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THE

LAW OF FIXTURES,

AND

OTHER PROPERTY,

PARTAKING

BOTH OF A REAL AND PERSONAL NATURE;

COMPRISING

THE LAW RELATING TO ANNEXATIONS TO THE FREEHOLD IN GENERAL;

AS ALSO

EMBLEMENTS, CHARTERS, HEIR-LOOMS, ETC.

WITH

An Appendix,

CONTAINING

PRACTICAL RULES AND DIRECTIONS

RESPECTING THE REMOVAL, PURCHASE, VALUATION, ETC., OF FIXTURES BETWEEN LANDLORD AND TENANT, AND BETWEEN OUT-GOING AND IN-COMING TENANTS.

BY

JOSEPH FERRARD, Esq.,
BARRISTER-AT-LAW.

FROM THE LATEST ENGLISH EDITION.

WITH NOTES AND REFERENCES TO AMERICAN AUTHORITIES,

BY WILLIAM HOGAN,
COUNSELLOR-AT-LAW.

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INTRODUCTORY NOTE.

THE Law of Fixtures forms an exception to the general rule that Text Books, which discuss the principles that lie at the foundation of the law relating to any particular subject, are only useful to, and appreciable by, Members of the Legal Profession.

The Volume now offered to the Public is so thoroughly practical in the application of the principles investigated to the daily occurrences of business, and so circumstantial in details, that its contents should be familiar to every Landlord, or Agent employed in the management of Houses, Stores, Factories and other Real Estate; they would thereby avoid many embarrassments and litigations, and secure many savings, and even valuable accessions of property.

Thirty years have passed away since Amos & Ferard, Barristers at Law, published the results of their joint labor and research in a small volume, entitled "A Treatise on the Law of Fixtures, and other Property, partaking both of a Real and Personal nature, comprising the Law relative to annexations to Freeholds, Emblements, &c." The intrinsic usefulness of this work soon gained a just appreciation; it was regarded as the surest guide on the subjects of which it treated, and the authors enjoyed the gratification of observing that many suggestions, modestly put forth by them, were, from time to time, adopted as sound principles on which authoritative decisions should rest, by Tribunals, graced and strengthened by such men as Mansfield, Kenyon, Hardwicke, Tenterden, Ellenborough, Parke and Lyndhurst.

The Editions then published, as well in England as in America, soon passed from the shelves of Booksellers. The Authors, engrossed by the duties and interests of successful practice, found no leisure to prepare a revision of their Book. Gibbons' Law of Fixtures, and Grady's Law of Fixtures, in a measure supplied the want; at length, in the maturity of intellectual and professional eminence, Mr. Ferard (the survivor of his colleague in the earlier work) has published a new Edition, embracing a review of the numerous cases which had been adjudicated during the long interval in the Courts of Great Britain, together with all the new learning, supplied by the wisdom of experience, and the great and interesting variety thrown around the subject by the modern and wonderful developments of science, and their application to those useful arts contributive to the economic comforts and enjoyments of every day domestic life.

The following pages present a reprint of the latest Edition, revised by the Author, to which have been added many notes containing copious extracts from Reports of leading cases, decided in our American Courts, in which the legal acumen, the practical common sense and comprehesive views of American public policy, of Cowen, Walworth, Parker, Daggett, Kent and Story, and other learned Jurists who still remain with us, have substantially set forth and established the American Law of Fixtures.

But, it may not be assumed that such Law, although thus built up on a course of decisions equivalent to a system of judicial legislation, is immutable as that of the Medes and Persians of eld. Change is of its essence, and ever has been; it has ever been progressive, and in derogation of that ancient law, protective solely of landed property, which then was primary, but, in our time, only secondary in consideration with political economists, in their estimates of the comparative wealth of nations, and of their advancement in refinement, civilization and power.

Therefore, this work, however accurate an exponent of existent law, might happen to prove only of temporary usefulness, if it were not distinguished by characteristics which assure for it a wider range, and continuity of influence. The copiousness of illustration with which it abounds; the variety of subject which it treats; the brief, but eminently suggestive notices which it presents of the habits, manners, interests, diverse condition, and, consequently, fluctuating policy belonging to

different periods of the History of the same People; together with the incidentally suggested comparison of these with the diversities of opinion and action which marked the contemporaneous policy of other nations under differing conditions of progress, customs and interests, will lead the reflective Reader into trains of thought, involving considerations worthy of the gravest attention from every American who loves his Country, glories in its Present, and looks forward with hope, not unmingled with solicitude, to its Future.

The relaxations of the ancient law, that whatever became annexed to the Realty, thenceforth formed parcel thereof, have hitherto been yielded chiefly in favor of Trade and Manufactures; but it has become a problem of deep interest, and deserving the constant thought of every American Jurist and Statesman, how far such relaxations should be extended to agriculture—what modifications may be desirable in respect of tillage, and meadow, and pasture lands—what measures devised to cause the vast masses of our Agricultural Population to realize the great truth that the manly, independent and essential avocation of the Farmer, places him on even platform with the Manufacturer, the Merchant, and the Professions, in all his social and political relations.

Notwithstanding the modern heresies, Agriculture is the foundation of National Wealth, and national existence; Agriculture is the parent of Commerce, and fosterer of Art. The product of the soil is the first result of that primal Blessing which ordained that Man should be the Tiller of the Ground. The Ownership and Cultivation of the Soil, and the domestic associations which then cluster round the local Home, form the strongest links in that chain which binds communities together by the love of Country. Do such local attachments exist in the strength and to the extent which the public welfare demands in the United States? We are proud of the achievements of the Revolution; we are boastful of the golden prosperity of the present Day; but how many amongst us have been so unfortunate as already to have dared to calculate the value of the Union!

WILLIAM HOGAN.

EXTRACT

FROM THE

PREFACE

TO THE

LATEST ENGLISH EDITION.

THE former edition of the Treatise on Fixtures has been long out of print. The number of cases which have arisen upon the subject, since the publication of the first edition, exceeds the aggregate of those which were to be found in the books at that period. In originally preparing the Treatise for the press, an attempt was made for the first time to arrange and methodize this branch of law; and to extract, from the loose and scattered authorities then extant, some definite principles for determining the right of property in Fixtures. It is a satisfaction to the editor to find that the principles there suggested, have, in several instances, since received the countenance of the courts.

In availing himself of the modern decisions, the editor has followed the course adopted in the first edition; and has stated each case somewhat fully, when discussing the rights of the particular class of claimants to which it more particularly refers. But when any principle, recognized by the court in deciding upon one class of cases, has been found more or less applicable to another class also; he has thought it advisable to notice it briefly in the chapter assigned to that other class. He trusts that the facility thus afforded to the practitioner, in investigating the claims more immediately under his consideration, will be deemed a sufficient apology for some little repetition.

PREFACE

TO

THE FIRST EDITION.

THE branch of law which is examined in the following pages, has not hitherto been made the subject of any distinct Treatise. The investigation of it, however, seems to be important, since it will be found to present greater difficulties than usually belong to legal researches. This is owing to the refined distinctions, which the law recognizes between real and personal property, and which give rise to many intricate questions in respect of property partaking of both these characters.

With regard to the *Doctrine of Fixtures*, which forms the principal subject of the work, it appears singular that so little attention should have been bestowed upon it in any of the modern publications. For it relates to a species of property which, in many instances, is of very great value; and involves questions of daily occurrence, which affect the rights as well of landlord and tenant, as of many other classes of individuals in the ordinary relations of society.

It may be thought extraordinary, that upon a subject of such extent and importance, there should be found so small a number of reported decisions. No inference, however, is to be drawn from that circumstance against the practical utility of a Treatise like the present. For the rights of individuals to property of this description are, in questions of minor importance, most usually left to the determination of brokers, whose appraisements are made according to their private opinions of fairness between the parties, or the customs of their trade. And where claims of a more intricate nature have arisen, which it has been thought expedient to submit to the decision of a court of law, they have generally been referred to arbitration, at the instance of the judge at *Nisi Prius*. For these reasons, therefore, it is apparent that the cases rela-

ting to fixtures which occur in the books of reports, cannot be considered as a criterion of the number of questions upon the subject that actually arise in practice.

It has been the chief object of the present Treatise, to lay down some general principles and rules relative to this species of property. In determining how far this design has been accomplished, some indulgence will perhaps be allowed, on account of the peculiar state of the law upon the subject. For the Doctrine of Fixtures rests on a series of judicial decisions in contravention of an ancient rule in favor of the freehold. And as these decisions arose out of particular emergencies, and were pronounced at different periods of time, it is extremely difficult to reduce them into an uniform system, or to extract from them any principles of general application.

With regard to the arrangement of the work,—the rights of a common tenant, and of the executors of tenants for life, in tail and in fee, in respect of fixtures, are discussed in separate chapters. This order, though it has unavoidably occasioned some repetition, will, it is trusted, be found very convenient for reference, and may tend to remove the confusion which has frequently been complained of, in distinguishing the rights of these several classes of persons.

The other descriptions of property which form the subject of the treatise, are examined principally in the chapter concerning the rights of the executor of tenant in fee. In the concluding section of that chapter, the nature and principles of Heir-looms are discussed; together with the right of property in charters relating to land; and the claims of the heir against the executor in respect of chattels animate as incident to the inheritance. In the same section a general view is taken of the doctrine of Emblements; and a separate division has been appropriated to an examination of the right of property which accrues in consequence of annexations made to the freehold of the Church. The law relative to Ecclesiastical Dilapidations is also incidentally noticed, in connection with the general subject of the work.

The remaining chapters of the first part of the Treatise relate to the transfer of fixtures, considered with reference to the conveyance of them by sale, mortgage, devise, bankruptcy, &c. And in the last chapter some general properties of annexations to the freehold are treated of, more particularly as affecting the rights and liabilities of persons in regard to poor's rates, parochial settlements, &c.

The second part of the work contains the remedies of parties in respect of fixtures; together with the rights of creditors; and the criminal law as it affects property attached to the freehold. The rule exempting fixtures from distress is also considered in this place. And, lastly, some curious decisions are noticed upon the subject of Deodands, as applied to the case of personal chattels annexed to land.

The Appendix consists of a Digest of the Law of Fixtures in its immediate application to landlords and tenants, and out-going and in-coming tenants; and it contains a summary of practical rules and directions respecting the removal, valuation, &c., of fixtures between these parties. It has been framed with a view to obviate the inconvenience that might have been complained of by some readers, if it had been necessary to search for the points of law to which more frequent reference is likely to be made, among the general disquisitions in the body of the work.

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INTRODUCTION

TO

THE LAW OF FIXTURES.

THE Law of Fixtures affords a remarkable illustration of the strong tendency which may be observed in the jurisprudence of a country, to adapt itself to the varying manners and necessities of society. The privileges which exist in respect of this species of property are in derogation of the principles of the common law, and have been gradually introduced and established by the judges, who, in this instance, have exercised a sort of legislative authority. The strict rules of the law respecting waste, which had their origin in feudal times, were found to be incompatible with the notions of property entertained in a more civilized age; and as the legislature did not interfere to abolish them, it became indispensably necessary that their practical operation should be modified and controlled. The courts, therefore, although they did not venture to abandon altogether the principle of the ancient law, considered themselves at liberty to mitigate its rigor; and by a series of decisions they have, from time to time, engrafted upon it the various exceptions and qualifications which form the subject of consideration in the following Treatise.

In the present introductory Chapter, it is proposed to examine the nature of the several innovations which have thus been made upon the maxims of feudal policy; in order that a distinct view may be taken of the steps by which the courts have proceeded towards perfecting this branch of the law. And, for this purpose, it will be necessary, in the first place, to consider the origin of the general rule of law in respect of annexations to the freehold.

The rule of law, that whatever is affixed to the freehold becomes essentially a part of it, and is subjected to the same rights of property as the land itself, originated in a state of manners very different from

that which prevails in the present day. The fee simple was not in ancient times divided into a multiplicity of particular estates; personal property was scarcely regarded as an object of concern to the legislature; and the proprietors of the freehold were the authors of those very laws which settled the conflicting claims of themselves and their tenants. Notwithstanding the great change which has taken place in the habits and opinions of society, this rule in favor of the freeholder still remains unaltered; and it must be regarded as the *general rule* of law at the present day, although it appears to be both inequitable in its principle, and injurious in its effects to the spirit of improvement.

It is curious to observe the first attempts which were made by the courts to afford relief from the strictness of the ancient law. Much hesitation is apparent in the early decisions as reported in the Year Books and other authorities; and many subtle distinctions are there relied upon by the judges, which have since been very properly exploded. It appears, however, that so early as in the reign of Henry VII, an exception from the law respecting annexations to the freehold was recognized in the particular case of *tenants;* and these were said to be at liberty to remove some species of articles, if erected at their own expense on the demised premises. It has indeed been represented that the courts, at the period spoken of, allowed this privilege to tenants from a politic concern for the interests of trade and manufactures; but it seems very doubtful whether any principle of so liberal a character is to be traced in their judgments. An important step was however made, when the courts thus assumed the power of restraining the rights of the freeholder without the express sanction of the legislature.

The modern authorities proceeded on more unequivocal principles; and from time to time they introduced exceptions of so extensive a nature as almost to have subverted the general rule. For, in the first place, it has been the recognized doctrine of the courts, ever since the time of Queen Anne, that a relaxation should be allowed in favor of erections and utensils put up for *trading and manufacturing* purposes. A very important description of property was thus exempted from the operation of the ancient rule. And this innovation was sanctioned by the judges, not because it was warranted by any particular law, but altogether upon an enlarged principle of public policy.

In progress of time other exceptions were admitted. For it was found that the state of refinement to which the country had arrived, in

matters of *domestic furniture and decoration*, rendered the rules of the feudal law incompatible with the general convenience of society. Accordingly, in this instance also, the judges found it expedient to modify the ancient law, with the view of adapting it to the manners of the times; and by a series of determinations a further exception in favor of articles for *ornament and domestic use* was gradually introduced.

After the relaxation in favor of *trade* had been long and clearly established, an attempt was made to apply the principle of that exception to the case of *agricultural* erections. This attempt was warranted by judicial opinions of high authority, and seems to derive great support from analogy and general reasoning. But, in this instance, as no direct precedent could be found in which erections or buildings for the purpose of agriculture had been considered as privileged, the Court of King's Bench refused to countenance this further innovation upon the general rule.

The exigencies of society, however, had, previously to the last mentioned determination, rendered it necessary that the ancient law should receive some qualification in the case of erections made with a view to the enjoyment of the *profits of land.* And accordingly there have been several decisions in which an exception, similar to that in favor of trade, has been allowed in respect of steam engines and other machinery for the purpose of working mines, collieries, &c. Erections of this description have usually been considered as a species of trade fixtures, and removable on the same grounds. It is obvious, however, that the privilege of trade, as regarded in this point of view, is construed with great latitude; and it must, consequently, have the effect of restraining, within a very narrow compass, the rule which prevails with respect to agricultural erections.(*a*)

With respect to the *extent* to which these several exceptions have been carried, it is to be observed, that the judges, in admitting the innovations in question, have evinced a great anxiety to remove from

(*a*) According to the decisions, steam engines in collieries and cider mills may be removed, because, as is said by Lord Ellenborough, in *Elwes* v. *Maw*, they are used in a *species* of *trade*. Lord Ellenborough, however, considered salt pans to be too much connected with the realty to be entitled to the same privilege. Lord Mansfield, on the other hand, was of opinion that they might be removed between landlord and tenant, but not by the executor of an owner in fee. Upon this subject an important decision has been recently pronounced in the House of Lords.

themselves the charge of infringing upon ancient principles, or of affording a ground for future encroachment. They have accordingly taken great pains to support their decisions by a variety of reasons derived from the facts of each particular case. And hence it happens, that in questions respecting the right to fixtures, it is in general necessary not only to inquire whether an article, its object and purpose considered, falls within any of the admitted exceptions, but to advert also to many other incidental circumstances, which have occasionally been relied upon in the judgments of the courts.(a)

And, indeed, where there is a direct precedent in favor of the removal of a particular fixture, the right of the claimant may still be subject to great uncertainty, if he does not stand precisely in the same situation as the party who has been held entitled to remove it. For the courts have repeatedly affirmed, that the exceptions from the ancient rule of law have been carried to a different extent in the several cases of landlord and tenant, executor of tenant for life or in tail and remainder-man or reversioner, and executor of tenant in fee and the heir. And yet the limits within which the privileges of these parties are respectively confined are nowhere pointed out; neither have any satisfactory reasons been assigned by the courts for the distinctions thus laid down, from a consideration of which the rights of these several classes of individuals might be inferred.

In the course of the preceding remarks, the reader has been presented with a general outline of the state of the law relating to the doctrine of fixtures. And from this view of the subject, he will perhaps be of opinion, that further improvements are requisite for rendering this branch of law at once intelligible in its principles, and precise in its terms. And for this purpose it would seem, in the first place, desirable that no change of property should result from the mere fact of annexing a personal chattel to the freehold, unless in cases in which some principle intervened which might be deemed reasonable in the present day. For it seems a reflection upon the jurisprudence of the country, that a general rule of law which is productive of much in-

(a) In the case of *Buckland* v. *Butterfield*, Ch. J. Dallas states the law as to the privilege in favor of ornamental fixtures in these terms:—"Matters of ornament may or may not be removable, and whether they are so or not, must depend on the facts of each particular case." See, also, 6 Bing. 439.

convenience to the public, should have no better foundation than the motives of feudal policy.(a)

But, if the right of removal is still to be regarded as an *exception* instead of constituting the general rule, it ought to be extended as far

(a) When the rules of our own jurisprudence appear open to animadversion, it may be useful to consult the writings of foreigners, with a view to ascertain the nature of the provisions which, in a similar state of manners, seem to be best suited to the wants and general convenience of society. From such an inquiry in the present instance, it may perhaps be thought to result, that notwithstanding the rule of the English law may, as a *general rule*, appear objectionable, yet that particular cases might be mentioned, in which it would be consistent with a just and reasonable principle, that the property in things fixed to the freehold should be transferred to the ultimate proprietor of the soil. Upon the subject of fixtures, it seems to be the more general opinion among the writers on French law, that in ordinary cases a landlord is not entitled to any additions made by his tenant, and can only insist on his leaving the premises in the condition they were in at the commencement of his term; on this principle, that "*nemo detrimento alterius locupletior fieri potest.*" There is, however, an exception in favor of the landlord in cases where improvements have been made with the obvious design of permanent annexation, or where to remove them must occasion their entire destruction: because in this case the landlord would be prejudiced without any benefit resulting to the tenant. In some cases, also, the French authors think that the landlord will have a right to improvements made by the tenant, on offering him a sum of money which will enable him to procure other things of the same description. And this is considered to be the law in respect of trees planted by a tenant, unless in a nursery gound. The landlord, they say, is entitled to the growing trees on tendering the value of the wood. The same rule, however, does not hold when the matters annexed by the tenant are of a rare or precious description, and for which he may be supposed to have a particular affection. *Vide Desgodets, Lois des Batimens; Notes sur Desgodets, par Goupy; Lepage, Lois des Batimens; Traite de Locations, par Leopold.* See, also, Code Civil, Liv. 2, tit. 1, art. 517, *et seq.*; 534, *et seq.* According to the Code of the Civil Law, the rule upon these questions is, that such movables as are fixed to the freehold, *perpetui usus causa* are, therefore, justly deemed parts of it. See Dig. Lib. 19, tit. 1, 13, secs. 14, 18. Just. Inst. Lib. 2, tit. 1, sec. 22, *et seq.*, (p. 84, Harris' edition.) The following distinguished commentators define the rules of the Roman Law as to fixtures with much accuracy: Mackledey's Comp. Gen. part, Div. 3, secs. 147, 153, 154; Sp. Pt. book 1, ch. 2, tit. 2, sec. 268. Dr. Warkœnig's Comm. Lib. 1, ch. 3, secs. 4, 8, and *Institutiones* by the same learned author, Lib. 2, ch. 1, tit. 4, sec. 225, *et seq.*; Voets Comm. ad Pandect. Lib. 1, tit. 8, parag. 5; Dr. Wood's Inst. book 2, ch. 3. Artificial accessions; Taylor's El. Property, *Res immobiles*, p. 475, 3d ed. For the rules as adopted by the law of Scotland, in regard to fixtures, the following writers may be consulted: Erskine's Inst. book 2, tit. 2, Bell's Princ. secs. 743, 1470, *et seq.*; Bell's Commentaries, Vol. I, p. 649; Vol. II, pages 2, 3; Stair's Inst. book 2, tit. 1, secs. 29, *et seq.*; 39, *et seq.* And for the decisions, see Shaw's Dig. Tit. Heritable or Movable; by Accession, p. 544. For the law as established in America, see Kent's Commentaries on American Law, Vol. II, pages 342, 347. For the Prussian Law of Fixtures, Pertinenz-stucke, (things appurtenant or annexed,) see Allgemeines Landrecht fur die Preussischen Staaten. Erster Theil, Zweiter Titel, secs. 42, 108; or the French translation, *Code General pour les Etats Prussiens* Premiere Partie, tit. 2, secs. 42, 77, *et seq.* The reader will find the rules respecting fixtures, not only in the English Law, but in the Civil Law, and the codes of other nations, collected n Burge's Commentaries on Colonial and Foreign Laws, Vol. II, p. 6, *et seq.*

as the principles of policy and public convenience will allow. If, therefore, it is considered that the purposes to which buildings, machinery or utensils are appropriated, ought to be the criterion by which that right is to be tried, these purposes should at least not be arbitrarily selected, nor too narrowly construed. Upon this ground it may, perhaps, be thought advisable, that some of the more refined distinctions which the courts have established with regard to fixtures should be abolished; and, in particular, the rule which excludes agricultural tenants from the protection afforded to tenants in trade.

Again, it may, perhaps, be deemed expedient, even with respect to the several species of fixtures privileged by the law, that the mere purposes for which they are used, should not of themselves be conclusive upon the question of removal. It ought, however, to appear, by plain and determinate rules, what are the particular considerations by which the right of removal may be qualified and restrained. For it is not sufficient that the nature of the exceptions to the general rule is ascertained, if the privilege which these exceptions confer is, in some cases, dependent on collateral circumstances, while the effect and operation of those circumstances is left altogether unsettled.

Lastly, if satisfactory reasons of law and policy, can be suggested for admitting a greater relaxation, in favor of certain classes of individuals than of others, it ought to be precisely known in what the difference between their respective rights consists. And, indeed, if a definite rule upon this subject were to be laid down, it would tend to remove much of the perplexity which, in the present state of the law, is experienced, in respect of the claims of personal representatives; and would at once put an end to the doubt which now exists, as to the particular cases in which analogical reasoning is admissible, and those in which it fails.

From the preceding examination of the ancient and modern principles of the law, relative to the subject of fixtures, it is hoped that the reader will be able to exercise a clearer judgment on the questions about to be discussed in the ensuing pages. The controversies respecting property of this nature, which arose within the city of London as early as in the fourteenth century, were considered of so much importance, that a particular ordinance was enacted for the adjustment of them.(a) And in the present day, it cannot fail to be an object of

(a) In the mayoralty of Adam Bury, 39 Ed. III, 1365. It may not be uninteresting to the

public interest, to determine by wise and intelligible rules, the rights of individuals with respect to a species of possessions, the value of which will always increase in a country, in proportion to the progress of civilisation and refinement.

reader to see a copy of this curious document. It is, therefore, added in its original form; together with a confirmation of it by the Mayor and Aldermen of London. It is worthy of remark, that Serjeant Hill, in his valuable MS. notes to the 15th Vol. of Viner's Abridgment, in the Library of Lincoln's Inn, p. 43, notices this document; and he calls it an Ordinance of *Parliament*. He refers to Entick's History of London, Vol. I, p. 258, where it is in like manner called an Ordinance of Parliament. Entick appears to have extracted his account from Maitland's History, Vol. I, book 1, p. 131; but it is observable that it is there described simply as an Ordinance. The document in question, appears to be merely an Ordinance of the citizens of London, enacted at one of their deliberative courts, or general assemblies; and afterwards confirmed by an act of the Court of Mayor and Aldermen. It can hardly be considered an original act of the Common Council. For it was not till the reign of Edward III, that an attempt was first made towards the regular constitution of the court of common council as a legislative and representative body; and it was not fully established upon the present representative system till the reign of Richard II. As to the nature of an ordinance, see 4 Inst. 25.

ANCIENT RECORDS.

THE FOLLOWING ARE THE ANCIENT RECORDS REFERRED TO IN THE NOTE IN PAGE XXVIII.

The Ordynaunce of the Cite for Tenaunts of Houses: what thingis they shall not remeue att theyr departinge.

Intrat' in libro cum littera G. folio c. lxxiiij. tempore Ade Bury tunc Majoris A° Regs Edwardi Tercij. xxxix.

ORDINATUM est quod si aliquis codicat tentm vel domos in civitate Londen vel in subbarbijs eiusdem civitatis tenendum ad terminum vite vel annorum vel de anno in annum vel de q'rterio in q'rteriu, si huius inteneus aliqua appencia seu alia asiamenta in huiusmodi tentius vel in domibus fecerit, eciam ad merenius dcos tntos vel domos clauos ferios aut ligneos attachiamet nolicebit tali tenenti huiusmodi appecicia seu asiamenta in fine terminu vel aliquo alio tempore abradicare sed semper permanebut dno soli vt percelli eiusdem.

A Confirmacion of the same Acte be the Mayre and Aldermen.

WHERE as nowe of late amonge dyuers people was sprongen a mater of dowt vpon the most olde custume had & vsed in this cyte of Lodon of suche thingis which by tenatis terme of lyf or yeris ben affixed vnto houses wythout speciall licence of the ownar of the soyle, whether they owe or remayne vnto the ownar of the soyle as percell of y^e^ same or ellis wheder it shalbe lefull vnto such tenauntis on thende of her terme, all such thingis affixed to remeue. Wherupon olde bokis seen, and many recordis olde processis and iugementis of the sayde cyte, it was declared by the Mayre and th' Aldermen for an olde prescribed custum of the cyte aforesayde. That alle suche easmentis fixed vnto houses or to soile by suche tenements wythout special and expresse lycence of the ownar of the soile. Yf they be affixed w^t^ nayles of irne or of tree as pentises, glasse lockis benchis or ony suche other, or of ellis yf they bee affixed w^t^ morter or lyme or of erther or ani other morter as forneis leedis candorus chemyneis corbels pauemettis or such other, or ellis yf plants be roetid in the groud as vynes trees graffe stouks trees of frute, &c., yt shal not be leeful vnto such tenauntis in y^e^ ende of her terme or any other tyme therin nor any of them to put away moue or pluk vp in any wyse, but y^t^ they shall alway remayn to the owner of the soyle as percels of y^e^ same soyle or tenement.

[See *Arnold's Chronicle*, fols. 137, 138.

A

TREATISE

ON THE

LAW OF FIXTURES,

ETC., ETC.

PART I.

ON THE RIGHT OF PROPERTY IN FIXTURES.

CHAPTER I.

ON THE NATURE OF FIXTURES.

THE term *fixtures* is used by writers with various significations; but it is always applied to articles of a personal nature, which have been affixed to land. The term fixtures

On some occasions, no further idea is intended to be conveyed by the term, than the simple fact of annexation to the freehold; and hence have arisen the popular expressions of landlord's fixtures, and tenant's fixtures, of removable and irremovable fixtures.

The name of fixtures is also sometimes applied to things expressly to denote that they *cannot* legally *be removed; as where they have been annexed to a house, &c., and the party who has affixed them is not at liberty afterwards to sever and take them away. Thus it has been said, that an article shall fall in with the lease to the landlord, or descend to the heir with the inheritance, *because* it is a fixture. [*2]

Fixtures defined.

There is, however, another sense in which the term fixtures is very frequently used, and which it is thought expedient to adopt in the following treatise, viz.: as denoting those personal chattels which have been annexed to land, and which *may* be afterwards severed and removed by the party who has annexed them, or his personal representative, against the will of the owner of the freehold.(*a*)

This definition divides itself into two branches; first, a consideration of what is meant by annexation; secondly, of what is intended by a right of removal against the will of the owner of the freehold.

Manner of annexation.

With respect to the first branch of the definition, it is necessary, in order to constitute a fixture, that the article in question should be let into or united to the land, or to some substance previously connected with the land. It is not enough that it has been laid upon the land, and brought into contact with it; the definition requires something more than mere juxtaposition; as, that the soil shall have been displaced for the purpose of receiving the article, or that the chattel should be cemented, or [*3] otherwise *fastened to some fabric previously attached to the ground.

Hence, there is a numerous class of decisions that may be considered as part of the law of fixtures, the object of which is to determine, whether a thing that has been placed upon the land is actually affixed to it or not. If it is found, that in point of fact, the connection with the soil does not amount to complete annexation, and that the thing is not strictly affixed, it remains in that case, to all intents and purposes, a mere personal chattel, and is in the same situation as any other chattel which has never been brought upon the premises.

It may perhaps be useful to explain this branch of the definition more particularly by examples. And a simple method of doing this, will be by pointing out a few of the most important instances where chattels have been to a certain degree connected

(*a*) The reason for preferring the use of the term in this sense, will appear in the course of the chapter. Since its adoption in the first edition of the work, it has been recognized by Mr. Baron *Parke*, in *Hallen* v. *Runder*, 1 Cr. M. & R. 266; 3 Tyr. 959. See, also, Wms. on Exrs., Vol. II, p. 509, n., and *Ex parte Reynal*, 2 Mont. D. & D. 444.

with the soil, but not to an extent amounting to legal annexation; and from which circumstance alone, the property has been pronounced not to fall within the denomination of fixtures.

What not a sufficient annexation.

Of these, an instance may be mentioned from Buller's *Nisi Prius*, p. 34; and it is the more remarkable, because it was not till later times, when the doctrine of fixtures came to be better understood, that the decision of the case in question was treated as resting upon the circumstance of imperfect annexation to the freehold, the determination having originally proceeded on a different ground. It is the case of a barn, before Ch. J. Treby, at Hereford, which is described as having been built upon pattens, or *blocks of wood lying upon the ground, but the building itself not fixed in or to the ground. The explanation which has been given of this case by Lord Ellenborough, is, that the party who erected the barn might unquestionably treat it as a mere movable chattel, because "the terms of the statement exclude it from being considered as a fixture: *it was not fixed in or to the ground.*"(a) [*4]

In another case which arose out of the bankrupt laws, and respected the right of the assignees to goods and chattels in the disposition of the bankrupt, under the statute 21 Jac. I, ch. 19, the property in dispute was the stock of a distiller, which consisted of certain stills set in brick-work, and let into the ground; certain vats, supported by and resting upon brick-work and timber, but which were not fixed in the ground; and some other vats standing on horses, or frames of wood, which also were not let into the ground, but stood upon the floor. In this case, the court thought that there was a material distinction between the vats, &c., that were actually affixed to the ground, and those that were placed upon brick-work or frames; these latter they considered to be mere goods and chattels, from the mode in which they were stated to be connected with the premises. And, accordingly, the determination of the case proceeded upon this distinction.(b)

A further instance occurs in a subsequent decision.(c) The property in dispute in this case, consisted of certain pieces of

(a) *Elwes* v. *Maw*, 3 East, 55.
(b) *Horn* v. *Baker*, 9 East, 215.
(c) *Davis* v. *Jones*, 2 Bar. & Ald. 165.

machinery called jibs, the description of which was as follows:
[*5] Certain caps *and steps of timber were fixed into a building, and the jibs were placed in these caps or steps, and are the uprights that turn round the work in the caps and steps; they were fastened by pins above and below, and might be taken in and out of the caps or steps without injuring them or the buildings, but could not be removed without being a little injured themselves. The Court of King's Bench, on this occasion, thought that the question before them depended upon a conclusion of fact, to be drawn from the matters stated in the case, and not upon any point of law; and they were of opinion, that these jibs, from their mode of construction, were not properly fixtures at all, but mere personal chattels.(*a*)

Again, in a still more modern case, a barn built of wood rested on, but was not fastened by mortar or otherwise, to the caps of certain blocks of stones called stadles, which were fixed into the ground or let into brick-work; the brick-work being in part built in and let into the ground. The barn rested on the foundation by its own weight alone. It was held that such an erection was not united to the freehold, and that it formed no part of it.(*b*)

Some further illustrations of this principle will be found in several of the cases referred to in the course of the work.(*c*) And
[*6] from all the authorities, it will *clearly appear that to constitute a fixture in its strict sense, there must be a substantial and per-

(*a*) The same explanation is given of this case by Parke, B., in the case of *Minshall* v. *Lloyd*, 2 Mee & Wal. 459. It seems difficult, however, to explain satisfactorily some of the facts of the case upon the principle relied upon: for the jibs appear to have been parts of an entire machine fastened to other parts which are stated to have been permanently affixed to the freehold.

(*b*) *Wansbrough* v. *Maton*, 4 Bar. & E. 884.

(*c*) See the instance of a varnish-house built on a wooden plate lying on brick-work. *Penton* v. *Robart*, 4 Esp. N. P. 33; 2 E. 88, and explained *post*, ch. 2, sec. 1, 5; a stable on rollers, 1 Hen. Bl. 259; a post windmill, *R.* v. *Inh. of Londonthorpe*, 8 T. R. 377; *Steward* v. *Lombe*, 1 Brod. & B. 403; a windmill resting on a brick foundation, *R.* v. *Otley*, 1 Bar. & Ad. 161. In *Ward's case*, (4 Leon. 241,) it was said to have been adjudged, that if a mill be set upon posts no waste lieth for it. In the *Bedford Election case*, (1785, 2 Lud. case 12,) a windmill fixed on a post upon pattens, in a foundation of brick-work, was held a freehold estate. See further, *Kimpton* v. *Eve*, 2 Ves. & B. 349; *Hedges' case*, Leach Cr. C. 201; 2 Stark. N. P. C. 403; *Anthony* v. *Haneys*, 8 Bing. 186. And see the mention made of doors hung upon gymolds, Moor, 177, with which compare Shep. Touch. 470; and *Mant* v. *Collins*, cited in *Wood* v. *Hewitt*, 14 Law J. Rep. (Q. B.) 247.

manent annexation to the freehold itself, or to something connected with the freehold.(a)[1]

(a) What will amount to a complete annexation, as by nails, screws, &c., see the cases referred to in ch. 2, sec. 4. The reader should be apprised, that there are certain peculiar cases of *constructive* annexation, as in the instance of keys, &c., belonging to a house. *Liford's case*, 11 Co. 50. Windows or doors hanging or serving to the house. Shep. Touch. 470. So mill-stones removed for picking. *Post*, ch. 4, sec. 1, and ch. 5. And see the section relating to heir-looms, &c., in chap. 4, *post*. In these instances of *constructive* annexations, objects which are really chattels are, for certain purposes, considered to be annexed to the freehold; but nevertheless they do not acquire all the incidents of realty; for example, trover may be brought for them like other chattels.

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[1] In *Heermance* v. *Vernoy*, (6 J. R. 5,) relating to a sale of land, on which was a bark mill, and stone for grinding bark to be used in a tannery, it was held to be the better opinion that the bark mill was personal property, because the mill stone with the building covering it, was necessary to the tanning business, which is a matter of a personal nature. In *Cresson* v. *Stout*, (17 J. R. 116, 121,) Platt, Justice, gave the opinion that frames in a factory for spinning flax and tow, although fastened by upright pieces extending to the upper floor, and cleats nailed to the floor round the feet, neither of the *machines* being nailed to the building, would not be considered part of the freehold, and might be levied on as personal property on *fi. fa.* against the owner, but the question was not finally decided. In this case the judgment debtor owned the fee subject to a mortgage; had he been mere tenant for life or years, the machinery erected by him would no doubt have been subject to execution against him. But the dictum of Platt, J., was followed with respect to cotton machinery; the posts of which were fastened to the floor by wooden screws set into the floor—by unscrewing, the machinery could be removed without injury to the building. *Swift* v. *Thompson*, 7 Conn. Rep. 63. Daggett, J., said, "We resort to the criterion established by the common law, could the property be removed without injury to the freehold? The case finds this fact: this then should satisfy us." These views are sustained in the strong case of *Gale* v. *Ward*, (14 Mass. R. 352;) there the owner of the freehold had carding machines not nailed nor attached to the freehold, but too large to be taken out of the door, unless taken to pieces; Parker, J. said, "they must be considered personal property, because although in some sense attached to the freehold, they could easily be disconnected and set up and used in another building; the relaxation of the ancient doctrine has been in favor of tenants against landlords, but the principle is correct in every view." But *Union Bank* v. *Emerson*, (15 Mass. Rep. 159,) narrows the general reasons of *Gale* v. *Ward*, which case is also questioned in *Kittridge* v. *Wood*, (3 New Hamp. Rep. 506;) in this case, and in *Whiting* v. *Brastow*, (4 Pick. 310,) and in *The Case of the Olympic Theatre*, (2 Browne, 279, 285,) the court recognized the distinction in favor of tenants, but appear to consider the rule as very strict against the heir as between him and the executor; which is said to be the same in respect of fixtures, as between vendor and vendee. *Holmes* v. *Tremper*, 20 J. R. 30; *Miller* v. *Plumb*, 6 Cowen, 665. In *The Case of the Olympic Theatre*, the court say that when the instrument is accessary to a thing of personal nature, as carrying on a trade, it is to be considered a chattel; but if it be a necessary accessary to the enjoyment of the inheritance, it is to be considered part of the inheritance: this rule, as broad as that in *Heermance* and *Vernoy*,

Nature of the right of removal.

With respect to the right mentioned in the second branch of the definition—viz.: of severing and removing an article annexed to the land—it is a circumstance of ordinary occurrence, that persons having the present interest and possession of land, whether as tenants for years, for life, or in fee, make annexations to the freehold, exclusively for their own convenience or profit, either by placing an erection on the soil itself, or by affixing some personal chattel to a house or other building that has been already annexed to the soil. Now, in respect of many of these annexations, if the individuals who put them up, or their personal
[*7] *representatives, were afterwards to detach and remove them from the freehold, they would be subject, according to the general rule of law, to an action of waste or trespass, at the suit of the reversioner, or of the heir succeeding to the estate. But there are certain species of annexations that are excepted out of this general rule. With respect to these, the right of property in them is not, as in other cases, abandoned to the land owner by their being affixed to the freehold; but they may be again separated from the land, and taken away, against the will of those persons who would have become entitled to them by reason of their ownership in the soil. It is of the right to remove annexations of this description that it is proposed to treat in the present work.

Upon what it depends.

And in order to explain more fully the nature of the privilege here spoken of, it will be necessary briefly to point out the principal considerations upon which questions respecting the right to remove fixtures have turned; reserving, however, for another place, the more detailed examination of them. These considerations are, the *nature* of the thing affixed, whether it was a chattel, in gross or in part, before it was put up. The *situation of the party* claiming the right, as the executor of a tenant in fee, of tenant in tail, or tenant for life, or the tenant of a chattel interest; and, with respect to him, the continuance of his right after the expiration of his term, and redelivery of possession to his landlord. Again, arguments derived from the *intention of the parties* in making the annexation, have been used in several of the judicial decisions. Others have been drawn from the *com-*

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has, however not been adopted in Pennsylvania. See *Gray* v. *Holdship*, 17 Serg. & Rawl. 413. In *Miller* v. *Plumb*, (6 Cowen, 665,) the distinction between the relation of vendor and vendee, tenant and landlord, is distinctly considered and recognized. See, also, *Reynolds* v. *Shuler*, 5 Cowen, 323, and *Raymond* v. *White*, 7 Cowen, 319.

parative value of the fixture, and the land in a state of *union, and when disunited. And so the effect of *custom*, and the *injury occasioned to the freehold* by the removal, have respectively been relied upon. But the great and leading principle which has governed all the decisions relating to the doctrine of fixtures, is the *purpose and object* for which the annexation has been made; that is to say, whether it was for the purpose of *trade*, for *agriculture*, for *ornament* merely, or for the *general improvement* of the estate. It is upon these different grounds, generally, however, upon some combination of them, that the courts both of law and equity have ascertained and supported the right of property in fixtures. [*8]

Distinct from the rights of the owner of the estate.

Now, from a review of these several considerations, it will be seen, that the right of removing fixtures is of a very different description from that by which the proprietor of land severs and removes property of a personal nature, which has been annexed to his own freehold. In this latter case, the proprietor exercises the same right to all purposes, that he enjoys in respect of cutting down trees, or doing any other act as owner of the land: it is a right arising altogether out of ownership of estate. But where an individual, under the privilege conferred by the law of fixtures, separates and removes a personal chattel which has been affixed to the soil by himself or those under whom he claims, the right exercised by him does not arise merely out of an interest in the land, but is a special privilege allowed by the law in certain cases only, and in favor of particular classes of persons; and it is, moreover, a privilege in derogation of the rights of the individual to whom the property would appertain as owner of the estate. It appears, however, from an attention to the principles on which *the power of removal in these cases depends, that it is always connected with some interest in the land, and is not simply collateral to it: it is a power coupled with an interest.(*a*) [*9]

Legal effect of annexation.

In the definition of fixtures that has been given above, a principle is involved, which may be considered as the foundation of the law relating to this species of property, and which it may be proper to examine in this preliminary chapter. It is the effect which, in a legal point of view, is produced upon a personal chattel, by the act of annexing it to the freehold.

(*a*) *Vide* per Holt, Ch. J., in *Poole's case*, 1 Salk. 568.

Fixtures parcel of the freehold.

It is a maxim of law of great antiquity, that whatever is fixed to the realty is thereby made a part of the realty to which it adheres, and partakes of all its incidents and properties. By the mere act of annexation, a personal chattel immediately becomes part and parcel of the freehold itself. *Quicquid plantatur solo solo cedit.*[1] This proposition the reader will find laid down as a general principle, in almost every one of the cases to which it will be necessary to refer in the course of the present work; and, indeed, many of the decisions proceed exclusively upon it. It is recognized in particular in the following authorities: 10 Hen. VII, pl. 2; 20 Hen. VII, 13; 20 Hen. VII, 26; Co. Lit. 53 a; 4 Co. 63; Bul. N. P. 34; Amb. 113; 3 Atk. 13; 3 East, 50; 7 Taunt. 190; 2 M. & W. 459. See also the cases respecting the ratability, &c., of personal chattels affixed to land, in chap. 6.

[*10] Now every case in which there is a right of severing a thing from the freehold by virtue of the law *of fixtures, is considered as an *exception* from this general rule. And the manner in which the law of fixtures operates in these cases may be explained in two ways: either on the supposition that the chattel nature of the thing is still preserved after its annexation; or by considering that the thing ceases to be a chattel by being affixed to the land, and becomes real property, but reducible again to a chattel state by separation from the realty. It will be found, upon an inspection of the cases, that for some few purposes, as in favor of creditors, the chattel nature of the thing is retained after its annexation: but that for most purposes its personal character is lost, and it becomes strictly freehold. The circumstance of the property being subject to a right of removal, and of being reconverted to a personal chattel, does not affect the nature and condition it has acquired by being incorporated with the realty.

It is true, that in some of the early cases, an article which is held to be removable is expressly said not to be parcel of the freehold. But these, and other like general expressions, may,

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[1] If a party erect buildings on the land of another voluntarily, and without any agreement in relation thereto, he may not remove them. *Washburn* v. *Sproat*, 16 Mass. Rep. 449; Britton, ch. 33, on Right of Property by Accession; Bracton, ch. 3, sec. 4; 6 Perkins, (Dower,) 328; Cowell's Inst. book 2, tit. 1, 327; Pulbeck's Par. tit. Devises, 39. But if a father permit a son to build a house on his land, for the son's use and accommodation, the house was held to be the personal property of the son. *Wells* v. *Banister*, 4 Mass. Rep. 514. The license given modified the rule.

consistently with the principles of those decisions, be interpreted to mean, that the property is not considered, *in every respect*, in the same condition and subject to the same rights as other parts of the freehold.

In the case of *Lee* v. *Risdon*,(*a*) an important case on the subject, the view here taken of the nature of fixtures is stated to be the true one. And the court, in that case, considered that they constitute essentially a part of the freehold, and until the moment of their *severance are in no respect distinguishable from [*11] the rest of the land. The principle, also, of several later decisions is in conformity with this view of the subject.(*b*)

Use of the term, *fixtures*.

From the observations that have been offered in the preceding pages, the reader will probably be of opinion, that the use of the term *fixtures*, in the sense in which it is adopted in the definition, is attended with some convenience; inasmuch as it serves to distinguish a species of things which are subject to a very peculiar right of property, and which manifestly require some appropriate appellation. Indeed, the application of the term indiscriminately, to all chattels affixed to land, serves to point out their physical character only, and has no reference to any legal rights that may attach to them. And with respect to its application to those things which *cannot* legally be removed after annexation, there appears to be the less necessity for giving a name to them, because the right of property in these cases is precisely of the same nature as that which is exercised over every part of the freehold. It should, however, be observed, that the term fixtures has been used by the courts, and amongst the text writers, without much precision; and it is difficult to determine in which of the above senses it is most frequently employed.

*With a view to explain to the reader more fully, the rule of [*12] law laid down in the preceding pages, it may not be uninter-

(*a*) 7 Taunt. 190. Upon which, see the observations of the court, and the cases cited in *Ex parte Lloyd*, 1 Mont. & Ay. 508, *et seq.*

(*b*) See per Alexander, C. B., in 3 Y. & J. 333; and per Parke, B., in *Minshall* v. *Lloyd*, 2 M. & W. 459; and in *Mackintosh* v. *Trotter*, 3 M. & W. 184; also in *Hallen* v. *Runder*, 1 C. M. & R. 275. See, also, *post*, ch. 5; and the second part of the treatise respecting the forms of actions. Fixtures are frequently compared in respect of their freehold character to trees. 5 Bar. & Ald. 828; 1 Atk. 175. And they have sometimes been called "*movable freeholds*."

esting to notice, in this place, a few cases and authorities which serve to illustrate the principle under consideration in a somewhat striking manner; particularly as it respects the legal effect of the annexation of a personal chattel by a mere stranger, to the soil and freehold of another.

Effect of annexing *alieno solo*.

It is observed by Britton, in treating of the right of property by accession, c. 33, that "property accrues from the fraud and folly of another: as where persons, with an evil intent, or through ignorance, build with their own timber on another's soil. The same may be applied to those who plant or engraft, also to those who sow their grain on another's land without the leave of the owner of the soil. In such cases, what is built, planted and sown, shall be the owner's of the soil, upon presumption that they were given to him. For in these cases it would be a great encouragement to such builders, planters or sowers, if what was built, planted and sown, was not to belong to the owners of the soil, and especially if such structures are fixed, or the plants and seeds have taken root or nourishment. But if any one perceives his folly, he may lawfully remove his timber or his trees, so as he does it before our writ of prohibition comes against his removing anything, and before the timber is fastened with nails, or the trees have taken root."

To the same effect is the language of Bracton; *De acq. rerum dom.* chap. 3, sec. 4, 6. And his observations are copied with very little alteration by Fleta, lib. 3, ch. 2, sec. 12. The reader [*13] will also find *some curious illustrations of the same rule in Perkins, tit. Dower, 328; Cowell's Inst. book 2, tit. 1, sec. 27; Fulbeck's Par. tit. Devises, 39.

In Brooke's Ab. Tresp. pl. 23, it is laid down that "If a piece of timber, which was illegally taken from J. S., has been hewed, trespass does not lie against J. S. for retaking it. But if a piece of timber, which was illegally taken, have been used in building or repairing, this although it is known to be the piece which was taken, cannot be retaken, the nature of the timber being changed; for by annexing it to the freehold it becomes real property."

It appears that, by the custom of London, a man may erect poles on his neighbor's land for repairs without abandoning his property therein. Priv. Lond. p. 59; Com. Dig. London.

A gibbet erected in *private solo*.

Other and more recent authorities afford some singular illustrations of the principle under consideration. In Lord Raymond, p. 738, is the following case, which is thus briefly reported. *Spark* v. *Spicer*, Mic. 10, Will. III, per Holt, C. J. If a man be hung in chains upon my land, after the body is consumed I shall have gibbet and chain. Said upon a motion for a new trial.(*a*)

Trees planted *alieno solo*.

In 2 Rolle, 141, it is said, if A. plants a tree in the land of B., the tree shall belong to B. *Masters* v. *Pollie*. And see Moor, 20.

[*14]

Roots of, extending into.

In *Waterman* v. *Soper*, Lord Raym. 737, it was *ruled by Holt, C. J., at Lent Assizes at Winchester, upon a trial at *N. P.* (1697–8,) that if A. plants a tree upon the extreme limits of his land; and the tree growing, extends its roots into the land of B. next adjoining, A. and B. are tenants in common of this tree. But if all the root grows into the land of A., though the boughs overshadow the land of B, yet the branches follow the root and the property of the whole is in A. As to this, however, see 2 Rolle, 141.(*b*)

Stones, &c., falling into.

In a late case, in the Court of Exchequer,(*c*) it appeared that certain large masses of stone, had from time to time, fallen from the cliffs above upon the field of a copyholder, and had thereby become imbedded in the soil: there was no evidence to show when any particular portion of them had fallen within living memory. It was held that these stones must be considered a part of the soil below, belonging to the lord, and, therefore, his property, although the cliffs above did not belong to him; and that the copyholder was not entitled to take them for his own profit.(*d*)

Mill hatch, &c., placed on.

In the case of a chattel *placed* on the soil of another, but severable from it, it has been held in a very late case in the Court

(*a*) This case is thus reported in Salk. 648. One was ordered by the judge of assize to be hanged in chains. The officer hung him in *private solo*. The owner brought trespass, and upon not guilty, the jury found for the defendant; and the court would not grant a new trial, it being done for *convenience of place, and not to affront the owner*.

(*b*) As to the case of trees blown down, or boughs that in lopping fall on to the soil of another, or fruit that drops from a tree growing in a hedge into the field of another, and that in such cases the property is not lost. See Year Book, 6 Ed. IV, 18; Latch, 13; Poph. 161; Vin. Ab. Tresp. H.; Com. Dig. Plead. 3 M. 39.

(*c*) *Dearden* v. *Evans*, 5 M. & W. 11.

(*d*) See, also, *Blewitt* v. *Tregonning*, 3 Ad. & E. 554, that sand drifted and blown from the sea-shore upon a man's close, becomes part of it, and belongs to the owner of the close.

[*15] of Q. B., that this does not necessarily *become part of the freehold, even though it may be accessorial to a principal thing that is itself connected with the soil: but that it is always matter of evidence whether it belongs to the freehold or not. Thus, the owner of a mill had placed a hatch and fender for the use of his mill upon a stream of water, where neither the banks of the stream, nor the adjoining land belonged to him. The fender moved up and down in a groove fixed to the brick-work, and when down, rested upon a sill also fixed to the brick-work. It was held that this fender did not necessarily become part of the freehold; but that it was matter of evidence whether by agreement it did not remain the property of the original owner, though placed on the soil of another.(a)

Door on hinges. In the above case, it was said by counsel in the argument, that it had been decided in a case of *Mant* v. *Collins*, Q. B. Trin. T. 1842, not reported, that a door which hung upon hinges, and which could be removed by lifting it up, was a personal chattel. Upon which Lord Denman, C. J., observed, that the case might be taken to be law to this extent, that it is matter of evidence how such a thing came where it is, and in what manner it was intended to be used and enjoyed.(b)

Adverting now to the more immediate subject of this chapter, in which has been described the general nature of the species of property, to which it is proposed to apply the denomination of [*16] *fixtures*, it is *intended in the ensuing chapters, to consider by what persons, and under what circumstances, the right of removal, as above explained, may be exercised and enforced.(c)

(a) *Wood* v. *Hewitt*, 14 Law J. R. (Q. B.) 247. East. T. 1846.

(b) The reader may see further upon these subjects in the case of *Welsh* v. *Nash*, 8 E. 394, observed on in part 2, *post:* also in 6 E. 161; 5 B & Ald. 603; Gilb. Evid. 209, *et seq.* Swin. on Wills, part 7, sec. 20.

(c) With respect to the particular points referred to in the last preceding pages, it may be observed that the rules of the civil law, in these and the like questions, appear to correspond with our own. The maxims of civil law, applicable to such cases, are "*solo cedit quod solo inædificatur.*" "*Solo cedit quod solo implantatur.*" The extent and application of these principles in the civil law may be found fully explained in the following authorities: Halifax Anal. book 2, ch. 2, sec. 15; Brown's Comp. book 2, ch. 7, sec. 2, tit. Adjunction; Wood's Inst. book 2, ch. 3, tit. Accession by Building, sec. 5; by Planting, sec. 6. For the rules in regard to such annexations according to the law of Scotland, see Stair's Inst. book 2, tit. 1, sec. 40. And for those of the Dutch jurisprudence, (in which the Roman law is much cultivated, and its decisions pretty generally followed,) see the recent translation of Grotius, by Herbert, book 2, ch. 10, tit. by Accession. In the French Code, the law, as applied to the particular cases under consideration, appears to be very well defined.

CHAPTER II.

OF FIXTURES, AND THE RIGHT TO REMOVE THEM, AS BETWEEN LANDLORD AND TENANT.

SECTION I. *Of the Right of a Tenant to remove Trade Fixtures.*
SECTION II. *Of Erections made by a Tenant for agricultural Purposes.*
SECTION III. *Of the Right of a Tenant to remove Fixtures set up for Trade, combined with other Objects.*
SECTION IV. *Of the Right of a Tenant to remove Fixtures for Ornament and Convenience.*
SECTION V. *Of the Time when a Tenant may remove Fixtures, as affected by the Nature and Duration of his Interest in the Premises.*
SECTION VI. *Of the Effect of Contract and the Terms of the Tenancy in respect of Fixtures.*

SECTION I.

Of the Right of a Tenant to remove Trade Fixtures.

IT was observed in the preceding chapter, that there existed in certain cases, and in favor of particular individuals, a right of severing and removing personal chattels which have been affixed to the freehold. And this right, it was said, prevailed over the claims of other persons, who, by reason of their interest in the land, would have had a property in the articles, and might have prohibited their removal, if they were to be considered in all respects like other parts of the freehold. In nearly all the cases relating *to the doctrine of fixtures, the conflicting rights [*18]
of individuals to some particular object have been the subject of dispute, where the one party has claimed the property as being permanently affixed to the freehold of which he is the proprietor, and the other has rested his title to it, on the ground of its having been fixed up by himself, or by some other person of whom he is the legal representative.

Parties claiming fixtures.

Questions respecting the right to fixtures, have arisen principally between three classes of persons. First, between *landlord*

and tenant. Secondly, between the *executors of tenant for life, or tenant in tail, and the remainder-man or reversioner.* Thirdly, between the *personal representative and the heir of the deceased owner of the inheritance.*(a)[1]

It is proposed to investigate the law relating to fixtures, by considering the respective claims of these three classes of individuals. And it is thought expedient to examine these claims separately, and according to the order here mentioned; because many of the rules on which the doctrine of fixtures depends, will be found not to be alike applicable to each of the classes of persons; to consider them, therefore, under one general head, would lead to a confused and inaccurate view of the subject.

Law of fixtures between landlord and tenant.

The present chapter, then, will treat of the doctrine of fixtures in the case of *landlord and tenant;* that is to say, of the property which a tenant continues to possess, and the right of removal that belongs to him, when he has, during his term, annexed [*19] any matter to *the soil which may be considered a *fixture*, according to the definition given in the preceding chapter.

Now, it is obvious that the respective claims of the landlord and the tenant may be affected by the nature and the terms of the contract that has been entered into between them. In order, however, to obtain a correct view of the general principles on which the law of fixtures depends, it is necessary, in the first place, to consider the rights of these parties independently of

(a) *Elwes* v. *Maw*, 3 East, 51; 1 H. Blac. 260, *in notis.*

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[1] Fourthly, between tenants in common, owners of the fee—a relation of exceptional occurrence in England, and rarely brought under the notice of the courts; but constantly befalling, in the United States, under the laws regulating the descent of real estate, and its equal partition among all the children of the ancestor. The rule in New York is laid down in the case of *Walker* v. *Sherman*, 20 Wend. 636, in which, on motion to set aside report in partition, for that the commissioners had mistaken the character of several articles of machinery belonging to a mill, considering them as *personal property*, whereas they should have been regarded as *real estate*, the Supreme Court, Cowen, J., held: in this case the question is between *tenants in common, owners of the fee*, and is to be decided on the same principles as if it had arisen between grantor and grantee, or as if partition had been effected by the parties through mutual deeds of bargain and sale. As between such parties, the doctrine of fixtures making part of the freehold, and passing with it, is more extensively applied than between any others.

any private agreement between them. The situation of the tenant, and the extent of his privileges, may or may not be varied by the conditions he makes with his landlord; and the consideration of this part of the subject will be fully entered upon hereafter. For the present, therefore, it must be supposed that nothing is found in the terms of the demise controlling the general right of the tenant in regard to fixtures, and that there exists between the parties, nothing but the mere relation of landlord and tenant.

General rule as to annexations by a tenant.

The *general* rule of law, with respect to annexations made by a tenant during the continuance of his term, has been established from a very remote period, and may still be regarded as the rule in ordinary cases. It is, that whenever a tenant has affixed anything to the demised premises during his term, he can never again sever it without the consent of his landlord. The property, by being annexed to the land, immediately belongs to the freeholder: the tenant, by making it a part of the freehold, is considered to abandon all future right to it, so that it would be waste in him to remove it afterwards. It *therefore falls in [*20] with his term, and comes to the reversioner as part of the land.(a)

Relaxed in modern times.

A strict observance of this rule, which appears originally to have admitted of no distinction, whatever may have been the object of the annexation, or the intention of the party in making it, must have been attended with great hardship and injustice to tenants; and it may be supposed that early endeavors were made to obtain a relaxation of it. In progress of time, certain exceptions and modifications were introduced into the rule, which tended greatly to limit its operation, and led to the establishing of some very important privileges in favor of tenants, which have since been confirmed to them by a succession of judicial decisions.[1] It appears, however, from the old reports,

(a) Co. Lit. 53 a; 4 Co. 64; *Herlakenden's case*, Moore, 177; 3 East, 51; See *ante*, chap. 1.

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[1] *Whiting* v. *Brastow*, 4 Pick. 310; *Union Bank* v. *Emerson*, 15 Mass. Rep. 159; *Gale* v. *Ward*, 14 Mass. Rep. 352; *Holmes* v. *Tremper*, 20 J. R. 30; *Miller* v. *Plumb*, 6 Cowen, 665; *Taylor* v. *Townsend*, 8 Mass. Rep. 416; *Reynolds* v. *Shuler*, 5 Cowen, 323; *Walker* v. *Sherman*, 20 Cowen, 636; *Van Ness* v. *Pacard*, 2 Peters, 137; *Heermance* v. *Vernoy*, 6 J. R. 5; *Dubois* v. *Kelly*, 10 Barb. S. C. R. 496; *Mott* v. *Palmer*, 1 Comstock, 564.

that the indulgence was at first granted by the courts not without doubt, and after some struggle. Indeed, on its introduction, it does not seem to have been maintained upon any settled or intelligible ground; for, in the earlier cases, the privilege is found to be built on legal subtleties and nice distinctions, instead of being made to rest upon principles of general policy, which the modern determinations have declared to be the proper foundation of it.

At this distance of time, it is difficult to ascertain the precise period when a relaxation of any kind was first admitted. It was said by Lord Holt,(*a*) in allusion to a particular class of fixtures, that the right of the tenant to remove erections of that description [*21] *was by the common law. Perhaps this expression is not to be understood literally; for it should be recollected that at common law, and before the Statute of Gloucester, a tenant for years was not punishable for any species of waste.(*b*) It was after that statute, and in consequence of its provisions, that questions respecting the right of removing things erected by tenants during their term, frequently became the subject of judicial consideration; and many of these questions are to be met with in the reports of very early cases.

The fixtures to which Lord Holt refers, are those which a tenant erects upon the demised premises for the purpose of carrying on his *trade and manufacture.* The law respecting this class of annexations, forms a very important branch of the present inquiry; and as the tenant's right in these cases is undoubtedly more extensive, and rests upon more settled principles than any other he enjoys in respect of fixtures, and is also represented to have been established first in order of time, it may be proper to begin by investigating the claims of the tenant, in removing fixtures of this description.

Of trade fixtures. First, then, of fixtures erected by a tenant for purposes of *trade and manufactures.*

The facts of several of the cases to which it will be necessary to refer, will of themselves, suggest, that the trade carried on by

(*a*) *Poole's case*, 1 Salk. 368.
(*b*) *Vide post*, chap. 1 of part 2.

a tenant may be of two kinds. It may be a trade unconnected with, and independent of the land he occupies, such as dyeing, brewing, &c.; or it may be a trade derived from the land, and *depending essentially on its peculiar produce; as the getting [*22] and vending of coals from a colliery, or the manufacturing of salt from salt springs. The distinctions which may thus be observed in the nature of the tenant's business and employment, will hereafter become the subject of particular notice; inasmuch as they are the foundation of certain rules in the doctrine of fixtures, which are very important, and involve points of difficult solution. At present, however, it will be more convenient to consider the subject without reference to these distinctions; and merely to suppose that the tenant carries on any general trade upon the premises, and that, in the prosecution of his trade, he annexes an article to the freehold, the right of severing and removing which, becomes a matter of dispute between himself and his landlord.

Early authorities examined.

The earliest authority on this subject, to which it will be necessary to advert, occurs in the Year Book, 42 Ed. III, p. 6, pl. 19. It was an action of waste brought against a lessee, for removing a furnace which he had erected and affixed to the walls of a house demised to him for a term of years.(a) The point was then raised, whether the removal of the furnace was justifiable, or if it amounted to waste; and this question was, after discussion, adjourned as doubtful, and was left undetermined.

The next in order, is a case in the Year Book, 20 Hen. VII, p. 13; in which the question was, whether *a furnace fixed to the free- [*23] hold with mortar, should go to the executor, or to the heir of the owner of the fee who had put it up. In the course of the judgment in this case, the court (Rede, Ch. J., Fisher and Kingsmill) laid down the following proposition: "If a lessee for years set up such a furnace for his advantage, or a dyer make his vats and vessels to occupy his occupation, during the term he may remove them." "And so of a baker. And it is no waste to remove such things within the term, by some." The report then states, that in 42 Ed. III, it was doubted whether this was waste or not.

(a) The fact of the furnace being annexed to the *wall* is not mentioned in the report; but it appears to have been so fixed according to the remarks on the case in subsequent authorities in the Year Books. *Vide* 21 Hen. VII, 26.

This case is generally adduced as the first which in terms recognizes the right of a tenant to remove fixtures. It is quoted, moreover, as the great authority for the prevalence of a rule, in very early times, in favor of *trade fixtures*. For it is insisted, that the privilege which is there said to belong to the lessee, is admitted in respect of articles of *trade* only; and is to be understood as a right arising solely out of the principle of protecting commerce and manufactures. The expression in the original, which has given rise to the supposition, is "*pour occupier son occupation;*" and it has been imagined, that the instances of the dyer's vessels are intended, not merely to signify additions made by a tenant for his common domestic accommodation, but to indicate fixtures put up by him expressly in relation to the trade which he is carrying on upon the premises.

[*24] It may, however, be doubted if this is a fair inference from the case cited. For, in the first place, it *deserves to be mentioned, that in another report,(a) or rather abstract of the case in the Year Book, 20 Hen. VII, which was published at a subsequent but very early period, the passage upon which the supposition in question mainly proceeds is particularly introduced, but the expression "*pour occupier son occupation*" is left out. If this circumstance had been suggested to the courts in the discussion of the subsequent cases, it would probably have been thought to merit attention, as tending to show that the rule laid down by the judges in the time of Henry the Seventh was not universally considered to have been founded on an exception arising solely out of trade.(b)

(a) It is a book printed A. D. 1614, entitled "*Un Abridgment de touts les Ans del Roy Henrie le Sept,*" and the position in question is thus expressed: "And if lessee for years makes any such furnace for his pleasure, or a dyer makes his vats and vessels, he may remove them during the term," &c., "and so of a baker. And some, *semb.*, that it is not waste to remove such things within the term; but this is contrary to the opinions aforesaid," &c.

(b) It may not be unimportant to notice the manner in which the concluding part of the above passage from the Year Book, on which so much stress has been laid, was construed in a modern case. In *Elwes* v. *Maw*, (3 East, 42,) the counsel read it thus: "It is no waste to remove such things within the term "by *any*:" Lord Ellenborough renders it, "It is not waste to remove such things within the term by *some*:" according to either of which constructions, it seems to be left in doubt whether the concluding words of the sentence are not intended to refer to *tenants*. In the original, the sentence is thus printed and punctuated. "*Et n'est ascun waste de remuer tiel chose diens le terme, per Ascuns;*" it is no waste to remove such things within the term, according to the opinions of some JUDGES. It is clearly thus intended, from what immediately follows in the report. See also the corresponding expressions in the extract in the preceding note.

And the inference that trading fixtures were not particularly and exclusively intended by the judges in this case, will more clearly appear, from the remark which follows in the report, viz.: that in 42 Ed. III, it was doubted whether this was waste or not. Now, *on referring to the case in 42 Ed. III, p. 6, pl. 19, it will [*25] appear that no allusion whatever is made to an exception in favor of trade, neither is it mentioned or implied that the furnace there in dispute was erected for a trading purpose. Again, in the same sentence in which the dyer's vat is mentioned, and immediately before it, is put the instance of a furnace erected by a lessee, and this is said to be removable like the vat. And so far from its being intimated that the furnace is connected with trade, it is, on the contrary, described as put up for the convenience of the lessee, "*pour son avantage*," or (as the abridgment has it,) "*pour son pleasure*."(*a*)

But further, if this principle of allowing an exemption on the ground of trade had been clearly recognized in the case in question, it might be expected that it would have been applied to the solution of subsequent cases. But the contrary is the fact; and all the ancient cases which follow the decision of 20 Hen. VII, are found to proceed upon a distinction depending altogether upon the mode of annexation. Thus, in a case which occurred immediately afterwards, and before the same judges,(*b*) it was laid down by the court, that if a lessee makes an erection, as a furnace or post, &c., and fixes it to the soil, or to the middle of the house only, and not to the walls, he may take it away. Nothing is said in this case of a distinction in respect of trade: on the contrary, Kingsmill, J., apparently in allusion to the particular instances of vats in a brew-house or dye-house, relies solely on their construction and annexation; *and says the re- [*26] moval of such things would not be waste, *because* the house would not be impaired by it. So, lastly, in the cases which followed some time after those in the Year Books, there is no recognition whatever of any peculiar privilege in regard to trade. For *Cook's case*(*c*) (24 Eliz.) is wholly silent upon it. And in a case reported in Owen, 70, and Cro. Eliz. 374,(*d*) (which respected

(*a*) And see 8 Hen. VII, 12.
(*b*) 21 Hen. VII, 26. And see Br. Abr. tit. Chattels, pl. 7, 11.
(*c*) Moore, 177.
(*d*) *Day* v. *Austin and Bisbitch*, 37 Eliz. And see 1 Roll. Ab. 891, pl. 50.

the power of a sheriff to seize a furnace under an execution against a termor,) the article is expressly stated to have been erected for the use of a dyer; and the court, adverting to the right of the termor himself in such a case, determine it by the circumstance of the article being fixed to the walls, and not to the middle of the house. On this particular ground they consider that the furnace would not be removable; and the principle of an exemption on the ground of trade is altogether unnoticed.(*a*)

Upon the whole, then, it can scarcely be inferred that the expressions used by the court in 20 Hen. VII, pl. 13, were employed in any other sense than as mere general examples of fixtures, the object of which was to illustrate the legal doctrine of an exception introduced for the benefit of all tenants alike, by a less rigid construction of the old rule of law. Indeed, with regard to the dictum itself, it should be observed, that it is entirely extra-judicial, and appears in a decision in which the judgment of the court proceeded on a totally different principle.(*b*)

[*27] *The examination of the early authorities which has thus been made, may not be deemed useless in this place, because it may serve to give the reader a more perfect view of the doctrine relating to fixtures, by presenting a comparison between the law as it stood formerly, and as he will find it established in later times. The observations that have been made are intended chiefly to show, that it is by no means clear that an exception of any kind in favor of tenants was admitted in very early times; and moreover, that when the exception was introduced, it seems to have extended as fully to other fixtures, as to those which related immediately to trade. And yet it is a notion which appears to have prevailed very generally, that the first modification of the ancient rule was exclusively in favor of commerce, and that this is plainly, and without dispute, pointed out in the old cases.

Result of the early authorities.

However, the equivocal state of the law in its earlier stages is of little importance at the present day. For the privilege of a

Modern decisions in favor of trade.

(*a*) In the report of this case, as cited in Went. Off. of Ex. p. 61, it is said, that the jury found that by the *custom* of Kent, the lessee might remove such articles.

(*b*) See Mr. Smith's remarks on this question in his very valuable Notes on Leading Cases, Vol. II, p. 115. He, however, appears to be under the impression that the argument in the text rests wholly on the abridgment referred to.

tenant to remove fixtures set up by him in relation to his trade, was plainly and authoritatively stated by Lord Holt, C. J., in *Poole's case*, 1 Salk. 368; and it has since been recognized in a series of uniform decisions of modern date.

Poole's case occurred a considerable length of time after the decisions cited in the preceding pages.(*a*) It was the case of a soapboiler, an under tenant, who, for the convenience of his trade, had put up certain vats, coppers, tables, partitions, and paved the backside, *&c., all which things had been taken under an [*28] execution against him; on which account the first lessee brought an action against the sheriff, for the damage occasioned to the house, and which he was liable to make good. Lord Holt, Ch. J., held, that during the term, the soapboiler might well remove the vats he set up in relation to trade; and he said, moreover, that he might do it by the common law (and not by virtue of any special custom,) in favor of trade, and to encourage industry.(*b*)

The principle of the relaxation.

The right of a tenant to take away *trade fixtures* may be considered to have been established from this time. And not only has it been confirmed by many subsequent decisions, but a very sound and satisfactory principle is assigned as the foundation of the privilege. This is to be collected in the first instance from some cases which came before the courts of equity, during the period in which Lord Hardwicke presided there. It becomes, therefore, necessary to refer to these decisions. And as it will be found that the particular claims to which they relate were not, in fact, between landlord and tenant, but between other parties, viz., the executors of tenant for life and the remainder-man, it is proper briefly to premise, that the privilege of removing fixtures, (as will be more particularly shown in another part of this work,) is considered to be construed more liberally in the case of a common tenant against his landlord, than in the case of a tenant for life or in tail against the remainder-man or reversioner, or in that of an executor of tenant in fee against the heir. And hence it may be received as a rule, that the decisions in favor of the executors of *tenants for life, in tail or in fee, as against the [*29] remainder-man, reversioner or heir, may in general be applied to

(*a*) Mic. 2 Ann.

(*b*) As to this, see *ante*, p. 21.

cases between landlord and tenant, and are to be considered as governing authorities in support of a *tenant's* rights.(a)

Of these cases in equity, the most important is that of *Lawton* v. *Lawton*,(b) which was decided in the year 1743. The question in this case was, whether a fire engine (or steam engine) set up for the benefit of a colliery by a tenant for life, should, at his death, go to his executors as part of his personal estate, or to the tenant in remainder.

Lord Hardwicke, in his judgment, thus explains the *principle* of the rule respecting trade erections: "To be sure, in the old cases, they go a great way upon the annexation to the freehold; and, so long ago as Henry the Seventh's time, the courts of law construed even a copper and furnaces to be part of the freehold. Since that time the general ground the courts have gone upon of relaxing this strict construction of law is, that it is for the benefit of the public to encourage tenants for life to do what is advantageous to the estate during their term."

In the case of *Lord Dudley* v. *Lord Warde*,(c) which followed shortly after that of *Lawton* v. *Lawton*, there was a similar question as to the right of the executor of a particular tenant to take a fire engine as against the remainder-man. On this occasion
[*30] *Lord Hardwicke observed, "Some general rules are very clear, as what is annexed to the freehold is to be considered a part of it; and yet there are some exceptions to that rule, as between landlord and tenant: what is erected by the latter for the sake of *trade* may be removed, though fixed to the freehold." "The determinations have been from consideration of the benefit of trade."

The decisions in the courts of common law will be found to have proceeded upon the same principle. In *Lawton* v. *Salmon*,(d) in K. B., before Lord Mansfield, there was a question between the executor and the heir of a person who, some years before his death, had placed certain vessels called salt pans, fixed

(a) *Vide* 3 Atk. 13; Amb. 114; Bul. N. P. 34; 2 East, 91; 3 Esp. C. N. P. 11; 3 East, 51. And see the observations upon this subject in chap. 3, sec. 1, *post*.

(b) 3 Atk. 13.

(c) Amb. 114; Bul. N. P. 34.

(d) 1 H. Black. 259, *in notis*; 3 Atk. 16, *in notis*, *S. C.*

to the ground, in buildings erected upon his salt works; and, after consideration, the opinion of the court was given in favor of the heir, on the particular grounds explained in another chapter of the work. But in the course of the judgment, Lord Mansfield states that there had been a relaxation of the strict rule, for the benefit of trade, between landlord and tenant; that many things might be taken away which could not formerly, such as erections for carrying on any trade, when put up by the tenant. "It would have been a different question if the springs had been let, and the *tenant* had been at the expense of erecting these salt works: he might very well have said, I leave the estate no worse than I found it. That, as I stated before, would be for the encouragement and convenience of trade, and the benefit of the estate."(*a*)

*So, in a subsequent case, it was said by Lord Kenyon,(*b*) that [*31] "the old cases upon this subject leant to consider as realty whatever was annexed to the freehold by the occupier; but, in modern times, the leaning has always been the other way, in favor of the tenant, in support of the interests of trade, which is become the pillar of the state."

It is unnecessary to enter into a detail of other cases, in which the principle under consideration has been repeated and enforced.(*c*) It will, however, be proper to advert to the remarks of Lord Ellenborough upon this subject, because the reasons which he appears to assign for the rule in respect of trade fixtures may be thought, in some measure, to differ from those which have been already examined.

In the case of *Elwes* v. *Maw*(*d*) (a leading decision upon the doctrine of fixtures,) Lord Ellenborough, in stating the several exceptions which, as between different parties, had been en-

(*a*) See per Tindal, Ch. J., acc. in *Mansfield* v. *Blackburne*, 6 Bing. N. C. 439.

(*b*) *Penton* v. *Robart*, 2 East, 90.

(*c*) For further authorities upon the subject, see Com. Dig. Waste, D. 2; 15 Vin. Ab. 43; 22 Vin. Ab. 445; 7 Bac. Ab. 257; Bul. N. P. 34; 2 Saund. 259, n. 11; 2 Brod. & Bing. 54, and the decisions referred to in chap. 5, *post*. Of the several cases cited in the text, it should be observed that a fuller statement of the facts and of the grounds of their determination will be found in subsequent pages. They are introduced here not so much for the sake of the decisions, as to show the principle on which the exceptions for the benefit of trade are founded.

(*d*) 3 East, 38.

grafted upon the old rule of law in favor of trade, and of vessels and utensils which are subservient to trade, observes, that this exception is founded on the principle of trade being a matter of *a personal nature;* whence it followed, that an article which is used as an accessory to trade ought itself to be deemed personalty, and not a part of the freehold.(*a*) This explanation *of the rule does not appear to have been adopted by any other authority: and it is observable that, in deciding the case of *Elwes* v. *Maw*, Lord Ellenborough relies less upon this technical view of the nature of trade, than upon the course of precedents. Indeed, as the principle must have been coeval with the common law, instead of originating in modern times, it would have authorized the removal of trade fixtures long before the privilege was, in fact, generally admitted by the courts.

[*32]

Public benefit the ground of the relaxation.

The inference, then, to be drawn from the several cases which have been cited, is, that a tenant has an indisputable right to remove fixtures which he has annexed to the demised premises for the purpose of carrying on his *trade;* and that the *benefit of the public* may be regarded as the principal object of the law in bestowing this indulgence. The reason which induced the courts to relax the strictness of the old rules of law, and to admit an innovation in this particular instance, was, that the commercial interests of the country might be advanced, by the encouragement given to tenants to employ their capital in making improvements for carrying on trade, with the certainty of having the benefit of their expenditure secured to them at the end of their terms.

Extent of the relaxation.

Having thus considered the principle upon which the privilege in respect of trade fixtures is established, and having traced the steps by which it has gradually received the sanction of the courts, the next material object of inquiry is, the *extent* to which this privilege has been carried in the decision of questions between landlord and tenant.

[*33]

*For the additions made by a tenant in relation to his trade, may be of various degrees of value and importance. They may consist merely of machinery, vessels, or other appendages of the like description, in themselves of a perfect chattel nature, before

(*a*) 3 East, 54.

they are put up; or they may be erections and buildings, which have no existence as integral chattels, except in connection with the freehold, and which may be of a more or less substantial character, and more or less capable of removal and reconstruction.

What trade fixtures may be removed.

The question, therefore, is, whether a tenant is entitled to sever and take away all articles, and erections put up by himself for the purposes of trade, whatever may be their nature, construction and magnitude: and if not, to what description of things this privilege is confined.

In almost all the cases which have been referred to in the preceding pages, the property in dispute was either a mere utensil or instrument of trade, or machinery employed in trade; or else what might be deemed accessory to such articles, in supporting or protecting them, or as being instrumental to their convenient use. In almost all of them, too, the articles, or the parts of which they were composed, were such as, after removal, were capable of being again employed for the same or similar purposes. Of this description were the furnaces, vats, coppers, &c., in the early cases; the steam engines in the cases before Lord Hardwicke; and the salt pans before Lord Mansfield. These instances, therefore, cannot be considered as carrying the tenant's right of removal to any great extent. But, in the *dicta* and observations that are to be met with in some of *the decisions, the exception in favor of trade is found to be laid down in very comprehensive and general terms. For not only are utensils and instruments of trade specified, but *buildings* and *erections* are frequently mentioned without any qualification as to their nature or construction.(a)[1]

[*34]

(a) Per Lord Kenyon in *Dean* v. *Allalley*, 3 Esp. C. N. P. 11; Per Lord Mansfield in *Lawton* v. *Salmon*, and Lord Ellenborough in *Elwes* v. *Maw*. See, also, 4 Esp. C. N. P. 34.

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[1] *Van Ness* v. *Pacard*, 2 Peters' Rep. 137. Story, Justice. It has been suggested, that the exception in favor of trade has never been applied in cases like this, where a large house has been built, and used in part as a family residence. But the question, whether removable or not, does not depend upon the form or size of the building, whether it has or not a brick foundation, is of one or two stories, or has brick or other chimneys; the sole question is, was it designed for purposes of trade or not? "A tenant may erect a large as well as a small messuage, or a soap boilery of one or two stories, and on whatever foundation he may choose;" and it was held

It now, therefore, becomes necessary to give a more particular description of the articles mentioned in the several cases that have been referred to; which was omitted in the former pages in order that the subject, then under inquiry, might not be embarrassed by detail. Other decisions which have reference to the extent of the tenant's right of removal, will afterwards be stated and explained.

Steam engines, &c.

In the case of *Lawton* v. *Lawton*,(a) it was determined that a *fire engine* or *steam engine* erected by a tenant for life, should at his death go to his executor as part of his personal assets.

The fire engine was described as a piece of machinery with a shed over it, in which holes were left for the timbers, to make it more commodious for removal. It was stated in evidence, that such articles were very capable of being carried from place to place: but it was shown, on the other side, that they could not be removed without tearing up the soil and destroying the brick-work.

The case of *Lord Dudley* v. *Lord Warde*, before Lord Hardwicke, Amb. 113, was, in all its circumstances, very similar to this of *Lawton* v. *Lawton*.

[*35] *These two decisions, although between other parties, may be regarded, according to the rule laid down in a preceding page, as direct authorities upon the subject of the *tenant's* rights. Indeed, it was said, by Lord Hardwicke, that the right of removing steam engines, would be very clear as between landlord and tenant.

They establish, therefore, that a tenant is entitled to take away *engines* and other *machines* like the fire engines, put up by him at his own expense, for trading or manufacturing purposes.

In determining, however, these cases, it is evident that Lord Hardwicke considered that the construction and mode of an-

(a) 3 Atk. 13.

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that tenant is not liable in an action of waste for pulling down and removing a wooden dwelling, with cellar of stone or brick and brick chimneys, which he had erected upon a demised lot, for a term of years, reserving rent, with a view of carrying on the business of a dairyman, and for the residence of his family and servants engaged in the business.

nexation of the articles were material circumstances; for he begins his judgment in *Lawton* v. *Lawton* by remarking that it appeared, from the evidence, that the engine in dispute was in its nature personal movable chattel, taken either in gross or in part, before it was put up.

Vessels and pipes in brew-houses.

Speaking of the right to remove fire engines, Lord Hardwicke observes, further, that "*coppers and all sorts of brewing vessels* cannot possibly be used without being as much fixed as fire engines; and, in brew-houses especially, *pipes* must be laid through the walls, and supported by the walls; and yet, notwithstanding this, as they are laid for the convenience of trade, landlords will not be allowed to retain them."

Cider mills.

In the discussion of the above case of *Lawton* v. *Lawton*, a decision of Lord Ch. Baron Comyns, respecting a *cider mill*, was cited by the counsel, and was adopted by Lord Hardwicke. It was stated that the *Lord Ch. Baron had ruled at *Nisi Prius*, [*36] that a *cider mill*, let into the ground, belonged to the executor of the deceased owner of the land, as part of the personal estate, and that the heir should not take it as parcel of his inheritance. The principle of this decision is generally represented to have been, that as the mill was employed in the making of cider, the case was brought within the exception in respect of trading erections. And the inference from the determination is, that an article of this description would, in like manner, be removable between landlord and tenant.(*a*)[1]

Salt pans.

Moreover it appears, upon the authority of Lord Mansfield, that a tenant may lawfully remove *pans* fixed up in *salt works*. The *salt pans* in the case of *Lawton* v. *Salmon*,(*b*) above referred to, were utensils made of iron and rivetted together, brought in pieces, and capable of being again removed in pieces, without

(*a*) The case is not found in any of the reports. It has been recognized as law by several eminent judges; but its authority has been impugned in a late decision in the House of Lords. See *post*, ch. 4.

(*b*) 1 H. Bl. 259, *in notis*; *S. C.*, 5 Atk. 16, *in notis*. See a description of these utensils in *E. Mansfield* v. *Blackburne*, 5 Bing. N. C. 426; and see *post*, ch. 4, sec. 1.

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[1] A cider mill erected by the tenant, being within the exception in respect of trading erections, would be removable as between landlord and tenant, at the expiration of the tenancy. *Holmes* v. *Tremper*, 20 J. R. 30.

injury to the surrounding buildings; and they were not joined to the walls, but fixed with mortar to the brick floor. In deciding this case, as between the heir and executor of the owner in fee, who had made the erection, Lord Mansfield alludes to several distinct arguments, quite unconnected with trade, and inapplicable to the case of landlord and tenant. But it may be observed that when he intimates his opinion, that, as between the latter parties, a tenant would be entitled to remove the salt pans,

[*37] he seems to rest the right of removal *principally upon the construction of the articles, and the little injury that would be occasioned to the estate by taking them away.

This case, therefore, cannot be considered to carry the privilege of the tenant farther than the decisions of Lord Hardwicke, or than that of *Poole's case*, in respect of vats, coppers and the like.

Dutch barns. The above decisions were followed by the case of *Dean* v. *Allalley*.(a) In this case, a tenant, during his term, had erected certain sheds or buildings called Dutch barns. The construction of these buildings may be collected from the MS. note of counsel cited in the case of *Elwes* v. *Maw*;(b) from which it appears that they were sheds having a foundation of brick-work in the ground, and uprights fixed in and rising from the brick-work, and supporting the roof, which was composed of tiles, and the sides open. Lord Kenyon said, "If a tenant will build, upon premises demised to him, a substantial addition to the house, or add to its magnificence, he must leave his additions, at the expiration of his term, for the benefit of his landlord; but the law will make the most favorable construction for the tenant, where he has made necessary and useful erections for the benefit of his trade or manufacture, and which enable him to carry it on with more advantage. It has been held so in the case of cider mills, and in other cases; and I shall not narrow the law, but hold erections of this sort, made for the benefit of trade, or constructed as the present, to be removable at the end of the term."

[*38] *It does not appear, from the report of this case, for what purpose the buildings in dispute had been erected. Nevertheless,

(a) 3 Esp. N. P. C. 11.
(b) 3 East, 47.

the decision may undoubtedly be considered an authority for the tenant's right of removing similar erections, connected to the same extent with the freehold, whatever conclusion may be formed as to the grounds upon which the barns were held removable, with reference to the particular object for which they were put up.(*a*)

Sheds, posts, and rails.

In the case of *Fitzherbert* v. *Shaw*,(*b*) Mr. Justice Gould was of opinion, at *Nisi Prius*, that a tenant would clearly have been entitled to take away a *wooden stable*, standing upon blocks and rollers, and also a *shed* which he had built on brick-work, and some *posts and rails* he had put up.(*c*) And although, in this case, the erections might not have been made by the tenant for the purpose of trade, still the same observation holds that has just been suggested in respect of the Dutch barns, viz.: that Mr. Justice Gould's opinion is an authority for the removal of similar erections, if set up for trading purposes, because the tenant's privilege in respect of trade fixtures is, without dispute, greater than any other he could rely upon under the law of fixtures. Perhaps, however, it may be objected to this authority, (in conformity with Lord Ellenborough's view of it,) that the opinion of Mr. Justice Gould was wholly extra-judicial, *as the point could not properly have come before him at *Nisi Prius*.(*d*) [*39]

A varnish-house.

In the case of *Penton* v. *Robart*,(*e*) the court considered that a tenant, during his term, would have been entitled to remove an erection used as a *varnish-house* for carrying on a varnish manufactory. The building was described as having a brick foundation let into the ground, with a chimney belonging to it, upon which a superstructure of wood, brought from another place, where the defendant, the tenant, had carried on his business, was raised, in which the defendant exercised his trade. The decision turned upon a point which will be explained in a subsequent section. With reference, however, to the present subject, it is

(*a*) Some doubts seem to have been entertained whether the parts of the buildings removed by the defendant were actually affixed to the soil. See Lord Ellenborough's remarks upon the authority of this case in 3 East, 55.

(*b*) 1 H. Blac. 528.

(*c*) As to iron fences and hurdles, see, per Sir John Cross in *Ex parte Belcher*, 2 Mont. & Ay. 169.

(*d*) 3 East, 55.

(*e*) 2 East, 88; 4 Esp. N. P. C. 33.

conceived that the case, when properly stated, does not amount to a general authority upon the tenant's right of removal. For it appears, from the statement of the case, that, in point of fact, the erection which the defendant removed, and which gave rise to the dispute, was a *part* of the building only; for he took away only the wooden superstructure, which, according to the *Nisi Prius* report of the case, was *merely placed upon a wooden plate, laid upon the brick foundation.* The foundation, and a chimney belonging to the building, were not removed. According to this view of the facts, the principle of fixtures would not be involved at all in the case. For, as was shown in the former chapter of this work, an erection constructed like that portion of the building which the tenant removed, is not to be considered a part of the freehold, but remains a mere personal chattel.

[*40] *From a want, however, of an accurate examination of these circumstances, the case of *Penton* v. *Robart* has not unfrequently been supposed to authorize the removal of buildings of a more substantial nature than is warranted by any other decision. But even if it be thought that it may be implied from the determination, that the court deemed the erection to be actually affixed, still the peculiar character and construction of the building will not admit of the case being considered an authority for a very extensive right on the part of the tenant.(a)

Vats, coppers, &c.

Poole's case,(b) it has been seen, was an action against the sheriff for taking in execution the *vats, coppers, tables, partitions, pavements, &c.*, of a soapboiler; on which occasion Lord Ch. J. Holt held, that the soapboiler might well remove the *vats* he set up in relation to trade.[1] The mention of *pavement* in this case has often given rise to an opinion that such an article might always

(a) When this case was before Lord Kenyon at *Nisi Prius*, he is reported to have said, that the mere erection of a chimney would not prevent the right of taking away the rest of the building which surrounded it.

(b) 1 Salk. 368. It is said in *Pyot* v. *Lady St. John*, (2 Bulst. 113; *S. C.*, Cro. Jac. 329,) that pavement is a structure, for they take lime to finish it. Perhaps it may be thought that the pavement in *Poole's case* was accessory to the trade utensils, as being necessary to their more convenient use and enjoyment; like the sheds which covered the fire engines in *Lawton* v. *Lawton;* as to which, see *post.*

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[1] *Union Bank* v. *Emerson*, 15 Mass. Rep. 154. Dye kettle fixed in brick-work of fulling mill may be removed. As between landlord and tenant, the latter may, during the term, remove copper stills, steam tubs, and various other erections for

be removed if set up for trade. And it has been considered a strong instance in favor of an unqualified right in the tenant to take away every erection put up for trading purposes. But on an attentive perusal of the case, it will be found, that it is not clear from the statement, whether any *pavement* was in fact removed; and indisputably the right of removing it cannot be relied upon as *being established by any part of Lord Holt's judgment. [*41]

The doctrine of fixtures was considered in a very elaborate manner in the celebrated case of *Elwes* v. *Maw*; (a) a very important decision, the grounds of which will be fully explained in the next section. Lord Ellenborough, throughout his judgment in that case, speaks of *buildings* constructed for the purpose of trade. And it is worthy of remark, that it is an argument on which he principally relies, that the indulgence allowed to tenants in respect of trade had, by no valid authority, been extended to the particular description of buildings then in dispute, viz., buildings for agricultural purposes. The objection, therefore, in this case, did not arise out of the nature and structure of the buildings, but was considered to depend entirely upon their object and purpose. Perhaps it cannot safely be inferred, from this circumstance, that the erections in question, viz., substantial buildings of brick and mortar, tiled and having foundations deep in the soil, would have been held removable, provided they had been put up for trade. Yet it would seem to have furnished a very obvious answer to the defendant's case, to have said (had the court so considered it) that the claim in question was too extensive even on the ground of trade itself, on account of the permanent nature and construction of the buildings.(b)[1] Buildings.

(a) 3 East, 38.

(b) As to the removal of a conservatory, pinery, &c., see *post*, sec. 4.

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the purposes of his trade, although of apparently permanent character, provided such erections are put upon the soil by him and at his expense. *Reynolds* v. *Shuler*, 5 Cowen, 323. Stoves in a house in which is no chimney, *Freeland* v. *Southworth*, 24 Wend. 191; certain parts of machinery in a woolen factory, *Walker* v. *Sherman*, 20 Wend. 636; cider mill, *Holmes* v. *Tremper*, 20 J. R. 29; bark mill, *Heermance* v. *Vernoy*, 6 J. R. 5; machinery for spinning flax, *Cresson* v. *Stout*, 17 J. R. 116; *Cook* v. *Champlain Transportation Co.*, 1 Denio, 91; *Farrer* v. *Chauffetete*, 5 Denio, 527. The rule is different, however, as between vendor and vendee; in such case the rule is the same as between heir and executor. *Miller* v. *Plumb*, 6 Cowen, 665.

[1] The just criterion is whether the buildings can be removed without injury to the freehold. In such case the tenant may take them away, whether intended for trade or other purposes. *Taylor* v. *Townsend*, 8 Mass. R. 411.

Accessory buildings.

It should, however, be observed that Lord Ellenborough, in the course of his judgment in this case, lays down a position, [*42] that a building which is *accessory to a removable utensil, is equally removable with the thing to which it is incident. This opinion has frequently been cited as sound law in subsequent discussions. But, upon reference to the authority upon which Lord Ellenborough considers it to be founded,(a) it seems that Lord Hardwicke's observations concerning the sheds and the walls of the fire engine only amount to this,—that although, by removing an utensil, its accessorial building may be impaired, such an injury shall not deprive a party of his right to remove the utensil itself.

Lime kilns.

One case only remains to be mentioned, which came more recently before the Court of King's Bench. In *Thresher* v. *East London Waterworks Company*, (b) there was a discussion whether a tenant had a right to take away a *lime kiln*, which had been erected upon the demised premises. The kiln was stated to be a substantial building constructed of brick and mortar, at an expense of £160, and having its foundations let into the ground. It was admitted to have been erected for the use of trade, and the lime that was burnt was brought from a distance.(c) The decision of the case ultimately proceeded upon a particular ground, depending on the terms of certain leases by which the premises had been demised; and the court gave no opinion as to the general right of a tenant to remove an erection of this description. The case, however, should not be passed over without [*43] notice, *because it deserves to be stated, that the court during the argument appeared to be struck with a view of the consequences which might follow, if every erection, such as an extensive manufactory, built by a tenant for the convenience of trade, might be demolished at the expiration of his lease. And they expressed themselves as considering the general question to be one of great importance, and which would require much deliberation in any future discussion.(d)

(a) *Lawton* v. *Lawton* and *Dudley* v. *Warde*. It does not appear, from either of the judgments in those cases, that the sheds over the engines were considered by Lord Hardwicke to be removable.

(b) Hil. T. 1824. 2 Barn. & Cres. 608.

(c) That a person using a kiln in this way is a trader within the bankrupt laws, see *Paul* v. *Dowling*, 1 M. & M. 267. And see the late statute.

(d) Upon this subject, see Lord Brougham's judgment in *Fisher* v. *Dixon*, referred

It has not been thought necessary on the present occasion, to refer to the two cases of *Culling* v. *Tuffnal*(*a*) and *Davis* v. *Jones*,(*b*) mentioned in the preceding chapter. Because the buildings in dispute in those cases (whether they are to be considered as trading erections or otherwise) were not attached to the freehold in contemplation of law. In all cases of this description, whatever may be the magnitude, or however substantial the nature of the erection, still, if it is so constructed as not to be actually fastened to, or let into the freehold, the tenant may always remove it; because the law considers it as a mere loose and movable chattel.(*c*)

Right of removal as affected by the construction of the article.

The cases which have been collected in the preceding pages, contain all that is to be found upon the right of a tenant to remove trade fixtures.(*d*) From an *examination of them it will be perceived, that the construction of an article as affecting the privilege of removal, is only incidentally noticed by the courts, and has never yet been the express point of decision. The language, however, used by the judges in some of these cases, is deserving of attention, as it shows that they were by no means indifferent to arguments derived from the nature, structure, and mode of annexation of the fixture. With respect, indeed, to the inferences to be drawn from the actual decisions, it will have been observed that the cases are but few in number, and in several of them, the property in question was of a very peculiar description.

[*44]

Other circumstances affecting the right of removal.

But there are other circumstances, besides those that relate to the construction of the thing affixed, which it may sometimes be necessary to take into consideration, in order to judge of the right of the tenant to remove trade erections. For, on a reference to the cases at large, it will be seen that the courts have, in their decisions, been influenced by various arguments derived

to *post*, ch. 4, sec. 1. What are to be considered *buildings*, see 5 Bar. & Ald. 555. And see Lord Ellenborough's explanation of the term in 6 Mau. & Sel. 189.

(*a*) Bul. N. P. 34.

(*b*) 2 Bar. & Ald. 165.

(*c*) As to cases of this description, see *ante*, ch. 1. And see the Appendix.

(*d*) It should be observed, that in determining the extent of the tenant's privilege, it may frequently be found useful to consult the decisions which are referred to in ch. 5, *post*, and also to those that relate to the taking of fixtures in execution; as to which, see *post*, part 2.

from the facts of each particular case. Thus, the existence of a *custom* in respect of the property in question; the *intention* of the party in making an erection; the *injury* occasioned to the freehold by its removal; and the *comparative value* to the respective claimants; these, or some of these considerations, are almost always adverted to in confirmation, if not as principal grounds of decision.

Custom.

Injury to the premises, &c.

Custom.

[*45]

For example, with regard to *custom*, Ch. J. Treby, in deciding the case of *Culling* v. *Tuffnal*,(a) relied *altogether upon the usage of the country; though there certainly were other reasons upon which he might have supported the tenant's claim. Lord Mansfield evidently admits the effect of custom in respect of fixtures, for he is stated to have been of opinion, that the case of the cider mill was probably decided on that particular ground.(a) Lord Ellenborough also, in a *Nisi Prius* case, alludes to the effect of custom, in giving the tenant a right to remove things, which, by the general law, as affixed to the freehold, belonged to the landlord.(b) And in the case of *Davis* v. *Jones*,(c) evidence was given, that it was usual between out-going and in-coming tenants to value machines like those in dispute; and the court thought that such a practice might be taken to indicate the nature and character of the articles. In *Lawton* v. *Lawton*, however, where it was stated that it was customary to remove fire engines, Lord Hardwicke made no observation upon the circumstance; neither did he notice it in the subsequent case of *Lord Dudley* v. *Lord Warde*.[1]

And as considerable weight is often attached to the effect of *custom* in trials at *Nisi Prius*, in questions relating to fixtures, it may be useful to add here a few remarks upon the nature of

(a) Bul. N. P. 34.

(a) *Vide Lawton* v. *Salmon*, as reported in 3 Atk. 15, *in notis*.

(b) *Wetherell* v. *Howells*, 1 Camp. N. P. C. 227.

(c) 2 Bar. & Ald. 165. See *ante*, p. 26, n. *c*; 11 Vin. Abr 154; 6 Bing. 438; 9 Bing. 24; 2 Cr. & Mee. 153; 4 Sim. 326, and other cases cited in ch. 4, sec. 1, and in chap. 5, *post*.

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[1] It is competent to establish a usage and custom for tenants to make removals of buildings erected by them during their term. Every demise between landlord and tenant in respect of matters as to which the parties are silent, may be fairly open to explanation by the general usage and custom of the country or district in which the land lies. *Van Ness* v. *Pacard*, 2 Peters R. 148.

the evidence which is usually offered on these occasions. The object proposed by this species of evidence, is either (as in *Davis* v. *Jones*) to show the nature of the article in dispute; or else to establish a prevalent usage, with *reference to which the claimants may be supposed to have contracted the relation of landlord and tenant.(a) It is not necessary to prove that the custom has existed from time immemorial: but the effect and validity of the evidence will depend upon the length of time it has continued, the extent of the district or neighborhood over which it prevails, and the absence of instances which show a contrary practice. The evidence adduced in proof of a custom of the country is frequently of a very loose and indefinite description; and the instances relied upon in support of it are often found, when properly inquired into, to have no other origin than the special agreements of parties.(b) [*46]

A decision upon the exclusive effect of custom, in cases of trading and other fixtures, appears to be a *desideratum* in this branch of the law; since among brokers and other practical men, it is frequently the only guide by which they are directed in making their appraisements, and in deciding disputes that are referred to them.

Injury to the premises.

With regard to the injury occasioned to the premises by the removal of things that have been affixed to them,—it will be recollected, that the distinctions taken in the old cases, in favor of removing furnaces fixed to the floor, and not to the walls, and doors which were not outer doors, and other similar instances, proceeded upon the principle that the walls were not the worse, nor the house impaired by taking *them away.(a) In *Lawton* v. *Lawton*, Lord Hardwicke said, that it was a very true maxim in the doctrine of fixtures, that the principal thing shall not be destroyed by taking away the accessary.(b) And it is observa- [*47]

(a) See *post*, sec. 6, of this chapter, as to custom having the effect of implied contract.

(b) See 6 Ves. 328; also 2 Mad. 62; 16 Ves. 173, and 2 Ves. & Bea. 349, as to injunctions for waste in removing things contrary to the custom of the country; and see 1 Ed. 99.

(a) *Vide* 21 Hen. VII, p. 26; Moor. 177.

(b) 3 Atk. 15. And see *Lord Dudley* v. *Lord Warde*, Amb. 114; *sup.* 37; *Avery* v. *Cheslyn*, 3 Ad. & El. 75; *Grimes* v. *Bowcren*, 6 Bing. 437. See, also, Mr. Smith's sensible remarks in 2 Lead. Cas. 116.

ble that when Lord Mansfield admitted that a tenant would be entitled to remove salt pans, he seemed to rest his opinion principally upon the argument that the premises would come to the landlord in the same state as if they had never been erected. And so in the instance of the jibs in *Davis* v. *Jones*, the circumstance that neither the caps in which they were fixed nor the chief buildings would be injured by the removal, was stated as an additional reason for the judgment of the court.(*c*)

Intention, &c.

It will be found in like manner, on referring to the cases, that the other topics above mentioned, in respect of *the intention* of the parties, &c., have been incidentally noticed by the courts, either separately or in combination with those that have been here particularly pointed out.(*d*)

It is true, indeed, that some of these grounds of argument have been relied upon more especially in claims between other classes of persons; and it is therefore difficult to say what degree of im-
[*48] portance *would be attached to them, in questions between landlord and tenant. But as they have so frequently been adverted to, and considered worthy of attention and inquiry in the judicial opinions, it would not in any case be safe to overlook them, in determining upon the right of a *tenant* in taking away trade erections.

Right of removing trade fixtures. General observations.

From a review of the authorities that have been examined in the course of this section, it will appear that if any rule were to be laid down to serve as a guide in practice as between landlord and tenant, with respect to the right of removing annexations made for the purposes of trade, it would be necessary, in the present state of the law, to express it in terms so guarded as not to clash with any of the grounds of decision which have been adverted to in the preceding remarks. The following rule, however, may perhaps be found to be most consistent with the adjudged cases. That things which a tenant has fixed to the freehold for the purposes of trade or manufacture, may be taken

(*c*) See this principle further considered in the 4th sect. of this chapter; where will also be found some remarks upon the liability of the tenant to repair damage occasioned to the freehold, by putting up and taking down fixtures. See, also, *Foley* v. *Addenbroke*, 13 M. & W. 174.

(*d*) See the cases of *Lawton* v. *Lawton*, and *Lawton* v. *Salmon*. See, also, in *Buckland* v. *Butterfield*, 2 Brod. & Bing. 56; *Empson* v. *Soden*, 4 B. & Ad. 657.

away by him, wherever the removal is not contrary to any prevailing practice; where the articles can be removed without causing material injury to the estate; and where, in themselves, they were of a perfect chattel nature before they were put up, or at least have in substance that character independently of their union with the soil; or in other words, where they may be removed without being entirely demolished, or losing their essential character or value.[1] If an erection, put up in relation to trade, can be severed without violating *any one* of these conditions, it may very safely be affirmed, that whatever be its magnitude, construction, *or mode of annexation, it is a fixture [*49] which a tenant is privileged to remove. It is not, however, meant to be inferred, that because in any particular instance these circumstances do not all concur, that, therefore, an article cannot be removed by the tenant. On the contrary, it is not inconsistent with some of the decisions, to say that things may be removable, although these requisites are not completely fulfilled. And, indeed, when the liberality with which the courts have generally been disposed to construe the indulgence in favor of trade is considered, it is not improbable that they would extend the privilege even to cases where not one of these conditions is found to be satisfied. The rule, therefore, here proposed, is only offered as an affirmative one; that wherever the above mentioned circumstances do concur, that there an article may confidently be pronounced to belong to the tenant. And although it may be thought that this rule is too narrow to be of much practical utility, still no other could safely be laid down; because, upon looking into the judgments of the courts, it is impossible not to see, that in a disputed claim between landlord and tenant, the absence of any one of the requisites which have been mentioned, might with propriety be urged against the exercise of the tenant's right.(a)

(a) For a summary view of the particular articles which have been held to belong to a tenant, upon the authority of the cases detailed at length in this section, the reader may refer to the appendix, where they are collected and arranged with reference to the manner in which questions upon this subject usually occur in practice.

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[1] "There seems to be no doubt, that a tenant for life, years, or at will, may, at the expiration of his estate, remove from the freehold, all such improvements as were erected or placed there by him, the removal of which will not injure the premises, or put them in worse plight than they were in when he took possession." *Whiting v. Brastow*, 4 Pick. 311. Tenant under a lease may remove buildings erected by

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*SECTION II.

Of the Removal, by a Tenant, of Things set up for Agricultural Purposes.

Agricultural erections not removable.

It has been decided in a case of great importance, and upon which much deliberation was bestowed, that the privilege established in favor of tenants in trade, does not extend to *agricultural* tenants, so as to entitle them to remove things which they have erected for the purposes of husbandry; not even although they leave the premises in the exact state in which they found them on their entry.

The importance of the decision, requires that it should be stated at length.

It is the case of *Elwes* v. *Maw*, in the King's Bench, Mic. T. 1802.(*a*) The declaration stated that the plaintiff was seised in fee of a certain messuage, with the out-houses, &c., and certain land, &c., in the county of Lincoln; which premises were in the occupation of the defendant, as tenant thereof to the plaintiff, the reversion belonging to the plaintiff; and that the defendant intending to injure the plaintiff in his hereditary estate in the premises, whilst the defendant was possessed thereof, wrongfully and without the license, and against the will of the plaintiff, pulled down divers buildings, parcel of the said premises, in his the defendant's occupation, viz., *a beast-house, a carpenter's shop, a* [*51] *waggon-house, a fuel-house, and* **a pigeon-house*, and *a brick wall enclosing the fold yard*, and took and carried away the materials, which were the property of the plaintiff as landlord, and converted them; by reason whereof the reversionary estate of the plaintiff in the premises was injured, &c. The defendant pleaded the general issue. And at the trial a verdict was found for the plaintiff, subject to the opinion of the court on the following case:—

The defendant occupied a farm, consisting of a messuage, barn, stables, &c., and lands, under a lease from the plaintiff for 21

(*a*) 3 East, 38.

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him on the demised premises, in such manner, that they may be removed without injury to the soil. *Washburn* v. *Sprout*, 16 Mass. Rep. 449. See, also, *Taylor* v. *Townsend*, 3 Mass. 411; *Kirwan* v. *Latour*, 1 Harris & Johns. Rep. 289.

years; which lease contained a covenant on the part of the tenant to keep and deliver up in repair the said messuage, barn, stables, and out-houses, and other buildings belonging to the said demised premises. About 15 years before the expiration of the lease, the defendant erected upon the said farm, at his own expense, *a substantial beast-house, a carpenter's-shop, a fuel-house, a cart-house, and pump-house, and fold yard.* The buildings were of brick and mortar, and tiled, and the foundations of them were about one foot and a half deep in the ground. The carpenter's shop was closed in, and the other buildings were open to the front, and supported by brick pillars. The fold yard wall was of brick and mortar, and its foundation was in the ground. The defendant, previous to the expiration of his lease, pulled down the erections, dug up the foundations, and carried away the materials, leaving the premises in *the same state as when he entered* upon them. These erections were necessary and convenient for the occupation of the farm, which could not be well managed without them. The question for the opinion *of the court was, Whether the defendant had a right to take away these erections. [*52]

The case was twice argued before the court at considerable length; and at a subsequent period Lord Ellenborough delivered the judgment. After stating the facts, his Lordship thus proceeds:—"Questions respecting the right to what are ordinarily called fixtures principally arise between three classes of persons. 1st. Between different descriptions of representatives of the same owner of the inheritance; *viz.*, between his *heir and executor.* In this first case, *i. e.*, as between heir and executor, the rule obtains with the most rigor in favor of the inheritance, and against the right to disannex therefrom, and to consider as a personal chattel anything which has been affixed thereto. 2dly. Between the *executors of tenant for life or in tail* and *the remainderman or reversioner;* in which case the right to fixtures is considered more favorably for executors than in the preceding case between heir and executor. The third case, and that in which the greatest latitude and indulgence has always been allowed in favor of the claim to having any particular articles considered as personal chattels, as against the claim in respect of freehold or inheritance, is the case between landlord and tenant.

"But the general rule on this subject is that which obtains in the first mentioned case, *i. e.*, between heir and executor; and

that rule (as found in the Year Book, 17 E. II, p. 518, and laid
[*53] down at the close of *Herlakenden's case*, 4 Co. 64; in Co. *Litt. 53; in *Cooke* v. *Humphrey*, Moore, 177; and in *Lord Darby* v. *Asquith*, Hob. 234, in the part cited by my brother Vaughan, and in other cases) is, that where a lessee, having annexed anything to the freehold during his term, afterwards takes it away, it is waste. But this rule at a very early period had several exceptions attempted to be engrafted upon it, and which were at last effectually engrafted upon it in favor of trade, and of those vessels and utensils which are immediately subservient to the purposes of trade."

Lord Ellenborough then proceeds to trace the progress of these exceptions. He refers to the cases in the Year Books, and particularly to the dictum of the court in 20 H. VII, 13; (*a*) and to *Poole's case*, in 1 Salk. 368. Upon which he adds, "But no adjudged case has yet gone the length of establishing, that buildings subservient to purposes of agriculture, as distinguished from those of trade, have been removable by an executor of tenant for life, nor by the tenant himself who built them during his term."

His Lordship next examines the grounds of the decisions in the three principal cases upon the subject; viz.: *Lawton* v. *Lawton*, 3 Atk. 13; *Lord Dudley* v. *Lord Warde*, Amb. 113; and *Lawton, Executor* v. *Salmon*, 1 H. Blac. 259, *in notis*. These, and also the cider mill case before Ch. B. Comyns,(*b*) he considers to have been decided mainly upon the ground, that notwith-
[*54] standing the fire engines and the *cider mill were erected for the enjoyment of the profits of land, yet they were accessary to a species of *trade*, a matter of a personal nature. He intimates an opinion, that in *Lawton, Executor* v. *Salmon*, Lord Mansfield does not consider the salt pans as accessary to the carrying on a trade; and adds that if he had, "still it would not have affected the question before the court, which is the right of a tenant, *for mere agricultural purposes*, to remove buildings fixed to the freehold, which were constructed by him for the ordinary purposes of husbandry, and connected with no description of trade whatsoever."

(*a*) See *ante*, in the last sect., p. 22.
(*b*) See these cases referred to in the last section.

Lord Ellenborough then enters upon an examination of the authorities which had been urged in support of the defendant's claim. He disposes of the case of the Dutch barns, in *Dean* v. *Allalley*, first, as being a mere decision at *Nisi Prius;* and secondly, by supposing that Lord Kenyon considered the buildings rather as trade erections. The case of the barn before Ch. J. Treby, *Culling* v. *Tuffnall*, cited in Buller's *Nisi Prius*, 34, is explained according to the principle before noticed in this work, viz.: that it was not, in fact, affixed to the freehold.(a) "In the case of *Fitzherbert* v. *Shaw*," he continues, "we have only the opinion of a very learned judge indeed, Mr. Justice Gould, of what *would have been* the right of the tenant as to the taking away a shed *built on brick-work*, and some *posts and rails* which he had erected, if the tenant had done so during the *term; but [*55] as the term was put an end to by a new contract, the question, what the tenant could have done in virtue of his right under the old term if it had continued, could never have come judicially before him at *Nisi Prius:* and when that question was offered to be argued in the court above, the counsel were stopped, as the question was excluded by the new agreement."

As to the case of the varnish-house, in *Penton* v. *Robart*, 2 East, 88, Lord Ellenborough considers that it does not apply to the question in dispute; because it was a building for trading purposes only. And, in allusion to Lord Kenyon's observations in that case, he says, "Though Lord Kenyon, after putting the case upon the ground of the leaning, which obtains in modern times in favor of the interests of trade, upon which ground it might be properly supported, goes further, and extends the indulgence of the law, to the erection of green-houses and hot-houses by nurserymen, and, indeed, by implication, to buildings by all other tenants of land; there certainly exists no decided case, and, I believe, no recognized opinion or practice, on either side of Westminster Hall, to warrant such an extension." "He (Lord Kenyon) certainly seems, however, to have thought, that buildings erected by tenants for the purposes of farming, were, or rather *ought to be*, governed by the same rules which had been so long judicially holden to apply in the case of buildings for the purposes of trade. But the case of buildings for trade, has been

(a) The same remark would apply to the modern case of *Wansbrough* v. *Maton*, 4 Ad. & E. 884.

always put and recognized *as a known, allowed exception* from
[*56] the *general rule which obtains as to other buildings; and the circumstance of its being so treated and considered, establishes the existence of the general rule, to which it is considered as an exception. To hold otherwise, and to extend the rule in favor of tenants *in the latitude contended for* by the defendant, would be, as appears to me, to introduce a dangerous innovation into the relative state of rights and interests holden to subsist between landlords and tenants. But its danger, or probable mischief, is not so properly a consideration for a court of law, as whether the adoption of such a doctrine would be an innovation *at all;* and, being of opinion that it would be so, and contrary to the uniform current of legal authorities on the subject, we feel ourselves, in conformity to, and in support of those authorities, obliged to pronounce that the defendant had no right to take away the erections stated and described in this case."

Such was the decision in the case of *Elwes* v. *Maw*. It has established an unqualified rule, which excludes *agricultural* tenants from participating in the advantages possessed by tenants in trade in regard to fixtures. And the distinction upon which this rule is founded, must accordingly be strictly attended to in practice.(*a*)

Examination of the judgment in *Elwes* v. *Maw*.

It may, however, be observed of this decision, that it was the first in which any distinction between trading and agricultural erections was made by the courts: at least in no previous case
[*57] had it been laid *down, that the exception in favor of trade implied a negative rule, to the exclusion of every article not strictly subservient to trade. The decision appears, moreover, to stand opposed to opinions indirectly expressed, but of high authority, and which had immediate reference to the subject of the profits arising from land. And although it has been adverted to in subsequent judgments of the courts with great respect, on account of the important matter it contains, yet it has not been followed by any determination, in which the general principle of *public benefit and convenience* has received the same restriction.

It has been shown in the foregoing section, that the passage cited from the Year Book, 20 H. VII, upon which, it appears, much

(*a*) See, as to brick pillars for supporting pans in a dairy, per Patteson, J., *Leach* v. *Thomas*, 7 Car. & P. 327.

reliance is placed by Lord Ellenborough, in order to prove that an exception from the general rule of law obtained in early times specifically in favor of trade, is very far from having any such exclusive operation; and that, on the contrary, the general meaning of the expressions there found must be greatly narrowed and violated, not to include other erections besides those erected for trade or manufacture.(*a*) And this observation applies with equal, if not greater force to the rest of the early decisions; indeed, the instances mentioned in some of them, as paling, posts, &c., removable by a lessee, seem rather in the nature of *agricultural* erections.(*b*) Neither Lord Hardwicke nor Lord Mansfield, in their judgments in *Lawton* v. *Lawton*, *Dudley* v. *Warde*, *and [*58] *Lawton* v. *Salmon*, intimate any opinion that agricultural erections are subject to a different rule from that which prevails in respect of trading erections. Lord Hardwicke considered the collieries as the profits *of land*, and held the fire engines to be removable, notwithstanding they were accessaries to the enjoyment of the *real estate*. He also approved of Ch. B. Comyns' decision respecting the cider mill, "although," as he observed, "cider is part of the profits of the *real estate*."(*a*) Moreover, he remarks, that the general ground on which the courts proceeded in relaxing the old rule in favor of tenants for life was, that it is for the benefit of the public to encourage such tenants to do what is advantageous *to their estates*. So, Lord Mansfield, in the case of *Lawton* v. *Salmon*, although he regarded the salt pans *as accessary to land*, (in which also Lord Ellenborough concurred, and said that they were not considered as the means or instrument of carrying on trade,) yet he thought that such articles would be removable by a tenant. And it must be presumed that his Lordship did not intend to confine his observations (as to the salt pans being accessary to land) to the case before him, (which was between heir and executor;) for it would be a difficult proposition to maintain, that an article should be considered an accessary to *land* as between heir and executor, but an accessary to *trade* as between landlord and tenant. Again, in *Fitzherbert* v. *Shaw*, Mr. Justice Gould is reported to have been clearly of

(*a*) See *ante*, p. 25, *et seq.*

(*b*) *Vide* Br. Ab. Waste, pl. 104; Id. Chattels, pl. 7. And see 21 H. VII, 26; *Cook's Case*, Moore, 177; Owen, 70; *Day* v. *Austin*, Cro. Eliz. 374.

(*a*) Lord Ellenborough takes the same view of these cases, and admits that the erections were put up in part for the enjoyment of the profits of land.

[*59] opinion at the trial, *that a tenant was entitled to take away a stable, a shed, and some posts and rails; and it may therefore at least be inferred from this opinion, that the principle on which the case of *Elwes* v. *Maw* was decided, was not perfectly recognized, or generally understood, in the time of this learned judge. And so in the case relating to the *barn*, before Ch. J. Treby, it is certainly true, as observed by Lord Ellenborough, that, owing to the construction of the article, it did not come within the law of fixtures. But Mr. Justice Buller, in his comment upon this case, treats the barn as if it had been actually fixed, and expressed a decided opinion, that such a building would be removable, on the general ground of the exception in favor of tenants. The case of *Dean* v. *Allalley* has not, perhaps, such a distinct reference to agriculture as to amount to an express authority for the removal of agricultural erections. Yet, it should be observed, that the concluding part of Lord Kenyon's judgment in that case extends the privilege to trade erections, *or* (disjunctively) to such as were constructed like the barns in question. Moreover, the description given of these buildings in the MS. note cited by counsel in *Elwes* v. *Maw*, as well as their name, and the purposes for which such erections are usually made, confirm the supposition, that Lord Kenyon's opinion may be considered an authority for the removal of at least some species of agricultural erections: and, indeed, Lord Ellenborough seems to have so treated it in one part of his judgment. That Lord Kenyon did assign a very extensive latitude to the rule in favor of trade fixtures, ap-

[*60] pears from his *observations in the subsequent case of *Penton* v. *Robart.*(a)

According to this view of the authorities antecedent to the case of *Elwes* v. *Maw*, it seems difficult to acquiesce in the opinion expressed by Lord Ellenborough, that the doctrine sought to be established by the defendant "was contrary to the uniform current of legal authorities." The true state of the question (as observed in one part of his Lordship's judgment) appears rather to be, that "no adjudged case has gone the length of establishing that buildings subservient to purposes of agriculture, as distinguished from those of trade, have been removable by the tenant who built them during his term." But admitting that no case is to be found among the more ancient authorities in favor of agri-

(a) 2 East, 88.

cultural erections, it should be recollected that the mode of agriculture pursued in early times was extremely simple, and that the implements of husbandry then in use were defective and of very little value: inasmuch as, for a period subsequent to that over which the Year Books extend, the English may rather be considered a pastoral than an agricultural nation.(*b*)

But the rule laid down in the case of *Elwes* v. *Maw* appears liable to further objection, on account of the narrow grounds upon which it rests. It is universally allowed that the privilege in respect of trade is not confined to trade according to the strict meaning and construction of the statutes of bankruptcy. It is not a trading within these statutes to work a coal *mine;(*a*) nor [*61] for an occupier of land to manufacture cider from his own fruit for sale; (*b*) nor to manufacture salt for sale from springs on the demised premises.(*c*) Yet these and similar occupations are held to entitle a tenant to remove utensils and erections *as trade fixtures*;(*d*) and it would seem that many branches of husbandry have a strong affinity to *trade* in this enlarged sense of the expression; for instance, the dealings of a farmer in stock, wool, and bark, &c., the making of charcoal, growing and preparing flax, or the manufacturing of hoops, which, in some of the counties of England, is a considerable source of the profits of a farm. In this view of the subject, the making of cheese on a farm, or the preparing of grain for market by means of a threshing machine, may, with equal reason, be considered a manufacture or a *species* of trade, as the making of cider from the produce of an orchard annually renewing.(*e*)

(*b*) *Vide* Strutt's Antiquities, Vol. II, on the Husbandry of the English. And see *Fortescue de Laudibus Legum Angeliæ*, ch. 29.

(*a*) Wils. 169. 7 East, 447. See stat. 6 G. IV, c. 16.

(*b*) Id. ib. And see 1 T. R. 38, per Lord Mansfield.

(*c*) *Ex parte Atkinson*, 1 M. D. & D. 300. Under the present bankrupt act, 5 & 6 Vic. ch. 122, which is more comprehensive than the former law. So formerly, to burn bricks from clay got from the land, 9 Bar. & Cr. 577, 590; or *semb.* to burn chalk got on the land into lime for sale, *Paul* v. *Dowling*, 1 M. & M. 267; *Sup.* p. 42. But by the late statute, 5 & 6 Vic. ch. 122, sec. 10, brickmakers, limeburners, millers, &c., are now deemed traders within the bankrupt laws. So, market gardeners.

(*d*) And see, as to a tenant's right to remove trees in a nursery gound, 2 East, 91; 7 Taunt. 191, and the cases collected in the ensuing section.

(*e*) Lord Ellenborough considers the cider mill as an accessary to a species of trade. The manufacturing of cider and perry, is an object of British husbandry, which, in our fruit countries is of great importance. In the county of Worcester,

[*62] *But the strongest objection to the distinction established by this case is, that the *principle* on which trade fixtures are permitted to be removed, applies with equal reason to agricultural erections. The principle of the trade cases is that of *public policy*, it being for the benefit of the public to encourage tenants to make useful additions to their premises, and to avail themselves of modern improvements in arts and manufactures. Husbandry, according to present practice, has become a scientific pursuit; the increased produce and profits of the land depend upon the expenditure of capital, and the exercise of intelligence in the improved modes of cultivation; and according to these improved modes much valuable machinery is employed, which requires to be substantially affixed to the premises: and it is obvious that the industry of the farmer will be more productive in proportion to the better disposition of his buildings, and the facilities he possesses for rearing and keeping stock, and storing and preparing his produce. If, therefore, the principle of the indulgence to tenants be deemed of beneficial tendency, as it affects the interests and protects the improvements of the manufacturer, the distinction must be very refined upon which it is thought politic to deny the same advantages to the agricultural tenant.[1] Indeed, Lord Ellenborough seems to have felt the force of this objection; and it is observable that, in one part of

where it seems the question as to the cider mill arose, there is upon most of the farms a mill for the purpose of making cider from the fruit growing in the orchards and fields of the farm. The cider is made by the farm tenants for the consumption of their families, and for the purpose of sale. In some instances the cider is sold directly from the mill and press, in the state of expressed juice, to persons who collect it from the different farms, and afterwards manufacture it for market.

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[1] The general tendency of American policy to extend these relaxations of the rigor of the common law rule, which already obtain in respect of trading fixtures, to those which are erected for the use and convenience of agriculture, is well exemplified in a case decided in 1851, in the Supreme Court of New York. (*Dubois* v. *Kelley*, 10 Barb. S. C. R. 496.) Harris, J., holds the following language: "In the consideration of the case of *King* v. *Wilcomb*, (7 Barb. S. C. R. 263,) I had occasion to examine with much care, the law relating to the right of a tenant to remove fixtures erected by him, for his own use and enjoyment, while occupying the premises under his tenancy; the conclusion at which I then arrived, was, that a tenant who makes additions to the freehold, or improvements on it, for the better use or enjoyment of the land, while his interest continues, has the right to remove such additions and improvements at any time before his right of enjoyment expires, when such removal would not operate to the prejudice of the inheritance by leaving it in worse condition than when he took possession. A review of the grounds which led to

his judgment, he has rested his argument against agricultural tenants on a more technical ground; for he says that machinery *and erections may be removed when they are accessary to trade, [*63]

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that conclusion, has resulted in a stronger conviction that I had not misapprehended the present rule of law on the subject."

In *Elwes* v. *Maw*, Lord Ellenborough reviewed all the English decisions on the subject, and came to the conclusion that there was a distinction between annexation for the purposes of trade, and those made for agricultural purposes; that in one case the tenant had the right to remove what he had annexed, but, in the other, the annexation having been made, became part of the realty, and could never afterwards be severed by the tenant; but this distinction has not been received with favor in America—its foundation is narrow and artificial.

Mr. Justice Story, referring to this distinction, says: "The common law of England is not to be taken in all respects to be that of America. Our ancestors brought with them its general principles, and claimed it as their birthright; but they brought with them, and adopted only that portion which was applicable to their situation. As between landlord and tenant, it was not so clear that the rigid rule of the common law (at least as expounded in 3 East, 38,) was so applicable to their situation, as to give rise to necessary presumption in its favor. The country was a wilderness, and the universal policy was to procure its cultivation and improvement; the owner of the soil, as well as the public, had every motive to encourage the tenant to devote himself to agriculture, and to favor any erections which should aid this result. In the comparative poverty of the country, what tenant could afford to erect fixtures of much expense in value, if he was to lose his whole interest therein by the mere act of erection? His cabin or log hut, however necessary for the improvement of the soil, would cease to be his the moment it was finished. It might, therefore, deserve consideration whether, in case the doctrine were not previously adopted in a state by some authoritative practice or jurisdiction, it ought to be assumed by the Sup. Court of the U. S., as a part of the jurisprudence of such state, upon the mere footing of its existence in the common law. In *Van Ness* v. *Pacard*, (2 Peters, 137, 144,) the court decided that the building in question fell within the exception in favor of trade, and held that a two story wood house upon stone foundation, with stone cellar and brick chimney, erected by the tenant for the residence of his family and business of a dairyman, might be removed by him during his term. *Dubois* v. *Kelley*, 10 Barb. S. C. R. 496.

Holmes v. *Tremper*, (20 J. R. 29,) Spencer, Ch. J. "I never could perceive the reason, justice or equity of the old law, which gave to the landlord such kind of erections as were merely for the use and convenience of the tenant; the removal of which neither defrauds nor does injury to the landlord. The rule anciently was very rigid, but I think it has yielded materially to the more just and liberal notions of modern times." And referring to the case of *Elwes* v. *Maw*, he adds, "it is not necessary to express an opinion; the tenant was allowed to remove the cider mill; &c., because necessary to the *trade* of making cider."

In *Whiting* v. *Brastow*, (4 Pick. 310,) the Supreme Court of Massachusetts, states the rule to be, that "tenant for life, years, or at will, may remove from the freehold all such improvements as were erected or placed there by him, the removal of which will not injure the premises, or put them in worse plight than they were in when he took possession." On this subject, Chancellor Kent says, (2 Kent Com. 343,) "as

because trade is a matter of a *personal* nature, and not real or local. But as this is a principle which obviously embraces a variety of claims which have no reference to trade, it would

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between landlord and tenant, many things are now treated as personal property, which seem in a very considerable degree to be attached to the freehold. The law of fixtures is in derogation of the original rule of the common law, which subjected everything affixed to the freehold to the law governing the freehold, and it has grown up into a system of judicial legislation, so as almost to render the right of removal of fixtures a general rule, instead of being an exception. The law of fixture in its application to the relation of landlord and tenant, partakes of the liberal and commercial spirit of the times. In this case, (*Whiting* v. *Brastow*,) a shed, stable, storehouse and barn, were claimed, (by a party who was a tavern keeper,) now, if connected with the trade of the owner, this is within the case of *Vanness* v. *Pacard*, the dairy-house case, and *Holmes* v. *Tremper*, the cider mill case. But as to what erections are, and what are not fixtures, there is a difference of opinion, and judges seem to have been influenced in referring to one class or another, by their own notions of justice in the particular case before them. Grady (Law of Fixtures, 2, 3) says, "the article must be fixed in or to the ground, or some substance already become a portion of the freehold, in order to deprive it of its personal nature; the mere laying or resting buildings on the earth, without letting or imbedding them into it, will not confer upon them the right to become fixtures. In *Walker* v. *Sherman*, (20 Wend. 636,) Cowen, J., lays down as the general rule, that "nothing of a nature personal in itself, will pass, (with a conveyance of the freehold,) unless it be brought within the denomination of a fixture, by being in some way permanently, at least habitually, attached to the land or some building upon it."

But the Supreme Court of Connecticut has adopted a more perfect rule, in *Swift* v. *Thompson*, (9 Conn. Rep. 63,) where it is held, that "to constitute a fixture, there must be such an annexation as to render removal impossible, without injury to the freehold."

In *Rex* v. *Otley*, (1 Barn. & Ad. 161,) a wooden mill on a brick foundation, on which it rested by its own weight, was not a fixture. In *Wansborough* v. *Maton*, (4 Ad. & Ellis, 884,) wooden barn on foundation of brick and stone, Lord Denman said, "these questions of fixtures, in general, arise between the *prima facie* right of the landlord on one hand, and exceptions in favor of trade or of *tenants* on the other; in this case, the building falls within the decision." *Rex* v. *Otley*. Littledale, J., said, "the barn consists of nothing but timber, and is not attached to the stone or brickwork. In removing the barn, the tenant does not disturb the freehold, but the foundation must remain." *Wood* v. *Hewett*, 8 Adolph & Ellis, (N. S.,) 913, to the same effect.

In *Cook* v. *The Champ. Transp. Comp.* (1 Denio, 91,) "machinery and engines, though firmly affixed, having been so affixed by tenants for the purpose of carrying on a business of a personal nature, are still their personal property, and removable by them. *Farrer* v. *Chauffetette*, 5 Denio, 527. *Leland* v. *Gassett*, 17 Verm. 430.

"The annexation which will convert personal into real estate, is not effected by placing the chattel upon or even affixing it to the land. It must be fixed to the freehold *perpetui usus causa*." Gardiner, J., *Mott* v. *Palmer*, 1 Comstock, 564; but assume that the buildings were fixtures, it is in proof that the plaintiff's husband, before the conveyance under which she claims title, agreed that any buildings put up

make the case of the agricultural tenant one of still greater hardship, than if the less comprehensive rule of confining the exception strictly to trading fixtures were insisted upon.

In the observations that have here been made upon the case of *Elwes* v. *Maw*, it is not intended to intimate any doubt respecting the validity of the decision as an existing authority of law. But it was thought of importance to draw the reader's attention to the particular grounds of the determination; because it will assist him in the practical application of the rule established by this case, and will be of material use in the discussion of questions relating to the class of fixtures treated of in the ensuing section.(*a*)

(*a*) Upon the subject discussed in this section, see the remarks of Mr. Smith, in the 2d vol. of Leading Cases, p. 116. He thus concludes: "Upon the whole, the extent of the tenant's rights, with respect to agricultural fixtures, does not seem even as yet, quite defined. It is clear that it does not go beyond, and unless the opinion expressed by Lord Ellenborough in the principal case be modified, it falls considerably short of his rights with respect to trading fixtures."

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by the tenant might be removed; but this license was by parol, and is said to be within the Statute of Frauds. 3 Kent's Com. 452. "A license is an authority to do a particular act, or series of acts, upon another's land, without possessing any estate therein; it is founded on personal confidence, and is not assignable, nor within the Statute of Frauds." And in *Mumford* v. *Whitney*, (15 Wend. 380,) held that a license to enter upon land and erect a dam for a temporary purpose, though by parol, is valid; but parol agreement to allow to enter and erect a dam for a permanent purpose, would be void within the Statute of Frauds, it being the transfer of an interest in the land. As to the time of removal, the rule to be collected from the several cases decided, seems to be, that "the tenant's right to remove continues during his original term, and during such further period of possession by him, as he holds the premises under a right still to consider himself as tenant." Alderson, B. See *Penton* v. *Robart*, 2 East, 88.

In *Gaffield* v. *Hapgood*, (17 Pick. 192,) "If the fixtures should not be removed during the term, and the tenant should quit, and the landlord take possession afterwards, the law is very clear that the fixture becomes part of the freehold, and the party who was tenant cannot legally take it away. See, also, *Holmes* v. *Tremper*, 20 John. 29. The rule seems to rest in the presumption of abandonment, arising from the conduct of the tenant. In the language of Lord Holt, "they become a gift in law to him in reversion, and are not removable." *Poole's case*, 1 Salk. 368.

[*64]

*SECTION III.

Of the Right of a Tenant to remove Fixtures set up for the Purpose of Trade combined with other Objects.

It was an observation made by Lord Ellenborough, in the case of *Elwes* v. *Maw*, that the exception which prevailed in favor of buildings erected for the purpose of trade, establishes the existence of the general rule with respect to erections made for any other object. He, however, recognizes the validity of several decisions, in which instruments or utensils that have been set up in relation to *trade in part*, and in some measure for a purpose *unconnected with trade*, have been held removable.

The decisions alluded to, are those of Lord Hardwicke, respecting the fire engines or steam engines in collieries;(*a*) and the case before Ch. B. Comyns, respecting the cider mill.(*b*) In the working of a colliery, the enjoyment of the *profits of land* is materially concerned; nevertheless, Lord Hardwicke considered that the getting and vending the coals so far partook of the nature of *a trade*, that the engines employed in the collieries might be deemed *trading* erections. The case of the cider mill appears to rest on the same principle. For it was said, that although the mill was put up in part for the enjoyment of the real estate, yet, as the making of cider was *a species of trade*, the mill might be considered to fall within the general exception in favor of trade fixtures.(*c*)[1]

[*65]

Fixtures where trade and the profits of land are combined.

*These decisions, therefore, in conjunction with the case of *Lawton* v. *Salmon*,(*a*) in which the same principle seems to have been recognized as between *landlord and tenant*, point out a class of trade fixtures of a peculiar description. They are what Lord Hardwicke calls *mixed* cases, between enjoying the profits of

(*a*) *Lawton* v. *Lawton*, 3 Atk. 13; *Dudley* v. *Warde*, Amb. 113.
(*b*) 3 Atk. 14.
(*c*) As to this case, see ch. 4, sec. 1, *post*.
(*a*) 1 H. Blac. 260, *in notis*.

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[1] Cider mill and press, erected by a tenant from year to year, is a personal chattel belonging to the tenant; and whether the cider mill be let into the ground or not is immaterial. *Holmes* v. *Trempex*, 20 John. Rep. 29.

land, and carrying on a species of trade;(*b*) and in this respect they are distinguishable from those fixtures that are subservient to trades which have no relation to the profits of the demised land.

It appears necessary to consider these fixtures as a separate class, chiefly on account of the distinction taken in the case of *Elwes* v. *Maw*, as explained in the preceding section. For, in deciding whether such erections are removable or not, it is essential, with reference to the doctrine laid down in that case, to inquire into the *proportion* in which the profits of land are combined with the object of trade.(*c*)

In what cases such fixtures are removable.

Questions between landlord and tenant, respecting the right to fixtures of this description, must, in the present state of the law, principally be determined by the authority of the above mentioned case adjudged by Ch. B. Comyns, and by the rules which Lord Hardwicke has laid down in *Lawton* v. *Lawton*, and *Lord Dudley* v. *Lord Warde*.(*d*) And it may be observed in general, that whenever the consideration *of trade prevails to the same extent as it appears to have done in these cases, an erection may be treated as lawfully removable by a tenant. [66*]

It will, however, seldom be safe to deviate from the strict analogy of these cases. For in the case of *Lawton* v. *Salmon*,(*a*) it was ruled, that the connection of the salt pans with the realty was too strong to allow them to come within the exception in favor of trade. And yet it would be impossible to say that in this case trade was not, in some degree, concerned in the employment of the salt pans; and that the getting and preparing the salt for market did not partake of the nature of a manufacture.(*b*) It should, however, be observed, that *Lawton* v. *Salmon* was a case

(*b*) *Lawton* v. *Lawton*, 3 Atk. 16.

(*c*) Where the subject matter of the tenant's occupation is not obtained from the demised land, but is brought from a distance in order to be worked up for market, the case is not to be considered as referable to the present section. Such was the instance of the *limeburner*, in *Thresher* v. *E. Lond. Waterworks Company*, 3 Bar. & Cres. 608.

(*d*) See the explanation given of these cases by Lord Ellenborough, in 3 East, 55. With which compare the judgments, as cited in ch. 3, sec. 1, *post*.

(*a*) 1 H. Bl. 260, *in notis*; *supra*, p. 36. And see Lord Ellenborough's observations on this case, in *Elwes* v. *Maw*, 3 East, 54; *Ante*, p. 54.

(*b*) *Ex parte Atkinson*, *Supra*, p. 61.

between *heir* and *executor;* and it was said by Lord Mansfield, that it would have borne a different interpretation as between landlord and tenant. But upon what ground this distinction can be supported, does not satisfactorily appear.(*c*)

It may be useful in this place to point out in what manner the principles of the foregoing cases may be found applicable to questions in practice.

Examples of fixtures of a mixed nature.

Many examples might be suggested of fixtures similar to those already referred to, in which the enjoyment of the profits of land may be combined with trade. As, for instance, where machines and erections are made and used by a tenant for procuring or [*67] preparing minerals, lime, alum, pottery and *brick earth, &c. In like manner mixed cases might occur wherein *agriculture* is combined with a species of trade. For a tenant might cultivate land, and raise grain for the purpose of converting it into malt in his own kilns for sale; or he might grow corn and grind it into flour for sale in his occupation as a miller. Another tenant, following the trade of a butcher, might erect a beast-house and a fold yard(*a*) for the use of cattle which he grazes upon the premises, or fattens on the produce of the land demised. So a distiller might grow his own grain; a weaver of linen his own flax. These, and the like instances, might give rise to many questions between landlord and tenant, which would involve the points above considered.(*b*)

Fixtures used occasionally for trade.

Another description of cases might be suggested, differing in some respects from the preceding. And that is, where a machine or utensil is employed *sometimes* for the purpose of trade, and *at other times* for a purpose wholly unconnected with trade; and where it may be uncertain whether the object of the erection is the trade, to which a right of removal attaches, or the other employment, to which such a right does not attach. There is no express decision affecting cases of this description; but it is conceived that the question, whether an article would be removable under these circumstances, will mainly depend on the fact, to

(*c*) As to this distinction, see *ante*, p. 58.

(*a*) In *Elwes* v. *Maw*, these erections were held not removable when put up exclusively for agriculture.

(*b*) See some further examples in illustration of this subject, *ante*, p. 61.

which of the two purposes the erection in dispute is more usually appropriated.[1]

*In all questions relating to the several kinds of fixtures here described, it will be very important to consider what has been the *primary object* of the erection in dispute; and whether in making it the intention of trade predominated over the other purpose with which it is combined. With this view, it may frequently be found useful to consult the decisions which occur in questions of bankruptcy; where the fact to be determined is, whether the dealing of a person is in the way of merchandize, which is to be deemed his principal occupation; or is merely incidental to a pursuit not within the scope of the bankrupt laws.(a) [*68]

Nurserymen and gardeners; their rights.

There is another class of persons whose rights appear to depend on the principles discussed in this section; viz., the tenants of *nursery and garden grounds*. It has been thought expedient to reserve their claims for a separate consideration in this place.

May remove trees, shrubs, &c.

It is now clearly settled that *gardeners* and *nurserymen* are entitled to sell and remove *trees*, *shrubs*, and the other produce of their grounds, planted by them with an express view to sale; and, this on the ground of their carrying on a species of trade.(b)

And fruit trees.

And it was held in a recent case that fruit trees, although they were in full bearing, yet if planted by a nurseryman in the way of his trade, might be removed by him at the expiration of his term; provided they might fairly be considered as *nursery trees*, and *were not of larger growth than could be dealt with by him in his trade as a nurseryman.(a) [*69]

Strawberry beds.

It was ruled, however, at *Nisi Prius*, by Lord Ellenborough, that a tenant of garden ground could not plough up *strawberry beds* in full bearing at the conclusion of his term, although he had purchased them of a preceding tenant, and although it was proved to be the general practice to appraise and pay for these

(a) *Sup.* p. 61; 9 Bar. & Cr. 577.

(b) 2 East, 91; 7 Taunt. 191. And see per Heath, J., in *Wyndham* v. *Way*, 4 Taunt. 316.

(a) *Wardell* v. *Usher*, 3 Scott's New. Rep. 508.

[1] *Van Ness* v. *Pacard*, 2 Peters' Rep. 137; *Ante*, p. 34. The building was used for the business of a dairyman, and also as a residence for his family.

plants as between out-going and in-coming tenants.(a) In this case, however, it was considered, that the ploughing up of the plants was an injury maliciously done to the reversion; because the plants were not removed by the tenant for sale, in his ordinary occupation, but were destroyed without any reasonable object.

Other persons may not remove trees.

But where a mere private individual, or a person who occupies land as a farmer, and does not profess to be a nurseryman or gardener, raises young fruit trees on the demised land, for the purpose of planting in his gardens or orchards, he is not entitled to sell or remove them at the end of his term.(c)

[*70] *And so, it has been holden that a tenant, not being a gardener, is not at liberty to take away a border or edging of *box* planted by himself: nor even *flowers*, per Littledale, J.(a)

Nor box edging; nor flowers.

Hot-houses, green-houses, &c.

With respect to the right of nurserymen and gardeners to remove *hot-houses*, *green-houses*, and other similar erections put up at their own expense, it was expressly said by Lord Kenyon, in the case of *Penton* v. *Robart*,(b) that they might take away such things at the end of their term. But Lord Kenyon's opinion upon this subject was subsequently disapproved of by Lord Ellenborough.(c) There is no reported case in which this question has been expressly decided.(d)

(b) *Wetherell* v. *Howells*, 1 Campb. N. P. C. 227.

(c) Per Heath, J., in *Wyndham* v. *Way*, 4 Taunt. 316. That it is waste in a tenant to destroy fruit trees, see Com. Dig. Waste, D. 3. A tenant has the property in hedges and bushes cut on the premises: *Berriman* v. *Peacock*, 9 Bing. 384. But if he grubs up or destroys them, he is liable to an action for waste. It is not waste in a lessee for years to cut down willows, leaving the stools or buts from which they will shoot afresh; unless where they are a shelter to a house, or a support to the bank of a stream: *Phillips* v. *Smith*, 14 M. & W. 589. As to pollards, see *Channon* v. *Patch*, 5 B. & C. 897; *Post*, part 2, ch. 1, sec. 3, *in notis*. With respect to cases where bushes, &c., are excepted in the demise, see *Jenney* v. *Brook*, 2 Q. B. 265; 13 Law J. R. Q. B. 376, *S. C.*

(a) *Empson* v. *Soden*, 4 Barn. & Ad. 655.

(b) 2 East, 91.

(c) *Elwes* v. *Maw*, 3 East, 56. And see the observations of Dallas, Ch. J., in *Buckland* v. *Butterfield*, 2 Brod. & Bing. 58. In this latter case, as reported in 4 B. Moore, 440, a MS. case is cited by Blossett, Serj., in which it is said to have been determined, that glasses and frames resting on brick-work in a nursery ground were not removable. See what is suggested on this subject by Mr. Just. Lawrence, in *Elwes* v. *Maw*, 3 East, 45, *in notis*.

(d) There seems to be no reason why hot-houses should not be removed, as well as trees in a nursery-ground; at least, on the principle of *trade*.

*SECTION IV. [*71]

Of the Right of a Tenant to remove Fixtures put up for Ornament or Convenience.

Fixtures for ornament, &c., removable.

THERE is another class of fixtures mentioned in several of the decisions, of a very different description from those treated of in the preceding sections. They consist of things which a tenant has affixed to the demised premises for the purpose of *ornament or convenience.*

Ancient authorities.

In some of the earliest cases it was said, that a lessee might take away *tables dormant, furnaces* and the like;(a) and, from the manner in which these instances are mentioned by the courts, it may be inferred that they were not meant to denote *trade* erections, but were put as mere general examples of fixtures. It has been seen on a former occasion, that this remark applies equally to the passage in the Year Book, 21 Hen. VII, c. 26. There is, however, much obscurity in the early decisions; and the distinctions upon which many of them proceed would not be deemed tenable at the present day.

Lord Coke, in treating of the liability of the tenant on account of waste, lays down the rule in favor of the reversioner in unqualified terms. He says, "If glass windows (though glazed by the tenant himself) *be broken down or carried away, it is waste; [*72] for the glass is part of the house.. And so it is of wainscot, benches, doors, windows, furnaces and the like, annexed or affixed to the house, either by him in reversion, or the tenant."(a) And the remarks at the end of *Herlakenden's case*, are to the same effect.(b)

When, at a subsequent period, Lord Holt declared his opinion in *Poole's case*,(c) that a tenant was allowed to take away erec-

(a) *Vide* 8 Hen. VII, 12; 20 Hen. VII, 13; 21 Hen. VII, 26; Br. Ab. Chattels, pl. 7, 11; Id. Waste, pl. 104. See, also, *Day* v. *Austin*, Owen, 70; Cro. Eliz. 374.

(a) Co. Lit. 53 a.

(b) 4 Co. 64. And see Swinb. on Wills, part 3, sec. 6, and part 6, sec. 7; Noy's Maxims, 167, (9th ed.;) Vin. Abr. Waste, E.; Com. Dig. Waste, D. 2. See, also, 10 Hen. VII, pl. 2.

(c) 1 Salk. 368.

tions put up in relation to trade, he expressly denied his right to remove annexations made for other purposes. For, he said, that there was a difference between what the soapboiler did to carry on his trade, and what he *did to complete his house*, as hearth and chimneypieces, which he held not removable.

Modern authorities.

And yet there had been a decision in Chancery, almost immediately before Lord Holt expressed this opinion, in which the strictness of the old rule of law had been departed from, in a case in which the consideration of trade was not involved, and under circumstances where the rule is supposed to be even more rigid than between landlord and tenant. For, in the case of *Squier* v. *Mayer*,(*d*) it was held by the Lord Keeper, that a *furnace*, though fixed to the freehold, and purchased with the house, and also *hangings* nailed to the walls, should be accounted as
[*73] *personalty, and should go to the executor of the deceased owner of an estate as against the heir. Contrary, as the report says, to *Herlakenden's case*, 4 Co. "*q'il dit n'est ley quoad præmissa.*"

Furnaces removable.

This case was indeed decided between the executor and the heir of the deceased owner of the inheritance. But it may, nevertheless, be regarded as an authority in favor of a tenant. Because, according to the rule laid down in a former part of this chapter,(*a*) a tenant is entitled to at least the same privilege against his landlord that an executor enjoys against the heir. Agreeably, therefore, to the decision in *Squier* v. *Mayer*, the *furnace* and *hangings* are matters which a tenant may remove, if he himself affixed them to the demised premises.

Hangings, pictures, pier-glasses, chimney-glasses, &c.

In another case in Chancery, *Beck* v. *Rebow*,(*b*) which occurred shortly after *Poole's case*, the right of a tenant to take away articles in no way connected with trade was expressly recognized by the court. In this case a bill was filed for the specific performance of certain articles of agreement against the defendant, who was the executor of the covenantor, and devisee in trust of a messuage. The testator had covenanted to grant to the plaintiff all the pictures upon the staircase, over the doors and chimneypieces, and *all things fixed to the freehold of the messuage.*

(*d*) 2 Freem. 249; 2 Eq. Cas. Ab. 430. This case seems to have escaped notice in the discussions relating to fixtures.

(*a*) See *ante*, p. 29.

(*b*) 1 P. Wms. 94; Hil. T. 1706.

After the testator's death, the defendant took away the pictures upon the staircase, &c., and likewise the *pier-glasses, hangings and chimney-glasses.* It was alleged for the plaintiff, that all these were as *wainscot, and fixed to the freehold, being fastened [*74] thereto with nails and screws, and no wainscot under them; and as they would have gone to the heir and not to the executor, so *a fortiori* would they go to the plaintiff; and especially the covenant being to grant to plaintiff all things fixed to the freehold. In support of this doctrine, the case of *Cave* v. *Cave*, 2 Vern. 508, was cited. But the Lord Keeper, as to all but the pictures over the doors, &c., was of a different opinion; saying, "that *hangings and looking-glasses* were only matters of ornament and furniture; and not to be taken as part of the house or freehold; but *removable by the lessee of the house.*"

Tapestry, iron backs to chimneys.

After an interval of some years, a case was adjudged at common law, where, in trover by an executor against the heir, the Chief Justice (Lee) held, that *hangings, tapestry and iron backs to chimneys* belonged to the executor, and not to the heir.(*a*) And, as in the before-mentioned case of *Squier* v. *Mayer*, so in this, the inference from the determination is, that articles of this description would be removable by a tenant against his landlord.

Wainscot, marble chimney-pieces, fixed beds

The opinions of the judges, in several decisions of later date, are in conformity with the foregoing cases. Lord Hardwicke, in one part of his judgment in *Lawton* v. *Lawton*,(*b*) observes, "what would have been held to be waste in Henry the Seventh's time, as removing *wainscot fixed only* by screws, and *marble chimneypieces*, is now allowed to be done." And in *Ex parte Quincey*,(*c*) he says, "during the *term a tenant may take away *chimney* [*75] *pieces* and *even wainscot.*" "Several sorts of things are often fixed to the freehold, and yet may be taken away, as *beds fastened* to the ceiling with ropes;(*a*) nay, frequently nailed; and yet, no doubt but they may be removed." Indeed, Lord Hardwicke seems to have been of opinion, that the exceptions engrafted upon the old rule of law, obtained not merely in respect of trade fixtures, but in respect of erections made for the *general improvement* of the estate.

(*a*) *Harvey* v. *Harvey*, Str. 1141.
(*b*) 3 Atk. 15.
(*c*) 1 Atk. 477. So in *Dudley* v. *Warde*, Amb. 113.
(*a*) As to these, see 20 Hen. VII, 13; Keilw. 88; Noy's Max. 167, (9th ed.)

So, in *Lawton* v. *Salmon*,(*b*) Lord Mansfield said, "Many things may now be taken away, which could not be formerly, such as erections for carrying on any trade, *marble chimney-pieces, and the like*, when put up by the tenant." And Lord Ellenborough, in *Elwes* v. *Maw*,(*c*) cites several of the above authorities; and considers that they have established a distinct class of cases, in extension of the privilege before enjoyed by the tenant in respect of trade fixtures. He says, "The indulgence in favor of the tenant for years during the term, has been since carried still further; and he has been allowed to carry away matters of ornament, as ornamental marble *chimneypieces, pier-glasses, hangings, wainscot fixed only by screws*, and the like."

Grates, &c.

[*76]

Again, in *Lee* v. *Risdon*,(*d*) Gibbs, Ch. J., mentions "*wainscots screwed to the wall, certain grates, and the* **like*," as fixtures which a tenant may sever during his term.(*a*)

Stoves, coppers, tubs, blinds.

And so, in the case of *Colegrave* v. *Dias Santos*,(*b*) the Lord Ch. J. thought at *N. P.*, and the court of K. B. agreed afterwards in the opinion, that *stoves, cooling coppers, mash tubs, water tubs, and blinds*, were removable, as between landlord and tenant. Nothing, indeed, was said in the case as to the mode of annexation of the articles; but it must be presumed, from the nature of the dispute, that they were in some way affixed to the freehold.[1]

(*b*) 1 H. Bl. 260, *in notis.*

(*c*) 3 East, 53.

(*d*) 7 Taunt. 191. And see Bul. N. P. 34; 2 Saund. 259, n.; 11 Harg; Co. Lit. 53 a, n. 346.

(*a*) So *stoves and grates* fixed into the chimney-places with brick-work; a *cupboard* standing on the ground supported by holdfasts, removable; per Bayley, J., in *R. v. Inh. St. Dunstan's*, 4 B. & C. 686. So a *bookcase* screwed to the wall; *Birch* v. *Dawson*, 2 A. & E. 37. And see, as to *set pots, ovens and ranges*, in *Winn* v. *Ingleby*, 5 B. & Ald. 625; *Bells, &c., Lyde* v. *Russell*, 1 B. & Ad. 394. See, also, as to *coffee mills* and *iron malt mills*, *R.* v. *Inhab. of Londonthorpe*, 6 T. R. 379. And for other instances, see *post*, ch. 4, sec. 2.

(*b*) 2 B. & C. 76.

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[1] In a dwelling-house sold, there was no fireplace, and no chimney, save from the chamber floor upward; the pipe from a stove placed on the lower floor passed directly upward into the foot of such chimney, and was there secured by pieces of brick wedged in around it. In the courts below, it was held that the stove and pipe passed as fixtures with the house by the deed; but on error, the Sup. Court, Bronson, J., held that, the stove not being in any manner fastened to the building, and the temporary fastenings about the pipe such as could be removed without damage to

Ornamental chimneypieces.

With respect to the instance of *marble chimneypieces*, mentioned both by Lord Hardwicke and by Lord Mansfield, as also by Lord Ellenborough, it has been expressly ruled in a recent case at *N. P.*, by Patteson, J., that if a tenant puts up chimneypieces of an *ornamental* nature, he has a right to remove them.(*c*)

Conservatories, pineries.

The case of *Buckland* v. *Butterfield*(*d*) must next be mentioned. It occurred prior to the decisions last mentioned; and it deserves particular notice, because, whilst it expressly recognizes the principle upon which all these decisions depend, it limits and defines the extent of the privilege they have introduced in favor of tenants. It will therefore be proper to *state it [*77] at length. It was an action on the case in the nature of waste, by a tenant for life, against the assignees of her lessee from year to year, who had become bankrupt. The bankrupt was the son of the plaintiff, and had also a remainder for life in the premises after her death. At *Buckingham Lent* assizes, 1820, before *Graham*, B., the case proved was, that the defendants had taken away from the premises let to the bankrupt a *conservatory* and a *pinery*. The conservatory, which had been purchased by the bankrupt, and brought from a distance, was by him erected on a brick foundation fifteen inches deep; upon that was bedded a sill, over which was frame work covered with slate: the frame work was eight or nine feet high at the end, and about two in front. This conservatory was attached to the dwelling house by eight cantilivers let nine inches into the wall, which cantilivers supported the rafters of the conservatory. Resting on the cantilivers was a balcony with iron rails. The conservatory was constructed with sliding glasses, paved with Portland stone, and connected with the parlor chimney by a flue. *Two windows*

(*c*) *Leach* v. *Thomas*, 7 Car. & P. 327.

(*d*) 2 Brod. & Bing. 54; *S. C.*, 4 B. Moore, 440.

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the chimney, the case was clearly distinguishable from *Goddard* v. *Chase*, (7 Mass. R. 432,) in which stoves were set in the chimneys, so that it was necessary to pull down the fireplaces to get them out. Stoves put up so that they can be removed at pleasure, and without injury to the building, have never been considered a part of the freehold in this state. See 2 R. S. 367, sec. 22, and p. 83, secs. 9, 10. The fact that there was no fireplace, does not prove that the stove was a necessary part of the building, but only that it was less perfect than it might have been; the stove was merely part of the furniture, and not of the freehold. *Freeland* v. *Southworth*, 24 Wend. 191.

were opened from the dwelling house into the conservatory, one out of the dining room, another out of the library. A folding door was also opened into the balcony; so that when the conservatory was pulled down, that side of the house to which it had been attached became exposed to the weather. Surveyors who were called, stated that the house was worth £50 a year less after the conservatory and pinery had been removed. The learned judge having stated his opinion, that the plaintiff ought to recover at
[*78] least for the pinery, and probably for the conservatory, *the jury, estimating the plaintiff's life at six years' purchase, gave a verdict for her, £300 damages.

A rule *nisi* was obtained for a new trial, on the ground that the conservatory, though affixed to the freehold, was a matter of ornament, not beneficial to the premises, but lawfully removable by the tenant; and that at all events the damages were excessive.

After argument, the court took time to consider; and the judgment was delivered by Dallas, Ch. J.: "The question in the cause, as far as relates to the motion now before us, was, whether a conservatory affixed to the house, in the manner specified in the report, was so affixed as to be an annexation to the freehold, and to make the removal of it waste? In *Elwes* v. *Maw* will be found at length all that can relate to this case, and to all cases of a similar description. It is not necessary to go into the distinctions there pointed out, as they relate to different classes of persons, or to the subject matter itself of the inquiry. Nothing will here depend on the relation in which the parties stood to each other, or the distinction between trade and agriculture; for this is merely the case of an ornamental building constructed by the party for his pleasure, and the question of annexation arises on the facts reported to us; and I say the facts reported, because every case of this sort must depend on its special and peculiar circumstances. On the one hand it is clear, that many things of an ornamental nature may be in a degree affixed, and yet, during
[*79] the term may be removed; and on the other hand, *it is equally clear, that there may be that sort of fixing or annexation, which, though the building or thing annexed may have been merely for ornament, will yet make the removal of it waste. The general rule is, that where a lessee, having annexed a personal chattel to the freehold during his term, afterwards takes it away, it

is waste. In the progress of time this rule has been relaxed, and many exceptions have been grafted upon it. One has been in favor of matters of ornament, as ornamental chimneypieces, pier-glasses, hangings, wainscot fixed only by screws, and the like. Of all these it is to be observed, that they are exceptions only, and, therefore, though to be fairly considered, not to be extended; and with respect to one subject in particular, namely wainscots, Lord Hardwicke treats it as a very strong case. Passing over all that relates to trade and agriculture, as not connecting with the present subject, it will be only necessary to advert, as bearing upon it, to the doctrine of Lord Kenyon in 2 East, 88, referred to at the bar. The case itself was that of a building for the purpose of trade; and standing, therefore, upon a different ground from the present: but it has been cited for the *dictum* of Lord Kenyon, which seems to treat green-houses and hot-houses erected by great gardeners and nurserymen, as not to be considered as annexed to the freehold. Even if the law were so, which it is not necessary to examine, still, for obvious reasons, such a case would not be similar to the present; but in *Elwes* v. *Maw*, speaking of this *dictum*, Lord Ellenborough says, there exists no decided case, and, I believe, *no recognized opinion or practice, on [*80] either side of *Westminster Hall*, to warrant such an extension. Allowing, then, that matters of ornament may or may not be removable, and that whether they are so or not must depend on the particular case, we are of opinion that no case has extended the right to remove nearly so far as it would be extended if such right were to be established in the present instance under the facts of the report, to which it will be sufficient to refer; and, therefore, we agree with the learned judge in thinking that the building in question must be considered as annexed to the freehold, and the removal of it consequently waste."

Pumps. A few years after the above decision, followed the case of *Grymes* v. *Boweren*, also in the Common Pleas.(a) In that case a tenant from year to year had, during the term, erected a pump at his own expense, on the demised premises. The pump passed through the brick flooring into the well beneath, and was attached to a stout upright plank, which rested on the ground at one end, and was fixed to the wall by an iron bolt or pin with a nut and screw on the other side. In withdrawing the pump,

(a) 6 Bing. 437.

four or five of the floor bricks were displaced, but the iron bolt was left as before in the wall. It was holden, on the authority of the decisions above referred to, that the pump fell within the class of removable fixtures, and might lawfully be taken away by the tenant.

Ornamental cornice.

[*81] Lastly came the case of *Avery* v. *Cheslyn*, in the K. B.;(*b*) in which the question was, whether a *wooden cornice fixed to the room of a house by a tenant during his tenancy, was removable by him or not? At the trial, the learned judge desired the jury to find in favor of the tenant, if they considered that the cornice was merely a matter of ornament, capable of removal without substantial injury to the freehold, and was in fact so removed during the tenancy. On motion for a new trial, on the ground of misdirection on these points, the court considered that the direction was correct; and that the inquiry as to the removal being without injury, formed a proper test as to the way in which the cornice was fixed to the freehold.

The cases that have now been cited, furnish the only instances in which questions have come before the courts in respect of the particular class of fixtures treated of in this section. And of these, the case of *Buckland* v. *Butterfield* may be regarded as the leading decision upon the subject. But, in order to complete the series of determinations, it may be proper to refer to two other cases at *Nisi Prius*. In the first of these, however, the right of removing property of this description was only incidentally noticed.

Verandas.

In the *Nisi Prius* case of *Penry* v. *Brown*,(*a*) a lessee had erected a *veranda* upon the premises demised to him, the lower part of which was attached to posts fixed in the ground. It was held by Abbot, Ch. J., that he could not remove any part of it.

[*82] The ground, however, of the decision in this case was, *that the building came within the terms of a particular covenant in the tenant's lease.(*a*)

Brick pillars.

In the case of *Leach* v. *Thomas*,(*b*) which has been already cited, it is said to have been ruled by Patteson, J., that where a

(*b*) 3 Ad. & El. 75; *S. C.*, 5 Nev. & Man. 370.
(*a*) 2 Stark. N. P. C. 403.
(*a*) As in the case of *West* v. *Blakeway*, 2 M. & G. 729.
(*b*) 7 C. & P. 327.

tenant had built some small pillars of brick and mortar on a dairy floor, to hold pans, that he had no right to remove them, even although the pillars were not let into the soil. The ground of this opinion is not stated in the report; but it may be noticed, that here the property in question could not be removed in an entire state, as in most of the other instances; but its removal would have occasioned the entire disintegration of the thing itself.

On examining the decisions which have here been collected, the reader will not fail to observe the stress which is laid in most of them upon the circumstance of the erection being put up for the purpose of *ornament*. In *Beck* v. *Rebow* it is said, that hangings and looking-glasses are removable, *because only matters of ornament and furniture.*(c) Lord Hardwicke and Lord Mansfield, both speak of *marble* chimneypieces being removable. Lord Ellenborough still more pointedly says, that the tenant is allowed to remove *matters of ornament*, as *ornamental* marble chimneypieces, *pier-glasses, &c. And Ch. J. Dallas makes use [*83] of the same expressions, and states that the exception has been in favor of matters of ornament, as *ornamental* marble chimneypieces, pier-glasses, and the like.

The same observation applies to the case of *Leach* v. *Thomas*, before Mr. J. Patteson. And so, in *Avery* v. *Cheslyn*, the learned judge, at the trial, put it to the jury to say (amongst other things) whether the cornice in dispute was merely a matter of *ornament*.

From the authorities, therefore, considered in this view, a rule has been deduced, that a tenant is entitled to take away certain things, which he has, at his own expense, affixed to the demised premises for the purpose of *ornament and furniture*. And the principle on which this rule is founded, appears to be, that as annexations of this nature must generally be designed for tem- Principle of the relaxation.

(c) As to *hangings*, these are esteemed by Swinburne as mere chattels; for they are mentioned by him as being comprehended under the term household stuff, and passing under a general legacy of household stuff. Treat. on Wills, part 7, sec. 10, p. 945. Speaking of wainscot being parcel of the house, as between executor and heir, he notes in the margin: "*Quamvis jure civili, quæ ornatus gratia magis quam perficiendi domum ponuntur, ædium partes non sunt.*" Part 6, sec. 7, p. 759. See, also, Godolp. Orph. Leg. part 2, ch. 14, p. 126.

porary purposes only, it would greatly incommode tenants in the enjoyment of their estates, if, by every slight attachment to the freehold, the property should immediately be changed, and pass over to the reversioner. Hence, it is obvious that the tenant's right of removal in respect of this class of annexations, depends upon very different grounds from those which prevail in the case of fixtures put up for *trade* and manufactures.

Fixtures not strictly ornamental.

But, on recurring to the facts of the cases which have been cited, it appears that some of the articles held to be removable by a tenant, are not matters of mere ornament and decoration. They consist rather of instruments and utensils fixed up for purposes of *general utility* or *common domestic convenience.* It is notorious *also in practice, that a great variety of articles are considered to belong to the tenant, and as such are taken away or valued to the in-coming tenant, which cannot be said to have been put up with a view to ornament; neither are they in any manner connected with trade. Although, therefore, articles of this description are not strictly referable to the head of ornamental fixtures, yet it is now generally understood that they fall within the same principle, and may be removed by the tenant at the end of his term.(a) Perhaps, in these cases, the *personal nature* of the property is the principal ground upon which it is protected. For it is observable, that the species of annexations described in the decisions, are utensils and machines which are perfect chattels in themselves, and are for the most part such as serve as substitutes for mere movable furniture.

[*84]

Extent of the tenant's right of removal.

Having now considered the general doctrine as to the removal of fixtures put up for ornament or convenience, it remains to inquire how far the exception in favor of this description of property may be extended; and to examine whether the tenant is subject to any greater restriction in the exercise of this privilege of removal, than he is in respect of the class of fixtures which have been treated of in the preceding sections.

Right of removal, how qualified.

On referring to the cases with a view to this inquiry, it will be found, that although an article appears to be such that, its object alone considered, *it would fall within the description of

[*85]

(a) This ground of exception is distinctly recognized in *Grymes* v. *Boweren*, (6 Bing. 437,) in the instance of the pump erected by a tenant.

things that are removable as matters of ornament or convenience, there may, notwithstanding, be certain particulars connected with its erection, which will entirely prevent the exercise of the tenant's right. For, in the class of fixtures described in this section, the operation of a principle is found, which, in the trade cases, is hardly adverted to in any of the judicial decisions. And this relates to the *mode of annexation* of the article.

Mode of annexation.

In one of Lord Hardwicke's decisions, the right of removing the wainscot is stated with a qualification of its being fixed only with screws. In a subsequent case, Lord Hardwicke states its removability without this qualification; but he says it is a very strong case.(a) In *Elwes* v. *Maw*, Lord Ellenborough, alluding to the same article, again introduces the mention of the screws; and this is repeated by Gibbs, Ch. J., in *Lee* v. *Risdon;* and again in the judgment of the court in *Buckland* v. *Butterfield*.(b) In

(a) See *post*, p. 87.

(b) And see Noy's Max. p. 167, (9th ed.) It must be admitted, that the removal of *wainscot* is a very strong case; that is, if the dictum of Lord Hardwicke is to be understood as referring to the ordinary wainscot of a house as now erected. Wainscot is one of the things which Lord Coke expressly points out as not removable by a tenant; and in Cro. Eliz. 374, Anderson, Ch. J., lays down the same rule. In the earlier cases it was said, that a lessee could not take down partitions that he had fixed to the freehold. 10 H. VII, 2; Moore, 178. Lord Hardwicke does not state upon what authority he founded his opinion in respect of this article, but there probably may have been a decision on the subject which has not been reported. It would be important to know the time when such a decision took place; as it might be the means of ascertaining the particular *description* of wainscot which was held removable, by inquiring into the state of refinement in domestic economy at that particular period. For if it was only that kind of covering for walls described in *Beck* v. *Rebow*, and other cases, which consisted of pictures or tapestry, put up with hooks or screws in lieu of wainscot (as was the practice in former times,) it was obvious that it would be no authority for the removal of the wainscot of a modern house. This was, no doubt, the kind of erection referred to by Dodderidge, J., (in Roll. Rep. 216,) where he says, that wainscot may as well be removed as arras hangings. In all questions of this sort, it is particularly necessary to consider the decisions with reference to the degree of improvement in modern manners, as compared with those of earlier times. In Henry the Seventh's time, it was said that *glass* should not be considered to belong to the heir as parcel of the house, *because it was not necessary to the house, which was perfect without it.* So in *Cooke's case*, (24 Eliz.) the court took a difference between removing outer-doors and inner-doors; saying, that the latter might be removable, *as being less necessary* to the house. In *Grymes* v. *Bowcren*, both Tindal, Ch. J., and Parke, J., appear to recognize the removal of wainscot as sanctioned by the authorities. But if, on any future occasion, a question should directly arise as to the right of taking down wainscot, it is highly probable that the court would not be disposed to favor a removal which would so materially injure and disfigure the dwelling-house, and at the same time produce so little benefit to the tenant.

[*86] the *last mentioned case, Ch. J. Dallas says, "There may be that sort of fixing or annexation which, though the building or thing annexed may have been solely for ornament, will yet make the removal of it waste;" and upon this ground, viz. that it was so annexed as to be permanently incorporated with the principal building, it was determined that the conservatory (the construction of which has been particularly described in a former page) could not be taken away. In like manner, in *Grymes* v. *Boweren*, Tindal, C. J., among other circumstances, relies on the fact that the article was only slightly attached to the freehold.

The instance put of *chimney pieces* is scarcely less strong than that of wainscot. Lord Hardwicke first introduced the mention of them, but he does not state under what circumstances their removal would be justifiable. And although his opinion in respect of this article has been followed in most of the judg-
[*87] ments;(*a*) *yet it may be presumed that, independently of their ornamental nature, the construction and method of annexation to the house could not have been altogether disregarded; else, as a general authority, it would seem to carry the tenant's right of removal very far indeed.(*b*)

Unfortunately, there is a great absence of authority for ascertaining the degree of annexation short of that which took place in the conservatory case, and more intimate than a connection with screws, nails or bolts, by which the tenant's privilege may be defeated.(*c*) The determination, therefore, of intermediate

(*a*) See Bul. N. P. 34; 2 Sand. 259, n. 11; Harg. Co. Lit. 53, a.; per Tindal, C. J., in *Grymes* v. *Boweren*; and see *Leach* v. *Thomas*, *supra*.

(*b*) It may be questioned whether a general and unqualified right to take down chimneypieces, would be sanctioned by the courts in the present day. Lord Holt selects the particular instances of *hearths and chimneypieces* to denote the kind of additions which a tenant cannot remove. *Poole's case*, 1 Salk. 368. The right of taking away such articles, on the ground, not unfrequently urged, of their great value, and the expense incurred by the tenant in erecting them, cannot be supported upon any authority. Under the ancient rule of law, a tenant was liable in waste, if he pulled down the shelves, closets, presses, wardrobes, dressers, &c., belonging to the house. See 2 Bulst. 113; Cro. Jac. 329; 1 Salk. 368; 2 Bl. Rep. 1111; 2 Ves. & Bea. 349. So as to to the lock and keys of a house. 2 Bulst. 113; Cro. Jac. 329; 2 Ves. & Bea. 349; 11 Co. 50.

(*c*) That a single screw constitutes *fixed furniture*, see *Birch* v. *Dawson*, 2 Ad. & E. 57. And see the same case at *N. P.*, (6 Car. & P. 658,) as to a carpet tacked to the floor, per Littledale, J. It was said by Lord Lyndhurst, C. B., in *Trappes* v.

cases will, in the present state of the law, be subject to considerable uncertainty.

Permanent nature of the erection.

But, besides the mode of annexation, it is to be observed that there is a further circumstance to *which the courts have had regard in the discussion of these questions, and which Mr. B. Graham considered to be a proper ground of decision in respect of ornamental fixtures. For, when the above mentioned case of *Buckland* v. *Butterfield* was before that learned judge at *Nisi Prius*, he was of opinion that the pinery was not removable, because it might be deemed a *permanent improvement*.(a) And Mr. J. Park explains the decision, on the same grounds, as resting on the fact that the building was deeply fixed in the soil, and formed part of the house to which it was attached.(b) These opinions are also comformable to that expressed by Lord Kenyon in a previous case. For in *Dean* v. *Allalley*(c) his Lordship is reported to have said that, "If a tenant will build, upon premises demised to him, a substantial addition to the house, or add to its magnificence, he must leave his additions, at the expiration of his term, for the benefit of his landlord."(d) [*88]

Injury to the premises.

Lastly, it is proper to notice one additional topic, which was mentioned by Lord Mansfield as a ground for permitting the removal of ornamental fixtures; viz. that the premises are left in the *same state* in which the tenant finds them, and that there is no *injury to the landlord.(a) This principle does not appear to have been adverted to, or at least insisted on, in the other modern decisions: although in the old cases, where it was agreed that a lessee might take away furnaces, &c., fixed to the floor and not to the walls of a house, the reason assigned was, that the [*89]

Harter, (2 C. & M. 177,) that the screwing of a stocking-frame to the floor, to keep it steady, would not make it a fixture. As to the annexations by *mortar*, see 20 H. VII, p. 13; *Lawton* v. *Salmon*, 1 H. Bl. 260; *R.* v. *Otley*, 1 B. & Ad. 161; *West* v. *Blakeway*, 2 Man. & Gr. 729.

(a) The pinery is stated, in the report of the case in 4 B. Moore, 446, to have been erected in the garden, on a brick wall, four feet high.

(b) 6 Bing. 437. *Grymes* v. *Boweren.*

(c) 3 Esp. N. P. C. 11.

(d) If a lessee erects a new house where none was before, if he abate it, an action of waste lies against him. Hob. 234; *Lord Darcey* v. *Asquith.* And see Vin. Ab. Waste, E. 20; 1 Bulst. 50. And see Lord Hardwicke's observations upon the legal maxim, that the principal thing shall not be destroyed by taking away the accessory. 3 Atk. 15.

(a) 1 H. Bl. 260, *in notis.*

house would not be impaired, and so, no waste.(*b*) Lord Mansfield, in making the remark alluded to, appears to apply it to trading, as well as to ornamental erections. But, certainly, in many of the trade cases, it would be impossible to say that no injury would accrue to the landlord, or his estate, by the act of removing the fixture; though, perhaps, it is true that there is no case hitherto decided in favor of the tenant, where it appeared as a fact that any considerable damage was occasioned to the freehold.

Indeed, where an article is removable under the law of fixtures, if it appears that the freehold will unavoidably be damaged by the severance of the property, such damage might more properly be regarded as the subject of compensation to the landlord by the tenant. And it appears to have bern generally understood in practice, that as well where trading as where ornamental fixtures are taken down, the tenant is liable to repair the injury the premises may sustain by the act of removal; and, in like manner, that where a fixture has been put up in substitu-
[*90] tion for *an article which was attached to the premises at the time of the demise, the tenant, on taking down his own fixture, is bound to restore the former article, or to replace it by another erection of a similar description.(*a*)

In the case respecting the fixed cornice noticed above, the learned judge at the trial left it as one of the questions to the jury, whether it was capable of removal without doing *substantial* injury to the house; and the court of K. B. approved of that direction, and considered that the injury to the freehold might properly be applied as a test of the mode by which the article was affixed.(*b*)

Liability of tenant to repair injury.

The late case of *Foley* v. *Addenbroke*(*c*) furnishes some very important rules upon these points. In that case there were indeed covenants expressly referring to fixtures; but the observa-

(*b*) "No waste." Some trivial injury would, no doubt, happen to the premises; but this appears to have been disregarded: as, in waste, where the jury found a verdict for the plaintiff with insignificant damages, the *defendant* was entitled to have judgment entered up for himself. 2 Bos. & Pul. 86; 1 Bing. 382.

(*a*) See *Martyr* v. *Bradley*, 9 Bing. 24; *Sunderland* v. *Newton*, 3 Sim. 450.

(*b*) *Avery* v. *Cheslyn*, 3 A. & E. 75.

(*c*) 13 M. & W. 174.

tions of the court appear to apply equally to all ordinary cases of removal. The lessee was bound to leave all the erections, buildings, improvements, &c., except, &c., in good repair; and it was held that in taking away certain large fixed machinery and apparatus, decided to be removable under the lease, the lessee might disturb such brickwork as was necessary to remove it, and that he was not bound to restore it to a perfect state, as if the articles it was intended to support or cover were still there; that it was sufficient for him to exercise his right to remove what the lease gave him authority to take; and, in doing so, to displace the *brick-work, and to leave it in such a state as would [*91] be most useful and beneficial to the lessors, or to those who might next take the premises: at the same time, in the exercise of this right, he was bound to do as little damage as possible; and was liable for any *unnecessary* disturbance of the brick-work, or any wanton damage to the premises; or in case he left them in such a state as not to be conveniently applicable for similar purposes by the lessor or another tenant.

Absence of injury not a conclusive ground for removal.

It is, however, necessary to caution the reader that it must not be inferred that a tenant may take away an article merely because the premises will not be impaired by removing it. Neither is it in itself a ground for the removal of an erection, that the premises are capable of being reinstated in their original condition.(a) For it must always be remembered that, by the act of annexation to the freehold, the thing itself becomes a part of the reversionary estate. And the law has regard to the reversioner's interest, not only as it existed at the time of the demise, but also in its improved state, and as increased in value by any additions made by the tenant.

Right of removing matters of ornament, &c.—General observations.

The several considerations pointed out in the foregoing pages, as affecting the right of a tenant to remove fixtures put up for ornament or convenience, will suggest the caution to be observed in the practical application of the indulgence which the law now concedes *to him. From a review of these considera- [*92] tions, it is evident that the tenant's right, in respect of this class

(a) In *Elwes* v. *Maw*, it was stated as a fact in the case, that the premises were left in the *same state as when the tenant entered upon them*; yet, this was not thought a ground for the removal of the erections. So the removal of young trees is not allowed, (except in the case of a nurseryman,) although the injury occasioned to the premises by digging them up, might be immediately repaired.

of fixtures, depends, in a peculiar manner, on the facts of each individual case.(*a*) And the important circumstances to be regarded in these cases, are, first, the *mode of annexation* of an article, and the extent to which it is united with the premises. Secondly, its *nature* and *construction;* as whether it has been put up for a *temporary* purpose, or by way of a *permanent and substantial* improvement.(*b*) And, thirdly, the *effect* its removal will have upon the *freehold of the reversioner.* With reference, indeed, to this latter circumstance, it may be laid down as a rule applicable to all cases, that if the removal of any article will occasion considerable prejudice to the freehold, as by damaging the substance or fabric of the house, &c., a tenant will not be entitled to take it away. Lastly, it should be observed, that if there is any *custom* or prevailing usage, such as that of valuing to incoming tenants, &c., this may be considered, in the absence of decision, as a safe and useful criterion in practice.(*c*) The privilege of the tenant in removing fixtures on the ground of ornament or convenience, must be regarded as one of a more limited nature than
[*93] that in respect of *trade fixtures. It is an indulgence which, according to the remark of Ch. J. Dallas,(*a*) is an exception only, and, though to be fairly considered, is not to be extended.(*b*)

(*a*) Per Dallas, Ch. J.; 2 Brod. & Bing. 58. And see a similar remark, 1 Brod. & Bing. 510; again, per Tindal, Ch. J., in 6 Bing. 439.

(*b*) In *Buckland* v. *Butterfield*, it was argued by counsel, that the *intention* of the party in putting up an erection ought to be attended to, and that this might be collected from the nature of his interest in the premises. See, also, as to the argument from intention, in *Lawton* v. *Salmon*, 1 H. Bl. 260, *in notis;* and in *Evepson* v. *Soden*, 6 B. & Ad. 655. The rule of the civil law, as drawn from this consideration, is referred to in the Introduction; *vide* the note.

(*c*) As to the effect of custom in questions of fixtures, see *ante*, sec. 1, p. 44, and *post*, sec. 6.

(*a*) *Buckland* v. *Butterfield*, *ubi supra.*

(*b*) The reader will see a summary of the particular articles which may be removed by a tenant on the ground of ornament and furniture, in the practical rules in the Appendix.

*SECTION V. [*94]

Of the Time when a Tenant may remove Fixtures, as affected by the Nature and Duration of his Interest in the Premises.

HAVING, in the preceding sections, pointed out the description of property which a tenant is entitled to remove as fixtures, the next object of inquiry is as to the *time of the removal*, with reference to the continuance and termination of the tenancy.

It has never been implied, in any of the decisions, that the property which an ordinary tenant is permitted to take away, depends in any degree on the nature of his interest in the premises. On the contrary, it appears that whether the tenant is lessee for years, tenant from year to year, or tenant at will, and whether his term is uncertain or otherwise, his right as to the description of articles he is authorized to remove, is in every respect the same. But, with regard to the *time* within which the tenant must exercise his privilege, a distinction may obviously exist. For a tenant who is aware of the period when his interest will expire, may be expected to use a greater degree of vigilance in removing his fixtures, than one who, from the nature of his estate, is uncertain how long he may continue in possession of the demised premises.

When a tenant must remove his fixtures.

The object, therefore, of the present section, is to point out the rules which the law has prescribed to *tenants, with regard to the time of removing their fixtures.(a) [*95]

Tenant for a time certain.

And, first, of a termor who knows when his interest in the premises will expire.

Removal must be within the term.

From the earliest recognition of the tenant's right, it was always considered that he was bound to use his privilege in removing his fixtures, *during the continuance of his term.* For, if he neglected to avail himself of his right within this period, the law presumed that he voluntarily relinquished his claim in favor

(a) It must be understood, that the rules laid down in this section are applicable only where there is no special agreement which may affect the question; as to which, see *post*, sec. 6.

of his landlord. Thus, in the Year book, (20 Hen. VII, 13,) the court, speaking of the furnaces set up by a lessee for years, say, "*During his term* he may remove them; but if he permit them to remain fixed to the soil *after* the end of his term, then they belong to the lessor." And the *dictum* of Kingsmill, J., in 21 Hen. VII, 26, is to the same effect.

In like manner, in *Poole's case*,(*b*) it was said by Lord Holt, that *during the term* the soapboiler might well remove the vats; but, after the term, they became a gift in law to him in reversion, and are not removable.

The rule is laid down in the same terms in the more modern decisions. Thus, it was said by Lord Hardwicke, in the case *Ex parte Qnincy*,(*c*) that a tenant may take away the chimney-pieces, &c., during the term, but *not after*; "if he did, he would [*96] be a *trespasser." And, again, in *Dudley* v. *Warde*,(*a*) he observes, "Such removal must be during the term, or he will be a trespasser."[1]

Many other cases might be cited in confirmation of this doctrine. In particular, the case of *Lyde* v. *Russell*, 1 B. & Ad. 394, where the rule, as above stated, was expressly recognized and approved by Lord Tenterdon, C. J. His Lordship adds, "According to these authorities, then, the property in fixtures which would be in the tenant, if he removed them during the

(*b*) 1 Salk. 368.

(*c*) 1 Atk. 477.

(*a*) Amb. 113. And see Br. Ab. Chattels, pl. 7; Com. Dig. Waste, D. 2; Went. Off. Ex. 61.

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[1] Although the tenant, after rendering possession of lands, may be a trespasser by entering to remove fixtures to which he was entitled; yet, the property in them is not changed,—he is merely a trespasser as to the entry. *Holmes* v. *Tremper*, 20 John. 29; *Heermance* v. *Vernoy*, 6 John. 6. But the general and safe rule seems to be, that the "tenant must remove the fixtures put up by him, before he quits the possession on the expiration of his lease;" (*Lee* v. *Risdon*, 7 Taunt. 183; *Ex parte Quincy*, 1 Atk. 477; 2 Barn. & Creswell, 76; *Poole's case*, 1 Salk. 368; *Penton* v. *Robart*, 2 East. 89.) If not removed during the term, they become the property of the landlord. *Lyde* v. *Russell*, 2 B. & Adolp. 394. The cases in which the right of property remains unchanged after the expiring of the term, and the surrender of possession of the premises by the tenant, rest upon the particular attendant circumstances; they are exceptional, and do not invalidate the general rule.

term, vests in the landlord on the determination of the term."(*b*) The same principle governed the decision in the important case of *Minshall* v. *Lloyd*, hereafter cited.

The authorities, therefore, all agree as to the period of time within which a tenant must remove his fixtures. And it is sufficiently obvious that the principle on which this rule is founded applies alike to all descriptions of fixtures, whether for trade or otherwise. Accordingly, this must be regarded as the settled rule in general cases.

Unless his possession continues

There is, however, one decision, which has been supposed to establish an exception to this rule in particular cases. For, in that case, it was held that if a tenant *continued to keep possession of the demised *premises* after the expiration of his term, he might still remove his fixtures, so long as he retained his possession, although his legal interest in the land had terminated. [*97]

Case of *Penton* v. *Robart*.

This appears to be the point determined in the case of *Penton* v. *Robart*, 2 East, 88. The decision, however, has sometimes received a construction which appears to be at variance with the general doctrine above laid down; and it may therefore be proper to examine it more minutely.

It was an action of trespass for breaking and entering a certain yard and buildings, &c., and breaking down the buildings, and the materials of a fence; and taking away certain timbers, bricks, &c., and disposing of the same, &c. As to the breaking the yard, the defendant suffered judgment by default, and pleaded the general issue to the rest of the trespass. At the trial before Lord Kenyon, Ch. J., it appeared(*a*) that the plaintiff had let the premises to one Gray, as tenant for a term, and the defendant was in possession as an under tenant to one Cotterell, (to whom Gray's executors had let them,) by whose permission he had erected a building thereon for the purpose of making var-

(*b*) Mr. Smith observes, that "this case, with which, although the judgment is not long, Lord Tenterden is said to have taken great pains, goes a step further than any prior decision; for it shows that, on the tenant's quitting the land, the property of fixtures vests so completely in the landlord, that even though they are subsequently severed and made chattels, the tenant's right to them does not revive." 2 Leading Cases, 119.

(*a*) See 4 Esp. C. N. P. 33.

nish. This building had a brick foundation let into the ground, (with a chimney belonging to it,) upon which a superstructure of wood, brought from another place where the defendant had carried on his business, was raised, in which the defendant carried on his trade. The original term expired at Michaelmas,
[*98] 1800, in consequence of a notice from plaintiff to the *executors of Gray, (and it was admitted that the plaintiff had recovered judgment in ejectment against the defendant for these very premises, though the fact was not proved at the trial.) But the defendant *remained in possession* for some time afterwards, *and was, in fact, in possession* at the time when he pulled down the *wooden superstructure*, and carried away the materials, which was the subject of the action.

A verdict was taken for the plaintiff, subject to the question, whether the defendant was warranted in pulling down the building, and taking away the materials after the expiration of the term.

A rule *Nisi* having been obtained for entering a verdict for the defendant, as *to all but the trespasses confessed* of breaking and entering the *yard;* it was argued that the defendant had no right to remove the building after the term was expired, for that he was a trespasser by the act of coming or continuing upon the premises; and that the law could never give a man a right, and yet make him a trespasser in the only act by which he could exercise it.

Lord Kenyon, Ch. J.—"The old cases upon this subject leant to consider as realty whatever was annexed to the freehold by the occupier: but, in modern times, the leaning has always been the other way, in favor of the tenant, in support of the interests of trade, which is become the pillar of the state. What tenant will lay out his money in costly improvements of the land, if he must leave everything behind him which can be said to be annexed to it?"—"This is a description of property *divided from*
[*99] *the realty.*—Here the defendant *did no more than he had a right to do; he was, in fact, *still in possession of the premises* at the time the things were taken away, and therefore there is no pretence to say *that he had abandoned his right to them.*"

Lawrence, J.—"It is admitted, now, that the defendant had a right to take these things away during the term: and all that

he admits upon this record against himself, by suffering judgment to go by default as to the breaking and entering, is, that he was a trespasser in coming upon *the land*, but not a trespasser *de bonis asportatis:* as to so much, therefore, he is entitled to judgment."

A verdict was, therefore, entered for the plaintiff as to the trespass in breaking and entering; and for the defendant, as to the rest of the trespass.

Report at Nisi Prius.

The above are all the circumstances that appear from the discussion of the case at bar. But it may be important to add some further particulars respecting the nature of the erection, which are to be collected from the report of the case at *Nisi Prius.*(a) From this, it appears that the building in question consisted of a brick basement sunk into the ground, upon which a *wooden plate was laid*, and the quarters belonging to the superstructure were morticed into the *plate.*

Case examined.

Upon an attentive examination of this case, it is conceived that it will not be found to introduce any modification or extension of the general rule which can be applied to ordinary cases. An impression, *however, seems to have prevailed, that the privilege of the tenant has been *generally* enlarged by this decision. And it has been thought to establish, that a tenant does not in any case relinquish his property in fixtures by omitting to remove them during the term, but may insist on taking them away after the expiration of his tenancy, and after he has given up possession of the premises; and even although his entry on the land for that purpose may be in itself tortious.(a) [*100]

But the principle on which the decision proceeds, does not seem to warrant this proposition. For the only rule which can

(a) 4 Esp. N. P. C. 33.

(a) And see Hammond's Treatise on *Nisi Prius*, p. 147; and his edition of Comyn's Digest, Waste, D. 2. See, also, (2 Bar. & Ald. 166,) and *Weeton* v. *Woodcock*, 7 M. & W. 14, in the argument of counsel. According to the report of the case of *Penton* v. *Robart*, (*Nisi Prius,*) the inclination of Lord Kenyon's mind certainly seems to be, that a tenant had a right to come upon the premises after the term was expired, for the purpose of taking away a fixture which he might have removed during the term.

be considered deducible from the case of *Penton* v. *Robart*, admitting it to be a valid authority, is, that a tenant may *sometimes*, and under *certain circumstances*, retain his right in taking away his fixtures, although his interest in the land has expired; that is to say, where he has not quitted the premises, and still continues in absolute possession of the property.

The decision in question depends essentially upon two points: the fact of the continued possession, and the state of the record. It has been seen that the reason why, in common cases, a tenant cannot insist upon his privilege if he has neglected to use it
[*101] during the term, is, that the law presumes that he *meant to leave the unsevered property for the benefit of his landlord. But, in *Penton* v. *Robart*, the tenant had never quitted possession; and consequently, as he showed no intention of abandoning his right to the property, the presumption of a gift to the landlord did not arise. The tenant, however, did not contend that he had a right of remaining or coming upon the premises for the purpose of removing the building; he disclaimed that altogether; and, suffering judgment by default, he admitted that he was a trespasser on the land. All that he insisted upon was, that the materials of the varnish house were still his property, because there had been no dereliction of them: that he had therefore a right to reduce them again to a chattel state, and to retain them when severed; and that he could not be a trespasser (*de bonis asportatis*) for taking his own goods.

It may, however, be observed that, according to the state of the facts, the case might perhaps admit of another explanation. For it seems that the only thing the defendant took away was the *wooden superstructure.* This superstructure was merely placed upon a wooden plate, laid on brick-work. The erection, therefore, might be deemed (like the barn resting upon blocks or pattens) not a fixture, but a mere chattel. In this point of view, the simple question for determination would have been (as in *Wansborough* v. *Maton*, *post*) whether the personal chattel in dispute was the defendant's or not; and the result of the whole case would, upon the pleadings, have been the same as it now stands.

[*102] *It is, indeed, observable, that some of Lord Kenyon's expressions seem to favor this solution of the case. And if it should

be thought that the decision proceeded upon this ground, then it is evident that it forms no kind of authority that a tenant may, under any circumstances whatever, claim a right, after the expiration of his term, to remove articles which are strictly affixed.(*a*)

But the former explanation of the case appears to be the true one. And, in this view of it, it is evident that the general principle as to the removal being made, in ordinary cases, within the term, is altogether untouched.(*b*) Accordingly, all the authorities subsequent to the case in question, as has been already shown, concur in establishing that the rule laid down in the earlier decisions is the correct rule *of law on the subject. In *Lee* v. *Risdon*, also,(*a*) Gibbs, Ch. J., describes the tenant's interest in fixtures as existing only during the continuance of his estate. And he says, "Although it is in his power to reduce them to the state of goods and chattels again, by severing them *during* the term, yet, until they are severed, they are parts of the freehold; and unless the lessee uses during the term his continuing privilege to sever them, he cannot afterwards do it." And this observation of the learned judge is cited and approved of by Abbot, Ch. J., in a subsequent case.(*b*) See also, per Lord Ellenborough, in *Elwes* v. *Mawe*, 3 E. 50; *Buckland* v. *Butterfield*, cited in the preceding section. Also, per Parke, B., in *Hallen* v. *Runder*, 1 Cr. M. & R. 275.(*c*) [*103]

(*a*) If a man, whose term in a house is expired, go into it, when the door is open, to take away goods left by him there, *trespass quare clausum fregit* lies; for it was his own folly to leave the goods there. Br. Ab. Tr. pl. 450. And see 15 H. VII, fol. 9, b.; 22 Ed. IV, 27. See the same principles as to chattels, in *Anthony* v. *Haneys*, 8 Bing. 186; and in respect of a barn, &c., fixed to the freehold. It has been held that a *custom* for a lessee for years to remove his utensils within a certain period after his term expires, is bad in law. Palm. 211. There are, however, cases where a person is entitled to enter the soil of another to take his own goods, under peculiar circumstances or of necessity. Thus, if a fruit tree grow in a hedge, and the fruit drops on to the ground of another, the owner may go upon the land and fetch it. Vin. Ab. Tresp. L. a. So if a tree is blown down, or through decay falls into a neighbor's land, the owner may lawfully enter and take it. Latch. 13. And see other instances referred to and explained by the court in *Anthony* v. *Haneys*, *sup.* See, also, *Wood* v. *Hewitt*, 14 Law J. R. 247, Q. B.; and *Wansborough* v. *Maton*, *post.*

(*b*) See *Weeton* v. *Woodcock*, *post*, and the judgment of Alderson, B., wherein the extension of the tenant's right, contended for on the authority of *Penton* v. *Robart*, is qualified by the expressions of the court. Compare, also, *Fitzherbert* v. *Shaw*, 1 H. Bl. 258; where the tenant continued in possession under a new agreement, whereby his right to his fixtures was divested, *post*, sec. 6.

(*a*) 7 Taunt. 191.

(*b*) *Colegrave* v. *Dias Santos*, 1 Bar. & Cr. 79.

(*c*) See the able remarks on this subject in Mr. Smith's Leading Cases, Vol. II, p. 118.

Same rule, although term ended by forfeiture, &c.

The rule under consideration applies equally to the cases where the tenant, by any act of his own, (as by forfeiture or condition broken,) puts an end to the term, as where it expires by effluxion of time. The case of *Minshall* v. *Lloyd*,(*d*) affords an instance. There a tenant took a lease of a colliery, and during the term erected steam engines thereon. Afterwards, in 1827, he assigned the colliery to trustees, in trust to secure the payment of an annuity, and to permit him to enjoy them until default, &c. In June, 1829, the landlord took possession of the colliery and fixtures under a clause of re-entry for forfeiture; and, in November of the same year, the engines were seized under a *fi. fa.* at the [*104] suit of an execution *creditor of the tenant. The trustees brought an action against the sheriff to recover the engines, &c. It was held, in accordance with the authorities above mentioned, that the right of the tenant to remove the fixtures ceased in June, 1829; and, having been left affixed to the freehold after the expiration of the term, the trustees, who had only the same right of removal as the tenant under whom they claimed, could not themselves remove them after that period.

To the same effect, though with some extension of the general rule, is a subsequent case, also in the Court of Exchequer. A tenant took a lease of a cotton factory, in which there was a proviso that the lease should be forfeited by the bankruptcy of the lessee. During the term, the lessee erected a steam-engine boiler on the premises, and subsequently became bankrupt; his assignees entered and took possession, after which the lessor entered for the forfeiture: afterwards the assignees, who still continued in possession, removed and sold the boilers. It was held, in conformity with the general rule and on the authority of the last mentioned case, that the right of the tenant to remove the fixtures continued only during the original term, and during such further period of possession by him as he held the premises under a right still to consider himself as tenant; and that such right ceased after the entry for the forfeiture: so that the assignees were then no longer in a condition to consider themselves tenants.(*a*)

(*d*) 2 M. & W. 450. See, also, in *Storer* v. *Hunter*, 3 B. & C. 368.

(*a*) *Weeton* v. *Woodcock*, 7 M. & W. 14. See per Parke, B., in *Mackintosh* v. *Trotter*, 3 M. & W. 184. It appeared, in the principal case, that the assignees had not removed the fixtures till three weeks after the lessor's entry; and, at the trial, the

*Assuming that, according to the case of *Penton* v. *Robart*, the right to fixtures would not be abandoned, and the presumption of a gift to the landlord is not to be inferred as long as the possession is retained, a question might arise whether the tenant's right would be preserved if, by some formal act or declaration, he expressly signified his intention not to abandon the fixtures at the end of his term. For example, if he were to accompany the delivery of possession of the premises, with a protestation that he does so without prejudice to his right of taking away his fixtures at a future time, and does not intend to give them to the landlord.(*a*) Or, again, whether any recognition of the tenant's right on the part of the landlord might have the effect of revesting the property in the tenant.(*b*) On these points, nothing satisfactory is to be collected from the authorities; and, as it has never been intimated by the courts what might be the effect of such proceedings, and they probably would be held to be inoperative on the principles explained in the case of *Marston* v. *Roe*, 8 A. & E. 59, they cannot safely be relied upon in practice. Indeed, it is a common and very proper precaution, to provide for the removal of fixtures after the end of the demised term, by a particular provision in the tenant's lease.(*c*) [*105]

Delivery of possession without prejudice, &c.

*It may, perhaps, be thought that the presumption of a gift to the reversioner has no very reasonable foundation, and may often be productive of considerable hardship and inconvenience. It can only be explained on the principle, that the tenant, by the very act of annexing a chattel to the freehold, makes it a part of the reversioner's property, and retains only a qualified right in it, viz. that of reducing it again to a chattel state. The omission, therefore, to exercise this right within the time limited by the law, is considered tantamount to an express gift to the owner of the land. [*106]

Gift in law to the reversioner.

jury found that such removal was not within a reasonable time after the entry. This circumstance furnished an additional ground for the decision of the court.

(*a*) This is stated to have been done in the case of *Davis* v. *Jones*, 2 Bar. & Ald. 166.

(*b*) See *Lyde* v. *Russell*, and *Minshall* v. *Lloyd*, sup.; *West* v. *Blakeway*, 2 M. & G. 729.

(*c*) See *Hallen* v. *Runder*, 1 C. M. & R. 266: where a tenant forbore to remove his fixtures during the term, his landlord agreeing to take them at a valuation, and held that he might afterwards recover their value. As to the continuing possession and right of property of an outgoing tenant, see *Beatty* v. *Gibbons*, 16 East, 116, as explained in the next section.

Rule not applicable unless property affixed.

It is obvious that the rule established in the several authorities above considered cannot apply to cases where, from the construction of the property in question, and its connection with the realty, it is not accounted a fixture at all, but is considered in law to remain a mere chattel. Thus, where a tenant erected a barn on the demised premises, which was so constructed that it was not united to the soil, but rested on the foundation by its own weight alone, it was held that, although the tenant left this barn on the premises after the expiration of his term, he did not relinquish his right to it, but might afterwards recover it from his landlord by action.(*a*)

Tenants of uncertain interests.

It was observed, at the beginning of the section, that the preceding remarks were to be understood as applying only to tenancies, the determination of which might be previously ascertained. Although no decision *has expressly established that tenancies which are of uncertain nature and duration are excepted out of the general rule, yet it cannot be doubted that tenants of such interests, as tenants for life, at will, &c., are not so restricted, but will be allowed to remove their fixtures *within a reasonable time* after the expiration of their estates.(*a*) For no laches can be imputed to them in not availing themselves of their privilege during the term; neither can a gift to the reversioner be implied.(*b*) This inference is supported by the analogy of the rule in the case of emblements, where a similar indulgence is allowed to tenants for life, &c., on the equitable principle, that a party shall never be prejudiced by the sudden determination of his term.[1]

[*107]

(*a*) *Wansborough* v. *Maton*, 4 A. & E. 884. See, also, *Davis* v. *Jones*, 2 B. & Ald. 165, that the property in chattels is not lost. And see *sup.*, p. 102.

(*a*) See the note to the case of *Weeton* v. *Woodcock*, *sup.*, p. 104.

(*b*) *Vide* 22 Ed. IV, 27; Cro. Jac. 204. And see Lit., sec. 69.

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[1] A mortgagee in possession, after recovery on a bill in equity by a mortgagor to redeem, and before possession taken under the judgment, may take down and remove buildings erected by him on the land mortgaged, the materials of which belonged to him, and not so connected with the soil, that they cannot be removed without prejudice to it. *Taylor* v. *Townsend*, 8 Mass. Rep. 411.

*SECTION VI. [*108]

Of the Right of a Tenant in Fixtures, as affected by the Terms of his Tenancy, &c.

THE doctrine of fixtures has been investigated in the preceding sections, on the supposition that there was nothing in the terms of the demise to control or affect the tenant's right of removal. It remains now to consider what effect is produced upon the relative interests of the landlord and tenant, when they have bound themselves by any agreement which, directly or by implication, has relation to fixtures.(a)

Tenant's right in fixtures, how affected.

It is a principle applicable to the law of fixtures, as well as to every other branch of law, that individuals, on entering into a contract, may agree to vary the strict position in which they would otherwise legally stand towards each other; that is, where no absurdity or general inconvenience would result from the transaction. "*Modus et conventio vincunt legem.*" A tenant, therefore, in consequence of the conditions *under which he [*109] holds, may be placed in a totally different situation from that in which he has hitherto been regarded.(a) And the following authorities will show to what extent his privileges may be affected in different cases.

By covenants to repair, &c.

In the case of *Naylor* v. *Collinge*,(b) a defendant covenanted by his lease that he would repair the demised messuage and

(a) The reader must observe that this section more particularly relates to the terms of the tenancy, as affecting the right to things put up by the tenant himself, and which are properly the subject of the law of fixtures, and that it does not refer to those provisions in leases, &c., which concern things annexed to the freehold *at the time* of the demise; as when a person, on becoming tenant, agrees to purchase of the landlord articles affixed to the demised premises. In letting houses, &c., a stipulation is often made that "*fixtures are to be taken at a valuation.*" Here there is an absolute transfer of property, as on a sale of growing timber. The effect of agreements of this latter description, are considered in the chapter relating to the conveyance of fixtures, (*Post*, ch. 5,) where will be found some observations upon the interest acquired by a tenant on taking a demise of premises together with fixed utensils or machinery.

(a) It was said by Dodderidge, J., that "There will be a great difference between an action of covenant, and an action of waste; and that same thing done may be a breach of covenant which shall not be waste." 2 Bulst. 113.

(b) 1 Taunt. 19. And see *Brown* v. *Blunden*, Skin. 121.

premises, and all erections and buildings then already erected and built, and also all other erections or buildings that might *thereafter be erected and built* in or upon the said premises. In an action brought upon this covenant, the breach (as far as is material to the present inquiry) respected certain erections and buildings which, *during the term*, had been raised upon the demised premises by *the defendant himself*, as tenant and occupier thereof. They were let into and fixed to the soil, and had been built and used for the *purpose of trade and manufacture* only. These buildings the defendant had removed: and the question was, whether they were comprehended within the terms of the covenant, and whether the tenant's right of removal was restricted thereby.

It was contended by the defendant, that, since the buildings were removable as trade erections, they could not be considered to fall within the restraining words of the covenant. But the court held, that the parties were precluded from all general argument [*110] *respecting the right of removing fixtures by the express words of the covenant. The court could not go out of the covenant, which, under the general terms of erections and buildings, included erections and buildings raised for the purposes of trade. If the tenant meant to exclude buildings of this nature, it ought to have been so expressed.

In the case of *R.* v. *Topping*,(*a*) a lease was granted of certain premises on which steam engines, machinery, and other fixtures employed in the mining and smelting trades, were erected. These engines, &c., were standing on the premises at the date of the demise, but did not form part of the demise; having been purchased by the lessee from the outgoing tenant. Some other engines, &c., were put up by the lessee himself during the term. The lessee covenanted to repair "all and every the said buildings, lands, mines and engines," &c., and to deliver up the same in good repair; but the word "engines" was not mentioned in any previous part of the lease. It was also agreed that in case the indenture of lease, or the mines and premises thereby demised, or any part thereof, should be extended or taken in execution, the terms should cease and the lessors be at liberty to re-enter. The lessor covenanted that the lessees might erect

(*a*) M'Clel. & Y. 544.

engines, &c., and might remove them during the term, or within twelve months after; as well as all such other engines as had theretofore been erected, "*except as in the cases and events therein before mentioned*," (viz., *inter al.* the forfeiture of the term, and entry by the lessor.) The lease having been *forfeited by the premises being taken in execution under a writ of extent, it was held that the lessee was precluded from removing any of the engines and fixtures, and that the lessor was entitled to the whole of them—on the ground that this appeared to be the intention of the parties according to the construction of the lease. And Alexander, Ch. B., observed, that if there had been no provisions respecting the machinery, it might have been taken away by the tenant, according to the general rules; but such rules were liable to be varied by agreement of the parties; and he thought that the terms of the indenture showed it to be intended in this case, that in the event that had happened, the lessor should have the fixtures as well as the land and buildings. [*111]

In another case, an action was brought upon a covenant in the lease of a house, by which the defendant covenanted to repair the premises, and all erections, buildings, and improvements which might be erected thereon during the term, and to yield up the same in good repair, &c. The defendant, during the term, had erected a veranda, the lower part of which was attached to posts which were fixed in the ground. And Abbot, J., was of opinion, that without entering into the question whether, independently of the covenant, the veranda was removable, it clearly fell within the terms of the covenant, and consequently the defendant could not remove any part of it.(*a*)

The same principle governed the decision of several modern cases. Thus, in *Martyr* v. *Bradley*,(*b*) a *tenant took a lease of a water mill, together with two pair of stones, gear works, machines, &c., in or affixed to or about the mill; and covenanted to leave the same, together with all locks, &c., and other fixtures, fastenings and *improvements*, which during the demise should be fixed, fastened or set up, in, or upon or about the premises, in good plight, &c., reasonable use and wear only excepted. During the term, the tenant had substituted two new mill stones for two [*112]

(*a*) *Perry* v. *Brown*, 2 Stark. *N. P. C.*, 403.
(*b*) 9 Bing. 24.

old ones which he found on the premises. The lower stone was rammed in and fixed with mortar; the upper one revolved on its axis. When he quitted the premises, he took away the new stones, and left in their place those which he found on entering. It was held by the Court of Common Pleas, on the authority of the preceding decisions, that, by the terms of the covenant, the tenant was precluded from taking away the new stones. For the words "*improvements*, fixed, fastened, or set up," comprehended alterations in the working part of the mill; and the stones were an *improvement*, and an essential part of the mill.

In this case the court thought that it made no difference, that it had been proved that it was the general custom for a tenant to remove such stones.

In another case, also in the Common Pleas, a lessee covenanted to yield up the demised premises at the expiration of the term, together with all erections and *improvements* which during the term should be made, erected or set up. During the term the lessee erected a green-house on the demised premises; it was built of wood on a frame fixed upon a wooden plate, which was laid upon mortar placed and bedded *in the indents of walls [*113] erected for the purpose for the front and sides; the back being formed by an old wall; no holes were made in any part of the walls, the green-house being erected with a view to removal. Before the expiration of the term, the lessee removed the green-house, leaving the walls and ground flues, and doing no injury to the premises. It was held that, under the terms of his covenant, the lessee was not entitled to take away the green-house, and that the removal was a breach of it. For the court was of opinion, that the green-house was to be considered an "erection or an improvement," and, therefore, within the meaning of the covenant entered into between the parties.(*a*)

Analogous to these cases is that of *E. Mansfield* v. *Blackburne*.(*b*) In that case the general right of the tenant to take

(*a*) *West* v. *Blakeway*, 2 Man. & G. 729. In the above case, two of the judges expressed an opinion that, according to the construction of the building in question, it became annexed to the freehold. A second point decided by the case was, that a parol license and permission given by the lessor to the lessee to remove the building, was no answer to an action on the covenant.

(*b*) 6 Bing. New C. 426.

away the property in dispute was admitted; but the question was considered not to turn on any rule of law relating to fixtures, but to depend only upon the legal construction of the covenant entered into between the parties, and which was equally applicable, whether the property was a fixture or not. In this case, a renewed lease was granted of certain salt works, messuages, wych-houses, erections, and other things erected upon the premises. In the lease the tenant covenanted to repair the buildings, works, &c., and to leave the premises and the works, engines, &c., in good repair at the end of the term. *It appeared that under the [*114] former lease the lessee had put up at his own expense divers erections, engines, &c., for carrying on the manufacture of salt; and had also put up certain salt pans. These pans were composed of plates of iron, which rested by their own weight, without any fastenings, upon low brick walls. They had rings in their sides, by which they could be lifted off. They were used in the boiling of the salt, and are necessary for making it; and are essential to the existence of salt works. It was held, that by the words of the covenant the lessee was restrained from taking away the salt pans at the end of his term. For, without regarding whether the pans were removable as mere chattels, as not being affixed to the freehold, the court considered that inasmuch as they were a necessary and constituent part of salt works, they must be understood to be included under the general description of *works*, and to fall within the terms and meaning of the covenant "to leave all and every the premises demised."

The same principle was also recognized in a case recently determined by the Vice-Chancellor. There a lessee of a mill and steam engine had covenanted to repair, "reasonable wear, &c., excepted." During the term the lessee had substituted a new steam engine of greater power, in lieu of the one which was on the premises when the lease was granted. The Vice-Chancellor was of opinion, that the right of the lessee was to be determined by the covenant in the lease; that the substituted engine was subject to the stipulation in the lease as to the old engine; and that the lessee was not entitled to remove it.(a)

*A very recent case decided in the Court of Exchequer de- [*115] serves attention here, as it affords a further illustration of the

(a) *Sunderland* v. *Newton*, 3 Sim. 450. See, also, *Weeton* v. *Woodcock*, 7 M. & W. 14.

effect of the covenants in a lease, upon the claim of a tenant in removing fixtures of which a general description only is found in the lease. This is the case of *Foley* v. *Addenbroke*:(a) the facts are very special, and may be collected from the case itself, where they are stated at great length, and the description of the fixtures in question particularly set forth.

It was an action for the breach of the covenants in a lease of certain iron stone mines; by which the lessee covenanted (amongst other things) to erect a furnace, &c., and iron works on the premises, and to repair and yield up in repair the furnaces, fire engine, iron works, dwelling-houses, and all other erections, buildings, improvements, and alterations, to be thereafter erected, built, or set up, *except the iron work castings*, railways, whimseys, gins, machines, and the movable implements and materials used in or about the said furnaces, fire engine, iron works and premises. In an action on this covenant, the breach assigned was for not repairing and leaving in repair the furnaces, &c. To this breach, it was pleaded (with other pleas) that everything was left in repair other than and except the iron work castings, and other matters which the defendant had a right to remove. It appeared that the lessee had built on the premises extensive iron works, consisting, amongst other things, of casting-houses, a forge and mill, furnaces, blast fire engines, boilers, gins, &c., [*116] houses, buildings, and *sheds. It was held, that under the above covenant, the tenant was entitled to remove whatever was in the nature of a machine or part of a machine, but not what was in the nature of building or support of building, although made of iron. And that, applying this rule, the tenant was entitled to remove the blast, steam, or fire engines, cylinders, pipes, and apparatus connected therewith; furnaces fixed in brick-work; wrought iron boilers resting on brick-work, and surrounded by flues and brick-work; boiler grates, consisting of bearers of cast iron set in brick-work, with bars, doors, &c.; castings and iron work of the engines; puddling furnaces, mill furnaces; gasometer, and other fixed property specified in the case, and of the same nature with the steam or fire engines. On the other hand, the court held that he was restrained by the lease from removing (besides buildings) brick pillars, or iron work substituted for brick-work, such as hoops, bearers, &c., be-

(a) 13 M. & W. 174.

longing to the furnaces; cast iron columns for supporting the buildings, &c.: such things not being in the nature of machines or implements.(a)

All the authorities, therefore, concur in establishing that notwithstanding the property in question may have belonged to the tenant, and whether it is permanently fixed to the freehold or not, it may still become irremovable, if, by the interpretation of the contract between himself and his landlord, it appears to have been contemplated by them that it should not be taken away at the expiration of the term.

*Moreover, from some of the same authorities, but particularly from an analogous one which followed the first mentioned case of *Naylor* v. *Collinge*, and where the authority of that decision was approved by the Court of King's Bench, a further inference may be deduced, which may be mentioned in this place. The case referred to is that of *Thresher* v. *East London Waterworks Company*.(a) And from that decision it appears that a lessee would be restrained by a general covenant to repair, from pulling down an erection which he had made before the commencement of his lease and during the time he held the premises under a previous tenancy. So that an erection made during a preceding lease, supposing it might have been removed whilst that lease continued, is no longer removable when the premises are conveyed to the same lessee by general words (as for instance, land, premises, or buildings) in a subsequent lease, although the latter contains only the common covenant to repair. It is not thought necessary to enter at large into the case, because it contains many complicated facts; but it virtually establishes the above proposition.(b) [*117]

By a subsequent demise.

The court also expressed an opinion in this case, that perhaps no matter *dehors* the lease could be alleged to prevent the covenant to repair from attaching; and that, at any rate, there ap-

(a) There are other important points decided in this case, which are noticed in other pages of the work.

(a) 2 Bar. & Cr. 608.

(b) The building in question was erected by an under-lessee of the tenant, which under-lessee, as against his immediate landlord, could not remove it. It is obvious, however, that this does not vary the principle of the case. See in *Ex parte Lloyd*, 1 Mont. & Ay. 511.

[*118] peared nothing *sufficient for that purpose in the particular facts before them.(a)

By a new agreement. It is to be remarked, that prior to the determination of any of the foregoing cases, there had been a decision which, in effect, proceeded upon the same principle. For it had been adjudged in the case of *Fitzherbert* v. *Shaw*,(b) that a tenant was precluded from removing fixtures by an implied dereliction of them, arising out of the nature of the transaction between himself and his landlord; although there was, in that case, no express covenant or agreement on the part of the tenant in respect of fixtures.

In *Fitzherbert* v. *Shaw*, the defendant had been holding certain premises from year to year since 1765. In 1787, they were purchased by the plaintiff, who, having given the defendant notice to quit, afterwards brought an ejectment against him to obtain possession. In March, 1788, (while the action was pending,) the parties entered into an agreement that judgment should be signed for the plaintiff, but with a stay of execution till the Michaelmas following; and it was stipulated that the defendant should remain in possession in the mean time. *In this agreement no mention was made of any buildings or fixtures.* Between the time of entering into the agreement and the ensuing Michaelmas, the defendant removed several things from the premises, which Mr. J. Gould, at *Nisi Prius*, considered would have been removable during the tenancy; but he thought that, by the *agreement, [*119] the parties had made a new contract, which put an end to the term. And the Court of Common Pleas decided, that without entering into the general question as to the right to remove the articles as fixtures, the defendant was precluded from taking them away by the fair interpretation of the agreement; from which it must be implied, that he was to do no act in the mean time to alter the premises.

It may perhaps be thought, from comparing the two last mentioned decisions, that this general principle is deducible from them, viz.: that where a tenant has an existing right to remove

(a) As to which, see *Doe* dem. *Freeland* v. *Burt*, 1 T. R. 701; and the dictum of Buller, J., that whether parcel of the thing demised, or not, is always matter of evidence. And see *post*, ch. 5.

(b) 1 Hen. Bl. 258.

fixtures erected by him during his term, that right may be divested by *any* new agreement for the enjoyment of the land in which there is no mention of the fixtures.(*a*)

It is proper to notice, that there is a *Nisi Prius* case, that of *Dean* v. *Allaley*,(*b*) respecting the Dutch barns, in which Lord Kenyon expressed an opinion not altogether consistent with the doctrine laid down in the foregoing cases. In that case, an action was brought upon a covenant in a lease similar in *terms [*120] to that in *Naylor* v. *Collinge*, the tenant having covenanted to leave all the buildings in repair which then were, or *should be*, erected upon the premises during the term. When this covenant was pressed upon Lord Kenyon, he is reported to have said, that he was fully aware of the extent of it, and not quite sure that it concluded the question: it meant that the tenant should leave all those buildings which were annexed to, and became part of, the reversionary estate. For reasons, however, which have been elsewhere assigned, this case must at all times be considered of uncertain authority.(*a*)

By the terms of his contract generally.

The principle laid down in the case of *Naylor* v. *Collinge* and the other decisions, is applicable generally to the law of fixtures, as it relates to landlord and tenant. And consequently a tenant may, by the special terms of his agreement, not only vary his rights as to the description of articles he is entitled to remove, but may enlarge the time for their removal, and subject himself to greater restrictions, or secure to himself greater privileges in

(*a*) It might be questionable whether the right would be divested immediately on the making of the agreement, or only from the time the agreement takes effect, in conveying the possession of the premises. The principle mentioned in the text would probably apply to a case, where an out-going tenant has agreed that when he quits possession, he will leave his fixtures for an in-coming tenant, who has taken a lease of the premises to commence at the expiration of the former tenant's interest. Here, if the landlord was not a party to the agreement, the question might arise, how far the second tenant would be clothed with the rights of the former tenant. For the landlord might contend that, as the fixtures were not actually severed by the first tenant, they formed a part of the demise to the new tenant; and that the latter would, therefore, be liable for waste if he removed them.

(*b*) 3 Esp. *N. P. C.* 12.

(*a*) And see a similar covenant in *Davis* v. *Jones*, 2 Bar. & Ald. 165. From these cases, and from the report of *Naylor* v. *Collinge*, it might perhaps be inferred, that such a covenant would not include erections that are not actually affixed to the freehold, as a barn on rollers, &c. The later decisions, however, seem to qualify this proposition.

the ultimate disposition of them, than would attach to him merely as tenant.(*b*) Thus, where a tenant has, by the terms of his lease, the privilege of selling his fixtures by valuation to an in-coming tenant, it is conceived that (in conformity with the principle laid [*121] down in *Beaty* v. *Gibbons*, 16 East, 166) he would have a *right of *onstand* on the premises, and that his property in the fixtures would not determine at the expiration of his lease.

Indeed, a tenant may, by the terms of his holding, acquire an almost unlimited right to remove things which he affixes to the freehold. For if a lease or demise for years is made with an express clause "*without impeachment of waste*," this condition will have the same effect as where it is inserted in a conveyance of an estate for life.(*a*) By entering into special conditions of this nature, the parties entirely change the situation in which they would stand towards each other from the mere relation of landlord and tenant. And in all these cases, the claims in controversy cannot be determined by the law of fixtures, but resolve themselves into questions of construction; in which the only point for determination is, whether the property in dispute falls within the terms of the agreement, exception, proviso, &c.(*b*)

Custom, whether of the same effect as contract.

It might be matter for consideration, whether the established *custom* of a particular district in respect of fixtures would not operate in the same manner as a contract which specifically relates to them. In claims between landlord and tenant, it has [*122] often been determined that custom has this effect, when not *opposed to the express words of an agreement.(*a*) But it does not appear that this doctrine has been applied to the case of fixtures. It would be material to ascertain how far such a principle would apply. For the decisions are not very explicit as to the degree

(*b*) *Vide Burn* v. *Miller*, 4 Taunt. 745; *Fairburn* v. *Eastwood*, 6 M. & W. 679, as explained in 2 Smith's Leading Cases, 118.

(*a*) 1 Cru. Dig. tit. 8, ch. 2, sec. 12. And see *Poole's case*, 1 Salk. 368. As to the effect of the clause, "*without impeachment of* waste," in a conveyance of life estate, see *post*, ch. 3, sec. 3.

(*b*) Sometimes clauses for removing fixtures are inserted in leases, merely for the sake of avoiding disputes. It is not unusual to have a condition, in leases of mills, collieries, &c., that the tenant shall be at liberty to remove all the machinery and erections he puts up.

(*a*) *Wigglesworth* v. *Dallison*, Doug. 190; *Senior* v. *Armitage*, 1 Holt's *N. P. C.* 197. And see 4 Bar. & Ald. 588, and 16 Ves. 173.

of weight to be attached to evidence of custom in cases of fixtures; and out-going and in-coming tenants are much in the habit of viewing their own rights with reference to the practice of antecedent tenants, and the usage of the particular neighborhood. And where a tenant has paid for an article by valuation on entering upon his tenancy, he has a right to presume that he shall be valued out as he was valued in; particularly if such a practice has prevailed during a succession of tenancies, and is known to be the common custom of the country.(*b*)

(*b*) See *ante*, p. 45; and *Martyr* v. *Bradley*, cited above.

[*123]

*CHAPTER III.

OF THE RIGHT TO FIXTURES, BETWEEN TENANTS FOR LIFE AND IN TAIL, OR THEIR PERSONAL REPRESENTATIVES, AND THE REMAINDER-MAN AND REVERSIONER.

SECTION I. *Of the Right of the Personal Representatives of Tenant for Life or in Tail, in respect of Fixtures put up for Trade, or for Trade, combined with other Objects.*

SECTION II. *Of the Right of the Personal Representatives in respect of Fixtures put up for Ornament or Convenience.*

SECTION III. *Of the Rights of Tenants for Life or in Tail, during their Lives, in respect of Fixtures.*

SECTION IV. *Of Fixtures put up by Ecclesiastical Persons; wherein of Dilapidations.*

SECTION I.

Of the Right of the Personal Representatives of Tenant for Life or in Tail, in respect of Fixtures put up for Trade, combined with other Objects.

QUESTIONS respecting the right to fixtures have arisen between another class of persons, viz.: between the personal representatives of tenant for life, or in tail, and the remainder-man or reversioner. On these occasions, it is insisted on the one hand, that when personal chattels have been annexed to the freehold
[*124] by the tenant for life or in tail, they become part of *the inheritance, and, in consequence, pass to the succeeding owner of the land: whilst on the other side, it is contended that such annexations continue in the nature of chattels, and are to be deemed a part of the personal estate of the deceased tenant; or, to speak more correctly, that his executors are entitled to sever them from the freehold, and to reduce them to a state of personalty in increase of assets.

Fixtures put up by tenants for life, or in tail.

The relative interests of these parties, viz.: the personal representatives of tenant for life or in tail, and the remainder-man

or reversioner, in respect of things which have been annexed to the freehold *during the particular estate*, becomes now the subject of consideration.

It does not appear that questions of this nature were presented to the courts at a very early period. Indeed, up to the present time, there are only two cases to be found in the reports, in which the rights of the personal representatives of tenant for life or in tail, have been in controversy. These cases, however, are of considerable importance, and are often referred to as leading decisions upon the doctrine of fixtures. On which account they have already been noticed in the course of this work, on more than one occasion.

Steam engines in collieries, personal estate.

The first is the case of *Lawton* v. *Lawton*, before Lord Chancellor Hardwicke.(a) It was determined in this case, that a *fire engine* (or steam engine,) erected in a *colliery* by a tenant for life, should be considered personalty, and go as assets to his executor, and that *the remainder-man should not take it as part of the real estate. [*125]

The nature of this erection has already been described in a preceding chapter.(a)

Lord Hardwicke, in delivering his judgment in this case, observed, "It does appear in evidence that, in its own nature, the fire engine is a personal movable chattel, taken either in part or in gross, before it is put up: but then, it has been insisted that fixing it, in order to make it work, is properly an annexation to the freehold.

"To be sure, in the old cases, they go a great way upon the annexation to the freehold; and, so long ago as Henry the Seventh's time, the courts of law construed even a copper and furnaces to be part of the freehold. Since that time, the general ground the courts have gone upon, of relaxing this strict construction of law, is, that it is for the *benefit of the public* to encourage *tenants for life* to do what is advantageous to the estate during their term.

"It is true, the old rules of law have indeed been relaxed, chiefly between landlord and tenant, and not so frequently be-

(a) 3 Atk. 13.
(a) *Vide ante*, p. 35.

tween an ancestor and heir at law, or tenant for life and remainder-man. But, even in these cases, it does admit the consideration of *public conveniency* for determining the question.

Furnaces, &c., in brew-houses.

[*126] "One reason that weighs with me is, its being a mixed case, between enjoying the profits of the *land and carrying on a species of *trade;* and considering it in this light, it comes very near the instances, in brew-houses, &c., of *furnaces and coppers.*"

Lord Hardwicke then proceeds to point out the analogy of the case of landlord and tenant, and says, that in the reason of the thing, the situation of tenant for life comes near to that of a common tenant, where the good of the public is the material consideration. And he remarks, that the indulgence resembles, in its principle, that of *emblements*, where the chief consideration is the benefit of the kingdom.

He thus concludes his judgment: "It is very well known that little profit can be made of coal mines without this engine; and tenants for lives would be discouraged in erecting them, if they must go from their representatives to a remote remainder-man, when the tenant for life might possibly die the next day after the engine is set up. These reasons of *public benefit and convenience* weigh greatly with me, and are a principal ingredient in my present opinion."

The decree, therefore, was, that the engine should go for the increase of assets in the hands of the executor.

It may perhaps deserve to be mentioned, that in this case the application to the court was made on behalf of a creditor of the deceased tenant for life. Upon this, Lord Hardwicke observed, that the court could not construe the fund for assets further than the law allowed, but would do it to the utmost

[*127] they could in favor of creditors. On a subsequent *occasion, however, he declared that this circumstance made no difference in the nature of the question.(a)

The next case is that of *Lord Dudley* v. *Lord Warde.*(b) It came before Lord Hardwicke a few years after the former de-

(a) In *Dudley* v. *Warde.*
(b) Ambler, 113.

cision, and is similar to it in almost every respect. It was a bill by the executor of Lord Dudley, who was tenant for life or in tail (it did not appear which) against the defendant, who was the remainder-man, to have certain *fire engines*, erected in a colliery, delivered up as part of the personal estate of Lord Dudley.

Lord Hardwicke said that the question was, whether the fire engines erected by a particular tenant, or by tenant in tail, were to be considered as part of the owner's real or personal estate.

"The case," he observes, "being between executor of tenant for life or in tail, and a remainder-man, is not quite so strong as between landlord and tenant, yet the same reason governs it, if tenant for life erects such an engine."

Referring to his decision in *Lawton* v. *Lawton*, he says, "If it is so in the case of a tenant for life, query, how would it be in cases of tenant in tail? Tenant in tail has but a particular estate, though somewhat higher than tenant for life. In the reason of the thing, there is no material difference; the determinations have been from a consideration of the benefit of *trade*. A colliery is not only the enjoyment of the estate, but in part carrying on a trade. The reason of *emblements* going to the *executor [*128]
of a particular tenant holds here, to encourage agriculture. Suppose a man of indifferent health, he would not erect such an engine, at a vast expense, unless it would go to his family."

The decree therefore was, that the fire engine, erected by the testator, should go as assets to his executor.

In the determination of each of these cases, Lord Hardwicke Cider mills.
expressly declared that his judgment was partly founded on the authority of the case of the cider mill decided by Ch. B. Comyns. This decision has been already referred to;(a) and, assuming it to be a valid authority, the inference from it would be that a *cider mill* let into the ground may be deemed part of the personal estate of a tenant for life or in tail.

The doctrine laid down in these cases of *Lawton* v. *Lawton*, and *Lord Dudley* v. *Lord Warde*, has been recognized and con-

(a) See *ante*, p. 36, and ch. 4, sec. 1, *post*.

firmed by many subsequent authorities. Thus, in the case of *Lawton* v. *Salmon*, it was said by Lord Mansfield, "There has been a relaxation in another species of cases, between tenant for life and remainder-man, if the former has been at any expense for the benefit of the estate, as by erecting a fire engine, *or anything else*, by which it may be improved; in such a case it has been determined that the fireengine should go to the executor on a principle of public convenience, being an encouragement to lay out money in improving the estate, which the tenant would not otherwise be disposed to do."(*b*)[1]

[*129] *In like manner, Lord Kenyon speaks of an exception having been allowed in favor of the personal estate of tenants for life or in tail.(*a*) And in *Elwes* v. *Maw*,(*b*) Lord Ellenborough cites the before mentioned cases, and enters into a particular explanation of the principle on which he considers them to have been decided.(*c*)

Nature of these fixtures.

In examining these decisions, it will have occurred to the reader that there are two important circumstances to be noticed in them: First, that the erections in dispute were held to be in the nature of personal estate, on account of their relation to *trade*. Secondly, that they were put up for the purpose of enjoying the *profits of land*, as well as for the object of trade. Lord Hardwicke compared the cases before him to the familiar instances in which the right of removal had been allowed to common tenants on the particular ground of trade. And he says that a colliery is not only an enjoyment of the estate, but in part carrying on a

(*b*) 1 H. Bl. 260, *in notis*.

(*a*) 2 East, 91.

(*b*) 3 East, 54.

(*c*) And see Bul. *N. P.* 34. See, also, the case of *Stuart* v. *the Marq. of Bute*, cited in the next chapter, where it appears that *fire engines* would pass under a bequest of *things in the nature of personal estate*; 3 Ves. 212; 11 Ves. 657.

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[1] In *Miller* v. *Plumb*, 6 Cowen, 665, which regarded an ashery, the distinction between the relation of vendor and vendee; and vendee, tenant and landlord; is considered and recognized. As between vendor and vendee, the potash kettles set in an arch of masonry with a chimney, would pass as fixtures by a sale of the premises; but as between landlord and tenant, they fall within the relaxation of the rule in favor of erections for trade and manufactures.

trade.(*d*) And further, he calls it a *mixed* case, between enjoying the profits of land and carrying on a species of trade. This is also the view which Lord Ellenborough takes of these cases.

Executors entitled to trade fixtures, and to fixtures for a mixed purpose.

It appears, therefore, from these authorities, that there are two classes of fixtures which form part of *the personal estate of a tenant for life or in tail, and which are excepted out of the general rule in favor of the inheritance, on the ground of *public benefit and convenience*.(*a*) These two classes of fixtures correspond, in respect of their total or partial relation to trade, to those which have been treated of in the preceding chapter of this work, as removable between landlord and tenant. The general nature of such erections has been already explained; and it will not therefore be necessary to enter into a more particular account of them on the present occasion. It will be sufficient to refer the reader to the first and third sections of the second chapter; in the former of which, cases of trade fixtures in general, have been investigated; and in the latter, those mixed cases in which trade and the profits of land are combined. [*130]

Extent of the executor's privilege

Considering the few occasions on which the claims of tenant for life or in tail have come before the courts, it is almost impossible to point out how far the *construction, magnitude, and mode of annexation* of an article, might affect the right of the executor to take it as part of the personal estate. An attentive examination of the grounds of decision in the two cases above cited, *Lawton* v. *Lawton*, and *Lord Dudley* v. *Lord Warde*, will afford the best criterion for determining these questions.

Affected by the construction, &c. of the article.

*And in the first place it is to be observed, that in the application of the general principle, as recognized in those cases, the particular state of the facts was much relied upon by the court. For, although the consideration of trade, as conducing to the [*131]

(*d*) The working of mines and collieries is considered in equity as a species of trade. See 3 Atk. 264; Amb. 56; 7 Ves. 308; 1 Jac. & Walk. 302.

(*a*) Lord Ellenborough treats these exceptions as resting on the ground, that trade is a matter of a personal nature; and therefore, whatever is accessary to trade ought itself to be deemed personalty. See *ante*, p. 34. It should be noticed, also, that Lord Hardwicke speaks in his judgments of the encouragement to be afforded to tenants for life, &c., in the *general improvement* of their estates. See *ante*, p. 29. And see per Lord Mansfield, in *Lawton* v. *Lawton*, *ub. sup.*

public benefit, was the substantial ground upon which the fire engines were deemed personalty, yet Lord Hardwicke mentions several other reasons in support of the executor's claim. Thus he adverts to the *nature* of the engines, as being movable chattels in gross or in part before they were put up; and he compares them in this respect to the ordinary utensils of a brew-house. Again, in answer to an objection as to the injury the inheritance would sustain in being deprived of the erections, he relies on the circumstance that the colliery could be enjoyed without them; so that it was only a question of *majus* and *minus*, whether it was more or less convenient for the collieries. He admits, also, that it is a general maxim, that the principal thing shall not be destroyed by taking away the accessary; and says that it did not affect the question before him, because the engines were the principal, and the walls and sheds over them the accessaries.(*a*) Lord Hardwicke, therefore, appears to consider, that if the removal of the erections would have occasioned any substantial damage to the estate, or if they had been so far essential to the enjoyment of the land, that the inheritance could not have subsisted without them, the executor would not have been entitled to them, *but they must have gone to the remainder-man as parcel of the freehold.

By the injury to the inheritance.

[*132]

Analogy of decisions between other parties.

In the next place it may be observed, that in determining the cases under consideration, the court took notice of the analogy of corresponding claims, which had been the subject of discussion between other parties. And these were supposed to furnish a criterion for the decision of like questions arising between tenants for life, &c., and those in remainder. In many instances this analogy would doubtless afford a safe mode of determining whether an article is to be deemed part of the real or the personal estate. But it must be borne in mind that in resolving questions of fixtures according to this method, it is very necessary to attend to the distinction which is supposed to exist, as to the degree of favor with which the law regards the claims of some individuals over those of others. Frequent allusion has been made to this distinction in the course of the work. And as it appears that the claims now under consideration have been contrasted, on the one hand, with those of the *executors* of *tenants*

(*a*) It had been objected in argument, that as the fire engines were annexed to certain sheds, the sheds ought not to be injured by taking away the accessarial engines.

in fee, and on the other, with those of a common *tenant for years*, the present seems a convenient opportunity for noticing the opinions that are entertained upon this subject.

Analogy of decisions between heir and executor.

There is no doubt that the personal representatives of tenant for life or in tail, would have at least the same privilege in removing fixtures against the remainder-man or reversioner, that the personal representatives of the *deceased owner in fee* have against the *heir*. For, in the case of executor and heir, the rule is said to obtain with the most rigor in favor of *the real estate; [*133] and the case of tenant for life or in tail has been called an "*intermediate*" one, between that of heir and executor, and that of landlord and tenant.(*a*) Accordingly, it seems to be generally understood, that any determination in favor of an executor's claim to remove fixtures against an heir, will support a similar claim between whatever parties it may arise.

Analogy of decisions between landlord and tenant.

With respect, however, to inferences to be drawn from decisions in favor of a *tenant for years*, it is certainly a remark often met with in the judgments of the courts, that questions relating to fixtures between the representatives of tenants for life or in tail, and the remainder-man, are to be construed less liberally than in the case of a common tenant and his landlord.(*b*) There does not, however, appear to be any case, the determination of which has proceeded upon a known or recognized distinction between these parties. For it cannot, upon authority, be affirmed of any specific article, that it is removable as between tenant and landlord, but that it is *not* removable as between tenant for life, and the remainder-man. Lord Hardwicke seems to treat the two classes much in the same light, and considers their claims to be founded on similar reasons. And, although he says that the case of a tenant for life is not quite so strong as that of a common tenant, yet many of his arguments are drawn from the close analogy between them. In like manner Lord Mansfield *appears [*134] to consider that the rule in respect of trade holds equally in the one case as in the other. And even in *Elwes* v. *Maw*, where the distinction is most pointedly laid down, the explanation which Lord Ellenborough gives of the leading decisions relating to fix-

(*a*) See this rule applied by Lord Hardwicke, in respect of the cider mill, *Ante*, p. 128.

(*b*) 2 East, 91; 3 East, 51.

tures, proceeds upon a principle that is alike applicable to every description of claimants.(a) However, as this distinction has been so often noticed by the highest authorities, it would not be safe to disregard it in practice. And this general observation may be offered on the subject: that, although everything which belongs to the representatives of a tenant for life or in tail, on the ground of its relation to trade, may be considered *a fortiori* removable by a tenant against his landlord, a decision between these latter parties must not be relied upon as forming a conclusive ground of determination, where the claims of the former individuals are in question. Nevertheless, from the analogy which prevails between the two classes, it will always be found useful, in determining the rights of tenant for life or in tail, to consult any corresponding cases that have been decided between a common tenant and his landlord.

Particular classes why favored.

There does not appear to be any reason assigned in the judgments of the courts, why the general rule of law should be construed most strictly in the case of heir and executor, and most liberally in the case of a common tenant. Perhaps, in addition to the known partiality of the law towards the interests of the heir, the reason may have been, that the courts considered that [*135] it was not equally necessary to relax *the general rule in respect of each description of claimants; and that the objects of public policy might be attained by a slighter deviation from the ancient strictness where one class of individuals was concerned, than in the case of others. For, as there is no community of interest in respect of fixtures between a tenant and his landlord, the tenant would generally be deterred from making expensive improvements for the benefit of his trade, if he were compelled to leave them at the end of his term. Whereas the interests of a tenant for life is often, (as in family settlements,) connected intimately with that of the remainder-man. And in the case of a tenant in fee, the question is merely one of real or personal assets; and whether the property, after his death, is transferred to his real or his personal representative, is a consideration which probably would not at all influence him in making annexations to his freehold.(a)

(a) See *ante*, p. 34.

(a) See the judgments in *Fisher* v. *Dixon*, Dom. Pr. referred to ch. 4, *post*.

General observations.

The practical inference to be deduced from the observations in the foregoing pages is, that in ascertaining whether a particular article set up in relation to trade, forms part of the personal estate of tenant for life or in tail, the first inquiry will be, whether it is governed by the case of the fire engines, or that of the cider mill, decided between the executor and the heir of the deceased owner in fee. The analogy of the different cases between landlord and tenant may next be resorted to; with that caution, however, which, it has been seen, is necessary on such occasions. In every instance, the general principles of trade fixtures, *as they apply to each class of individuals, must be borne in mind. And, lastly, regard must be paid to all those circumstances arising out of each particular case, which have been particularly alluded to in the concluding part of the first section of the preceding chapter. For, from Lord Hardwicke's observations upon this subject, it will appear that, besides other considerations, the question whether part of the real or the personal assets may be materially affected by the *nature* and *construction* of the article, its *value* to the inheritance, and the *injury* its removal will cause to the estate.(*a*) [*136]

It is, indeed, not unreasonable to expect, that, at the present day, a decision of the courts would carry the relaxation in favor of the personal estate, further than to the removal of mere machinery, like the fire engines, before Lord Hardwicke. For, in the time of Lord Hardwicke, *Poole's case* was the only reported authority which expressly recognized the exception in respect of trade fixtures. Whereas, since that period, the general principle of the exception has been gradually extended, and has been acted upon by the courts with increasing liberality.(*b*)[1]

(*a*) As to the effect of *custom* in questions of fixtures, see *ante*, p. 45.

(*b*) It is presumed that the executor will have a *reasonable* time for the removal of fixtures after the death of his testator. *Vide* 22 Ed. IV, p. 27; Cro. Jac. 204. A question, however, might arise, whether if he should be guilty of neglect in taking them away, it would amount to an abandonment of them; or whether, as ar fas respects the claim of the executor, the property will not continue in the nature of personalty.

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[1] The late Chancellor Kent, (*nomen præclarum et venerabile,*) in his valuable commentary on American law, Vol. II, p. 343, states the principles of the Law of Fixtures as generally received and adopted in the United States, with succinctness and perspicuity. He remarks, that "In modern times, for the encouragement of trade

37] *SECTION II.

Of the Right of the Personal Representatives of Tenant for Life or in Tail, in respect of Fixtures put up for Ornament or Convenience.

In the preceding section it was observed, that the only direct authorities relating to fixtures put up by tenants for life, or tenants in tail, were those of *Lawton* v. *Lawton*, and *Lord Dud-*

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and manufactures, and as between landlord and tenant, many things are now treated as personal property, which seem, in a very considerable degree, to belong to the freehold. The law of fixtures is in derogation of the original rule of the common law, which subjected everything affixed to the freehold, to the law governing the freehold; and it has grown up into a system of judicial legislation, so as almost to render the right of removal of fixtures a general rule, instead of being an exception. The general rule which appears to be the result of the cases, is, that things which the tenant has affixed to the freehold, for the purposes of trade or manufactures, may be removed when the removal is not contrary to any prevailing usage, or does not cause any material injury to the estate, and which can be removed without losing their essential character or value as personal chattels. Thus, things set up by a lessee in relation to his trade, as vats, coppers, tables and partitions belonging to a soap boiler, (*Poole's case*, 1 Salk. 368,) may be removed during the term. The tenant may take away chimneypieces, and even wainscot, if put up by himself, (*Ex parte Quincy*, 1 Atk. 477,) or a cider-mill and press erected by him on the land, (*Holmes* v. *Tremper*, 20 Johns. 29,) or a pump erected by him, if removable without material injury to the freehold. *Grymes* v. *Boweren*, 4 Moore & Payne, 143; 6 Bingham, 437. So a building resting upon blocks, and not let into the soil, has been held a mere chattel. *Naylor* v. *Collinge*, 1 Taunton, 21. A post windmill, erected by the tenant, (*Rex* v. *Londonthorpe*, 6 Term. R. 377; also, *Rex* v. *Otley*, 1 B. & Adolph. 161,) and machinery for spinning and carding, though nailed to the floor, (*Cresson* v. *Stout*, 17 Johns. 116,) and copper stills, and distillery apparatus, though fixed, (*Reynolds* v. *Shuler*, 5 Cowen, 323; *Raymond* v. *White*, 7 Cowen, 318,) are held to be personal property. On the other hand, iron stoves fixed to the brickwork of the chimneys of a house, have been adjudged to pass with the house as part of the freehold, where the house was set off on execution to a creditor. *Goddard* v. *Chase*, 7 Mass. R. 432. But in another case in the same court, between mortgagor and mortgagee, the possessor, on the termination of that relation, was allowed to take down and carry away buildings erected by him on the land, and standing on posts, and not so connected with the soil but they could be removed without prejudice to it. *Taylor* v. *Townsend*, 8 Mass. Rep. 411. The tenant may also remove articles put up at his own expense for ornament, or domestic convenience, unless they be permanent additions to the estate, and so united to the house as materially to impair it, if removed, and when the removal would amount to a waste. The right of removal will depend upon the mode of annexation of the article, and the effect which the removal would have upon the premises. *Buckland* v. *Butterfield*, 2 Brod. & Bing. 54. In the case of *Blood* v. *Richardson*, (N. Y. Court of Common Pleas, 1831,) the tenant was held to be entitled to remove a grate and other

ley v. *Lord Warde;* and these, it has been shown, were decided upon the ground of an exception in favor of trade. But besides trade erections, there are also articles of another description,

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fixtures put up by him for his own accommodation; and the law of fixtures, in its application to the relation of landlord and tenant, partakes of the liberal and commercial spirit of the times.

Questions respecting the right to what are ordinarily called fixtures, or articles of a personal nature affixed to the freehold, principally arise between three classes of persons. 1st. Between heir and executor; and there the rule obtains with the most rigor in favor of the inheritance, and against the right to consider as a personal chattel anything which has been affixed to the freehold. (New York R. S. part 2, ch. 6, tit. 3, art. 1, declares that things annexed to the freehold, or to any building, for the purpose of trade or manufacture, and not fixed into the wall of a house, so as to be essential to its support, go to the executor as assets; and that all other things annexed to the freehold, descend to the heir or devisee.) 2d. Between the executor of the tenant for life, and the remainder-man or reversioner; and here the right to fixtures is considered more favorably for the executors. 3d. Between landlord and tenant; and here the claim to have articles treated as personal property, is received with the greatest latitude and indulgence. 4th. There is an exception of a broader extent, in respect to fixtures erected for the purpose of trade, and the origin of it may be traced back to the dawnings of modern art and science; (20 Hen. VII, 13 a and b, pl. 24, in which case the exception was allowed in favor of a baker and a dyer affixing furnaces, or vats, or vessels, *pur occupier son occupations*, but the exception was almost too liberal for the age, and 21 Hen. VII, 27, it was narrowed to things fixed to the ground, and not to the walls of the principal building.) Lord Ellenborough, in *Elwes* v. *Maw*, (3 East. 38,) went through all the cases from the time of the Year Books, and the court concluded, that there was a distinction between annexations to the freehold, for the purposes of trade or manufactures, and those made for the purposes of agriculture; and the right of the tenant was strong in the one case, and not in the other. It was held that an agricultural tenant, who had erected for the convenient occupation of his farm, several buildings, was not entitled to remove them. Had the erections been made for the benefit of trade or manufactures, there would seem to have been no doubt of the right of removal. The strict rule as to fixtures, that applies between heir and executor, applies equally as between vendor and vendee; and manure lying on the land, and fixtures erected by the vendor for the purposes of trade and manufactures, as potash kettles, for manufacturing ashes, pass to the vendee of the land. *Miller* v. *Plumb*, 6 Cowen, 665; *Kirwan* v. *Latour*, 1 Har. & John. 289; *Kittredge* v. *Woods*, 3 N. H. R. 503. The main mill wheel and gearing of a factory, and necessary to its operation, are held to be fixtures and real estate, in favor of the right of dower, as against the heir. *Powell* v. *Monson and Brimfield Manufacturing Company*, 3 Mason R. 459. Such machinery will also pass to the vendee as against the vendor. *Farrar* v. *Stackpole*, 6 Greenleaf, 154. Fixtures go along with the premises to a lessee, if no reservation be made at the time of the contract; (*Colgrave* v. *Dios Santos*, 2 Barn. & Cress. 76,) and the tenant must remove fixtures put up by him, before he quits the possession, on the expiration of his lease. *Lee* v. *Risdon*, 7 Taunt. 183; *Ex parte Quincy*, 1 Atk. 477; 2 Barn. & Cress. 76; *Poole's case*, 1 Salk. 368; *Penton* v. *Robart*, 2 East. 88. If not removed during the term, they become the property of the landlord. *Lyde* v. *Rus-*

which, though fixed to the freehold, may be considered in the nature of personal estate; viz., *matters of ornament and convenience.*

Matters of ornament, &c., personal estate.

The right of the personal representative of tenant for life or in tail to take away matters of ornament or convenience, is to be inferred from the circumstance that fixtures of this description have been allowed to form part of the personal estate of a deceased *tenant in fee.* This inference is warranted by the rule laid down in the preceding section.(*a*) And it will be recollected, that a similar mode of reasoning was used in investigating the claims of a common tenant against his landlord, where, perhaps, the analogy is not quite so direct as in the present case.

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Tapestry, furnaces, grates, &c

*It will not, however, be found, that the claims of the personal representatives of tenant for life or in tail, in matters of ornament, &c., can be carried to any great extent upon the authority of decisions between heir and executor. For, on referring to the cases cited in chap. 4, sect. 2, it appears, that the articles which an executor of a tenant in fee has been held entitled to take, as part of the personal estate, consist merely of

(*a*) See *ante*, p. 132.

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sell, 1 Barn. & Adolphus, 394. The French law coincides with the English in respect to fixtures made for embellishment; the tenant may remove them, provided they can be removed without being destroyed, and without deteriorating the premises. *Lois des Batiments, par Le Page tom* II, 190, 205. It has been strongly questioned by high authority, (*Van Ness* v. *Pacard*, 2 Peters, 137,) whether erections for agricultural purposes, ought not, in this country, to receive the same protection in favor of the tenant, as those fixtures made for the purposes of trade, manufactures, or domestic convenience. They may be necessary for the beneficial enjoyment of the estate, and the protection of its produce; and public policy and the interest of the owner of the soil, are equally promoted by encouragement given to the tenant, to cultivate and improve the estate.

In *Whiting* v. *Brastow*, 4 Pick. 310, the agricultural tenant received a liberal application of the exception, in favor of the removal of fixtures. He was allowed to remove all such improvements as were made by him, the removal of which would not injure the premises, or put them in a worse plight than they were in when he took possession. The case of *Holmes* v. *Tremper*, 20 Johns. 29, may also be referred to, as containing a just and enlarged view of the subject; and the tenant was allowed to remove a cider mill and press, erected for his own use. But the same policy of encouraging and protecting agricultural improvements, will not permit the out-going tenant to remove the manure which has accumulated upon a farm during the course of his term. *Lassell* v. *Reed*, 6 Greenleaf, 222.

hangings, glasses, and tapestry nailed to the walls of a house, *furnaces, grates, iron backs to chimneys*, and such like.(a) These instances, therefore, only establish an indulgence extending to things which subsist as complete chattels in themselves, and which, having been put up as mere ornamental furniture, or for temporary domestic convenience, are not united to the fabric of the house by any permanent or substantial annexation.

Analogy of decisions between landlord and tenant.

It is very questionable whether it would be safe to conclude, that a matter of ornament put up by a tenant for life, &c., might be claimed as personalty by his executor, on the ground that it would be a removable fixture, as between *landlord and tenant.* Upon this subject the reader will find some observations in the concluding part of the last section; and he will collect from thence how far the decisions in favor of a common tenant may be applied to questions between tenants for life, &c., and those in remainder. It would seem, indeed, from some expressions of Lord Hardwicke and Lord Mansfield, mentioned on a *former occasion,(a) that these judges were disposed to give a very liberal construction to the privilege of the personal representative; for they appear to consider that he is entitled to remove things which have been put up for the *general improvement of the estate.* There is, however, no instance in which the courts have acted upon this principle: and it would by no means be safe to rely upon it in any practical question.

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General observations.

In the absence, therefore, of direct authority upon the subject, cases respecting the right of the personal representatives to things set up by tenants for life or in tail, which cannot be brought within the class of trade fixtures, must in general be left to be inferred from determinations between the heir and executor of the owner in fee. And where none of those determinations are in point, the question whether part of the real or personal estate, must be examined with reference to the general principles on which the exception in favor of matters of ornament had been allowed in other cases. It will always, however, be material in the practical application of those principles, to take into con-

(a) See the cases of *Squier* v. *Mayer*, 2 Freem. 249; *Harvey* v. *Harvey*, Str. 1141; and *Beck* v. *Rebow*, 1 P. Wms. 94.

(a) See *ante*, p. 130, *in notis*.

sideration the manner in which the article is constructed and affixed, and the injury which may be occasioned to the reversionary interest by its removal.(*b*)

[*140] *SECTION III.

Of the Rights of Tenants for Life or in Tail, during their Lives, in respect to Fixtures.

THE two former sections have treated of the right of property in fixtures *after the death* of a tenant for life, or a tenant in tail: and the rules laid down were intended to apply only to the claims of the *personal representatives* of those individuals, as against the party who has succeeded to the estate in reversion. But it might be useful to inquire what are the privileges of the tenants themselves in respect of things they annex to their own freehold; and to distinguish between the powers they possess from the general principles of tenure as *incident to their estates*, and those which they derive under the *law of fixtures*.

Right of tenant in *tail*.

And first, with respect to a *tenant in tail*. There can be no doubt that a tenant in tail, by reason of *the nature of his estate*, and independently of the law of fixtures, may remove whatever he has affixed to the premises, without reference either to the mode of its annexation, or the purpose for which it was put up. For a tenant in tail may commit every kind of waste; and a court of equity will in no case whatsoever restrain him by injunction.(*a*) The same observation holds in the case of the [*141] grantee of tenant *in tail; and if there be subsequent grantees, it applies to them also.(*a*) The tenant in tail, however, must exercise his powers during the continuance of his estate; for at the instant of his death they cease;(*b*) and the right which survives to his personal representative, under the law of fixtures, is of a very inferior nature.

(*b*) See the observations in the concluding part of sect. 4, of chap. 2.

(*a*) Perkins, sec. 58; Cas. Temp. Talb. 16; 2 Vern. 251; 3 Mad. 532. And see 1 Cru. Dig. tit. 2, ch. 1, sec. 23.

(*a*) 3 Leon. 121; 7 Bac. Abr. 260.

(*b*) Cru. Dig. *ubi sup.*

Secondly, with respect *to a tenant for life*—although in general he is not permitted to commit waste of any kind, but is impeachable for it, unless the contrary is provided by positive limitation,(c) yet, by inference from the right which it has been seen is possessed by his *executor* after his death, it must be concluded that he is entitled during his life, to remove the same description of things that his executor might claim as part of the personal estate. And since the tenant for life is punishable for every act of waste, it is apparent that his title to sever a thing from the freehold cannot arise from a power *incident to his estate*, but accrues to him by virtue of the law of fixtures only. Right of tenant for life.

By the same mode of reasoning it may be inferred, that if a person is tenant *pour auter vie*, he will have all the rights after the death of *cestui que vie*, that his own executor would have if he were tenant for his own life. Tenant pour auter vie.

But if the tenant for life holds his estate *without impeachment of waste*, his situation is altogether different. For in this case his powers are much more extensive, and, like those of tenant in tail, arise *merely out of his estate. So that, whenever he severs a thing from the freehold, he must be considered to do it by virtue of a right quite independent of the law of fixtures. Still, however, the interest of tenant for life *without impeachment*, so far differs from that of tenant in tail, that if a case may be supposed where the removal of an erection put up by the tenant for life himself, would, from its circumstances, amount to an act of *malicious* waste or destruction, it is conceived that he would not be allowed to take it away.(a) Tenant for life without impeachment. [*142]

The distinction between the rights which belong to a tenant from his not being impeachable for waste, and those which he derives from the law of fixtures, is pointed out by Lord Holt. He observes, in *Poole's case*,(b) (in reference to the taking of fix-

(c) 1 Cru. Dig. tit. 3, ch. 2.

(a) There have been many important decisions upon the restraints imposed in Chancery, on the clause "*without impeachment of waste.*" See *Vane* v. *Lord Bernard*, 2 Vern. 738; *S. C.* Prec. Ch. 454; 1 Eq. Ab. 399; 1 Salk. 161; *Rolt* v. *Somerville*, 2 Eq. Ab. 759; *Packington* v. *Packington*, 3 Atk. 216; *Aston* v. *Aston*, 1 Ves. 264; *O'Brien* v. *O'Brien*, Amb. 107; *Strathmore* v. *Bowes*, 2 Br. Rep. 88; *Marq. Downshire* v. *Lord Sands*, 6 Ves. 107; *Lord Tamworth* v. *Lord Ferrers*, 6 Ves. 419; *Day* v. *Merry*, 16 Ves. 375. See, also, 1 Br. Rep. 166; 2 Atk. 383; 16 Ves. 185; 1 T. R. 56; Com. Dig. tit. Chancery, D. 11.

(b) 1 Salk. 368.

tures in execution,) that the case of tenant for years without impeachment is not like that of a common tenant. In the former case, he allowed that the sheriff could not cut down and sell, though the tenant might; and the reason was, because in that case the tenant had only a bare power without an interest: but a common tenant has an interest as well as a power, as tenant for years has in standing corn, in which case the sheriff can cut down and sell.

[*143] *The rights of a tenant *in tail after possibility of issue extinct*, in removing things affixed to the freehold, may be considered as being the same as those of a tenant for life without impeachment of waste.(a) But the grantee of tenant in tail *apres possibility* is in the situation of a bare tenant for life.(b)

Tenant *apres possibility.*

Tenant by *the courtesy.*

A tenant by *the courtesy* is punishable for waste, like a common tenant for life. So likewise is a tenant in *dower*.(c) And hence the rights of these parties in fixtures will resemble those which belong to tenants for life.

Rights of tenants for life, &c., and of their executors, compared.

From comparing the rights enjoyed by the owners of these several interests and by their personal representatives, it may be seen that the privilege of removing fixtures after the determination of the particular estate, does not arise out of the principle that whatever a testator might have removed in his lifetime, his executor is entitled to remove after his death. For it has been shown, that the rights of tenants in tail, and tenants for life, differ both in nature and degree; whereas the rights of their executors are in all respects similar. The distinction seems to be, that in the case of tenant in tail or tenant without impeachment of waste, the testator removes articles affixed to the freehold simply by reason of a power incident to an estate in land; whereas the right of the executor is communicated to him by the law, with a [*144] view to public benefit and *convenience. The analogy of the doctrine of *emblements*, which is frequently of use in explaining the law of fixtures, seems, in this instance, calculated to mislead.

(a) 4 Co. 62; 11 Co. 79; 1 Roll. Rep. 177; 15 Ves. 419, 430; 2 Freem. 53, 278; 2 Show. 69, 2 Eq. Ab. 757; Com. Dig. Chanc. D. 11; Doct. Stud. Dial. 2, chap. 1.
(b) 3 Leon. 241; Co. Lit. 28, a.
(c) 2 Inst. 145, 301, 353.

Many legal inferences of a curious nature appear to result from the comparison here suggested. Thus, in respect of the rights of the executor of a tenant in tail: it is apprehended, that if his testator leaves issue in tail, the executor will not be entitled to greater privileges as to fixtures against the heir in tail, than the executor of tenant in fee simple may be found to have against the heir in fee; although the heir in tail takes *per formam doni.* Consequently, the right of the executor of a tenant in tail may vary according as it is opposed to that of the heir in tail, or to that of the remainder-man and reversioner. That is to say, *if* there *be* any difference between the right of an executor against the heir in fee simple, and the right of an executor of tenant in tail against the remainder-man and reversioner, the same difference will be found between the right of the executor of tenant in tail against the issue in tail, and that of the executor of tenant in tail against the remainder-man and reversioner. It would not, however, be proper to enter further into questions of this nature, since the legal authorities appear to be wholly silent upon them. The object of the present section has been principally to illustrate the principles laid down in the first chapter of the work; and it is obvious that this illustration could not have been offered at an earlier period, nor until the rights of the several parties whose claims have been examined had been fully developed.

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*SECTION IV. [*145]

Of the Right to Fixtures put up by Ecclesiastical Persons: and herein of Dilapidations.

Removal of fixtures by ecclesiastical persons.

To this chapter may, perhaps, most conveniently be referred another description of cases, in which the right of removing property annexed to land occasionally comes in question; and this is in the instance of persons holding ecclesiastical benefices.

Their rights similar to those of tenants for life, &c.

The claims arising between these persons and their successors, in respect of annexations made by them to the freehold, seem very nearly to resemble those which have been the subject of the preceding sections. And, accordingly, Bishop Gibson in

his Codex,(a) in treating of dilapidations, refers to the cases of *Beck* v. *Rebow*, *Cave* v. *Cave* and *Herlakenden's case*, which have frequently been cited in this treatise. And he says, that "he sets them down as parallel to the disputes which sometimes happen between succeeding incumbents and executors of their predecessors, as to what may or may not be taken away, and how far the taking of them away shall be accounted dilapidation."

May remove hangings, grates, &c.

The questions generally in dispute between ecclesiastical persons, relate to matters of *ornament or convenience* erected in the parsonage-house, &c., by the resident incumbent. And, with respect to things of this description, it is laid down by the author [*146] of *the Ecclesiastical Law,(a) that "If an incumbent enter upon a parsonage-house, in which there are *hangings*, *grates*, *iron backs to chimneys*, and such like, not put there by the last incumbent but which have gone from successor to successor, the executor of the last incumbent shall not have them, but it seemeth they shall continue in the nature of heirlooms: but if the last incumbent fixed them there only for his own convenience, it seemeth that they shall be deemed as furniture, or household goods, and shall go to his executor."

It may, therefore, it is conceived, be laid down, that an incumbent or his executor will, in general, be entitled to fixtures of the same description, as those which form part of the personal estate of a deceased tenant for life, and which have been described in the second section of this chapter.

Ornaments of bishop's chapel do not pass to the executor.

The ornaments of a bishop's chapel are considered by the law as in a manner fixed to the realty, and in the nature of heirlooms. And on the vacancy of a see, they pass to the succeeding bishop, and do not belong to the executors of the deceased party, as in the case of other chattels, the property of a sole corporation.(b)

Removal after resignation, &c.

Where an incumbent voluntarily determines his own interest, either by accepting a benefice, or by resignation, it may be concluded that he would not be allowed afterwards to remove his fixtures. On the same principle that he is not in such a case

(a) Gibson's Cod. Jur. Eccl. p. 752.

(a) Burn's Eccl. Law, p. 304.

(b) *Bishop of Carlisle's case*, Year Book, 21 Edw. III, 48; *Corven's case*, 12 Rep. 106.

*entitled to *emblements*.(a) Perhaps, however, it may be thought, that the right of removal would not be altogether abandoned until the possession of the fixtures is actually relinquished; in conformity with the doctrine laid down in the case of *Penton* v. *Robart* and other cases, as explained in a former chapter.(b) [*147]

Dilapidations.

Dilapidation is a kind of ecclesiastical waste, and is thus defined by Degge in the Parson's Counsellor, p. 134: "A dilapidation is the pulling down, or destroying in any manner, any of the houses or buildings belonging to a spiritual living, or the chancel; or suffering them to run into ruin or decay; or wasting and destroying the woods of the church; or committing or suffering any wilful waste in or upon the inheritance of the church." The species of waste that constitutes *dilapidation* is such as is committed to the rectory house, barns, out-buildings, &c., belonging thereto, and to the woods, hedges and fences of the same;(c) as also to the chancel of the church. These the incumbent for the time being is bound to keep in good and substantial repair. But it is confined to these things, and to fixtures and other annexations which become part and parcel of the freehold: and, therefore, a neglect to cultivate the glebe land in a husbandlike manner does not amount to dilapidation.(d)

Remedy for, by, and against whom.

*The remedy for dilapidation is in its nature similar to that provided against the owners of particular estates. For bishops, rectors, parsons, vicars and other ecclesiastical persons, are considered in questions respecting the waste of lands which they hold *jure ecclesiæ*, as tenants for life.(a) [*148]

An action lies at the common law for dilapidation, upon the custom of the realm;(b) though the right to sue in the temporal courts was not settled till the case of *Jones* v. *Hill*, (3 Lev. 268; *S. C.*, Carth. 224.) It lies also in the spiritual courts by the canon law.(c) And remedies have moreover been provided by

(a) *Bulwer* v. *Bulwer*, 2 Barn. & Ald. 470. See *post*, ch. 4.
(b) See *ante*, p. 97.
(c) 4 M. & S. 188; 2 Ad. & El. 773.
(d) *Bird* v. *Relph*, 4 B. & Ad. 826.
(a) 2 Roll. Ab. 813; Roll. Rep. 86; Amb. 176; 2 Atk. 217.
(b) Lil. Ent. 21, 67, 68; 2 T. R. 630; 3 Bl. Com. 91.
(c) Respecting the proceedings in the Ecclesiastical Court, see Gibson's Codex 751, *et seq.*; 1499, *et seq.*; and 3 Bl. Com. 91.

particular statutes, 13 Eliz. c. 10; 14 Eliz. c. 11; 17 Geo. III, c. 53; 57 Geo. III, c. 99.(*d*) The action may be brought by the successor against the predecessor if living, or if dead, then against his executor, &c. The action against the executor of the *tort feasor* was in this respect an anomaly, and an exception to the general rule that *actio personalis moritur cum persona.*(*e*)

Party suing must have the legal estate.

But if the successor have not the legal estate in the parsonage-house, lands, &c., he cannot bring an action for dilapidations.(*f*) If, however, the successor, being entitled to the legal estate, is [*149] put into *possession of a part of the glebe, it is equivalent to an induction into the whole.(*a*)

On exchange of livings.

Upon an exchange of livings by agreement, after mutual institution and induction, one incumbent may sue the other for dilapidation; and this although neither party at the time may have contemplated any such claim. For they have the same rights as in a common case of presentation; and it cannot be implied in such an agreement that either party was not to be liable for dilapidations.(*b*)

Prebendary.

Sequestrator.

A prebendary, or his personal representative, is liable to the successor for the waste of a prebendal house.(*c*) So also a sequestrator may be sued for dilapidations.(*d*)

Vicar accepting a benifice.

An action for dilapidations lies by the succeeding vicar against his predecessor, who by taking a benefice, had lost his vicarage.(*e*)

Curate with in-

But it has been held, that a curate appointed by the impro-

(*d*) It is said also to be good cause of deprivation, if an ecclesiastical person dilapidates the patrimony of the church. 3 Bl. Com. 91; Degge, part 1, ch. 8, p. 92; *Wood's case*, cited 12 Mod. 237; 3 Inst. 204; Godbolt's Rep. 259.

(*e*) See *post*, part 2, ch. 1, sec. 1.

(*f*) *Wright* v. *Smithies*, 10 East, 409; *Browne* v. *Ramsden*, 8 Taunt. 559; *S. C.*, 2 B. Moore, 612,

(*a*) *Bulwer* v. *Bulwer*, 2 Barn. & Ald. 470.

(*b*) *Downes* v. *Craig*, 9 M. & W. 166. And see this case as to the validity of an agreement to waive a claim for dilapidations under such circumstances.

(*c*) *Radcliffe* v. *D'Oyley*, 2 T. R. 630.

(*d*) *Hubbard* v. *Beckford*, 2 Hag. Consist. Rep. 307; *Whinfield* v. *Watkins*, 2 Phillimore's Rep. 1.

(*e*) Vin. Abr. Dilapidations.

priator, and licensed by the archbishop, but not instituted or inducted, is not liable to be sued for dilapidations.(*f*) Institution or induction.

The examples here offered, will be sufficient to point out the general doctrine of the law concerning dilapidation. The subject has been discussed and considered at great length in a modern case, *Wise* v. **Metcalfe*,(*a*) in the King's Bench; in which the liability of the incumbent and his representatives, and the principle upon which the compensation for dilapidations is to be estimated, are very clearly defined. The rule laid down by the court is, that the incumbent is bound, not only to sustain and repair the parsonage-house, buildings, &c., &c., but even to restore and rebuild them if necessary, according to the original form, without addition or modern improvement. But this obligation extends only to that which is *useful*, not to such as is matter of ornament or luxury; such as papering, whitewashing or painting, except so far as is necessary to preserve the timber from decay. General liability of incumbents. [*150]

For further information on this subject, the reader is referred to the authorities cited in the notes.(*b*)

(*f*) *Pawley* v. *Wiseman*, 3 Keb. 614.

(*a*) 10 B. & C. 299.

(*b*) Viner's Abrid. Dilapidations, with Serj. Hill's notes, in Lincoln's Inn Library. Stillingfleet's Ecclesiastical Cases, part 1, p. 60, *et seq.*; Degge's Parson's Counsellor, by Ellis, p. 134, *et seq.*; Godolphin Rep. 173, *et seq.*; Watson's Complete Incumbent, p. 399; Gibson's Codex, 751, *et seq.*; Burn's Ecclesiastical Law, Dilapidations; Woodeson's Vin. Lect. Vol. III, 205; Cripp's Treatise, 276, *et seq.*; *Bird* v. *Relph*, 2 Ad. & El. 773. And see stat. 13 Eliz. ch. 10; 14 Eliz. ch. 11; 17 Geo. III, ch. 53; 57 Geo. III, ch. 99; 1 & 2 Vic. ch. 106, sec. 41. See, also, as to proceedings for waste, by action, and by prohibition, and injunction, in the second part of this work; also Roll. Rep. 335; 11 Rep. 49 a.

[*151]

*CHAPTER IV.

OF THE RIGHT TO FIXTURES BETWEEN HEIR AND EXECUTOR.—AND HEREIN, OF CHARTERS, HEIR-LOOMS, EMBLEMENTS, ETC.

SECTION I. *Of the Right of the Executor to Fixtures put up for Trade, or for Trade combined with other Objects.*
SECTION II. *Of the Right of the Executor to Fixtures put up for Ornament or Convenience.*
SECTION III. *Of Charters, Heir-Looms, Emblements, &c.*

SECTION I.

Of the Right of the Executor to Fixtures put up for Trade, or for Trade combined with other Objects.

Fixtures between heir and executor.

THERE is a third class of persons, according to the division proposed at the beginning of the second chapter, between whom questions as to fixtures not unfrequently arise; viz., the personal representative and the heir of a tenant in fee. The respective claims of these individuals in things affixed to the freehold remain now to be considered.(a) The simple inquiry is this:—If the owner of the inheritance annexes a personal chattel to the soil, in whom will the right of property in it vest after his decease; *in his personal representative, or in the heir who takes the inheritance in the land?[1]

[*152]

There appears to be more uncertainty in the doctrine of fixtures, as it applies to the case of heir and executor, than to that

(a) For the right to fixtures as between the executor and the *devisee* of a tenant in fee, the reader is referred to ch. 5, *post.*

[1] The rule in New York, as between grantor and grantee, vendor and vendee, mortgagor and mortgagee, and heir and personal representative, is, that whatever is annexed or affixed to the freehold, by being let into the soil, or annexed to it, or to some erection upon it, to be habitually used there, particularly, if for the purpose of enjoying the realty, or some profit therefrom, is a part of the freehold. *Buckley* v. *Buckley*, 11 Barb. S. C. R. 43.

of any other class of persons. And as the difficulty seems in this instance to relate, not merely to the extent of the executor's right, but to the existence of the right itself, it may be proper, before proceeding to an examination of the cases, to consider the early opinions upon this subject, with more attention than was thought necessary when considering the claims of other parties.

Ancient authorities.

In the early periods of the law, it was considered an inflexible rule, that whatever was affixed to the freehold, should descend to the heir as part and parcel of the inheritance. On referring to the authorities, it will be found that so long ago as in the reign of Henry VII, questions between the executor and the heir as to things set up by the owner in fee, came before the courts; and it was then clearly laid down, that the executor was not entitled to anything that was connected with the testator's freehold.

Thus, in the Year Book, 20 Hen. VII, c. 13, trespass was brought by the heir against the executors of an owner in fee for taking away a furnace fixed with mortar to the freehold. And the court held that the taking by the executors was tortious.

In another case, in the Year Book, 21 Hen VII, c. 26, an action was brought against an executor for removing a furnace which was not fixed to the *walls*, but **to the middle* of a house. [*153] On this occasion the court thought that the circumstance of the annexation being to the earth only, would not support the executor's claim to the furnace, though it might give a lessee a right to it. They held, therefore, that the furnace belonged to the heir, and that the action well lay by him. And it was said by Kingsmil, J., that the furnace, after it is fixed to the freehold, is incident to, and becomes parcel of the freehold; and that the heir should have posts fixed to the ground by the ancestor; and so of vats fixed in a brew-house or dye-house: for "when they are fixed they are for the continual profit of the house; and, therefore, it is more reasonable that the heir should have them, to whom the freehold to which they are joined belongs, than the executors, who have nothing to do with the freehold." And Reid, Ch. J., observed, "The executors shall have all manner of chattels which were their testator's; but it is where they are properly in the nature of chattels; therefore, here, when this furnace is fixed, it is, as it were, a thing of a higher nature, and in a

manner is made incident to this, as in the case put of tables dormant, the heir shall have them, and not the executor: and for this reason, that when they are joined to the inheritance, it is agreeable to reason that they should pass with the inheritance."

The same principle appears to have governed the decision of a case reported in Keilwey (88,) Hil. T. 22, H. VII. See also the Year Book, 8 Hen. VII, 12; Owen, 71; Cro. Jac. 129; 4 Rep. 63, 64.(a)

[*154] Text writers.

*The several early text writers, who have treated of the respective claims of the heir and executor, express themselves in exact conformity with these cases. In Swinburne's Treatise of Wills,(a) the author, in stating what matters are to be put into the inventory of the executor, observes, that "glass, annexed to the windows of the house, is parcel of the inheritance, and the executor shall not have it. The like may be concluded of wainscot, howsoever it may be affixed; and if the executors should remove it, they are punishable for the same. And not only glass and wainscot, but any other such like things affixed to the freehold, or to the ground with mortar and stone: as tables dormant, leads, bayes, mangers, &c., for these belong to the heir, and not to the executor."

So, in Shepherd's Touchstone,(b) it is said that an executor or administrator "shall not have the *incidents of a house*, as glass, doors, wainscot, and the like, no more than the house itself; nor pales, walls, staulks," &c. And again, "tables dormant, furnaces of lead and brass, and vats in a brew and dye-house, standing and fastened to the walls, or standing in or fastened to the ground in the middle of the house (though fastened to no wall;)

(a) *Vide*, also, Br. Ab. tit. Chattels, pl. 7, (citing the above cases.) "The same law of paling, and windows, and posts or doors of a house, they shall go to the heir, and yet they are not fixed. But it is not a perfect house without them." It is then added, "the contrary of *glass*, for the executor shall have this; *for the house is perfect without the glass*. Per Pollard, *quod non fuit negatum*. See, also, Br. Ab. tit. Executors, 95; Rolle's Ab. 819; Bac. Ab. Executor, H. 3. Of *glass*, however, Lord Coke observes, that waste may be committed of it, for it is a parcel of the house, and shall descend as parcel of the inheritance to the heir, and the executors shall not have it. 4 Co. 64; *Herlakenden's case*, Went. Of. Ex. 62.

(a) Part 6, sec. 7, p. 758, 7th ed.; Id. 256. And see Godolphin's Orp. Leg. part 2, ch. 14. Law of Test. 380.

(b) Pages 469, 470.

a copper or lead fixed to the house; the doors within and without that are *hanging and serving to any part of the house, shall [*155] not go to the executor or administrator to be divided and sold from the house, albeit the executor or administrator have a lease for years of the house, and by that means hath the house also. But if the glass be from the windows, or there be wainscot loose, or doors more than are used, that are not hanging or the like, these things shall go to the executor or administrator."

The same doctrine is laid down in Wentworth's Office of Executors.(*a*.) And among other things, mill stones,[1] anvils,(*b*) doors, keys and window shutters are enumerated, of which it is said, none of these be chattels, but parcel of the freehold, or thereunto pertaining, and therefore shall not go to the executors.

So, in Noy's Treatise,(*c*) "The heir shall have not only the glass and wainscot, but any other of such like things affixed to the freehold or ground, as tables, dormants, furnaces, vats in the brew-house or dye-house." And again, "all chattels shall go to the executor, as vats and furnaces fixed in a brew-house or dye-house by the lessee, but if they be fixed by tenant in fee, the heir shall have them."

On referring to authorities of a still later date, it will be found that the rule of law is laid down with the same degree of strictness in favor of the heir. Thus, in Comyn's Digest,(*d*) it is said that goods *and chattels annexed to the freehold go to the heir, [*156] as the glass in a window, the doors and locks of a house. And the author refers to several of the foregoing cases. To the same

(*a*) P. 62. This and the work last cited, are attributed to the same author, Mr. Justice Doddridge.

(*b*) As to mill stones and anvils, see *post*, part 2, ch. 11, sec. 1; and the concluding page of this section.

(*c*) Pages 237 and 144, 9th ed.

(*d*) Tit. Biens, B.

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[1] The water wheels, mill stones, running gear, and bolting apparatus of a grist and flouring mill, and other fixtures of the same character, are constituent parts of the mill, and descend to the heir at law as real property, and do not pass to the executor or administrator of the deceased owner of the mill as part of his personal estate. *House* v. *House*, 10 Paige Ch. R. 158.

effect is the doctrine laid down in Back. Ab. Vol. III, p. 63, and in Vin. Ab. Vol. II, p. 166.(*a*)[1]

Sir Michael Forster, in his Report of Crown Cases, in discussing the question whether a cupboard or chest let into a wall is so far a part of the house, as to make the breaking it open to be burglary at common law, or an offence within the statutes respecting housebreaking, considers that in general the annexation of articles of this description makes them part of the freehold, and the property of the heir; though the rule in criminal cases is otherwise, *in favorem vitæ*. He says, "With regard to cupboards, presses, lockers, and other fixtures of the like kind, I think we must, in favor of life, distinguish between cases relative to mere property, and such wherein life is concerned. In questions between the heir or devisee and the executor those fixtures may with propriety enough be considered as annexed to and parts of the freehold. The law will presume that it was the intention of the owner under whose bounty the executor claimeth, that they should be so considered; to the end that the house
[*157] might remain to those, who, *by operation of law or by his bequest, should become entitled to it, in the same plight he put it, or should leave it, entire and undefaced.(*a*)

(*a*) It has been laid down, that dung in a heap is a chattel, and goes to the executor; but if spread upon the land, so that it cannot be taken without taking the soil with it, then it is accounted parcel of the freehold. Sty. 66; *S. C., nomine Carver* v. *Pierce*, Aleyn, 32. See, also, Noy's Max. 119, 9th ed.; *Higgon* v. *Mortimore*, 6 C. & P. 616; *Blewett* v. *Tregonning*, 3 Ad. & El. 554; and the judgment of Littledale, J., and Patterson, J., in that case. In the civil law, dunghills were considered accessaries of the soil.

(*a*) Cr. Cas. 109.

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[1] It has been held, that manure lying about a barn yard, passes by a conveyance of the land, as an incident to the inheritance. *Kittredge* v. *Woods*, 3 New Hamps. 503. The manure referred to in this decision, as well as in the English cases, was, no doubt, manure gathered in from the farm, and produced mainly by the feeding and depasturing of sheep, cattle and horses, on its succulent vegetables and grasses; such manure would partake of the accessarial character imputed to it by the civil law; but, it is apprehended that a different question would be presented, not only between landlord and tenant, but also between vendor and vendee, heir and executor, if the manure were not produced directly or indirectly from the land, but were foreign to the soil, as in the case of guano, poudrette, marl, lime, and other fertilizing appliances, purchased and brought upon the premises, but remaining in heaps, unspread upon the land, at the close of a tenancy, or upon a sale and conveyance, or descent cast.

Such, therefore, was the established rule of law with regard to annexations to the freehold, as observed with great rigor for a long period of time. But this strictness has, in later times, given way to a more liberal construction in favor of the executor and the personal estate in certain cases; and a departure from the ancient rule, with regard as well to fixtures put up for trade, as to those put up for other purposes, has been recognized, to a certain extent, by several modern authorities which are entitled to the highest consideration. Many, however, have hesitated to acquiesce in the propriety of this departure from the general rule. And with respect to the particular class of fixtures which are put up in relation to trade, an important judgment of the House of Lords in a recent case, appears to throw very considerable doubt upon the authorities in question. For in that case it was laid down that the principle upon which a relaxation in favor of trade is founded, is not applicable to questions between the heir and executor of the owner of the inheritance. Modern decisions

Such appears to be the result of the case of *Fisher, App.* v. *Dixon, Resp.*, (Dom. Proc. June, 1846;)(*b*) as far at least as respects machinery put up by the owner of the inheritance for the purpose of the beneficial enjoyment of the land, in the trade and business he carries on there, and which is necessary for such *enjoyment. This decision it will of course be necessary to consider at length. But as it is the first instance in modern times in which this restriction has been expressly laid down, and the effect and operation of this restriction in particular cases remains yet to be determined, it will be proper first to review the several authorities above alluded to, in which a relaxation in favor of the personal estate has been allowed in things partly or wholly essential to trade. [*158]

There is no case to be met with in the reports, in which an exception in favor of trade fixtures was allowed as between executor and heir, until after the indulgence had been confirmed to a common tenant on the authority of *Poole's case.*(*a*) For the first instance in which this principle appears to have been recognized as between these parties, is in a decision of Chief Baron Comyns respecting a *cider mill.* In an action of trover brought Cider mills.

(*b*) 12 Cl. & F. 212.
(*a*) Mic. T. 2 Ann.; 1 Salk. 368.

by an executor against the heir for a *cider mill* let into the ground, and affixed to the freehold, the Chief Baron held at *Nisi Prius*, that it was personal estate, and directed the jury to find for the executor.

This decision was mentioned for the first time in the discussion of the case of *Lawton* v. *Lawton*.(b) Lord Hardwicke, on that occasion, approved of the Chief Baron's determination, and speaks of the decision with great respect; and in the case of *Lord Dudley* v. *Lord Warde*,(c) which came subsequently before
[*159] him, *he said expressly, that his judgments were partly founded upon that authority. The case itself is nowhere reported, nor are the facts particularly mentioned. But the ground upon which it is generally supposed to have proceeded is, that it fell within the rule in favor of *trade* fixtures, and that the mill was to be considered in the nature of personalty, because the making of cider was *a species of trade*.

Such appears to have been Lord Hardwicke's view of the decision. For in one part of his judgment in *Lawton* v. *Lawton*, he says, that in cases between ancestor and heir, as well as between other parties, the law "does admit the consideration of *public conveniency* for determining the question." And moreover he observes, that the rule with respect to fixtures is like that of *emblements*, which, for the benefit of the kingdom, the law gives to the executor, and will not suffer them to go to the heir.

Mr. J. Buller considers the cider mill as on a footing in this respect with other trading fixtures of the same sort, as "brewing vessels, coppers, and fire engines."(a) As does also Lord Kenyon, in the case of *Dean* v. *Allalley*.(b) And so Lord Ellenborough, in *Elwes* v. *Maw*, clearly recognizes the authority of the Chief Baron's decision, and explains it by observing that the cider mill was to be considered as properly an accessary to the *trade* of making cider.(c)

(b) 3 Atk. 14. It was cited by Mr. Wilbraham in argument; and the mill is described as "let very deep in the ground, and is certainly fixed to the freehold."
(c) Amb. 114.
(a) Bul. N. P. 34.
(b) 3 Esp. C. N. P. 11.
(c) 3 East, 54.

The above mentioned decision is the only one to be found, in which it has been expressly held that the *exception on the ground of trade operates in favor of the personal estate against the claim of the heir.(a) [*160]

It has, however, been generally regarded as a valid authority; and is considered to have introduced a rule somewhat restraining the rigor of the ancient law, and establishing that in certain cases erections for the purpose of *trade* may be removed by the executor as part of the owner's personal assets. Both Lord Hardwicke and Lord Ellenborough seem to have been of this opinion. For in the case just cited, of *Lawton* v. *Lawton*, Lord Hardwicke observes, "It is true the old rule of law has indeed been relaxed *chiefly* between landlord and tenant, and not so *frequently* between ancestor and heir at law, or tenant for life, and remainder-man." And with reference to the fire engines in collieries, he says, "I think, even between ancestor and heir, it would be very hard that such things should go in every instance to the heir." And Lord Ellenborough appears to have considered, that the question whether property in dispute was part of the real or the personal estate, depended on the point whether it was properly accessary to the realty, or was the means or instrument of carrying on a *trade.* And although the reasons assigned by these learned judges for the exception in favor of trade differ in some respects,(b) yet it may *be observed that neither of them intimate that the principle of the exception is less applicable to the case of ancestor and heir than to that of any other parties.[1] [*161]

Fire engines in collieries.

(a) In *Stewart* v. *Earl of Bute*, a testator gave all his waggon ways, &c., and all implements, utensils, and things used for the working of his collieries, and *which might be deemed as of the nature of personal estate*, to be held with the collieries. Under this bequest, *fire engines* (among other things) were considered to pass. 3 Ves. 212; 11 Ves. 657. But it does not appear that the question as to the fire engines was viewed with reference to the law of fixtures, the principal point in the case relating to other property.

(b) See *ante*, p. 31.

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[1] In *House* v. *House*, 10 Paige Ch. R. 157. The Revised Statutes of New York, (2 R. S. part 2, ch. 6, tit. 3, art. 1,) provide that "things annexed to the freehold, or to any building, for the purpose of trade or manufacture, and not fixed into the wall of a house, so as to be essential to its support," shall not go to the heir at law, but be considered assets, and go to the administrator, to be applied and distributed as personal property. On this foundation, the administrator claimed the mill stones, bolts, and other machinery of a flouring mill; but Walworth, Ch., held, previous to the adoption of the

Again, in a recent case, that of *Trappes* v. *Harter*,(a) Lord Lyndhurst, C. B., with reference to the property there in dispute, viz., machinery set up in calico printing works, observes, that it was clear that as between landlord and tenant it might be removed by the tenant, if put there by him; "as between heir and executor, it would have passed to the executor. In *Lawton* v. *Lawton*, which was the case of a fire engine in a colliery, Mr. Wilbraham compared it to the case of a cider mill, which is let very deep into the ground, and is certainly fixed to the freehold; and yet Lord Chief Baron Comyns, upon an action of trover brought by the executor against the heir, was of opinion that it was personal estate, and directed the jury to find for the execu-

(a) 2 Cr. & M. 180.

Revised Statutes, a distinction was supposed to exist in relation to what was supposed to be part of the realty, as between landlord and tenant, and as between the heir at law and the personal representative. It also was supposed, that an out-going tenant might be permitted to remove fixtures of a particular description, placed by him on the premises for special purposes, which, as between the heirs and personal representatives of the owner of the freehold, would have descended to the heirs. The legislature, in adopting the provisions of the Revised Statutes, probably intended to put the administrator on the same footing with the tenant, as to the right to fixtures. Such, at least, was the recommendation of the revisers, but it was impossible to define in a short sentence of three lines, what was to be considered a part of the freehold itself, and what were mere fixtures or things annexed, for the purpose of trade or manufactures. And, therefore, we must go back to the common law and decisions of the courts, to ascertain what is a substantial part of the freehold, and what a mere fixture or thing annexed to it. We must also resort to the same sources of information, to ascertain what is to be considered part of a building, and what is in its nature mere personal property, and only annexed temporarily for the purposes of trade or manufactures; and in this case of a flouring mill, it could not have been the intent of the legislature to authorize the personal representatives of the decedent owner of the mill, to strip it of its water wheels, mill stones, bolting apparatus and running gear, leaving to the heir the mere shell, walls, floor partitions and roof. Fixtures of the character enumerated, are not merely conveniences for trade and manufacture, but are essential to the proper enjoyment of the inheritance, and are, therefore, as much part of the freehold, as the building and water power, which, with them, constitute the mill; they constitute part of the realty, and must go to the heir. Thus, the old rule was explicitly carried out, and a construction given to the statutory provision. But in a more recent case, (1850,) it was held that all the erections connected with a cotton factory, and other mills propelled by water power, including the dams, water wheels and gearing, and machinery fastened to the ground or building, are *prima facie* part of the realty, and descend to the heir at law, and do not pass to the administrator as personal estate. They must also pass to the remainder-man, as between him and tenant for life. *Buckley* v. *Buckley*, 11 Barb. Sup. C. R. 43.

tor." And after referring to the case of *Lawton* v. *Salmon*, and to that of *Elwes* v. *Mawe*, his Lordship adds, "Applying these authorities to the case before them, the court were of opinion that the machinery erected for the purposes of trade in a neighborhood where such machinery was commonly removed, and was capable of removal without injury to the freehold, was not to be considered as belonging to the inheritance, but was part of the personal estate."

These learned judges, therefore, as also Mr. Justice Buller and Lord Kenyon, as already noticed, *all concur, both in admitting [*162] the validity of the decision respecting the cider mill, and in assigning the principle upon which they consider this exception in favor of the personal estate to be founded.

Fixtures for trade and other objects combined

But, moreover, according to this view of the authorities, it would appear that there is a further inference to be drawn from the decision respecting the cider mill, in conjunction with the instances with which it is classed by Lord Hardwicke, of the steam engines in a colliery; that is to say, that the executor would be entitled to remove articles of a similar description, where they are erected for a purpose in which both *trade and the profits of land are combined.* Lord Hardwicke, speaking of the cider mill, says, that "it is an extremely strong case," for "cider *is part of the profits of the real estate;* yet it was held by Lord Ch. B. Comyns, a very able common lawyer, that the cider mill was personal estate notwithstanding, and that it would go to the executor." Lord Ellenborough also remarks, that "it is a mixed case between enjoying the *profits of land,* and carrying on a *species* of trade." It is material to attend to this circumstance; because, considered in this view, these several authorities point out two distinct classes of fixtures, which are to be deemed part of the testator's personal estate; and which it will at once be perceived are the same species of things as those which are considered to form personal estate in the case of a deceased tenant for life or in tail.(*a*)

Admitting, however, that a relaxation from the general rule of law has been sanctioned to a certain *extent by the ruling of Ch. [*163] B. Comyns, and the dicta of the learned judges as above cited,

(*a*) See secs. 1 and 3, of ch. 2.

still there is no doubt that the exception contended for must be understood with considerable qualification. For it will be seen from the important decision of Lord Mansfield in the case of *Lawton* v. *Salmon*, that if the property in dispute is absolutely essential to the value and enjoyment of the real estate, it cannot be deemed part of the personal assets. And, moreover, by the recent decision of the House of Lords already referred to, the validity of this exception in favor of the personal estate on the ground of trade, is still further weakened, if not altogether impugned.

Things accessary and essential to the realty not removable.

These decisions, therefore, are now to be considered. In *Lawton, Executor* v. *Salmon*, before Lord Mansfield, (E. 22 G. III,)(*a*) an action of trover was brought by an executor against a tenant of the heir, to recover certain vessels called *salt pans*, which were used in *salt works*, and had been erected by the testator in his lifetime.

Upon a case reserved by consent, it appeared that the salt pans were made of hammered iron, and rivetted together. They were brought in pieces, and might be again removed in pieces; and they were not joined to the walls, but were fixed with mortar to the brick floor. There were furnaces under them, and space for the workmen to go round; there were no rooms over them, but there were lodgings at the end of the wych-houses. It appeared also that they might be removed without injuring the buildings, [*164] *though *the salt works would be of no value without them;* which, with them were let for 8*l.* per week.(*a*)

Lord Mansfield, in pronouncing the judgment of the court, after referring to the cases between landlord and tenant, and tenant for life and remainder-man, proceeded thus: "But I cannot find that between *heir and executor* there has been any relaxation of this sort, except in the case of the cider mills, which is not printed at large. The present case is very strong. The salt spring is a valuable inheritance, but no profit arises from it unless there is a salt work, which consists of a building, &c., for the purpose of containing the pans, &c., which are fixed to the

(*a*) 1 H. Bl. 260, *in notis; S. C.*, 3 Atk. 15, *in notis.* And see the note of this case in Luder on Elect., Vol. II, p. 580.

(*a*) See the description of salt pans in *E. Mansfield* v. *Blackburne*, 6 Bing. N. C. 426.

ground. *The inheritance cannot be enjoyed without them:* they are accessaries necessary to the enjoyment and use of the principal. The owner erected them for the benefit of the inheritance: he could never mean to give them to the executor, and put him to the expense of taking them away, without any advantage to him, who could only have the old materials, or a contribution from the heir, in lieu of them. But the heir gains 8*l.* per week by them. On the reason of the thing, therefore, and the intention of the testator, they must go to the heir. It would have been a different question if the springs had been let, and the tenant had been at the expense of erecting these salt works: he might very well have said, 'I leave the estate no worse than I found it.' That, as I stated before, would be for the encouragement and convenience of trade, and the *benefit of the estate. [*165] For these reasons, we are all of opinion that the salt pans must go to the heir."

Case of *Lawton* v. *Salmon* examined.

From the expressions used by Lord Mansfield in this case, it appears, that although the right of the heir was treated as a paramount one in general, the decision of the case turned rather upon the circumstance of the erection in question being *accessary to the realty*, than upon the unbending nature of the heir's claim. For Lord Mansfield dwells strongly upon the circumstance that the salt pans were erected for the enjoyment of the estate, and as the proper means of deriving the profits of the land.(*a*) It is according to this view of the subject that Lord Ellenborough explains the decision, and endeavors to distinguish it from the case of the cider mill, and other cases, which falls within the class of trade fixtures. He says, "Lord Mansfield does not seem to have considered the salt pans as accessary to the carrying on a trade, but as merely the means of enjoying the benefit of the inheritance." Upon this principle he considers them as belonging to the heir, as parcel of the inheritance for the use of which they were made, and not as belonging to the executor as the means or instrument of carrying on a trade.(*b*)

Compared with the decision of Ch. B. Comyn.

It does not, indeed, appear by what criterion cider mills, salt

(*a*) It is observable that Lord Mansfield in his judgment, refers to several distinct grounds of decision, such as the *intention* of the party in making the erection, and the comparative value of the property to the respective claimants. It is difficult to form an opinion whether any, and what stress is to be laid upon these considerations.

(*b*) *Elwes* v. *Maw*, 3 East, 54.

[*166] pans, or any other similar articles *which are plainly connected both with trade and the profits of land, are to be deemed accessary to the one or the other purpose exclusively. And it is in this particular that the difficulty of reconciling the decisions in question consists. Perhaps it may be thought that the cider mill was not so *indispensably* necessary to the value and enjoyment of the principal as the salt pans; because the produce of the fruit trees might be rendered to a certain degree profitable without the manufacture of cider; whereas the salt brine could not be available at all but by the instrumentality of the salt pans, and the inheritance would have been of no value without the annexation. And this distinction, it may be recollected, is similar to that relied upon by Lord Hardwicke on another occasion. For he assigned as a reason why the fire engines should not pass to the remainder-man, that the colliery might be worked without them, although perhaps more advantageously with them; the enjoyment of the estate with or without the engines being only a question of *majus* and *minus*.

It must be confessed, however, that these distinctions are very refined; and many cases may occur where their application would be attended with much difficulty, and where it might be almost impossible to pronounce what is the precise nature and object of an erection. Thus it would have been very difficult to have concluded, *a priori*, that the manufacture of cider, or the working of a colliery, were not so far the means of enjoying the benefit of the inheritance, as to bring them within the principle
[*167] laid *down in the case of *Lawton* v. *Salmon*.(*a*) And on the other hand, it is almost impossible to say that trade was not in some measure pursued by the instrumentality of the salt pans. Indeed all that can be said upon this subject is, that perhaps these articles were more connected with land and less with trade than the cider mill; and that in erecting and using them, the consideration of enjoying the profits of land predominated over the intention of following a trade, more in the one case than it did in the other.

Although, therefore, the case of *Lawton* v. *Salmon* must be taken to depend, in some measure, on its own peculiar facts, still

(*a*) As to which, see per Lord Mansfield, in *Wells* v. *Parker*, 1 T. R. 38. And see the instances referred to in the case of *Keane* v. *Rogers*, (9 B. & C. 577,) in a question whether brick making was within the bankrupt laws then in force.

the decision must be deemed greatly to weaken the effect and to narrow the extent of the indulgence which the ruling of Chief Baron Comyns would have established. Indeed, it is apparent from Lord Mansfield's expressions, that he himself entertained doubts upon the validity of the latter decision. For he observes that it is a solitary determination at *Nisi Prius;* and (according to the report in 3 Atk. 16,) he conjectured that it was probably founded upon custom.(*b*)

*But the case of *Fisher*, *App.* v. *Dixon*, *Resp.*(*a*) is next to be considered. And in this case not only is the decision as to the cider mill treated as too doubtful in its circumstances to be relied upon as an authority, but, as before observed, the principle itself on which it is supposed to have proceeded, viz., the encouragement to be afforded to trade, which has been so frequently applied to the solution of similar cases, is declared not to be applicable to ordinary questions between heir and executor under the circumstances presented by this case. [*168]

It was an appeal to the House of Lords against a decree of the Court of Sessions of Scotland, arising out of the following case:

J. Dixon, deceased, was an extensive coal and iron mine owner, and was, at the time of his death, engaged in working mines; some of which were his freehold property, having been purchased by himself, while of the rest he was tenant under leases for various terms. A very valuable portion of his property consisted of engines, colliery utensils, rails, &c., employed in the business he carried on. After his decease a question was raised whether these engines, machinery, &c., were to be considered heritable property, and to pass with the estate to the heir, or movable property, and belonging to the executors.

(*b*) In the extract from Comyns' Digest, in the former part of the section, the Chief Baron lays it down, that *mill stones* go to the heir; from whence it might perhaps be inferred, that his opinion was, that in general, mills were part of the inheritance, and could not be separated from it. See, also, Sid. 207, where it is said to have been held by Fenner and Clench, Justices, that the *sails of a windmill* go as parcel of the freehold of the mill to the heir, and not to the executor. As to removing windmills, see Ward's case, 4 Leon. 241; 1 Brod. & Bing. 506; 6 T. R. 377; 6 Mod. 187; 1 B. & Ad. 161.

(*a*) 12 Cl. & Fin. 312. And see the report of the same case in 4 Bell, 286, where the proceedings, before the courts in Scotland, and the able judgments pronounced there, are given at length.

The Lord Ordinary, before whom the cause was appointed to be heard, referred it to one, and afterwards to a second ref-
[*169] eree, to report as to the nature *of the property, &c. The second referee described all the machinery as capable of being moved and replaced, but said that the removal would be very expensive; that it would more or less deteriorate the value of the machinery; that for that reason machinery was often left by the tenant, and its value made a matter of arrangement between him and the landlord; and that some parts, such as the steam engine for pumping the mines, must, if removed, be instantly replaced, or very serious damage would arise to the mines. He also referred to the practice of the country, and said, that the practice at coal and iron works, similar to those of the deceased, was to remove the mechanism of the engine, and other machinery, from one part of the premises to another, as occasion required. The practice, also, was for the tenant, at the termination of a lease, to remove the whole of such engines and machinery, if not previously belonging to the landlord. And in the event of the exhaustion of the mineral field, or any permanent bar arising to the profitable working of the minerals, the whole of the engines and machinery was removed by the tenant, or worker of the field, or by the proprietor, if his property.

The case was afterwards further debated before the Lord Ordinary; and accounts and inventories were put in, from which it appeared that the steam engines and rails were treated and described by the testator as "movable property," but the lands as heritable.

The Lord Ordinary referred the case as one of difficulty to the Lords of the Second Division; and their Lordships determined
[*170] to consult the Lords *of the First Division, and the permanent Lords Ordinary. The majority of their Lordships finally expressed an opinion to the effect, that the machinery which was fixed to the soil, and could not be used without being so fixed for the purpose of the profitable use of the land, was heritable.

From this decision there was an appeal to the House of Lords. On the hearing of the appeal, it was argued for the appellant, that this machinery employed by the testator to work the mines, was used by him in the course of his *trade*, and, therefore, it fell within the principle of law, which, in favor of trade, treats such

articles as personal property. The case of the cider mill, and those of *Lawton* v. *Lawton*, and *Lord Dudley* v. *Lord Warde*, were relied upon as establishing that proposition. *Lawton* v. *Salmon* was distinguished on the ground that the salt pans were a necessary part of the estate itself, which without the pans, would be almost useless to the owner. They were accessaries to the necessary enjoyment of the inheritance; but the machinery in the present case was an accessary, not to the enjoyment of the estate, but to the carrying on of the testator's trade; and the expressions of Lord Ellenborough in *Elwes* v. *Maw*, as to a thing being an accessary to a matter of a *personal nature*, were also cited.

For the respondents it was urged, that the machinery in question rendered the land capable of profitable employment, was erected for this sole object, and for the better enjoyment of the estate. The case of *Lawton* v. *Salmon* was much relied upon, *and it was urged that the facts of the cider mill case were too [*171] imperfectly known to be considered an authority. It was, moreover, insisted, that the principle of the convenience of trade applied only to cases where the erections were not made for the better enjoyment of the land, but merely for the purposes of trade; and where such erections were put up by persons having only a transitory interest in the land, and where they are claimed by the creditors of those persons.

The judgment was pronounced at a subsequent period. Lord Brougham said, that, upon the fullest consideration he had been able to give both to the English and the Scotch authorities which were cited, he entirely agreed with the majority of the court below. He observed, "Great reliance was of course placed upon the case before Lord Hardwicke in our Court of Chancery here, and a similar case which occurred in the Court of Exchequer, I think in Lord Lyndhurst's time.(a) But there was an attempt made to distinguish this case in principle from that, and to show that there was another inconsistent decision in the cider mill case. Now it is a remarkable circumstance, that of that case we have only a very indistinct and unsatisfactory report. We have really nothing that can be called a record of that case. It was cited in the case before Lord Hardwicke; and I must also say,

(a) *Trappes* v. *Harter*, *sup.*, p. 161.

that if the cider mill case is to be taken as it is represented to us, as regards the substance of the case and in its result, my mind
[*172] goes not at all with *that decision. It is contrary, undeniably, to the general principles of our law upon the subject; and if the same question were to arise to-morrow, with the circumstances which are represented to have attended that case, it would not, in my opinion, lead to the same result. Therefore I lay it out of view. We have a most imperfect account of the circumstances, and above all, of the most material circumstances, of how the mill was affixed to the soil. For if a cider mill be fixed to the soil, though it is a manufactory, and erected for the purposes of a manufactory, if it is really *solo infixum*, it is perfectly immaterial whether it is for the purpose of a manufactory, or a granary, or a barn, or anything else. It is a fixture on the soil, and it becomes part of the soil. Can any man say that one of the great brew-houses would belong to the executor, because it is erected for the purpose of a manufacture, and wholly unconnected with the land?" His Lordship therefore recommended that the judgment of the court below should be affirmed.

Lord Cottenham, after some preliminary observations, said, "The principal stress of the argument on the side of the appellant, has been that this is to be protected, because it is necessary for the encouragement of trade that this property should be considered as not belonging to the real estate, but as belonging to the personal estate. The principle upon which a departure has been made from the old rule of law, in favor of trade, appears to me to have no application to the present case. The individual
[*173] who erected the machinery was the owner of the land, *and of the personal property which he erected and employed in carrying on the works: he might have done what he liked with it; he might have disposed of the land; he might have disposed of the machinery; he might have separated them again. It was, therefore, not at all necessary, in order to encourage him to erect those new works which are supposed to be beneficial to the public, that any rule of that kind should be established, because he was master of his own land. It was quite unnecessary, therefore, to seek to establish any such rule in favor of trade as applicable here, the whole being entirely under the control of the person who erected this machinery.

"If, therefore, this be clearly a question of real or personal es-

tate, and if the rule, which in some cases has been acted upon, of making a departure from the established principle in favor of trade, has no application to the present case, what does it come to? Of course we throw out of consideration all the cases which have arisen between landlord and tenant, and between tenant for life and remainder-man, because the departure which has taken place there in some cases has no application to the present case. Then the case being simply this, the absolute owner of the land, for the purpose of better using that land, having erected upon and affixed to the freehold, and used for the purpose of the beneficial enjoyment of the real property, certain machinery, the question is, is there any authority for saying, that, under these circumstances, the personal representative has a right to step in and lay bare the land, and to take away all the machinery necessary for the enjoyment *of the land? Let us consider for a mo- [*174] ment, if that is the principle, to what extent it is to go. It is put by Lord Cockburn(*a*) (and a very strong illustration it is, if the owner of the land should dig a well, and erect machinery for the purpose of using that well, is it competent to the personal representative to come and take away that machinery, and leave the well useless? He thinks it is not. Where is the distinction between the two cases? Such machinery is capable of being taken away with very little, if any, damage to the land. Although, therefore, machinery is, in its nature, generally, personal property, yet, with regard to machinery, or a manufactory erected upon the freehold for the enjoyment of the freehold, nobody can suppose that that can be the rule of law; and so with respect to other erections upon land. It is not necessary to go beyond the present case, which is a case of machinery erected for the better enjoyment of the land itself. The principle probably would go a great deal further; but it is more advisable to confine the observations I have to make to the particular circumstances of this case. There is no case whatever which has been cited in which that doctrine has been recognized, except the one which has been referred to, (the cider mill case,) as to which we really know nothing, except that at the Worcester Assizes, a good many years ago, a cider mill was held to belong to the personal estate. Why it was so held, under what circumstances, and whether it was a cider mill fixed to the freehold or not, we do not know. We know nothing except *that this machine, called a cider mill, [*175]

(*a*) In the Court of Session.

was decided to go to the personal representative. It is impossible to extract a rule of law from a case of which we know so little as that. And with that exception there is a uniform course of decisions, whenever the matter has been discussed, in favor of the right of the heir to machinery erected under the circumstances of the present case; and if the *corpus* of the machinery is to be held to belong to the heir, it is hardly necessary to say, that we must hold that all that belongs to that machinery, although more or less capable of being used in a detached state from it, still if it belongs to the machinery and belongs to the *corpus*, the article, whatever it may be, must necessarily follow the same principle, and remain attached to the freehold." His Lordship, therefore, was of opinion that the judgment should be affirmed.

Lord Campbell also concurred in the same view of the case; and said, he "had no doubt in the world that the property in dispute should go to the heir both upon reason and upon precedent. That none of the arguments respecting the benefit of trade at all apply to a question as between heir and executor, in a case like this, where the owner of the fee being the absolute owner of the land and of the machinery erected upon it, the whole of it is in him, and he may dispose of it as he shall think fit for the benefit of the family.

"Then with reference to the authorities by which we are bound; whatever speculative notions we might entertain with respect to propriety and expediency, if we entertained a different
[*176] opinion upon *that subject, all the cases are quite uniform both in England and in Scotland to show that such property shall go to the heir. The only case the other way which has been referred to is that of the cider mill, where the essential circumstance is left entirely in doubt, whether, in fact, the mill was fixed to the freehold or not."(*a*)

(*a*) His Lordship then proceeds to show, that the cider mill might have been a mere movable, by citing the following instance: he says, "we know that a cider mill is not necessarily affixed to the freehold, a familiar instance of which is given in the Vicar of Wakefield; where, when a match was proposed between one of the Misses Primrose and young Farmer Flamstead, Moses said, 'I hope that if my sister marries young Farmer Flamstead, he will lend us his cider mill.' I take it, that the cider mill there was movable, and was not affixed to the freehold, but might have been carried from the farm of Farmer Flamstead to the vicarage of the Primroses."

The interlocutor was therefore affirmed with costs.

Such is the case of *Fisher*, *App.* v. *Dixon*, *Resp.* And in the present state of the law, more especially *with reference to this [*177] decision and the interpretation it may hereafter receive, it would be extremely difficult to deduce any fixed principle for determining in practice whether a particular article affixed by the owner of the inheritance to his own freehold, for a purpose in which trade is wholly or partially concerned, may be accounted personal estate in the hands of his executor. This difficulty is, moreover, not a little increased, by observing the contradictions which are to be found in some of the judicial opinions upon this subject. For the same judges who have unhesitatingly admitted the authority of the cider mill case, and appear to consider it reasonable that the strict rule of law should be relaxed between ancestor and heir, have, in delivering their opinions, not merely drawn a distinction as to the degree of indulgence to be shown to the executor's claims, but have laid it down in express terms, that the general rule still obtains in its former strictness whenever the heir and the real estate are concerned.

Remarks of the judges upon the rule between heir and executor.

This is observable of some of Lord Hardwicke's expressions. For, in *Dudley* v. *Warde*, in alluding to the exception which prevails in the case of landlord and tenant, he says, "But this does not hold between the heir and executor." (*a*) Again, he

The reader will probably be of opinion, that this illustration of the learned judge hardly meets the case; and that the longings of Moses might have been fully gratified, and the cider mill left in its proper and fixed place. In the cider counties, it is the constant practice of the smaller fruit growers, to carry their fruit to be ground and pressed at a neighboring mill; since to carry the mill to the fruit, would be next to impossible; a small sum is frequently paid for the accommodation, the grower employing his own horse to work the machinery. It is no uncommon thing for a farmer to accommodate his neighbor with the loan of his barn, threshing floor, or rick staddle. And to lend a house to a friend, is an expression which scarcely implies that the house shall be moved from its site to complete the obligation. Certainly, all the eminent authorities who have adopted and approved the Chief Baron's decision appear to have considered that the cider mill in dispute was clearly affixed to the freehold, as it was expressly described to be when the case was first brought forward. Indeed, the question could hardly have arisen at all, had it been otherwise. From the very nature and construction of such mills, and the heavy machinery by which they are worked, it would seem to be impossible that they could be used unless they were very deeply let into the soil. A full and accurate description of the mill house, press, and apparatus of a cider mill, may be seen in Marshall's Rural Economy of Gloucestershire.

(*a*) Amb. 113. And see Lord Hardwicke's observations respecting the fire en-

says, in *Ex parte Quincey*,(*b*) "The rule as to fixtures as between *heir and executor is another thing;* the freehold descending on the heir, the executor cannot enter to take away fixtures without
[*178] *being a trespasser. But there is another rule between landlord and tenant." In like manner Mr. Justice Buller(*a*) remarks, that "The general rule of law is, that whatever is fixed to the freehold becomes part of it, and cannot be moved; but many exceptions have been admitted of late to this general rule as between landlord and tenant, or between tenant for life or in tail and the reversioner: *but the rule still holds as between heir and executor.*" Yet it is evident that Mr. J. Buller did not dissent from the decision of the cider mill case, because he classes the mill among trade fixtures.(*b*) And so, lastly, Lord Ellenborough, who, in *Elwes* v. *Maw*, distinctly recognizes the principle of trade as between heir and executor, yet sets out in his judgment in that case with saying, that the rule between these parties is the general rule, not subject to any exception.(*c*)

General observations.

Under these circumstances, therefore, it has been considered the more desirable course to present to the reader, in the foregoing pages, a comprehensive detail of all the cases and opinions which bear upon the subject, without attempting to lay down any rule as applicable to the solution of particular cases. It may, however, be remarked, that many of the arguments which
[*179] have been adopted by the courts in *support of the claims of other classes of persons in questions of fixtures, seem to be entitled to equal weight in the case of heir and executor. Thus with
Effect of custom. regard to *custom*, it will be recollected that Lord Mansfield observed of the cider mill case, that the decision might probably have been founded on that consideration. And it appears that in other instances between heir and executor, custom has been considered by the courts to form a valid ground for the determi-

gines, in the second question discussed in this case, and upon which Lord Talbot had pronounced an opinion.

(*b*) 3 Atk. 477.

(*a*) Bul. N. P. 34.

(*b*) And see his recognition of the case of *Harvey* v. *Harvey*, as noticed in the next section.

(*c*) 3 East, 51. And see the same position laid down by Lord Mansfield, in *Lawton* v. *Salmon*. See, also, 7 Taunt. 191; 5 Bar. & Ald. 625; 2 Bar. & Cres. 77, 78; 4 Bar. & Cres. 691. It will be seen from the next section, that notwithstanding these general expressions of the courts, the rule has undoubtedly received a relaxation in the case of matters of ornament, &c.

nation of such questions. Thus in 11 Vin. Ab. 154, it is said to have been ruled by Eyre, Ch. B., at Winchester Assizes, 1724, that in Hampshire a granary built on pillars was by custom a chattel, and belonged to the executors. And so, in the case of *Lowther* v. *Cavendish*,(a) which respected the construction of a devise of certain lands and mines, a question was made whether the waggon ways, staiths, and fire engines used in working the mines, passed along with the mines. And the Lord Keeper directed that it should be referred to the Master to inquire whether the timber and other materials laid down for making the waggon ways, and the fire engines placed for the better working of the mines, are *deemed* and *reputed* in the county of Cumberland, and other counties in the north, fixed to the freehold, and pass to the heir or remainder-man, or go to the executor of the party erecting the same. See, also, to the same effect in the judgment of the court in *Trappes* v. *Harter*, 2 Cr. & M. 181; *Sup.* p. 161. With respect to these and other topics arising out of the facts of each particular case, the reader is *referred [*180] to the observations in the concluding part of the section relating to trade fixtures between landlord and tenant.

It should be borne in mind on every occasion, that it is a general maxim of law, that in questions between an heir and an executor, the heir and the real estate are to be preferred; and that it is, moreover, a rule which has itself become almost a maxim, that the inheritance shall never be suffered to descend to the heir prejudiced or imperfect.(1)

Things not actually fixed belong to the executor.

It is scarcely necessary to remind the reader, that if an article appears to be so constructed, that it is, in fact, not let into or united to the land or to any substance previously connected therewith, it then remains in law a mere personal chattel, and as such belongs to the executor, whatever be the magnitude or character of the structure. Thus, where a windmill built of wood had a brick foundation in the ground, but the wood-work

(a) 1 Ed. 99.

[1] "The greatest indulgence in favor of considering particular articles as chattels, is allowed in cases between landlord and tenant; and the greatest rigor in favor of the inheritance, obtains between the heir and executor." Case of the Olympic Theatre, 2 Browne, 285; *Miller* v. *Plumb*, 6 Cowen, 665.

was not inserted into the brick-work, but rested upon it by its own weight alone, and no part of the machinery of the mill touched the ground or the foundation, it was held that the mill was not parcel of the freehold, and nothing more than a chattel; and Bayley, J., said, "In this case the windmill would clearly have gone to the executor and not to the heir."(a)

Unless when constructively annexed.

This rule, however, must be understood as not applying to things which are in their nature incident to the realty, though not actually connected with it, as mill stones, keys, &c., and [*181] other like objects *referred to in a preceding page.(a) In the case of *Fisher* v. *Dixon*, above cited, it was ruled, that if the *corpus* of machinery belonged to the heir, all that belongs to that machinery, although more or less capable of being detached from it, and more or less capable of being used in such detached state, must also be considered as belonging to the heir.(1)

(a) *R.* v. *Otley*, 1 B. & Ad. 161.

(a) P. 155. See *Wood* v. *Hewitt*, 14 Law J. R. Q. B. 248; *Ante*, p. 15.

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[1] In the case of *Walker* v. *Sherman*, (20 Wend. 636,) it appeared that plaintiff and defendant were tenants in common, owners of the fee, seised in equal undivided moieties of a certain factory and machinery therein, a house, barn and twenty acres of land. In making partition of the estate between the parties, some portions of the machinery found in the factory were treated by the commissioners as *personal property*, and not as belonging to *the realty*, and the suit was instituted to set aside their report, but it was not shown that the machinery in question was in any manner affixed or fastened to the building, or to the land, and the report was therefore confirmed. The opinion of the court was delivered by Justice Cowen, whose untiring diligence, thorough research, accurate discrimination, and sound practical views in the application of general principles to particular cases, won for him the high respect of the legal profession; while the frank simplicity of his character, and unaffected kindness of his heart, endeared him greatly to those who were admitted to his friendship.

On this occasion, the learned judge collated and reviewed all the cases of importance in relation to the Law of Fixtures, which had then come under the cognizance of the courts of the several United States, illustrating them by references to the adjudged English cases, and to the elementary works of Amos and Ferard and Gibbons, and other authors.

This review, in connection with the remarks of Chancellor Kent, (Comm. Vol. II, 343,) the clear enunciation by Judge Story, (*Van Ness* v. *Pacard*, 2 Peters, 137; *Ante*, 62, n.,) of the limitations upon the adoption of the common law of England as the common law of America, the construction given to the Revised Statutes of New York by Chancellor Walworth, (*House* v. *House*, 10 Paige C. R. 157; *Ante*, 161, n.,) the slight shades of diversity of opinion, noticeable in *Mott* v. *Palmer*, (1 Comstock, 564, 1851; *Post*, 217, n.,) and some others of the cited cases, form together, sub-

*SECTION II. [*182]

Of the Right of the Executor to Fixtures put up for Ornament or Convenience.

HAVING, in the last section, considered how far the decisions of the courts have proceeded in introducing a deviation from the general rule of law, as between heir and executor, on the ground

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stantially, (with exceptional cases governed by some partial adoption of the civil law or local custom,) the American Law of Fixtures. Any work treating of the subject, if it were to notice these authorities, only with meagre reference, would be so manifestly deficient, that no hesitancy has been entertained in incorporating the essence of them in the notes to this edition; true it is, that they may be better consulted in the various volumes in which they find their appropriate places, but even in our largest cities, few beside the elders of the profession can boast of libraries embracing the lore of ancient days, and the voluminous reports and treatises of the busier age in which we live, and although this want may be in some degree supplied by laborious and time consuming recourse to public libraries; still, there are, throughout the Union, many thousands of acute and zealous professional gentlemen, who cannot command extensive private collections, nor yet avail themselves of resort to a public library; therefore, it is proper, in any American reprint of an authoritative English work, to make ample quotation and use of the decisions of our own courts, and of the arguments on which they rest.

In *Walker* v. *Sherman*, Justice Cowen says: "This question is one between tenants in common, the owners of the fee; and is, we think, to be decided on the same principle as if it had arisen between grantor and grantee, or as if partition had been effected by the parties through mutual deeds of bargain and sale. As between such parties, the doctrine of fixtures making a part of the freehold, and passing with it, is more extensively applied than between any others. As between tenant for life or years and reversioner or remainder-man, all erections by the former for the purposes of trade or manufactures, though fixed to the freehold, are considered as his personal property, and as such, may be removed by him during his term, or be made available to his creditors on a *fieri facias*. On his death, they go to his executors or administrators; yet by a conveyance, they pass to the vendee. *Fructus industriales*, it is well known, always go, on the owner's death, to the executor or administrator, not to the heir; whereas, they are carried by a devise or other conveyance of the land, to the devisee or vendee. *Spencer's case*, Winch's Rep. 51. *Austin* v. *Sawyer*, 9 Cowen, 39. *Wilkins* v. *Vashbinder*, 7 Watts, 378, *and the cases there cited overruling Smith* v. *Johnston*, 1 Pennsylv. Rep. 471, *contra*. The general rule is, that any thing of a personal nature, not fixed to the freehold, cannot be considered as an incident to the land, even as between vendor and vendee. The English cases on this subject are, most of them, well collected and arranged in Amos & Ferard's Law of Fixtures, p. 1, ch. 1, and p. 180, ch. 5, Am. ed., 1830.* For some still later, see Gibbon's Law of Fixtures, 15, ch. 2. The American cases are mostly

* Ferard, 214.

of *trade*, it is in the next place to be inquired, whether the rule has been relaxed between these parties, in respect of articles which have no reference to trading purposes.

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collected in 2 Kent's Comm. 345, (3d ed.) note c. I have said, that as a general rule, they cannot be considered an incident unless they are affixed. This is not universally so. A temporary disannexing and removal, as of a mill stone to be picked, or an anvil to be repaired, will not take away its character as a part of the freehold. Locks and keys are also considered as constructively annexed; and in this country it must be so with many other things which are essential to the use of the premises. Our ordinary farm fences of rails, and even stone walls, are affixed to the premises in no other sense than by the power of gravitation. It is the same with many other erections of the lighter kind about a farm. I shall hereafter have occasion to notice these and a few other like instances of constructive fixtures. I admit that some of the cases are quite too strict against the purchaser; but as far as I have looked into them, and I have examined a good many, both English and American, they are almost uniformly hostile to the idea of mere loose movable machinery, even where it is the main agent or principal thing in prosecuting the business to which a freehold property is adapted, being considered as a part of that freehold for any purpose. To make it a fixture, it must not only be essential to the business of the erection, but it must be *attached to it* in some way; at least, it must be mechanically fitted, so as, in ordinary understanding, to make a part of the building itself.

"The question has been occasionally examined in this court as between grantor and grantee, and in some other relations. The most material cases are *Heermance* v. *Vernoy*, 6 Johns. Rep. 5; *Cresson* v. *Stout*, 17 Johns. Rep. 116, 121; *Miller* v. *Plumb*, 6 Cowen, 665; *Austin* v. *Sawyer*, 9 Cowen, 39; and *Raymond* v. *White*, 7 Id. 319. None of them treat a personal thing as a fixture short of physical annexation; and some are peculiarly strong against the purchaser. The first related to a sale of land, on which was a bark mill, and a stone for grinding bark, to be used in a tannery. The court said, it seems to be the better opinion that the mill was personal property: for the mill stone, with the building covering it, was necessary to the tanning business, a matter of a personal nature. Taken upon that reason, a saw mill or grist mill would hardly have passed by such conveyance; yet it has been settled ever since the Year Book, 14 Henry VIII, 25, that the stones of a grist mill are a part of the freehold, though removed for the purpose of being picked; and they shall pass by a sale of the land. Amos & Ferard on Fixtures, p. 183.* In *Cresson* v. *Stout*, Mr. Justice Platt expressed his opinion, that frames in a factory for spinning flax and tow, though fastened by upright pieces extending to the upper floor, and cleats nailed to the floor round the feet, neither of the machines being nailed to the building, would not be considered as a part of the freehold. He thought, therefore, that they might be levied on as personal property, under a *fi. fa.* against the owner. But the question was not finally decided. Had the judgment debtor been a mere tenant for life or years, the machinery erected by him would doubtless have been subject to execution against him. But he appears to have owned the fee, subject to a mortgage.

"In the case of *Swift* v. *Thompson*, 9 Conn. R. 63, the dictum of Platt, J., was followed with respect to cotton machinery, the posts of which were fastened to the

* Ferard, 218.

At common law the heir was entitled not only to erections which might be deemed essential additions to the inheritance, but to things that had been affixed to the testator's freehold for

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floor by wooden screws set into the floor. By unscrewing, the machinery could be removed without injury to the building. Daggett, J., said, 'We resort, then, to the criterion established by the common law; could this property be removed without injury to the freehold? The case finds this fact. This, then, should satisfy us. The views of the learned judge are sustained by the strong case of *Gale* v. *Ward*, 14 Mass. R. 352. There, the owner of the freehold had carding machines in his woollen factory, 'not nailed to the floor, nor in any manner attached or annexed to the building, unless it was by the leather band which passed over the wheel or pulley, as it is called, to give motion to the machines. This band might be slipped off the pulley by hand, and it was taken off, and the machines removed from time to time, when they were repaired. Each machine was so heavy as to require four men to move it on the floor, and was too large to be taken out at the door. But it was so constructed as to be easily unscrewed and taken in pieces; and the machines were so taken in pieces, when removed by the deputy sheriff.' He had levied upon them as being the personal property of the freeholder, entirely distinct from the realty. Parker, Ch. J., said, 'They must be considered as personal property, because, although in some sense attached to the freehold, yet they could easily be disconnected, and were capable of being used in any other building erected for similar purposes. It is true, that the relaxation of the ancient doctrine respecting fixtures has been in favor of tenants against landlords; but the principle is correct in every point of view.' But see *Union Bank* v. *Emerson*, 15 Mass. R. 159, and *Whiting* v. *Brastow*, 4 Pick. 310. *Gale* v. *Ward* is questioned by Richardson, Ch. J., in *Kittredge* v. *Woods*, 3 New Hamp. R. 506. Some of the doctrine in *McLintock* v. *Graham*, 3 M'Cord, 553, was equally strong with that in *Gale* v. *Ward*. A still was fixed in a rock furnace, which furnace was built inside and against the wall of a house that had been erected for the express purpose of a still. The whole stood on a tract of land sold under a *fi. fa.* against the owner, and the court said the still did not pass. But there was evidence of the still being excepted at the sheriff's sale, and sold to another; so that the question did not rest entirely on annexation. Besides, as to this point, the case was afterwards shaken by *Fairis* v. *Walker*, 1 Bail 540, which I shall presently notice more at large. Hutchinson, Ch. J., in *Wetherbee* v. *Foster*, 5 Verm. R. 142, denied that potash kettles set in brick arches, with chimneys, are real estate. But he cited no authority. The case of *Duck* v. *Braddylb*, 1 M'Clel. 217; 13 Price, 445, treats cotton machinery, placed and fastened for the purposes of stability, by a tenant for years in a manufactory, as subject to be distrained by his landlord for rent, and to be taken in execution against him. This, doubtless, was so under the peculiar circumstances of that case. Mr. Gibbons' remarks upon this case, Gibbons on Fixtures, 20, that such machinery would seem not to be a fixture, if fastened by bolts or screws, and capable of being removed and replaced without injury, either to the machinery or the building. But the question, whether it should be deemed a fixture as between the owner of the freehold and his devisee or grantee could not arise; and, according to the report in Price, the court expressly refused to pass on the question of fixture; according to M'Clelland, they silently omitted to notice the point.'

"The third case which I noticed as decided in this court, was *Miller* v. *Plumb*. This regarded an ashery; and the court recognized and acted on the general dis-

mere ornament, or for the general improvement of the estate, and notwithstanding they might be in themselves of a chattel and movable nature. Thus, it will be recollected, that it was

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tinction, that things in any way fixed to the freehold, *e. g.*, potash kettles set in an arch of mason work with a chimney, though the arches were placed on a platform and not fastened to the building, would pass by a sale of the premises; but it was held, that small kettles, not fixed in any way, though necessary for use in the ashery, would not pass. The distinction between the relation of vendor and vendee, tenant and landlord, was distinctly considered and recognized. See also *Reynolds* v. *Shuler*' 5 Cowen, 323. The same distinction was held by Savage, C. J., in *Raymond* v. *White*. The question there was in respect to a heater used in a tannery, but in no way attached to the building. It was placed in a leach or vat, which latter was detached from the building, except that a small piece of board was tacked with nails to the vat and to the side of the building. But there was no necessity for fastening the vat, and the fastening was of no use, except to keep the side standing while the vat was put together.' The question was really one between landlord and tenant. But Savage, C. J., said the heater could not be considered as part of the realty, even if the person who placed it had owned the tannery. 7 Cowen, 321. In *Kirwan* v. *Latour*, 1 Harr. & Johns. 289, the sheriff had sold under a *fi. fia.* against the owner, *a house and lot with the appurtenances.* This house was built for a distillery; and the implements necessary to carry on the business were on the premises at the time of the sale. In trover by the owner for these, the court held that the pumps, cisterns, iron grating, door, distillery and horse mills passed by the sheriff's deed, but not the joists, vats, buckets, spigots and faucits. The case went on the distinction between things affixed to the freehold, and the mere loose utensils necessary for carrying on the business. The former were held to pass, though Chase, J., conceded that a tenant erecting them might have taken them away. It being as he said, the same as a question between ordinary vendor and vendee, 'everything passed which was annexed to the freehold.' Id. 291. The same thing was said as to the fixtures in an iron foundry. *Hare* v. *Horton*, 5 Barn. & Adol. 715. Park, J., said, '*Prima facie*, a mere conveyance of the foundry would have passed them.' Taunton, J., said, if the deed had only mentioned the foundry, the fixtures would have passed. 'There are many cases which show this.' Patterson, J., said, 'I should be sorry to bring into question the decision of this court, that a conveyance of premises will pass all that is attached to them.' And the *Union Bank* v. *Emerson*, 15 Mass. R. 159, narrows the general reasons of *Gale* v. *Ward*. It holds that a kettle fixed in brick-work in a fulling mill passed to the mortgagee of land, on which the fulling mill stood, though the appurtenances were not mentioned. The court recognized the usual distinction in favor of tenants. So they did in *Whiting* v. *Brastow*, 4 Pick. 310. In *Fairis* v. *Walker*, 1 Bail. 540, the plaintiff sold and conveyed his plantation to the defendant. On this, cotton was grown; and a cotton gin was in a gin-house on the premises attached to the gears. The plaintiff brought trover for the gin; but the court were of opinion that it was a fixture, and passed with the freehold. They said that, as between heir and executor, or vendor and vendee, 'All things which are necessary to the full and free enjoyment of the freehold, and are *in any way* attached to it, are held to be fixtures and pass with it.' In the case of the *Olympic Theatre*, 2 Browne, 279, 285, the court said, 'The permanent stage is so fixed to the freehold, that it ought to be considered as a part of it. But the movable scenery and flying stages are not necessary accessaries to the enjoyment

said in the Year Books and other early cases, that the executor should take nothing but what was properly in the nature of chattels. And that fixed *furnaces*, *tables dormant*, *benches*, the *cover-*

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of the inheritance. They were only necessary for the purposes of theatrical exhibitions, which in this respect must be considered as a species of trade. We are, therefore, of opinion, that they do not belong to the inheritance, and consequently are not subject to the liens, particularly when conflicting with the claims of execution creditors.' The court recognized the distinction in favor of tenants; but they appear to consider the rule as also very strict against the heir when the question arises between him and the executor, which has been said to be the same in respect to fixtures, as between vendor and vendee. Spencer, C. J., in *Holmes* v. *Tremper*, 20 Johns. R. 30. *Miller* v. *Plumb*, 6 Cowen, 665. In the case of the *Olympic Theatre*, the court say, 2 Browne, 285, 'The general rule appears to be, that where the instrument or utensil is an accessary to anything of a personal nature, as to the carrying on a trade, it is to be considered a chattel; but where it is a necessary accessary to the enjoyment of the inheritance, it is to be considered as a part of the inheritance; a rule as broad as that stated in *Heermance* v. *Vernoy;* and which has since been utterly repudiated by the Pennsylvania cases. In *Gray* v. *Holdship*, 17 Serg. & Rawle, 413, a copper kettle or boiler in a brew-house, was held to be a part of the freehold, though very slightly attached; and the court mention the wheels, stones and bolting cloths of a mill as parallel and familiar instances. Id. 415. So the engine by which a steam saw mill is propelled, thus performing the usual office of a water wheel. The court mentioned the gears of a mill as part of the freehold. *Morgan* v. *Arthurs*, 3 Watts, 140. And see *Lemar* v. *Miles*, 4 Watts, 330, S. P. admitted. So a steam engine with all its fixtures, used to drive a bark mill in a tannery, being erected by the owner of the freehold, was held to pass by a sale of the latter. *Ives* v. *Ogelsby*, 7 Watts, 106. In Massachusetts, two stoves fixed to the brick-work of a chimney were held to pass. *Goddard* v. *Chase*, 7 Mass. R. 432. In Gibbons on Fixtures, 17, the learned author remarks that 'In *Horn* v. *Baker*, 9 East, 215, it was not doubted but the distillers' vats supported upon brick-work and timber, but not let into the ground, and vats standing on horses or frames of wood, were goods and chattels; and that stills set in brick-work and let into the ground were fixtures.' He adds that a copper merely resting on a brick-work socket, and a water butt standing on the ground, or a wooden stool, are not fixtures. Otherwise, if the copper were fastened in brick-work.

"A deed conveying a *saw mill*, was held to pass a *mill chain*, dogs and bars, they being in their appropriate places at the time. *Farrar* v. *Stackpole*, 6 Greenl. 154. The great difficulty arose as to the *chain*. This was attached by a hook to a piece of a draft chain, which was fastened to the shaft by a spike. The chain was prepared for being hooked and unhooked at pleasure. The premises in question were here conveyed as a saw mill *eo nomine*. The chain was commonly used in drawing logs into the mill. The court, therefore, thought that it might pass as being essential to the mill, and therefore included in the terms of the conveyance. But, they added, 'we are also of opinion, that it ought to be regarded as appertaining to, and constituting a part of the realty.' See, in connection with this, the remarks of Hart, Vice Ch., near the close of his opinion in *Lushington* v. *Sewell*, 1 Sim. 435, as to what will pass by the devise of West India land by the name of a plantation.

"Certain things are fixtures or not, in their own nature, independent of the fact of annexation. Accordingly, some things which are entirely detached from the

ing of beds, and the like, should go to the heir no less than the trees growing on the land, or the doors and timbers of the house.

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freehold are, notwithstanding, holden constructively to belong to and pass with it. Such cases arise where the fixture is detached for some temporary purpose. We before noticed the removal of a mill stone to be picked as one instance. Amos & Fer. on Fixt., 183.* So, where the stones and irons of a grist mill were accidentally detached by a flood carrying away the main body of the mill, they were still holden to continue a part of the realty, and therefore not to be seizable on *fi. fa.*, at the suit of a creditor, as personal property. *Goddard* v. *Bolster*, 6 Greenl. 427. On the other hand, articles of furniture movable in their nature, are not fixtures, though attached by screws, nails, brackets, &c. Such are hangings, pier-glasses, chimney-glasses, book cases, carpets, blinds, curtains, &c. Gibbons on Fixtures, 20, 21.

Whatever its use or object, however, unless the thing were physically annexed to the freehold in some way, it has in general been held not to pass even as between vendor and vendee. This was held of a stove standing on the floor during winter, the funnel running into the chimney, but being loose, and not plastered in. The stove was up at the time of the conveyance. *Williams* v. *Bailey*, 3 Dane's Abr. 152. So of a padlock and loose boards used for putting up corn in the bins of a corn house, said in *Whiting* v. *Brastow*, 4 Pick. 311. So of a heater, placed loose in the vat of a tannery. Savage, Ch. J., in *Raymond* v. *White*, before cited. The case of the stove has been questioned, as I shall notice hereafter.

"The cases of constructive annexation, where the article is seldom or never corporally attached to the realty, are few, and may be set down as exceptions to the general rule. They are said to be the charters or deeds of an estate, and the chest containing them, deer in a park, fish in a pond, and doves in a dove-house. 2 Com. Dig. Biens, B., 6 Greenl. 157. 3 Dane's Abr. 156. 3 New Hamp. R. 505. The deer, fish and doves are set down by Amos & Fer. on Fixt. 168,* as *heir-looms;* and so of various other animals. *Heir-looms* are a class of property distinct from *fixtures*. But 'the doors, windows, locks, keys and rings of a house will pass as fixtures, by a conveyance of the freehold, although they may be distinct things: because they are constructively annexed to the house.' 'Amos & Fer. on Fixt. 183, *and the books there cited.* Many other obvious cases may be supposed. One is, our ordinary Virginia fence on country farms. No vendor would consider that as mere personal property. And in *Kittredge* v. *Woods*, 3 N. Hamp. R. 503, it was held that manure lying about a barn yard, passed by a conveyance of the land as an incident.

"These instances seem fully to justify the courts when they speak of the great difficulty in fixing on any certain criterion which shall govern all cases. They lead to a strain of reasoning by Mr. Dane, in the 3d vol. of his Abridgement, p. 156, as well by Weston, J., in *Farrar* v. *Stackpole*, by which, if followed out in practice, the machinery now in question might well be considered as a part of the realty; and therefore, the subject of partition. Mr. Dane says, that in all the instances put by him, the articles 'are very properly a part of the real estate and inheritance, and pass with it, because not the mere fixing or fastening to it is alone to be regarded; but the use, nature and intention.' Mr. Dane questions the decision in *Williams* v.

* Ferard, 218.
* Ferard, 199.

Right of executor to fixtures for ornament, &c.

This principle is found to govern all the earlier decisions. But in progress of time, a more liberal construction of the rule appears to have been admitted between these parties. For about

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Bailey, before cited, denying that the stove passed. 3 Dane's Abr. 157. See, also, Amos & Fer. on Fixtures, 154, 155.* And Weston, J., says, (6 Greenl. 157,) 'Modern times have been fruitful of inventions and improvements, for the more secure and comfortable use of buildings, as well as of many other things which administer to the enjoyment of life. Venetian blinds, which admit the air and exclude the sun, whenever it is desirable so to do, are of modern use; so are lightning rods, which have now become common in this country and in Europe. These might be removed from buildings without damage; yet, as suited and adapted to the buildings upon which they are placed, and as incident thereto, they are doubtless part of the inheritance, and would pass by deed as appertaining to the realty. But the genius and enterprise of the last half century has been in nothing more remarkable than in the employment of some of the great agents of nature, by means of machinery, to an infinite variety of purposes, for the saving of human labor. Hence, there has arisen in our country a multitude of establishments for working in cotton, wool, wood, iron and marble; some under the denomination of mills, and others of factories, propelled generally by water power, but sometimes by steam. These establishments have, in many instances, perhaps in most, acquired a general name, which is understood to embrace all their essential parts; not only the building which shelters, encloses and secures the machinery, but the machinery itself. Much of it might be easily detached without injury to the remaining parts, or the building, but it would be a very narrow construction, which should exclude it from passing by the general name by which the establishment is known, whether of mill or factory. The general principles of law must be applied to new kinds of property, as they spring into existence, in the progress of society, according to their nature and incidents, and the common sense of the community. The law will take notice of the mutations of language, and of the meaning of new terms, applied to new subjects as they arise. In other words, it will understand words used by parties in their contracts, whether executed or executory, whether in relation to real or personal estate, according to their ordinary meaning and acceptation.' He then supposes the steam saw mill at Bath, to be conveyed by its name of a *steam saw mill*, and adds, 'If you exclude such parts of the machinery as may be detached without injury to the other parts, or to the building, you leave it mutilated and incomplete, and insufficient to perform its intended operations. The parties, in using the general term, would intend to embrace whatever was essential to it, according to its nature and design; and the law would doubtless so construe the conveyance as to effectuate the lawful intention of the parties.' In aid of these views, undoubtedly, comes the reasoning of Lord Mansfield on the question between the heir and executor, respecting the salt pans. *Lawton* v. *Salmon*, 1 H. Black. 259, n.; *S. C.*, 3 Atk. 16, n. 1. 'The present case is very strong. The salt spring is a valuable inheritance; but no profit arises from it unless there is a salt work, which consists of a building, &c., for the purpose of containing the pans, &c., which are fixed to the ground. The inheritance cannot be enjoyed without them. They are accessaries, necessary to the use and enjoyment of the principal. The owner erected them for the benefit of the inheritance. He could never mean to give them to the executor,' &c. This case shows

* Ferard, 186, 187.

the beginning of the reign of Queen Anne, the courts seem to
[*183] have *considered that articles fixed up merely as *household furniture*, or for purposes of *common domestic convenience*, should not

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how the fire engines in *Lawton* v. *Lawton*, 3 Atk. 12, erected by the tenant for life, and there claimed by and allowed to his executor against the remainder-man, would have been decided, had the question been between the executor and heir, or vendor and vendee. The case of the cider mill fixed in the ground, which was awarded to the executor as against the heir, turned upon a custom. 3 Atk. 14, n. 2; 1 H. Black. 260. Mr. Wilbraham, who argued for the executor and against the remainder-man, in 3 Atk. 14, and who succeeded, still gave his opinion, when the salt pan case came before Lord Mansfield, that it would have been different in respect to the heir; and Lord Mansfield expressly adopted his opinion. These salt pans were very slightly fixed with mortar to the floor, and might be removed without injuring the buildings. A steelyard hung in a machine-house, was considered a fixture. *Rex* v. *Inh. of St. Nicholas*, Gloucester, 262. It was fixed for weighing coal and other things brought to market. Lord Mansfield said it must be annexed to the freehold in the nature of the thing. 'What is the house? It is the machine-house. They are one entire thing, and are together rated by the common known name which comprehends both: and the principal purpose of the house is for weighing. The steelyard is the most valuable part of the house. The house, therefore, applied to this use, may be said to be built for the steelyard, and not the steelyard for the house.' One question was whether the whole machine was ratable as real estate, the steelyard inclusive, for the support of the poor. Messrs. Amos & Ferard, speaking of this case, say, 'the machine which had been rated was clearly affixed to the freehold; and the court seem to rely upon that circumstance in delivering their judgment.' Amos & Fer. on Fixt., 209.* They then advert to another case in Caldecott, 266. It is *Rex* v. *Hogg*. There the sessions rated a building by the name of 'the engine house.' The sessions stated, at first, that 'the engine is not fixed to the premises, but capable of being moved at pleasure.' The whole building and machine were assessed at £36, though the building, independent of the machine, was worth only two guineas. The court directed the case to be restated. They required the sessions to state whether the engine was worked 'with water or horses; whether the house was a dwelling-house, or built for the purpose of receiving the engine, and whether it was used for any other purpose; and in what manner the engine was put up in the engine-house, and what its size and bulk.' The counsel afterwards consented to a set of facts; among them, they agreed 'that the engine was worked generally with water, but frequently by hand; that the building was not a dwelling-house, nor was it erected for the purpose of receiving the engine, but formerly was used for the purpose of turning bobbins, and as a weaver's shop; but is now used for the purpose of carrying on the cotton manufactory, there being in the same building two other engines, one of which was used for the purpose of carding and the other for tumming cotton, which *tumming* is another process of the same manufactory. All the engines are placed on the *floor*, and *no ways annexed or fastened* to the same, but may be moved at pleasure, and carried out and worked in any other place, either by means of water or manual labor, and are not adapted to any particular building. The frame in which the engine stands is twelve feet in length, three feet eleven inches in breadth, and two

* Ferard, 261.

be accounted strictly a part of the inheritance, but should go to the executor in the nature of personalty.

Thus, in the case of *Squier* v. *Mayer*, in Chancery,(a) it was held, by the Lord Keeper, that a *furnace*, though fixed to the

Furnaces, hangings.

(a) 2 Freem. 249.

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feet nine inches in height; the semi-diameter of the largest cylinder, with a small roller at the top rising twenty inches above the frame, the engine sinking in the same, seventeen inches. Still the difficulty as to annexation remained; for one question was whether the machine was ratable except as a part of the real property. Caldecott, in support of the assessment, complained that the return was evasive in merely saying that the engine was not annexed or fastened to the *floor;* whereas it might be fastened to the building in some other way. The opposing counsel said it was placed on the floor like a chair. Ashurst, J., said the case was still imperfect; for it is not stated negatively, that this engine, while it is in a state of working, is not in some way or other fixed to the house. It is only stated that it is not fixed to the *floor:* but it may be fixed to the walls of the building without being fixed to the floor. We can assume no facts on either side; but one should suppose *that it must be fastened in some way*, otherwise, as it is worked by water, the weight of the water must displace it; and if so, it is exactly the case of *The King* v. *St. Nicholas*, in Gloucester. Buller, J., said, speaking of the right to the engine, as between executor and heir, or tenant and landlord, 'If the engine were *clearly distinct*, it would, *in all cases*, go to the executor. But here, all being under lease for a term, all would go to the executor.' Grose, J., said, 'This is an engine-house fitted up with an engine, but whether that is fixed or not is uncertain. The engine is evidently a part of the house: for Walmesley is stated to be lessee of the premises which comprehend the whole, both *house and engine*. I therefore consider this as an entire thing.' Messrs. Amos & Ferard, in commenting upon this case, admit that it is generally considered as deciding that a poor rate may be assessed on mere personal property rented with a building. But they say, the better opinion seems to be that it cannot; and they seem to rely on what Ashurst, J., said, as showing that the engine was probably considered real estate.

"The two last cited cases seem to allow that the slightest permanent annexation of machinery is sufficient to make it a part of the realty; and sustain the reasoning of Weston, J., in *Farrar* v. *Stackpole*, so far as it maintains that the chain was a fixture, because it was hooked for use as a part of the permanent machinery. He said 'the chain is the last in the parts of the machinery, to which the impelling power is communicated, to effect the object in view. Its actual location in the succession of parts can make no difference.' See also the remarks of Amos and Ferard on Fixtures, p. 4, note (*a*) on the case of *Davis* v. *Jones*. A later case is somewhat material. *Colegrave* v. *Dias Santos*, 2 Barn. & Cress. 76, was decided in Tr. Term, 1823, by the King's Bench; *S. C.*, 3 Dowl. & Ryl. 255. It arose between the vendor and vendee of a mansion-house with the lands, called Downsell Hall, in Essex. A conveyance was executed, and the defendant entered into possession. To the house belonged certain articles which were all taken possession of with it by the vendee, and

* Ferard, 4.

freehold and purchased with the house, and also *hangings* nailed to the walls, should belong to the executor, and not to the heir. And it is added in the report, that "this was so determined, contrary to *Herlakenden's case*, (4 Co.,) '*qu'il dit n'est ley quoad præmissa.*'"

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none of them had been excepted either in the particulars of the sale, which was by auction, or the deed of conveyance. They consisted chiefly of 'bells and bell pulls, stoves, grates, blinds, shelves, coppers, a water butt, and other articles of the same kind,' 3 Dowl. & Ryl. 255; or according to 2 Barn. & Cress. Stoves, grates, kitchen ranges, closets, shelves, brewing coppers, cooling coppers, mash tubs, locks, bolts, blinds &c. The plaintiff, the vendor, demanded them all of the defendant, the vendee, by the name of *fixtures;* and, on the latter refusing to deliver them, brought trover; which it was held would not lie for any of them. It was conceded that some of the articles might be movables; in 2 Barn. & Cress., Abbott, C. J., said, 'three or four trifling articles;' what they were is not stated by either report; but the recovery was denied for the whole, inasmuch as there was a general demand and refusal of the whole as fixtures. Maryatt and Platt mentioned *stoves, bell pulls, shelves* and *water butts*, as movables, none of which were permanently attached to the house, or could be considered as part of it. Bayley, J., asked, 'is that so clear? To whom would such articles pass, the heir or executor?' The counsel submitted they would pass to the executor. Best, J., asked, 'Is not *Wynne* v. *Ingleby*, 1 Dowl. & Ryl. 247, a case of ranges, ovens and set pots, taken by a *fi. fa.*, against the owner of the freehold, see *S. C.*, *Nom.*, *Winn* v. *Ingilby*, 5 Barn. & Ald. 625, an express decision to the contrary? Has the vendor a right to dismantle a house in order to remove such articles?' For this colloquy, see 3 Dowl. & Ryl. 256. I cannot learn from the books, that there has been much litigation concerning fixtures as between vendors and vendees of houses since the decision of *Colgrave* v. *Dias Santos*. The rule of that case has lately been held to prevail as between mortgagor and mortgagee. *Longstaff* v. *Meagoe*, 2 Adolph. & Ellis, 167. Yet the English cases are extremely difficult to reconcile, especially those which have arisen between heir and executor, See Amos & Ferard on Fixtures, ch. 4, sec. 2, p. 151.

"There is also considerable conflict in the American cases, as may be seen by those which I have cited. The inconsistency appears to have arisen occasionally from not attending to the distinction maintained by the older cases, between the two relations of vendor and vendee, and tenant and landlord; though sometimes it has also arisen from a difference as to the mode of annexation. In *Powell* v. *Monson & Brimfield Manufacturing Company*, 3 Mason, 459, both the New York and Massachusetts cases were cited, to prove that the wheel and gearing of a cotton factory were not to be considered a part of the freehold, in such sense that the widow could have dower of them. Story, J., was driven to say that the carding machine in *Gale* v. *Ward*, though attached to the wheel by a leather band, was not strictly a fixture; and that the fastening in *Cresson* v. *Stout*, would not make the machinery so. Yet certainly the wheel,* and most, if not all the gearing mentioned and described in 3 Mason, might have been as easily removed as many other things attached to the freehold, which have been treated as movables. The case of the cotton gin, in 1 Bailey, the English steelyard and engine cases cited from *Caldecott & Colgrave* v. *Dias San-*

* Ferard, 189.

This doctrine, however, seems to have been qualified in the subsequent case of *Cave* v. *Cave*, in the same court, (Trin. T. 1705,) where the authority of *Herlakenden's case* was again recog- Pictures, glasses, &c. pier

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tos, with several other English cases, show that a very slight affixing for permanent use is sufficient. The mere hooking of a chain in *Farrar* v. *Stackpole*, was sufficient under the circumstances. Why is the key of a door lock deemed a fixture? Because it makes a part of the permanent machinery used to secure the door. Yet it is kept entirely separate, except when employed in locking and unlocking the door. The mode of annexation must evidently depend on the manner in which the parts of machinery are used. The saws in a saw mill may be in two sets, one at work, while the other is undergoing repairs or filing and sharpening; and either may be easily removed without violence to the frame where they belong; are either to be considered the less fixtures for these reasons? Gibbons says, if a copper fastened in brick-work, have a movable cover, the latter is a fixture; because the copper is the principal thing, and the latter a mere appendage. Gibbons on Fixtures, 17. The case of *Davis* v. *Jones*, 2 Barn. & Ald. 165, has accordingly been thought unexplainable by the principles professedly adopted in the case itself. Certain jibs making part of an entire machine, which was clearly a fixture, were treated as mere personal property. See Amos & Ferard on Fixtures,* p. 4, note (*a*).

The ancient distinction, however, between actual annexation and total disconnection is the most certain and practical; and should, therefore, be maintained, except where plain authority or usage has created exceptions. The reasoning of Mr. Dane, and of the learned judge in *Farrar* v. *Stackpole*, before cited, while it cannot be too extensively applied to modern machinery in subordination to that distinction, does not appear to be sustained by authority, when it seeks to raise a general doctrine of constructive fixtures, from the moral adaptation of what is in fact a mere movable, to the carrying on a farm or factory, &c., however essential the movable may be for such purpose. The argument in that shape proves too much. Such adaptation and necessity might be extended even to the use of domestic animals on a farm, and certainly to many implements in a manufactory which could never be recognized as fixtures, without utterly confounding the rule by which the rights of the *heir* or the *purchaser* have been long governed. The judicial application of the rule is already sufficiently nice and difficult. As between heir and executor, it was partially altered by 2 R. S. 24, sec. 6, sub. 4, 2d ed. By this, "things annexed to the freehold, or to any building, for the purpose of trade or manufacture, and not fixed into the wall of a house, so as to be essential to its support," pass to the executor. And see 3 Id. 638, 9, (2d ed.,) Appendix. This provision certainly indicates anything but a legislative intent to enlarge the rights of freehold. Taken literally, it would strip the heir of the wheels, gearing, and all the other machinery fixed in the ordinary way to a mill or manufactory inherited by him. It is certainly contrary to the ancient common law; (see 11 Vin. 167, Executor, (Z) pl. 6; Amos & Fer. on Fixt. 133, and cases there cited on to p. 138;) and seems to derive very questionable countenance from more modern authority. *Squire* v. *Mayer*, a short note of which is given in 2 Freem. 246, goes the farthest towards our statute rule; but how very doubtful this and some other modern causes of the like tendency are, may be seen by Amos & Fer. on Fixt., ch. 4, sec. 2, p. 151,† and cases there cited.

* Ferard, 4.

† Ferard, 152, 188.

nized.(*b*) For upon a question whether some *pictures* belonged to the heir or to the executor, the Lord Keeper was of opinion, "that although pictures and glasses, generally speaking, were

(*b*) 2 Vern. 508; Law of Test. 380; 3 Bac. Ab. 63. See the decree of the court in this case, noted in Wms. Executors, p. 517, 2d. ed.

See, also, Gibbons on Fixt. 11, 12. As between devisee and executor, the suggestion of Vice-Chancellor Hart, in *Lushington* v. *Sewell*, 1 Sim. 435, 480, seems to go beyond any adjudged case in favor of the freehold. He inclined to think that the devise of a *West India estate* would pass the incidental stock of slaves, cattle and implements; because such things are essential to render the estate productive; and denuded of them, it would be rather a burden than a benefit.

It is, I think obvious, not only from our statute, but from both the English and American cases, that there is a stronger tendency to consider fixtures for the purposes of trade as mere personal property, than we find either in regard to those of an agricultural or domestic character. See Gibbons on Fixt. 10, 11. Amos & Fer. on Fixt. 138,* ed. of 1830. By several English cases cited in these treatises, the executor was, in respect to trade fixtures, preferred in his claim against the heir, though the doctrine is far from being settled. By several American cases, we have seen that such fixtures were denied to have passed, even as between the vendor and vendee of the freehold; though such a rule derives no countenance, or certainly very little from any English authority; and seems to be against the weight of American adjudication.

On the whole, I collect from the cases cited, and others, that, as a general rule, in order to come within the operation of a deed conveying the freehold, whether by metes and bounds of a plantation, farm or lot, &c., or in terms denoting a mill or factory, &c., nothing of a nature personal in itself will pass, unless it be brought within the denomination of a fixture; by being in some way permanently, at least, habitually attached to the land, or some building upon it. It need not be constantly fastened. It need not be so fixed, that detaching will disturb the earth, or rend any part of the building. I am not prepared to deny, that a machine movable in itself, would become a fixture from being connected in its operations by bands, or in any other way, with the permanent machinery, though it might be detatched, and restored to its ordinary place, as easy as the chain in *Farrar* v. *Stackpole*. I think it would be a fixture notwithstanding. But I am unable to discover, from the papers before us, that any of the machines in question before the commissioners were even slightly connected with the freehold. For aught I can learn, they were all worked by horses, or by hand, having no more respect to any particular part of the building, or its water wheel, than the ordinary movable tools of such an establishment. These would have their common place, and be essential to its business. So, a threshing machine, and the other implements of the farmer. But it would be a solecism to call them fixtures, where they are not steadily, or commonly attached, even by bands or hooks, to any part of the realty. The word *fixtures* is derived from the things signified by it being fastened, or *fixed*. "It is a maxim of great antiquity, that whatever is *fixed* to the realty, is thereby made a part of the realty, to which it adheres, and partakes of all its incidents and properties." Toml. Law Dict. Fixtures. Hence, *fixtures* are defined to be "chattels or articles of a personal nature,

* Ferard, 159.

part of the personal estate, yet, if put up *instead of wainscot*, or where otherwise wainscot would have been put up, they should go to the heir. The house ought not to come to the heir maimed and disfigured. *Herlakenden's case*, wainscot put up with screws, shall remain with the freehold."

Glasses fixed with screws.

But there was another determination almost immediately after the foregoing case, which in its *principle seems to carry the doctrine of *Squier* v. *Mayer* to a very considerable extent. A bill was filed in the Court of Chancery, upon a covenant made by a testator to convey a house and *all things affixed to the freehold thereof.* And the Lord Keeper held,(a) that *hangings and looking-glasses* fixed to the walls of a house with nails and screws, and *which were as wainscot, there being no wainscot underneath*, were only matters of ornament and furniture, and not to be taken as part of the house or freehold. And he was of opinion that for this reason they were not within the testator's covenant. [*184]

According, therefore, to this construction it may be inferred, that in the opinion of the Lord Keeper, hangings and glasses fixed up with screws and nails, and even if put up in lieu of wainscot, are to be deemed part of the personal estate. For a covenant of this nature may properly be considered to pass to the covenantee everything which an heir would take by descent.(b)

(a) *Beck* v. *Rebow*, 1 P. Wms. 94; An. 1706; 15 Vin. Ab. 43; 2 Ad. & El. 37.

(b) See *Birch* v. *Dawson*, cited *post*, ch. 5, where looking-glasses, nailed to the walls, were deemed *fixed furniture*.

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which have been affixed to the land." Id. "It is an ancient principle of law," says Weston, J., in *Farrar* v. *Stackpole*, "that certain things, which, in their nature, are personal property, when *attached* to the realty, become part of it as *fixtures*." And see Amos & Fer. on Fixt., ch. 1, p. 1.

It is not to be denied, that there are strong *dicta*, and perhaps we may add the principle of several adjudicated exceptions, upon which we might, with great plausibility, declare the machines in question, so essential to the purposes of the manufactory, although entirely dissociated with the freehold, a fit subject for entering into the list of constructive fixtures. The general importance of the rule, however, which goes upon corporal annexation, is so great, that more evil will result from frittering it away by exceptions, than can arise from the hardship of adhering to it in particular cases.

Nor can we possibly say, as in the case of the steelyard or engine in the cotton manufactory, cited from Caldecott, that the machines in question must, in the nature of the thing, be annexed to the freehold. It appears, by the papers before us, that they have been used with the factory for several years, and have passed with it in conveyances. But the affidavits do not state that they are affixed in any way.

Tapestry, iron backs of chimneys.

A decision proceeding upon similar principles occurred afterwards at common law. The litigating parties in this case were the heir and the executor of the deceased owner of the land, and the determination is expressly in favor of the personal estate. In the case of *Harvey* v. *Harvey*,(c) in an action of trover brought by an executor against an heir, Ch. J. Lee held, that *hangings*, [*185] *tapestry* and *iron* **backs to chimneys*, belonged to the executor, who recovered accordingly against the heir.(a)

Of the above decisions it is to be observed, that the case of *Beck* v. *Rebow* has frequently been cited and approved of by the courts on subsequent occasions. And the case of *Harvey* v. *Harvey* is expressly recognized as law by Mr. Justice Buller in his treatise on the law of *Nisi Prius*.(b)

Decisions not uniform as to the executor's claims

The courts, however, have in several modern instances shown a very great reluctance to acquiesce in the principle of these determinations. Lord Mansfield, in the case of *Lawton* v. *Salmon*,(c) speaks as if the relaxation in favor of carrying away matters of ornament existed only as between landlord and tenant. And Lord Ellenborough appears to have been under the same impression.(d) In a late case, also, it was said by the court of

Set pots, ovens, ranges.

King's Bench, that certain articles consisting of *set pots*, *ovens* and *ranges*, fixed up by the owner of a house, would go to the heir and not to the executor.(e) And in another case, in which

Stoves, closets, shelves, &c.

there was a question whether *stoves*, *closets*, *shelves*, *brewing vessels*, *locks*, *blinds*, *&c.*, passed to the purchaser of a house, upon a sale and conveyance of the house, the court, said,(f) that some of the articles, viz., the stoves, cooling coppers, mash tubs, water tubs and blinds, might be removable as between landlord and tenant, but would not belong to the executor, but to the heir, [*186] and were as between *those persons parcel of the freehold. And so, on a still more recent occasion, it was said by Mr. Justice

Grates, cupboards.

Bayley, that *stoves*,[1] *grates* and *cupboards*, were parcel of the free-

(c) 2 Str. 1141.
(a) As to *hangings*, see *ante*, p. 82, *in notis*.
(b) Bul. N. P. 34 a.
(c) 1 H. Black. 260.
(d) *Elwes* v. *Maw*.
(e) *Winn* v. *Ingelby*, 5 Bar. & Ald. 625.
(f) *Colegrave* v. *Dias Santos*, 2 Bar. & Cres. 76.

[1] In *Goddard* v. *Chase*, (7 Mass. 432,) stoves fixed into the brick-work of the

hold, and though they might be removed by a tenant during the term, yet they would go to the heir and not to the executor.(*a*)

According, therefore, to these authorities, the courts seem to consider that the old rule of law has received only a very partial relaxation in the case of heir and executor.(*b*) It is, however, material to observe, that in the cases before Lord Mansfield and Lord Ellenborough, the conflicting claims of the heir and executor did not come into discussion; and therefore, the effect of the decisions in favor of the personal estate was not particularly adverted to in their judgments. And so with respect to the cases last referred to, the question as to the heir's claim arose there only collaterally, and was not, as in *Squier* v. *Mayer* and *Harvey* v. *Harvey*, the express subject of determination.

Opinions of text writers.

There is, indeed, much uncertainty as to the real extent of the executor's claims in these cases; and as the authorities are so few in number, and appear, moreover, so contradictory to each other, it may be useful to see how these questions have been treated by the modern text writers.

Chimneypieces, pumps, &c.

Mr. Justice Blackstone in his Commentaries, (Vol. II, p. 428.) speaking of the doctrine concerning heir-looms, says, "On the other hand, by almost general *custom, whatever is *strongly affixed to the freehold* or inheritance, and cannot be severed from thence without violence or damage, *quod ab ædibus non facile revellitur*, is become a member of the inheritance, and shall therefore pass to the heir; as *chimneypieces*, *pumps*,(*a*) *old fixed or dormant tables*, *benches*, and the like." [*187]

(*a*) *R.* v. *Inhabitants of St. Dunstan*, 4 Bar. & Cres. 686. As to cupboards, see *sup.* p. 76.

(*b*) And see the observations upon this subject in the last section.

(*a*) As to *pumps*, that these are removable by a *tenant*. See 6 Bing. 437; *Sup.* p. 180.

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chimneys of a house, were held to be fixtures, so that they could not be removed by the owner of the house, which had been levied on under an execution against him; *aliter*, *ut semble et sub modo*, as between landlord and tenant. *Rex.* v. *Inhab. of St. Dunstan*, 4 Bar. & Cres. 636. The case of *Goddard* v. *Chase*, is distinguishable from that of *Freeland* v. *Southworth*, 24 Wend. 191. Inasmuch as in the former, the stoves were set in the chimneys, so that it was necessary to pull down the fireplaces in order to get them out; while in the latter, they could be removed without injury to the building.

Wainscots, posts, &c.

In Wooddeson's Vinerian lectures, it is said,(*b*) that "many things which appear to be of a personal or chattel kind, nevertheless shall descend to the heir, and not go to the executor, such as things annexed and fixed to the freehold, which in some measure are *necessary for the enjoyment* of the inheritance, and which greatly contribute to its value, as *wainscot* in a house, and the *posts and rails* of an enclosure."(*c*)

Tables, ovens, jacks, clock cases &c.

And, in Burns' Ecclesiastical Law,(*d*) in allusion to the case of *Harvey* v. *Harvey*, it is observed that the law seemeth now to be holden not so strict as formerly: and if these things can be taken away without prejudice to the fabric of the house, it seemeth that the executor shall have them; as *tables*, although fastened to the floor; *furnaces*, if not made part of the wall; *grates*, *iron ovens*, *jacks*,(*e*) *clock cases*, and such like, although fastened to the freehold by nails or otherwise."

General observations.

[*188]

*The result of the several opinions and authorities upon this subject appears to be, that there are some *species of articles which, as being put up merely for purposes of ornament, or common domestic use, may be accounted part of the testator's personal assets. And if the cases of *Squier* v. *Mayer*, *Beck* v. *Rebow* and *Harvey* v. *Harvey*, are to be considered still unimpeached, these decisions establish an important modification of the ancient doctrine, and seem to carry the exception almost as far as in the case of landlord and tenant. Nevertheless, the observations of the judges in the several cases which have been referred to, must be considered as restrictive of any *general* right to fixtures on the part of the executor: and indeed it would seem that much of the reasoning upon which the decision in the case of *Fisher* v. *Dixon* (cited at length in the preceding section) was founded, applies to the case of annexations made by the owner of the fee for purposes of *ornament* or *convenience*, as strongly as to the case of annexations by him for purposes of trade. It may, at all events, be laid down as a clear rule in all cases,(*a*) that if an article put up for ornament or convenience is so annexed to the freehold that the inheritance would be greatly deteriorated by its sever-

(*b*) Vol. II, p. 379.
(*c*) As to rails, fences, &c., see *sup.* p. 38.
(*d*) Vol. IV, p. 301, 7th ed.
(*e*) As to *jacks* being parcel of the freehold, see 1 Sid. 207.
(*a*) *Vide*, 3 Bac. Ab. 63.

ance, it must be considered an essential part of the freehold, and the executor will not be entitled to take it as part of the personal estate.(*b*)

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*SECTION III. [*189]

Of Charters, Heir-looms, Emblements, &c.

THERE are certain species of things connected with the subject of the present treatise, which, like fixtures, are of a very technical character, and partake partly of a *real* and partly of a *personal* nature. It is proposed to investigate the doctrine relating to property of this mixed nature. And as the questions to which it gives rise usually occur between heir and executor, the present seems the proper place for considering it. And *first*—

Of Charters.

Charters, &c. pass with the land.

Charters or deeds relating to the inheritance, are the evidential muniments of the estate. They are, as Lord Coke expresses it, the *sinews* of the land. On this account, the law provides that they shall always follow the land to which they relate, and shall vest in the heir, and pass to the alienee, as incident to the estate, *et ratione terræ*.(*a*)

If the land is forfeited, (as for treason or felony,) the charters or evidences which belong to the land are also forfeited.(*b*)

*From this, their strict relation to land, they have even been accounted for some purposes not to be chattels.(*a*) And, therefore, it is said, that if a man gives and grants *omnia bona et catalla*, his charters concerning his land shall not pass by these words.(*b*) They are, nevertheless, so far in the nature of per- [*190]

(*b*) For other considerations affecting the class of fixtures treated of in this section, see *ante*, ch. 2, sec. 4.

(*a*) 20 H. VII, 13; 21 H. VII, 26; Co. Lit. 6 a; 11 Co. 50, Liford's case; Fitz. Nat. Brev. Detinue; Com. Dig. tit. Charters, A. See, also, 1 Co. 1; Moor. 687; 3 Bing. N. C. 680.

(*b*) Staun. Pl. Cor. lib. 3, ch. 26.

(*a*) Noy's Maxims, p. 359, 9th ed. *Vide*, 2 Roll. Ab. 108; Ley Gager, E. F.; 11 Vin. Ab. 173.

(*b*) Perkins, sec. 115; Shepp. Touch. ch. 5, p. 97; Br. Ab. Chattels, pl. 9; Roll.

sonalty, that an action of trover, detinue or trespass *de bonis asportatis*, will lie for them.(*c*)

Chest containing charters.

There seems formerly to have been some difference of opinion, with regard to the *box* or *chest* in which charters are preserved, whether this also should pass to the heir; and distinctions have even been taken as to the box being sealed or locked, or otherwise.

In Rolle's Abridgement(*d*) it is said, that if charters are in a chest, the executors shall have the chest, and the heir the charters: and if the chest *is shut*, the heir shall have the chest also; but if it is not shut, the executors shall have the chest. And Swinburne lays it down,(*e*) that the box *ensealed*, though the same be not affixed to the freehold, yet, because it contains those things which belong to the heir, it also belongs to the heir, and not to the executors.

[*191] *But of these distinctions, the author of the Law of Testaments observes, that they seem not to be well taken. For, he says if it be a box *purposed* for the keeping of the deeds, the heir ought to have it, whether locked or open; on the other hand, if it be a box designed for other use, as for the keeping of linen, it cannot be said to be appurtenant to evidences, although some be in it, for so be many other things also; or perhaps it may be a or cabinet of great value, surely this shall not go to the heir, chest when perhaps there is not personal estate sufficient to pay the testator's debts.(*a*)

In like manner in Wentworth's Office of Executors it is said, that the distinctions taken in the old cases are not grounded on good reason; and, in Comyns' Digest, it is laid down, in general terms, that the chest passes to the heir.(*b*)

Ab. Grant. X. The law considers them as partaking so much of the nature of land, that larceny at common law cannot be committed of them. 1 Hale, P. C. 510; Leach's C. L. 13. But see 1 Hawk. 142, and 10 E. IV, 14, where a different reason is suggested for this rule. See now the stat. 7 & 8 Geo. IV, ch. 29, sec. 21, *et seq.*; *R.* v. *Walker*, R. & M. 155. Charters are not distrainable as chattels.

(*c*) Com. Dig. Charters, D.; Action upon this case, Trover, C.; Trespass, A. 1. *Vide*, 3 B. & C. 225; 2 Br. & B. 650.

(*d*) Roll. Ab. tit. Exors. U; Id. tit. Ley Gager, F.

(*e*) Treat. on Wills, p. 759.

(*a*) Law Test. 381; *Vide*, 4 Burn's Ecc. Law, 304.

(*b*) Com. Dig. Biens, B., Charters, A. See upon this subject, 36 H. VI, p. 27;

Deeds relating to personalty.

But it is to be observed that those deeds and writings only are here intended, which concern *land*, and relate to *the freehold and inheritance*. For such as relate to *personalty*, as terms of years, goods, &c., will belong to the personal representative, together with the chattel interest to which they refer.(c)

Deeds pledged.

So, also, if the writings of an estate are pawned or pledged for money lent, they are considered as chattels in the hands of the creditor, and, in case of his *decease, they will go to his personal representative, as the party entitled to the benefit accruing from the loan.(a) [*192]

Of Heir-looms.

Another instance in which property may pass to the heir, although it is in itself of a personal nature, is in the case of *heir-looms*.

Heir looms go with the estate by custom.

Heir-looms, chiefs or principals, are those things which have continually gone with the capital messuage,(b) and which, upon the death of the owner, descend to the heir along with and as a member of the inheritance, *according to the special custom of some countries*.

Are personal chattels.

An heir-loom, in its strict and proper sense, is always some loose personal chattel, such as would ordinarily, and but for the particular custom, go to the personal representative of the deceased proprietor.(c)

Lord Holt, indeed, is reported to have said, that goods *in gross* cannot be heir-looms, but that they must be things *fixed to*

Finch. book 1, p. 16; Plowd. p. 323; Br. Ab. Chattels, 18; Roll. Ab. Grant, X. pl. 5; Godolph. Orp. Leg. part 2, ch. 13; Shep. Touch. p. 470; Noy's Max. 239, 9th ed. It is said, that larceny cannot be committed of the box in which charters are kept. 1 Hale, 510; 3 Inst. 109.

(c) Off Ex. 63; 3 Bac. Ab. 65.

(a) Shep. Touch. 469; Tollers' Executors, 231. To whom the possession of deeds appertains in different cases, see *upon a warranty of title, Lord Buckhurst's case.* 1 Co. 1; Harg. Co. Lit. 6 a. N, 4; in case of estates *for life or in tail*, Finch. B. 1, ch. 3, p. 23; Id. B. 2, ch. 2, p. 88; 2 P. Wms. 471; in case of a *purchase not completed*, 3 B. & C. 225. And for other cases upon this subject, see Fitz. N. B. Detinue; 1 Dick. 650; 1 Eden. 8; 2 T. R. 708; 2 Taunt. 268; 6 Taunt. 12; 4 Bing. 106.

(b) 14 Vin. Ab. 290.

(c) Co. Lit. 18 b, 185 b.

the freehold, as old benches, tables, &c.(*d*) And it is observable
[*193] that Spelman *thus defines an heir-loom: "*Omne utensile robustius quod ab ædibus non facile revellitur, ideoque ex more quorundam locorum ad hæredem transit tanquam membrum hæreditatis.*"(*a*)

As the best bed, table, &c.

But the instances met with in the different authorities are always things of a mere personal *chattel* kind, not affixed to the house or land; such as the best bed, table, pot, pan, cart, or other dead chattel movable. These are the only kind of heir-looms mentioned by Lord Coke;(*b*) and he illustrates his remarks upon them by this citation from the old entries: "*Consuetudo hundredi de Stretford in Com' Oxon' est, quod hæredes tenementorum infra hundredum prædictum existentium post mortem antecessorum suorum habebunt, &c., principalium, Anglice*, an heire-loome, viz.: *de quodam genere catallorum, utensilium, &c., optimum plaustrum, optimam carucam, optimum ciphum, &c.*"

So, in *Les Termes de la Ley*, an heir-loom is said to be "any piece of *household stuff* (*ascun parcel des utensils d'un mease*,) which, by the custom of some countries, having belonged to a house for certain descents, goes with the house, (after the death of the owner,) unto the heir, and not to the executors."

Sir William Blackstone, in the Commentaries, describes heir-looms as "goods and chattels,"(*c*) and always treats them as personalty; though, (with some degree of inconsistency, perhaps,) he says, they are generally such things as cannot be taken away
[*194] *without damaging or dismembering the freehold. And in one part of the Commentaries(*a*) he says expressly, "An heir-loom, or implement of furniture, which by custom descends to the heir, together with an house, is neither *land nor tenement*, but a mere *movable*."(*b*)

And indeed, if by heir-looms were to be understood, only matters affixed to the freehold, it would follow that there are some

(*d*) 12 Mod. 520, at *Nisi Prius*. But see the same case in 1 Lord Ray. 728, where Lord Holt is reported merely to have said, that only *things ponderous* can be heir-looms.

(*a*) Spelman's Gloss. *voce* Heir-Loome.

(*b*) Co. Lit. 18 b.

(*c*) 2 Com. 428.

(*a*) 2 Com. 17.

(*b*) And see to the same effect, Roll. Ab. Descent, E. Doct. & Stud. dial. 2, ch. 40. p. 228. So, the heir may recover an heir-loom in *detinue;* Br. Ab. Detinue, pl. 30.

articles attached to the realty which require the aid of custom to make them descendible with the inheritance, and which, but for such custom, would legally belong to the executor. Such a principle, however, is altogether inconsistent with the general rule respecting annexations to the freehold; unless, indeed, it be thought that in these cases, the chief operation of custom upon a matter which would, of itself, necessarily pass to the heir as parcel of the freehold, is, by imparting to it a further incident, (which will presently be noticed,) viz.: that of making it inseparable and inalienable from the inheritance by devise.

Things in the nature of heir-loom

But, besides heir-looms, properly so called, there are certain species of chattels which may be considered in *the nature of* heir-looms, and which are also held to pass to the heir with the inheritance. The things referred to, seem, however, to differ from those that are strictly heir-looms, because the title of the heir in these cases does not depend upon any *local custom*. And an attention to this distinction would *remove the confusion which has sometimes arisen from classing under the general name of heir-looms all those personal chattels which the law gives to the heir as part of, or incident to his inheritance. [*195]

Coat armor, ancient pictures, &c.

Thus, the coat armor of an ancestor hung in a church, and the sword, pennons, and other ensigns of honor suited to his degree, descend to the heir in the nature of heir-looms. And in like manner, ancient portraits and family pictures, though not fastened to the walls of the house, accompany the inheritance; and the executor is not allowed to remove them, although they are mere personal chattels.(*a*)

Collar of S. S.

So, also, the collar of S. S. and garter of gold, descend as ensigns of honor and state, in the way of heir-looms; and this, even although there may be a special bequest of all jewels.(*b*)

(*a*) 12 Rep. 105; Corven's case; Godb. 199; 1 Brownl. 45; Noy, 104; 2 Bulst. 151; Cro. Jac. 367; Vin. Ab. Descent, E.; Com. Dig. Cemetery, C.

(*b*) 11 Vin. Ab. 167; Owen, 124; *Countess of Northumberland's case*; Swinb. part 3, sec. 6. And see *Lord Petre* v. *Heneage*, 12 Mod. 520; *S. C.*, 1 Ld. Ray. 728. For an explanation of the collar of S. S., see Selden's Titles of Honor. Mr. D'Israeli relates, from an article among the Sloane MSS., that upon Lord Coke's disgrace, the new Chief Justice sent to purchase his collar of S. S. Lord Coke returned for answer, that he would not part with it, but would *leave it to his posterity*, that they might one day know they had a chief justice for their ancestors. D'Israeli's Curiosities of Literature, 2d series, Vol. I, p. 298.

Crown jewels.

And so the ancient jewels of the crown are accounted heir-looms;(c) because they are necessary to maintain the state and support the dignity of the sovereign for the time being.(d)

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Ornaments of bishop's chapel.

Things in ecclesiastical houses.

*Again, as was noticed in a former page, the ornaments of a bishop's chapel are considered to be of the nature of heir-looms; and as such pass to the successor in the see.(a) And in like manner, things belonging to ecclesiastical houses, and which have continually passed from successor to successor, have sometimes been esteemed as heir-looms.

Ancient horn.

Moreover, the heir may sometimes claim a right to a personal chattel, from the peculiar manner under which the estate is holden. Thus an ancient horn, where the tenure of the land is by *cornage*, shall always descend to the heir.(b) But things of this description seem rather to resemble charters of inheritance;

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or they might perhaps more properly be *ranked among some of the species of possession which are treated of in the ensuing pages.

Chattels limited as heir-looms.

But further, a testator may by his will constitute what has been called a *quasi* heir-loom. That is to say, he may devise or

(c) 2 Bl. Com. 428; 14 Vin. Ab. 290; Swinb. Tr. W., part 3, sec. 6, p. 251.

(d) King James I, by indenture between himself (under the Great Seal) and the lords and others of his privy council, (an. 3 Jas. I, 1606,) "annexed and assured individually and inseparably for ever, to the crown of this realme, divers and many royal and princely ornaments and jewels of great value and estimation," consisting of diadems, coronets, circlets, collars, borders, &c. See the deed, entitled "*De Jemmis et Jocalibus Coronæ Angelicæ annexandis*," in Rymer's Fœd. Vol. XVI, p. 641. There is also a schedule annexed, giving a full and particular description of each; and it enumerates, among others, "*The Imperial Crowne of this Realme, of Goulde;* and a great and riche jewell of gould, called "*The Mirrour of Great Brittaine.*" King Charles I, in the beginning of his reign, ordered several valuable jewels, many of which had passed with the crown in continual succession, to be sold, under a special warrant to the Duke of Buckingham. Among them was the above mentioned, "*great and rich jewel of goulde, called the Mirrour of Great Brittaine,*" and a very valuable collar, known as *the inestimable great collar of ballast rubies.* See the warrant in the 18th Vol. of Rym. Fœd., p. 236. Afterwards, at a subsequent period of his reign, many other of the crown jewels were pawned or disposed of abroad; whereupon, in 1642, an order was issued by the Parliament, specially forbidding any such disposition of them.

(a) *Supra*, p. 146.

(b) *Pusey* v. *Pusey*, 1 Vern. 273. As to tenure by cornage, *vide* Co. Lit. 107 a. Of the Pusey and other horns, as a charter or instrument of conveyance, see several curious particulars in the Archæologia, Vol. III, p. 1, *et seq.* And see Id., Vol. I, p. 168; Vol. V, p. 340; Vol. VI, p. 42.

limit in strict settlement, an estate and capital mansion, together with personal property, as the plate, pictures, library, furniture, &c., therein, such plate, &c., to be enjoyed, together with the house and estate, unalienable by the devisees in succession, so far as the law will allow.(*a*) Limitations of this sort depend upon the principles of executory devises, and the doctrines of equity; for a remainder, in the strict sense of the term, can only be limited of a freehold estate. This subject has given rise to many questions of considerable nicety; and it will be sufficient, on the present occasion, to observe generally, that upon such a devise or settlement, the absolute interest in the chattels, subject to the interest for life which may be created in them, will vest in the person who is entitled to the first estate of inheritance, whether in tail or in fee; and upon his death the property will devolve upon his personal representative.(*b*)

Heir-looms not devisable apart from the estate.

With respect to heir-looms properly so called, viz., those depending on custom, it appears that they cannot be devised away from the heir; that is to say, when the inheritance to which they belong descends *to him. For Lord Coke lays it down, that "if a man be seized of a house, and possessed of divers heir-looms that by custom have gone with the house from heir to heir, and by his will deviseth away the heir-looms, this devise is void."(*a*) [*198]

Upon this it has been observed by Professor Woodeson in his Vinerian Lectures,(*b*) that the opinion of Lord Coke is founded upon a decision in 1 Hen. V, 108, which, he thinks, being prior to the Statute of Wills, could only amount to a determination against such a devise of heir-looms separately from the house by way of personalty: and he supposes that at present they might be devised as realty distinct from the estate. Upon reference, however, to the passage in Co. Lit., it appears that Lord Coke grounds his opinion upon a principle which applies as well to a devise of realty as of personalty: viz., that the *custom* vests the

(*a*) Wood. Vin. Lec. Vol. II, 380. See *Cadogan* v. *Kennet*, Cowp. 432; *Foley* v. *Burnell*, Cowp. 435, *in notis*; 1 Br. Ch. Rep. 279; 2 Atk. 82, 321; 3 P. Wms. 336. And see Fearne's Exec. Dev. (6th ed. by Butler) 407; Harg. Co. Lit. 18 b, N. 109.

(*b*) The several decisions upon this subject, are collected in Roberts' Treatise on Wills, Vol. II, p. 295, *et seq.*

(*a*) Co. Lit. 185 b. So per Lord Coke, the crown jewels are not devisable by testament; Co. Lit. 18 b.

(*b*) Vol. II, p. 380.

property in the heir instantly upon the death of the testator, and takes place of the devise, which has effect only after the death of the testator. And although this reasoning has not been universally assented to, yet the doctrine appears to have been recognized by many subsequent authorities.(*c*)

May be granted away by the owner; or devised with the freehold

The owner of the inheritance, however, may, *during his life*, sell or dispose of these customary heir-looms, as he may of the timber of his estate.(*d*) *And if he devise the house away from the heir, it is presumed that in this case the heir-looms would pass with the house to the devisee.(*a*)

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Of Deer, Fish, etc., as incident to the Inheritance.

There is another description of property, which the law considers to be so appropriated to, and so necessary to the well being and enjoyment of the inheritance, that although it is in itself of a personal nature, yet it always accompanies the land and vests in the heir, and does not pass to the personal representative.

Fish belong to the heir.

For, as it is said by the old writers, if a man buy divers fishes, as carps, breames, tenches, &c., and put them in his pond, and dieth, in this case the heir who has the water shall have them, and not the executors: but they shall go with the inheritance, because they were at liberty, and could not be gotten without industry, as by nets, and other engines;(*b*) otherwise, however, it is, if they are in a trunk, or in a net, or the like; for then they are severed from the soil.(*c*)

Deer, conies, swans, &c.

So likewise, of deer in a park, conies in a warren, and doves in a dove-house;(*d*) and, according to some *authorities, pheas-

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(*c*) Com. Dig. Biens, B. H. Harg.; Co. Lit. 18 b. Per Lord Macclesfield, Chanc. 1 P. Wms. 730. And see Mr. Serj. Hill's MS. note, 14 Vin. Ab. 290, in Linc. Inn Lib.

(*d*) 2 Bl. Com. 429.

(*a*) That, if an estate be devised in tail with remainders, the devise over is good as to the heir-looms as well as to the estate, see Mr. Serj. Hill's MS. note, 14 Vin. Ab. 291.

(*b*) Co. Lit. 8 a; 11 Rep. 50; *Liford's case;* Swinb. on Wills, 759; Keilw. 118; 4 Leon. 240; Owen, 20; Cro. Eliz. 372; 1 Roll. Ab. 916; Com. Dig. Biens, B. Off. Ex. 52.

(*c*) Id. ib.; 3 Bac. Ab. 64; Com. Dig. Biens, F.

(*d*) Note (*b*) *sup.*; 7 Rep. 90, 91; case of Swans. See, also, 18 Ed. IV, p. 14;

ants and partridges in a mew; swans, though unmarked, in a private moat or pond, or kept on water within a manor, or at large, if marked; and, bees in a hive; all which, as is said by these authorities, shall go along with the inheritance; and the reason assigned is, because without them, the inheritance is incomplete.(*a*)

And these things are considered in law so much a part of the inheritance, that the destruction of them is waste. And, therefore, if a tenant for life of a park, vivary, warren or dove-house, kills so many of the deer, fish, game or doves, that there is not sufficient left for the stores, it is waste.(*b*)

Hawks and hounds.

It is said in Swinburne's Treatise on Wills,(*c*) that *hawks and hounds* belong to the heir with the estate: and Noy is an authority to the same effect;(*d*) and he says, that by a grant of all goods and chattels, *neither hawks nor hounds nor other things *ferœ naturæ* shall pass, and the heir shall have them. It is presumed, however, that at the present time the law is otherwise with respect to this description of property.(*a*) [*201]

God. Orp. Leg. 126; Noy's Max. pages 230, 239, 9th ed.; 11 Vin. Ab. 166. It would appear that the above rule respecting deer, must be understood only of deer in *legal* parks, *i. e.*, parks by grant or prescription. See per Willes, Ch. J., in *Davies* v. *Powell*, Willes Rep. 46. Probably it may, upon investigation of the subject, appear that the principle upon which deer in a legal park are said to belong to the heir, and not to the executor, may be this; that whilst brought within no other enclosure than the wide range of a legal park, deer may be supposed to retain their wild nature; they may not, therefore, in that condition, be distinct subjects of property so as to pass to the executor; and the only person capable of exercising any right over them, or rather of capturing them, may be the owner, for the time being, of the park; not perhaps as heir of the former owner, but simply *ratione soli*.

(*a*) See the preceding notes, and Shep. Touch. 469. *Qu.* as to pheasants, &c., in a mew? A mew is properly a place for keeping or mewing up falcons. Whence "*muta regia*," the king's mews or falconry. Cowell's Dict. It appears that larceny may be committed of pheasants in a mew. 1 Hale, 511; 1 Hawk. ch. 33, sec. 39. As also of swans, Dalton, ch. 156. And according to the authorities cited *post*, 202, pheasants, &c., so confined, would not belong to the heir.

(*b*) 1 Cru. Dig. tit. 3, ch. 2, sec. 20; Vin. Ab. Waste, E.; Co. Litt. 53 a.

(*c*) Part 7, sec. 10, p. 938.

(*d*) Noy's Max. p. 239; 9th ed.; Id. 144, 230.

(*a*) See Off. Ex. 53, 57; God. Orp. Leg. part 2, ch. 13, and part 3, ch. 21; 3 Bac. Ab. Executors, 57, 65. It is said to be to this day a branch of the king's prerogative upon the death of every bishop, to have his mew or kennel of hounds, (*muta canum, meute de chiens,*) or a composition in lieu thereof. 4 Inst. 338; Swinb. part 2, sec. 26; 2 Bl. Com. 413; Cowell's Dict. Upon this subject, see Spelm. Rem. p.

Otherwise where the testator has a chattel interest.

It should be observed that in these cases the testator is supposed to have *the inheritance* in the park, pond, &c.; consequently the question is between the heir succeeding to the ancestors' estate, and the executor who takes no interest whatever in the land. But the case will be different if the testator has only *a term of years* in the premises; for then if he dies before his term is expired, as his executor succeeds to his interest in the land, he will also have the deer, &c., with the land to which they belong. For in this case they pass to the personal representative, as accessary chattels following the state of the principal; and the heir can have no right to the interest in the land, which is itself personalty.(*b*)

Or the deer, &c., are tame.

In like manner, if the testator have any *tame* deer, rabbits, pheasants, partridges, pigeons, &c., they shall *go to the execu-
[202] tors: and though they were not tame, yet if they were kept alive in any cage, room, or such like place, the executors shall have them.(*a*)

The species of property spoken of in this division, is sometimes considered by writers to pass with the inheritance as *heir-looms*. But it has been shown in a preceding page that the right of the heir in respect of heir-looms is founded, not upon the nature of the chattels themselves, but altogether upon special custom.

Of Things Annexed to the Freehold of the Church.

Monuments, effigies, &c.

It has been seen in a former page that the coat armor and ensigns of honor of an ancestor, such as pennons, armorial tro-

117, in the Answer to the Apology of Archbishop Abbot for shooting the keeper of Bramsil Park, while hunting.

(*b*) Off. Ex. 53; God. Orp. Leg. part 2, ch. 13. And see Harg. Co. Lit. 8 a, N. 41, where, however, the distinction above adverted to, is expressed in terms that might perhaps be misunderstood. See, also, 11 Vin. Ab. 166. So, if an executor takes an estate *pour auter vie*, or an heir succeeds as special occupant, they will have the same interest in the property that the deceased owner of the particular estate enjoyed.

(*a*) Off. Ex. 53, 57; Law of Test. 379. In this latter authority, it is said that pigeons, though not tame, yet if they are not able to fly, shall belong to the executors; with which acc. 3 Bac. Ab. 65. But see a contrary rule in several of the authorities above referred to. It is larceny to steal pigeons which are so far tame that they return home. *R.* v. *Brooks*, 4 C. & P. 131. As to the distinctions taken in early times, with respect to the property in deer that were tame, or which could be identified by some peculiarity, as white deer, see Reeve's Hist. Vol. III, p. 378.

phies, achievements, &c., hung up in a church, belong to the heir in the manner of heir-looms. The same rule holds as to monuments, tombstones, and effigies, &c., set up in the church. And notwithstanding these things may be absolutely affixed to the walls or fabric of the church, yet the parson shall not take them although the freehold of the church is in him.

For Lord Coke says,(*b*) "If a nobleman, knight, esquire, &c., be buried in a church, and have his *coat armor and pennons [*203] with his arms, and such other ensigns of honor as belong to his degree or order, set up in the church, or if a grave stone or tomb be laid or made, &c., for a monument of him, in this case albeit the freehold of the church be in the parson, and that these be annexed to the freehold, yet cannot the parson or any take them or deface them, but he is subject to an action to the heir and his heirs in the honor and memory of whose ancestors they were set up.(*a*) And so it was holden Mich. 10 Ja., and herewith agree the laws in other countries. Note this kind of inheritance. And some hold that the wife or executors that first set them up may have an action in that case against those that deface them in their time."(*b*)

It was holden, however, by the Court of Common Pleas, in a modern case,(*c*) that the property of a tombstone remained in the party who erected it, and that he might maintain an action of trespass against a person who wrongfully removed it from the churchyard and afterwards erased the inscription.(*d*) The *prop- [*204] erty of a coffin and shroud remains, it is said, in the executors or Coffin and shroud.

(*b*) Co. Lit. 18 b.

(*a*) Unless they were set up without the consent of the ordinary. See Gib. Cod. 454; 1 Str. 576.

(*b*) See 12 Rep. 105, *Corven's case;* 3 Inst. 110, 202; 1 Roll. Ab. Descent, E; Sid. 206; Cro. Jac. 367; Cro. Eliz. 366; 2 Roll. Rep. 140; Doct. & Stud. pages 305, 309; Com. Dig. Cemetery, C. See, also, *Hitchcock* v. *Walford*, 5 Scott, 792. As to the right to erect monuments in a church, see 3 Inst. 202; Degge, p. 217, 7th ed. And see 1 Bar. & Ald. 508; 1 Haggard, 14, 205; 1 Str. 576; 2 Str. 1080; 3 Add. 15; 1 Lee, 640; *Brecks* v. *Woolfry*, 1 Curt. 880.

(*c*) *Spooner* v. *Brewster*, 3 Bing. 136; 2 Carr. N. P. C. 34; Com. Dig. "Cemetery."

(*d*) As to the right of the incumbent to grant the privilege of making a vault, and erecting a tablet, &c., in a church, and the interest thereby conferred, see the authorities referred to in the preceding notes, and the case of *Bryan* v. *Whistler, Clk.*, 8 B. & C. 288. See, also, Rogers' Eccl. Law, 187.

other person who was at the charge of the funeral; and it may be laid as theirs in an indictment for stealing them.(*a*)

Mourning hung in a church, scaffolding, &c.

But things that are fixed up in a church not in honor of individuals, but for other purposes, as when a church is hung in mourning, or when ornaments or erections, as scaffoldings, &c., are put up on public occasions, these become the property of the parson, in consequence of his possession of the freehold, and on the ground of their being a tacit gift to him.(*b*)

Pews and seats.

With respect to pews and seats erected in a church, these become by annexation parcel of the freehold of the incumbent; though the use of them is in those who have the use of the church.(*c*) And, therefore, if seats have been annexed to the church without legal authority, it is said that the property of the materials when pulled down is in the parson, who may sue the wrongdoer in trespass. But as to seats put up by the parishioners by good authority, it seems, according to the ecclesiastical writers, that the property of the materials upon removal will be in the parishioners, and that the churchwardens and not the parson may maintain an action for taking them *away.(*a*) With respect, however, to movable seats in a church, the party that set them up may remove them at his pleasure.(*b*)

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Bells.

If a man hang up bells in the steeple, they become church goods, although they may not be expressly given to the church: he cannot therefore afterwards remove them; and if he does, he may be sued by the churchwardens, to whom the custody and possession of the goods of the church belong, though the property

(*a*) Wms. Exors. p. 505; 2d. ed.

(*b*) *Vide* Cases and Opinions, Vol. I, p. 273. Upon this point, however, see *Cramp v. Bayley, Clk.*, Kent Lent Ass. 1819, cited in the notes to the edition of Degge's Parson's Counsellor, by Ellis, p. 218; And see Prideaux's Directions, p. 87, and the authorities there referred to. It is certainly true that the soil and freehold of the church and churchyard is in the parson; but the freehold is in him, not for his own emolument, but for public purposes only, as for supplying places for sepulture, &c. With respect to trees in the churchyard, see *post*.

(*c*) 8 H. VII, 12; Br. Ab. Chattels, pl. 11; 1 T. R. 430; 5 Bar. & Ald. 361. And see 1 Phill. Rep. 322.

(*a*) Degge, p. 213, 7th ed.; Burns' Ecc. Law, Vol. I, tit. Church; Noy, 108; *Vide*, Shaw's Par. Law, ch. 25, sec. 9; Prideaux, 73.

(*b*) Degge, 211. This, however, seems to be questionable. Wats. ch. 39; Burns' Just. tit. Churchwardens, sec. 3. And see Shaw, ch. 25, sec. 7; Prideaux, 32.

of them is in the parishioners.(c) The property of the bell ropes is in the churchwardens.(d) Bell ropes.

So, if a man take the organ out of a church, the churchwardens may have an action of trespass against him; because the organ belongs to the parishioners and not to the parson, and the parson cannot sue the taker in the Ecclesiastical Court.(e) And the succeeding churchwardens may sue, although the trespass was done in the time of their predecessors.(f) Organ.

The trees growing in a churchyard belong to the incumbent, and he may bring his action, if they be cut down.(g) Trees in churchyard.

*Of Emblements. [*206]

It will be useful to advert, in the last place, to another species of property which has often been compared to fixtures, and respecting which, questions frequently arise between the heir and the personal representative of the deceased owner of the inheritance.

There are certain vegetable products of the earth, which, although they are annexed to and growing upon the land at the time of the proprietor's death, yet, as between his heir and his executor, are considered as a chattel interest, and will pass to the executor. Emblements between heir and executor.

(c) 11 H. IV, 12; Degge, 217; Burns' Ec. Law, *ub. sup.;* Com. Dig. Esglise, F. 3; Cro. Eliz. 145; 2 Salk. 547; 1 Sid. 281; 2 Keb. 22. That bells are parcel of the freehold of the church, see 11 H. IV, 12; Sid. 206; 1 Lev. 136, *S. C.* As to the origin of bells and chimes, and some curious observations upon them, see Lutw. Rep. Nelson, p. 327; 1 Salk. 164; Roll. Ab. Prohibition, K.; Sid. 206. See, also, Hook's Church Dictionary, tit. Bells.

(d) *Jackson* v. *Adams*, 2 Bing. N. C. 403.

(e) 1 Roll. Ab. 393.

(f) Cro. Eliz. 145, 179; 1 Leon. 177.

(g) Br. Ab. Tresp. 210; Lindw. 267; 2 Atk. 217. The preamble of the ancient stat., 35 Ed. I, sec. 2, entitled "*Statutum ne Rector prosternat Arbores in Cœmitario,*" recites, that "Forasmuch as a churchyard that is dedicated, is the soil of the church, and whatsoever is planted belongeth to the soil, it must needs follow, that those trees which be growing in the churchyard, are to be reckoned amongst the goods of the church, the which laymen have no authority to dispose; but as the Holy Scripture doth testify, the charge of them is committed only to priests to be disposed of," &c. The statute then directs that the timber shall be applied to the repair of the chancel, &c. Of this statute, Lord Coke observes, that it is but a declaration of the common law; 11 Co. 49.

Trees, fruits, &c., belong to the heir.

In general, trees and the fruit and produce of them, from their intimate connection with the soil, follow the nature of their principal; and, therefore, when the owner of the land dies, they descend to the heir, unless they have been previously severed. So it is of hedges, bushes, &c.(*a*) For all these are the natural or [*207] permanent profit of the earth, and *are reputed parcel of the ground whereon they grow.(*a*)

Year's crop of corn, &c., goes to the executor.

But corn and other products of the earth which are produced annually by labor and industry, (and thence called *fructus industriales*,) having been sown with the intention of being afterwards separated from the realty, are held to partake of a personal nature. Hence, if the proprietor sows or plants his land, and dies before gathering the produce, his personal representative is entitled to take the profits of the crop, or the *emblements*, as a compensation for the labor and expense of tilling, manuring and sowing the land.(1) And this rule of law is founded on a consideration of public benefit, and is said to be for the encouragement of husbandry, and the increase and plenty of provisions.(*b*)

Hemp, hops, roots, &c.

It is now fully established, that not only corn and grain of all kinds are emblements, but everything of an artificial and annual profit that is produced by labor and manurance. Thus, hemp, flax, saffron and the like;(*c*) and melons, cucumbers, artichokes,

(*a*) Com. Dig. Biens, H.; 11 Rep. 48. Trees removable by a nurseryman belong to his executors; as to which, see *ante*, p. 68.

(*a*) It would seem that not only the natural fruits, that is, such as grow of their own accord, and without any great labor or cost, but all growing fruits, though produced by skill and culture, are the property of the heir. *Vide*, Swinb. pages 934, 935; Noy's Max. 116; 9th ed.; God. Orp. Leg. part 2, ch. 14, sec. 1, and part 3, ch. 21, sec. 13; Cro. Car. 515; 3 Bac. Ab. 64; Com. Dig. Biens, B.; Off. Ex. 58; 2 Freem. 210; *Rodwell* v. *Phillips*, 9 M. & W. 167.

(*b*) Co. Lit. 55 b; 1 Roll. Ab. 726, *et seq.*; Swinb. Wills, page 210.; Com. Dig. Biens, G. 1; 2 Bl. Com. 122; *Graves* v. *Weld*, 5 B. & Ad. 105. Emblements is derived from the French "*emblavence de bled*;" *i. e.*, corn sprung or put up above ground. Cowell's Dict.

(*c*) Id. ib.; God. Orp. Leg. part 2, ch. 13; 2 Freem. 210; Gilb. Law. Ev. 208, 216, 6th ed.; Harg. Co. Lit. 55 b.

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[1] The Revised Statutes of New York, (part 2, ch. 6, tit. 3, art. 1,) provide that crops growing on the land of deceased at the time of his death, and every kind of produce raised annually by labor or cultivation, excepting grass growing, and fruit not gathered shall be deemed assets, and go to the executors or administrators.

&c. And hops also, although they spring from old *roots; because they are annually manured and require cultivation, and an additional expense is incurred annually which is necessary to make them grow.(a) And so of turnips, carrots, potatoes, &c.(b) [*208]

Artichokes.

Of the latter kind of produce, it is said indeed in Wentworth's Off. Ex.,(c) that roots in the ground and artichokes also, shall not go to the executor but to the heir; because they cannot be taken without digging and breaking the soil which belongs to the heir. This opinion, however, is contrary to the general principle of emblements, and to the rule as laid down by Lord Coke: and it appears now to be generally understood, that the executors shall have emblements of *all* annual crops sown by the testator, and which are growing at the time of his decease.(d)

Teazles.

In one case, that of *Kingsbury* v. *Collins*,(e) it seems to have been assumed by the Court of C. P., that a crop of teazles was the subject of emblements. But the case can hardly be considered an authority to that effect. For, as was observed by the Court of K. B., on a subsequent occasion when this case was relied on,(f) the point had not been argued, and the court did not appear to have been made acquainted with the nature of the crop or its mode of cultivation; or it might be that in the year when this plant is fit to gather, so much labor and expense is incurred *as to put it on the same footing as that of hops. [*209]

Artificial grasses

But the growing crop of *grass*, even if sown from seed, or though ready to be cut for hay, cannot be taken as emblements; because, as it is said, the improvement is not distinguishable from what is the natural product, although it may be increased by cultivation. It seems, however, from some authorities, that the artificial grasses, as clover, saintfoin, and the like, by reason

(a) Id. ib.; Harg. Co. Lit. 55 b, note 364. And see the explanation given as to these in 5 B. & Ad. 119.

(b) Id. ib.; Law of Test. 380; Cro. Car. 515; 5 B. & C. 832, 840.

(c) Off. Ex. 61, 62; Gilb. Evid. 216; God. Orp. Leg. part 2, ch. 14, sec. 1.

(d) *Vide* 1 Roll. Ab. 728; God. Orp. Leg. part 2, ch. 14; Com. Dig. Biens, G. 1.; 3 Bac. Ab. 64; 2 Bl. Com. 123; Harg. Co. Lit. *ub. sup.*

(e) 4 Bing. 202.

(f) *Graves* v. *Weld*, 5 B. & Ad. 105.

of the greater care and labor necessary for their production, are within the rule of emblements, and belong to the executor.(*a*)

Clover.

But with respect to these latter crops and others of a like nature, the claim of emblements, even if admitted at all, must be understood in a much more limited sense. For in a modern decision of the Court of K. B., in which the doctrine of emblements was very elaborately discussed, it was holden that the privilege is confined to such species of crops as yield a present annual profit, and to that year's crop which is growing when the interest of the party determines. And, therefore, that the right to take a crop of clover, did not extend to the full period of its profitable maturity, viz., the second year from its sowing, but that if the doctrine of emblements applied to such a crop at all, it could be taken only during the year in which it is sown; although the value at that time did not compensate for the cost and labor of its cultivation.(*b*)

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Who may have emblements.

*With respect to the parties who are entitled to emblements, it is to be observed that the privilege is not confined to the case of the personal representatives of a tenant in fee as against the heir; for the law allows a similar indulgence to many individuals claiming different degrees of interest in land. It would be foreign to the object of the present treatise to enter into a particular enumeration of the several persons entitled to this privilege;(*a*) but it may be useful to notice a few instances, for the purpose merely of explaining the manner in which the right is affected by the nature of the estate, and by the mode in which it is determined.

Thus, if a tenant for life, whether for his own or *pour auter vie*, sows the land and dies before the severance of the crop, his executors shall have the emblements; because, in this case, the estate of the tenant is said to be determined by the act of God.(*a*)[1]

(*a*) 1 Roll. Ab. 728; Hob. 132; 2 Freem. 210; 3 Salk. 160; Com. Dig. *ub. sup.*; Bac. Ab. *ub. sup.*; Gilb. Ev. 215; 4 Burn. Ecc. L. 299.

(*b*) *Graves* v. *Weld*, 5 B. & Ad. 105; see Mr. Serjt. Hill's MS. note in 9 Vin. Ab. 368; Shep. Touch. by Preston, p. 469.

(*a*) The reader is referred to the valuable Treatise on the Law of Executors, by Mr. E. V. (now Mr. Just.) Williams, Vol. I, p. 496, *et seq.*, 2d ed.

(*b*) Co. Lit. *ub. sup.*; Roll. Ab. *ub. sup.*

[1] Therefore, if tenant for life make a lease for years, and die before the term, the

So, where a life estate is determined by the act of law; as if a lease were made to husband and wife during the coverture, and the husband sows the land, and they are divorced *causa præcontractus*, the husband in this case shall have the emblements, for the sentence of divorce is the act of law.(*c*)

A tenant at will, when the landlord determines the will, is entitled to emblements;[2] so also is a lessee for years of tenant for life. And so a tenant of any other estate which is determinable on an uncertain *event.(*a*) Indeed "the general rule is, [*211] that whenever a man has an uncertain interest and sows the land, and his estate determines, yet he has a title to the corn that he has sown on the land, though the property of the land is altered,"(*b*)

But if the tenant's estate is determined by his *own act*, as for forfeiture by waste, &c., there shall be no emblements.(*c*) And upon this principle the court decided in a modern case, that a parson resigning his living was not entitled to emblements of the glebe land.(*d*)

And as the privilege is founded on public policy, and the justice of affording a recompense to the party, who by his own industry, and at his own expense has cultivated the land, the benefit of emblements cannot be claimed by a person although he has an estate which is uncertain, if he is not the actual party

(*c*) 4 Co. 116; Roll. Ab. *ub. sup.*

(*a*) See the authorities cited in the preceding notes. See, also, Perk. sec. 513, *et seq.*; Shep. Touch. 244, 471; Swinb. on Wills, part 3, sec. 6, p. 253; 2 Bl. Com. 123, 146.

(*b*) Gilb. Evid. 208.

(*c*) There are many instances where a party is deprived of emblements, owing to a voluntary determination of the estate; as a *femme* copyholder *durante viduitate* on her marriage; tenant at will on outlawry; forfeiture of estate by condition broken, &c. *Vide* 5 Co. 116; Cro. Eliz. 461; 1 Roll. Ab. Emb. pl. 3. *Davis* v. *Eyton*, 7 Bing. 154.

(*d*) *Bulwer, Clk.* v. *Bulwer*, 2 Bar. & Ald. 470. The advantages of emblements are extended to the parochial clergy by St. 28 H. VIII, ch. 11; *Vide* Swinb. on Wills, part 2, sec. 26; 2 Bl. Com. *ub. sup.*; 1 Cru. Dig. tit. 3, ch. 1, sec. 54.

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under tenant for years, if he have sown the land, is entitled to the crop, and to ingress, egress and regress to preserve, harvest and carry it off. *Bevans* v. *Briscoe*, 4 Harris, & Johns. R. 139.

[2] *Stewart* v. *Doughty*, 9 John. Rep. 198.

who has sown the land, and the charge has been incurred during the existence of a previous estate. Thus, if A. seised of land sows it, and then conveys it to B. for life, remainder to C. for life; and B. dies before the corn is reaped; in this case B.'s
[*212] executors shall *not have it, but it shall go with the land to C.; for here the reason of industry and charge fails.(*a*)[1]

So, where a party has not the exclusive property in the land, as in the case of a joint tenant who dies; the corn sown goes to the survivor, and the moiety shall not go to the executors of the deceased tenant.(*b*)

Devise of emblements.

But although, in general, the right to take the emblements belongs to the personal representative, as against the heir of the deceased owner of the inheritance, yet if there is an express devise of the land itself, the growing crops pass to the devisee, and the executor shall not take them. For it is presumed then in favor of the devisee, that it was the testator's intention to pass not only the land itself, but that which appertained thereto.(*c*) On the other hand, this presumption is rebutted if the growing corn is expressly devised away, or there is any personal bequest in the will which can apply to emblements, as goods, stock, &c. For in this case the legatee will be entitled to the crops, and will take them against the heir, the executor, and the devisee of the land.(*d*)

Interest in the land until severance.

Where there is a right to emblements, the law confers a free

(*a*) Hob. 132; Winch. 31; Cro. Eliz, 61, 463.

(*b*) Cro. Eliz. 61; Co. Lit. 55 b.

(*c*) 1 Roll. 89, 727; Winch. 51; Perk. sec. 59; Cro. Eliz. 61. 461; Bul. N. P. 34 a. And see *Cox* v. *Godsalve*, 6 East, 604, n.; 8 East. 339. See, also, Mr. Hargrave's note to Co. Lit. 55 b, (N. 365,) where he says, that it is not easy to account for the distinction which gives corn growing to the devisee, but denies it to the heir, though it has been attempted.

(*d*) See the authorities in the last note. As to who may devise emblements, see Vin. Ab. Devise, I.

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[1] Where land has been purchased and conveyed in trust for husband and wife during their joint lives, and the life of the survivor, and the crops growing at the death of the husband, were sown by the vendor, before conveyance made, held that such crops, as emblements, survived to the wife under the trust, and was not part of the husband's personal estate; but it would have been otherwise, had the land been sown by the husband after his purchase. *Hazlett, Adm.* v. *Glenn*, 7 Harris & John. R. 17.

entry, egress and regress, in order to cut *and carry them away.(*a*) [*213] With respect, however, to the nature of the interest which the tenant or the personal representative has in the land until the corn is ripe, there is but little information to be found in the authorities; neither does it satisfactorily appear whether any compensation is to be made for the occupation of the land in the mean time.(*b*)[1]

The reader who may be desirous of pursuing the subject further, will find the doctrine of emblements very fully treated of in Co. Lit. 55 b; in Perkins' Profitable Book, sec. 512, *et seq.;* in Gilb. Law Ev. 208, *et seq.*, 6th ed., and in Com. Dig. Biens, G.; Vin. Abr. Emblements and Executor, with Mr. Serjt. Hill's Notes in Linc. Inn Lib.; and Bac. Abr. tit. Executor. See also Wms. Exors. Vol. I; and the note to *Graves* v. *Weld*, in 2 Nev. & M. 734.[2]

(*a*) Co. Lit. 56 a.

(*b*) See Plowden's Queries, 239; and see per Bayley, J., in *Evans* v. *Roberts*, 5 B. & C. 835.

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[1] Where tenant for life dies in possession, or has leased for years to an undertenant, and dies, the reversioner or remainder-man is not entitled to the occupation of the lands on which a crop is growing, until such crop is taken off, or reasonable time elapsed to have taken it off; but after the crop is so removed, if the tenant still occupy the land, the remainder-man would be entitled to recover for the use and occupation. *Bevans* v. *Briscoe*, 4 Harris & John. R. 139.

[2] The law of Pennsylvania, as regards the right to emblement, differs from the law of New York, (in which the English law has been mainly followed,) in allowing, by custom, the way-going crop to a tenant for a term certain, whether such right be recognized by contract or not; and such tenant may maintain trespass for it, against the landlord or vendee, after the lease has expired. *Diffedorfer* v. *Jones*, cited 5 Binney, 289; 2 Binney, 487; *Stultz* v. *Dickey*, 5 Binney, 285; *Briggs* v. *Brown*, 2 Serg. & Rawle, 14. And the right to such crop remains, notwithstanding the vendee obtain possession by *hab. fa. poss.* on a judgment in ejectment obtained by the landlord against a former tenant; and the record of the ejectment is not a justification of a trespass by the vendee. *Briggs* v. *Brown*, Ibid.

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*CHAPTER V.

OF THE TRANSFER OF FIXTURES BY SALE, MORTGAGE, DEVISE, ETC., AND IN CASE OF BANKRUPTCY.

IN the present chapter it is proposed to consider in what cases fixtures will pass by the terms of a conveyance, whether it be by grant, mortgage, lease, &c.; by devise, or other species of alienation; and to point out the questions of law which ordinarily occur upon the transfer of property of this description; and such also as arise in the event of bankruptcy.

And, first, as to a conveyance by *sale*:—it is to be observed, that in general under the name of land are comprised all buildings and erections affixed to the soil. The term *land* has accordingly been held to convey houses, &c., erected thereon, although not mentioned, and notwithstanding other houses and buildings are specifically described in the conveyance.(*a*)[1]

Chattels affixed pass by conveyance of the land.

Upon this principle it was laid down, in very early times, that where mere *personal chattels* are annexed to the freehold, they are made incident to the freehold, and will be included in a conveyance of the land in general terms. And, therefore, in the Year Book, 21 H. VII, 26, it was said, that vats fixed in a brew-
[*215] house or dye-house should always go with the *freehold, and pass by feoffment together with the inheritance.

This doctrine has been recognized by the courts in several more modern determinations. Thus in the case of *Ryall* v. *Rolle*,(*a*) it was said by Parker, Ch. B., that by a conveyance by way of mortgage of the freehold, fixed utensils would pass. And in a still more recent case in the Common Pleas,(*b*) a windmill,

(*a*) Com. Dig. Grant. E. 3; Co. Lit. 4 a; 2 Roll. Ab. Graunt. 1; 1 Levi. 131.
(*a*) 1 Atk. 175.
(*b*) *Steward* v. *Lombe*, 1 Brod. & Bing. 507.

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[1] *Fairis* v. *Walker*, 1 Bail. 540. Plaintiff conveyed to defendant his cotton plantation; a cotton gin was in a gin-house attached to the gears; plaintiff brought trover for the gin, but it was held to be a fixture, and that it passed with the freehold under the rule, as between heir and executor, or vendor and vendee.

which was described as a wooden edifice built on brick-work, and anchored into the ground by spores and land ties, being one foot under the surface of the earth, but removable at pleasure, was found by the jury *not to be a fixture;* nevertheless its connection with the land was of such a nature, that it was considered that by a conveyance of the land, the purchaser would have been entitled to the mill without any mention of it in the deed.(c)

So fixtures.

And it appears that the principle applies equally to cases where personal chattels have been affixed to the freehold, and there is a subsisting right to remove them under the law of fixtures. Thus in the case of *Thresher* v. *East London Water Works Co.*,(d) the court seem to have been of opinion, that if a tenant takes premises under a renewed lease containing the terms *land, buildings, erections, &c.*, such general words will comprise *fixtures* which have been put up pending a former lease; and that consequently, the tenant will be precluded from *setting up any claim to remove the fixtures, whatever may have been his rights antecedently to the new lease. [*216]

So, in the case of *Fitzherbert* v. *Shaw*,(a) a tenant had entered into a certain agreement with his landlord, in the construction of which the court thought that it was implied that the premises should be redelivered to the lessor in the same state as at the time of the agreement; and although there was no mention of fixtures in the agreement, yet it was held that they were subject to the same stipulation with the land itself, because they formed a part of the land.

This rule respecting the passing of personal chattels attached to the freehold by a conveyance of the freehold itself, was much discussed by the Court of King's Bench in a modern case. In *Colegrave* v. *Dias Santos*,(b) the plaintiff being the owner of a freehold house, advertised it for sale; and printed particulars were circulated, which took no notice of certain fixed articles, consisting of mash tubs, grates, closets, shelves, &c., which were fixed in and belonged to the house. The defendant becoming the pur-

(c) Per Richardson, J., Ibid. And see per Bayley, J., as to machinery in a mine, 5 B. & C. 854; also per Parke, B., in *Hitchman* v. *Walton*, 4 M. & W. 409.

(d) 2 Bar. & Cr. 609.

(a) 1 H. Bl. 258.

(b) 2 Bar. & Cr. 76.

chaser, the house was conveyed to him, and possession given, the fixed articles still remaining in the house. Afterwards the plaintiff insisted that a valuation of these things should be made, and that the defendant should pay for them; but the latter contended that they passed to him together with the freehold, and refused [*217] to pay for them or deliver them *up. Upon these facts the court held, that the articles in question passed to the defendant, together with and as part of the house. They said that the plaintiff ought to have insisted upon his right before he executed the conveyance; for if he might afterwards insist on payment for the utensils, he might also, after the sale of the house, refuse to sell what was affixed to it, and might do great injury to the house by taking them away. If the house descended, the articles in question would descend to the heir; so also if it had been devised; and the law was considered to be the same in the case of a purchase.[1]

The above authorities, therefore, may be considered to establish the general proposition, that by a conveyance of the freehold to a purchaser, all things annexed to the freehold will pass with the land as parcel thereof. And it appears from the observations of the court in the before-mentioned case of *Thresher* v. *East London Water Works Co.*, that the circumstances must be very special which would prevent the operation of this general principle; and that perhaps no matter *dehors* the instrument of conveyance is capable of having that effect.(*a*)

And things constructively annexed.

And it may be observed, moreover, that a similar rule obtains with respect to personal chattels which are *incident* to the freehold;[2] these also will pass by a grant of the freehold

(*a*) As to the effect of collateral circumstances *dehors* the instrument, see *Colegrave* v. *Dias Santos*, cited above, in respect of there being no stipulation for the appraisement of fixed articles on the sale of a house. So *Ex parte Quincey*, *Post*, in respect of there being no consideration. See also *Doe* dem. *Freeland* v. *Burt*, 1 T. R. 701. Phill. on Evid. Vol. I, ch. 10; and the cases referred to in treating of conveyances by way of mortgage, *Post*.

[1] When a farm is sold, without any reservation, the same rule would apply as to the right of the vendor to remove fixtures, as exists between the heir and executor. Per Spencer, Ch. J., *Holmes* v. *Tremper*, 20 Johns. 29; see, also, *Miller* v. *Plumb*, 6 Cowen, 665.

[2] An ordinary Virginia fence is a constructive fixture, no vendor would consider that as mere personal property. Cowen, J., *Walker* v. *Sherman*, 20 Wend. 636.

itself,[3] although at the time of *the grant they are actually sev- [*218]
ered from it. And, therefore, by a conveyance or lease of a house, the doors, windows, locks, keys, and rings of the house will pass,

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[3] *Mott* v. *Palmer*, 1 Comstock, 564. Ruggles, Justice. Mott covenanted in grant to Palmer, that "he is the lawful owner of the premises above granted, and seised of a good and indefeasible estate of inheritance therein, clear of all incumbrances." Action was brought by the grantee to recover the value of a rail fence, which stood on the land when the deed was executed, but did not belong to the grantor—it having been built by a third party, upon lease, to fence in for a certain purpose, part of grantor's land, and to take away the fence whenever he liked. The defendant, the grantee, after the conveyance, removed and converted the fence to his own use; the party licensed by the grantor to build the fence, with leave to take it away again, sued the grantee for the value thereof, and recovered—the grantor being witness against the grantee. In this action, brought on the covenant by the grantee against the grantor, is the grantee entitled to recover the value of the fence? A grantor undertakes to convey everything described in the deed, and by covenant of seisin assumes to own all he undertakes to convey. In a deed, the word land includes not only the earth, but everything within it, and buildings, trees, fixtures and fences upon it. *Goodrich* v. *Jones*, 2 Hill. 143; *Walker* v. *Sherman*, 20 Wend. 639, 640, 646; *Green* v. *Armstrong*, 1 Denio, 554; Com. Dig. Grant, E.; Co. Litt. 4 a; 2 Roll. 265; and all the incidents to the land expressed or not—and fixtures belonging to the owner of the land cannot be reserved by parol when the land is conveyed; the reservation must be in writing. *Noble* v. *Bosworth*, 19 Pick. 314. If the fence was the grantor's, it would have passed, not by the force of the term "appurtenances," but as part of the land. Trees, buildings, fixtures and fences are corporeal in nature, and subject of seisin, like the land, of which, in law, they are regarded as part. A rail is personal property, but when used in construction of a fence, its legal character is changed, and it becomes real estate, and, governed by the law relating to land, descends to the heir as inheritance, or passes by deed as part of the freehold.

But the earth, within certain boundaries, may be owned by one man, and the buildings, trees and fences on it, by another. A man may have an inheritance in an upper chamber, although the title to the lower buildings and soil be in another; (Shep. Touchstone, 206; 1 Instit. 48 b;) and it is a corporeal inheritance. 10 Vin. 202. Buildings and fixtures put up by a tenant for purposes of trade belong to him, and are removable without consent of his landlord. *Holmes* v. *Tremper*, 20 Johns. 30; *Miller* v. *Plumb*, 6 Cowen, 665; *Doty* v. *Gorham*, 5 Pick. 489.

Herlakenden's case, (4 Co. R. 63,) presents an instance in which one man owned the land, another the trees. In *Rogers* v. *Woodbury*, (15 Pick. 156,) a man had built a house on land which did not belong to him, the court said, "it might or might not be parcel of the realty; if the owner of the land owned the building it would be so, if not, and the owner of the building had no interest in the land, such building would be personal property." *Smith* v. *Benson*, (1 Hill, 176,) was the case of a dwelling and grocery belonging to one man, although standing on the ground of another; and in *Russell* v. *Richards*, (1 Fairf. 431,) the owner of land on which another, with his consent, had erected a saw mill, executed a deed for the land and mill, but it was held, no title passed to the mill, because it belonged to him who built it. The conclusion, as applied to this case, would be that the deed purports to pass real estate only, but, the fence being personal property of another, was not

although they may be distinct things; because they are constructively annexed to the house. And so, by a grant of a mill, the mill stone passes, notwithstanding at the time of the convey-

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part of the premises granted, and therefore not within the covenant, which relates only to the realty. The fence, in one sense, was not a part of the thing granted; it did not pass by the deed, but the fence was within the description of the thing granted as clearly as the land itself, and, therefore, was part of what the deed purported to convey, and of which the grantor covenanted he was the owner. It all amounts to this—the grantor undertook to convey the fence as part of the realty, by a deed which would have been effectual, if he had been the owner, as by his deed he professed to be. It is, therefore, a case in which the covenant of seisin affords a remedy, and it is just the grantor should pay the grantee, because there is nothing to show the grantee was informed by the grantor, or others, that the fence was not owned by the grantor.

Bronson, J. The fence stood on the land conveyed; and as between vendor and vendee, was part of the thing granted. *Goodrich* v. *Jones*, 2 Hill, 142; *Thayer* v. *Wright*, 4 Denio, 180; *Green* v. *Armstrong*, 1 Id. 554. The soil may be owned by one, the buildings and fences by another; as between such owners, these structures will be regarded as personal property; they are, however, in their nature, real estate, and will pass with the soil, to the heir or grantee. The fact that fences may be owned by one, and the soil by another, does not tend to show how much the grantor attempted to convey; that must be settled by the deed. The covenant of seisin, in the usual form, goes to the title, and is broken the moment it is made, if the vendor had not then the lawful title to the whole and every part of the premises! The covenant included the fences, to which the covenantor had no title.

Johnson, J. There is no reservation of the fence in the deed which purports to convey the entire premises. The question is, what upon the face of the instrument the grantor undertook to convey and to covenant that he was seised of. The undertaking is one thing; its effect upon the subject matter, and the rights of parties under it, another. He undertook to convey what it is conceded did not belong to him, his covenant is broken and he is liable. Wright, J., and Gray, J., assenting. Gardener, J., dissenting.

Rails upon a fence are constructive fixtures; (3 Kent. Comm. 347, n.;) they are in their own nature personal property, and become parcel of the realty, as the term fixtures imports by their annexation to the land; the annexation which will convert personal into real, is not effected by placing the chattel upon, or even by affixing it to the land; it must be affixed to the land "*perpetui usus causa.*" Id. 347, *et ante; Walker* v. *Sherman*, 20 Cow. 647, 655; 3 Dane's Abr. 156; 4 Ad. & El. 884. The rails were never so attached, and the covenant of seisin had no application. Upon annexation by agreement with the owner, for the purposes of trade, (3 Kent. 345; R. S. part 2, ch. 6, tit. 3, art. 1,) or of agriculture, (*Whiting* v. *Brastow*, 4 Pick. 310,) the chattel does not become part of the freehold, but remains personal property. But it is said the grantor was estopped from denying that the fence was parcel of the land, but, the grant was of land, so was the covenant; it is a perversion of such contract to turn it into a warranty, that everything upon the land is parcel of the freehold; the ownership of the property determines its character, whether it is part of the freehold, or an appurtenance, or a mere chattel. 4 Kent. 468. The declaration is *felo de se:* 1st, the plaintiff avers the rails were attached to the land, and

ance it is severed from the mill and removed for a temporary purpose; for it still remains, in contemplation of law, parcel of the mill.(a)

Unless where express provision to the contrary.

On the other hand, notwithstanding there may be general words in a conveyance, &c., which would include fixtures, yet if it can be collected from the deed itself that these words are qualified by other stipulations found in the deed, so as to make it appear that the intention of the parties was restrictive of the general terms employed, in such a case the *prima facie* inference arising from the general expressions is modified and controlled. The case of *Hare* v. *Horton*(b) affords an example of such a qualification of the general rule. In that case a party in a conveyance by way of mortgage conveyed an iron foundry, dwelling-houses, &c., with the appurtenances; together with all grates, boilers, bells, and other fixtures *in the said dwelling-houses;* and all trees, houses, &c., easements, profits, &c., to the said *foundry, [*219] messuages, and lands appertaining. There were in the foundry certain cranes and presses, a steam engine, and other fixtures used for the purposes of the business carried on there, and valued at £600. It was held that the specification of the grates and fixtures *in the dwelling-house* excluded the articles in the foundry, and showed that the latter were not intended to pass; though it was admitted that they would have passed under the general terms in the granting part of the deed, if the others had not been mentioned.

(a) Shep. Touch. 90; 11 Co. 50; *Liford's case*, 6 Mod. 187. And see Went. Off. Ex. 62; *Pyot* v. *Lady St. John*, Cro. Jac. 329; 2 Bula. 113, *S. C.; Place* v. *Fogg*, 4 Man. & R. 277; *Martyr* v. *Bradley*, 9 Bing. 24; *Fisher* v. *Dixon*, 12 Cl. & F. 312; *Dom. Proc.* As to detached *pipes and conduits* passing by a grant of a house, see *Nicholas* v. *Chamberlain*, Cro. Jac. 121; *Archer* v. *Bennet*, 1 Lev. 131; Cro. Car. 169; *Sup.* p. 180.

(b) 5 B. & Ad. 715. And see *Longstaff* v. *Meagoe*, *Post.*

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therefore part of the premises; this was necessary to bring the averment within the grant. And 2d, by way of breach, that they were not at the time the property of defendant. The two propositions are utterly repugnant—if the rails were owned by one who had no interest in the land, they were personal property, and could not be parcel of the freehold; but if parcel of the land, then they could not be the property of the third person. In *Rogers* v. *Woodbury*, (15 Mass. 158,) in trover for a fish-house, held "if the owner of the land did not own the building, and the owner of the building had no interest in the land, the building was personal property." See *Smith* v. *Benson*, 1 Hill, 176; 4 Co. 63; 3 McCord, 553; 8 Mass. 411; 1 Fairf. 429. Jewett, J., and Jones, J., also dissented, but gave no opinion.

It is, however, proper to mention, that there are two cases which appear to be in some degree at variance with the principles laid down in the foregoing decisions. For in the case *Ex parte Quincey*,(a) Lord Hardwicke seemed to have been of opinion, that the fixed utensils of a brew-house would not pass by a conveyance of a brew-house with the appurtenances. And in another case, (*Beck* v. *Rebow*, 1 P. Wms. 94,) it was held, that a covenant to settle a house and all things fixed to the freehold of the house, did not comprise certain matters of ornament which at the time of the deed were affixed to the house, and united to it by screws and nails.

But of the former of these cases, it may be observed that it was never finally determined.(b) And with respect to the case of *Beck* v. *Rebow*, it is particularly to be remarked, that the property in dispute appears to have been of a description similar to that which in other cases has been held removable, as between [*220] heir *and executor. It may therefore be thought, perhaps, that without infringing the rule in ordinary cases, the court considered that articles of this description, which are so much in the nature of personalty as to be assets in the hands of the executor, might be an exception to the general rule, and ought not in strictness to be comprehended under the general terms of a conveyance.[1]

Executor's fixtures, whether they also pass.

And it is observable that the distinction here suggested seems to derive support from some expressions of the court in the case of *Colgrave* v. *Dias Santos* above cited. The principle, however, has not been recognized in any other determination; and, on the contrary, it appears from the whole current of authorities referred to in the course of this work, that things fixed to the

(a) 1 Atk. 477.

(b) The conveyance was by way of mortgage. For a more particular examination of the case, see *post*, in the division which treats of mortgages.

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[1] In *Kirwan* v. *Latour*, 1 Harr. & John. 289; on *fi. fa.* against the owner, sheriff sold "house and lot with the appurtenances." The house was built for a distillery, and the implements necessary for the conduct of the business were on the premises. In trover to recover them, it was held that the pumps, cisterns, iron grating, door, distillery and horse mill passed by the sheriff's deeds; but not the joists, vats, buckets, spigots and faucits; the distinction was taken between things fixed to the freehold, and mere loose utensils for carrying on the business.

freehold are, in all cases, to be deemed essential parts of the freehold, while they subsist in a state of annexation, notwithstanding they may be subject to a right of being afterwards severed from the freehold, and converted into personal chattels.

From the principles which have been discussed in the preceding pages, some practical inferences may be deduced, to which it will be useful to draw the reader's attention, with reference to the precautions to be used in purchasing houses, &c., and taking leases or assignments of premises with the fixtures and other appendages belonging to them.

Stipulations respecting fixtures.

Thus, upon an agreement for the sale of a house, if it is intended that things of a personal nature which are attached to the house should not be included* in the purchase, it is, in general, necessary to make an express reservation of them,[1] and it will be a very convenient practice to provide in the agreement or instrument of conveyance, that the excepted articles should be taken at an appraisement, or at a valuation to be made in some appointed mode.(a) [*221]

Fixtures to be taken at a valuation.

It frequently happens that in agreements of sale, and in a demise of premises, there is an express stipulation that "*the fixtures are to be taken at a valuation*;" and difficulties repeatedly arise as to what particular articles are to be included in this provision, and for which the purchaser or tenant may be called upon to pay.

What fixtures are to be valued.

With respect to the precise import of these terms in different cases, there is very little assistance to be derived from the authorities; and the practice of the individuals who are usually referred to on these occasions, seems to be governed by no uniform or very definite rule. It would seem, however, that when a stipulation of this kind occurs on the *sale* of a house, those

On the sale of house.

(a) It will be found very useful in practice, whenever premises containing fixtures are sold, demised, or assigned, that the conveyance should be accompanied by a *schedule*, specifying the particular articles which are intended to be valued. See Bac. Ab. Leases A.; Bul. N. P. 156.

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[1] The reservation of fixtures which are personal property, may be by parol. *Heermance* v. *Vernoy*, 6 Johns. 5. See, also, *Austin* v. *Sawyer*, 9 Cowen, 39.

things only are, in strictness, to be comprehended in the valuation, which would be deemed personal assets as between heir and executor, and which would not pass with the inheritance as part of the freehold of the house.(*b*)

On a demise. When the like stipulation occurs upon a *demise* of premises, [*222] it must, it is conceived, be interpreted *to mean, that all those articles are to be valued to the incoming tenant, which would be fixtures as between a landlord and tenant, and which the tenant would be at liberty to remove, if he had himself put them up during the term. It is apprehended, therefore, that the tenant will not be bound to pay for anything but what properly falls within the rule here suggested.

On assignment. So, where a tenant by assignment of his lease pending the term, or at his out-going, disposes of his fixtures under a similar agreement, he may be considered as transferring to the purchaser all those articles which he would have been entitled to remove from the premises, either by reason of having taken them *as fixtures*, or as having himself erected them during the term.

But in all these cases the *intention* of the parties is the true criterion to be consulted; and this intention is to be collected from the general nature of the contract, and from the description of the premises, and the purposes for which they are usually occupied. It may also be inferred from a custom prevailing in the particular district, and with reference to which the parties may be supposed to have contracted.

Purchase of fixtures by an incoming tenant. When a tenant at the commencement of his term purchases of the landlord articles belonging and affixed to the demised premises, his right to sever them and convert them into personal chattels, is very different in its nature from that by which he [*223] severs and takes away fixtures put up by himself. *For here the right of removal arises wholly out of the contract, and not out of the law of fixtures. And perhaps, in such a case, the tenant would not absolutely lose his right of property in the articles, by omitting to sever them before the expiration of his term; unless, indeed, it is implied in the purchase, that he should hold

(*b*) See *Hitchman* v. *Walton*, 4 M. & W. 409.

them upon the same conditions as his own fixtures. The precise nature, however, of the interest which accrues under agreements of this kind, does not appear to have been hitherto discussed.(a)

Demises of premises with things affixed.

Again, a tenant's lease sometimes contains an express demise of fixtures: as in leases of collieries, breweries, mills, &c., which are let together with the machinery, plant, and fixed utensils.(b) In these cases the tenant is not at liberty to sever the articles, and use them as personal chattels during the term; for immediately upon the severance, the property vests in the landlord, and the tenant by his wrongful act forfeits all future interest in it.[1] The tenant, it is to be observed, has not the dominion of the property demised, but only a qualified right to use it during the term in a particular way, viz., as annexed *to the freehold.(a) Although, if it is tortiously severed, he may indeed maintain an action against the wrong doer; as will be seen hereafter in the second part of the work. [*224]

Lastly, if, at the time of making a demise, nothing is said respecting the fixed articles belonging to the premises, the tenant

(a) See the remarks of Parker, Ch. B., *Ryall* v. *Rolle*, 1 Atk. 175. If after a grant of fixtures, the grantee should take a lease of the land itself, it might perhaps be contended that the fixtures become re-annexed to the land by the second grant, and that the only interest which the grantee takes, is that which is derived under the lease. *Vide* 2 Anders. 52; Owen, 49.

(b) The value and importance of the fixtures in collieries and other like works, has given rise to very special terms in the leases of property of that description. Of these, see several instances in *Storer* v. *Hunter*, 3 Bar. & Cres. 368; *Horn* v. *Baker*, 9 East, 215; *Duck* v. *Braddyll*, 1 M'Cleland, 219; and in the cases cited in the next division.

(a) *Farrant* v. *Thompson*, 5 Bar. & Ald. 826; *Combs* v. *Beaumont*, 5 B. & Ad. 72; *Ryall* v. *Rolle*, *ub sup.* The tenant's interest in the fixtures is similar to that he enjoys in respect of trees growing on the demised premises; per Bailey, J., in *Farrant* v. *Thompson*. As to the nature of a tenant's interest in movable utensils and machinery which are demised together with the premises, see 5 Rep. 15, *Spencer's case*; *Gordon* v. *Harpur*, 7 T. R. 9; Dyer, 212 b; 1 Atk. 170; 2 N. Rep. 223; 1 Bos. & Pul. 82, 83, *in notis*. And see the cases referred to in the preceding note.

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[1] It follows, that if a person who has a right by contract to enter upon, and enjoy land for agricultural purposes, cuts timber for any purpose, other than the cultivation, improvement and enjoyment of the land as a farm, the timber thus separated from the freehold, becomes the personal property of the owner of the inheritance, and he may maintain trover for it against any one in possession, although he be a *bona fide* purchaser from the occupant. *Moore* v. *Waite*, 3 Wind. 104.

will be entitled to the use of them during the term as part of the demise; and the landlord cannot afterwards remove them, neither can he insist upon their being valued, or that any additional consideration shall be paid for them.

Thus where a party accepted a demise of a house containing fixtures, and took possession, and there was no proof of any agreement that he should pay for the fixtures, it was held that the acceptance of the demise and taking to the fixtures, did not raise an implied contract to pay for them.(*b*)

Mortgage of Fixtures.

Things affixed pass by a mortgage of the land.

With respect to the transfer of fixtures *by way of mortgage*:—it is to be observed, in the first place, that this species of property may be mortgaged *either in connection with or in separation from the realty. [*225] And there appears to be no sound reason for supposing that fixtures are not included under general terms in mortgage conveyances, as well as in conveyances of any other description.(*a*)[1] It has, however, been thought, that a contrary doctrine is intimated by Lord Hardwicke in the case *Ex parte Quincey*,(*b*) which has already been referred to, as well as in some other more recent authorities. In the case *Ex parte Quincey*, a person sold the utensils and granted a lease of a brew-house, and afterwards mortgaged the brew-house with the appurtenances to another person. The lessee sold his lease and utensils to A, who, for a sum of money, mortgaged the whole to the original proprietor, who afterwards became bankrupt; and the right to these fixtures was litigated between his assignees and the first mortgagee of the brew-house. Under these circumstances Lord Hardwicke was inclined to think, that the fixed

(*b*) *Goff* v. *Harris*, 5 Man. & Gr. 573. And see the same case as to the effect of paying money into court as an admission of a liability in respect of the fixtures.

(*a*) As to a supposed distinction between mortgage and other conveyances, see *Eaton* v. *Jacques*, Doug. 438; *Westerdell* v. *Dale*, 7 T. R. 306; *Williams* v. *Bosanquet*, 1 Brod & Bing. 238.

(*b*) 1 Atk. 477. *Vide* Powell on Mortg. Vol. I, p. 40; Vol. II, p. 1040. And see Sugden's Vend. & Pur. 30.

[1] As between mortgagor and mortgagee, fixtures put up for manufacturing or property leased for a term of years, are included in and pass by a mortgage of the land. *Day* v. *Parkins*, 2 Sandf. Ch. Rep. 359.

utensils of the brew-house did not pass by the mortgage. "For," he observed, "there is some description generally of things in a brew-house: the manner of describing the parcels shows that it *was not meant* to mortgage the utensils, for the word *appurtenances* seems only to intend things belonging to the out-houses. It is said that a mortgage is a purchase; but then it is a redeemable one. How does it stand *between a purchaser and a vendor? [*226] If a man sells a house where there is a copper, or a brew-house where there are utensils, unless there was some consideration given for them they would not pass." The case, however, stood over; and it does not appear that it was ultimately determined.

The opinion here expressed by Lord Hardwicke appears to be at variance with his Lordship's observations in a prior decision, that of *Ryall* v. *Rolle*, hereafter cited. Indeed, the case itself does not seem to warrant the position which some writers have deduced from it, that fixtures will not pass by a mortgage of land as part of the mortgaged estate, unless they are specifically mentioned.[1] For, allowing to it full weight as a final decision, the case must be considered to have been determined entirely with reference to its own peculiar circumstances; to the intent of the parties, and to the construction put upon the language of the conveyance.

Unless not intended by the parties.

And the same observation applies to, and will explain several of the more recent decisions upon this subject. Thus, in the case of *Hare* v. *Horton*,(a) noticed at length in a preceding page, the court distinctly recognize the principle that under a conveyance of land by way of mortgage, property affixed thereto would in general pass, and that there was no distinction between such a conveyance, and a general conveyance by sale, &c.: but they thought that in this case it was to be collected from the terms of the deed itself, that the trade fixtures in dispute were never *in- [*227] tended by the parties to be included in the mortgage. So, like-

(a) 5 Bur. & Ad. 715; *Sup.* 218.

[1] *Union Bank* v. *Emerson*, 15 Mass. 159. It appears to be unnecessary to refer to the fixtures in a mortgage. Here was a mortgage of a fulling mill in which was a kettle for dying, fixed in brick-work—it was held that the kettle passed to the mortgagee of the land on which the fulling mill stood, though the appurtenances were not mentioned. The court recognized the usual distinction in favor of tenants.

wise, in the case of *Trappes* v. *Harter*,(*a*) it was held that certain fixed machinery did not pass to the mortgagee; and this, even although the mortgage deed contained an express mention of fixed property in very general terms. But the court came to that conclusion from the very special circumstances of the case, and without at all impugning the general principle above laid down. For they considered that it appeared from the facts of the case, that the fixtures in question *were not meant* by the parties to be included in the mortgage deed: and that the words in the deed which would seemingly have embraced them, were satisfied by other fixed property about which no question was made.

Things attached pass, though not mentioned.

The case of *Longstaff* v. *Meagoe*,(*b*) may be further cited as an express authority in favor of the rule that fixtures pass by a mortgage of the land itself.[1] And in that case the court was of opinion, that even although no mention is made of fixtures, they pass with the estate, and constitute a part of the mortagee's security. It was an action of trover for certain counters, presses, grates, coppers, workboards, cupboards, glazed doors, movable partitions, &c. The lessee of a house containing these fixtures executed an assignment of the premises by way of mortgage, not mentioning the fixtures: and afterwards he assigned the premises and all his estate and effects to trustees. The trustees being [*228] in treaty for a sale of the fixtures *to a third party, the mortgagee, whose principal and interest were due, took forcible possession of the house, and refused on demand to deliver up the fixtures: whereupon the trustees brought an action of trover. It was held that they were not entitled to recover the fixtures, as against the claim of the mortgagee.

By mortgage of mill, the stones and tackling pass.

Lastly, in the case of *Place* v. *Fagg*,(*a*) it was held that by a

(*a*) 2 Cr. & Mee. 153. See, also, *Boydell* v. *M'Michael*, 2 Cr. & M. 182; 1 Cr. M. & R. 177.

(*b*) 2 Ad. & Ell. 167.

(*a*) 4 M. & Ry. 277.

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[1] Fixtures are embraced by a mortgage, and a bill against waste by their removal may be filed. *Robinson* v. *Preswick*, 3 Edwards Ch. R. 246.

mortgage of a mill, the stones, tackling and implements necessary for the working of the mill pass to the mortgagee.(*b*)[1]

Although, then, it clearly appears from all these authorities that a mortgage of lands cannot be construed to pass any different rights, with respect to things attached thereto, than other conveyances, yet the decisions referred to may be useful to show the utility of expressing in clear terms in mortgages, (as well as in other instruments of conveyance,) the intention of the parties with regard to the transfer of property annexed to the freehold.(*c*)

Things pass though annexed after the mortgage.

Moreover, it may be collected from several of the decisions above cited, that there is no distinction in respect of fixtures which are annexed by the mortgagor *subsequent* to the mortgage, For the security extends alike to all, and the mortgagee is entitled to everything he finds affixed to the mortgaged premises: unless, indeed, (as in other cases,) where *there is evidence of any intention to except them.(*a*) [*229]

And though annexed out of a partnership fund

So, whether the fixtures have been added by the mortgagor himself, or in partnership with others, and at their joint expense. As where a trader mortgages his premises, and then enters into a partnership, and the firm continue to carry on the business on the same premises, and erect additional fixtures thereon; the

(*b*) And see the same principle acted upon in *Ex parte Wilson*, 2 Mont. & Ay. 61; *Ex parte Belcher*, Id. 160; and in other cases referred to, *post*, under the head of bankruptcy.

(*c*) See Sugden's Vend. & Pur. p. 30. And see, also, *Wheeler* v. *Montefiore*, 2 Q. B. 133.

(*a*) And see *Ex parte Belcher*, 2 Mont. & Ay. 160; *Ex parte Price*, 2 Mont. D. & D. 518; *Ex parte Reynal*, Id. 443; *Hitchman* v. *Walton*, 4 M. & W. 409.

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[1] *Vanderpoel* v. *Van Allen*, 10 Barb. S. C. R. 157. Brown, J. Fixtures have been defined to be "chattels, or articles of a personal nature, affixed to land," various articles of machinery for carding, spinning, twisting, bolling and preparing cotton, yarn, &c., standing on the floor of a mill, over the openings made for the passage of the leather working bands, and not otherwise fixtures to the building than by such bands, and some cleats tacked to the floor, held not to be so attached as to make them fixtures. The machinery in this case was claimed by plaintiff as fixtures by virtue of a mortgage executed by defendant; and on the other hand it was claimed by the creditors of the mortgagor under an execution against his property, and also under a chattel mortgage, as chattels.

mortgagee is not affected by, and has no concern with the question of, the partnership claims; but he is entitled to everything belonging to the estate, as against the mortgagor.(*b*)

Possession by the mortgagor.

Several questions have arisen respecting the effect of the mortgagor retaining possession of the fixtures after granting a mortgage of the land to which they are attached. The ground of objection in these cases has been, that as fixtures may be regarded in the nature of personal chattels, the possession of them after a conveyance would, in general, be deemed inconsistent with the deed, and strong proof of fraud.(*c*) Agreeably to this view of the subject, Lord Hardwicke, in the case *Ex parte Quincey*, first cited, thought that there would have been a difficulty on account [*230] of the mortgagor's possession, if it had not *appeared that there was an express agreement between the parties that he should have a right of entering upon the brew-house. It is, however, now clearly established, that things affixed to the land partake so much of the nature of realty, that the retaining possession of them together with the land after an assignment, will not avoid the conveyance on the ground of fraud. In this respect, therefore, a mortgage of property in a state of annexation, differs from a mortgage of things severed from the freehold, or of mere personal chattels transferable from hand to hand.(*a*)

This subject will be found more fully discussed in the cases referred to in the next division of the chapter. It will be sufficient in this place, to cite the two following authorities, in which the rule is very clearly laid down. In the case of *Ryall* v. *Rolle*,(*b*) a brewer having borrowed money, as a security conveyed and assigned his dwelling-house and brew-house, and all the coppers and utensils of trade belonging thereto, by way of mortgage,

(*b*) *Ex parte Cotton*, 2 Mont. D. & D. 725. There is no difference in the rule as to fixtures passing by a mortgage, whether it is a mere equitable mortgage, or a lien by deposit of title deeds; nor, again, whether it is an absolute mortgage in fee, or for a term.

(*c*) See the Statute 13 Eliz. ch. 5; *Twyne's case*, 3 Co. 80; *Edwards* v. *Harben*, 2 T. R. 587; *Reid* v. *Blades*, 5 Taunt. 212; *Bryson* v. *Wylie*, 1 Bos. & Pul. 83; *Eastwood* v. *Brown*, 1 R. & M. N. P. C. 312.

(*a*) Even with regard to personal chattels, it is not in every case necessary that there should be a change of possession; provided the omission is consistent with the deed. The want of delivery of the goods is only evidence that the transfer is colorable. *Martindale* v. *Booth*, 3 B. & A. 498.

(*b*) 1 Atk. 165; *S. C.*, 1 Ves. 348.

subject to redemption; and afterwards continued in possession. On a question between the first mortgagee and the subsequent mortgagees and creditors, as to the validity of the first mortgage, which was disputed on the ground of fraudulent possession by the debtor, the court were clearly of opinion, that the first mortgage was not invalidated on this account, nor was the mortgagee *deprived of his lien upon the fixed utensils. The court said, [*231] moreover, that neither the mortgagor nor any other person had a right to remove the fixtures until the mortgage was satisfied.

In like manner, in the case of *Steward* v. *Lombe*,(a) a person having mortgaged a windmill of a peculiar construction, continued in possession of it after the mortgage; and it was holden that the possession was not fraudulent. And the court observed, that it was not to be expected that the mortgagee should come to reside in the mill. The mortgagee, in conformity with the usual practice in such cases, permitted the mortgagor to continue in possession, and constructive possession of the land under the deed was a sufficient possession of the mill standing on the land; and the more so, as this was not an absolute conveyance, but a mere pledge to be kept till money lent on the security of it was repaid. If the party relinquished possession, it would probably defeat all the ends of the mortgage. The mortgagee could only have taken possession by entering the land unnecessarily, or by occupying the mill to his own personal inconvenience.(b)

In this case it may be observed, that the mill had been erected by the owner of the fee, and was not seizable under a writ of *fieri facias* against him; and the court appear in some measure to have relied upon this circumstance. This distinction has been insisted on in some other cases also. But it is clear *that the [*232] principle of the decision holds equally in the case of the mortgage of a mere chattel interest; as where a *tenant* having erected fixtures during the term, afterwards mortgages his interest in the premises.(a) The circumstance of the fixed property being in

(a) 1 Brod. & Bing. 506; 1 Powell on Mortg. 36.

(b) See, also, *Hubbard* v. *Bagshaw*, 4 Sim. 326, decided on the authority of the above cases; *Fletcher* v. *Manning*, 1 Car. & Kir. N. P. 350.

(a) Acc. per Parke, B., and Alderson, B., in *Minshall* v. *Lloyd*, 2 M. & W. 459, *et seq.*; and per Alderson, B., in *Boydell* v. *M'Michael*, 1 Cr. M. & R. 266.

the latter case seizable under a *fieri facias* in the hands of the tenant, cannot make it so far a personal chattel, that the mortgagor's retaining possession of it afterwards together with the land, would be deemed fraudulent.

Mortgagor cannot remove fixtures pending the mortgage.

It follows from the principles laid down in the preceding pages, and from the relation in which the mortgagor stands to the mortgagee, that although the mortgagor may continue in possession of the estate and of the fixtures after the mortgage, he is not at liberty to disannex and remove any of the fixtures from off the premises. The case of *Hitchman* v. *Walton*(*b*) is also an authority to that effect. It was there holden that where a lessee for years had mortgaged all his interest in the premises, and became bankrupt, the mortgagee might sue the assignees who had taken down and removed the fixtures from off the premises; and might declare in case as reversioner: and moreover, that he could recover in trover against them for the value of the fixtures, whether they were on the premises before the lease, or were afterwards erected by the mortgagor; and whether they belonged to the lessor at the end of the term or not.(*c*)

[*233] **Bankruptcy.*

The Statute 21 Jas. I, c. 19, relating to bankruptcy, and the more recent enactment, 6 G. IV, c. 16, have given rise to some questions respecting fixtures, which depend upon the peculiar nature of this species of property. The points in most of the cases before the courts have arisen on the bankruptcy of the mortgagors of premises and fixtures, who have remained in possession of the property after the mortgage. And the question has been whether the assignees are entitled to claim the fixtures as part of the goods and chattels of the bankrupt, or as being in their reputed ownership at the time of the bankruptcy; or whether the mortgagees can legally claim them as part and parcel of the mortgaged estate.

By the 11th section of the former statute, "it was enacted that

(*b*) 4 M. & W. 409. And see *Ex parte Reynall*, 2 M. D. & D. 450, and the cases there referred to.

(*c*) For some further points as to the mortgage of fixtures, as well when conveyed together with the land, as when mortgaged in separation from it, see the case of *Ryall* v. *Rolle*, *ub. sup.*

if any person or persons shall become bankrupt, and at such time as they shall so become bankrupt, shall by the consent and permission of the true owner and proprietary, have in their pos session, order and disposition, *any goods or chattels*, whereof they shall be reputed owners, and take upon them the sale, alteration or disposition as owners, that in every such case, the commissioners shall have power to sell and dispose the same, to and for the benefit of the creditors which shall seek relief by the commission, as fully as any other part of the estate of the bankrupt."

*The provisions of this section of the statute, are re-enacted in nearly the same words in the new statute, 6 G. IV, c. 16, s. 72; and the decisions under the former act may be considered as authorities in the construction of the latter. [*234]

Fixed articles not "goods and chattels" within the statutes of bankruptcy.

In pursuing this inquiry, it will be proper to notice in the first place the case of *Horn* v. *Baker*,(a) the particulars of which will be found in a former page. The question arose there, under the Statute of James, by which the subject was then governed. Certain stills fixed to the freehold had been leased together with a distill house for a term; the lessee became bankrupt; and it was holden that the stills did not pass to the assignees under the description of *goods and chattels* within the meaning of the statute. And the court drew a distinction between these articles, and certain other utensils which were not fixed, but merely stood upon frames or horses; and the latter they held would pass to the assignees under the words of the statute.(b)[1]

(a) 9 E. 215.

(b) With respect to the *movable* utensils in this case, there was nothing to rebut the reputed ownership of the bankrupt as to them; but the court considered that they would not have passed to the assignees had there been a known usage of trade of leasing such things together with the premises; for then the use and possession of them would not have carried the reputed ownership. As to which, see *Storer* v. *Hunter*, and other cases, *post*. And as to trading articles not fixed passing to the assignees, see *Bryson* v. *Wylie*, 1 Bos. & Pul. 83; *Ex parte Dale*, 1 Buck. 365; *Ex parte Richardson*, Id. 480; *Lingard* v. *Messiter*, 1 B. & C. 308; *Hornblower* v. *Proud*, 2 B. & A. 327.

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[1] Gibbons on Fixtures, 17, remarks, "in *Horn* v. *Baker*, (9 East, 215,) it was not doubted but the distiller's vats, supported upon brick-work and timber, but not let into the ground, and vats standing on horses or frames of wood, were goods and chattels; and that stills set in brick-work and let into the ground were fixtures. A

This case and that of *Ryall* v. *Rolle*,(c) which has also been already noticed, may be considered as the leading decisions upon this subject: and the principle to be deduced from them, viz., [*235] that fixtures constitute *part of the freehold, and are not to be taken as goods and chattels, within the meaning of the bankruptcy acts, has been recognized and affirmed by a series of very important decisions of modern date.

Thus, in the case of *Clerk* v. *Crownshaw* in the Court of King's Bench,(a) a tenant took a lease of a mill and iron forge, and bought the fixed and movable implements therein; but it was agreed that they should be delivered up at the determination of the term at a valuation, if the lessors gave notice of their desire to have them. The tenant afterwards assigned the premises and machinery by way of mortgage, but continued in possession of them, and became bankrupt. It was holden that this case fell within the principle of *Horn* v. *Baker*, and was governed by it; and a like distinction was taken, as in that case, between the fixed and the movable property in the mill.

Again, in another case which followed soon afterwards in the same court, a similar question arose. In *Coombes* v. *Beaumont*,(b) a steam engine, &c., fixed up in a colliery, was leased to a tenant to be used by him during the term, but to be held as the property of the landlord. It was ruled, on the authority of *Horn* v. *Baker*, that these engines did not come under the description of "*goods and chattels*;" and did not pass as such to the assignees under a commission of bankrupt against the tenant. See, also, *Boydell* v. *M'Michael*, *Post*; *Hallen* v. *Runder*, 1 C. M. & R. 766, [236] to the same effect; also per Parke, B., in *Minshall* v. **Lloyd*, 2 M. & W. 459; and per Abinger, Ch. B., in *Hitchman* v. *Walton*, 4 M. & W. 414.

There is a decision upon this subject in the Court of Exchequer which has given rise to much discussion, and perhaps

(c) 1 Atk. 165; *Sup.*, p. 230.
(a) 3 B. & Ad. 804.
(b) 5 B. & Ad. 72.

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copper merely resting on a brick-work socket, and a water butt standing on the ground, or a wooden stool, are not fixtures; otherwise if the copper was fastened in in brick-work."

to some misapprehension: and in which the doctrine laid down in the above cases appears not to have been altogether adopted by the court. A distinction, moreover, seems to have been there taken in respect of cases where the annexation in question has been made for trading purposes, and has been erected by the owner of the freehold himself, who afterwards becomes bankrupt. This is the case of *Trappes* v. *Harter*.(a) In that case certain partners, the owners in fee of some premises and calico print works, mortgaged the same, together with the steam engine, mill gearing, fixed machinery, and things erected and being on the premises, which in any manner constitute fixtures and appendages to the freehold. They continued in possession; and afterwards became bankrupt. And it was holden that the machinery did not belong to the inheritance, but was part of the personal estate of the bankrupts, and as such was declared to pass to the assignees.

The facts of this case are very special and complicated. They may be collected from the summary given in the judgment delivered by Lord Lyndhurst, Ch. B. "The bankrupts had carried on the business of calico printers in partnership. Many years ago the land and buildings in question were purchased, and the conveyance was taken to one of the partners; *but it is [*237] clear that the estate was treated throughout as belonging to the partnership. The machinery was erected by the partners for the purposes of carrying on the partnership trade. It consisted principally of articles which could be removed without the slightest injury to the freehold. They were fixed by bolts and screws, so that they could be drawn off without any damage to the building. All the rest of the machinery was so fixed that it was capable of being removed; and it was actually removed without any material injury either to itself or the freehold. In taking the account of stock the land and buildings were always placed under one head, and the machinery under another. In the part of the country where these premises were situate, it appears that machinery of this description is constantly bought and sold distinctly from the freehold."(a)

(a) 2 Cr. & M. 153.

(a) His Lordship here remarks, "It is clear that as between landlord and tenant, it might be removed by the tenant if put there by him; as between heir and executor, it would have passed to the executor. The machinery in this case appears to have been in the reputed ownership of the bankrupts; and they obtained credit by reason of their possession of it."

The court took time to consider; and, in delivering a very elaborate judgment, the Ch. B., after reviewing several of the principal cases in which fixed property had been considered to form part of the personal estate, said: "Applying these authorities to the present case, we think that this machinery, erected for the purposes of trade, in a neighborhood where machinery is commonly removed, and which was capable of removal without [*238] injury to the freehold, is not *to be considered as belonging to the inheritance, but as part of the personal estate." And he thus concludes his judgment: "It appears to us, therefore, that there was sufficient to satisfy this mortgage deed without the machinery in question; and that it *was not intended* to pass, and did not pass, under this mortgage deed: it follows, that it was personal estate, and passed to the assignees."

Conceding to this case its full effect as a valid authority, it must be regarded as having been decided entirely upon its own peculiar circumstances; and especially with reference to the *intent* of the parties to the mortgage deed. And although the *dicta* of the judges certainly seem to favor the proposition that trade fixtures erected under the circumstances mentioned, are to be looked upon as personal chattels, yet the general question as to fixtures being goods and chattels within the bankrupt acts is not really touched by the case. For the court having decided that the machinery in question was not included in the mortgage, it necessarily passed to the assignees with the bankrupt's estate. This decision, therefore, cannot be regarded as impugning the doctrine which had been so clearly established by all the previous cases.

It is to be noticed, also, that in another case, that of *Boydell* v. *M'Michael*,(a) decided in the same court, and very shortly after the one in question, the doctrine laid down in *Horn* v. *Baker* was again distinctly recognized and adhered to. And it must further be stated, that in the still more recent and important [*239] case of *Minshall* v. *Lloyd*,(b) (also in the *same court,) when this case of *Trappes* v. *Harter* was cited in argument as an authority with regard to the property in fixtures, it was observed by Parke, B., that some doubt had been thrown on that case as far as it bore upon the point in discussion.

(a) 1 Cr. M. & R. 177.
(b) 2 Mee. & Wel. 456.

From the principles laid down in the foregoing decisions, it may be inferred that where a tenant for years becomes a bankrupt, the articles and utensils which *he has himself attached* to the demised premises, and which are removable by him at the end of his term, will not pass absolutely to the assignees like his other goods and chattels, or those in his possession or disposition.(a) There is no doubt, however, that the assignees may lay claim to them on the ground of their succeeding to the bankrupt's interest in the term; but if they renounce the bankrupt's lease, it is conceived, they will have no right to take the fixtures. Perhaps, indeed, a severance[1] of the fixtures would, of itself be deemed an acceptance of the demise, and subject the assignees to the covenants contained in the tenant's lease.

Right of the assignees to a tenant's fixtures.

But independently of the construction put upon the words "*goods and chattels*" in the statutes, as laid down in the foregoing cases, it has been established that property affixed to the freehold is not within the intent of the statute; because the possession of such property does not create a visible ownership in the bankrupt, so as to procure him unmerited credit. *For creditors are not deceived by the possession of property of this description; and it differs from the case of personal goods, where the possession and power of disposal are the only evidence of ownership to which a creditor can look. [*240]

Possession of fixtures not a reputed ownership.

This proposition forms, indeed, in part, the ground of decision in several of the cases which have been already referred to. And the rule resulting from it, that the doctrine of reputed ownership does not attach to property affixed to the freehold, has been established by a series of decisions both at law and equity.

(a) Fixtures erected by the tenant himself, are *in favor of creditors* so far considered as goods and chattels, that they are seizable under a *fieri facias* which contains only the words "goods and chattels." See *post*, part 2.

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[1] *Goddard* v. *Bolster*, 6 Grenl. 427, the question of severance was considered. In this case, it appeared that the mill stones and irons had been detached by a freshet, which carried away the main body of the mill, and it was claimed that such stones and iron were subject to seizure on *fi. fa.* as personal property; but it was held, that notwithstanding such accidental severance, they continued to be part of the realty, and therefore not seizable as personal property.

Thus, in the case of *Steward* v. *Lombe*,(*a*) Ch. J., Dallas intimates an opinion, that if the mortgagor of the mill had become bankrupt, the mill would not have passed to his assignees, because it would not have been a case in which the appearances could excite a false credit by reason of the possession of the debtor after the assignment.

On the same principle, the case of *Rufford* v. *Bishop*, in Chancery, was decided by the M. R.(*b*) There the owner in fee of certain iron works mortgaged them, together with the steam engines, furnaces, and other erections thereon: he continued in possession, and afterwards became bankrupt. It was considered [*241] by *his Honor, that the possession of the fixed machinery did not necessarily infer that the property belonged to the bankrupt, so that he might acquire a false credit therefrom. And accordingly he held that it did not pass to his assignees, as being in his order and disposition.

The case of *Hubbard* v. *Bagshaw*, which followed soon after in the Vice-Chancellor's Court,(*a*) is an authority to the same effect. There a tenant in fee of a messuage and cotton mills, in which was a steam engine and boilers, &c., mortgaged the same in fee together with the machinery; but he remained in possession until his bankruptcy. It appeared that the steam engine was in part affixed to the foundation of the mill, and the rest secured by bolts and screws. The Vice-Chancellor held, with reference to the cases of *Steward* v. *Lombe* and *Ryall* v. *Rolle*, that the steam engine did not pass to the assignees on the ground of reputed ownership.

Analogous to these cases is that of *Boydell* v. *McMichael*, in the Court of Exchequer.(*b*) There a lessee of a house for a term, purchased the fixtures from the lessors by valuation: he after-

(*a*) 1 Brod. & Bing. 511. And see *De Tastet* v. *Walker*, 1 Buck. 153. In *Sinclair* v. *Stevenson*, (2 Bing. 514,) the assignees of a bankrupt were held entitled to certain implements and fixtures on the ground of reputed ownership. But that decision rested on the fact of fraud between the parties, in making a pretended lease of the premises and fixtures to the bankrupt; and the principle established in *Horn* v. *Baker*, &c., was not adverted to.

(*b*) 5 Russell, 346; cited 4 Sim. 336.

(*a*) 4 Sim. 326.

(*b*) 1 Cr. M. & R. 177.

wards assigned the lease of the house by way of mortgage, and the fixtures were included in the assignment: he remained in possession, and afterwards became bankrupt. It was holden, on the authority of *Horn* v. *Baker*, that the fixtures did not pass to the assignees, as goods and chattels within his order and disposition at the time of the bankruptcy. And the reason assigned by *Parke B., was, that from the nature of fixtures, they are a part [*242] of the freehold during the term, and that with regard to real property, the possession is considered as nothing, and the title only is looked to.

Prior to the foregoing decisions, a case of a similar description had occurred in the Court of King's Bench; but the determination was there made to rest on less general grounds. In the case of *Storer* v. *Hunter*,(*a*) it was held that the possession by a tenant of certain fixed machinery which he had taken on lease together with some collieries, and of new machinery which he had erected to replace some of the old, was not to be considered a reputed ownership within the meaning of the statutes of bankruptcy; either during the term, or after he had forfeited it between a judgment in ejectment by his landlord, and the execution of the writ of *habere facias possessionem*. But in this case, the court relied principally on an usage which was proved, of demising the machinery with the collieries, the landlord retaining the right to it on the determination of the tenant's lease; for it was said that this usage rebutted the presumption of a reputed ownership arising from the possession of the articles.(*b*)

Of this case it may be remarked, that in some of the other decisions on the subject, the prevalence of a custom in the neighborhood, of demising fixtures together with the premises, or of selling them *without reference to the freehold, has been adverted to by the judges as an ingredient in their determinations. It has been seen, however, that the rule which establishes that the doctrine of reputed ownership is not applicable to things fixed to the freehold, is founded on a more general principle, depending on the nature and character of the property itself. It is ap- [*243]

(*a*) 3 Bar. & Cr. 368. See, also, *Clerk* v. *Crownshaw*, *ub. sup.*, and the remarks of Taunton, J., in that case.

(*b*) See *Rufford* v. *Bishop*, *Trappes* v. *Harter* and *Hubbard* v. *Bagshaw*, *ub. sup.*; *Ex parte Scarth*, 3 M. & Ay. 240. See, also, in *Horn* v. *Baker*, 9 E. 215.

prehended, therefore, that in this case of *Storer* v. *Hunter*, the claim of the assignees could not have been supported in any point of view; for, according to the general rule, the possession of the fixed articles would not have created a reputed ownership, even if there had been no usage in the case; and from the decision of *Horn* v. *Baker*, and the other cases, it follows, that notwithstanding the bankrupt retained the visible ownership of the machinery, it would not have passed to the assignees under the words of the statute; and lastly, the assignees could not have taken the fixed property as part of the bankrupt's estate and effects, because it appears from the statement of the case, that before the act of bankruptcy, the lease had been forfeited, and the term was at an end.(*a*)

One further case remains to be noticed. A. having contracted to purchase a factory with a steam engine and fixtures, took possession on part payment of the price; he never himself assumed the actual occupation, nor worked the machinery; but retained [*244] the *man who before had the charge of it under the vendor in the same employment: the remainder of the purchase money not being paid, he requested the vendor to resell and pay himself; and accordingly the latter immediately took possession of the property, and engaged the man in charge still to continue so on his behalf. On the following day, A. became bankrupt: it was held that under these circumstances, the steam engines and fixtures were not in the reputed ownership of the bankrupt at the time of his bankruptcy.(*a*)

Tenant's fixtures are not excepted.

In the application of the rule as laid down in the preceding pages, a distinction has been insisted upon in some of the cases, between fixtures which are put up by a tenant, and those annexed by the owner of the freehold to his own estate; and it has been contended that the former partake so much of the nature of personalty that they ought to be considered goods and chattels within the meaning of the clause of order and disposition. This doctrine has been admitted by some of the judges in the

(*a*) See the explanation of this case given by Parke, J., in *Coombs* v. *Beaumont*, 5 B. & Ad. 76. The case was tried a second time at the Derby Spring Assizes, 1826, and a verdict was found against the assignees. It was brought down for trial a third time at the following Summer Assizes, but was compromised.

(*a*) *Ex parte Watkins*, 1 Dea. 296. This case was decided without regard to the question, whether the property in dispute was to be regarded as personalty.

courts of bankruptcy; at least in respect of *trade* fixtures erected by a tenant, and which might be removed without damage to the freehold.(*b*) But on considering the true nature of fixtures, of whatever description, and that for whatever purpose they may have been erected, they all alike change their character by annexation, and participate in that of the freehold, it seems difficult to understand the principle of such *a proposition: and certainly [*245] no such distinction has been allowed to prevail in the courts of common law, in the series of cases from *Horn* v. *Baker* downwards. It is, moreover, especially opposed to the decision in the case of *Boydell* v. *McMichael.* Indeed, it is difficult to reconcile the practice in bankruptcy as found in some of the reported cases, with the general rule as it is laid down in every one of the decisions, with the exception, perhaps, of that of *Trappes* v. *Harter.*

For further authorities on the doctrine of order and disposition as applied to the case of fixtures, the reader may refer to the following cases: *Exp. Broadwood*, 1 M. D. & D. 631; *Exp. Scarth*, 3 M. & A. 240; *Exp. Spicer*, 3 M. & A. 273; *Exp. Reynal*, 2 M. D. & D. 443, where the cases are examined; *Exp. Price*, Id. 518; *Exp. Bentley*, Id. 591; *Exp. Heathcoate*, Id. 711; *Fletcher* v. *Manning*, 1 Car. & Kir. N. P. 350; and to the authorities referred to in the preceding page. Many also of the cases which have been treated of under the head of mortgage conveyances, will be found to be applicable to the present subject.

Devise of Fixtures.

Annexations to the freehold, in what cases devisable.

With respect to the transfer of fixtures by devise, it may be observed, that where a testator has a devisable interest in a house, &c., he may devise the incidents of the house, and things that are annexed to the house, either together with, or in separation from the freehold. On the other hand, if the estate itself is not devisable, the things which are annexed to it are not in general devisable; and therefore a tenant for *life or in tail cannot [*246] devise the doors, windows, or wainscot of a house, nor personal chattels that are affixed to the house, and which form part of it;

(*b*) See *Ex parte Lloyd*, 1 M. & Ay. 494, 506; *Ex parte Wilson*, 2 M. & Ay. 61, 70; *Ex parte Belcher*, Id. 162; *Ex parte King*, 1 M. D. & D. 119, where the court were divided in opinion; and *Ex parte Austin*, 1 Dea. & Ch. 208; in which case, however, no judgment was given.

but such a devise is void.(a) But even in this case, the testator may devise away such fixtures as are severable from the freehold, and which would go to his personal representative; because these are not incident to the inheritance.

Belong to devisee of the land.

In general it may be considered as a rule, that the devisee of land will be entitled to all articles which are affixed to the land, whether the annexation takes place prior or subsequent to the date of the devise; according to the legal maxim "*quod ædificatur in area legata cedit legato.*" By a devise, therefore, of a house, all personal chattels which are annexed to the house, and which are essential to its enjoyment, will pass to the devisee.(b) And in like manner, things that are constructively annexed to the house, as the locks, keys and rings, &c., of the house, will go to the devisee.(c) And so of any other matter that is incident to the principal thing, although it may be distinct from it; and, therefore, if the owner of a mill take out one of the mill stones to pick or gravel it, and devise the mill while the stone is severed from it, yet it shall pass as part of the mill.(d)

Whether executor's fixtures pass to the devisee of the land.

[*247]

It is conceived, however, that an exception from this rule will be found to exist in respect of the class *of fixtures which have been described in the first and second sections of the preceding chapter. For, as the articles there referred to are considered not to pass to the heir as part of the inheritance, but are held to be personal assets in the hands of the executor, it would seem to follow, that as between the executor and the devisee of the land, the devisee would not be entitled to them under a general devise of the realty. This point, however, is not altogether free from difficulty: for although in ordinary cases the devisee takes the land in the same condition as it would have descended to the heir, yet, it should be recollected, that the devisee of land is entitled to *emblements*, (which are very analogous to fixtures,) and may claim them as against the executor, notwithstanding the heir would not have taken them with the estate.(a)

(a) Shep. Touch. 340, 322; Cowell's Inst. tit. 20, pl. 12.

(b) Shep. Touch. 469, 470; *Herlakenden's case*, 4 Co. 62. And see *Colegrave* v. *Dias Santos*, 2 Bar. & Cres. 80.

(c) *Liford's case*, 11 Co. 50. See *ante*, p. 218.

(d) 6 Mod. 187; *Place* v. *Fagg*, 4 M. & Ry. 277. And see *Martyr* v. *Bradley*, 9 Bing. 24.

(a) See *ante*, p. 212.

In one case, which was a conveyance by deed, a testator had covenanted to *grant a house and all things fixed to the freehold of the house;* and on a question between the covenantee and the defendant, who was the executor and devisee of the house in trust to settle it according to the covenant, it was held, that articles of the description just referred to, viz., hangings and looking-glasses fixed to the walls of the house, were not within the testator's covenant, because they were not to be taken as part of the house.(*b*) From this decision it might perhaps be inferred that such fixtures would not be comprised under a corresponding devise in a will.

*Under the Statute of Charitable Uses, 9 G. II, which in certain cases avoids devises of lands and bequests relating to interests in real property, it was held by the Vice Chancellor, that fixtures in a leasehold house of a testator, such as he was entitled to remove, would pass under a bequest of residue of personal estate for charitable purposes; for these were considered by the Vice-Chancellor as mere personal chattels.(*a*) [*248]

Fixtures pass by a bequest for charitable purposes.

With respect to the language of a devise relating to fixtures, it should be observed, that where it is the intention of a testator expressly to devise fixtures in separation from the freehold, or that the devisee of the land should take all appendages belonging to the land, it is necessary to specify the articles by some appropriate term or description. For there are decisions to the effect that things fixed to the freehold, will not be included under terms which are usually applied to property of a mere chattel nature.

Fixtures, how described in a devise.

Thus under the term "*furniture*," in a devise, it was holden that the devisee was not entitled to articles fixed to the freehold of the testator's house, notwithstanding they were matters of mere ornament. In the case of *Allen* v. *Allen*,(*b*) a testator gave to the defendant, *inter alia*, his *furniture*, jewels, &c.; on a bill brought by the heir of the testator, it appeared that the defendant claimed under this devise certain marble slabs and chimney-pieces fixed up in a house of which the testator was the owner

Will not pass as "furniture."

(*b*) *Beck* v. *Rebow*, 1 P. Wms. 94.

(*a*) *Johnston* v. *Swan*, 3 Mad. 457.

(*b*) Mosely, 112. But see *Paton* v. *Sheppard*, *post*.

[*249] in fee, and certain *other slabs and chimneypieces belonging to a house of which the testator was tenant for years. It was contended that all these things passed to the devisee, because they were ornaments every day taken down by tenants, and also upon executions. But the Lord Chancellor held, that by the word furniture, the devisee was not entitled to the marble slabs or chimneypieces or anything fixed to the freehold on the testator's *own estate.* And he said, that glasses in pannels were to be considered as part of the freehold, but not if they were screwed in; and that there was a great difference between the heir and devisee, or the executor and devisee, and a landlord and tenant.

Nor as "household goods."

So, where a testator gave by his will all his *household goods and implements of household;* it was held by Lord Talbot, Chancellor, that under this bequest a clock in the house would pass, "*if not fixed to the house.*"(*a*) From whence it may be concluded that articles of this description, if actually fixed to the freehold, would not be included under a devise of *household goods.*(*b*)

But included under "fixed furniture."

The term "*fixed furniture,*" however, will be sufficient to comprehend articles of this description; and may embrace, perhaps, even more than the term "*fixtures*" in its strict sense. Thus a testator bequeathed his leasehold messuage, with the grates, coffers, locks, &c., and other "*fixtures and fixed furniture* to A. for [*250] *life;* and the household goods, *furniture, plate, &c., and other properties in the messuage, not being comprehended under the preceding terms *fixtures and fixed furniture,*" to him absolutely. There were in the messuage some looking-glasses, which were standing on the chimneypieces and nailed to the walls, and a bookcase standing on brackets and screwed to the wall. It was held that these were comprehended under the term "*fixed furniture*" in the will, and that A. took only a life interest therein.(*a*)

Mr. Serjeant Hill, in his MS. notes,(*b*) in referring to the above mentioned case of *Allen* v. *Allen*, remarks that it seems admitted

(*a*) *Slanning* v. *Style*, 3 P. Wms. 334.

(*b*) And see Burn. Ecc. Law, Vol. IV, pages, 168, 170; Swinb. on Wills, part 7, sec. 10; God. Orp. Leg., part 3, ch. 20, sec. 12. See, however, *Stewart* v. *Marq. of Bute, ante,* p. 160, *in notis.*

(*a*) *Birch* v. *Dawson*, 2 Ad. & El. 37. See the report of the case at *Nisi Prius*, where Littledale, J., expresses a doubt whether a carpet tacked to the floor is fixed furniture. 6 Car. & P. 658.

(*b*) See his copy of Viner's Ab. in Linc. Inn, Lib. Vol. XIV, p. 319, tit. House E.

in the case that the legatee of "*furniture*" should have the slabs and chimneypieces in the testator's dwelling-house, of which he was only *tenant for years*. The distinction seems to be, that in the latter case, the articles may be considered to partake more of the nature of personalty, because the testator has only a chattel interest in the estate itself.(*c*)

And "household furniture."

And there is a modern decision in conformity with this view of the case. For where a testator made a bequest of his "*household furniture*," it was holden that fixtures consisting of stoves, blinds, bell pulls, and other articles generally considered as tenant's *fixtures, and belonging to the testator in a leasehold house occupied by him, would pass: and the Vice-Chancellor said the articles in question were not less furniture because they were fixed to the house.(*a*) [*251]

Intention of testator.

In the case of wills, however, the intention of parties more than any particular form of expression, is the criterion to be resorted to, for ascertaining whether things affixed pass by a conveyance of the real or of the personal estate. And with respect to this, it may be observed, that the intention of a testator may frequently be indicated by the circumstance of the articles having been used together with the premises during the lifetime of the party.(*b*)

Inferred from unity of occupation.

Thus where a testator devised his copyhold estate, consisting of a brew-house and malt-house; under this devise the plant of the brew-house was held to pass with the brew-house itself, although there was a bequest of the personal estate to another; for the court, without reference to the doctrine of fixtures, presumed that from the circumstance of their having been in lease together, the testator must be understood to have devised them together.(*c*)

(*c*) The case before the court does not, however, seem to involve this point. It is clear the heir was not entitled to the fixtures on the leasehold estate; but the question would still remain, whether, as between the devisee and the *executor*, they would pass to the devisee as furniture.

(*a*) *Paton* v. *Sheppard*, 10 Sim. 186.

(*b*) As to the effect of custom in such cases, see *Lowther* v. *Cavendish*, 1 Ed. 99; *Sup.* 179.

(*c*) *Wood* v. *Gaynon*, Amb. 395. And see upon this subject, 3 Wils. 141; 1 Bos. & Pul. 53; 2 T. R. 498; 2 Bing. 456; 1 Bar. & Cres. 350.

Whether fixtures pass by will unattested.

There does not appear to be any authority respecting the proper formalities of a will which is intended to pass fixtures in separation from the land, and whether it must *formerly* have [*252] been duly executed according *to the provisions of the Statute of Frauds. Perhaps a distinction may be thought to exist between a devise of articles which are in the nature of personal estate, and which would be assets in the hands of the executor, and those appendages to the freehold which would descend to the heir, notwithstanding they were antecedently of a chattel nature. In the former case the subject of the devise has a close analogy to emblements, which are said to pass by an unattested will. The question, however, does not appear to have been hitherto discussed.(a)

Form of Agreement, &c.

It remains now to mention a few particulars respecting the proper formalities to be observed in agreements and conveyances relating to fixtures.

Agreement for fixtures, whether within the Statute of Frauds.

The most important question that occurs upon this subject is, whether contracts which relate to the sale and transfer of fixtures, can be considered to fall within the provisions of the *Statute of Frauds*. Although this question may be supposed to have frequently arisen, as well upon original demises between landlords and tenants, as upon assignments between out-going and incoming tenants, and upon sales under executions, yet there does not appear to be any instance in which it has been the subject of express judicial decision. Where, indeed, the contract relates [*253] to a transfer of fixtures together with the land, it *clearly falls within the fourth section of the statute; and it is apprehended that in such a case any agreement for the sale, valuation, &c., of the fixtures, although it may be of a chattel interest only, must be in writing, and executed according to the formalities required by the statute.(a) But the question seems to be more doubtful

(a) *Vide* Swinb. on Wills part 3, sec. 6; Roberts on Wills, Vol. I, p. 88. And see now the recent statute, which requires that wills, whether of real or personal estate, should be alike attested.

(a) See as to an agreement for house and furniture being within the statute, *Michelen* v. *Wallace*, 7 Ad. & El. 49. So, per Wylde, C. J., an agreement to take premises, and to pay for furniture and fixtures, &c., is an agreement relating to an interest on land, and must be in writing. *Vaughan* v. *Hancock*, 16 Law J. R. C. P. 1.

when things annexed to the freehold are sold in contemplation of an immediate severance, and the contract takes place between parties who do not transfer any interest whatever in the land; as between an out-going tenant at the expiration of his term, and the in-coming tenant under a new demise. For in this case the subject of the contract is, in the view of the parties, a bare chattel; and, as was observed by Lord Ellenborough in the case of *Parker* v. *Staniland*,(*b*) it does not follow because articles are not at the time of the contract, in the shape of personal chattels, as not being severed from the land so that larceny might be committed of them, that therefore the contract for the purchase of them passed an interest in land within the fourth section of the Statute of Frauds.[1] It deserves also to be noticed that in the case of *Mayfield* v. *Wadsley*, in the King's Bench,(*c*) as well as in other cases, it seems to have been considered by the court, that a *parol* contract for the sale of *growing crops* might be good; at least where, as between out-going and in-coming tenant, *there was no sale of any interest in the land itself.(*a*) [*254]

After an appraisement.

However, if fixtures, while they subsist in a state of annexation, are to be considered an interest in land, and within the provisions of the Statute of Frauds, it appears from analogy to the cases relating to the sale of trees, &c., that a contract which could not be enforced for want of the requisites of the statute, would give a right of action where it has been executed by an *appraisement* having been made of the fixtures.(*b*)

Agreement for sale of fixtures by valuation, not within the statute.

The case of *Hallen* v. *Runder*,(*c*) is an authority on this point;

(*b*) 11 East, 362.

(*c*) 3 Bar. & Cres. 360.

(*a*) And see 1 Bing. 6. See, also, *Evans* v. *Roberts*, 5 B. & C. 829, that a sale of a growing crop of potatoes is not within the fourths; and *S. C.*, as to a sale of emblements. See further in *E. Falmouth* v. *Thomas*, 1 Cr. & M. 89; *Jones* v. *Flint*, 10 Ad. & El. 753; *Sainsbury* v. *Matthews*, 4 M. & W. 343. In *Rodwell* v. *Phillips*, 9 M. & W. 501, it was held that the sale of a growing crop of fruit is within the statute.

(*b*) *Vide Poulter* v. *Killingbeck*, 1 Bos. & Pul. 397; *Teal* v. *Auty*, 2 Brod. & Bing. 99. See, also, *Salmon* v. *Watson*, 4 B. Moore, 73, as to the effect of an appraisement of fixtures.

(*c*) 1 C. M. & R. 266.

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[1] Wheat growing may be sold by parol, and the right of property will pass without writing. Such sale does not pass any interest in the land, and is not within the Statute of Frauds. *Austin* v. *Sawyer*, 9 Cowen, 39.

and indeed the decision goes further, perhaps, and appears to support the view taken above, that a sale of fixtures does not transfer any interest in land within the Statute of Frauds. In that case a tenant a few days previous to the expiration of his tenancy, agreed with his landlord, and at his request, to leave the fixtures, the latter engaging to take them at a valuation; the tenant accordingly gave up possession of the premises with the fixtures to the landlord; and the fixtures were afterwards valued by brokers on each side at above £10; and they signed the appraisement. It was held that under these circumstances *this was not a sale of any interest in land, within the 4th sect. of 29 Car. II, c. 3.

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Nor within the 17th sect., as a sale of goods.

It would seem also, that in this case the court considered that a note in writing was not necessary as upon a sale of goods above £10, under the 17th sec. of the statute.

Sale of a reversionary interest in fixtures by parol agreement, valid.

In a late case at *Nisi Prius*, (North Circ.,) it was ruled by Creswell, J., that a reversionary interest in trade fixtures, *e. g.*, a steam boiler, would pass to a purchaser under a parol agreement, and that a deed was not in such a case necessary.(*a*)

Stamps on Instruments relating to Fixtures.

Schedule of fixtures, stamp on.

A few observations occur with respect to the provisions of the stamp acts, as they apply to schedules or inventories of fixtures, and the amount of stamps on agreements, leases, &c., of fixtures.

These schedules or inventories are either annexed to or indorsed upon instruments of lease, &c., or they are distinct instruments which are merely referred to in the lease. According to the provisions contained in the general stamp act, 55 G. III, c. 184, a schedule or inventory, &c., which is *put or indorsed* upon, *or annexed to*, a deed or agreement, must be included in the calculation of the number of words as part of the instrument.(*b*) But "a schedule, inventory, or catalogue of any *fixtures*, &c., which shall *be referred to* in or by, and be intended to be used or given in evidence as part of, or as material to, any agreement, *lease, tack, bond, or other instrument, &c., but which shall be

[*256]

(*a*) *Petrie* v. *Dawson*, 2 Car. & Kir. 138.
(*b*) *Lake* v. *Ashwell*, 3 East, 326.

separate and distinct from and not indorsed on or annexed to such agreement, &c.," is subject to a duty of £1 5*s.*; and if it contains 2,160 words or upwards, for every entire quantity of 1,080 words over and above the first 1,080, a further progressive duty of £1 5*s.* is payable.(*a*)

Under this latter provision of the act, it seems that an inventory of fixtures referred to by any instrument cannot be given in evidence unless it has the proper stamp: but it has been held that the circumstance of such an inventory not being stamped, will not vitiate the deed itself to which it refers.(*b*)

Stamps on agreements.

With respect to other provisions contained in the stamp act; it appears that an agreement for the sale and purchase of fixtures requires a stamp, where the amount is £20 and upwards: for such an agreement is not within the exception in the stamp act relative to the sale of *goods*, *wares*, or *merchandizes*.(*c*)

It has been held that an instrument containing an agreement for the purchase of fixtures in a house, and which contains also a present demise of the house, cannot be given in evidence to prove the sale of the fixtures in an action for their value, unless it has a lease stamp; the one contract being auxiliary to the other; an agreement stamp is not sufficient.(*d*)

*Where a lease reserves one rent for a house, and there is another separate and distinct reservation for the furniture and fixtures, the stamp must be to an amount in proportion to the two reservations.(*a*) [*257]

In the case of *Buxton* v. *Bedell*,(*b*) it was held that an executory agreement for the making and putting up of machinery in a house, was not within the exemptions of the stamp act in favor of agreements for or relating to the sale of goods, &c., but that it

(*a*) By 7 & 8 Vic. ch. 21, the duty on certain agreements, formerly charged by the stamp act with a duty of £1, is reduced to 2*s.* 6*d.*

(*b*) *Duck* v. *Braddyll*, 1 M'Clel. 217; 13 Price, 455.

(*c*) *Wick* v. *Hodgson*, 12 Moore, 213; *Marson* v. *Short*, 2 Scott, 243; *Chanter* v. *Dickenson*, 6 Scott N. R. 190. And see *Pinner* v. *Arnold*, 2 C. M. & R. 613.

(*d*) *Corder* v. *Drakeford*, 3 Taunt. 382. And see 1 Camp. C. N. P. 387; 3 Stark. C. N. P. 128; *Clayton* v. *Burtenshaw*, 5 B. & C. 41, and the cases cited in note (*c*).

(*a*) *Coster* v. *Cowling*, 7 Bing. 456; *Clayton* v. *Burtenshaw*, *ub. sup.*

(*b*) 3 E. 393.

must be stamped like any other agreement: this decision, however, has been overruled by more modern cases.(c)

Auction duty.

The duty formerly payable on the sale of fixtures by auction is now abolished.

Stamps on valuations.

For the stamps required on valuations of fixtures, and for other points connected with such valuations, the reader is referred to the Appendix, No. III.

(c) *Wilks* v. *Atkinson*, 6 Taunt. 11; *Hughes* v. *Breeds*, 2 C. & P. 159; *Garbutt* v. *Watson*, 5 B. & Ald. 613; *Pitner* v. *Arnold*, 2 C. M. & R. 613; *Marson* v. *Short*, 2 Scott, 243; *Chanter* v. *Dickenson*, 6 Scott N. R. 190. See the stat. 9 G. IV, ch. 14, sec. 8, as to stamp duties on executory contracts for the sale of *goods* of the value of £10, and upwards within that statute.

*CHAPTER VI. [*258]

ON THE RIGHTS AND LIABILITIES OF PARTIES IN RESPECT OF LAND AS INCREASED IN VALUE BY THE ANNEXATION OF PERSONAL CHATTELS.

THE law, in a variety of instances, determines the liabilities of persons to perform public duties, or to contribute to public charges in consequence of the possession of real property. In like manner it confers many important rights on freeholders and tenants of inferior estates, by reason of their interest in land. In these instances it is frequently necessary to ascertain the precise value of the property; and wherever that value has been increased by the annexation of personal chattels to the freehold, it will be important to take into consideration the nature and doctrine of fixtures.

Land ratable to the poor according to its value improved by annexations.

Thus, *First*:—With respect to the liabilities of persons to make contribution to the *poor rates*. The statute 43 Eliz. c. 2, enacts that competent sums, to be levied for the purposes therein specified, should be raised by the taxation of every occupier of lands and houses in a parish. And in the construction of this statute, it is held, that land and houses are to be rated according to their annual value, although that value may be in part derived from the annexation of personal chattels.(*a*)

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As by a steelyard in a machine-house.

*Thus, where a corporation, being possessed of a house, erected a machine in the street, leading by the house for the purpose of weighing wagons, &c., loaded with coal, &c., at 2*d.* per ton. The steelyard of the weighing machine was, and always had been in the house. The corporation was rated for the *machine-house* according to the annual value, not only of the house itself, but of the clear profits of the machine. The court held the rate good; and Lord Mansfield observed, that the nature of the thing showed that the machine was annexed to the freehold; they were

(*a*) The mode in which the net annual value is to be estimated, is now provided for by the Stat. 6 and 7 Will. IV, ch. 96, secs. 1, 3. The object of the statute is merely to determine the relative liabilities of parties, and in no way affects the principles discussed in the text.

one entire thing, and were together rated by the common name (the machine-house) which comprehends both; the steelyard was the most valuable part of the house; the house therefore applied to this use might be said to be built for the steelyard, and not the steelyard for the house. And Willes, J., said, that if the machine be appurtenant to the building, its clear profits are undoubtedly ratable. If a billiard table stand in a house, and the house should in respect of such table let at a higher sum, it would be ratable whilst the table continued there, and was so let at the advanced rate.(a)

House improved by a billiard table.

By a carding machine.

In another case,(b) a building called the engine-house, consisted of a bay of building in which there was a carding machine for manufacturing cotton. The engine was generally worked with water, but frequently by the hand. The building wherein the [*260] engine stood was not a dwelling-house, nor was it *erected for the purpose of receiving the engine. The engine was placed on the floor; and the case stated that it was not annexed or fastened to the floor, but might be moved at pleasure and carried out and worked in any other place, either by means of water or manual labor; and was not adapted to any particular building. The court thought that this case was not distinguishable from the preceding one of *Rex* v. *St. Nicholas, Gloucester;* and accordingly they held, that the house and engine ought to be rated as one entire subject.

By a malt-mill.

It was observed by Mr. Justice Grose, in the course of his judgment in this case, that if a tenement were to be fitted up as a malt-house, and a malt mill put into it, and the whole was let together, the whole ought to be estimated together according to its improved value.

By a steam engine and railway

Again, where the lessee and occupier of a coal mine erected steam engines for draining and working the mine, and laid down a railway for the use of the mine, and thereby improved its annual value; it was held that he was ratable for such improved value, at the amount as increased by reason of the improvement from the engine and railway.(a)

(a) *Rex* v. *St. Nicholas, Gloucester*, Cald. 262.
(b) *Rex* v. *Hogg*, Cald. 266; 1 T. R. 721.
(a) *R.* v. *Lord Granville*, 9 B. & C. 188.

Or machinery of any description.

To the like effect is the more recent case of *Rex* v. *Birmingham and Stafford Gas Company*,(*b*) in which the same general principle was adhered to. And in delivering the judgment in that case, Lord Denman, C. J., said, in respect of machinery attached *to houses, &c. "Such machinery constitutes a mode of occupying: that really is clear from the beginning to the end of all the cases on the subject. The principle has never been called in question; and even where the machine has not been attached, a house has been held ratable in respect of it, if the value of the house has been increased by the machine." [*261]

In another case, which followed shortly afterwards,(*a*) the rule is laid down in the same terms. And Denman, C. J., said, "Real property ought to be rated according to its actual value as combined with the machinery attached to it, without considering whether the machinery be real or personal property, and liable or not to distress or seizure under a *fi. fa.*, or whether it would go to the heir or executor, or at the expiration of a lease to the landlord or tenant."(*b*)

Whether land is ratable in respect of chattels not actually affixed.

There is an ambiguity in some of the above cases as to whether the chattel must be actually affixed to the premises in order to make it the subject of a rate upon land and houses. In the case of *Rex* v. *St. Nicholas, Gloucester*, the machine which had been rated was clearly affixed to the freehold; and the court rely upon this circumstance in delivering their judgment. It has, however, been thought that the case of *Rex* v. *Hogg* goes the length of determining that things let together with a house under the same *demise, and yielding a profit, are ratable whether affixed or not.(*a*) But the better opinion appears to be that the profits arising from a personal chattel not attached to the premises, ought not to be included in a rate professedly raised upon land and houses only. And it is observable that in *Rex* v. *Hogg*, Mr. Justice Ashurst, adverting to the construction of [*262]

(*b*) 6 Ad. & E. 634.

(*a*) *R.* v. *Guest*, 7 Ad. & E. 951. And see *Brown* v. *Lord Granville*, 10 Bing. 69.

(*b*) As to the principle to be adopted as the proper measure of the ratable value of a *railway*, see *R.* v. *Grand Junction Railway Co.*, 4 Q. B. 18; *R.* v. *Great West. R. Comp.*, 6 Q. B. 179.

(*a*) Nolan's Poor Laws, Vol. I, pages 82, 84, *in notis*. And see per Denman, Ch. J., in *R.* v. *Birmingham and Stafford Gas Co. sup.* See the rule in the case of settlements, *R.* v. *Londonthorpe, post.*

the carding machine, remarks that although it was stated that the machine was not fixed to the floor, yet that it might be fixed to the walls of the building, and that it was to be supposed that it must be fastened in some way, otherwise, as it worked by water, the weight of the water must displace it.(*b*)

Water-pipes laid in land ratable.

The principle above considered applies also to another class of cases; as where pipes, &c., are laid in the ground for the conveyance of water or gas, and profit is derived thereby to the proprietors. These pipes, &c., are to be deemed a part of the soil, and are ratable as such in the parish in which they are situated, according to the profits derived from the pipes; although the ownership of the land itself may be in other individuals.

The company of the Rochdale Water Works were rated in the township of Spotland, in the county of Lancaster, in respect of the trunks and pipes, and other apparatus for the conveyance [*263] of water belonging *to the company, fixed in the ground in the township of Spotland, and for the profits arising therefrom within the township. It was contended, on the part of the Rochdale Company, that the act of Parliament by which they were incorporated merely gave them a license to carry pipes through the lands of others: but the court determined that the company were clearly ratable to the poor by reason of their occupation of the land in which the pipes were placed.(*a*)

Gas pipes ratable.

The same principle governed the case of *Rex* v. *The Birmingham Gas Company*.(*b*) And again, in a still more recent case,(*c*) it was held that a public gas company were liable to be rated in respect of the increased value of the land, arising from the profits of the gas pipes in the parish in which the pipes were laid; and that the company were to be considered occupiers of the land in which the pipes were fixed, although they had no interest in the land through which the pipes passed, but merely a license to

(*b*) For a description of a carding machine, see *R.* v. *Miller*, 2 East, 189. In *Trappes* v. *Harter*, (2 C. & M. 177,) Lord Lyndhurst, C. B., observes that the screwing of a stocking frame to the floor to keep it steady, would not make it a fixture. As to which, see *Duck* v. *Braddyll*, 1 M'Cleland, 217.

(*a*) *Rex* v. *Rochdale Water Works Company*, 1 Maule & Selwyn, 634.

(*b*) 1 B. & C. 506.

(*c*) *Rex* v. *Brighton Gas Company*, 5 B. & C. 466; 9 B. & C. 112; Acc. *R.* v. *Cambridge Gas Co.*, 8 Ad. & El. 73.

place them there, and had the power under an act of Parliament of removing them when they thought fit. The court, in deciding the question, adverted to the two last mentioned cases, and said that the pipes were to be considered a part of the land, for they were not merely laid upon the land, but affixed thereto, and the land must be disturbed to come at the pipes. And, in the discussion of the case, they compared the pipes to the case of a tunnel under a river, which they said would be ratable. And, with *respect to the power of taking them up and altering their position as provided for by the act, they said, that the privilege was not greater than in the case of trade erections put up by a tenant, &c., which, although they might be removed under the law of fixtures, yet, until actually severed, were subject to be rated, because, in the meantime, they constituted a part of the land. [*264]

Tenant's fixtures ratable.

But in applying the rule here laid down, one obvious principle is to be attended to; viz., that when the principal subject matter is not liable to be rated, neither is anything that is annexed thereto and which is accessary to the subject matter, liable. Thus, in the case of an iron-stone mine, which by express statute is exempted from rate, a steam engine erected for the purpose of clearing and draining such mine is within the exception, and cannot be rated.(a)

Distinction where the principal not ratable.

Secondly. In questions respecting the right to *parochial settlements*, it is frequently necessary to refer to the doctrine of fixtures. For it may often happen that the value of land, as increased by annexations made to it, would amount to the sum which is requisite to confer a settlement; but if those annexations were not to be taken into calculation, it would fall short of it.

Settlements by occupation, &c., of land improved by annexations.

Thus a question arose as to the value of a tenement, by the *rating*, &c., of which it was contended a settlement was gained under the Statute 3 W. & M. ch. 11, sec. 6, and 35 G. III, ch. 101, which then governed the subject, and the latter of which required that the *tenement should be of the yearly value of £10.(a) The pauper occupied a house in the parish of St. Dun- [*265]

House improved by the addition of stoves, &c.

(a) *R.* v. *Bilston*, 5 B. & C. 851.

(a) See the note to the next case.

stan's, at the rent of £10 per annum, and was rated and had paid an assessment in that parish: it was proved that the houses were rated at half their value in that parish; and the pauper's house was assessed at £3 10*s.* annual value; but it had been let, together with the fixtures therein, to other persons as well as to the pauper, at the same rent of £10. The fixtures consisted of stoves, grates and cupboards. The stoves and grates had not originally belonged to the house, but had been put in by a tenant; and the landlord had taken them in part payment of rent about six years before: they were fixed in with brick-work, but might be removed without doing injury to the chimney places; the cupboards stood on the ground, supported by holdfasts, and these might also be removed without doing any other injury to the walls than leaving a few marks of nails. It was further proved that the use of these several articles was worth about sixpence per week; and that the tenement, including the use of them, was worth £7 10*s.*, and without them about £6 *per annum*. The Court of Quarter Sessions confirmed the order, but stated their opinion to be, that if any deduction, however small in amount, was to be made in respect of the above mentioned articles, the tenement would not be of the annual value of 10*l.* The court of K. B. confirmed the order of sessions; and Mr. Justice Bailey, in delivering his judgment, observed, that although
[266] these fixtures, if they had belonged to *the tenant, might have been removed by him during the term, yet, as they actually belonged to the landlord, they were parcel of the freehold, and would have gone to the heir, and not to the executor, and that the tenement was therefore of the annual value of £10.

Chattels must be actually affixed.

But in these cases, in order to confer a settlement, the property by which the value of land is improved must be actually affixed to the soil; notwithstanding it has been seen that, in questions upon rates, some doubts have been entertained upon this subject.

Post or other windmill, not fixed.

Thus, in a case which was prior to the Stat. 59 Geo. III, ch. 50,(*b*)

(*a*) *Rex* v. *St. Dunstan's, Kent*, 4 Bar. & Cres. 686.

(*b*) Since the Statutes 59 G. III, ch. 50, & 6 G. IV, ch. 57, (which materially alter the conditions for gaining a settlement, and amongst other things, make it to depend on the amount and payment of the rent of the premises,) there does not appear to have been any decision on the subject involving the principle discussed in the text; nor from which it may be collected whether any modification of the rule is introduced by those statutes. It may be observed, that with regard to some of the conditions for conferring a settlement required by the latter of those statutes, the

where a settlement was sought to be established by the *renting* of a tenement of the yearly *value* of £10, the pauper rented a tenement at £6 per annum, and also a piece of ground at the yearly rent of 10*s.* 6*d.*; on this piece of ground he built a post windmill at an expense of £120, which he was at liberty to remove at pleasure: it was constructed upon cross traces, laid upon brick pillars, but not attached or affixed thereto, which is the usual mode of building mills of that nature. He worked the mill himself for about three quarters of a *year, and let it for a short time at the rate of £9 per annum, and during that period he resided on the other tenement. The mill was considered the property of the pauper, and he afterwards sold it as a chattel, and it was taken away by the purchaser without any interruption from the landlord; no rates were ever paid or demanded for the mill, or the ground on which it stood. [*267]

It was contended that the value of the land must be taken to be increased by the erection of the mill upon it; and it was compared to the cases of a rabbit warren, or a land-sale colliery, where the value of the rabbits, and of the horses, gins, ropes, and other chattels for working the collieries, might be taken into account for making up the value required.

But Lord Kenyon observed, "This windmill, as described in the case, is nothing but a chattel. And if in questions of this kind we were merely to consider the ability of the pauper, without at the same time considering whether he rented a tenement, we should abandon the statute altogether and the decisions upon it. It might as well be said that an iron malt mill would give a settlement. This post windmill was the sole property of the tenant himself, and it was not fixed in the ground, but detached from it. But in order to confer a settlement, it should be so connected with the land, as, in legal contemplation, to fall within the description of a tenement."(*a*)

same construction is to be put upon them as in the previous statute which was repealed by it. The statutes since passed, viz.: 1 Will. IV, ch. 18, and 4 & 5 Will. IV, ch. 76, do not affect the subject in question.

(*a*) *R.* v. *Londonthorpe*, 8 T. R. 377. See, also, *R.* v. *Minworth*, 2 E. 197, and the judgment of Le Blanc, J., in that case. If, instead of a *bona fide* letting, there is a mere license to use a part of the machinery of a mill, or a mere standing place in a mill for the party's own machinery, to be worked by the steam power of the mill, this would not confer a settlement. See R. v. *Dodderhill*, 8 T. R. 449; *R.* v. *Ham-*

[*268] *So, in a more recent case, a pauper rented a cottage, &c., with a windmill; these were together of the annual value of £10, but exclusively of the mill the tenement was not of that value. The mill was of wood, and had a brick foundation; but it was not inserted in the brick-work, or annexed to it, but rested upon it by its own weight alone; and no part of the machinery of the mill touched the ground or the foundation. It was held, on the authority of the preceding case, that as the mill was not affixed to the freehold, nor to anything connected with it, it was not parcel of the tenement, and therefore the pauper gained no settlement.(a)

Right of voting at elections in respect of property improved by annexations.

Thirdly. The principles which have been discussed in the preceding pages would, it is conceived, apply to the subject matter of the qualifications in respect of property required by statute, in order to confer the right of voting in the election of members of Parliament. There is, however, only one case to be found upon this subject. It was the case of a vote at an election for the county of Bedford. A voter had polled for a windmill, which appeared in evidence to be fixed on a post, upon pattens, in a foundation of brick-work, and to be upon a plot of ground enclosed with a fence, put up by the voter in a common field. [*269] It did not appear in whom the title to the ground *was, further than as it might have been inferred from possession. The vote in respect of this mill was held good by a committee.(a)

It may be observed of this case, that the committee seem to have recognized the principle, that whatever was affixed to the freehold was to be considered as land; and that if it enhanced the value of the land to the requisite amount, it would confer a right of voting. On the facts as stated in the report, it does not appear satisfactorily in what manner the windmill was connected with the soil. The case, however, does not warrant an inference that the right of voting would accrue in respect of property, the value of which is increased by a personal chattel which is not actually affixed to the freehold.(b)

mersmith, 8 T. R. 450; *R.* v. *Miller*, 2 E. 189; *Robinson* v. *Learoyd*, 7 M. & W. 48; *Post*, part 2, ch. 2, sec. 1.

(a) *R.* v. *Olley*, 1 B. & Ad. 161. And see *Wansborough* v. *Maton*, 4 A. & E. 884, where this case was recognized and a similar building was held not to be parcel of the freehold.

(a) 2 Lud. Case 12, p. 440.

(b) See *R.* v. *Olley*, *sup.*

PART II.

CHAPTER I.

OF THE REMEDIES BY ACTION, ETC., IN RESPECT OF FIXTURES.

SECTION I. *Of the Action of Waste, and of Case, in the nature of Waste, as applied to Fixtures.*
SECTION II. *Of Injunctions for Waste, and of equitable Relief in the case of Fixtures.*
SECTION III. *Of other Remedies by Action in respect of Fixtures.*

SECTION I.

Of the Action of Waste, and Case in the nature of Waste, as applied to Fixtures.

HAVING in the preceding division of the work treated of the rights of different parties with regard to the property in fixtures; the next subject for consideration is the means by which those rights may be enforced, and the remedies provided by the law when they are infringed.

Injury to things affixed to the freehold is waste.

The owners of the inheritance, in whom, in early times, the power of legislation was principally vested, secured themselves against such injuries to the freehold committed by their particular tenants, by means of *the law of waste. And it was held to be equally waste to damage or remove a personal chattel which had been annexed to the freehold, as where the substance of the freehold itself was impaired. Accordingly, Lord Coke, in treating upon this subject, observes, that "if glass windows, though put in by the tenant himself, be broken or carried away, *it is waste.* So it is of wainscot, benches, doors, furnaces, and the like, annexed or fixed to the house either by the reversioner or the tenant."(a) [*271]

(a) Co. Litt. 53 a; 2 Saund. 259, n. 11; *Green* v. *Cole.*

Hence it is, that many of the questions respecting the right of property in fixtures have come before the courts in the form of an inquiry, whether the severance or removal of them was an act of waste or not. And agreeably to this view of the subject, the decisions relating to the law of fixtures are usually classed by the text writers, and in the digests, under the head of *Waste*. It will appear, however, from what is observed in a subsequent part of this section, that such a classification is not comprehensive enough to embrace many important determinations which constitute a part of the doctrine of fixtures.

Writ of waste.

With respect to the remedy for waste, the old method of proceeding was by writ of waste. And it may be proper to notice some particulars relative to this ancient remedy, because it is the foundation of the modern form of action, and was moreover revived upon more recent occasions, before it was finally abolished by statute.

For and against whom it lay.

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The common law gave an action for waste in three cases only; tenancy by the curtesy, tenancy in dower, *and guardianship in chivalry. These estates were created by act of law; and the tenants were from the earliest times restrained from an abuse of what the law thus conferred.(a) Afterwards, by the Statutes of Marlebridge, (52 Hen. III, c. 23,) and Gloucester, (6 Edw. I, c. 5,) an action for waste was given against lessee for life or years, tenant *per auter vie*, and against the assignee of tenant for life or years, for waste done after assignment.(b) By a liberal construction of the last mentioned statute, tenants from year to year, and tenants for a part of a year, were held punishable for waste;

(a) 2 Inst. 145; Co. Lit. 53 a, *et seq.*; Doct. & St., Dial. 2, chaps. 1, 2; 2 Saund. 252, n. 7. Some have thought, that at common law waste did not lie against tenant by the curtesy. 2 Inst. 145, 301; Br. Ab. Waste, 88; Harg. Co. Lit. 53 b, n. 356. It seems that tenants by statute staple, and statute merchant, are not punishable for waste, although they come in by process of law. 5 Co. 37. As to which, see Harg. Co. Lit. 57 a, note 377.

(b) 2 Inst. 299; Co. Lit. 54 b; 2 Saund. 252, n. 7. In Reeve's History of the Eng. Law, Vol. I, p. 386, and Vol. II, pages 73, 74, 148, it is attempted to be shown, that tenants for life were punishable for waste at common law, upon which, see, also, Eden on Injunctions, 145, *in notis*. With respect to *termors for years*, there would be less reason for the law providing a remedy against them, because their estates were very precarious previous to the Statute of Gloucester, 6 Edw. I, ch. 11, and indeed until the Statute 21 Hen. VIII, ch. 15; inasmuch as the reversioner might at any time put an end to their interest by means of a fictitious recovery.

which is a remarkable instance of the manner of construing statutes by equity in former times.(c)

*The ancient action of waste retained several vestiges of its early introduction; and as it came into use before estates were commonly subdivided into numerous interests, it was not allowed, even afterwards, to be brought, except by the party who had the immediate estate of inheritance, either *in fee* or *in tail*. Nor could any person maintain the action unless he had the inheritance vested in him at the time when the waste was committed.(a) [*273]

Nature of.

The action of waste was in its nature a mixed action; real, because on a judgment against the defendant the plaintiff recovered the land wasted;(b) and personal, because he was entitled to treble damages.(c) The right, however, to damages ensued originally only after prohibition delivered, in those cases where a prohibition was grantable: and therefore, as the right of plaintiffs in general to costs is given by a chapter of the Statute of Gloucester prior to that relating to damages in waste against tenants for life or years, which, as Lord Coke says, was a law of creation, a plaintiff was not entitled to costs in an action against these individuals;(d) unless, indeed, under the Statute 8 & 9 Will. III, c. 11, *s. 3, when the damages recovered in waste did not exceed the sum of twenty nobles. [*274]

(c) As to the equitable construction of this statute, see Plowden's observations at the end of the case of *Eyston* v. *Studd*, Plow. Com. 467. See, also, Hatton on Statutes. The practice of construing statutes by equity, of which so much is said in the ancient law writers, was a necessary consequence of the brief and sententious manner in which the early statutes are framed. See further, respecting a tenant for a less term than a year, being included under the term "tenants for years," in Serj. Hill's notes to Vin. Ab. Vol. XXII, Waste; Br. Ab. Waste, pl. 52. In one case Lord Ellenborough refused to give a similar extension to the Statute 4 G. II, ch. 28, which specifies tenants for life, lives, or years. *Lloyd* v. *Rosbee*, 2 Camp. N. P. C. 453.

(a) 2 Inst. 303, 305; Co. Lit. 53 b; 2 Roll. Ab. 833; Com. Dig. Waste, C. 4; Pleader, 3 O. 18; 1 Taunt. 196. As to an action of waste lying at common law by a tenant in tail, it should be observed, that it is the more common opinion that what is now an estate tail was a fee simple conditional before the statute *de donis*.

(b) As to what is to be considered the "*locus vastatus*," see 2 Inst. 304; Co. Lit. 53 b; Com. Dig. Waste, F. 2.

(c) Finch. 29; 3 Bl. Com. 118. If judgment is given against the defendant when the writ charges him in the *tenet*, it must be for the place wasted, and also for damages; but if it be in the *tenuit*, it is for damages only. 2 Inst. 304; Com. Dig. Plead. 3 O. 22.

(d) 2 Inst. 289; 10 Co. 112; *Pilford's case*, 2 Saund. 252 a, n. 7.

Modern instances of the action

The remedy by this proceeding gradually fell into disuse; and the case of *The Keepers of Harrow School* v. *Anderton*, 2 Bos. & Pull. 86, has been mentioned as the only instance to be met with in modern times, until it was revived in the case of *Redfern* v. *Smith*, 2 Bing. 262.(a) The court, however, on both these occasions distinctly recognized the ancient form of proceeding, and adopted some of the important principles of the old doctrine of waste. For, in the former case, they held that injuries of a very trivial kind did not amount to waste; and that if the jury found a verdict for the plaintiff, and gave only very small damages, the defendant was entitled to judgment;(b) and in the latter case, they held that under the Statute of Gloucester, the jury must always find the place wasted; and for a defect of the verdict in this particular, they granted a new trial.(c)

This action, however, being now abolished by the legislature, it is unnecessary to enter into a further examination of it. The reader who is desirous to be more particularly acquainted with the nature of the proceeding, and its application to different cases, will find it fully treated of in 2 Inst. 145, 299, *et seq.*; Co. Lit. 53 a; Fitz. Nat. Brev. Writ of Waste; Com. Dig. Waste; Bl. Com. Vol. II, p. 281; Vol. III, p. 223; Bul. N. P. 119 a; and
[*275] in the very able notes to the *case of *Green* v. *Cole*, in 2 William's Saund. 228, (6th ed. 1845.)(a)

Action of case in the nature of waste.

For the old action by writ of waste having in modern times generally given way to another remedy, *viz.*, an *action on the case in the nature of waste*, the former proceeding was at length abolished by the Stat. 3 & 4 Will. IV, c. 27, s. 36. The action of case for waste is founded on the ancient form of proceeding, and is adapted to the redress of the same species of injuries to the freehold. It is a much more easy and expeditious remedy than

(a) And see 1 Bing. 382.

(b) *Vide* 1 Jac. & Walk. 653, and the notes to the late edition of Williams' Saunders, Vol. II, 259, n. 11; (1845.)

(c) So, the courts of equity will sometimes act upon the doctrine that the place wasted is forfeitable. See *Gourlay* v. *Duke of Somerset*, 1 Ves. & Bea. 68.

(a) It may be useful to caution the reader, that much confusion upon the subject of the ancient doctrine of waste has arisen from an inattention to the important distinctions between the several remedies at common law, under the Statute of Marlbridge, and under the Statute of Gloucester.

the writ of waste, and is applicable to many cases where the former proceeding altogether failed.(*b*)

A remedy in cases of fixtures.

The action on the case in the nature of waste may therefore be resorted to in many instances, for the purpose of determining whether the removal of articles annexed to the freehold is warranted by the law of fixtures or not. It is the appropriate remedy in such cases for the reversioner against a tenant in possession, whether for life or for years.(*c*) The proceeding is founded on the injury occasioned to the plaintiff's reversionary interest by the wrongful act of the party in immediate possession of the land. *And hence it would be inapplicable to all those cases in [*276] which an executor lays claim to remove articles, as fixtures, which have been put up by his testator, whose interest in the land is determined by his death; because, in such cases, there exists no privity of estate between the parties.(*a*) Now, however, by Stat. 3 & 4 W. IV, c. 42, s. 2, the action may be maintained by the personal representative, for such injuries to the real estate as are committed within six calendar months before the testator's death, provided such action is brought within a year after his decease.

Liability of executors for waste.

Neither could this action be maintained *against* the personal representative for waste committed by the testator in his lifetime; because waste is a tort, which in the language of the law, "*moritur cum persona.*"(*b*) However, the executors and administrators of a tenant for years are punishable for waste committed by them while they are in possession of the land.(*c*) And if, by the commission of waste by a testator, his personal estate has been benefited, his executors will be chargeable for it to the value of the property, although not in this form of action.(*d*) Moreover, by the above mentioned statute, an action is given

(*b*) As to the advantages of the action upon the case compared with the ancient writ of waste, see 2 Williams' Saunders, 252 a, n. 7, *Green* v. *Cole.*

(*c*) In an early case it was said that if an under lessee takes planks, &c., fixed to the freehold, an action upon the case lies against him by the lessee. Jones, 224; Cro. Car. 187. As to the liability of a tenant in waste for the acts of a stranger, see 2 Inst. 145, 303, 305; Vin. Ab. Waste, K.; Doct. & Stud. Dial. 2, ch. 4; 1 Taunt. 183, *et seq.*

(*a*) *Vide Hitchman* v. *Walton*, 4 M. & W. 409; *Bacon* v. *Smith*, 1 Q. B. 345.

(*b*) 2 Inst. 302.

(*c*) 1 Cru. Dig. tit. 8, ch. 2, sec. 11; *Powell* v. *Rees*, 7 Ad. & El. 426.

(*d*) Cowp. 376; 1 P. Wms. 407; Dick. 215; Vin. Ab. Waste, 2 S.

against the personal representative, for injuries committed by the testator to the real estate of another within six calendar months previous to the testator's death.

[*277] *In respect of the parties between whom this action is maintainable, it has been held that the right to support the action will not be waived by entering into any special covenant, such as not to do waste, &c.; but that the reversioner will have his election either to bring an action upon the case in tort for the waste, or an action upon the special covenant. In *Kinlyside* v. *Thornton*,(a) a lessee covenanted to yield up the demised premises in repair at the end of the term. During the term waste had been committed in pulling down and demolishing certain articles described in the declaration as *fixtures*, as an ale-house bar, and divers doors, partitions, dressers, &c. The plaintiff, after the expiration of the term, brought an action of case in nature of waste; and upon an objection that he ought to have sued on the covenant, the court were of opinion, that an action on the case was maintainable as well as covenant; for, it was said, the landlord, by acquiring a new remedy by the special covenant, did not therefore lose his old.(b)

Whether case for waste may be supported against a tenant who covenants to repair, &c.

The authority of this decision has, however, been supposed to be impeached by some more modern cases. In *Jones* v. *Hill*,(c) the plaintiff declared in an action of case in nature of waste against a lessee who had entered into a special covenant to repair. And according to the report of the case in 1 Bay Moore,
[*278] 100, Ch. J. Gibbs, in delivering judgment, *observed, that "when there is an express stipulation or contract between two parties, this species of action is not maintainable; for such contract is a *total waiver of tort*, and it therefore ceases to bear the character of waste."

But it is to be observed of this case, that in the report given of it in 7 Taunt. 392, the *dictum* attributed to Ch. J. Gibbs is wholly omitted. Indeed, the decision itself turned upon a particular

(a) 2 Bl. Rep. 1111.

(b) See 2 Saund. 252, n. b. In *Elwes* v. *Mawe*, the plaintiff declared in an action of case in nature of waste, yet it appears that the tenant held under a lease, in which there was a special covenant to repair. A covenant to repair does not preclude an injunction in equity for waste. Dick. 445; 18 Ves. 455; 2 Ves. & Bea. 349.

(c) 7 Taunt. 392.

point, which did not involve the general question, viz., that the injury complained of by the plaintiff could not in any view be considered to amount to an act of waste. And this is the construction put upon the case in *Burnett* v. *Lynch*, 5 B. & C. 603., where the authority of *Kinlyside* v. *Thornton* is supported by the court.

There is also another case, *Herne* v. *Benbow*,(*a*) which has been thought to be at variance with the decision of *Kinlyside* v. *Thornton;* and is considered to be an authority against an action on the case being maintainable where an *assumpsit* is to be implied between a landlord and tenant.(*b*) On referring, however, to this case, the determination appears to have proceeded altogether upon a different principle, which has been countenanced in some recent decisions, viz., that an action on the case is not maintainable for *permissive* waste.(*c*)

*The forms of pleading in waste, and in actions on the case in [*279] nature of waste, are treated of with much learning in a note of Mr. Serj. Williams in 2 Saund. *252 c, n. 7. (See the 6th ed.) For precedents of waste in respect of chattels affixed to the freehold, see 2 Bl. Rep. 1111; 1 H. Bl. 258; 3 East. 38; 1 Brod. & Bing. 54; 3 Ad. & E. 75. [*280]

Pleading and evidence in waste.

(*a*) 4 Taunt. 764.

(*b*) And see Harg. Co. Lit. 54 b, n. 359; 3 Brod. & Bing. 171. But see *Burnett* v. *Lynch*, *ub. sup.*

(*c*) With respect to this latter question, whether an action upon the case can be supported for *permissive* waste, the authorities are by no means satisfactory. It is conceived that much of the difficulty upon this subject has arisen from not distinguishing between tenancies at will, and tenancies from year to year, as affected by the provisions of the Statute of Gloucester. The Statute of Gloucester gives a remedy for waste in the case of tenancies for years, or for a less term than a year, but is held not to extend to tenancies strictly at will. Co. Litt. 54 b; 2 Inst. 302; 6 Rep. 37. It has been expressly decided that those tenants who are within the provisions of the statute, are liable in an *action of waste*, as well for *permissive*, as for *voluntary* waste. Co. Lit. 53 a; 2 Inst. 145; 2 Roll. Ab. 816; Owen, 92; 1 Saund. 323 a, n. 7; 2 Saund. 252, ch. 259; 1 Salk. 19; 3 Lev. 359, *S. C.* And see Harg. Co. Lit. 56 b, n. 376. The question, therefore, is whether the action of case in the nature of waste, which has been substituted in lieu of the action of waste, cannot be supported for permissive waste in all those cases in which the old action could itself have been supported. In the *Countess of Salop's case*, (5 Rep. 14; Cro. Eliz. 777, 784,) it was holden, that an action upon the case in nature of waste could not be maintained against a tenant *at will*, for permissive waste; and the reason is stated to be, because the Statute of Gloucester does not extend the remedy by action of waste to the case of tenancies *at will*. Now, from this reason being assigned as the ground

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*SECTION II.

Of Injunction for Waste, and Relief in Equity in the case of Fixtures.

THE proceedings described in the foregoing section are remedies of a corrective nature; and they are in reality methods of recovering a compensation for injuries already sustained, and for which the party aggrieved can, in general, only receive satisfaction by pecuniary damages.(*a*) But it frequently happens that the consequences attending injuries to real property are of such a nature, that the damages recoverable in an action are a very inadequate compensation for the loss incurred; so that the redress afforded by a court of law would prove an imperfect as well as a tardy relief to the injured party. Thec ourts of equity,

of decision, it seems a fair inference, that an action upon the case would lie for permissive waste against a tenant for years; because, as against such a tenant, waste might have been brought under the statute. Accordingly, Mr. Serj. Williams, in his notes to the cases of *Pomfret* v. *Ricroft*, and *Green* v. *Cole*, lays it down expressly, that an action upon the case may be brought as well for permissive, as for voluntary waste, 1 Saund. 323 a, n. 7; 2 Saund. 259. It has, however, been thought that a contrary doctrine is established by some modern decisions of the courts, viz., *Gibson* v. *Wells*, 1 New. Rep. 290; *Herne* v. *Benbow*, 4 Taunt. 764; *Jones* v. *Hill*, 7 Taunt. 392; 1 B. Moore, 100, *S. C.* With respect to the first of these decisions, the judgment of the court is certainly expressed in very general terms, and the marginal note states broadly, that an action on the case does not lie for permissive waste. But it appears, that in this case, the action was in fact brought against a tenant at will; and it is observable that Mr. Serj. Williams, in the notes already referred to, cites this very authority, and does not consider it as conflicting with the opinion he lays down. As to the case of *Herne* v. *Benbow*, the decision turned upon a different point; in that case, however, the court seems, undoubtedly, to have lost sight of the distinction between tenants for years and at will; for they cite the *Countess of Salop's case*, as a general authority against the action for permissive waste, which, it has been seen, was a case of a tenancy at will, and could, therefore, decide nothing as to the action not being maintainable against a tenant for years. In the case of *Jones* v. *Hill*, the distinction between tenancies at will and for years, was pressed upon the court, and Ch. J. Gibbs then declined to give any opinion upon the general question. Notwithstanding, therefore, several of the text writers have, upon the authority of these modern decisions, laid it down as a general rule, that an action upon the case will not lie for permissive waste, it seems very questionable whether such a position can be maintained, except in respect of tenancies at will, in the strict sense of the term. The reader may see further upon this subject, in 22 Vin. Ab. 525, tit. Waste; 1 Jac. & Walk. 522; 2 Sim. & Stu. 87; and the notes to the case of *Pomfret* v. *Ricroft*, in the last edition (1845) of Williams' Saunders, Vol. I. 323 a, n. 7; and in the cases there referred to.

(*a*) By the old writ of waste in the *tenet*, the place wasted was recovered.

however, provide a very beneficial remedy in these cases, which is of a preventive nature, and whereby injuries to real property may be anticipated and prevented. This equitable interposition of Chancery consists in restraining a person from committing waste, either threatened, or which he may be in the act of committing, by means of the *writ of injunction;* which is a prohibitory writ issuing by the order and under the seal of a court of equity.

It has been seen, that the right to fixtures is frequently decided upon questions of waste. And as *the remedy by injunction is calculated to afford very prompt and effectual protection, in cases where injury to this species of property is apprehended, or might be sustained, it will be useful to give a brief account of the nature and application of the proceeding. [*282]

Prohibition at common law.

By the common law, a prohibition to inhibit waste issued out of Chancery against the three classes of persons who were at common law punishable of waste; viz., tenant by the curtesy, in dower, and guardian. It was granted on the prayer of the party who had the inheritance, and might be had before any waste was actually committed. The writ of prohibition lay afterwards against all tenants for life or for years, under the provisions of the statutes of Marlbridge and Gloucester.(*a*)

Estrepement of waste.

There was also at common law another remedy for waste, of a preventive nature, in the *writ of estrepement of waste.* This writ lay after a judgment obtained in a real action, and before possession delivered by the sheriff, to prevent the defendant from committing waste in the lands recovered. By the Statute of Gloucester, a further writ was given in these cases to prevent the defendant from committing waste *during the suit,* which was called the writ of *estrepement pendente placito.*(*b*)

Injunction to restrain waste.

These methods of restraining waste have long since fallen into disuse. For the Court of Chancery *will now, by means of a *writ of injunction,* restrain a party from committing waste in all cases in which waste is punishable by law. And in some particular cases it will restrain a party even where he is dispunish- [*283]

(*a*) 2 Inst. 299; Com. Dig. tit. Chancery, D. 11; 1 Bos. & Pul. 108, 121. The Court of Chancery seems to have derived its jurisdiction in injunction from the ancient writ of prohibition of waste. Dick. 455.

(*b*) 2 Inst. 328; Fitz. Nat. Brev. 135; Eden on Inj. 159; 2 Reeve's History, 152.

able of waste, either from the nature of his estate, or by express grant "without impeachment of waste."(a)

In what cases it lies.

There are a great variety of cases in which a court of equity will thus interfere. The most ordinary occasion, however, is to restrain a tenant for life, or tenant for years, upon the application of the owner of the inheritance. And an injunction may be obtained on the application of a remainder-man for life, as well as on that of a remainder-man in fee, notwithstanding there is an intermediate estate for life.(b)

It would be unnecessary for the present purpose to enter into a detail of the various cases in which the remedy by injunction applies. The reader will find them very clearly specified in Com. Dig. tit. Chancery, D. 11, and Eden's treatise on the law of Injunctions.

Injunction to restrain trespass.

In general the interposition of equity in restraint of waste is founded on privity of estate. There are, however, some particular occasions in which an injunction will be granted against a stranger, and where the act complained of is a mere trespass.(c)

[*284] This principle has been adopted only by the modern *practice of the court; and it is by no means applicable to a case of a common trespass which is only contingent and temporary. For the court will always expect a strong case of destruction or irreparable mischief to be made out; of irreparable mischief which may be completely effected before any trial at law can be had.

Equity will decree account of waste committed

The equitable remedy for waste is attended with this additional advantage; that, if waste has already been committed, the court will at the same time that it enjoins from further waste, also grant an account, and decree satisfaction for waste which has been actually done.(a) So that a party has by this means the same redress that he would have obtained by recovering damages in a court of law. Again, where waste has been already committed, as in timber that has been cut down, the court will prevent the defendant from taking advantage of

(a) See *ante*, p. 142; *in notis*.

(b) 1 Eq. Ca. Ab. 400; 3 P. W. 268; Amb. 105; 3 Atk. 94, 210, 723; 6 Ves. 787.

(c) 3 Atk. 21; 1 Br. Ch. Ca. 588; 6 Ves. 147; 7 Ves. 308; 10 Ves. 290; 17 Ves. 128, 138, 281; Dick. 670; Swanst. 208.

(a) 3 Atk. 262; Eden, 159.

his wrongful act, by restraining him by order from taking it away.(*b*)

What a sufficient ground for injunction.

The relief by injunction will not be granted on slight or uncertain grounds; for, in the affidavit upon which it is founded, it is not sufficient that the plaintiff merely swears that he apprehends, or has been informed, that the defendant intends to commit waste; but there must appear an actual waste, or some act from which the intention is fully evinced, as sending a *surveyor [*285] to mark out trees, &c.(*a*) Threats, however, will form a sufficient ground for an injunction; for it is not necessary to stay till waste is actually done.(*b*) And in like manner, an injunction has been granted against a tenant for life who insisted on a right to commit waste where he had none, although no waste was in fact committed.(*c*)

Injunction to restrain the removal of things fixed to the freehold.

From the view here given of the nature of the proceeding by injunction, it appears that it is a remedy which may frequently be adopted by the reversioner for the purpose of restraining a tenant for life or for years, who intends or rather threatens to sever things from the freehold under a claim arising out of the law of fixtures. It seems, indeed, to be more particularly applicable where a tenant at the expiration of his term insists on a right of taking away substantial buildings which the owner of the land contends are not within the privilege of removal.(*d*)

Until the right determined at law.

Thus, an injunction was granted by the Vice-Chancellor against the assignees of a bankrupt lessee, to restrain them from selling or removing a steam engine, &c., from the premises, until the claim in dispute was determined at law. In this case, a lease was granted to the bankrupt of a mill, and steam engine, &c.; in which lease he covenanted to repair the premises and

(*b*) 1 Ves. jun. 93. As to whether equity will entertain a bill for an account where an injunction is not also prayed for, see 3 Atk. 263, 381; Amb. 54; 2 P. W. 240; 1 Br. Ch. Ca. 194; 3 Br. Ch. Ca. 37; 1 Ves. jun. 78; Dick. 211; Fonb. on Eq. Vol. I, p. 14.

(*a*) 2 Atk. 182; 5 Ves. 688; 7 Ves. 309, 417; 10 Ves. 54.

(*b*) 2 Atk. 182; 6 Ves. 706; Dick. 101; 1 Jac. & Walk. 653.

(*c*) Barn. 497.

(*d*) As to relief in equity against executors for the waste of their testator, and the distinction in this respect between legal and equitable waste, see Eden on Inj. 211, *et seq.*; *Vide sup.* p. 276.

steam engine, and to leave them in repair at the end of the term, [*286] reasonable wear, *&c., excepted. It appeared, that during the term the lessee had added to the buildings, and removed all the works of the engine, except the fly-wheel, shaft, &c., and had attached to them a new engine of greater power. The Vice-Chancellor was of opinion, that although, if the engine had been worn out by wear and tear, the lessee would have been under no obligation to repair it; yet, having taken away the existing engine and substituted another for it, the latter was subject to the same stipulations in the lease as the old engine, and that it could not therefore be removed. Accordingly, he granted an injunction against the assignees to prevent this, subject to an action to be brought by the lessors to try the right.(a)

Property must be actually affixed.

But, in all these cases, to entitle a party to relief by injunction, on the specific ground of waste, it must appear that the property in dispute is actually affixed to the freehold. For, where a bill was brought praying an injunction and account, which stated that the defendant had committed waste, by destroying a dovecote, and by removing the locks from the doors of the house, the chains from the lawn, the statues, images, and fences from the pleasure ground, wardrobes, presses and closets, forming part of the wainscot of the house, the Lord Chancellor, in giving his judgment, said, "The foundation of this motion to revive the injunction is, first, a clear act of waste; second, an act removing things supposed to be fixed to the freehold, wainscot, presses, &c. As to the dovecote, a clear act of waste is [*287] proved,—therefore against *waste the injunction must be revived. But I cannot grant it against removing the presses, *eo nomine*, if not fixed to the freehold.(a)

Other remedies in equity.

Besides the specific remedy by means of injunction to stay waste, as above described, it appears that there are a variety of other methods by which the right to fixtures may be incidentally determined in a court of equity. For instance, by means of an injunction to restrain a breach of covenant: or upon a decree for an account, &c. And from a reference to several of the

(a) *Sunderland* v. *Newton*, 3 Sim. 450. And see *Hooper* v. *Broderick*, (9 Law J. R. Eq. 321,) as to the mode of deciding the right to fixtures on injunction. See, also, Mitf. 123; 1 Br. C. C. 57.

(a) *Kimpton* v. *Eve*, 2 Ves. & Bea. 349. And see 2 Dy. 108 b.

cases detailed in the former part of this work, it will be seen that many important questions relating to the law of fixtures have arisen in proceedings instituted in the equity courts.(*b*)

Prohibition against ecclesiastical persons.

The liability of ecclesiastical persons for waste has been explained on a former occasion.(*c*) And with respect to the remedy in such cases, it is to be observed, that besides an action by the successor, either in the spiritual court, or in the courts of common law, to recover damages for waste already committed, it seems that the Court of Chancery has jurisdiction to issue a writ of *prohibition of waste*, to restrain such persons from committing waste in their ecclesiastical possessions.(*d*) And by analogy to this proceeding, a *court of equity now more frequently [*288] interferes by injunction; as, for instance, against a rector at the suit of the patron.(*a*) And so, an injunction was in one case granted to stay waste against the widow of a rector at the suit of the patroness, during a vacancy.(*b*) It seems, also, that bishops, deans and chapters may be restrained by injunction at the suit of the crown.(*c*)

(*b*) See *Lawton* v. *Lawton*, 3 Atk. 13, where the right to fixtures between the executor of tenant for life and the remainder-man, was determined on a bill by a creditor of the deceased tenant for life. So, in *Lord Dudley* v. *Lord Warde*, Amb. 113, a bill in equity was filed by the executor of a tenant for life against the remainder-man, to have fire engines delivered up as a part of the personalty. In *Ex parte Quincy*, 1 Atk. 477, the question arose on a bankrupt petition.

(*c*) See *ante*, p. 148.

(*d*) 2 Roll. Ab. 813. And see the case of *Jefferson* v. *The Bishop of Durham*, 1 Bos. & Pul. 105. See, also, 2 Burn. Ecc. Law, tit. Dilapidation; 1 Cru. Dig. tit. 3, ch. 2, sec. 74; 3 Swanst. 493, 499. A very learned account of the introduction of the writ of prohibition of waste will be found in *Jefferson* v. *The Bishop of Durham*; in which case it was determined, after much discussion, that the Court of Common Pleas has no power to issue an original writ of prohibition to restrain a bishop from committing waste in the possessions of his see, at least at the suit of an uninterested person; and doubted whether the Court of King's Bench had such a power.

(*a*) 2 Atk. 217; Barn. 399, *S. C.*; Amb. 176; 1 Bos. & Pul. 119.

(*b*) 2 Br. Ch. Ca. 552.

(*c*) Amb. 176; 3 Mer. 427.

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*SECTION III.

Of other Remedies by Action in respect of Fixtures.

OF TRESPASS.

Trespass to fixtures, before and after severance.

FIXTURES, as constituting in their nature a part of the land while in a state of annexation, are subject to the general rules which govern the action of trespass, in its application to injuries to real property. And when severed from the freehold, and after their personal nature is revived, they may properly be sued for in an action of trespass *de bonis asportatis.*

Trespass *quare clausum fregit* for fixtures.

Thus, upon the same principle that in trespass *quare clausum fregit* for an injury to land, it is essential that the plaintiff should have actual possession of the land at the time of the act complained of, a landlord cannot, during a subsisting term, support trespass *quare clausum fregit* against a stranger for the removal of fixtures attached to his freehold.[1] In the case of the tenant, however, this would be the proper form of action in which he might recover compensation for the like injury.(*a*)

So, where a tenant, under color of the law of fixtures, wrongfully severs from the freehold articles put up by himself during the term, or which have been demised to him together with the

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premises, the landlord cannot, pending the term, support *an action against him as for trespass to real property.(*a*)

For the same reason, and because in respect of real property there is no constructive possession, the heir could not, till after entry, try the question with the executor, whether articles descend with the inheritance or are properly fixtures, in an action

(*a*) As to analogous cases of trespass for cutting down trees, see 4 Co. 63; Br. Ab. Tresp. 273; Com. Dig. Tresp. A. 1, 2; Biens, H.; Viner's Abr. Tresp. S.; 7 T. R. 9; 1 N. R. 25; 2 Mau. & Sel. 499; 1 Saund. 322, n. 5. And see 1 Price, 53.

(*a*) *Vide Hitchman* v. *Walton*, 4 M. & W. 409. It seems that trespass would lie in such a case against a strict tenant at will, because it is said his term is put an end to by the severance. See 8 Ed. IV, p. 8; 12 Ed. IV, p. 8; Litt. sec. 71; Saville, 84; Dyer, 121 b.

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[1] *Taylor* v. *Townsend*, 9 Mass. R. 415.

of trespass *quare clausum fregit*. After entry, however, this would be the proper form of proceeding.(*b*)

Trespass *de bonis asportatis* for fixtures.

But, where fixed articles have been severed from the freehold and so reduced to a chattel state, the party in whom the right of property is vested from the time of severance, may support trespass *de bonis asportatis* for the removal; because the general property of personal chattels draws to it the legal possession. The reversioner may, therefore, sustain this action against a tenant in possession pending a lease, for the removal of things which the tenant, either from the circumstance of their having been demised to him, or for any other reason, has no right to sever and take away.(*c*) And so a tenant, although the property in fixed articles may belong to the landlord by the terms of the demise or otherwise, may maintain this action *against a stranger [*291] who wrongfully removes them: for during the term he has a special property therein.(*a*)

Tenant's property in things demised, after severance.

It would seem, that a tenant, after the severance of articles to which he is not entitled as fixtures, could not, in general, maintain trespass against his landlord for removing them.(*b*) In one case,(*c*) indeed, an action of trespass was brought by a tenant against the bailiff of his landlord, for removing certain fixed articles which it appeared had been demised to him together with the house, and for which he recovered damages. But no objection as to the form of action, with reference to the plaintiff's interest, seems to have been taken on that occasion;(*d*) and it may be observed, moreover, that the articles in question had been wrongfully severed under the authority of the landlord himself; and it might, therefore, be considered, that the landlord

(*b*) 21 Hen. VII, 26; 2 Mod. 7.

(*c*) For the principle, see 11 Co. 81; *Udal* v. *Udal*, Aleyn, 82; *Post*, 292; 2 Campb. N. P. C. 491; 2 Chit. Rep. 636. And see *Berry* v. *Heard*, as cited in Viner's Abr. Trespass, S. pl. 10. As to which, see Serj. Hill's MS. note, Ibid. See, also, *Farrant* v. *Thompson*, 5 Bar. & Ald. 826; *Higgon* v. *Mortimer*, 6 Car. & P. 616; *Post*, 304.

(*a*) See *Hitchman* v. *Walton*, *ubi sup.*; and per Parke, B., in *Boydell* v. *M'Michael*, 1 Cr. M. & R. 177.

(*b*) And *semb.*, not against a stranger, according to *Evans* v. *Evans*, 2 Camp. C. N. P. 491.

(*c*) *Pitt* v. *Shew*, 4 Bar. & Ald. 206.

(*d*) This case was prior to that of *Farrant* v. *Thompson*, in which it was clearly laid down, that the property of fixed articles demised with the premises, reverted to the landlord on severance, *post*, 303.

and the defendant who acted under him, were estopped from insisting that the tenant's interest was put an end to by the severance.(*e*)

Right to bring trespass, before and after severance.

It may be collected from the foregoing remarks, that the right to bring an action of trespass *de *bonis asportatis* for chattels [*292] which have been disannexed from the freehold, and to bring trespass *quare clausum fregit* for injuries to them previous to the act of severance, will frequently reside in different individuals. And this proposition may be illustrated by the case of *Harrison* v. *Parker*.(*a*) In that case a person had, at his own expense, erected a bridge on the soil of another with his permission; part of the bridge having been pulled down, and the materials taken away by a wrongdoer, it was holden, that the original owner might maintain trespass for the asportation, because the exclusive right of property in the materials reverted to him by the act of severance. And Lord Ellenborough observed upon this occasion, that the case would have involved a different question, if the injury complained of had been to the materials while in a state of annexation.

Where the severance and asportation are one continued act.

It may be questionable whether an action of trespass *de bonis asportatis* for the removal of fixtures after their severance, could be maintained in a case where the severance and removal are *one continued and entire act.*

In the case of *Udal* v. *Udal*,(*b*) it is said, that the court agreed, that "if a lessee for years cuts down timber trees and lets them lie, and after carries them away, so that the taking and carrying away be not *as one continued act*, but that there be some time for the distinct property of a divided chattel to settle in the lessor, that an action of trespass *vi et armis* would lie in such case against [*293] *the lessee: and that in such case felony might be committed of them; but not where they were taken and carried away at the same time."

(*e*) See *Twigg* v. *Potts*, 1 C. M. & R. 89. In the case of *trees*, it has been held that, where pollards are not excepted in a demise, and the tenant would be entitled to them if blown down, and has the usufruct in them during the term, the lessor cannot by wrongfully severing them acquire a right to them; and the tenant may maintain an action against him for the wrongful cutting. *Channon* v. *Patch*, 5 B. & C. 897.

(*a*) 6 East, 154. See, also, 8 Taunt. 614, *et seq.*

(*b*) Aleyn, 82.

If the principle contained in this passage be correct, it would seem to apply equally to the case of fixtures.(a) The question, however, does not appear to have undergone much discussion;(b) but the reader will find some further remarks upon it in the ensuing division respecting the action of trover, to which the authorities more immediately relate.

Form of declaring.

With reference to the form of the declaration in an action of trespass for injuries to fixtures,—it may be observed, that it is necessary to give an appropriate description to the property in question. And where the subject matter of complaint arises whilst it is in a state of annexation to the freehold, it is advisable, in order to meet objections upon this point, to describe the property in terms applicable to it only in a fixed state.(c)

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Plea.

Formerly, the plea of the general issue would in *ordinary cases have raised the question between the contending parties as to the right of property in fixtures. But now, by the new rules, a special plea is necessary for that purpose.

The case of *Welsh* v. *Nash*,(a) although it arose under the old form of pleading, may, perhaps, deserve notice here; not so much from its supposed variance with the rules of pleading as then existing, but because it has sometimes been thought to impugn the general doctrine as to the right of property which accrues from the annexation of things to the freehold. It was held in that case, that a defendant could not, under the general issue, justify cutting certain posts and rails which the plaintiff had erected upon his, the defendant's own soil. It is to be observed of this case, that the question in controversy came before the court upon a case reserved, in which, as was said by the court,

(a) And see the position as laid down in Bul. N. P. 84. See also, Vin. Ab. Trees, A. G.; Com. Dig. Biens, H.; 2 Roll. Abr. 119.

(b) *Vide Spooner* v. *Brewster*, 2 Bing. 136; *Ward* v. *Andrews*, 2 Chit. Rep. 636; *Wheeler* v. *Montefiore*, 2 Q. B. 140.

(c) See the observations of Parke, B., in *Boydell* v. *M'Michael*, 1 Cr. M. & R. 177. In *Pitt* v. *Shew*, 4 Bar. & Ald. 206, it was held, that the value of fixtures might be recovered under a count charging the defendant with breaking and entering the plaintiff's house, and taking his *goods, chattels, and effects*. In this case it is probable that the articles were not taken away till some days after the severance under the distress. See the facts as stated on the motion for a new trial, 4 Bar & Ald. 208. See, also, *Sheen* v. *Rickie*, *post*, 299; and *Twigg* v. *Potts*, *post*, 309.

(a) 8 East, 394. And see 5 Bar. & Ald. 603.

the posts and rails were meant to be stated as the property of the plaintiff. This being so, there was no room for the legal presumption that they passed to the defendant as owner of the soil. For, as the record stood, the state of the facts was, that the *plaintiff's* posts and rails were wrongfully standing on the defendant's land: the general rule of pleading then necessarily applied, that as the defendant's answer was, that the articles were *damage feasant* on his soil, such answer should have been specially pleaded. According to this view of the decision, the question which might have been raised in this case, as to the legal consequence of annexing a *personal chattel to the soil of another, is altogether untouched.(a)

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Trover.

Trover lies for fixtures severed.

Where fixtures have been unlawfully severed from the freehold and carried away, an action of trover may be brought to recover their value. The mere act of severance, however, is not a sufficient ground for sustaining the action: there must be a subsequent asportation, or some unlawful assumption of property to make the conversion, which is the gist of the action.(b)

Not whilst they remain annexed.

But as trover is not maintainable except for the conversion of personal chattels, this action cannot be brought for the recovery of fixtures so long as they are annexed to and remain parcel of the realty. This rule is recognized by Lord Hardwicke in the case *Ex parte Quincy*.(c) And in *Lee* v. *Risdon*,(d) Ch. J. Gibbs observes, that it never was heard of that trover could be brought by a tenant for his fixtures remaining unsevered at the expiration of his term. So, also, in the case of *Davis* v. *Jones*,(e) where it was held that trover would lie for certain jibs, which were detached pieces belonging to some fixed machinery, the ground upon which the action was sustained was, that these articles might be considered, from *their nature and construction, to be

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(a) Upon this question, viz., the legal effect of the annexation of a personal chattel to the freehold of another person, see some curious decisions referred to in part 1, ch. 1, p. 12, *et seq.*

(b) Bac. Abr. Trover A. And see 2 Mod. 245; Bul. N. P. 44 b. See, also, *Lyde* v. *Russell*, 1 Ad. & El. 396; *Longstaff* v. *Meagoe*, 2 A. & E. 167.

(c) 1 Atk. 478.

(d) 7 Taunt. 191.

(e) 2 Bar. & Ald. 165.

mere movable chattels.(a) And Abbott, Ch. J., said, that if the jibs were to be considered as annexed and parcel of the freehold, then admitting that the plaintiffs might have removed them during the term, as being erections for the benefit of trade, yet they could not, after the term, maintain trover for them; because the action of trover was maintainable in respect of personal chattels only.(b)

The same principle governed the more recent decision of *Minshall* v. *Lloyd*.(c) In this case trover was brought for certain steam engines, and other fixed machinery of a colliery. A lessee while in possession of the premises erected the machinery; and having forfeited his interest during the term, the lessor obtained possession under a proviso for re-entry. Afterwards the machinery was seized under a *fi. fa.*, at the suit of an execution creditor; and trover was brought for it against the sheriff, by certain trustees claiming under an assignment made prior to the lessor's re-entry. The decision of the case turned upon the principle that the right of the tenant having determined while the articles continued fixed, he could not maintain an action of trover for them as goods and chattels. So neither could a party claiming under him by the assignment recover in trover, as the machinery was never goods and chattels at all, so as to pass to them; and they had no greater right *than the tenant himself, [*297] which was only that of removing the property during the term.

In conformity with the same rule, and on the authority of the case last mentioned, it was holden, on a subsequent occasion, that even during the term a tenant cannot maintain trover for fixtures which remained unsevered when the action was brought.(a)

In the foregoing case of *Minshall* v. *Lloyd*, it was stated by

(a) In 11 Vin. Ab. 154, Tit. Executors, it is said, that a granary built on pillars in Hampshire, is, by custom, a chattel which goes to the executors, and may be recovered in *trover*.

(b) And see 2 Bar. & Cres. 79; Cro. Jac. 129. See, also, the remarks of Lord Ellenborough in *Horn* v. *Baker*, 9 East. 237.

(c) 2 M. & W. 450.

(a) *Mackintosh* v. *Trotter*, 3 M. & W. 184. See, also, *Lyde* v. *Russell*, 1 B. & Ad. 394, in which case a tenant on quitting the premises left his fixtures, and although they were afterwards severed by the landlord, it was held that the tenant could not maintain trover for them.

Parke, B., that the decision of the case of *Davis* v. *Jones* proceeded entirely on the ground above explained; viz., that the jibs in question were not fixtures at all, but mere personal chattels. And a like distinction prevailed in a more recent case, that of *Wansborough* v. *Maton*.(*b*) There an action of trover was brought for a barn. This barn appeared to be a wooden building, erected on a foundation of brick and stone; the superstructure of the barn rested by its own weight alone, upon certain stone staddels or blocks, and in part on a foundation of brickwork: both the stones and the brick foundation were let into the ground, but the barn was not attached to them either with mortar or otherwise. It was held that an action of trover would lie for a barn so constructed; because not being united to the freehold it was not part of it, and no fixture at all. And the court said that the case was not distinguishable from that of *R.* v. *Otley*,(*c*) where such a building was considered to be no part of the tenement.

[*298] In trover, the property presumed not to be fixed.

*However, in trover, it will not be intended that the property in demand is connected with the freehold, unless that fact expressly appears.(*a*) Thus, where the declaration was that the plaintiff was possessed, *ut de bonis propriis*, of a *portal* with hinges, a *hand mill*, a *lead*, and a *washing vat*, and lost them, &c. After verdict for the plaintiff, it was objected in arrest of judgment that these things appeared to be fixed to the house, and are as parcel thereof, and not accounted as goods; for the portal is a door of a house; and the handmill, and lead, and the washing vat are always fixed things. *Sed non allocatur:* for it is alleged in the declaration, that the plaintiff was possessed of them, *ut de propriis:* and it may be, that these things were severed from the freehold and things lying by; and it shall be so intended when the plaintiff so declares, and the contrary appears not to the court by any matter shown in the defendant's plea.(*b*)

(*b*) 4 Ad. & E. 884.

(*c*) 1 B. & Ad. 161. See note (*a*) in the preceding page.

(*a*) It will have been observed, that several of the most important early questions respecting fixtures, have, in fact, been determined in actions of trover; as in the instance of the cider mill, before Ch. Bar. Comyns; the hangings and tapestry in *Harvey* v. *Harvey;* and the salt pans in *Lawton* v. *Salmon*. It does not distinctly appear whether the property in these cases had been separated from the land before the commencement of the action.

(*b*) *Wood* v. *Smith*, Cro. Jac. 129; Com. Dig. Action on the case, Trover, G. 1. See, also, Dyer, 108; 2 Ves. & Bea. 349. And see the principle upon which the

Nor does the term "fixtures," *in pleading*, necessarily mean things affixed to the freehold. For, where a declaration in trover was for certain goods, chattels and *fixtures*, to wit, beds, &c., stoves, ranges, shelves, *grates, closets, cupboards and ovens, it was held that the term "fixtures" did not necessarily mean things affixed to the freehold, but might and should *after verdict* receive an interpretation which would support the declaration. And per Parke, B., "the objection is that the damages having been assessed generally on the whole record, the judgment ought to be arrested, on the ground that a part of the subject matter of the action, viz., the fixtures, was such as could not be made the subject of an action of trover. . . . . . If it had clearly appeared that the plaintiff meant to sue in respect of "fixtures" properly so called—things affixed to the freehold—the declaration would be bad after the assessment of general damages. But after verdict we ought to make every reasonable intendment in favor of the declaration."(*a*)

Term "fixtures" in pleading.

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From the nature of the action of trover as thus applied to the subject of fixtures, a question arises, whether this action could be supported, if the severing and carrying away of the article is one continued and entire act?

Whether trover lies where the severance and asportation are one continued act.

There does not appear to be any case in which this question has been discussed with reference to the doctrine of fixtures; but it seems to have arisen incidentally in respect of the cutting down and carrying away of timber. In 2 Rolle's Ab. 119, tit. Mæresme, it is laid down, that if lessee for life or years cuts timber trees, and immediately barks them and carries them away, yet they belong *to the lessor who has the inheritance: for they are parcel of the inheritance; and the lessor may have trover and conversion for them, although he never seizes them before the carrying them away, and that the lessee carried them away *immediately* after the felling and barking, *so that all was but one entire act.* Between *Berry* and *Heard*, adjudged upon a special verdict in B. R.

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This case of *Berry* v. *Heard* is found in several of the books

case of *Niblet* v. *Smith*, 4 T. R. 503, was decided, *post*, 309. As to the shelves in a house, that they shall be intended fixed, see 2 Bulst. 113; Cro. Jac. 329, *S. C.* So of racks in a stable, Anon., 2 Vent. 214.

(*a*) *Sheen* v. *Rickie*, 5 M. & W. 175. See *Hallen* v. *Runder*, cited *post*, p. 310.

of reports, and is stated in a manner somewhat differently in each of them.(*a*) It established a principle which had been for a long time doubted, viz., that a landlord has such a possession of timber cut down during the continuance of a lease, that he could maintain trover for it; because the lessee has only an interest in it while it was growing, and which determined the instant it was cut down. This was, in fact, the principal question raised in the case, and the observations of the court are for the most part applied to this point. It appears, however, from a reference to the case, that the court did also take into consideration the objection as to the cutting and carrying away of the trees being one continued act. For they advert to the rule of law, that in criminal cases such a taking would be no felony; and, according to the report of the case in Palmer, Mr. Just. Doddridge is said to have remarked, that in respect of the *barking* of the tree, there must have been an interval between it and the cutting down of the tree.(*b*)

[*301] *There is another case, *Udal* v. *Udal*,(*a*) in which the same point arose, and which has been mentioned on a former occasion. In the discussion of that case, it is said to have been agreed by the court, that an action of trespass *vi et armis* would lie against a lessee for the taking and carrying away of trees, *if the same be not as one continued act.* The case itself was an action of *trover;* and the effect of the decision, according to the note in Comyn's Digest, Biens, H., was, that a lessor may maintain trover for the *bark* of trees cut, although they are carried away or converted at the time of cutting, or afterwards. It is observable, that in the judgment of this case, the above mentioned decision of *Berry* v. *Heard* was referred to by the court, and in terms which in substance correspond with the abridgment of it given by Rolle.

There is also a further case, which may perhaps deserve to be noticed in reference to this subject. In Noy's Rep. 125, in the case of *Sir Jos. Skidness* v. *Huson*, it was determined, that if a stranger enters my close and cuts my trees and carries them away, I may have trover, although that after the cutting and before the carrying away I could not claim them, and no actual

(*a*) Palmer, 327; Sir W. Jones, 255; Bend. 141; Cro. Car. 242.
(*b*) And see per Houghton, J., in the same report.
(*a*) Alyn. 82; *Ante*, p. 292.

possession in me. The decision of this case, however, seems rather to turn upon the right of property in the trees, than upon the form of action, or the nature of the injury complained of.

Since the determination of these early cases, the point does not appear to have been the subject of legal *discussion. It was, however, adverted to by the Court of Common Pleas on one occasion. For, in the case of *Clark* v. *Calvert*,(a) Chief J. Dallas is reported to have proposed the question, whether an action of trover could be maintained for trees cut down and carried away at the same time? [*302]

In criminal law, indeed, it is a clearly established rule that there must be an interval between the severance and removal of a thing to make the taking of it a felony.(b) But the principle upon which this rule proceeds in criminal cases, seems, in some essential particulars, to be inapplicable to proceedings of a civil nature.

Perhaps the subsequent detention of the article in a chattel state may be thought to amount to a conversion, for which an action of trover might be sustained. And at all events, a very short interval between the acts of severing and taking away the fixture, would be sufficient to remove an objection so very technical in its nature. And, in practice, it may be found a useful precaution, to make a demand of the property previous to bringing the action, because a refusal after demand would probably be deemed evidence of a new conversion.

What amounts to conversion.

The case of *Wansborough* v. *Maton*, which has been already cited,(c) though not strictly applicable as a case of fixtures, affords an illustration of what will amount to a conversion so as to support this action. A tenant in that case, after the expiration of his term, *left a barn on the premises, which he was entitled to remove as not being attached to the freehold. He demanded it afterwards of the landlord off the premises. The latter refused to allow the removal; and afterwards, when a succeeding tenant was in possession, came thereon and prevented [*303]

(a) 3 B. Moore, 107. And see *Davis* v. *Connop*, 1 Price, 53.
(b) But see now the statutable provisions referred to in ch. 3, *post*.
(c) *Supra*, p. 106.

the first tenant from entering to take the barn away. This was held to be a conversion so as to support an action of trover against the landlord.(*a*)

In what cases trover lies for fixtures.

With respect to the particular cases in which the action of trover may be resorted to as a mode of determining the right of property in fixtures,—it is only necessary to consider the general principles which govern this form of action, with reference to the interest of the plaintiff and the nature of the injury complained of. Thus, in the case of landlord and tenant, where certain mill machinery had been demised with the mill for a term, and the tenant himself, without permission of his landlord, *severed* the machinery from the mill, which was afterwards seized and sold under an execution against the tenant, it was holden that the property in the machinery instantly vested in the landlord, when separated by the wrongful act of the tenant; and, therefore, that the landlord was entitled to bring trover for it against the purchaser, even during the continuance of the tenant's term.(*b*)

By landlord against tenant for removing soil

So where a tenant a short time before his tenancy expired, in taking away a dung heap belonging to himself, dug into and [*304] took away a quantity of the *virgin soil beneath, it was held at *N. P.*, by Parke, B., that the landlord might maintain trover (*or tresp. de bonis asp.*) for the removal of the earth. His Lordship was of opinion that by such wrongful act the soil became, by operation of law, the personal property of the landlord; and was so completely revested in him as to enable him to maintain such action.(*a*)

Or against the assignees of tenant, after entry for forfeiture.

Again, in the case of *Weeton* v. *Woodcock*,(*b*) which has been already referred to for another point, and the facts of which case appear *ante*, p. 104, it was held that a landlord who had entered for a forfeiture of a lease, (wherein was a proviso that the term should cease on the bankruptcy of the tenant,) might recover in trover against the assignees of the tenant, who having, before the

(*a*) 4 A. & E. 884. See *Longstaff* v. *Meagoe*, 2 Ad. & E. 166, as to what is not a conversion. See, also, *Wood* v. *Smith*, Cro. Jac. 129.

(*b*) *Farrant* v. *Thompson*, 5 Bar. & Ald. 826; 3 Stark. C. N. P. 131. And see *Berry* v. *Heard*, *ante*, p. 300; 1 Price, 53.

(*a*) *Higgon* v. *Mortimer*, 6 Car. & P. 616.

(*b*) 7 M. & W. 14.

landlord's entry, taken possession under the bankruptcy, had afterward and while in possession, removed and sold a trade fixture.

When by a tenant during his term.

But if fixtures are wrongfully severed and removed by a third party, the tenant has during the term a sufficient interest in them to entitle him to maintain trover; and this, even although at the end of the term he may be bound by the terms of the demise to leave them for the use of the landlord.(*c*)

And so, where a landlord under a distress for rent seized and severed certain fixtures and afterwards sold them, it was held that trover would lie by the tenant, and that the articles might be described in the *declaration as "goods and chattels." For the landlord could not wrongfully distrain and sever the fixtures, and then take advantage of such wrong, and defend the distress by insisting that the plaintiff having (for the purposes of the action) treated the things as goods and chattels, had thereby waived the illegality of the distress.(*a*) [*305]

Is a concurrent remedy with trespass.

But upon these subjects the reader is referred to the remarks in the preceding division respecting the action of trespass. And as an action of trover may be supported whenever trespass *de bonis asportatis* is maintainable, the observations which have been offered relative to the latter form of action, will sufficiently point out by and against whom an action of trover may be maintained for the tortious conversion of property after its severance from the realty.

The action of trover, however, is in some respects a more extensive remedy than trespass, and is sometimes a preferable mode of proceeding in the case of fixtures. For example, where a sheriff had illegally taken in execution a furnace fixed to the land, and sold and delivered it to a third person, it was held that trespass could not be maintained against the latter, because he came to the possession without any fault on his part.(*b*) It is

(*c*) *Boydell* v. *M'Michael*, 1 C. M. & R. 177. And see *Hitchman* v. *Walton*, 4 M. & W. 409, 416. See, also, from this case, that the reversioner may, during the term, maintain trover for fixtures after they are wrongfully removed.

(*a*) *Dalton* v. *Whittem*, 3 Q. B. 961. See, also, *Twigg* v. *Potts*, 1 C. M. & R. 89.

(*b*) 2 Roll. Ab. Tresp. 556, pl. 50; Br. Ab. Tresp. pl. 48; Cro. Eliz. 374; 16 Hen. VII, fol. 3; 21 Hen. VII, fol. 39. And see 9 Price, 257.

presumed, however, that an action of trover would have been maintainable in this case; at least after a demand and refusal.(c)

[*306] *It will also frequently be found convenient in practice to adopt the action of trover, for the purpose of joining it with an action on the case in nature of waste.(a)

Plea. According to the present rules of pleading, the general plea of Not Guilty, does not operate in denial of the plaintiff's title to the property: this question can now be raised only by a plea specially traversing it.(b)

Actions founded upon Contract.

Actions, *ex contractu*, in respect of fixtures. Fixtures frequently become the subject of an action in form *ex contractu*. For not only does the transfer and disposition of them arise, in general, out of the particular stipulations of parties, which can only be enforced in an action of this nature, but the right of property in them depends in numerous instances upon express or implied agreements by which the general law of fixtures is modified or controlled.

In what cases maintainable. Thus, a tenant, by reason of the special terms of his lease, &c., may be restricted from removing articles which, by the general law of fixtures, he would be entitled to take away. So an injury committed by a tenant to things fixed to the freehold may, in some cases, be regarded as an untenantlike use of the demised [*307] property, which would amount to a breach of *an implied contract under which the premises are held. And in like manner there are a variety of cases in which agreements are made between landlords and tenants, respecting the purchase and valuation of fixtures at the beginning or end of a lease, and for which an action in form *ex contractu* is the proper remedy.

(c) See a point as to the form of the demand for fixtures, in *Colgrave* v. *Dias Santos*, 2 Bar. & Cres. 77. See, also, *Longstaff* v. *Meagoe*, 2 Ad. & El. 166, *sup.* 303.

(a) As in *Hitchman* v. *Walton*, 4 M. & W. 409. In this case it was held, that the mortgagee of a lease was entitled to declare in case as *reversioner*, and to recover in trover against the assignee of the tenant (who had become bankrupt) for the removal of fixtures: and this, although by the terms of the lease, all the fixtures were to be left for the landlord at the end of the term. See the case, *ante*, p. 232.

(b) Id. ib.

Again, where things fixed to the freehold have been tortiously removed and converted, the party in whom the property is vested may sometimes waive the tort in respect of the unlawful taking, and proceed for the value of the articles in an action of assumpsit. And it was upon this principle, that a compensation might be recovered in the case of waste committed by a testator in wrongfully severing articles affixed to the freehold. For, if it can be shown that the personal estate has thereby received any benefit, his executor will be answerable to that extent in an action for money had and received.(a)

Pleadings. Property how to be described.

With respect to the form of declaring in cases of this nature, it is to be observed, that wherever it is necessary in pleading to describe property existing in a state of union with the freehold, it ought not to be referred to in terms which are applicable to personalty merely. Thus, the value of fixtures sold cannot be recovered under a count for "*goods*" sold and delivered. This point was so ruled by Lord Ellenborough in the *Nisi Prius* case of *Nutt* v. *Butler*.(b) There, an out-going tenant had left on the premises *certain fixtures, consisting of grates and other fixed articles, which the defendant, the in-coming tenant, had agreed to take and pay for. The plaintiff declared, in assumpsit, for "goods sold and delivered;" and Lord Ellenborough held, that the price of the articles could not be recovered under this count, inasmuch as they did not come within the description of goods sold and delivered, being fixed to the freehold, and not a separate and undivided chattel.

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Price of fixtures not recoverable as for goods sold.

The same point was afterwards adjudged by the Court of Common Pleas, in the case of *Lee* v. *Risdon*.(a) And on that occasion, Ch. J. Gibbs, in delivering judgment, observed, that although such things might originally have been goods and chattels, yet when affixed, they ceased to be so by becoming part of the freehold. And though it might be in the tenant's power to reduce them to the state of goods and chattels again, by severing them during the term, yet until they were severed, they were parts of the freehold.

(a) *Hambly* v. *Trott*, Cowp. 371. And see Cases and Opinions, Vol. II, p. 304. See now the provisions of the recent statute, *ante*, p. 276.

(b) 5 Esp. N. P. C. 176.

(a) 7 Taunt. 188; 2 Marsh. 496, *S. C.* And see *Salmon* v. *Watson*, 4 Bay Moore, 73; *Knowles* v. *Michel*, 13 East, 248; *Horn* v. *Baker*, 9 East, 215.

The importance of attending to the distinction taken in these cases, as arising out of the peculiar nature of fixtures prior to an actual severance, is further shown by the following decision. In an action of replevin, the declaration was for taking goods and chattels, to wit, a *lime kiln*. To an avowry for rent arrear, there was a plea in bar that the lime kiln was affixed to the freehold: [*309] and it was held, that *the plea was inconsistent with the declaration, and a departure in pleading. For the court considered, that treating the lime kiln as a chattel would have been correct only if speaking of a movable thing, as a portable oven for baking lime.(*a*)

The case of *Pitt* v. *Shew*(*b*) seems, perhaps, in some degree to militate against the above decisions. It was held in that case, that under the words "*goods, chattels, and effects*," the plaintiff might recover in trespass for the value of fixtures which had been illegally distrained and sold by the defendant.[1] But it is probable that the fixtures there in dispute had been severed from the freehold before the sale by the defendant.(*c*) It is however, to be observed, that Chief J. Abbot does not appear to have relied upon this circumstance as the ground of decision; for he is reported to have stated as a reason for his judgment, that fixtures might be taken in execution under a *fieri facias*, which contains similar words.(*d*)

However, notwithstanding this decision, it will not be correct in ordinary cases, or where the circumstances are not in every respect similar, to describe the property as *goods and chattels*, unless the entire cause of action arises after a severance of the fix-

(*a*) *Niblet* v. *Smith*, 4 T. R. 504. And see *Dalton* v. *Whittem*, 3 Q. B. 961; *Twigg* v. *Potts*, 1 Cr. M. & R. 93.

(*b*) 4 Bar. & Ald. 206; *Ante*, pages 240, 244, *et seq.*

(*c*) This view of the case is approved by Parke, B., in *Hallen* v. *Runder*, *post*. See, also, by the same judge, in *Twigg* v. *Potts*, *ub sup*.

(*d*) And see 1 Bing. 6, where it was held that growing crops might, under certain circumstances, be considered as falling under the description of *goods* and *chattels*. See per Parke, B., in *Marson* v. *Short*, 2 Scott, 249.

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[1] By severance of a thing fixed to the freehold, it becomes personal property, for which replevin may be maintained. *Cresson* v. *Stout*, 17 John. 116; *Reynolds* v. *Shuler*, 5 Cowen, 323.

tures from the freehold. And no difficulty *will result in practice from this rule, because the pleader will, in every case of a contract executed, be safe if he adheres to the popular term of "fixtures."(a) [*310]

Term "fixtures" sufficient.

Thus, in a late case, a tenant on entering a house purchased certain fixtures therein, and afterwards erected others, all of which he was entitled to remove during the term; he agreed, at the request of his landlord, a few days before the expiration of his tenancy, to forbear to remove the fixtures, the landlord agreeing to take them at a valuation. Accordingly, at the expiration of the term, he delivered up the house to the landlord leaving the fixtures on the premises, and the landlord took possession of them, together with the house; on the following day the fixtures were valued by brokers on each side, and the valuation was signed. In an action of *indebitatus assumpsit* by the tenant for the price and value of "*fixtures*" bargained and sold, and sold and delivered, it was held that the action was maintainable in this form, although the fixtures were never severed from the freehold.(b)

Form of counts.

It may, perhaps, be useful to mention, that besides the proper description of fixtures in pleading as above noticed, it is frequently necessary to distinguish *the cases in which the plaintiff ought to declare in a special count, and when a general count will be sufficient. Thus, where a party had agreed, as in the case last mentioned, to take fixtures at a valuation, and a valuation has accordingly been made, there is no necessity for resorting to a special form of declaring. For it has been held, that the appraised value of fixtures may be recovered under the common count on the *insimul computassent;* the valuation of the appraisers being in effect an ascertainment of the price by the parties themselves.(a) But, where there was an agreement between the [*311]

(a) See *Wick* v. *Hodgson*, 12 B. Moore, 213.

(b) *Hallen* v. *Runder*, 1 C. M. & R. 266. See, also, *Mackintosh* v. *Trotter*, 3 M. & W. 184. And with these, compare the case of *Sheen* v. *Rickie*, cited above, p. 299, and *Birch* v. *Dawson*, 2 Ad. & E. 57. See, also, per Parke, B., in *Clark* v. *Bulwer*, 11 M. & W. 251. In the principal case, Lord Lyndhurst, C. B., and Bayley, B., seem to draw a distinction between cases where the action is brought by the owner of the inheritance, and by a tenant. Bayley, B., also observed, that the sale effects a severance when the purchase is complete, but not before.

(a) *Salmon* v. *Watson*, 4 Bay Moore, 73.

plaintiff and the defendant, that the defendant should accept an assignment of a lease from the plaintiff, and should also take the fixtures, &c., at a valuation, and the fixtures were valued and possession given, but the lease was never assigned; it was held, under Lord Ellenborough's direction, that in this case, *indebitatus assumpsit* would not lie for the price of the fixtures, but that the plaintiff should have declared upon the special agreement, the contract being entire.(*b*)

In another case, where a contract was entered into "to build an engine for the sum of £— to be *completed* and *fixed* by the middle or end of December," and it appeared that the different parts of the engine were constructed at the plaintiff's manufactory, and sent in parts at different intervals to the defendant's colliery, a distance of twenty miles, where they were fixed piecemeal, and so made into an engine; it was held that on the contract being executed, the price *agreed upon could not be recovered in *indebitatus assumpsit* "for the price and value of an engine, and other goods *sold and delivered*." For "the engine was not contracted for to be delivered, or delivered as an engine in its complete state, and afterwards affixed to the freehold;—there was no sale of it as an entire chattel, and delivery in that character,—and, therefore, it could not be treated as an engine sold and delivered. Nor could the different parts of it which were used in the construction, and from time to time fixed to the freehold, and therefore became part of it, be deemed goods sold and delivered, for there was no contract for the sale of them as movable goods. The proper form of count is in *indebitatus assumpsit*, for work, labor and materials, or for erecting and constructing an engine."(*a*)

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Where there was a written agreement to let apartments "at seventy-five guineas *per annum*: fixtures as follows," (enumerating them,) "the rent to commence at the time possession is taken." In assumpsit on this agreement for not giving possession of the apartments, it was held that it was no variance that the declaration omitted to state that part of the agreement which

(*b*) *Neal* v. *Viney*, 1 Camp. N. P. C. 471.

(*a*) *Clark* v. *Bulwer*, 11 M. & W. 243. And see *Cotteril* v. *Apsey*, 6 Taunt. 322; *Tripp* v. *Armitage*, 4 M. & W. 687, cited in the principal case. See, also, *Pinner* v. *Arnold*, 2 Cr. M. & R. 613.

referred to the fixtures. For the *gravamen* of the action was the not giving possession of the apartments, and the fixtures were not the substance of the agreement.(*b*)

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*It will not be necessary on the present occasion, to enter more minutely into the rules and forms of pleading in these cases; because, except as regards the points already noticed, there does not appear to be any distinction between actions founded on contracts concerning fixtures, and such as relate to any other subject matter of agreement.

(*b*) *Ward* v. *Smith*, 11 Price, 19; *Vide Vaughan* v. *Hancock*, 16 L. J. R. C. P. 1.

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*CHAPTER II.

OF OTHER LEGAL PROCEEDINGS IN RESPECT OF FIXTURES.

SECTION I. *On the Exemption of Fixtures from Distress.*
SECTION II. *On taking Fixtures under Legal Process.*

SECTION I.

On the Exemption of Fixtures from Distress.

Things annexed to the freehold not distrainable.

IT is an established rule of law, that things adhering to the freehold cannot be taken under a distress, whether for rent, services, fines, or duties, &c.(a) And this rule holds, not merely in respect of such things as become, by annexation, parcel of the inheritance, and are not afterwards severable, but it applies to fixtures of whatever nature or construction, and whether put up for trade or for any other purpose.

Ground of the exemption.

The reasons for this exemption are thus explained by Chief Baron Gilbert.(b) "A distress was anciently no more than a pledge in the hands of the lord, to compel the tenant to pay the [*315] service, or *perform the duty for which it was taken; and, therefore, at common law, it could not be sold, but like all other pawns or pledges, was to be restored to the owner when the service or duty was performed.(a) The nature of contracting by pawns or pledges is, that upon payment of the money for security whereof they were given, the pawn or pledge ought to be restored to the owner in the same plight and condition it was delivered." Afterwards, he observes, "whatever is part of the freehold cannot be distrained; for what is part of the freehold cannot be severed from it without detriment to the thing itself

(a) *Quære*, as to a distress for *poor's rates*, or other similar demands which are in the nature of executions? See 1 Burr. 588.

(b) Gilb. Dist. pages 34, 48. And see the reasons assigned in *Simpson* v. *Hartopp*, Willes, 514; and *Pitt* v. *Shew*, 4 Bar. & Ald. 207.

(a) Upon the origin of the right of distress, and the principles by which it ought to be governed, see Pothier, *Traite du Contrat de Louage*, part 4, ch. 1.

in the removal; consequently, that cannot be a pledge which cannot be restored *in statu quo* to the owner. Besides, what is fixed to the freehold is part of the thing demised; and the nature of the distress is not to resume part of the thing itself for the rent, but only the *inducta et illata* upon the soil or house."(*b*)

The rule upon this subject is mentioned in very early authorities. In the Year Book, 21 Hen. VII, c. 13, the court, in discussing the right of the heir to take furnaces, fixed tables, the covering of beds, &c., treat such things as being clearly exempt from distress; and a similar opinion is expressed in the Year Book, *21 Hen. VII, 26.(*a*) And, in conformity with these [*316] cases, Lord Coke lays it down generally, that furnaces, cauldrons, or the like, fixed to the freehold, cannot be distrained.(*b*) Indeed, all the authorities concur in stating this principle to be a part of the common law.(*c*)[1]

Are absolutely privileged.

And it is to be observed, that the privilege in these cases is absolute: for things fixed to the freehold cannot be distrained, even although there is no other distress upon the premises. In this respect, therefore, the privilege is of a higher nature than that in favor of instruments of trade and agriculture; for these are only partially exempted, and are liable to be taken when there is no other sufficient distress to be found.(*d*)

So of things constructively annexed.

The same principle, it may also be remarked, extends to things which are only constructively annexed to the freehold. For the doors and windows of a house hanging only upon hooks, and which are movable, are not distrainable. And so of a mill stone,

(*b*) What is subsequently erected is considered in law as part of the demised premises, and is said to be potentially demised; and, therefore, an action of waste would lie against a lessee, for not repairing a house erected by himself on the demised land, and the writ might be in *domibus dimissis*. *Lord Darcy* v. *Askwith*, Hob. 234. Upon this subject, see 7 Taunt. 167. And see Serj. Hill's MS. note in Vin. Abr. Waste, E. Linc. Inn. Lib.

(*a*) See, also, Br. Ab. Chattels, pl. 7; Distress, pl. 29.

(*b*) Co. Litt. 47 b.

(*c*) *Vide* 1 Roll. Abr. Dist. H. 45; Com. Dig. Dist. C.; *Davies* v. *Powell*, Willes, 46; *Simpson* v. *Hartopp*, Willes, 514; *Gorton* v. *Falkner*, 4 T. R. 567, 569; *Pitt* v. *Shew*, 4 B. & A. 206. And see as to a lime kiln, *Niblett* v. *Smith*, 4 T. R. 504. That a replevin does not lie for things affixed to the freehold, see Bac. Ab. Replevin, F.

(*d*) *Vide Simpson* v. *Hartopp*, Willes, 514; *Gorton* v. *Falkner*, 4 T. R. 569.

[1] *Reynolds* v. *Shuler*, 5 Cowen, 323.

which, though not annexed to the freehold, is yet essentially parcel of the mill.(*e*)

Though removed for a temporary purpose.

[*317] And it is held, that even a temporary removal of such things for purposes of necessity, is not sufficient *to destroy the privilege.[1] Thus, in the Year Book, 14 Hen. VIII, p. 25, it was adjudged, that if a mill stone is severed and lifted out of its place, in order to be picked, it is not distrainable; for it still continues parcel of the mill, as it lies all the time on the other stone: and the removal is of necessity, and for the good of the commonwealth.(*a*) And it was further said, that it would be the same although the stone was detached and carried away for the purpose of picking.(*b*)

Smith's anvil whether distrainable.

In the report of the last mentioned case a *quære* is subjoined, whether the anvil of a smith would be free from distress. And Brooke, in his abridgment of the case, (Distress, pl. 23,) has the like *quære*.[2]

Chief Baron Gilbert, in alluding to this question, states expressly, that the anvil would be protected; for, he says, it is accounted part of the forge, though it be not actually fixed by nails to the shop. Lord Kenyon, however, referring to the same instance on a more modern occasion, appears to consider that the ancient authorities respecting the smith's anvil, proceeded upon the ground of its being affixed to the freehold.(*c*)

(*e*) 14 Hen. VIII, p. 25; Finch, book 2, p. 135; *Ante*, 218. Charters, &c., cannot be distrained; for they are not chattels in law. Br. Ab. Dist. 29, Replevin, 34; Brownlow, 168.

(*a*) And as to this, see Br. Ab. Dist. pl. 23; Finch, *ub. sup.*; 11 Rep. 50; Gilb. Dist. 49; 6 Mod. 187. And *Place* v. *Flagg*, 4 M. & R. 277.

(*b*) But if it is wholly severed and removed from the mill, then it is not part of the mill, and is distrainable. Finch, *ub. sup.* And so, if a man has two mill stones, and one only is in use, and the other lies by, not used. Willes, 516.

(*c*) *Gorton* v. *Falkner*, 4 T. R. 567. And see Comyn's Dig. Distress, C. So in *Jollie* and *Broad's case*, 2 Rolle, 202, where it is said that mill stones and anvils can-

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[1] *Reynolds* v. *Shuler*, 5 Cowen, 323.

[2] Suppose the anvil, the mill stones, &c., separated from the freehold not temporarily, for the purpose of repair, but permanently, for the purpose of being sold, and still remaining on the demised premises, would it not be liable to be distrained. They would have ceased to be part of the freehold, or to savor of the realty, they would be simply personal chattels, and as such unquestionably liable to distress. Sutherland, J. *Reynolds* v. *Shuler*, 5 Cowen, 323.

*In a case before the Court of Exchequer,(a) it was argued upon one occasion, that the rule above laid down, of chattels annexed to the freehold being protected from distress, was not to be taken as a general rule, but was to be understood only of things which could not be restored to the owner *in statu quo*. And therefore, it was insisted that certain machinery put up in a factory by a tenant, which was fixed only by bolts and screws to the floor, might be distrained; because it could be removed and replaced without sustaining any injury whatever. But it was answered, that the instance of the mill stone, above noticed, established a principle which admitted of no such exception; for, in that case, the article might be taken away without detriment either to itself or the principal thing. The determination of the case ultimately proceeded upon a different ground, and the point was not noticed in the judgment of the court.(b) [*318]

And the strict rule of law, as it was laid down by the earlier authorities, has been adopted by the Court of Q. B., in a modern case. For it was there expressly held that tenant's fixtures, viz., kitchen ranges, stoves, coppers and grates, were not distrainable for rent. Moreover, the reason for the rule, as it has been above explained, was on that occasion declared by the court to be the correct one.(c)

*It may perhaps deserve to be mentioned in this place, that the principles of the common law were so repugnant to any distress being levied upon the freehold itself, that even *fructus industriales*, as corn, grass and other things growing upon the soil, could not be distrained.(a) This, however, was altered by the Statute 11 G. II, ch. 19, sec. 8, as between landlord and tenant. For by that statute, landlords are enabled to distrain [*319]

Growing corn distrainable.

not be distrained, it is on the ground of their being instruments of trade. See *Twigg* v. *Potts*, as reported 3 Tyr. 969, where trespass was brought for seizing, under a distress for rent, fixtures, as anvils, bellows, vices, &c.; the point, however, was not raised in this case.

(a) *Duck* v. *Braddyll*, M'Cleland's Rep. 217; 13 Prince, 455, *S. C.*

(b) See the remark of Lord Lyndhurst, C. B., in *Trappes* v. *Harter*, 2 C. & M. 177, as to a stocking frame screwed to the floor.

(c) *Darby* v. *Harris*, 1 Q. B. 895. And see *Twigg* v. *Potts*, in the Exc. 1 Cr. M. & R. 89. See, also, *Dalton* v. *Whittem*, 3 Q. B. 961; where held, that if a landlord under a distress for rent severs fixtures and disposes of them, he is liable in trover.

(a) 5 Ed. 2 pl. 135; 18 Ed. 3, 4; 2 Inst. 82; 1 Roll. Abr. 666; 2 Mod. 61; 4 Bar. & Ald. 208, *per* Abbot, C. J.

corn, grass, hops, &c., or other produce growing on the demised premises, for arrears of rent. The provisions, however, of this statute have received a strict construction. For it has been decided, that they apply only to produce of a similar nature to that specified in the act: and, therefore, it was held that trees and shrubs growing in a nursery ground remain as at common law, and are not distrainable.(*b*)

Nursery trees not distrainable.

Under this head, one further case may perhaps deserve notice. It is in the instance of an action brought (under the Statute 4 G. II, ch. 28,) against a tenant holding over premises which had been let to him, together with the use of a fixed steam engine. A tenant took a room in a woollen factory together with a supply of power by means of a shaft revolving in the room, and connected with a steam engine belonging to the landlord fixed up in another part of the mill. In an action for double value against the tenant for holding over the room, &c., it was held that in estimating such double value, the value of the power [*320] supplied from the engine was not to be *included, although both were let together and the rent was entire. In the course of the argument in this case, it was observed by Parke, B., that the question seemed to be, whether the amount claimed could be recovered in the shape of rent by distress.(*a*)

[*321]

*SECTION II.

On seizing Fixtures under Legal Process.

Fixtures seizable under process.

It seems to have been formerly considered that things annexed to the freehold were not liable to be taken in execution, like the movable goods and chattels of the debtor.(*a*) But this rule of law has given way to a more liberal construction in favor of

(*b*) 8 Taunt. 431; 2 Bay M. 491. *S. C.* Acc. 8 Taunt. 742; 3 Bay M. 96, *S. C.*

(*a*) *Robinson* v. *Learoyd*, 7 M. & W. 48.

(*a*) 20 Hen. VII, 13; 21 Hen. VII, 26; *Day* v. *Austin*, Cro. Eliz. 374; Owen, 70, *S. C.* And see 1 Roll. Ab. Execution, 891; Com. Dig. Execution, C. IV.; Process, D. 6; Gilb. Exec 19. Under the writ of attachment in real actions, the sheriff could only take the movable goods of the defendant, and not a chattel real, or a thing affixed to the freehold. Com. Dig. Process, D. 6; Vin. Abr. Attach. B. C. 2 Inst. 254.

creditors in modern times; and for their benefit, *fixtures* are now considered to be so far in the nature of personal chattels, that in certain cases they may be seized and removed under a writ of *fieri facias* or other similar process.

Thus it was holden, in *Poole's case*,(*b*) that articles put up by a tenant in relation to his trade, and which he was entitled to remove at the end of his term, might be seized in execution by a sheriff under a *fieri facias*.

And although this decision related to *trade* utensils, and a distinction seems to have been taken by Lord Holt on this particular ground, yet it is now generally understood that the rule is the same with respect to other fixtures, whether put up for ornament or any other purpose, and that all are alike to be *considered as goods and chattels for the benefit of execution creditors.(*a*) [*322]

It is not, however, decided by any of the cases, that all articles and erections of whatever magnitude and construction, if put up by a tenant for trade or other privileged object, are liable to be seized in execution. Indeed, in the case of *Steward* v. *Lombe*,(*b*) Mr. Justice Burrough expressed himself of opinion, that such a structure as the mill which was then the subject of dispute, and which has been described in a former part of this work, could not be taken in execution, although it might be erected by, and was in the possession of a tenant.

But not things severable by virtue of powers, &c.

And it is to be observed, that it is only in the peculiar case of fixtures, that the law regards things attached to the realty as personal chattels in favor of creditors. For the same privilege does not exist in respect of articles which are removable under powers appendant to estates, or by virtue of the private agreement of parties. And, therefore, it was observed by Lord Holt, in *Poole's case* above cited, that there was a difference between a common tenant and a tenant for years, *without impeachment of*

(*b*) 1 Salk. 368; 1 Brod. & Bing. 512. And see *Ryall* v. *Rolle*, 1 Atk. 170, 176.

(*a*) So ruled in *Place* v. *Fagg*, 4 M. & R. 277. And see *R.* v. *Topping*, M'Cl. & Y. 544. See, also, 5 Bar. & Ald. 625; 1 Stark. N. P. C. 43; 4 Bar. & Ald. 207, *per* Abbot, Ch. J.; and *per* Parke, B., in *Minshall* v. *Lloyd*, 2 M. & W. 459. In the case of *Allen* v. *Allen*, Moseley, 112, it seems admitted in argument, that marble chimney-pieces and glasses are ornaments every day taken down by tenants, and also upon executions.

(*b*) 1 Brod. & Bing. 506.

waste; for in the latter case, he said, that the sheriff could not cut down and sell, though the tenant himself might.

[*323] Nor under process against the owner in fee.

*Moreover, it has been held that a sheriff is not allowed to take in execution, articles which have been set up by the owner in fee upon his own freehold. In the case of *Wynn* v. *Ingleby*,(a) a sheriff had, under a writ of *fieri facias*, seized certain fixed articles, consisting of *set pots, ovens and ranges;* and it appeared that the house to which they were attached, was the freehold of the person against whom the writ issued. The Court of King's Bench determined, that the articles in question were not liable to be seized in execution. And they said that the freehold belonging to the party made it different from other cases, and that, as against him, the articles could not be taken as goods and chattels.

So, also, in the above mentioned case of *Steward* v. *Lombe*, where a person seised in fee of land, with a windmill erected thereon, mortgaged the land and mill, it was holden that the mill could not be taken in execution by a creditor of the mortgagor, although he continued in possession after the mortgage. The court, indeed, in this case, confined their attention principally to another point; but Mr. Justice Richardson seemed to think that there might have been a difference if the mortgagor had, as tenant for years, erected the mill.

Whether executor's fixtures seizable.

The same point was again ruled in the more recent case of *Place* v. *Fagg*.(b) Nevertheless it does not appear to be satisfactorily established by any of these cases, that articles erected by the owner of the freehold can in no instance whatever, be taken

[*324] in execution *by virtue of a writ of *fieri facias*. The judgment of the court in the case of *Wynn* v. *Ingleby*, has indeed been supposed to have decided this point. But it is observable, that the court in that case, as well as in the case last referred to, assumed that the property in question would descend to the heir as an essential part of the freehold, and would not pass as personalty to the executors. The decisions, therefore, cannot perhaps be regarded as authorities for the exemption generally of fixtures which tenants for life, in tail, or even in fee, may set up, and

(a) 5 Bar. & Ald. 625.

(b) 4 Man. & Ry. 277. See, also, *per* Bayley, B., in *Hallen* v. *Runder*, 1 Cr. M. & R. 266; 3 Tyr. 960.

which their executors would be entitled to, as partaking of the nature of personalty.(*a*)

Fixed articles demised, may be taken in execution.

It remains only to observe, in respect of another class of fixed articles, viz., those which are demised to a tenant, together with the premises to which they are attached, (as in the case of a brewery, &c., leased with the plant and machinery,) that the sheriff is authorized to seize and convey the lessee's interest in the fixed property, of whatever nature it may be; although he cannot sell the articles as divided chattels in separation from the freehold.(*b*)

But if a tenant has wrongfully severed things which have been demised to him, together with the premises, *in this case the sheriff cannot afterwards take them under an execution against the tenant; because the property when reduced into a chattel state, immediately vests in the landlord, even during the continuance of the tenant's term.(*a*) [*325]

When sheriff bound to sell fixtures separately.

Where a sheriff has taken fixtures in execution together with a lease of the premises to which they are attached, and is authorized to sever them from the freehold to satisfy the writ, he is bound to sell the fixtures separately, if he cannot find a purchaser for the whole.(*b*)

Not under an extent for duties, under 34 G. III, c. 20.

It has been held that fixtures demised with a paper mill, and used by the tenant in the manufacture of paper, are not liable to be seized under an extent for duties to the crown, as "utensils" for the making of paper, within the meaning of that term as used in the Stat. 34 Geo. III, ch. 20, sec. 27.(*c*)

(*a*) Growing crops, which are *fructus industriales*, and go to the executor, are seizable in execution as *goods and chattels*. Gilb. Exec. 19; 1 Salk. 368; 2 Brod. & Bing. 368, per Richardson, J. As to which see *Evans* v. *Roberts*, 5 B. & C. 835, 841.[1] As the right of seizing things attached to the realty seems to be closely connected with the right of removal under the law of fixtures, it may be useful, in determining questions of this description, to inquire into the nature of the power under which the party himself might remove the articles in question. As to the distinctions upon this subject, see *ante*, part 1, ch. 3, sec. 3.

(*b*) See *Ryall* v. *Rolle*, 1 Atk. 165, *et seq.*; Wentw. Off. Ex. 61; citing Austin's case. See, also, *Gordon* v. *Harpur*, 7 T. R. 11, 12.

(*a*) *Farrant* v. *Thompson*, 5 Bar. & Ald. 826.

(*b*) *Barnard* v. *Leigh*, 1 Stark N. P. C. 43.

(*c*) *Att. Gen.* v. *Gibbs*, 3 Y. & J. 333.

[1] Wheat growing is a chattel, and if raised upon the land of another by virtue of an agreement between him and the defendant, may be levied upon, and sold under an execution against the latter. *Whipple* v. *Post*, 2 Johns. 428; *Stewart* v. *Doughty*, 9 Johns. 108.

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*CHAPTER III.

OF CRIMINAL LAW IN ITS APPLICATION TO PROPERTY AFFIXED TO THE FREEHOLD: WHEREIN OF DEODANDS.

Fixtures not the subject of larceny, at common law.

FIXTURES are not the subject of larceny at common law. For to constitute larceny there must be a felonious taking and carrying away the *personal goods* of another;(a) and fixtures, by reason of their adherence to the freehold, cannot be regarded as personal goods.

Accordingly, in the case of *Lee* v. *Risdon*,(b) Chief Justice Gibbs, referring to this species of property, says—"felony cannot be committed of these things; for if a thief severs a copper, and instantly carries it off, it is no felony at common law." And he then adds, "if, indeed, he lets it remain after it is severed any time, then the removal of it becomes a felony, if he comes back and takes it; and so of a tree which has been some time severed."(c)

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This principle, that the taking of property fixed to the freehold, even though done *animo furandi*, does *not amount to felony unless an interval elapses between the severance and removal, has been recognized by all the writers upon criminal law.(a) It is thus explained by Sir William Blackstone in his Commentaries.(b) "Lands, tenements and hereditaments, (either corporeal or incorporeal,) cannot, in their nature, be taken and carried away. And of things likewise that adhere to the freehold, as corn, grass, trees, and the like, or lead upon a house, no larceny could be committed by the rules of the common law; but the

(a) *Vide* Bract. Lib. 3, ch. 32; 3 Inst. 107.

(b) 7 Taunt. 190. And see per Bayley, J., 2 Bar. & Cres. 80.

(c) So, if a man cut and carry away corn at the same time, it is trespass only and not felony, because it is but one act; but if he cut it and lay it by, and carry it away afterwards, it is felony. Per Hale, Ch. J., 1 Mod. 89. But in all these cases, a slight interval between the severance and removal will make the act a felony. That dung spread upon land is not the subject of felony, see Aleyn, 31. And see *ante*, p. 156.

(a) *Vide* 3 Inst. 109; Hale's P. C. 510; Hawk. book 1, ch. 33, sec. 21; East, P. C. 587. And see Freem. 22; Aleyn, 83; Palm. 327; Str. 1134; Leach C. C. 587.

(b) Vol. IV, p. 232.

severance of them was, and in many things is still, merely a trespass; which depended on a subtlety in the legal notions of our ancestors. These things were parcel of the real estate; and therefore, while they continued so, could not by any possibility be the subject of theft, being absolutely fixed and immovable. And if they were severed by violence so as to be changed into movables, and at the same time by one and the same continued act, carried off by the person who severed them, they could never be said to be taken from the proprictor, in this their newly acquired state of mobility, (which is essential to the nature of larceny,) being never, as such, in the actual or constructive possession of any one, but of him who committed the trespass. He could not, in strictness, be said to have taken what at that time were the personal goods of another, since the very act of taking was what turned them into personal goods."

*The reasoning contained in this passage may not, perhaps, be deemed very satisfactory at the present day.(a) The rule itself, however, must be understood as the established rule of common law; and it is applicable to every species of property annexed to land, except in certain cases which have since been made the subject of express legislative provision. [*328]

Fixtures not considered a part of the freehold, *in favorem vitæ*.

But the principle that fixtures are to be deemed parcel of the freehold, seems to have been relaxed in cases where it would operate to the prejudice of a prisoner. For it has been doubted whether a press or cupboard, let into the walls of a house, is to be so far deemed a part of the house, as to make the breaking it open to be burglary, or an offence within the statutes relating to house-breaking. Sir Mich. Foster is of opinion that it ought not; and he thinks, that in capital cases, such fixtures which merely supply the place of chests and other ordinary utensils of household furniture, should, in *favorem vitæ*, be considered in no other light than as mere movables, partaking of the nature of those utensils, and adapted to the same use.(b)

Legislative provisions in respect of fixtures, &c.

There are, however, certain cases in which the legislature has at different periods interfered to afford protection to property

(a) Concerning the reasonableness of this rule of Criminal Law, see Hobbes' Dialogue between a Philosopher and Student; Hobbes' Tracts, Vol. II, p. 118.

(b) Fost. C. C. 109. And see Hale, P. C. Vol. I, p. 555; Vol. II, 355, 358; East, P. C. 489; Kelynge, 59, 69.

fixed to the freehold, where, from its nature, it would be particularly exposed to theft or injury. The earlier enactments made with this view have been wholly repealed; and other provisions,
[*329] *having the same general object, but of a more comprehensive nature, have been introduced by the larcency act, 7 & 8 Geo. IV, ch. 29, and by other statutes passed at the same period.

Stealing fixed property.

By sec. 44 of that statute, to steal, or rip, cut, or break with intent to steal, any glass or woodwork *belonging* to any building whatsoever,(*a*) or any lead, iron, copper, brass, or other metal, or any utensil or fixture, whether made of metal or other material, respectively fixed to any building;(*b*) or anything made of metal fixed in any land, being private property, or for a fence to any dwelling-house, garden, or area, or in any square, street, or other place dedicated to public use or ornament,(*c*) is made felony, and is punishable as directed in the act.(*d*)

[*330] *By sec. 45, it is made felony for tenants, &c., to steal any fix-
Stealing fixtures let with house, &c. tures let to be used with any house or lodging.

Stealing growing trees, fruit, &c.

By sec. 38, and following sections, it is made felony in certain cases, to steal, cut, &c., with intent to steal, growing trees, shrubs, fruit, plants, vegetable productions,(*a*) cultivated roots, &c. In

(*a*) What is a *building* within the act, see *R.* v. *Worral*, 7 Car. & P. 516.

(*b*) See *R.* v. *Gooch*, 8 Car. & P. 293. An indictment for stealing a copper pipe fixed to the dwelling-house of A. & B., is not supported by proof of stealing a pipe fixed to two rooms, of which A. & B. are separate tenants in the same house, 1 Mood. C. C. 418.

(*c*) That a churchyard is a place dedicated to public use, so that stealing brass fixed to a tombstone therein is within the statute, see *R.* v. *Blick*, 4 Car. & P. 377. See, also, *Reece's case*, 2 Russ. by Greaves, 65; and a similar decision in *Jone's case*, 2 Russ. by Greaves, 66.

(*d*) The repealed statutes which referred to certain of the offences above specified, were the 4 G. II, ch. 32, and 21 G. III, ch. 68; and as these were, in many respects, similar in terms with the recent statute, the cases which have been decided to be within them, may be usefully consulted in questions on the latter statute. For these decisions, see *Hickman's case*, 1 Leach C. C. 318; *Rex* v. *Parker*, 1 Leach C. C. 320, *in notis*; *Senior's case*, 1 Leach C. C. 496. And see *Rex* v. *Richards*, and *Rex* v. *Norris*, Russell and Ryan's C. C. 28, 69. In *Hedge's case*, 1 Leach, 201, it was held that window-sashes, which were neither hung nor beaded in the frames, but only fastened to the frames by laths nailed across, were not fixed to the freehold. But the late statute appears to comprehend all cases of this description.

(*a*) The words "plant or vegetable production," in the 42d sect. of the Statute 7 & 8 G. IV, ch. 29, do not include young fruit trees. *Hodge's case*, M. & M. 341.

certain, however, of the like cases, the offence is made punishable on summary conviction.

Fences, gates, &c.

And by sec. 40, of the same act, provision is made against the offences of cutting, stealing, cutting, breaking, or throwing down with intent to steal, any part of any live or dead fence, or any wooden post, pale, or rail, &c., or any stile or gate, &c.

Ores, coals, &c., from mines.

Again, by sec. 37, the stealing the ores of any metal, &c., or coals, &c., from any mine, bed, &c., is declared to be felony.(*b*)

Malicious injuries to fixtures, &c.

In like manner, with respect to *malicious injuries* committed to fixtures, or to private property of a like description, provision is made by the Stat. 7 & 8 G. IV, ch. 30. For by sec. 3 of that statute, the maliciously cutting, &c., or damaging silk and other articles (as specified) in the loom, or on any machine or engine, &c.; or cutting, &c., any loom, frame, machine, engine, &c.; or any implement, whether fixed or movable, employed in manufacturing the above goods, is declared to be felony.

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To machinery, &c.

*Also, by sec. 4, it is made felony unlawfully and maliciously to cut, break, or destroy, &c., any threshing machine, or any machine or engine, whether fixed or movable, employed in any manufacture whatever, (except such as are provided for in the foregoing section.)(*a*)

In mines.

Again, by sec. 7, of the same statute, provision is made against the like mischief committed in mines; and it is thereby made felony maliciously to pull down or destroy, or damage with intent, &c., any steam engine, or other engine for working, &c., mines; or any staith, building, or erection used, &c., in a mine;(*b*) or any bridge, wagon-way, or trunk for conveying minerals from a mine.

(*b*) For a decision on this section of the act respecting mines, see *R.* v. *Webb*, 1 Mood. C. C. 431. The Stat. 2 & 3 Vict., ch. 58, sec. 10, provides specially for the case of mines in Cornwall, and the taking away of the ore and minerals therefrom by the workmen.

(*a*) The destruction of a part of a threshing machine which has been taken to pieces and separated, is within the statute; *R.* v. *Mackarell*, 4 Car. & P. 448. And see further upon the construction of this statute, *R.* v. *Bartlett*, and *R.* v. *Chub*, 2 Dea. C. L. 1517; *R.* v. *West*, Id. 1518; *R.* v. *Fidler*, 4 Car. & P. 449.

(*b*) What is an erection used in conducting the business of a mine, see *Reg.* v. *Whittingham*, 9 Car. & P. 234. And for other points upon the stat., see *S. C.*, & *R.* v. *Norris*, 9 Car. & P. 241.

Injuries to machinery, &c., by riotous assemblies.

So, with regard to offences committed against property of this nature, by *riotous assemblies* of persons:—By the statute 7 & 8 G. IV, ch. 30, sec. 8, the demolishing or pulling down by persons riotously assembled, of mills, &c., or any machinery, whether [*332] fixed or movable,(c) employed in any manufacture;(d) *or any steam engine, or other engines for mines; or any bridge, wagon-way, or trunk for conveying minerals from mines, as in the act specified, is declared to be a capital felony.(a)

Remedy against the hundred.

By Stat. 7 & 8 G. IV, ch. 31, a remedy is given against the hundred for injuries of this description.(b)

Deodands.

The peculiar nature which personal chattels acquire by reason of their annexation to the realty, gave rise formerly to some nice questions connected with the subject of deodands. And although this curious branch of law may, perhaps, henceforth be rather matter of study for the antiquarian than the practical lawyer, (since deodands have recently been entirely abolished by the legislature,)(c) still it seems proper not to pass wholly unnoticed the few striking cases upon this subject which are to be found in the books; inasmuch as they throw a light on the principles out of which the general law of fixtures has grown up, and serve to

(c) Under a previous statute against this offence, (52 G. III, ch. 130,) it was decided that the engines intended by that act, were such powerful engines connected with the soil, as are analogous to erections or buildings. And, therefore, a frame for manufacturing lace-work, fixed to the floor for the mere purpose of keeping it steady, and removable from one part of the room to another, was held not to be within that statute. *Orgell* v. *Smith*, 6 M. & S. 182. The determination whether the machinery destroyed was part of the works belonging to the mill, or was independent of it, was held to be a question for the decision of the jury. 1 Price, 343.

(d) By Statute 2 & 3 Will. IV, ch. 72, the provisions of this statute are extended to threshing machines.

(a) The punishment for these offences is altered by Statute 4 & 5 Vict., ch. 56. sec. 2, explained by 6 & 7 Vic., ch. 10.

(b) By the police act, 2 & 3 Vic., ch. 47, penalty on summary conviction is awarded in the case of wilful damage to any part of a building in any thoroughfare or public place, or to any wall, fence, &c., or any fixture or appendage thereto; or to any tree, shrub, or seat in any public walk, park, or garden, committed within the limits of the metropolitan police districts. And in ch. 71, sec. 38, of 2 & 3 Vict., there is a provision for wilful damage to premises and furniture by tenants, &c., within the same limits.

(c) See the Statute 9 & 10 Vict., ch. 62.

explain the nature of this species of property in its strict relation to land.

The ancient authorities laid it down, that if, in *case of misadventure, the death of a man was occasioned by means of a thing affixed to the freehold, it was liable to be forfeited to the king as a deodand in the same manner as any movable chattel. But, according to later opinions, it was considered that there could not be a deodand in such a case, unless the thing was actually separated from the freehold before the accident happened. [*333] No deodand of things affixed.

Thus, in the *Axminster parish case*,(a) a man ringing a bell in a church was drawn up and strangled by the rope. Two justices, Hide, Ch. J., and Windham, J., were of opinion, that the bell was not forfeited, because parcel of the freehold; but the other two justices, *semb. contra.*(b) The case was adjourned, and was not afterwards moved.(c) As a bell in a church.

However, in the discussion of this case, it was said, that if a door or gate is forced, *per vim venti*, *against a man and kills him, that it shall not be deodand. *Quod fuit concessum per Cur.*(a) A door or gate. [*334]

In like manner, it is said to have been held by Clench and Fenner, Justices, that the sail of a windmill, which causes a The sail of a windmill.

(a) 1 Sid. 207; 1 Lev. 136, *S. C.*; 1 Kob. 723, 745, *S. C.*; Sir. T. Ray, 97, S. P. and seems to be *S. C.* And see *Rex* v. *Wheeler*, 6 Mod. 187, per Roll, Ch. J. See, also, *Norff* v. *Caudray*, Dyer, fol. 78, *in notis*.

(b) In *Woodward* v. *Mackpeth*, Comb. 132, it is said that church bells are *chattels* not fixed to the freehold, though the frames are. See 1 Salk. 164; *Ante*, 205, *in notis*. If a person hang a bell in the steeple, it becomes church property. 2 Salk. 671.

(c) Another argument urged against the forfeiture in the *Axminster case*, was that the bell had already been dedicated to God. This argument is founded on the explanation given of a deodand by some of the old writers; viz., "a thing given or rather forfeited to God for the pacification of his wrath, where any Christian man came to a violent end without the fault of any reasonable creature; which thing so given to God was to be sold and distributed to the poor by the king's almoner, for an expiation for that dreadful event." *Fleta* says, the price is to be distributed to the poor for the soul of the king, his ancestors, and all faithful people departed this life. Lib. 1, ch. 25. Other ancient authorities consider it a payment for the purchase of propitiatory masses for the soul of the *deceased*, and, therefore, originally, belonging to the church, though afterwards vested in the king as a forfeiture. 2 Inst. 281. While others again state it to belong to the crown by common right, to be distributed in pious uses.

(a) 2 Rolle, 23.

death by striking against a man, cannot be a deodand.(*b*) And Clench, J., held, that the *linen* of the sail was liable to forfeiture; which Fenner denied, because it participated of the nature of the sail itself.

A mill stone, &c.

So, according to a more modern case, a mill stone, or the wheel of a forge or mill, which occasions a death, cannot be accounted a deodand.(*c*)

A tree.

And so a tree, not severed, but which is blown by the wind against another.(*d*)

Secus, if the thing is first severed.

On the other hand, if the thing was severed from the freehold before causing the death, then it was liable to forfeiture.

As a bell or mill stone falling.

Thus if a bell fell from a steeple, or a mill stone fell from the mill, and killed any one in its descent, then it would have been forfeited as a deodand; because it was a chattel from the moment of its severance.(*e*)

Or a jack-weight.

And so if a jack-weight fell and killed a man, the weight would be forfeited, but not the jack which moved it.(*g*)

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Or earth falling.

And, in like manner, if a mass of earth was *separated from the soil, and in falling crushed a man.(*h*)

Or trees cut, &c.

So, if one in felling a tree gave notice to the bystanders, but nevertheless the tree, in its fall, killed one, the tree was forfeited.(*a*)

And so, where a tree was blown against another, and a branch of the latter was thereby broken off, and in falling, killed a man, it was said that there should be a deodand of the branch. And,

(*b*) 1 Sid. 207.

(*c*) 6 Mod. 187; Sir T. Ray. 97; 3 Inst. 57, Keb. 745. See 1 Salk. 220, per Pollexfen, Ch. J., in the case of the Lord of the Manor of Hampstead. See, also, Finch B. 3, ch. 18.

(*d*) 1 Sid. 207. And see 1 Salk. 220; Hale's P. C. 420; Cowell's Dict. tit. Deodand.

(*e*) 1 Keb. 723; Sir T. Ray. 97.

(*g*) 1 Sid. 207, *arg.*

(*h*) 1 Sid. 207; 1 Keb. 745.

(*a*) Coke's Copyholder, 45.

according to some authorities, both the tree and the branch should be forfeited.(*b*)

The above instances will suffice to show the strict application of the general principle of the common law to the subject of deodands. Should the reader be desirous of pursuing the subject further, he is referred to the following authorities, where will be found some curious points and distinctions arising out of the peculiar character of things connected with the realty. Bract. Lib. 3, tract 2, cap. 5; Britt. cap. 17; West's Symb. Indict. sec. 49; Staund. Cor. Lib. 1, ch. 12; Coke's Copyholder, 46, 47; Nels. Lex Man. Tit. Deodand, 96. For more modern authorities, he may consult 1 Hale P. C. 420; 1 Hawk. ch. 26; Com. Dig. Waife, E, 2; 2 Bac. Ab. 393; 7 Vin. Ab. 535; Fost. on Homicide, Disc. 2, ch. 1.

(*b*) Staundf. Lib. 1, ch. 12. In a late case, where a death was occasioned by the explosion of a steam engine boiler, a question was made whether both engine and boiler were deodand. *Reg.* v. *Brownlow*, 11 Ad. & E. 119. By the Statute 3 & 4 W. IV, ch. 99, sec. 29, *et seq.*, provision was made for the more effectually levying of deodands by the crown.

APPENDIX.

APPENDIX:

CONTAINING

A SUMMARY OF PRACTICAL RULES AND DIRECTIONS RELATING TO FIXTURES BETWEEN LANDLORD AND TENANT.

No. I.

General Rules respecting Fixtures between Landlord and Tenant; pointing out what Fixtures a Tenant may take away; the Time within which they may be removed, &c., &c.

I. A TENANT may take away certain things which he has himself affixed to the premises for the purposes of his *trade and manufacture.*

This rule may be illustrated by the following examples, which are to be met with in decided cases.

Vessels and utensils of trade, such as furnaces, coppers, brewing vessels, fixed vats, salt pans, tables, partitions, and the like. (1 Salk. 368; 3 Atk. 13; Amb. 113; 1 Hen. Black. 259; 3 East, 56; Bul. N. P. 34: 6 Bing. N. C. 439.)

Machinery in breweries, collieries, mills, &c.; as steam engines, cider mills, and the like. (3 Atk. 12; Amb. 114; Bul. N. P. 34; 3 East, 53; 3 Esp. N. P. C. 11; 2 Bar. & Ald. 165.)

Also certain buildings for trade, such as a varnish-house; at least if they are built on plates laid on brick-work. (2 East, 88.) See *post*, p. 345.

And so, sheds or buildings called dutch barns, formed of uprights rising from a foundation of brick-work. (3 Esp. N. P. C. 11; but see 3 East, p. 47, 55, 56.)[1]

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[1] *Ante*, pages 34, 40, note.

[*340] *By reference to these particular instances, the tenant must be guided as to his right to remove the ordinary articles which he puts up in the course of his trade.(a)

But it has not been established in the courts of law that a tenant may remove *substantial* and *extensive* additions to the premises, although he may have built them exclusively for the convenience of his trade: such as lime kilns, pottery or brick kilns; wind or water mills;(b) or workshops, store-houses, and other buildings of that description.[1] Nor, indeed, is it satisfactorily laid down, that trade erections even of a less substantial nature than these, are in all cases removable by a tenant. Cases, therefore, of this description, will be subject to considerable doubt, whenever the removal of the property would much deteriorate the freehold to which it is attached; or where the structure and substance of the thing itself will be destroyed in taking it away. (12 Cl. & Fin. 312.)

In questions respecting the right to remove erections of this description, the reader must refer to the observations in the concluding part of the 1st section of chap. 2, part 1.

If, however, a building is merely an accessary to the principal thing, such as an engine-house built to protect a removable steam engine; in such a case it seems the tenant would be allowed to remove the accessarial building. (3 Atk. 12; 3 E. 55.)

II. Besides trade fixtures, a tenant may also remove certain fixtures which he has put up at his own expense *for the ornament and furniture of his house.*

(a) The following may be cited among the numerous examples of erections which ordinarily occur in practice, and which seem to be of the nature of trade fixtures; the plant of a brewer, distiller, &c.; pumps, engines, cisterns, cranes, forges, presses, &c.; shop-fittings, such as counters, desks, drawers, shelves, partitions, glass fronts, gas pipes, &c., iron safes, closets or repositories, reservoirs; with other things of the same description, as usually erected in manufactories, shops, or ware-houses, for the convenience of trade.

(b) With respect to kilns, see 4 T. R. 504; 2 Bar. and Cress. 608. As to windmills, see 4 Leon. 241; 6 T. R. 377; 8 T. R. 377; 1 Brod. & Bing. 506; 1 B. & Ad. 161; 4 Ad. & E. 884.

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[1] A tenant may remove buildings of this description, although not erected for the purposes of trade exclusively. *Van Ness* v. *Pacard*, 2 Peters, 137.

*And under this class of fixtures, certain articles are comprehended which are not strictly of an ornamental nature, but which are set up by the tenant for ordinary *domestic use and convenience.* [*341]

Of the first class, the following examples are found in the authorities:—

Hangings, tapestry, and pier-glasses, nailed to the walls or panels of a house; and even, as it is said, where they are put up in lieu of wainscot; marble, or other *ornamental* chimneypieces; wooden cornices; marble slabs; window blinds; wainscot fixed to the walls by screws, and the like. (2 Freem. 249; Moseley, 112; 1 P. Wms. 94; Str. 1141; 3 Atk. 12; Amb. 113; 1 Hen. Black. 260; 2 Saund. 259, n. 11; 3 East, 53; 7 Taunt. 191; 2 Brod. & Bing. 58; 1 Bar. & Cres. 77; 7 Car. & P. 385; 2 Ad. & E. 37.) 3 Ad. & E. 75.(a)

But articles of this description can be removed only where they are so attached to the premises, as not to have become part of the substance and fabric of the house. For it appears that a tenant cannot remove an article, though put up for ornament, if he has so substantially united it to the house, that it would materially impair the freehold by removing it. So neither will he be allowed to take away erections which may be considered as permanent additions or improvements to the estate. The right of removal in each case must depend on its own particular circumstance. (3 Esp. C. N. P. 11; 2 Br. & B. 58.)

Thus it has been held, that he is not entitled to pull down a conservatory built on a brick foundation, and which is intimately connected with the dwelling-house. (2 Brod & Bing. 54; 4 B. Moore, 440; 2 Stark. N. P. C. 403; 16 Law J. R. Exc. 61.)

*Nor even a pinery erected on brick-work, although built in a garden and detached from the house itself. (Id. ibid.) And see the same cases as to a veranda. [*342]

Nor brick pillars built on a dairy floor to hold the pans. (7 Car. & P. 328.)

(a) As to chimneypieces and wainscots, see the notes, pages 85, 87. Some of the cases referred to were not decided between landlord and tenant; but it has been shown, in the former part of the treatise, that they may be considered authorities as between these parties.

With respect to the *second* class of fixtures, viz., those put up by a tenant for *ordinary use and convenience*, the following articles may be enumerated; and they are the only instances to be met with in the legal authorities:—

Grates, ranges and stoves fixed in brick-work; iron backs to chimneys; beds fastened to the ceiling; book cases; bells; fixed tables; furnaces, coppers; pumps; iron fences and hurdles; mash tubs, and water tubs fixed; coffee mills, malt mills, &c.; jacks; cupboards fixed with holdfasts; clock cases; iron ovens: and the like: all these are removable by a tenant. (Year Books, 8 Hen. VII, 12; 20 Hen. VII, 13; 21 Hen. VII, 26; Cro. Eliz. 374; 2 Freem. 249; Str. 1141; 1 Atk. 477; 6 T. R. 379; 7 Taunt. 191; 5 Bar. & Ald. 625; 1 Bar. & Cress. 77; 4 Bar. & Cress. 686; 1 B. & Ad. 394; 6 Bing. 437; 2 Ad. & E. 37; 3 Ad. & E. 75; Burn. Ecc. Law, 301.)

But with respect to these fixtures also, it is particularly to be observed, that they must be so affixed and connected with the premises as to occasion but little damage in their removal; otherwise the tenant will not be allowed to take them away. (9 Bing. 24; 3 Sim. 450; 3 A. & E. 75; 13 M. & W. 174.)(*a*)

III. A tenant in *husbandry* has not the same privilege as a tenant in trade. For he cannot take away things which he has affixed to the demised premises at his own expense *for purposes which are merely agricultural.*

[*343] *Thus it has been held, that a tenant cannot remove a beast-house, carpenter shop, fuel-house, cart-house, pump-house, or fold yard wall, erected for the use of his farm, *even though he leaves the premises exactly in the same state as he found them on his entry.* (3 East, 38.)

This rule, however, is confined to articles of a *strictly agricultural* nature. For, if the object and purpose of an erection has also relation to a *trade* of any description, the tenant may take it

(*a*) The following examples are of frequent occurrence in practice; and although there has been no legal decision respecting them, they seem to be of the same nature as the instances mentioned in the text; shelves, cabinets, &c., planned and fitted; dressers, presses, bins; fixed cisterns and sinks; iron chests; turret and other clocks; lamps; and other articles of similar nature and construction.

away, notwithstanding it is the means or instrument of obtaining the profits of land: subject, however, to the former observations as to the extent and character of the addition.

Thus, a tenant may take away a mill for making cider; or machinery for working mines and collieries; or, as it would seem, utensils set up for manufacturing salt from springs upon the demised premises. (3 Atk. 12; Amb. 113; Bul. N. P. 34; 1 H. Bl. 259, n.)

Fixtures of this description belong to a class of cases which have been denominated *mixed cases*. With respect to the right of removing them, the reader is referred to sec. 3, ch. 2, part 1; as the questions to which they give rise are sometimes attended with much difficulty.

IV. *A nurseryman or gardener* is legally entitled, before the end of his term, to remove and dispose of the young trees, shrubs, &c., which he has planted for the purpose of sale. (2 East, 91; 7 Taunt. 191; 4 Taunt. 316.)

And fruit trees, also, though of full bearing age, if they are nursery trees such as he might fairly deal with in his trade. (3 Scott's N. R. 508.)

It has been held, however, that he cannot, at the close of his term, plough up strawberry beds in full bearing, without having any reasonable object in view. (1 Camp. N. P. C. 227.)

It is not satisfactorily determined that a gardener or nurseryman is allowed to take down hot-houses, green-houses, forcing-pits, &c., which he has built during his tenancy. (2 *East, 90; 3 East, 45, 56; 2 Brod. & Bing. 58.) And refer to part 1, ch. 2, sec. 3. [*344]

But a private person is not at liberty to sell and remove young fruit trees, shrubs, &c., planted by himself, not in the way of trade. (4 Taunt. 316.)

Nor even a border of box: nor flowers. (4 Bar. & Ad. 65.)

As to a tenant's property in hedges, bushes, pollards, &c., see pages 69, 291, of the text.

V. A tenant must remove his fixtures *before the expiration of his tenancy;* for he is not at liberty to insist on his claim afterwards. (1 Salk. 368; 1 Atk. 477; Amb. 113; 7 Taunt. 191; 1 B. & C. 79; 1 B. & Ad. 394; 7 M. & W. 14; 2 M. & W. 450; 1 C. M. & R. 275.)

This must be considered as the rule in general cases. But if a tenant continues in possession of the premises after the end of his term (although against the will of his landlord,) it seems that he may be entitled during his continuing occupation, to remove the fixtures which he had previously neglected to take away.

But even in this case he may be liable to an action at the suit of his landlord, for being wrongfully on the premises after his tenancy has expired. (2 East, 88.) As to this, see part 1, ch. 2, sec. 5.

If, however, the interest which the tenant has in the demised premises is uncertain, as, if he is tenant strictly at will, or tenant *pour auter vie*, &c., in this case he will, in general, be allowed a reasonable time to remove his fixtures after the actual determination of his tenancy.

The several rules laid down in the foregoing pages, are alike applicable, whether the tenant holds by lease under seal, or by parol demise. With respect also to the description of fixtures which a tenant is authorized to remove as against his landlord, there is no distinction whether the party is lessee for life, for years, or merely tenant from year to year, &c.

[*345] *VI. But in applying these rules to practice, it should be observed, that the rights both of landlord and tenant, in respect of fixtures, are frequently varied and controlled by the *express terms of the demise*, or by the circumstances under which the tenancy was originally created.

Thus, if a tenant covenants to repair the demised premises and all erections, &c., built, or that may be *afterwards* built thereon, such a covenant will prevent the tenant from taking down an erection put up by himself, even although it was intended for the

purpose of trade, and might have been removed but for the covenant in question. (1 Taunt. 19; 2 Stark. C. N. P. 403; 2 Barn. & Cres. 608; M'El. & Y. 544; 9 Bing. 24; 6 Bing. N. C. 426; 3 Sim. 450; 13 M. & W. 174.)

And, therefore, before a tenant severs an article from the freehold, it is necessary that he should examine his claim, not only with reference to the general law of fixtures, but also as it may be affected by any covenant or stipulation, express or implied, in his lease, &c. (See *ante*, part 1, chap. 2, sec. 6.)

So, if a tenant, at the expiration of his term, is desirous of renewing it, or if he enters into any fresh agreement respecting the premises, he should be careful to make a stipulation as to his fixtures; otherwise, by making such fresh engagement, he may lose his property in them altogether. (2 B. & C. 608; 1 H. Bl. 258.)

VII. A tenant may so put up machinery, or so construct an erection or building, that it will not be considered to be affixed to the freehold in contemplation of law. And then, whatever its purpose may be, and however substantial it is in itself, the landlord will have no right to it at the end of the term. For, unless a thing is absolutely attached to the realty, by being let into the ground, or united to the freehold by means of nails, screws, bolts, mortar, or the like, the law regards it as a mere loose and movable chattel.

Thus, if a tenant erects a barn, granary, stable, or any other building, upon blocks, rollers, staddles, stilts, or pillars, *the [*346] landlord is not entitled to it as a part of his freehold. (3 East, 55; 1 H. Bl. 259; 3 Esp. N. P. C. 11; 1 Taunt. 20; 11 Vin. Ab. 154; Bul. N. P. 34; 4 B. & C. 884.)

So, a varnish-house, laid upon a wooden plate resting on brickwork, the quarters being mortised into the plate, is a chattel, and removable by the tenant. (4 Esp. N. P. C. 33; 2 East, 88; 4 Ad. & E. 884.)

So, a post windmill; at least if laid on cross traces not attached to the ground. (6 T. R. 377; and see 1 Brod. & Bing.

506; 4 Leon. 241; 8 T. R. 377; 1 Bar. & Ad. 161; 4 Ad. & E. 884.)

So, vessels or utensils supported on brick-work, frames, or horses standing on the ground. (9 East, 215.)

And the like, of machinery let into caps or steps of timber; and even, as it seems, although fastened by pins. (2 Bar. & Ald. 165.)

By adopting, therefore, these or other similar modes of construction, a tenant may not only make valuable additions to his premises with perfect safety, but also avoid the effect of a covenant in his lease respecting the repair of buildings, &c., erected by himself after the commencement of the term. (See 1 Taunt. 19; 2 Bar. & Ald. 165.)

It will frequently be found a great security to tenants, and may avoid litigation, to have special clauses inserted in their leases, &c., as to the disposal of their fixtures at the end of their term. It may be provided by these clauses, that the tenant shall be allowed to remove his fixtures within a reasonable time after the end of his term; or that he may leave them on the premises to be valued to an in-coming tenant; or that the landlord shall take them at an appraisement to be made in a manner specified. And these provisions are particularly recommended, where the tenant intends to make considerable improvements and additions to the premises; or where his fixtures are, from the nature of his occupation, of a valuable description, as in collieries, breweries, &c.; or where they are in any manner connected *with [*347] the produce and profits of land, as in the instance, particularly, of farm leases.(a)

(a) The following precedents are inserted with a view of showing generally the nature of the provisions here recommended.

Proviso in the Lease of a Colliery, for re-valuing Fixtures to the Landlord at the End of the Term.

It is provided, that at the expiration or other sooner determination of the present demise, the said A. B. (the tenant) shall and will leave and yield up unto the said C. D., (the landlord,) his heirs, &c., all and singular the engines, gins, machines, railroads, machinery, effects and things belonging to and used in the said collieries or coal-works; and that an inventory and valuation shall, three months previous there-

to, be made and taken by two indifferent persons, to be for that purpose appointed by the said A. B. and C. D., or their representatives, or by an umpire to be appointed by the two referees, in case they shall differ about the same; and such inventory and valuation shall thereupon be compared with the present inventory and valuation; and in case the amount thereof shall fall short of the amount of the present valuation, the difference shall be paid by the said A. B. unto the said C. D., his heirs, &c., on demand; but in case the amount of the inventory and valuation, to be taken as aforesaid, on the expiration or other sooner determination of the demise, shall exceed the amount of the present inventory or valuation, then the said C. D., his heirs, &c., shall pay unto the said A. B., his executors, &c., the difference in value thereof, within three months from the time of such valuation being made. See 2 Bar. & Cres. 369; 6 M. & W. 679; 3 B. & Ald. 804; 9 E. 215.

Demise of Premises for a Nursery ground, with Liberty to remove Trees, &c.

To have and to hold the said close to the said A. B., as tenant thereof to the said C. D., from year to year, as long as they, the said A. B. and C. D., shall respectively please; the said close to be holden as and for a nursery ground, with the power and liberty of planting and raising thereon, and of removing from time to time and taking away, such trees and plants as shall or may, at any time during the said demise, be planted or raised by the said A. B., his &c., on the said nursery ground, in the way of his trade and business as a nurseryman, intended to be carried on upon the said demised premises. See 3 Bay Moore, 99. A similar proviso should be inserted in respect of green-houses and other like erections; and so of frames, pits, stoves, sheds, &c.

**Provision in the same that the Landlord shall take the Trees by Appraisement at the End of the Term.* [*348]

And it is provided, that at the end or expiration, or other sooner determination of the said demise, a fair valuation and appraisement shall be made by two indifferent persons, (one to be chosen by each of the said parties to the said indenture, or their respective executors, administrators or assigns,) of all and every the fruit trees and bushes that shall be then standing and growing, and which shall have been planted and set by the said A. B., (the tenant,) his executors, administrators, or assigns, upon the said demised premises, and that he, the said A. B., his executors, administrators, or assigns, shall yield and deliver up the same trees and bushes to the said C. D., (the landlord,) his executors, administrators, or assigns, at the value or appraisement thereof to be made and fixed as aforesaid; and the said C. D., his executors, or administrators, shall and will, well and truly pay, or cause to be paid, to the said A. B., his executors, administrators, or assigns, immediately after such valuation or appraisement shall be made by two indifferent persons as aforesaid, all such sum or sums of money for such trees and bushes, as the same trees and bushes shall be valued and appraised at. See 2 Chitty's Rep. 482.

Special Provisions respecting Fixtures, in a Crown Lease of Mines.

It shall and may be lawful to and for the said A. B., (the lessee,) and his, &c., to remove and carry away all and every the engines, machines, and fixed materials in, upon, about, or belonging to the said quarries, works and premises respectively, or any of them, together with all tools, implements, stores, matters and things whatso-

ever, which at any time during the said term hereby granted, shall by the said A. B., his executors, administrators and assigns, or any of them, have been brought upon, kept or used, in, upon, or within the same quarries, works, or premises, or any part thereof, doing as little damage to the said premises as may be. *PROVIDED NEVERTHELESS*, that if the commissioners for the time being of Her Majesty's woods, forests and land revenues, or the Surveyor-General for the time being of her Majesty's land revenue, or her Majesty's agent or agents for the time being of the said premises, by the direction of the said commissioners or Surveyor-General, shall give or deliver unto the said A. B., his executors, administrators and assigns, or any of them, or to his or their agent or agents for the time being, at the said quarries, works, or premises, or cause to be left at or upon the same premises, or some part thereof, three calendar months at the least, before the expiration or other sooner determination of the said term hereby granted, notice in writing, signifying that the said engines, machines and materials, or any of them, in, upon, about, or belonging to *the said respective quarries, works and premises, or any part thereof respectively, will be taken for the use of her Majesty, her heirs and successors, at a fair valuation; that then and in such case, the same shall be respectively valued by two indifferent persons, one of such persons to be named and appointed by the said commissioners or Surveyor-General for the time being, and the other of such persons to be named and appointed by the said A. B., his executors, administrators, or assigns; and that, upon the said A. B., his executors, administrators, or assigns, being paid according to such valuation for all and every such engines, machines and materials, as shall be so proposed to be taken as aforesaid, the same and every of them shall be accordingly left by the said A. B., his executors, administrators, or assigns, in and upon the said respective quarries, works and premises, for the use of her Majesty, her heirs and successors: anything herein contained to the contrary thereof in anywise notwithstanding.

[*349]

*No. II. [*350]

Miscellaneous Rules and Directions respecting the Demise, Purchase, Valuation, &c., of Fixtures, between Landlord and Tenant, and between Out-going and In-coming Tenants.

UPON the demise of a house, &c., it is usually agreed between the landlord and the tenant, that "*the fixtures are to be taken at a valuation.*" This is the form in which questions of fixtures very commonly arise in practice; and a broker is then called in to determine what specific articles are intended in this case, and the amount which the tenant is accordingly to pay.

Upon an agreement of this kind, the proper construction appears, in general, to be, that all such articles are to be valued between the parties, which a tenant would, in ordinary cases, be entitled to remove under the law of fixtures if he put them up himself during the term.

But when a stipulation of this kind occurs in a covenant by which a landlord agrees to make an allowance for the fixtures at the end of the term, it would seem that those articles should alone be valued at the conclusion of the lease, which were paid for by the tenant on entering upon the premises. For, it is conceived, that the covenant would not extend to any new erections that have been made by the tenant; unless, perhaps, where they have been merely substituted for others which before formed a part of the premises.

But, in all these cases, the valuation should be made with reference to what appears to be the real meaning and intention of the parties, as collected from the language of the whole agreement, the custom of the district, and the general nature of the transaction.

Upon agreements between landlord and tenant for the purchase of fixtures merely, it appears not to be requisite that the *contract should be in writing, and signed, &c.(a) But where [*351]

(a) See *ante*, 254.

there is a written agreement between parties for the sale and purchase of fixtures, it cannot be received in evidence unless it is stamped with an agreement stamp, if the amount is £20 and upwards. (12 Moore, 213; 2 Scott, 243.)

Fixtures are considered so much an integral part of a house, that upon an agreement for a lease, &c., if nothing is said as to the fixed articles in the house, they must be considered as thrown into the bargain, and a compensation for their use included in the rent of the premises. (2 Bar. & Cres. 76, 608.)

Hence it is a necessary caution in leases, assignments, and other conveyances, when it is intended that the fixtures should be valued and paid for separately from the premises, that this intention should be clearly expressed, and an enumeration of the fixtures made in the instrument of conveyance, by schedule or otherwise.

Where a tenant has put up fixtures which he intends to remove, and at the close of his tenancy renews his term, or takes a new interest in the premises, or makes any other engagement with his landlord in respect of the same, he must be careful to reserve his right to take away his fixtures. For by entering into such agreements without expressly stipulating about the removal of his fixtures, he may sometimes lose his property in them altogether. (1 Hen. Blac. 258; 2 Bar. & Cres. 608.)

In removing fixtures, a tenant must do as little injury as possible to the demised premises; and, as far as it is in his power, should replace everything in its former situation. If he occasions any unnecessary injury to the premises in taking away the fixtures, the landlord may compel him to make it good. (As to which, see some of the points in the case of *Foley* v. *Addenbroke*, 13 M. & W. 174. *Ante*, p. 90.)

[*352] *In leases, &c., of mills, breweries, &c., the fixed machinery and utensils, which form a very valuable part of the lease, are frequently demised to the tenant, together with the premises. In these cases, the tenant will be bound, under a general covenant to repair, not only to keep in proper condition the building, &c., but also every species of article annexed to the premises at the commencement of his lease. And in the absence of a special

covenant, the liability of keeping them in tenantable repair, will result from the relation of landlord and tenant.

It is considered, however, that the tenant is bound to repair the fixed articles and utensils only so long as they are capable of restoration: and that he could not be called upon to substitute others in lieu of those which are worn out in the ordinary use of them. If the tenant himself puts up new fixtures in the place of those which are worn out, and incapable of further repair, he will not, it seems, be entitled to remove these at the end of the term. (6 Bing. N. C. 426; 9 Bing. 24; 3 Sim. 450; 7 M. & W. 14.)

The qualified property which, in these cases, a tenant has in the fixed articles demised to him together with the premises, subsists only, as against the landlord, as long as they continue annexed to the freehold. So that, if the tenant severs them during the term, they instantly belong to the landlord, and he may maintain an action for them as personal chattels, even against the tenant himself. (5 Barn. & Ald. 826.)(a)

(a) Sometimes an express covenant is inserted in leases of mills, mines, &c., with machinery, in order to prevent the removal of the fixed property; as thus:—And also, that he, the said C. D., (the tenant,) &c., shall not, nor will at any time take down, remove, or displace the said steam engine, mill work, machinery, &c., or any part thereof, (except for the purposes of repair, or other lawful and necessary occasions;) nor use nor occupy the same, or any part thereof, elsewhere than upon the said premises.

The following precedents will serve as examples of the manner in which stipulations in respect of fixtures may be introduced in a lease, &c.

And whereas it hath been agreed between the said A. B. (the vendor) and the said C. D., (the purchaser,) that he, the said C. D., should purchase the several fixtures, fixed utensils, and things belonging to, or being in or upon the said premises, as specified in the inventory or schedule hereunto annexed, at the price or sum of . Now this indenture further witnesseth, that for and in consideration of the sum of , of lawful money, to the said A. B., in hand, well and truly paid by the said C. D., at or before the sealing and delivery of these presents, the receipt whereof the said A. B. doth hereby acknowledge, and of and from the same and every part thereof, doth hereby acquit, &c., he, the said A. B., hath granted, bargained and sold, and by these presents doth grant, bargain, sell and confirm unto the said C. D., all and singular the several ranges, grates, cupboards, cisterns, coppers, dressers, shelves, pier-glasses, mirrors, chimneypieces, and all other the fixtures, fixed utensils, and things which are mentioned and set forth in the schedule or inventory hereunder written, (or hereunto annexed,) and every of them and every part thereof: to have and to hold the same unto the said C. D., absolutely and free from all liens, debts and charges of him the said A. B., or any person or persons claiming by, from, through, or under him.

[*353] *Sale, Valuation, &c., of Fixtures between Out-going and In-coming Tenants.*

When it is agreed between an out-going and in-coming tenant,
[*354] that the fixtures on the premises are to be taken at a *valuation, the broker should value such things to the incoming tenant, as, under the general law of fixtures, are removable between a landlord and his tenant. And all fixed articles upon the premises which fall within this description, should be included in the valuation, although they may in fact have been originally purchased of the landlord by the out-going tenant.

But the out-going tenant cannot insist on anything being appraised, which, as against his landlord, he is not legally authorized to sever; nor will he be entitled to any allowance for the same, notwithstanding he may have put them up at his own expense.

It is also further agreed, by and between the said parties, that all and singular the fixtures of and belonging to the said premises, (save and except, &c.,) shall be taken by the said C. D., (the tenant,) at a fair valuation, to be made within days from the date of these presents, by two persons to be indifferently chosen by the said C. D. and the said A. B., (the landlord,) respectively; and if they shall disagree in their valuation, then by some third person, to be by them appointed; and that the amount of the valuation shall be duly paid by the said C. D. to the said A. D., within the space of days after it shall have been so ascertained as aforesaid, and the said C. D. shall have notice thereof.

This indenture, &c., witnesseth that, &c., he, the said A. B., (the landlord,) hath demised, &c., unto the said C. D. (the tenant) all that messuage, &c., together with all the fixed articles, utensils and things, in or upon the said premises, or any part of them, or belonging to the same, as specified in the inventory or schedule annexed to this indenture; to have and to hold, &c. [*After the usual covenants add.*] And also that he, the said C. D., his executors, administrators and assigns, shall and will at the end or other sooner determination, &c., yield and deliver up the said premises, &c., to the said A. B., his executors and administrators, together with all and singular the said fixed articles, utensils and things hereinbefore mentioned and described in the said schedule hereunto annexed, in the same plight and condition in which the same now are, (reasonable use and wear thereof only excepted.)

If so agreed between the parties, the covenant may be to leave in repair the premises, together with all fixtures, erections, &c., then already being in or upon the premises; and also all other fixtures, erections and *improvements* which may hereafter be made, fastened, set up, &c., in and upon the same premises, reasonable wear, &c., excepted.

And with respect to those things which are generally removable by a tenant, if any of these were affixed to the premises prior to the demise to the first tenant, and were purchased by him of his landlord, or if the removal of them would contravene any proviso, covenant, or agreement in the lease, they ought not to be valued to the in-coming tenant.

If the property purchased by the in-coming from the out-going tenant, turns out in fact to belong to the house, and was scheduled in the original lease, the in-coming tenant may recover the sum he paid for it, in an action against the out-going tenant for money had and received. (Peake's N. P. C. 94.)

And in such an action, it will be no defence that the outgoing tenant did not know that the articles belonged to the landlord, and that he bought them himself of a preceding tenant. He will, however, have an action over against the party *who sold them to him, and may, perhaps, recover the costs of the first action. (Peake's N. P. C. 94.) [*355]

A party taking an assignment of a term when the original lease is nearly expiring, ought to be cautious in agreeing to pay the full value for the fixtures, unless it is ascertained that the landlord will consent to a valuation of them at the end of the term. For otherwise, as they must be removed before the lease expires, and when severed would be sold at considerable loss, the *superior landlord* would have it in his power to press a sale to himself under terms very disadvantageous to the tenant.

So, also, in taking an under-lease of premises, the party should consider the length of time which the lease of the mesne landlord has to run. For in case his reversion is of short duration, he will not have a sufficient inducement to repurchase the fixtures at their full value; and the under-lessee will then be compelled to dispose of them at a loss, unless he has stipulated for a valuation of them at the end of his term.

It sometimes happens that the purchase money for fixtures is advanced by a third person on behalf of the in-coming tenant. In these cases it will be prudent to have the appraisement made out to the party advancing the money, in his own name; as, in

case of the bankruptcy of the tenant, the property will by this means be protected from any claim of the assignees. (See 9 East, 215; and compare 3 Taunt. 256, in respect of an execution.)

Where an in-coming tenant enters into an arrangement with the out-going tenant for the purchase of his fixtures, he should require that the landlord be made privy to the transaction. For if the landlord is no party to the agreement, he may afterwards insist, that as the articles were not actually removed during the out-going tenant's term, they fell in with the lease, and that the second tenant took them only as part of the demised premises, and is, therefore, not entitled to remove them. (2 M. & W. 450.)

[*356] *In like manner, if a tenant is desirous of leaving his fixtures at the end of his term to be valued to an in-coming tenant, it is absolutely necessary that he should obtain the consent of the landlord, before he quits possession of the premises. (2 M. & W. 450.) If, however, there is a covenant in his lease that the fixtures shall remain for the benefit of the in-coming tenant, on paying their value, it would appear that the effect of this agreement is to give him a right of leaving his fixtures till he can sell them to the succeeding party, and that the possession and property of them remain in him in the meantime. (See 16 East, 116.)

The right of in-coming and out-going tenants in regard to fixtures, are, indeed, very much regulated among practical men with reference to custom. And with respect to this, it was said by the Court of King's Bench on one occasion, that a custom of valuing a particular article as between out-going and in-coming tenants, was a proper criterion for determining the nature of the property, and whether it was a fixture or not. (2 Bar. & Ald. 165; but see 1 Camp. N. P. C. 227; *Ante*, p. 122,)

*No. III. [*357]

Appraisement of Fixtures.

A WRITTEN valuation or appraisement of fixtures, must have the proper stamp required by statute, otherwise it cannot be received in evidence.

This is regulated by the general stamp act, 55 G. III, ch. 184; by which the following duties are imposed upon every valuation or appraisement of any estate or effects, real or personal, &c.; or of the annual value thereof; or of any dilapidations; or of any repairs wanted; or of the materials, &c., except, &c.; viz., where the amount of such appraisement or valuation does not exceed £50, a duty of 2*s.* and 6*d.*; where it exceeds £50, but does not exceed £100, a duty of 5*s.*; where it exceeds £100, and does not exceed £200, a duty of 10*s.*; where it exceeds £200, and does not exceed £500, a duty of 15*s.*; and where it exceeds £500, a duty of 20*s.*

Where nothing but the mere value of fixtures is referred to appraisers, for the purpose of ascertaining the amount due between two parties, it is sufficient that the written valuation has an appraisement stamp; and an award stamp is not necessary. (12 East, 1; 2 Chit. Rep. 399.)

And where a valuation is made merely for the information of parties and to guide their judgment, and is not intended to be binding upon them, a stamp on the appraisement is not necessary, although the vendee agrees afterwards to pay a price according to the valuation. (5 M. & S. 240; 2 Cr. & M. 361.)

An inventory of fixtures, appraised and signed by brokers whom the landlord and tenant appoint for the purpose, will enable the landlord to recover the price of them, as upon an account stated, without giving further evidence of the contract for the sale of the articles, or of their value. (4 B. Moore, 73.)

*And it would seem, that where fixtures are purchased and [*358
possession delivered of them upon such an inventory and ap-

praisement, it amounts to a part performance, sufficient in equity to take an agreement for the sale of premises out of the Statute of Frauds. (4 Ves. 91.)

For further information upon the appraisement of fixtures, refer to chap. 5, of part 1, page 254, 256.

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