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 THE FREEHOLD IN GENERAL,

AND 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 OUTGOING AND INCOMING TENANTS.

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PREFACE.

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 relating 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 connexion 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 outgoing and incoming 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

rigour; and they have, accordingly, engrafted upon it the various exceptions and qualifications which form the subject of consideration in the following Treatise.

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 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, still the rule in favor of the freeholder remains unaltered; and it must be regarded as the *general rule* of law at the present day, although it appears 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 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; who were said to be at liberty to remove some species of articles, if erected at their own expence 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 have proceeded on more unequivocal principles, and have from time to time 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 is thus exempted from the operation of the ancient rule. And this innovation has been sanctioned by the judges, not because it was warranted by any particular law, but 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 have modified the ancient law, with the view of adapting it to the manners of the times, and have introduced a further exception in favor of articles for ornament and domestic use.

After the relaxation in favor of trade had been long 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 buildings for the purpose of agriculture had been held privileged, the Court of King's Bench refused to countenance any further innovation upon the general rule.

The exigencies, however, of society 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 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. It is obvious, however, that the privilege of trade, as regarded in this point of view, is to be 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*).

(*a*) According to the decisions, steam-engines and cider-mills may be removed, because, as it 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.

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 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 also to advert to many 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

(*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."

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 are any reasons assigned for the distinctions thus laid down by the courts, 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 relative 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. For this purpose it would seem, in the first place, desirable that no change of property should result from 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 inconvenience to the public, should have no better foundation than the motives of feudal policy. (*a*)

(*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

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 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.

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general convenience of society. From such an enquiry 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 favour 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-ground. 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 Bâtimens; Notes sur Desgodets, par Goupy; Lepage, Lois des Bâtimens; Traité de Locations, par Leopold.*

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 purposes for which they are used should not of themselves be conclusive upon the question of removal. But then it ought 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, and yet 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 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 discussed in the ensuing pages. The controversies respecting property of this nature, that arose within the city of London 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 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 civilization and refinement.

(*a*) In the mayoralty of Adam Bury, 39 Edw. III. 1365.; Arnold's Chronicle, fol. 137. Mr. Serjeant Hill, in his MSS. to 15 Vol. Viner's Abr. p. 43. calls this an Ordinance of *Parliament*, and refers to Entick's History of London, Vol. I. p. 258., where it is in like manner described as an Ordinance of *Parliament*. Entick, however, appears to have extracted his account from Maitland's History, Vol. I. B. 1. p. 131.; and it is observable that it is described there simply as an Ordinance. It is certainly not mentioned in any of the collections of ancient parliamentary proceedings. See the Ordinance itself, and a confirmation of it by the mayor and aldermen of London, in the *Addenda*, p. 331.; from a reference to which it will probably be thought that this ancient record was an act or ordinance of the common-council of the city of London.

A

TREATISE

ON

The Law

OF

FIXTURES,

&c. &c. &c.

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 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 is 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.

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 (*a*); 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.

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 should be let into or united to the land, or to substances previously connected therewith. 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 juxta-position; as, that the soil shall have been displaced for the purpose of receiving the article, or that the chattel should be cemented, or otherwise fastened to some fabric previously attached to the ground.

(*a*) The reasons for preferring the use of the term in this sense appear at the conclusion of the chapter.

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. When 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 chattel, and is in the same situation as any other chattel which has never been brought upon the premises.

It may 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 in a certain degree connected with the soil, but not to an extent amounting to legal annexation; in consequence of which circumstance, the property has been pronounced not to fall within the denomination of fixtures.

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 totally different grounds. 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 moveable 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*)

In another case (*b*), arising out of the bankrupt laws, and which respected the right of the assignees to goods and chattels in the disposition of the bankrupt, under the statute 21 Jac. 1. c. 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 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 brickwork or frames; for 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.

A further instance occurs in a more recent decision. (*c*) The property in dispute in this case consisted of certain pieces of machinery called jibs, the

(*a*) *Elwes* v. *Maw*, 3 East, 55.

(*b*) *Horn* v. *Baker*, 9 East, 215.

(*c*) *Davis* v. *Jones*, 2 Bar. & Ald. 165. It is difficult to explain this case satisfactorily upon the principles relied on in the judgment: the jibs appear to have been parts of an entire machine fastened to the other parts, which are stated to have been permanently fixed to the freehold.

description of which was as follows. 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*)

It appears, therefore, from these cases, that to constitute a fixture there must be a complete annexation to the soil. And here it may be observed, that in order to determine whether a matter has been sufficiently attached to the freehold to make it a fixture, it may

(*a*) The reader will see further illustrations of the principle noticed in the text in several of the cases referred to in the course of the work. As in *Penton* v. *Robart*, 4. Esp. C. N. P. 53. and 2 East, 88. in the instance of a varnish house, built on a wooden plate lying on brickwork, as explained in ch. ii. sect. 1. & 5. So in respect of a stable on rollers, in 1 Hen. Bl. 259. See also *Kimpton* v. *Eve*, 2 Ves. & Bea. 349. Hedge's case, Leach's Cr. Ca. 201. 2 Stark. N. P. C. 403. And see the mention made of doors hung upon gymolds, Moor, 177., with which compare Shep. Touch. 470 As to the case of a post-windmill, see *R.* v. *Inhabitants of Londonthorpe*, 6 T. R. 377. *Steward* v. *Lombe*, 1 Brod. & Bing. 403. In Ward's case, 4 Leon. 241. it was said to have been adjudged, that if a mill be set upon posts no waste lyeth 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, and the vote in respect of it good. See further on this subject in the Appendix.

be necessary, in doubtful cases, not only to regard the construction of the article, but to attend to any other circumstance that may serve to explain its nature and character. At least, in the last cited case of *Davis* v. *Jones*, it appears that a custom in respect of the article in dispute, was inquired into for this purpose. (*a*)

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 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 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;

(*a*) 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, 11 Co. 50. Liford's case. Windows or doors hanging or serving to the house. Shep. Touch. 470. So mill-stones removed for picking. And see the section relating to heir-looms, &c. in chap. iv. post.

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.

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 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 as a tenant of a chattel interest; and, with respect to him, the continuance of his right after the expiration of his term, and the re-delivery of possession to his landlord.—Arguments also from the *intention of the parties* in making the annexation have been used in judicial decisions. — Others have been drawn from the *comparative 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 article has been put up; that is to say, whether it was for *trade*, for *agriculture*, for *ornament* merely, or for the *general improvement* of the estate. It is upon these different grounds, generally, however, upo

some combination of them, that the courts have ascertained and supported the right of property in fixtures.

Distinct from the rights of the owner of the estate.

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 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 a 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, 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. (*a*)

Legal effect of annexation.

The definition of fixtures that has been given above, involves a principle which may be considered as the foundation of the law relating to this species of property, and which it may be proper to examine

(*a*) *Vide* per Holt Ch. J. in *Poole's case*, 1 Salk. 368.

in this preliminary chapter. It is the effect produced, in a legal point of view, upon a personal chattel, by the act of annexing it to the freehold.

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 parcel of the freehold itself. *Quicquid plantatur solo solo cedit.* This 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 some of the decisions proceed exclusively upon it. It is recognised in particular in the following authorities. — 10 Hen. 7. pl. 2. 20 Hen. 7. 13. 20 Hen. 7. 26. Co. Lit. 53. *a.* 4 Co. 63. Bul. N. P. 34. Amb. 113. 3 Atk. 13. 3 East, 50. 7 Taunt. 190. (*a*)

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. The manner in which the law of fixtures operates in these cases may be explained in two

(*a*) There is a passage in Brooke's Ab. Trespass, pl. 23. which strongly illustrates this principle. "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 is "become real property." As to the effect of a mere stranger affixing a personal chattel to the soil of another, see the case of *Welsh* v. *Nash*, 8 East, 394. and the observations on that case in part ii. See also 6 East, 161. 5 Bar. & Ald. 603. Gilb. Evid. 209, 210. Swinb. on Wills, part. vii. s. 20. — In further illustration of the principle in the text, see the cases on the rateability of personal chattels affixed to land, Nolan's Poor Laws. And see *Rex* v. *Brighton Gas Company*, K. B. E. T. 7 Geo. 4.

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 perhaps 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, does not affect the nature it acquires 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, 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*), 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 the rest of the land. Moreover the principle of several late decisions is in conformity with this view of the subject. (*b*)

(*a*) 7 Taunt. 190.

(*b*) See chap. v. post. And see the second part of the treatise, respecting the forms of action. Fixtures are frequently compared in respect of their freehold character to trees. 5 Bar. & Ald. 828. 1 Atk. 175.

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 is 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.

Having now described the general nature of the species of property to which it is proposed to apply the denomination of fixtures, it is intended in the ensuing chapters to consider by what persons, and under what circumstances, the right of removal may be exercised and enforced.

CHAPTER II.

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

SECTION 1. Of the Right of a Tenant to remove Trade Fixtures.
SECTION 2. Of Erections made by a Tenant for agricultural Purposes.
SECTION 3. Of the Right of a Tenant to remove Fixtures set up for Trade, combined with other Objects.
SECTION 4. Of the Right of a Tenant to remove Fixtures for Ornament and Convenience.
SECTION 5. Of the Time when a Tenant may remove Fixtures, as affected by the Nature and Duration of his Interest in the Premises.
SECTION 6. 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 of

individuals to some particular article 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 principally arisen 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*)

It is proposed to investigate the law relating to fixtures by considering, in the first place, 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 is established, will be found not to be alike applicable to each of the classes of persons, and therefore to consider them 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 will, therefore, 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, an-

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

nexed 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 to consider the rights of these parties independently of any private agreement. 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 purpose, 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 any thing 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 with his term, and comes to the reversioner as part of the land. (*a*)

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 endeavours 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. It appears, however, from the old reports, 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 resting upon principles of general policy, which the modern determinations have declared to be the proper foundation of it. Relaxed in modern times.

At this distance of time it is difficult to ascertain the period when a relaxation of any kind was first admitted. It was said by Lord Holt (*b*), in allusion to a particular class of fixtures, that the right of the tenant to remove erections of that description was

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

(*b*) 1 Salk. 368. *Poole's case.*

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. (*a*) After that statute, and in consequence of its provisions, 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 has also been 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 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,

(*a*) *Vide* post. chap. i. of part ii.

and depending essentially on its peculiar produce; as the getting 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; 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, 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 to which it will be necessary to advert, occurs in the year-book 42 Ed. 3. 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. 7. p. 13.; in which the question was, whe-

(*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. 7. 26.

ther a furnace fixed to the freehold 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 occupa- "tion, 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. 3. it was doubted whether this was waste or not.

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*. And 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 gives 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 expressly in relation to the trade which the tenant is carrying on upon the premises.

It may, however, be much 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. 7., 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 entirely left out. If this circumstance had been suggested to the courts in the discussion of the modern 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 merely out of trade. (*b*)

And the inference that trading fixtures are not particularly and exclusively intended in this case, will more clearly appear, from the remark which fol-

(*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 deemed 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 late 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 expression in the extract given in the last note.

lows in the report; viz. that in 42 Ed. 3. it was doubted whether this was waste or not.' On referring to the 42 Ed. 3. p. 6. pl. 19. 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, which 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 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. 7. 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 par-

(*a*) And see 8 Hen. 7. 12.

(*b*) 21 Hen. 7. p. 26. And see Br. Ab. Tit. Chattels, pl. 7.

ticular instances of vats in a brew-house, or dye-house, relies solely on their construction and annexation; and says the removal 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 of any peculiar privilege in regard to trade. For Cook's case (*a*), (24 Eliz.) is wholly silent upon it. And in a case reported in Owen, 70. and Cro. Eliz. 374. (*b*), (which respected 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. For this reason they consider that the furnace would not be removable; and the principle of an exemption on the ground of trade is altogether unnoticed. (*c*)

Upon the whole, then, it can scarcely be inferred, that the expressions used by the Court in 20 Hen. 7. 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. And with regard to the dictum itself, it should be observed, that it is entirely extra-judicial, and ap-

(*a*) Moore, 177.

(*b*) *Day* v. *Austin* and *Bisbitch*, 37. Eliz. And see 1 Roll. Ab. 891. pl. 50.

(*c*) 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.

pears in a decision in which the judgment proceeded on a totally different principle.

Result of the early authorities.

The above examination of the early authorities 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 chiefly intended 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 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 that appears to prevail 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.

Modern decisions in favor of trade.

However, the equivocal state of the law in its earlier stages is of little importance at the present day. For the privilege of the tenant to remove fixtures set up in relation to trade was plainly and authoritatively stated by Lord Holt C. J. in *Poole*'s case, 1 Salk. 368., and 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 soap-boiler, an undertenant, who, for the convenience of his trade, had

(*a*) Mic. 2 Ann.

put up vats, coppers, tables, partitions, and paved the back-side, &c., all which things had been taken under an 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 soap-boiler might well remove the vats he set up in relation to trade; and he said 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.

The principle of the relaxation.

The right of the tenant to take away *trade fixtures* may be considered to have been fully established from this time. And not only has it been confirmed by many subsequent decisions, but a very 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 is (as will be more particularly shown in another part of this work) supposed 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 remainder-man, reversioner, or heir, may in general be applied to cases between landlord and tenant, and are to be considered as governing authorities in support of the *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 1748. 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 giving 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 encou- "rage 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

(*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. sect. 1. post.

(*b*) 3 Atk. 13.

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

executor of a particular tenant to take a fire-engine as against the remainder-man. On this occasion 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* (*a*), 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 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 expence 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 en-

(*a*) 1 H. Blac. 259, *in notis*. 3 Atk. 16. *in notis*, S.C.

" couragement and convenience of trade, and the " benefit of the estate."

In a subsequent case it was said by Lord Kenyon (*a*), that " the old cases upon this subject leant to con- " sider as realty whatever was annexed to the free- " hold 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. (*b*) 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* (*c*), (a most important decision upon the doctrine of fixtures,) Lord Ellenborough, in stating the several exceptions which, as between different parties, had been engrafted upon the old rule of law in favor of trade, and of those 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*;

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

(*b*) 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. 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 shew the principle on which the exceptions for the benefit of trade are founded.

(*c*) 3 East, 38.

whence it followed, that an article which is used as an accessary 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.

Public benefit the ground of the relaxation.

The inference to be drawn from the several cases that 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

(*a*) 3 East, 54.

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.

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 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 re-construction.

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 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 that 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 may fairly be treated as immediately accessary to such articles, in supporting or protecting them, and 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 nature 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 establishing 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*)

It now, therefore, becomes necessary to give a more particular description of the articles mentioned in the several cases that have been already referred to; which was omitted in the former pages, in order that the subject then under inquiry might not be embarrassed by detail. The other decisions that 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* (*b*) 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

(*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.

(*b*) 3 Atk. 13.

could not be removed without tearing up the soil and destroying the brickwork.

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

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.

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

In determining, however, these cases, it is evident that Lord Hardwicke considered that the construction and mode of annexation 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 a personal moveable 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 observed, 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, not-"withstanding this, as they are laid for the con-

" venience of trade, landlords will not be allowed to " retain them."

In the discussion of the case of *Lawton* v. *Lawton*, a decision of Lord Ch. Baron Comyns respecting a *cyder mill* was cited by the counsel, and adopted by Lord Hardwicke. It was stated that the Lord Ch. Baron had ruled at Nisi Prius, that a *cyder 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 cyder, 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. Cyder mills.

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* (*a*) were utensils made of iron and rivetted together, brought in pieces, and capable of being again removed in pieces, without 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 Salt-pans.

(*a*) 1 H. Bl. 259, *in notis*. S. C. 5 Atk. 16, *in notis*. See ante, p. 26, and post, Chap. IV. § i.

when he intimates his opinion, that as between the latter parties, a tenant would be entitled to remove the salt pans, 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. (*a*)

Dutch Barns.

In *Dean* v. *Allalley* (*b*), 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* (*c*); 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 ad- "ditions, 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 cyder mills, and

(*a*) Ante p. 22.
(*b*) 3 Esp. N. P. C. 11.
(*c*) 5 East, 47.

" 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 re- " movable at the end of the term."

It does not appear from the report of this case for what purpose the buildings in dispute had been erected. Nevertheless, 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*, which stood upon blocks and rollers, and also a *shed* which he had built on brick-work, and some *posts and rails* he had put up. 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.

(*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 also Lord Ellenborough's remarks upon the authority of this case, in 3 East, 55.

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

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 extrajudicial, as the point could not properly have come before him at Nisi Prius. (*a*)

A varnish-house.

In the case of *Penton* v. *Robart* (*b*), 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 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

(*a*) 3 East, 55. (*b*) 2 East, 88. 4 Esp. N. P. C. 33.

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.

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. And even if it be thought that it may be implied from the determination, that the Court deemed the erection to be actually a fixture, 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 soap-boiler; on which occasion Lord Ch. J. Holt held, that during the term the soap-boiler might well remove the *vats* he set up in relation to trade. 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 2 Bulst. 113. *Pyot* v. Lady *St. John*. 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 accessary 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*.

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.

Pavement.

Buildings.

The general doctrine of fixtures was considered in a very elaborate manner, in the celebrated case of *Elwes* v. *Maw* (*a*), the determination 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

(*a*) 3 East, 38.

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.

Accessary buildings.

It should be observed, that Lord Ellenborough in the course of his judgment in this case, lays down a position, that a building which is accessary to a removable utensil, is equally removable with the thing to which it is incident. This opinion has frequently been 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 very 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. It was stated to be a substantial building constructed of brick and mortar, at an expence of 160*l.*, and having its found-

(*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.

ations 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. 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 to remove an erection of such a description. The case, however, should not be passed over without 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.

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. For 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

(*a*) Bul. N. P. 34. (*b*) 2 Bar. & Ald. 165.

remove it; because the law considers it as a mere loose and moveable chattel. (*a*)

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

The cases that have been collected and referred to in the preceding pages, contain all that is to be found upon the right of a tenant to remove trade fixtures. (*b*) 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 shews 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.

Other circumstances affecting the right of removal.

But there are other circumstances, besides those that especially 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

(*a*) As to cases of this description, see *ante*, Chap. I. And see the Appendix.

(*b*) 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 relate to the taking of fixtures in execution; as to which see *post*, Part II.

derived 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.

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 cyder-mill was probably decided on that particular ground. (*b*) 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. (*c*) And in the case of *Davis* v. *Jones* (*d*), 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

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

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

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

(*d*) 2 Bar. & Ald. 165. See *ante*, p. 21. note (*c*) and 11 Vin. Abr. 154.

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*.

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 a few remarks upon the nature of 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 neighbourhood over which it prevails, and the absence of instances which shew 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 in support of it are often found, when properly inquired into, to have no other origin than the special agreements of parties. (*b*)

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

(*b*) See 6 Ves. 328. 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.

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, went 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 observable 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*)

(*a*) Vide 21 Hen. 7. p. 26. Moor. 177.

(*b*) 3 Atk. 15. And see Lord *Dudley* v. Lord *Warde*, Amb. 114.

(*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.

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. (*a*)

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 importance would be attached to them, in questions between landlord and tenant. But as they have 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 detailed 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, in respect of the removal of trade erections as between landlord and tenant, 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 that have been adverted to in the preceding remarks. The following rule 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 away by him,

(*a*) See the cases of *Lawton*, v. *Lawton*, and *Lawton* v. *Salmon*. See also in *Buckland* v. *Butterfield*. 2 Brod. & Bing. 56.

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, 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. 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 or construction or mode of annexation, it is a fixture 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 that 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.

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 modern 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 large.

It is the case of *Elwes* v. *Maw*, in the King's Bench, Mic. T., 1802.(*a*) The declaration stated that the plaintiff was seized in fee of a certain messuage, with the outhouses, &c., and certain land, &c., in the parish of Bigby in the county of Lincoln, which premises were in the tenure and occupation of the defendant, as tenant thereof to the plaintiff, at a certain yearly rent, the reversion belonging to the plaintiff; and that the defendant wrongfully, &c., intending to injure the plaintiff in his hereditary estate in the premises, whilst the defendant was possessed thereof, wrongfully and injuriously, and

(*a*) 3 East, 38.

without the licence and against the will of the plaintiff, pulled down divers buildings, parcel of the said premises, in his the defendant's tenure and occupation, viz. a *beast-house*, *a carpenter's shop*, a *waggon-house*, *a fuel-house*, *and a pigeon-house*, and *a brick wall inclosing the fold-yard*, and took and carried away the materials, which were the property of the plaintiff as landlord, and converted them to his, the defendant's, own use; by reason whereof the reversionary estate of the plaintiff in the premises was greatly injured, &c. The defendant pleaded the general issue. And at the trial a verdict was found for the plaintiff, with 60*l.* damages, subject to the opinion of the Court on the following case:

The defendant occupied a farm, consisting of a messuage, cottages, barn, stables, outhouses, and lands, at Bigby, in the county of Lincoln, under a lease from the plaintiff for 21 years, commencing on the 12th day of May, 1779; which lease contained a covenant on the part of the tenant to keep and deliver up in repair the said messuage, barn, stables, and outhouses, 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 expence, 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. If he had, then a verdict to be entered for the defendant: if not, the verdict for the plaintiff to stand.

The case was twice argued before the Court, and at considerable length. The argument on the part of the plaintiff proceeded upon an examination of the authorities which had introduced the exceptions in favor of tenants, in relaxation of the old rule of law; which rule, it was contended, was universal, and would, but for the particular exceptions, have made the removal of buildings under any circumstances an act of waste; and it was insisted, that the only known exception (at least to the extent claimed) was in favor of *trade* in its strictest sense. Some additional arguments were drawn from the nature of the erections themselves.

On the other side, it was urged, that the principle upon which the modern exceptions were founded, applied equally to agriculture as to trade; and that the only qualification of the tenant's privilege was in respect of the state and condition in which he was bound to leave the premises at the end of his term.

The Court took time to consider: and at a subsequent period Lord Ellenborough delivered judgment. After stating the facts of the case, he thus proceeded: "The question for the opinion of the Court "was, whether the defendant had a right to take "away these erections? Upon a full consideration of "all the cases cited upon this and the former argu- "ment, which are indeed nearly all that the books "afford materially relative to the subject, we are all "of opinion that the defendant had not a right to "take away these erections.

"Questions respecting the right to what are ordi- "narily 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 exe-* "*cutor.* 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, any thing which has been affixed thereto. "2dly. Between the *executors of tenant for life* "*or in tail,* and *the remainder-man or reversioner;* "in which case the right to fixtures is considered "more favorably for executors than in the preced- "ing 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 con- "sidered as personal chattels, as against the claim in "respect of freehold or inheritance, is the case be- "tween landlord and tenant.

" But the general rule on this subject is that " which obtains in the first mentioned case, *i. e.* be- " tween heir and executor; and that rule (as found " in the year-book 17 E. 2. p. 518, and laid 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 any thing " 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 en- " grafted upon it, and which were at last effectually " engrafted upon it, in favor of trade, and of those " vessels and utensils which are immediately subser- " vient 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. 7. 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 establish- " ing that buildings subservient to purposes of agri- " culture, 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 Dud-*

(*a*) See *ante*, in the last sect., p. 18.

ley v. *Lord Warde*, Amb. 113.; and *Lawton, Executor*, v. *Salmon*, 1 H. Blac. 259, *in notis*. These, and also the cyder-mill case before Ch. B. Comyns (*a*), he considers to have been decided mainly upon the ground, that notwithstanding the fire-engines and the cyder-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 contends, 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 pur-* "*poses*, 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."

Lord Ellenborough then enters upon an examination of the authorities that 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. *Tuffnal*, 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. "In the case of "*Fitzherbert* v. *Shaw*," he continues, "we have only

(*a*) See these cases referred to in the last section.

" 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 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 fa- " vor 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 always put and recognized *as a* " *known, allowed exception* from the general rule " which obtains as to other buildings; and the cir- " cumstance 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 ten- " ants in the latitude contended for by the defendant, " would be, as appears to me, to introduce a danger- " ous 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 our- " selves, in conformity to, and in support of those " authorities, obliged to pronounce that the defend- " ant 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 any participation in the advantages possessed by tenants in trade: and the distinction upon which this rule is founded, must accordingly be strictly attended to in practice.

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

It may, however, be observed of this decision, that it was the first occasion on which any distinction between trading and agricultural erections was made by the Courts: at least in no previous case 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. 7., upon which, it appears, much 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*) 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,

(*a*) See *ante*, p. 18. *et seq.*

seem rather in the nature of *agricultural* erections.(*a*) Neither Lord Hardwicke nor Lord Mansfield, in their judgments in *Lawton* v. *Lawton*, *Dudley* v. *Warde*, and *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. Comyn's decision respecting the cyder-mill, "although," as he observed, "cyder is part of "the profits of the *real estate*." (*b*) 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*. In *Lawton* v. *Salmon*, although Lord Mansfield 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 Lord Mansfield thought that they 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

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

(*b*) 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.

heir and executor, but an accessary to *trade* as between landlord and tenant. In *Fitzherbert* v. *Shaw*, Mr. Justice Gould is reported to have been clearly of 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, 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. 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, treating the barn as if it had been actually fixed, 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. And, moreover, the description given of these buildings in the MS. note cited by counsel in *Elwes* v. *Maw*, together with 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 so Lord Ellenborough seems to have 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, appears 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 agricultural erections, it should be recollected that the mode of agriculture pursued in early times was extremely simple, and that the implements of husbandry were defective and of very little value: since, for a period subsequent to that over which the year-books extend, the English might 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

(*a*) 2 East, 88.

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

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 for an occupier of land to manufacture cyder from his own fruit for sale. (*b*) Yet these and similar occupations are held to entitle a tenant to remove utensils and erections *as trade fixtures* (*c*); 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., or the making of charcoal, 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 preparing of cyder from the produce of an orchard annually renewing. (*d*)

But the strongest objection to the distinction established in this case is, that the principle on which

(*a*) 2 Wils. 169. 7 East, 447. Co. Bkt. L. p. 60. See the late statute, 6 G. 4. c. 16.

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

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

(*d*) Lord Ellenborough considers the cyder-mill as an accessary to a species of trade. In the county of Worcester, where it seems the question as to the cyder-mill arose, there is upon most of the farms a mill for the purpose of making cyder from the fruit growing in the orchards and fields of the farm. The cyder is made by the tenants for the consumption of their families, and for the purpose of sale. In many instances the cyder is sold directly from the mill, in the state of expressed juice, to persons who collect it from the different farms, and afterwards manufacture it for market.

trade fixtures are permitted to be removed, applies with equal reason to agricultural erections. The principle of the trade cases is, that it is 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 the present practice, is become a scientific pursuit, and much 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 improved 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. Indeed, Lord Ellenborough seems to have felt the force of this objection; and it is observable that, in one part of 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, because trade is a matter of a *personal* nature, and not real or local. But as this principle obviously embraces many claims which have no reference to trade, it at least makes the case of the agricultural tenant one of 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 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.

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 in collieries (*a*); and the case before Ch. B. Comyns, respecting the cyder-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 cyder-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 cyder was *a species of trade*, the mill might be considered to fall within the general exception in favor of trade fixtures.

(*a*) *Lawton* v. *Lawton*, 3 Atk. 15. (*b*) 3 Atk. 14. *Dudley* v. *Warde*, Amb. 113.

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 recognised 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 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 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 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

(*a*) 1. H. Blac. 260. *in notis.*

(*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 *lime-burner* in *Thresher* v. *E. Lond. Waterworks Company.* 5 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. III. s. 1. *post.*

it appears to have done in these cases, an erection may be treated as lawfully removable by a tenant.

And it seems that it will seldom be safe to deviate from the strict analogy of these cases. For in *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. It should, however, be observed, that *Lawton* v. *Salmon* was a case 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. (*b*)

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 preparing minerals, lime, alum, pottery, and brick earth, &c. In like manner mixed cases might oc-

(*a*) 1 H. Bl. 260. *in notis, supra*, p. 31. And see Lord Ellenborough's observations on this case, in *Elwes* v. *Maw*. 3 East, 54. *ante*, p. 51.

(*b*) As to this distinction, see *ante*, p. 55.

cur 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 which of the two purposes the erection in dispute is more usually appropriated.

In all questions relating to the several kinds of fix-

(*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. 58.

tures 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*)

Nurserymen and Gardeners. Their rights.

It has been thought expedient to reserve for a separate consideration the claims of tenants of *nursery or garden-grounds;* a class of persons whose rights seem to depend on the principles discussed in the present section.

Removal of Trees, Shrubs, &c.

It appears 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. (*b*)

Strawberry-beds.

It was held, however, at Nisi Prius, under Lord Ellenborough's direction, 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 plants as between outgoing

(*a*) *Vide* Mont. Bank. L. p. 16. et seq. (2d ed.)

(*b*) 2 East, 91. 7 Taunt. 191. And see per Heath J. in *Wyndham* v. *Way*, 4 Taunt. 516.

and incoming 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.

If 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, it seems, entitled to sell or remove them at the end of his term. (*b*)

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 expence, it was expressly said by Lord Kenyon, in the case of *Penton* v. *Robart* (*c*), 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. (*d*) And there is no reported case in which the question has been expressly decided. (*e*)

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

(*b*) 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.

(*c*) 2 East, 91.

(*d*) *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 Blosset Serj., in which it is said to have been determined, that glasses and frames resting on brickwork 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*.

(*e*) 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.

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. 7. 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

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

of the reversioner in unqualified terms. He says, "If "glass windows (though glazed by the tenant him- "self,) be broken down or carried away, it is waste; "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 erections 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 soap-boiler did to carry on his trade, and what he *did to complete his house*, as hearth and chimney-pieces, 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 was 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, that *a furnace*, though fixed to the freehold, and purchased with the

(*a*) Co. Lit. 53. a.

(*b*) 4 Co. 64. And see Swinb. on Wills, pt. 5. s. 6., and pt. 6. s. 7. Noy's Maxims, 167. (9th ed.) Vin. Abr. Waste, E. Com. Dig. Waste, D. 2. See also 10 Hen. 7. pl 2

(*c*) 1 Salk. 368.

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

house, and also *hangings* nailed to the walls, should be accounted as 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 præ-*" *missa.*"

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*), it seems to be established, that a tenant would be 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 (*b*), which occurred shortly after *Poole*'s case, the right of a tenant to take away articles in no away connected with trade was expressly recognized by the Court. 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 stair-case, over the doors and chimney-pieces, and *all things fixed to the freehold of the messuage.* After the testator's

(*a*) See *ante*, p. 24.

(*b*) *Beck* v. *Rebow*, 1. P. Wms. 94. Hil. T. 1706.

death, the defendant took away the pictures upon the stair-case, &c., and likewise the *pier-glasses, hangings, and chimney-glasses.* And it was alleged for the plaintiff, that all these were as wainscot, and fixed to the freehold, being fastened 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 *à fortiori* would they go to the plaintiff, and especially the covenant being to grant to plaintiff all things fixed to the freehold. The case of *Cave* v. *Cave*, 2 Vern. 508. was cited in support of this doctrine. 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 chimnies.

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 chimnies* 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 nature would be removable by a tenant against his landlord.

The opinions of the judges in several modern decisions 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

(*a*) *Harvey* v. *Harvey*, Str. 1141. (*b*) 3 Atk. 15.

" held to be waste in Henry the Seventh's time, as " removing *wainscot fixed only* by screws, and *marble* " *chimney-pieces* is now allowed to be done." And in ex parte *Quincey* (*a*), he says, " during the term a " tenant may take away *chimney-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 (*b*); 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.

Wainscot. Marble chimney-pieces. Fixed beds.

In *Lawton* v. *Salmon* (*c*), Lord Mansfield said, " Many things may now be taken away, which " could not be formerly, such as erections for carrying " ing on any trade, *marble chimney-pieces, and the* " *like*, when put up by the tenant." And Lord Ellenborough, in *Elwes* v. *Maw* (*d*), 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 or- " namental marble *chimney-pieces*, *pier-glasses*, *hang-*

(*a*) 1 Atk. 477. So in *Dudley* v. *Warde*, Amb. 113.

(*b*) As to these, see 20 Hen. 7. 13. Keilw. 88. Noy's Max. 167. (9th ed.)

(*c*) 1 H. Bl. 260. *in notis.*

(*d*) 3 East, 53.

" *ings, wainscot fixed only by screws,* and the " like."

Grates, &c.

To these authorities may be added the opinion of Ch. J. Gibbs, in *Lee* v. *Risdon* (*a*), who mentions " *wainscots screwed to the wall, certain grates, and* " *the like,*" as fixtures which a tenant may sever during his term.

But there is a modern case which deserves more particular notice; and which it will be proper to state at length, since it recognises and explains the principle upon which the foregoing decisions depend.

Pineries. Conservatories.

It is the case of *Buckland* v. *Butterfield,* in the Common Pleas. (*b*) It was an action on the case, in the nature of waste, by tenant for life, aged 70, 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,

(*a*) 7 Taunt. 191. And see Bul. N.P. 34. 2 Saund. 259. n. 11. Harg. Co. Lit. 53. a. n. 346. That *stoves* and *grates* fixed into the chimney places with brickwork may be removed, see *per* Bayley J., in R. v. Inhab. St. Dunstan, 4 Bar. & Cres. 686.

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

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 parlour chimney by a flue. Two windows 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*l.* 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 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*l.* damages.

A rule nisi had been 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.: "This was an action on the case, tried before "Graham B. at the last Aylesbury assizes. 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 re- " port, 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 simi- " lar 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 mat- " ter 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 agricul- " ture; for this is merely the case of an ornamental " building constructed by the party for his plea- " sure, 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 " 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 orna- " ment, 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 pro- " gress 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 orna- " mental chimney-pieces, pier-glasses, hangings, " wainscot fixed only by screws, and the like. Of

" all these it is to be observed, that they are excep-
" tions only, and therefore though to be fairly con-
" sidered, not to be extended; and with respect to
" one subject in particular, namely, wainscots, Lord
" Hardwicke treats it as a very strong case. — Pass-
" ing 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., re-
" ferred 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 pre-
" sent: 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 nursery-
" men, 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 recognised opinion or
" practice, on 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."

The above case of *Buckland* v. *Butterfield* may be regarded as the leading decision in respect of the class of fixtures treated of in this section. But to complete the series of cases upon the subject, it may be proper to refer to two other decisions, in which the right of removing articles of this description has been 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. 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.

Stoves. Coppers. Tubs. Blinds.

Lastly, in the recent case of *Colegrave* v. *Dias Santos* (*b*), the Lord Ch. J. thought, at Nisi Prius, (and the Court of K. B. agreed afterwards in this opinion,) *that stoves, cooling-coppers, mash-tubs, water tubs, and blinds*, were removable as between landlord and tenant. Nothing was said 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.

On examining the decisions that have here been

(*a*) 2 Stark. N.P.C. 403.

(*b*) 1 Bar. & Cres. 77. So, that a *cupboard* standing on the ground, and supported by *hold-fasts*, is removable, see *per* Bayley J. in R. v. Inhab. St. Dunstan, 4 Bar. & Cres. 686. And see as to *set pots, ovens, and rangees*, in *Winn* v. *Ingleby*, 5 Bar. & Ald. 625. See also the view taken by the Court of *coffee-mills*, and *iron malt-mills* put up by a tenant, in R. v. Inhab. of Londonthorpe, 6 T. R. 379. And for other instances, see *post*, ch. 4. s. 2.

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

Principle of the relaxation.

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 expence 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 temporary 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

(*a*) 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, pt. 7. s. 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* "*gratiâ magis quam perficiendi do-* "*mum ponuntur, ædium partes non* "*sunt.*" Pt. 6. s. 7. p. 759. See also Godolp. Orph. Leg. pt. 2. ch. 14. p. 126.

that the tenant's right of removal in respect of this class of annexations depends upon very different reasons 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 that 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 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 seems to be generally understood that they fall within the same principle, and may lawfully be removed by the tenant at the end of his term. 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 which apparently serve as substitutes for mere moveable furniture.

Extent of the tenant's right of removal.

Having thus considered the general doctrine as to the removal of fixtures put up for ornament or convenience, it now remains to inquire how far the exception 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 is such that, its object alone considered, it would fall within the description of 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. 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.* (*a*) In the last-

(*a*) 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 C. 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. 7. 2. Moore, 178. Lord Hardwicke does not state upon what authority he founded his opinion in respect of this article, but there probably

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 it was determined, that the conservatory (the construction of which has been particularly described in a former page) could not be taken away.

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 judgments (*a*),

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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 enquiring 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 is 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 7th'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 *Cook*'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. If on any future occasion a question should 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.

(*a*) See also Bul. N.P. 34. 2 Sand. 259. n. 11. Harg. Co. Lit. 53. a.

yet it may be presumed that 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 rights very far indeed. (*a*)

Unfortunately there is a great absence of direct 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 or nails, by which the tenant's privilege may be defeated. The determination, therefore, of intermediate cases must, in the present state of the law, be subject to considerable uncertainty.

Permanent nature of the erection.

But, besides the mode of annexation, it may sometimes be proper to attend to another consideration, which Mr. Baron Graham seems to have regarded as a proper ground of decision in respect of ornamental fixtures. In the above mentioned case of *Buckland v. Butterfield*, Mr. Baron Graham was of opinion at Nisi Prius, that the pinery was not removable because it might be deemed a *permanent improvement*. (*b*)

(*a*) It may be questioned whether an unqualified right to take down chimney-pieces would be sanctioned by the courts in the present day. Lord Holt selects the particular instances of *hearths and chimney-pieces*, 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 expence incurred by the tenant in erecting them, cannot be supported upon any authority. That, under the general rule of law, a tenant is liable in waste, if he pulls down the shelves, closets, presses, wardrobes, dressers, &c. belonging to the house, see 2 Buls. 113. Cro. Jac. 329. 1 Salk. 368. 2 Bl. Rep. 1111. 2 Ves. & Bea. 349. So as to the locks and keys of a house, 2 Buls. 113. Cro. Jac. 329. 2 Ves. & Bea. 349. 11 Co. 50.

(*b*) The pinery is stated in the report of the case, in 4 B. Moore, 440. to have been erected in the garden, on a brick wall, four feet high.

And this opinion is conformable to that expressed by Lord Kenyon in a previous case. (*a*) His Lordship is reported to have said, "If a tenant will "build upon premises demised to him a substan- "tial addition to the house, or add to its magni- "ficence, he must leave his additions at the "expiration of his term for the benefit of his land- "lord. (*b*)

Injury to the premises.

Lastly, it is proper to notice one additional topic, which has been mentioned by Lord Mansfield as the ground for 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. (*c*) This principle does not appear to have been adverted to 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 house would not be impaired, and so, no waste. (*d*) 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

(*a*) 3 Esp. N. P. C. *Dean* v. *Allalley*.

(*b*) 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 *Darcy* v. *Asquith*. And see Vin. Ab. Waste, E. 20. 1 Bulst. 50.

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

(*d*) "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 find a verdict for the plaintiff with insignificant damages, the *defendant* is entitled to have judgment entered up for himself. 2 Bos. & Pul. 86. 1 Bing. 382.

say that no injury would accrue to the landlord by the removal of 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.

Liability of tenant to repair damage.

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 may more properly be regarded as the subject of compensation to the landlord by the tenant. And it appears to be generally understood in practice, although there is no direct decision to that effect, that as well where trading as where ornamental fixtures are taken down, the tenant is liable to repair any injury the premises may sustain by the act of removal. And, in like manner, it would seem, that where a fixture has been put up in substitution 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.

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 re-instated in their original condition. (*a*) For it must be remembered, that by

(*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:*

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 considerations that have been examined in the foregoing pages, will suggest the caution necessary to be observed in the practical application of the principle which authorises the removal of fixtures for ornament or convenience. From a review of these considerations, it is evident that the tenant's right in respect of this class of fixtures, depends, in a peculiar manner, on the facts of each individual case. (*a*) 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*. And with reference to this latter circumstance, it may be laid down as a

yet this was not thought a ground for the removal of the erections. So the removal of young trees is not allowed, (except where they belong to a nurseryman,) although the injury occasioned to the premises by digging them up might be immediately repaired.

(*a*) *Vide* per Dallas Ch. J. 2 Brod. & Bing. 58. And see a similar remark, 1 Brod. & Bing. 510.

(*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*.

rule applicable to all cases, that if the removal of an article will occasion any considerable prejudice to the freehold, as by damaging the substance or fabric of the house, 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. (*a*) 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 that in respect of trade fixtures. It is an indulgence which, according to the remark of C. J. Dallas (*b*), is an exception only, and though to be fairly considered, is not to be extended. (*c*)

It is remarkable, in respect of the class of fixtures that have been the subject of the above section, that although the right of the tenant to remove them is fully established, yet there is no reported case to be found in which, as between himself and the landlord, this right has been expressly determined in the tenant's favor. The privilege, although in derogation of an acknowledged principle of law, rests wholly upon the dicta of judges, and upon inferences derived from decisions between other parties.

(*a*) As to the effect of custom in questions of fixtures, see *ante*, sect. 1. p 41., and *post*. sect. 6.

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

(*c*) 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.

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 things which a tenant is entitled to remove as fixtures, the next object of inquiry is as to the *time of their 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 a 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 authorised to remove is in every respect the same. But with regard to the *time* during 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.

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 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 of his landlord. Thus, in the year-book 20 Hen. 7. 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 H. 7. 26. is to the same effect.

In like manner in *Poole*'s case (*a*), it was said by Lord Holt, that *during the term* the soap-boiler 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 modern decisions. Thus, it was said by Lord Hardwicke, in the case *ex parte* Quincy (*b*), that a tenant may take away the chimney-pieces, &c. during the term, but *not after*; "if he did, he would be a trespasser." And, again, in *Dudley* v. *Warde* (*c*), he

(*a*) 1 Salk. 368.
(*b*) 1 Atk. 477.
(*c*) Amb. 113. And see Br. Ab. Chattels, pl. 7. Com. Dig. Waste, D. 2. Went. Off. Ex. 61.

observes, " indeed, such removal must be during the " term, or he will be a trespasser." — And many other cases might be cited in confirmation of this doctrine.

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, a modern decision, which may be considered to have established an exception to this rule. For where a tenant *continues to keep possession of the demised premises* after the expiration of his term, he may still remove his fixtures so long as he retains his possession, although his legal interest in the land has terminated.

Case of *Penton* v. *Robart.*

This, it is conceived, is the point determined in the case of *Penton* v. *Robart*, 2 East, 88. But as that decision has sometimes received a construction which appears to conflict with the doctrine above laid down, it may be proper to examine it more minutely.

It was an action of trespass for breaking and entering a certain yard and divers buildings, &c. of the plaintiff, and breaking down and pulling to pieces the said buildings, and the materials of a certain fence belonging to the said yard; and for taking away certain timbers, bricks, &c. and disposing of the same, &c. As to the breaking and entering the

yard, the defendant suffered judgment by default, and pleaded the general issue as 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 undertenant 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 varnish. 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 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 that 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*

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

confessed of breaking and entering the *yard*; it was argued, on showing cause against the rule, 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 C. 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 in- "terests 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 "every thing behind him which can be said to be "annexed to it?" — "This is a description of pro- "perty *divided from the realty*. And some of the "cases have even gone further in favor of the "executor of tenant for life against the remainder- "man, between whom the rule has been holden "stricter; for it has been determined that the ex- "ecutor of tenant for life was entitled to take away "the fire-engine of a colliery. — 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, damages one shilling; 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 former 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. For 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

(*a*) 4 Esp. N.P.C. 53.

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*)

But the principle on which the decision proceeds does not seem to warrant an inference so extensive. For the only rule which can be considered deducible from the case of *Penton* v. *Robart* is, that a tenant may *sometimes*, and under *peculiar circumstances*, retain his right of taking away his fixtures, although his interest in the land has expired; that is to say, in cases 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 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 property, the presumption of a gift to the landlord could not

(*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. in the argument of counsel. According, indeed, to the report of the case of *Penton* v. *Robart* at Nisi Prius, the inclination of Lord Kenyon's mind seemed to be, that a tenant had a general 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.

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, 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. (*a*)

(*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. 430. And see 13 Hen. 7. fol. 9. b., and 22 Ed. 4. 27. That the property in the chattels would not be lost, see per Abbot Ch. J. in *Davis* v. *Jones*, 2 Bar & Ald. 167.

It is observable, that some of Lord Kenyon's expressions seem to favor this solution of the case. If, indeed, 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.

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. Accordingly, it will be found that in the authorities subsequent to the case of *Penton* v. *Robart*, the rule as to the time of removal, is laid down exactly as it was in the previous decisions. Thus, in *Lee* v. *Risdon* (*a*), Ch. J. Gibbs, explaining the nature of the tenant's interest in fixtures, describes it as existing only during the continuance of his estate. For 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 pri-"vilege 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 very late case. (*b*) *See also per Lord Ellenborough in* Elwes *v.*

(*a*) 7 Taunt. 191.

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

Maw, 3 *East*, 50., Davis *v.* Jones, 2 *Bar. & Ald.* 167., *and the case of* Buckland *v.* Butterfield, *cited in the preceding section.*

Delivery of possession without prejudice.

Assuming then, that the right to fixtures is not abandoned, and that the presumption of a gift to the landlord cannot be inferred so 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. (*a*) On this point nothing is found in the authorities: and as the validity of such a mode of proceeding has never been established by the Courts, it 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. (*b*)

Gift in law to the reversioner.

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,

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

(*b*) See as to the continuing possession and right of property of an outgoing tenant, in the case of *Beaty* v. *Gibbons*, 16 East, 116., as explained in the next section.

makes it a part of the reversioner's property, and retains only a qualified right to reduce 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.

Tenants of uncertain interests.

It was observed at the beginning of the section, that the above remarks were to be understood as applying only to tenancies, the determination of which might be previously ascertained. Although no decision has established, that tenancies which are of uncertain nature and duration are excepted out of the general rule, yet it appears consistent that tenants for life, at will, &c. should be allowed to remove their fixtures *within a reasonable time* after the expiration of their estates. 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. (*a*) And 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.

But it is conceived, that if the tenant determines his interest by his own act, as by forfeiture or condition broken, &c., that he would not be entitled to remove his fixtures, at least after the entry of his landlord.

(*a*) *Vide* 22 Ed. 4. 27. Cro. Jac. 204.

SECTION VI.

Of the Right of the Tenant, as affected by the Terms of the 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 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 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

(*a*) The reader must observe, that this section 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 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 effects of agreements of this latter description are considered in the chapter relating to the conveyance of fixtures, *post*, Chap. V.; 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.

tenant, therefore, in consequence of the conditions under which he holds, may be placed in a totally different situation from that in which he has hitherto been regarded. (*a*) And the following authorities will shew to what extent his privileges may be affected in different cases.

By covenants to repair.

In the case of *Naylor* v. *Collinge* (*b*), a defendant covenanted by his lease that he would from time to time, &c. during the continuance of the term, at his own cost, &c. well and sufficiently repair and keep the demised messuage or tenement, and 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, or any part thereof; and the same premises, in such good and sufficient repair, would, at the end, or other sooner determination of the said lease, peaceably and quietly surrender and yield up. 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 carried away: and the question was,

(*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.

whether they were comprehended within the terms of the covenant.

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 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.

This was a decision respecting *trade* erections. 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 and sufficient 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*)

(*a*) *Penry* v. *Brown*, 2 Stark. N. P. C. 403

By a subsequent demise.

The authority of the before-mentioned case of *Naylor* v. *Collinge*, and the doctrine it establishes, was fully approved of by the Court in the recent case of *Thresher* v. *East London Water-works Company.* (*a*) And from the latter decision it may be inferred, 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 decides the above proposition. (*b*)

The Court 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 appeared nothing sufficient for that purpose in the particular facts before them. (*c*)

(*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.

(*c*) As to this, 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*, Chapter V.

By a new agreement.

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* (*a*), 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.

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, 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

(*a*) 1 Hen. Bl. 258.

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 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. *Allalley* (*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 *Dean* v. *Allalley*, an action was brought upon a covenant in a lease similar in terms 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

(*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 outgoing tenant agrees, that when he quits possession he will leave his fixtures for an incoming 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 cloathed 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*) 5 Esp. N.P.C. 12.

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 the ultimate disposition of them, than would attach to him merely as tenant. (*b*) Thus, for example, 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 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

(*a*) And see a similar covenant in *Davis* v. *Jones*, 2 Bar. & Ald. 165. From which case, and from the decision in *Naylor* v. *Collinge*, it appears, that such a covenant does not include erections that are not actually affixed to the freehold, as a barn on rollers, &c.

(*b*) Vide *Burn* v. *Miller*, 4 Taunt. 745.

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 an important consideration, whether an established *custom* 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 often been determined that custom has this effect, when not opposed to the express words of an agreement. (*c*) 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 of weight

(*a*) 1 Cru. Dig. Tit. 8. ch. 2. s. 12. And see *Poole's* case, 1 Salk. 568. As to the effect of the clause "*without impeachment of* waste," in a conveyance of a life estate, see *post*, Ch. III. s. 3.

(*b*) The effect of the words of a covenant as restrictive of the tenant's power of removal, was discussed in a late case in the Exchequer. *Rex* v. *Topping*, Trin. T. 6 G. 4. 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.

(*c*) *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.

to be attached o evidence of custom in cases of fixtures; and outgoing and incoming 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 neighbourhood. 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.

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 1. 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 2. Of the Right of the Personal Representatives in respect of Fixtures put up for Ornament or Convenience.

SECTION 3. Of the Rights of Tenants for Life or in Tail, during their lives, in respect of Fixtures.

SECTION 4. 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, or 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 are annexed to the freehold by the

tenant for life or in tail, they become part of the inheritance, and of 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 the 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 the personal representatives of tenant for life or in tail, and the remainderman or reversioner, in respect of things annexed to the freehold *during the particular estate*, become 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 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, An. 1743. (*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

(*a*) 3 Atk. 13.

his executor, and that the remainder-man should not take it as part of the real estate.

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 "moveable 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 between 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.

"One reason that weighs with me is, its being a "mixed case, between enjoying the profits of the

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

" land and carrying on a species of *trade;* and con- Furnaces, &c. in brew-houses.
" sidering it in this light, it comes very near the
" instances in brew-houses, &c. of *furnaces and*
" *coppers.*"

Lord Hardwicke then points 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 in-
" gredient 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 the application to the Court was made in this case 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 they could in favor of creditors. On a subsequent occa-

sion, 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 decision, 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

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

" executor of a particular tenant, holds here, to en-
" courage agriculture. Suppose a man of indifferent
" health, he would not erect such an engine, at a
" vast expence, unless it would go to his family."

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

Cyder-mills

In determining the cases above cited, Lord Hardwicke declared that his judgments were partly founded on the authority of the cyder-mill case before Ch. B. Comyns. This decision has been elsewhere explained. (*a*) And the inference from it is, that a *cyder-mill* let into the ground may be deemed part of the personal estate of a tenant for life or in tail. (*b*)

The doctrine laid down in these cases of *Lawton* v. *Lawton*, and Lord *Dudley* v. Lord *Warde*, has been recognised and confirmed by many subsequent authorities. Thus, 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 expence for the
" benefit of the estate, as by erecting a fire-engine,
" or any thing else, by which it may be improved;
" in such a case it has been determined that the
" fire-engine should go to the executor, on a prin-
" ciple of public convenience, being an encourage-
" ment to lay out money in improving the estate,
" which the tenant would not otherwise be disposed
" to do." (*c*)

(*a*) See *ante*, p. 51.
(*b*) See *post*, p. 115.
(*c*) *Lawton* v. *Salmon*, 1. H. Bl. 260. *in notis.*

In like manner, Lord Kenyon speaks of an exception 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 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,

It appears, therefore, from the authorities, that there are two classes of fixtures which form part of

(*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*. 5 Ves. 212. 11 Ves. 657.

(*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. 502.

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 that 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, general cases of trade fixtures have been investigated; and in the latter, those mixed cases in which trade and the profits of land are combined.

and to fixtures for a mixed purpose.

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 may 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 *Dud-*

Extent of the executor's privilege.

(*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. 27. 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. 24. And see *per* Lord Mansfield, in *Lawton* v. *Lawton*, ub. sup.

ley v. Lord *Warde*, will afford the best criterion for determining this question.

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

And upon this 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 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 moveable chattels in gross or in part before they were put up; and he compares them in this respect to the ordinary utensils of a brewhouse.

By the injury to the inheritance.

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, seems 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

(*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 accessorial engines.

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.

Analogy of decisions between other parties.

It may be observed in the next place, that in determining whether an article is part of the real or personal estate of the tenant for life or in tail, it may be useful to consider the *analogy* of cases that have been decided between other parties. In resolving questions of fixtures according to this method, it is very necessary to attend to a 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 from the decisions, that the claims now under consideration, have been contrasted, on the one hand, with those of the *executors* of *tenants 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; 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*) And accordingly, it seems to be generally understood, that any determination in favor of an executor against an heir, will support a similar claim between whatever parties it may arise.

Analogy of decisions between landlord and tenant.

With respect to inferences to be drawn from the 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 landlord and tenant, 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, considering 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. So Lord Mansfield appears 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

(*a*) See this rule applied by Lord Hardwicke to the case of the cyder-mill, ante, p. 111.

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

down, the explanation which Lord Ellenborough gives of the leading decisions relating to fixtures, proceeds upon a principle that is alike applicable to every description of claimants. (*a*) However, as this distinction has been so often noticed by high authorities, it would not be safe to disregard it in practice. And this general observation may be offered on the subject: — that although every thing which belongs to the representative of a tenant for life or in tail, on the ground of its relation to trade, may be considered *à fortiori* rèmovable 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 that 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 may 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. And it is less easy to account for this distinction, because the right to fixtures appears to be founded on principles which have no reference whatever to the situation of the different claimants. Perhaps, in addition to the known partiality of the law towards the interests of the heir,

(*a*) See *ante*, p. 26.

the reason may have been, that the Courts considered that 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 interest of a tenant for life is not unfrequently, (as in family settlements,) closely connected 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.

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 cyder-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, but with that caution, 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. Moreover, the consideration of *custom* must not be overlooked. And, lastly, regard must be paid to those circumstances arising out of each particular case which are alluded to in the concluding part of the first section of the preceding chapter. For it appears from Lord Hardwicke's observations upon this subject, that the question whether part of the real or the personal assets, may be 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*)

It is 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.

(*a*) 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. 4. 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 far as respects the claim of the executor, the property will not always continue in the nature of personalty.

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 cases relating to fixtures put up by tenants for life, or tenants in tail, were those of *Lawton* v. *Lawton*, and Lord *Dudley* v. Lord *Warde*; and these, it has been shewn, were decided upon the ground of an exception in favor of trade. It seems, however, that besides trade erections, there are articles of another description, 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.

(*a*) See *ante*, p. 115.

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. iv. 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 *hangings, glasses, and tapestry* nailed to the walls of a house, *furnaces, grates, iron backs to chimnies,* and such like. (*a*) According to these instances, the privilege seems to be confined 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

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

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.

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 tried with reference to the general principles on which the exception in favor of matters of ornament has been allowed in other cases. It will always, however, be material in the practical application of those principles, to take into consideration 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*)

(*a*) See *ante*, p. 115. *in notis*.

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

SECTION III.

Of the Rights of Tenants for Life or in Tail, during their Lives, in respect of 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 grantee of tenant in tail; and if there be subsequent grantees, it applies to them

(*a*) Perkins, s. 58. Cas. Temp. Talb. 16. 2 Vern. 251. 3 Mad. 532. And see 1 Cru. Dig. Tit. 2. ch. 1. sect. 32.

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.

Right of tenant for *life*.

Secondly, with respect *to a tenant for life*,—although in general he is not permitted to commit waste of any kind, but is always 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.

Tenant *pour auter vie*.

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 for life *without impeachment*.

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

(*a*) 3 Leon. 121. 7 Bac. Abr. 260.
(*b*) Cru. Dig. *ubi sup.*
(*c*) 1 Cru. Dig. Tit. 3. ch. 2.

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 *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 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*)

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

(*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.

Tenant *apres possibility.*

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*) Though the grantee of tenant in tail *apres possibility*, is in the situation of a bare tenant for life. (*b*)

Tenant by the *curtesy.*

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

Rights of tenants and 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 life-time, his executor is entitled to remove after his death. For it has been shewn, 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 view to public benefit and convenience. The analogy

(*a*) 4 Co. 62. 11 Co. 79. 1 Roll. Ab. 757. Com. Dig. Chanc. D. 11. Rep. 177. 15 Ves. 419. 430. 2 Doct. Stud. Dial. 2. ch. 1. Freem. 53. 278. 2 Show. 69. 2 Eq. (*b*) 3 Leon. 241. Co. Lit. 28. a.
(*c*) 2 Inst. 145. 301. 355.

of the doctrine of *emblements*, which is frequently of use in explaining the law of fixtures, seems, in this instance, calculated to mislead.

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 chief object of the present section has been 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 different claimants had been fully developed.

SECTION IV.

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

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

of this description, it is laid down by the author of the Ecclesiastical Law; (*a*) "If an incumbent enter "upon a parsonage-house, in which there are *hang-* "*ings, grates, iron-backs to chimnies,* and such like, "not put there by the last incumbent, but which "have gone from successor to successor, the execu- "tor of the last incumbent shall not have them, but "it seemeth they shall continue in the nature of "heir looms: but if the last incumbent fixed them "there only for his own convenience, it seemeth "that they shall be deemed as furniture or house- "hold 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 heir-looms. 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

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

(*b*) *Bishop of Carlisle's* case, Year-book, 21 Edw. 3. 48. *Corven's* case, 12 Rep. 106.

be allowed afterwards to remove his fixtures. On the same principle that he is not in such a case 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*, as explained in a former chapter. (*b*)

Dilapidations.

Dilapidations are a kind of ecclesiastical waste; and the remedy 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. (*c*)

Remedy for, by and against whom.

An action lies for dilapidations in the spiritual courts by the canon law (*d*); and at the common law upon the custom of the realm (*e*): though the right to sue in the temporal courts was not settled till the case of *Jones* v. *Hill*, (3 Leving, 268. Carth. 224. S. C.) The action may be brought by the successor against the predecessor, if living, or if dead, then against his executor.

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

(*a*) *Bulwer* v. *Bulwer*, 2 Barn. & Ald. 470. See *post*, Ch. IV.

(*b*) See *ante*, p. 88.

(*c*) 2 Roll. Ab. 813. Roll. Rep. 86. Amb. 176. 2 Atk. 217.

(*d*) Respecting the proceedings in the ecclesiastical court see Gibson's Codex, 751, et seq. 1499, et seq., and 3 Bl. Com. 91.

(*e*) Lil. Ent. 21. 67. 68. 2 T. R. 630. 3 Bl. Com. 91. It is said also to be good cause of deprivation if an ecclesiastical person dilapidates the patrimony of the church. 3 Bl. Com. *ubi supra*. Degge, pt. 1. c. 8. p. 92.

action for dilapidations. (*a*) If, however, the successor, being entitled to the legal estate, is put into possession of a part of the glebe, it is equivalent to an induction into the whole. (*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 benefice.

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

Curate without institution or induction.

But it has been held, that a curate appointed by the impropriator, and licensed by the archbishop, but not instituted or inducted, is not liable to be sued for dilapidations. (*f*)

The examples here offered will be sufficient to point out the general doctrine of the law of dilapidations. And for farther information on the subject, the reader is referred to the authorities cited in the notes. (*g*)

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

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

(*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.

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

(*g*) Viner's Abrid. Dilapidations, with Serjt. 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. Watson's Complete Incumbent, p. 399. Gibson's Codex, 751, et seq. Burn's Ecclesiastical Law, Dilapidations. Woodeson's Vin. Lect. vol. iii. 205. And see stat. 13 Eliz. c. 10. 14 Eliz. c. 11. 17 Geo. 3. c. 53. 57 Geo. 3. c. 99. See also as to proceedings for waste, and by prohibition and injunction, in the second part of this work.

CHAPTER IV.

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

SECTION 1. Of the Right of the Executor to Fixtures put up for Trade, or for Trade combined with other Objects.
SECTION 2. Of the Right of the Executor to Fixtures put up for Ornament or Convenience.
SECTION 3. 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.

THE third class of persons, according to the division proposed at the beginning of the second chapter, is that of the personal representative and the heir of a tenant in fee: and the respective claims of these individuals in things affixed to the freehold, remains now to be considered. 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?

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

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 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 any thing that was connected with the testator's freehold.

Thus, in the year-book 20 *Hen.* 7. *c.* 13., trespass was brought by the heir against the executors 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.* 7. *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. On this occasion the court thought that the circumstance of the annexation being only to the earth, would not support the exe-

cutor'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 brewhouse 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, C. 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. 7. And see the Year-book* 8 *Hen.* 7. 12. *Owen* 71. *Cro. Jac.* 129. 4 *Rep.* 63, 64. (*a*)

(*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. The contrary of *glass*, for the executor shall have this: for the house is perfect without the glass. Per Pollard, *quod non fuit*

The several early text-writers, who have treated of the 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." Text writers.

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 dyehouse, 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 copper or lead fixed to the house; the doors within and without that are

negatum." See also Br. Ab. Tit. Executors, 95.; and Roll's Ab. 819. Of *glass*, Lord Coke observes, that waste may be committed of it, for it is 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*) Pt. 6. s. 7. p. 758, (7 Ed.) *id.* 256. And see Godolphin's Orp. Leg. Pt. 2. c. 14. Law of Test. 380.

(*b*) P. 469, 470.

hanging and serving to any part of the house, shall 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, anvils, 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 (*b*); "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 brewhouse or dyehouse." Again, "All chattels shall go to the executor, as vats and furnaces, fixed in a brewhouse or dyehouse by the lessee, but if they be fixed by tenant in fee, the heir shall have them."

In authorities of later date, the rule is laid down with the same degree of strictness. Thus, in Comyn's Digest (*c*), it is said, that goods and chattels annexed to the freehold go to the heir, as the glass in a window, the doors and locks of a house. And the

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

(*b*) Pp. 239. and 144. 9th Ed.

(*c*) Tit. Biens, B.

author refers to several of the foregoing cases. *See also* 3 *Bac. Ab.* 63. *and* 11 *Vin. Ab.* 166. to the same effect.

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 question 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 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. But in capital cases I am of opinion that such fixtures which merely supply the place of chests, and other ordinary utensils of household, should be considered in no other light than as mere moveables partaking of the nature of those utensils, and adapted to the same use." (*a*)

(*a*) Cr. Cas. 109.

Modern decisions.

It appears, therefore, that the rule respecting annexations to the freehold was observed with great rigor for a long period of time. Some decisions are now to be examined from which it will be seen, that this strictness has in modern times given way to a more liberal construction in favor of the executor and the personal estate. And the following authorities will shew that there has been a relaxation to a certain extent, in the case of fixtures put up in relation to *trade and manufactures.*

Trade fixtures part of the personal estate.

Cyder mills.

There is no case to be met with 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 recognised between these parties, is in a decision of Chief Baron Comyns respecting a *cyder mill.* In an action of trover brought by an executor against the heir for a *cyder 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 in the subsequent case of Lord *Dudley* v. Lord *Warde,* (*c*) he said expressly, that his judgments were partly founded upon

(*a*) Mic. T. 2. Ann. 1 Salk. 368.
(*b*) 3 Atk. 14.
(*c*) Amb. 114.

that authority. The case itself is no where reported, nor are the facts particularly mentioned. But the ground upon which it is commonly supposed to have proceeded is, that the mill was to be considered in the nature of personalty, because the making of cyder was *a species of trade.*

This 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, "it does admit the consideration of *public conve-* "*niency* 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.

So Mr. Justice Buller classes the cyder mill among "things relative to *trade*, as brewing vessels, cop- "pers, fire-engines, cyder-mills, &c." (*a*) As does Lord Kenyon in the case of *Dean* v. *Allalley*. (*b*) And in *Elwes* v. *Maw*, Lord Ellenborough explains the Chief Baron's determination by observing, that the cyder mill was to be considered as properly an accessary to the *trade* of making cyder. (*c*)

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. (*d*)

(*a*) Bul. N. P. 54.
(*b*) 3 Esp. C. N. P. 11.
(*c*) 3 East, 54.

(*d*) In *Stewart* v. Earl of *Bute*, a testator gave all his waggon-ways, &c. and all implements, utensils, and

It appears, however, to establish a general principle, that erections for the purpose of trade may be removed by the executor as part of the owner's personal assets. Lord Hardwicke and Lord Ellenborough seem to have been of this opinion. For in *Lawton* v. *Lawton*, Lord Hardwicke said expressly, in reference to the fire-engines in collieries, "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, in a case which will presently be noticed, appears to have considered, that the question whether the 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 (*a*), 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 of any other parties.

Fire-engines in collieries.

But there is a further inference to be drawn from the decision of the cyder mill case, and the instance put by Lord Hardwicke of the fire engine in a colliery: viz. that the executor is entitled to remove

Fixtures for trade and other objects combined.

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.

(*a*) See *ante*, p. 26.

articles erected for a purpose in which *trade and the profits of land are combined.* Lord Hardwicke, speaking of the cyder mill, says, that "it is an extremely strong case," for "cyder *is part of the profits of the real estate.*" And, according to Lord Ellenborough, "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 authorities point out two distinct classes of fixtures, which are to be deemed part of the testator's personal estate. They are the same species of things as those which belong to the executors of *tenants for life* or in tail; and which have formed the particular subject of discussion in the first and third sections of the chapter relating to landlord and tenant. It will not be necessary in this place to enter more at large into their general nature, or the principles on which they depend. And for further information upon this subject, the reader is referred to the second chapter of this work.

Things accessary to the realty not removable.

It appears, however, that the exception in favor of the personal estate, as deduced from the cases above referred to, must be understood with some qualification. For it will be seen from the following important decision, that if the property in dispute is absolutely essential to the value and enjoyment of the real estate, it cannot be removed by the executor, but will descend to the heir as parcel of the inheritance.

Salt-pans.

In *Lawton*, executor, v. *Salmon*, before Lord Mans-

field, (E. 22. G. 3.) (*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, though the salt-works would be of no value without them; which, with them, were let for 8*l. per* week.

Lord Mansfield, in pronouncing the judgment of the Court, after referring to the cases between landlord and tenant and tenant for life and remainderman, 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 cyder 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 ground. The inheritance cannot be

(*a*) 1 H. Bl. 260. *in notis.* S. C. of this case in Luder on Elect. vol. 2. 3 Atk. 15. *in notis.* And see the note p. 580.

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. For these reasons, we are all of opinion that the salt-pans must go to the heir."

It will probably be thought that the decision of the court in this case is at variance with the ruling of Chief Baron Comyn respecting the cyder mill. On this account it may be proper to examine it with more attention.

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

From the expressions used by Lord Mansfield 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 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 pro-

fits of the land. (*a*) It is according to this view of the subject that Lord Ellenborough explains the decision, and endeavours to distinguish it from the case of the cyder mill and other cases which fall 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. Comyns.

It does not, however, appear by what criterion, cyder mills, salt-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 cyder 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 profitable without the manufacture of cyder. Whereas the salt brine could not subsist at all but by the instrumentality of the salt-pans, and the inheritance would have been of no value

(*a*) It is observable that Lord Mansfield in his judgment refers to several distinct grounds of decision, 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 it to be laid upon these considerations.

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

without the accompanying annexation. 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 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, *à priori*, that the manufacture of cyder 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 laid down in the case of *Lawton* v. *Salmon*. (*a*) 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. And all that can be said upon this subject is, that perhaps these articles were more connected with land and less with trade than the cyder-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.

(*a*) As to which, see *per* Lord Mansfield, in *Wells* v. *Parker*, 1 T. R. 58.

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

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

It has, however, been seen that the claim of the executor to trade fixtures has been expressly recognised by the Courts on several occasions. It is singular, therefore, to remark the inconsistency which appears in some of the judicial decisions with reference to this subject. For the same judges who have distinctly admitted the validity of the cyder-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

(*a*) In 11 Vin. Ab. Executors, 154, it is said to have been ruled by Eyre Ch. B., Sum. Ass. Winchester, 1724, that in Hampshire, a granary built on pillars is by *custom* a chattel, and belongs to the executor. In the extract given from Comyn's 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. 577. 6 Mod. 187.

to be shown to the executor's claims, but have laid it down in positive terms, that the general rule still obtains in its former strictness whenever the heir and the real estate are concerned.

This is observable, in the first place, of some of Lord Hardwicke's expressions. For, in *Dudley* v. *Warde*, Lord Hardwicke, in alluding to the exception which prevails in the case of landlord and tenant, says, "but this does not hold between the "heir and executor." (*a*) Again, he 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 being a trespasser. "But there is another rule between landlord and "tenant." In the next place, Mr. Justice Buller (*c*) remarks, that "the general rule of law is, that what-"ever 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 "tail and the reversioner: *but the rule still holds as* "*between heir and executor.*" And yet it appears that Mr. J. Buller did not dissent from the decision of the cyder-mill case, because he mentions the mill among things relative to trade which a common tenant might remove. (*d*) So, lastly, Lord Ellenborough,

(*a*) Amb. 113. And see Lord Hardwicke's observations respecting the fire-engines, in the second question discussed in this case, and upon which Lord Talbot had pronounced an opinion.

(*b*) 3 Atk. 477.

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

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

who, in *Elwes* v. *Maw*, distinctly recognises 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. (*a*)

Perhaps these general expressions are to be understood in a qualified sense, and are only intended to mean that, comparatively speaking, the rule in questions between executor and heir is to be construed more according to its original acceptation, and that the line is to be drawn the strictest, and the freehold more scrupulously protected in these than in any other cases. But even as thus understood, it is by no means easy to reconcile the *dicta* with the decision of Chief Baron Comyns; and they are altogether at variance with the general principles of trade fixtures assigned both by Lord Hardwicke and by Lord Ellenborough. (*b*)

General observations.

It remains now to offer a few remarks upon the mode of determining in practice whether a thing affixed to the freehold is to be accounted part of the owner's real or personal estate. This question is principally to be resolved by a comparison of the decision of Chief Baron Comyns respecting the cyder-mill, and that of Lord Mansfield respecting the salt-pans. In general, it is conceived, that if the property in dispute bears such a relation to trade as to bring it within the scope of the former decision, it may be

(*a*) 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.

(*b*) It will be seen from the next section, that notwithstanding the general expressions of the Courts, the rule appears to have received material relaxation in the case of matters of ornament, &c.

removed by the executor as personalty. But the executor must examine whether it have not a relation to the realty also, and whether the reasons upon which the salt-pans were held to belong to the heir apply to the particular case in question. If the matter has been put up for the purposes of a trade which is *merely personal,* and has no connection with land, the decision concerning the salt-pans will not conflict with the executor's claim. So neither will it constitute an objection to the removal of the property, if the trading purpose appears not to be more strongly connected with the enjoyment of the land than in the instance of a cyder-mill or the fire-engine of a colliery. But, besides these considerations, the executor must attend to the *construction* of the article, and the *mode of its annexation* to the freehold. And here again, if in these particulars it is found to resemble the cyder-mill or the fire-engines, there will be the same reason for accounting it part of the testator's personal estate. The executor will then have express authority for the removal of the article, both as regards the object and the nature of the erection. It may be questionable whether it will, in any instance, be safe to rely upon the analogy of decisions between other parties; and certainly those decisions must be resorted to with the greatest caution. (*a*) It is presumed, however, that many of the arguments which the Courts have adopted in support of the claims of other individuals, such as

(*a*) See *ante*, p. 115. *et seq.* And see Lord Mansfield's observations in *Lawton* v. *Salmon*, that a *tenant* might remove the salt-pans, though the executor could not.

custom, &c. will be entitled to equal weight in cases between heir and executor: and with respect to these and other topics arising out of the facts of each particular case, the reader is referred to the observations in the concluding part of the section relating to trade fixtures between landlord and tenant. (*a*) It should always be borne in mind on these occasions, 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.

(*a*) And see as to custom, *ante*, p. 146. *in notis*.

SECTION II.

Of the Right of the Executor to Fixtures put up for Ornament or Convenience.

HAVING, in the last section, considered certain cases in which as between heir and executor there has been a deviation from the general rule of law on the ground 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.

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 mere ornament, or the general improvement of the estate, and notwithstanding they might be in themselves of a chattel and moveable nature. Thus, it will be recollected, that it was 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 *covering 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.

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 ad-

mitted between these parties. For about the beginning of the reign of Queen Anne, the Courts seem to have considered that articles fixed up merely as *household furniture*, or for purposes of *common domestic convenience*, should not be accounted strictly a part of the inheritance, but should go to the executor in the nature of personalty.

Furnaces. Hangings.

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 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.*"

Pictures. Pier-glasses, &c.

This doctrine, however, seems to have been qualified in the subsequent case of *Cave* v. *Cave*, in the same Court (Trin. T. 1705.). (*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 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

(*a*) 2 Freem. 249.

(*b*) 2 Vern. 508. Law of Test. 580. 3 Bac. Ab. 63.

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.

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 every thing which an heir would take by descent.

Tapestry. Iron backs of chimnies.

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* (*b*), in an action of trover brought by an executor against an heir, Ch. J. Lee held, that *hangings, tapestry,* and *iron*

(*a*) *Beck* v. *Rebow,* 1 P. Wms. 94. An. 1706. 15 Vin. Ab. 43.

(*b*) 2 Str. 1141.

backs to chimnies, belonged to the executor, who recovered accordingly against the heir. (*a*)

Of the above decisions it should 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 recognised 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 decisions in favor of carrying away matters of ornament had arisen solely between landlord and tenant. And Lord Ellenborough appears to have been under the same impression. (*d*) In a late case it was said by the Court of 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 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,

Set pots. Ovens. Ranges.

Stoves. Closets. Shelves, &c.

(*a*) As to *Hangings*, see *ante*, p. 77. *in notis*.
(*b*) Bul. N. P. 54. a.
(*c*) 1 H. Black. 260.
(*d*) *Elwes* v. *Maw*.
(*e*) *Winn* v. *Ingelby*, 5 Bar. & Ald. 625.
(*f*) *Colegrave* v. *Dias Santos*, 1 Bar. & Cres. 76.

but would not belong to the executor, but to the heir, and were as between those persons parcel of the freehold. And so, on a still more recent occasion, it was said by Mr. Justice Bayley, that *stoves*, *grates*, and *cupboards*, were parcel of the freehold, 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*)

Grates. Cupboards.

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.

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, 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.

Opinions of text-writers.

(*a*) *R.* v. *Inhabitants of St. Dunstan*, 4 Bar. & Cres. 686.

(*b*) And see the observations upon this subject in the last section.

Chimney-pieces. 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 (*a*), 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 *chimney-pieces*, *pumps*, *old fixed or* "*dormant tables*, *benches*, and the like."

Wainscots. Posts, &c.

In Wooddeson's Vinerian lectures, it is said (*b*), that "many things which appear to be of a per-"sonal 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."

Tables. Ovens. Jacks. Clock-cases, &c.

And, in Burn's Ecclesiastical Law (*c*), 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* (*d*), *clock-cases*, and such like, although "fastened to the freehold by nails or otherwise."

(*a*) Quære, if the expression "al-"most general custom," is not inaccurately used here for *the common law*.

(*b*) Vol. ii. p. 379.

(*c*) Vol. iv. p. 301., 7th ed.

(*d*) As to *jacks* being parcel of the freehold, see 1 Sid. 207.

General observations.

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. If, indeed, the cases of *Squier* v. *Mayer*, *Beck* v. *Rebow*, and *Harvey* v. *Harvey*, are to be considered still unimpeached, these decisions have introduced an important modification of the ancient doctrine, and seem to carry the exception almost as far as in the case of landlord and tenant. (*a*) Nevertheless, the observations of the judges in the several cases that have been referred to, together with the frequent allusion which the Courts have made to the inflexible nature of the rule in favor of the real estate, must be considered as restrictive of any *general* right to fixtures on the part of the executor. And, it may certainly be laid down as a clear rule in all cases (*b*), 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 severance, the executor will not be entitled to take it away. (*c*)

(*a*) As to inferring the rights of an executor from those of tenants for years or for life, see the concluding part of the preceding section.

(*b*) 5 Bac. Ab. 65.

(*c*) For other considerations affecting the class of fixtures treated of in this section, see *ante*, Ch. II. § 4.

SECTION III.

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*)

From their strict relation to land they have even been accounted for some purposes not to be chattels. (*b*) And, therefore, it is said, that if a man

(*a*) 20 H. 7. 13. 21 H. 7. 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.

(*b*) Noy's Maxims, p. 559. (9th Ed.) *Vide* 2 Roll. Ab. 108. Ley Gager, E. F.

gives and grants *omnia bona et catalla*, his charters concerning his land shall not pass by these words. (*a*) They are, however, so far in the nature of personalty, that an action of trover, detinue, or trespass *de bonis asportatis*, will lie for them. (*b*)

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 it should also pass to the heir; and distinctions have been taken as to the box being sealed or locked, or otherwise.

Swinburne lays it down (*c*), 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. And in Rolle's Abridgment (*d*) it is said, that if the 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.

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

(*a*) Perkins, s. 115. Shepp. Touch. ch. 5. p. 97. Br. Ab. Chattels, pl. 9. Roll 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, & 10 E. 4. 14., where another reason is suggested for this rule.

(*b*) Com. Dig., Charters, D., Action upon the case, Trover, C., Trespass, A. 1. Vide 5 Bar. & Cres. 225.

(*c*) Treat. on Wills, p. 759.

(*d*) Roll. Ab. Tit. Exors. U. *Id* tit. Ley Gager, F.

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 may other things also; or perhaps it may be a chest or cabinet of great value, surely this shall not go to the heir, 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 Comyn's Digest, it is laid down, in general terms, that the chest passes to the heir. (*b*)

Deeds relating to personalty.

It should 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 interests to which they refer. (*c*)

Deeds pledged.

And so, if the writings of an estate are pawned or pledged for money lent, they are considered as chattels in the lands of the creditor, and, in case of his decease, they will go to his personal representative

(*a*) Law Test. 581. *Vide* 4 Burn's Ecc. Law, 304.

(*b*) Com. Dig. Biens, B., Charters, A. See upon this subject 36 H. 6. p. 27. Finch. Bk. 1. p. 16. Plowd. p. 523. Br. Ab. Chattels, 18. Roll. Ab. Grant, X. pl. 5. Godolph. Orp. Leg. pt. 2. ch. 15. 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. 65. 3 Bac. Ab. 65.

as the party entitled to the benefit accruing from the loan. (*a*)

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, 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.*

Heir-looms go with the estate by custom.

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*)

Are personal chattels.

Lord Holt, indeed, is reported to have said, that goods *in gross* cannot be heir-looms, but that they must be things *fixed to the freehold,* as old benches, tables, &c. (*d*) And it is observable that Spelman

(*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. 20. a. N. 117.: in case of *conveyances to uses,* Cro. Jac. 217. Harg. Co. Lit. 6. a. N. 4.: in case of estates *for life or in tail,* Finch. B. 1. c. 3. p. 23. Id. B. 2. c. 2. p. 88. 2 P. Wms. 471.: in case of a *purchase not completed,* 3 Bar. & Cres. 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.

(*b*) 14 Vin. Ab. 290.

(*c*) Co. Lit. 18. b. 185. b.

(*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.

thus defines an heir-loom: "*Omne utensile robustius* "*quod ab ædibus non facile revellitur, ideoque ex* "*more quorundam locorum ad hæredem transit tan-* "*quam 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 moveable. 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, quòd hæredes tene-* "*mentorum infra hundredum prædictum existentium* "*post mortem antecessorum suorum habebunt, &c. prin-* "*cipalium Anglice;* an heire-loome, viz., *de quo-* "*dam 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 without damaging or dismembering the freehold

(*a*) Spelman's Gloss. *vocc* Heir-Loome.

(*b*) Co. Litt. 18. b.

(*c*) 2 Com. 428.

And in one part of the Commentaries (*a*) he says expressly, "An heir-loom, or implement of furni-"ture, which by custom descends to the heir, "together with an house, is neither *land nor tene-*"*ment*, but a mere *moveable*." (*b*)

And indeed, if by heir-looms were to be understood only matters affixed to the freehold, it would follow that there are some 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-looms.

There are certain species of chattels which may be considered in *the nature of* heir-looms, and which are held to pass to the heir with the inheritance. But the things referred to seem 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 it may perhaps deserve to be remarked, that an attention to this distinction would remove the confusion which has sometimes arisen

(*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.

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.

Coat-armour. Antient pictures, &c.

Thus, the coat-armour 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 even although there may be a special bequest of all jewels. (*b*)

Crown jewels.

And so the ancient jewels of the Crown are said to be heir-looms; because they are necessary to maintain the state and support the dignity of the sovereign for the time being. (*c*)

(*a*) 12 Rep. 105. *Corven's* case. Godb. 199. 1 Brownl. 45. Noy, 104. 2 Bulst. 151. Cro. Jac. 567. Vin. Ab. Descent, E. Com. Dig. Cemetery, C.

(*b*) 11 Vin. Ab. 167. Owen 124. Countess of *Northumberland's* Case. Swinb. Part. 3. s. 6. And see Lord *Petre* v. *Heneage*, 12 Mod. 520. 1 Ld. Ray. 728. S. C. 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 ancestor. D'Israeli's Curiosities of Literature, 2nd series, vol. 1. p. 298.

(*c*) 2 Bl. Com. 428. 14 Vin. Ab. 290. Swinb. Tr. W. part 3. s. 6. p. 251. King Charles I., in the beginning of his reign, ordered several valuable jewels, which had long passed with the Crown by continual descent, to be sold, under a special warrant to the Duke of Buckingham: among them was a very valuable collar, known as *the inestimable great collar of ballast rubies*. See the warrant in Rymer's Fœd. vol. 18. p. 236.

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. (*a*) But things of this description seem rather to resemble charters of inheritance; or they might perhaps more properly be ranked among some of the species of possessions that are treated of in the ensuing pages. (*b*) Ancient horn.

A testator may also by his will constitute what has been called a *quasi* heir-loom. That is to say, he may devise, or 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. (*c*) 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 ge- Chattels limited as heir-looms.

(*a*) 1 Vern. 273. *Pusey* v. *Pusey*. 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. 3. p. 1. *et seq.* And see *id.* vol. 1. p. 168. vol. 5. p. 340., vol. 6. p. 42.

(*b*) Things belonging to ecclesiastical houses, and which have continually passed from successor to successor have sometimes been considered as heir-looms. And so the ornaments of a bishop's chapel, &c. As to which see *ante*, p. 129.

(*c*) Wood. Vin. Lec. vol. 2. 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.

nerally, 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. (*a*)

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 seised 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." (*b*)

Upon this it has been observed by Woodeson in his Vinerian Lectures (*c*), that the opinion of Lord Coke is founded upon a decision in 1 Hen. 5. 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 by way of realty, as of personalty: viz. that the *custom* vests the property in the heir instantly

(*a*) The several decisions upon this subject are collected in Roberts' Treatise on Wills, vol. 2. p. 295. *et seq.*

(*b*) Co. Lit. 185. b. So *per* Lord Coke, the Crown jewels are not devisable by testament. Co. Lit. 18. b

(*c*) Vol. 2. p. 580.

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. (*a*)

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. (*b*) 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. (*c*)

Of Deer, Fish, &c. 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 not in 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 dyeth, 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

(*a*) Com. Dig. Biens, 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.

(*b*) 2 Bl. Com. 429.

(*c*) 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.

engines (*a*): 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. (*b*)

Deer, conies, swans, &c.

So likewise, of deer in a park, conies in a warren, and doves in a dove-house (*c*); and so of pheasants 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, as it is said, bees in a hive; all these shall go along with the inheritance; and the reason assigned is, because without them, the inheritance is incomplete. (*d*)

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. (*e*)

Hawks and hounds.

It is said in Swinburne's Treatise on Wills (*f*), that *hawks and hounds* belong to the heir with the estate: and Noy is an authority to the same effect (*g*); and he says, that by a grant of all goods and chattels, neither hawks nor hounds nor other things *feræ*

(*a*) 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.

(*b*) *Id. ib.* 5 Bac. Ab. 64. Com. Dig. Biens, F.

(*c*) Note (*a*) *sup.* 7 Rep. 90, 91. Case of Swans. See also 18 Ed. 4. p. 14. God. Orp. Leg. 126. Noy's Max. p. 230. 259. (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.

(*d*) See the preceding notes, and Shep. Touch. 469.

(*e*) 1 Cru. Dig. tit. 3. chap. 2. s. 20. Vin. Ab. Waste, E.

(*f*) Part 7. s. 10. p. 938.

(*g*) Noy's Max. p. 259. 9th ed. *id.* 144. 230.

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*)

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 executors: and though they were not tame,

(*a*) See Off. Ex. 53. 57. God. Orp. Leg. part 2. ch. 13. & part 3. ch. 21. 5 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*) or a composition in lieu thereof. 4 Inst. 338. Swinb. part 2. s. 26. 2 Bl. Com. 413. As to which, see Spelm. Rem. p. 117., in the Answer to the Apology for 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.

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-armour and ensigns of honor of an ancestor, such as pennons, armorial trophies, achievements, &c. hung up in a church, belong to the heir in the manner of heir-looms. The same rule holds as to monuments, tomb-stones, 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-armour and pennons with his armes, and such "other insignes of honor as belong to his degree or

(*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.* 5 Bac. Ab. *65.* But see a contrary rule in several of the authorities above referred to. 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 Reeves's Hist. vol. 3. p. 378.

(*b*) Co. Lit. 18. b.

" 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 free- " hold, yet cannot the parson or any take them or " deface them, but he is subject to an action to the " heire and his heires in the honor and memory of " whose ancestor they were set up. (*a*) And so it " was holden Mich. 10 Ja. and herewith agree the " lawes in other countries. Note this kind of inheri- " tance. 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 by the Court of Common Pleas in a very recent case (*c*), that the property of a tomb-stone 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 church-yard and afterwards erased the inscription.

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,

(*a*) Unless they were set up without the consent of the ordinary. See Gib. Cod. 454.

(*b*) See also 12 Rep. 105, *Corven's* case. 3 Inst. 202. 1 Roll. Ab. Descent, E. Sid. 206. Doct. & Stud. p. 305. 309. Com. Dig. Cemetery, C. 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.

(*c*) *Spooner* v. *Brewster*, 3 Bing. 136. 2 Carr. N. P. C. 34.

in consequence of his possession of the freehold, and on the ground of their being a tacit gift to him. (*a*)

Pews and seats.

With respect to pews and seats erected in a church, it seems that they 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. (*b*) And therefore, if seats have been placed in the church without legal authority, it is said that the property of the materials when pulled down is in the parson. 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. (*c*) With respect, however, to moveable seats standing in a church, it has been said that the party that set them up may remove them at his pleasure. (*d*)

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 posses-

(*a*) *Vide* Cases and Opinions, vol. 1. 273. But see *Cramp* v. *Bayley*, Clk. Kent Lent Ass. 1819, cited in the notes to the last edition of Degge's Parson's Counsellor, by Ellis, p. 218. And see Prideaux, Directions, p. 87.; and the authorities there referred to.

(*b*) 8 H. 7. 12. Br. Ab. Chattels, pl. 11. 1 T. R. 430. 5 Bar. & Ald. 361. And see 1 Phill. Rep. 322.

(*c*) Degge, p. 213. (7th ed.) Burn's Ecc. Law, vol. 1. tit. Church. Noy, 108. *Vide* Shaw's Par. Law. ch. 25. s. 9. Prideaux, 73.

(*d*) Degge, 211. This, however, seems to be questionable. And see Shaw, ch. 25. s. 7. Prideaux, 32.

sion of the goods of the church belong, though the property of them is in the parishioners. (*a*)

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. (*b*)

Of Emblements.

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.

Emblements between heir and executor.

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, they are considered as a chattel interest, and will pass to the executor.

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.

(*a*) 11 H. 4. 12. Degge, 217. Burn's Ec. Law. *ub. sup.* Com. Dig. Esglise, F. 3. Cro. Eliz. 145. That bells are parcel of the freehold of the church, see 11 H. 4. 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. by Nelson, p. 327. 1 Salk. 164. Roll. Ab. Prohibition, K. Sid. 206.

(*b*) 1 Roll. Ab. 393. The succeeding churchwardens may sue although the trespass was done in the time of their predecessors. Cro. Eliz. 145. 179. 1 Leon. 177.

So it is of hedges, bushes, &c. (*a*) For all these are the natural or permanent profit of the earth, and are reputed parcel of the ground whereon they grow. (*b*)

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 expence of tilling, manuring, and sowing the land. And this rule 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. (*c*)

Hemp, hops, roots, &c.

It seems to be now fully established that not only corn and grain of all kinds are emblements, but every thing of an artificial and annual profit that is produced by labor and manurance. Thus, hemp, flax, saffron, and the like (*d*); and melons, cucumbers, artichokes, &c. And hops also, although they spring from old roots; because they are annually ma-

(*a*) Com. Dig. Biens, H. 11 Rep. 48.

(*b*) It would seem that not only the natural fruits, that is, such as grow of their own accord and without any great labour or cost, but all growing fruits, though produced by skill and culture, are the property of the heir. *Vide* Swinb. p. 934, 935. Noy's Max. 116. (9th ed.) God. Orp. Leg. part 2. ch. 14. s. 1. & part 3. c. 21. s. 13. Cro. Car. 515. 5 Bac. Ab. 64. Com. Dig. Biens, B. Off. Ex. 58. 2 Freem. 210.

(*c*) Co. Lit. 55. b. 1 Roll. Ab. 726. *et seq.* Swinb. Wills, p. 210. Com. Dig. Biens, G. 1. 2 Bl. Com. 122.

(*d*) *Id. ib.* God. Orp. Leg. part 2. c. 13. 2 Freem. 210. Gilb. Law. Ev. 208. 216. (6th ed.) Harg. Co. Lit. 55. b.

nured and require cultivation. (*a*) And so of turnips, carrots, &c. (*b*)

Of the latter kind of produce, it is said indeed in Wentworth's Off. Ex. (*c*), that roots in the ground 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*)

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, that the artificial grasses, as clover, saint-foin, and the like, by reason of the greater care and labor necessary for their production, are within the rule of emblements, and belong to the executor. (*e*)

(*a*) *Id. ib.* Harg. Co. Lit. *55.* b. note 364.

(*b*) *Id. ib.* Law of Test. 380. Cro. Car. *515.*

(*c*) Off. Ex. *61, 62.* Gilb. Evid. 216. God.Orp. Leg. part 2. c. 14. s. 1.

(*d*) *Vide* 1 Roll. Ab. 728. God. Orp. Leg. part 2. c. 14. Com. Dig. Biens, G. I. 3 Bac. Ab. 64. 2 Bl. Com. 123. Harg. Co. Lit. *ub. sup.*

(*e*) 1 Roll. Ab. 728. Hob. 132. 2 Freem. 210. 3 Salk. 160. Com. Dig. *ub. sup.* Bac. Ab. *ub. sup.* Gilb. Ev. 215. As to *Clover*, &c. see Mr. Serj. Hill's MS. note, 9 Vin. Ab. 368. See also Shep. Touch. by Preston, p. 469. It is said that *dung in a heap* is a chattel in the hands of the executors; but otherwise if spread on the land. *Per* Rolle J. Sty. 66. *Vide* Aleyn, 31. Noy's Max. 119. (9th ed.)

Who may have emblements.

With respect to the parties 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; 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*)

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 *causâ præcontractus*, the husband in this case shall have the emblements; for the sentence of divorce is the act of law. (*b*)

A tenant at will, when the landlord determines the will, is entitled to emblements; 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

(*a*) Co. Lit. *ub. sup.* Roll. Ab. *ub.* (*b*) 5 Co. 116. Roll. Ab. *ub. sup. sup.*

event. (*a*) Indeed "the general rule is, 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 by forfeitnre for waste, &c. there shall be no emblements. (*c*) And upon this principle the Court decided in a late 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 recompence to the party, who by his own industry and at his own expence has cultivated the land, emblements cannot be claimed by a person although he has an estate which is uncertain, if he is not the actual party who has sown the land, but the charge has been incurred during the existence of a previous estate. Thus, if A seized 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 executors shall not have it, but it shall go with the land to C; for here the reason of industry and charge fails. (*e*)

(*a*) See the authorities cited in the preceding notes. See also Perk. s. 513. *et seq.* Shep. Touch. 244. 471. Swinb. on Wills, part 3. s. 6. p. 253. 2 Bl. Com. 125. 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, &c. *Vide* 5 Co. 116.

(*d*) *Bulwer Clk.* v. *Bulwer.* 2 Bar. & Ald. 470. The advantages of emblements are extended to the parochial clergy by st. 28 H. 8. c. 11. *Vide* Swinb. on Wills, part 2. s. 26. 2 Bl. Com. *ub. sup.* 1 Cru. Dig. tit. 3. ch. 1. s. 54.

(*e*) Hob. 132. Winch, 31. Cro. Eliz. 61. 463.

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. (*a*)

Devise of emblements.

But although, in general, the right to 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. (*b*) 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. (*c*)

Interest in the land until severance.

Where there is a right to emblements, the law gives a free entry egress and regress, in order to cut and carry them away. (*d*) With respect however to the nature of the interest which the tenant or the personal representative has in the land until

(*a*) Cro. Eliz. 61. Co. Lit. 55. b.

(*b*) 1 Roll. 89. 727. Winch. 51. Perk. s. 59. Cro. Eliz. 61. 461. Bul. N. P. 34 a. And see *Cox* v. *Godsalve*, 6 East, 604. n. 8 East, 539. See also Mr. Hargrave's note to Co. Litt. 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.

(*c*) See the authorities in the last note. As to who may devise emblements, see Vin. Ab. Devise, I.

(*d*) Co. Lit. 56. a.

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 premises in the mean time. (*a*)

The reader who is 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*, s. 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. Serj. Hill's notes in Linc. Inn Lib.*; and *Bac. Abr.* tit. *Executors.*

(*a*) See Plowden's Queries, 239.

CHAP. V.

OF THE TRANSFER OF FIXTURES BY SALE, DEVISE, &c.

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, devise, or other species of alienation; and also to point out the questions of law which ordinarily occur upon the transfer of property of this description.

And it is to be observed in the first place, 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 and not mentioned, notwithstanding other houses and buildings are specifically described in the conveyance. (*a*)

Chattels affixed pass by conveyance of the land.

Upon this principle it was laid down, in very early times, that where *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. 7. 26, it was said, that vats fixed in a brewhouse or dyehouse should always go with the freehold, and pass by feoffment together with the inheritance.

(*a*) Com. Dig. Grant E. 5. Co. Litt. 4 a. 2 Roll. Ab. Graunt. I.

This doctrine has been recognised by the courts in several modern determinations. In the case of *Ryall* v. *Rolle* (*a*), it was said by Parker Ch. B., that by a mortgage of the freehold fixed utensils would pass to the mortgagee. And in a very recent case in the Common Pleas (*b*), a windmill which was described as a wooden edifice built on brickwork, 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 connexion with the land was of such a nature, that it seems to have been 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 under consideration 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 Waterworks 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.

So, in the case of *Fitzherbert* v. *Shaw* (*e*), a tenant

(*a*) 1 Atk. 175.
(*b*) *Steward* v. *Lombe*, 1 Brod. & Bing. 507.
(*c*) *Per* Richardson J. *ibid.*
(*d*) 2 Bar. & Cr. 609.
(*e*) 1 H. Bl. 258.

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.

The 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 very recent case. In *Colegrave* v. *Dias Santos* (*a*), 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 purchaser, 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 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 con-

(*a*) 2 Bar. & Cr. 76.

veyance, 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.

The above authorities, therefore, may be considered to establish the general principle respecting the transfer of fixtures by a conveyance of the land to which they are united. Indeed it appears from the observations of the court in the before-mentioned case of *Thresher* v. *East London Waterworks Co.*, that the circumstances must be very special which would prevent the operation of this general principle; and that perhaps no matters *dehors* the instrument of conveyance is capable of having that effect. (*a*)

Things constructively annexed.

It may be observed, moreover, that a similar rule obtains with respect to personal chattels that are incident to the freehold, which will pass by a grant of the freehold itself, though at the time of the grant they are actually severed from it. And, therefore, by the conveyance or lease of a house, the doors, windows, locks, keys, and rings of the house will pass, although they may be distinct things; because they are con-

(*a*) As to the effect of collateral circumstances *dehors* the instrument, see *Colegrave* v. *Dias Santos*, 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.

structively annexed to the house. And so, by a grant of a mill, the mill-stone passes, notwithstanding at the time of the conveyance 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*)

It is however proper to mention in this place, that there are two cases which appear in some degree at variance with the principles laid down in the foregoing decisions. For in the case *ex parte Quincey* (*b*), Lord Hardwicke seemed to have been of opinion, that the fixed utensils of a brewhouse would not pass by a conveyance of the brewhouse 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 comprize 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 it may be observed of the former of these cases that it was never finally determined. (*c*) 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 heir and executor. It may therefore be

(*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 Buls. 113. S. C. As to detached *pipes and conduits* passing by a grant of a house, see *Nicholas* v. *Chamberlain*, Cro. Jac. 121. 1 Lev. 151.

(*b*) 1 Atk. 477.

(*c*) The conveyance was by way of mortgage. For a more particular examination of the case, see *post*, in the division which treats of mortgages.

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.

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 *Colegrave* v. *Dias Santos* above cited. The principle, however, has not been recognized in any other determination; and it appears from many of the authorities referred to in the course of this work, and particularly from the observations of C. J. Gibbs in the case of *Lee* v. *Risdon* (*a*), that things fixed to the 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 discussed in the preceding pages some practical inferences may be deduced, to which it may be useful to draw the reader's attention, with reference to the precautions to be used in purchasing houses, &c., and upon taking leases or assignments of premises with the fixtures and other appendages belonging to them.

Upon an agreement for the sale of a house, if it

(*a*) 7 Taunt. 190.

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 them upon the same conditions as his own fixtures. The precise nature, however, of the interest which is taken under agreements of this kind, does not appear to have been hitherto discussed. (*a*)

Demise of premises with things affixed.

Sometimes a tenant's lease 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. The tenant, it is to be observed, has not the dominion of the property, but only a qualified right to use it during the term in a particular way, *viz.* as annexed to the freehold. (*c*)

(*a*) See the remarks of Parker Ch. B. in *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.

(*c*) *Farrant* v. *Thompson*, 5 Bar. & Ald. 826. *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* Bayley J. in *Farrant* v. *Thompson*. As to the nature of a tenant's interest in moveable uten-

If, at the time of making a demise, nothing is said respecting the fixed articles belonging to the premises, the tenant 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.

Mortgage of Fixtures.

Whether things affixed pass by a mortgage of the land.

With respect to the transfer of fixtures *by way of mortgage*, there does not appear to be any reason why fixtures should not be included under general terms in mortgage conveyances as well as in conveyances of any other description. (*a*) 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. In that case a person sold the utensils and granted a lease of a brewhouse, and afterwards mortgaged the brewhouse 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 the

sils 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. 224. 1 Bos. & Pul. 82, 83. *in notis*. And see the cases referred to in the preceding note.

(*a*) As to the supposed distinction between mortgage and other conveyances, see *Eaton* v. *Jacques*, Doug. 458. *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.

fixtures was litigated between his assignees and the first mortgagee of the brewhouse. Under these circumstances Lord Hardwicke was inclined to think, that the fixed utensils of the brewhouse 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 be- "tween a purchaser and a vendor? 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 whether it was ultimately determined.

This authority, allowing it full weight as a final decision, appears to have been determined with reference to its own peculiar circumstances, and the construction put upon the language of the conveyance. It seems, therefore, hardly to warrant the position which some writers have deduced from it, that fixtures will not in any case pass by a mortgage of the land, unless they are specifically mentioned.(*a*) The decision, however, shews the utility of expressing, in clear terms, in a deed or instrument of con-

(*a*) And see *Steward* v. *Lombe* and other recent cases referred to in the preceding pages.

veyance, the intention of parties with respect to the transfer of property annexed to the freehold. (*a*)

Possession by the mortgagor.

Several questions have arisen respecting the effect of a mortgagor retaining possession of fixtures after granting a mortgage of the land to which they are attached. The ground of objection in these cases is, 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 a strong proof of fraud. (*b*) Agreeably to this view of the subject, Lord Hardwicke in the case last cited, thought that there would have been a difficulty on account 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 brewhouse. It seems, however, to be now clearly established, that things affixed to 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*) See Sugden's Vend. & Pur. p. 30.

(*b*) See the statute 13 Eliz. c. 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.

Thus, in the case of *Ryall* v. *Rolle* (*a*), a brewer having borrowed money, as a security conveyed and assigned his dwelling-house and brewhouse, and all the coppers and utensils of trade belonging thereto, by way of mortgage, 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 a 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, 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* (*b*), 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

(*a*) 1 Atk. 165. S. C. 1 Ves. 348. (*b*) 1 Brod. & Bing. 506. 1 Powell on Mortg. 56.

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.

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. But it should seem that the principle of the decision would hold 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. It is conceived, that the circumstance of the fixed property being in the latter case seizable under a *fieri facias* in the hands of the tenant, could not make it so far a personal chattel, that the mortgagor's retaining possession of it afterwards together with the land, would be deemed fraudulent. (*a*)

BANKRUPTCY.

Bankruptcy.

The statute 21 Jas. 1. c. 19. relating to bankrupts, has given rise to some questions respecting fixtures, which have depended upon the peculiar nature of this species of property. By the 11th sect. of that statute, it was enacted, "that if any person or per-

(*a*) See further as to the mortgage of fixtures, as well when conveyed together with the land, as when mortgaged distinctly from it, in *Ryall* v. *Rolle*, *ub. sup.*

"sons 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 possession, order, and "disposition, *any goods or chattels*, whereof they "shall be reputed owner, 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." (*a*)

Fixed articles not "goods and chattels," within 21 Jac. 1. c. 19.

In a case arising out of this statute, it was holden that certain stills fixed to the freehold, which had been leased together with a distil-house to a bankrupt, would not pass to his assignees under the description of "*goods and chattels.*" (*b*) 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 which they held would pass to the assignees under the words of the statute. (*c*)

(*a*) The provisions of this section of the statute are preserved in nearly the same words in the new act, 6 G. 4. c. 16. *Vide* Sect. 72.

(*b*) *Horn* v. *Baker*, 9 East, 215. In the recent case of *Sinclair* v. *Stevenson*, 2 Bing. 514., the assignees of a bankrupt were held entitled to certain articles stated to be fixtures, on the ground of reputed ownership, contrary, as it should seem, to the decision of *Horn* v. *Baker*. That decision, however, was not adverted to in the discussion of the case. See further, as to reputed ownership in cases of fixtures, in *Ryall* v. *Rolle*, 1 Atk. 165. *De Tastet* v. *Walker*, 1 Buck. 155.

(*c*) With respect to the *moveable* 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 as-

From the principle of this decision, it may, perhaps, 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; though, if they renounce the bankrupt's lease, it is conceived, they will have no right to take the fixtures. Perhaps, indeed, a severance 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.

Independently of the construction put upon the words "*goods and chattels*" in the statute 21 Jas. 1., as laid down in the foregoing case, it seems that property affixed to the freehold is not within the intent of the statute; because the possession of such property would not create a visible ownership in the bankrupt so as to procure him unmerited credit. Upon the same principle that the Courts have made a distinction between the mort-

Possession of fixtures not a reputed ownership.

signees 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*, *post*. And see as to trading articles not fixed passing to the assignees, *Bryson* v. *Wylie*, 1 Bos. & Pul. 83. *Ex parte* Dale, 1 Buck. 365.

(*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 II.

gage of fixtures and the mortgage of mere personal chattels. 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. Accordingly, it may be observed, that in the case of *Steward* v. *Lombe*, 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. (*a*)

Possession consistent with the usage of trade.

In the recent case of *Storer* v. *Hunter*, in the King's Bench (*b*), it was determined, 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*. In this case, however, the Court principally relied 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 pre-

(*a*) 1 Brod. & Bing. 511. And see *Ryall* v. *Rolle*, ub. sup.

(*b*) 3 Bar. & Cr. 568.

sumption of a reputed ownership arising from the possession of the articles. But it is apprehended that the claim of the assignees, as far at least as respects the fixed machinery demised to the tenant, could not have been supported in any point of view. (*a*) For, according to the principle above referred to, it would appear that the possession of *fixed* articles would not create a reputed ownership, even if there had been no usage in the case; and from the decision of *Horn* v. *Baker*, it would seem to follow, 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. (*b*)

Devise of Fixtures.

Annexations to the freehold, in what cases devisable.

With respect to the transfer of fixtures by way of 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 se-

(*a*) The question was raised in this case, as well as in *Horn* v. *Baker*, and *Sinclair* v. *Stevenson*, (cited in a former note) in an action of *trover*; but it seems that trover was not the proper form of action for recovering the fixed utensils. *Vide post*, Part II.

(*b*) 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.

paration from the house. On the other hand, if the estate itself is not devisable, the things that are annexed to it are not in general devisable; and therefore a tenant for life or in tail cannot devise the doors, windows, or wainscot of a house, nor personal chattels that are affixed to the house, and which form part of it; 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 they 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 that 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 areâ legatâ 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*)

(*a*) Shep. Touch. 340. 322.
(*b*) Shep. Touch. 469, 470. 4 Co. 62., *Herlakenden's* case. And see *Colegrave* v. *Dias Santos*, 2 Bar. & Cres. 80.
(*c*) 11 Co. 50., *Liford's* case. See *ante*, p. 184.
(*d*) 6 Mod. 187.

Whether executor's fixtures pass to the devisee of the land.

But it is conceived that an exception from this general rule will be found to exist in respect of the class of fixtures which have been described in the preceding chapter. For, as those articles 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*)

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

(*a*) See *ante*, p. 178.

(*b*) *Beck* v. *Rebow*, 1 P. Wms. 94.

not be comprized under a corresponding devise in a will.

Fixtures, how described in a devise.

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 phrase or description. For, it seems, that things fixed to the freehold will not be included under terms which are usually applied to property of a mere chattel nature.

Will not pass as "furniture."

Thus, under the term "*furniture*," in a devise, the devisee will not be entitled to articles that are fixed to the freehold of the testator's house, notwithstanding they are matters of mere ornament. In the case of *Allen* v. *Allen* (*a*), 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 in fee, and certain other slabs and chimney-pieces 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 chimney-pieces, or any thing fixed to the freehold on the testator's *own estate*. And he said, that

(*a*) Mosely, 119.

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 that under this bequest the 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*)

Mr. Serjeant Hill, in his MS. notes (*c*), in referring to the above-mentioned case of *Allen* v. *Allen*, remarks that it seems admitted in the case, that the legatee of furniture should have the slabs and chimney-pieces 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. (*d*)

Intention of testator.

In cases of wills, however, the intention of the parties more than any particular form of expression is the

(*a*) *Slanning* v. *Style*, 3 P. Wms. 334.

(*b*) And see Burn. Ecc. Law, vol. iv. p. 168. 170. Swinb. on Wills, Part 7. s. 10. God. Orp. Beg. Part 3. ch. 20. s. 12. See, however, *Stewart* v. Marq. of *Bute*, *ante*, p. 140, *in notis*.

(*c*) See his copy of Viner's Ab. in Linc. Inn Lib. vol. xiv. p. 319. tit. House, E.

(*d*) 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.

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.

Unity of occupation.

Thus where a testator devised his copyhold estate, consisting of a brewhouse and malthouse; under this devise the plant of the brewhouse was held to pass with the brewhouse 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. (*a*)

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 be 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

(*a*) *Wood* v. *Gaynon*, Amb. 395. 141. 1 Bos. & Pul. 53., 2 T. R. 498. And see upon this subject, 5 Wils. 2 Bing. 456. 1 Bar. & Cres. 350.

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 Agreements, &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 agreements which relate to the transfer of fixtures can be considered to fall within the provisions of the *statute of frauds*. Although this question must be supposed frequently to to arise, as well upon original demises between landlords and tenants, as upon assignments between outgoing and in-coming tenants, and upon sales under executions, yet there does not appear to be any instance in which it has been hitherto the subject of legal discussion. Where, indeed, the contract relates to a transfer of fixtures together with the land, it clearly falls within the 4th 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. But the question seems to be much more doubtful when things annexed to the freehold are sold in contemplation of an immediate severance, and the contract takes place between parties who do

(*a*) *Vide* Swinb. on Wills, part 3. s. 6. Roberts on Wills, vol. 1. p. 88.

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* (*a*), 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 4th section of the Statute of Frauds. It deserves also to be noticed, that in a very recent case, *Mayfield* v. *Wadsley*, in the King's Bench (*b*), 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. (*c*)

After an appraisement.

But 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 is conceived 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, might give a right of action where it has been executed by an *appraisement* having been made of the fixtures. (*d*)

(*a*) 11 East, 362.
(*b*) 3 Bar. & Cres. 560.
(*c*) And see 1 Bing. 6.
(*d*) *Vide Poulter* v. *Killingbeck*, 1 Bos. & Pul. 397. *Teal* v. *Auty*, 2 Brod. & Bing. 99. See also *Sal-*

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.

These schedules are either annexed to or endorsed upon instruments of lease, &c. or else are distinct instruments which are merely referred to in the lease. According to the provisions contained in the general stamp act, 55 G. 3. c. 184., a schedule or inventory, &c. which is *put or endorsed* upon, *or annexed to* a deed or agreement, must be included in the calculation of the number of words as part of the instrument. (*a*) 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 separate and distinct from and not indorsed on or annexed to such agreement, &c." is subject to a duty of 1*l.* 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*l.* 5*s.* is payable.

Under this 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

mon v. *Watson*, 4 B. Moore 73., as to the effect of an appraisement of fixtures.

(*a*) *Lake* v. *Ashwell*, 3 East, 526.

of such an inventory not being stamped, will not vitiate the deed itself to which it refers. (*a*)

Stamps on agreements.

With respect to other provisions contained in the stamp act; it is 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; and an agreement stamp is not sufficient. (*b*)

An executory agreement for the making and putting up of machinery in a house, is not within the exemptions of the stamp act in favor of agreements for or relating to the sale of goods, &c. but must be stamped like any other agreement. (*c*)

Auction duty.

Lastly, it may be useful to mention, that by the statutes 43 G. 3. c. 69., and 45 G. 3. c. 30., a duty of 1*s.* in the pound is payable upon fixtures sold by auction, the same as in the case of personal goods.

(*a*) *Duck* v. *Braddyll*, 1 M'Cleland, 217.

(*b*) *Corder* v. *Drakeford*, 3 Taunt. 382. And see 1 Camp. N. P. C. 387. 3 Stark. N. P. C. 128.

(*c*) *Buxton* v. *Bedell*, 3 East, 593.

CHAPTER VI.

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 the 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 rateable to the poor according to its value improved by annexations.

Thus, with respect to the liabilities of persons to make contributions 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, (amongst other persons) of every occupier of lands and houses in a parish: and in the construction of this statute it has been held, that land or houses are to be rated according to their annual value, although that value may be derived from the annexation of a personal chattel.

As by a steel-yard in a machine-house.

Thus, where a corporation being possessed of a house, erected a machine in the street leading by the said house for the purpose of weighing waggons, carts, &c., loaded with coal, &c. at 2*d. per* ton. The steelyard of the said weighing machine was, and always had been, in the said 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 one entire thing, and were together rated by the common name (the machine house), which comprehends both; the steel-yard was the most valuable part of the house, the house therefore applied to this use might be said to be built for the steel-yard, and not the steel-yard for the house. And Willes, J. said, that if the machine be appurtenant to the building, its clear profits are undoubtedly rateable. 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 rateable 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 18 feet long and 19 wide, 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 engine stood was

(*a*) *Rex* v. *St. Nicholas Gloucester*, Cald. 262.

(*b*) *Rex* v. *Hogg*, Cald. 266. 1 T. R. 731.

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 labour; and was not adapted to any particular building. The frame in which the engine stood was twelve feet in length, three feet eleven inches in breadth, and two feet nine inches in height; the semidiameter of the largest cylinder, with a small roller at the top, rising twenty inches above the frame; the engine sinking in the frame seventeen inches. (*a*) The Court thought that this case was not distinguishable from the preceding decision of *Rex* v. *St. Nicholas, Gloucester:* and accordingly they held, that the house and engine for carding cotton 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.

Whether land is rateable in respect of chattels not actually affixed.

There is some ambiguity in the above cases as to the necessity of a personal chattel being actually affixed to the premises, 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

(*a*) The statement is given from the case after it was amended, on being referred back to the sessions.

rated was clearly affixed to the freehold; and the Court rely upon this circumstance in delivering their judgment. It has, however, been thought that perhaps 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 rateable 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 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.

Water-pipes laid in land rateable.

Upon the same principle, it is considered that personal chattels annexed to land which produce profit to the proprietors are rateable, notwithstanding the ownership of the land itself may be in other individuals. Thus it has been decided that pipes laid down and fixed in the ground are to be deemed a part of the soil, and are rateable in the parish in which they are situate, according to the profits derived from the pipes, by the conveyance of water or gas. The Company of Rochdale Water-works were rated to the relief of

(*a*) Nolan's Poor Laws, vol. 1. p. 82. 84 n. See *Rex* v. *Londonthorpe*, post.

the poor of the township of Spotland, in the county of Lancaster, for and in respect of the trunks and pipes, and other apparatus, for the conveyance of water belonging to the company, situate and being fixed in the ground, in the township of Spotland, and 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 licence to carry pipes through the lands of others; but the Court determined that the company were clearly rateable to the poor by reason of their occupation of the pipes. (*a*)

Gas pipes rateable.

So, in a very recent case (*b*) it was held that a public company were rateable for the profits of their pipes in the parish in which the pipes were laid; although it appeared that the company had no interest in the land through which the pipes passed, but merely a licence to place them there, and that they had the power under an act of parliament of removing them when they thought fit. The Court in deciding the question adverted to the last-mentioned case of the Rochdale Waterworks Company, 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 they compared the pipes to the case of a tunnel under a river which they said would clearly be rateable. With respect to the power of taking them up and altering

(*a*) *Rex* v. *Rochdale Waterworks Company*, 1 Maule & Selwyn, 634.

(*b*) *Rex* v. *Brighton Gas Company*, E. T. 1826. K. B.

Tenant's fixtures rateable.

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.

Settlements by occupation of land improved by annexations.

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.

House improved by the addition of stoves, &c.

Thus, in a very recent case, a question arose respecting the value of a tenement, by the rating of which it was contended that a settlement had been gained by the pauper according to the statutes 3 W. c. 11. s. 6. & 35 Geo. 3. c. 101. s. 4. By the latter of these statutes, it is enacted, "That no person "who shall come into any parish, township, or "place, shall gain any settlement therein by being "charged with and paying his share towards "the public taxes or levies of such place, for or "on account or in respect of any tenement not "being of the yearly value of 10*l.*" On the part of the respondent parish, it was proved that the pauper's husband had on the 23d April 1823, gone to live in a house in the parish of Saint Dunstan, at the yearly rent of 10*l.*; that he had not occupied it for a year, but that he had been rated for the house

in that parish, and had paid the assessment for one quarter; that one Butler had occupied the house before the pauper's husband; that at the time of the hearing of the appeal one Hunt held it, each of them paying the annual rent of 10*l.*; and that it had for six years preceding the pauper's tenancy been let, together with the articles of furniture hereinafter mentioned, at 10*l. per annum.*

On the part of the appellant parish, it was proved, that all houses in the parish of Saint Dunstan were rated at half their actual value, and that in the assessment on the pauper's husband, the said house was valued at 3*l.* 10*s.*; that at the time of his occupation the house was in a very bad state of repair, and that it would have required an expenditure of 40*l.* to put it into tenantable condition; that since his death, and previously to Hunt's tenancy, 12*l.* had been expended on it; that there were a stove and cupboard in the room below stairs, a grate and a cupboard in the chamber, and a grate in the kitchen; that the stove 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; that these were fixed with brick work in the chimney places, but that they might be removed without doing any injury to the chimney places; that the cupboards stood on the ground, and were supported by holdfasts, and that these might also be removed without doing any other injury to the walls than leaving a few marks of nails; that the use of these several articles was worth about 6*d.* per week; and that

the tenement, including the use of them, was worth 7*l.* 10*s.*, and without them about 6*l. 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.*

It was contended on the part of the appellant parish, that the fixtures, although they belonged to the landlord and were used by the tenant, constituted no part of the tenement; that the ancient rule of law had been relaxed between landlord and tenant, and that the rule so relaxed ought to prevail in the present case. The Court however were of a different opinion and confirmed the order of sessions. And Mr. Justice Bailey, in delivering his judgment, observed, that although 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*l.* (*a*)

Chattels must be actually affixed.

It seems however, that 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. Thus, in a question respecting the removal of a pauper from Grantham to Londonthorpe both in the

Post-windmill.

(*a*) *Rex* v. *St. Dunstan*, 4 Bar & Crcs. 686.

county of Lincoln, it appeared (*a*) that the pauper took a tenement in the hamlet of Spittlegate, in the parish of Grantham, in the county of Lincoln, at six pounds a year, in which he resided near three years, and the greater part of that time rented of the lord of the manor of Spittlegate a piece of waste ground in the hamlet, at the yearly rent of 10*s.* 6*d.*, upon which he had the privilege of building a post-windmill, and which he was to be at liberty to remove at pleasure. He accordingly built a post-windmill upon that ground at the expence of 120*l.*, and worked it for about three quarters of a year, but rented the ground for two years and a half, the greatest part of which time the mill was standing thereon. The mill 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. And the mill was considered as the property of the tenant. He let it to one Jackson for a quarter of a year, at the rate of 9*l. per annum*, during which time the pauper resided in the said tenement of the rent of 6*l. per annum*. The pauper afterwards sold the said mill as a chattel interest, and it was taken away by the purchaser without any interruption of the landlord; no rates were ever paid or demanded for the mill, or the ground on which it stood.

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

(*a*) *Rex* v. *Londonthorpe*, 8 T. R. 377.

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."

And *per* Grose J. This mill was a mere chattel, and was the property of the tenant, and not of the landlord. And it is no more a tenement than a large coffee-mill put up by the tenant in his house.

Right of voting at elections in respect of freeholds improved by annexations.

It is conceived that the principles which have been discussed in the preceding pages, would, in like manner, affect the right of voting for freeholds at 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 inclosed with a fence, put up by the voter in a common field. 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 clearly recognized the principle, that whatever was affixed to the freehold was to be considered as land, and as such conferred a right of voting. On the facts as stated in the report, it does not appear satisfactorily whether the windmill had ever been completely annexed to the soil. The case, however, can scarcely warrant an inference that a right of voting will belong to the owner of a chattel property which is merely laid upon the ground, and is not actually attached to the freehold.

(*a*) 2 Lud. Case 12. p 440.

PART II.

CHAPTER I.

OF REMEDIES BY ACTION, &c. IN RESPECT OF FIXTURES.

SECTION 1. Of the Action of Waste, as applied to Fixtures.
SECTION 2. Of Injunctions for Waste, and of equitable Relief in the case of Fixtures.
SECTION 3. Of other Remedies by Action in respect of Fixtures.

SECTION I.

Of the Action of Waste as applied to Fixtures.

HAVING in the preceding division of this 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 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*)

Hence it is that many of the questions respecting the right to 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 a writ of waste. And it will be proper to notice some particulars relative to this more ancient remedy, because it is the foundation of the modern form of action, and has moreover been revived upon some recent occasions.

(*a*) Co. Litt. 53 a. 2 Saund. 259. n. 11.

For and against whom it lay.

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*) By the statutes of Marlebridge (52 Hen. 3. c. 23.), and Gloucester (6 Edw. 1. 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; which is a remarkable instance of the manner of construing statutes by equity in former times. (*c*)

(*a*) 2 Inst. 145. Co. Lit. 53 a. *et seq.* Doct. & St., Dial. 2. ch. 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. 556. 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 577.

(*b*) 2 Inst. 299. Co. Lit. 54 b. 2 Saund. 252. n. 7. In Reeve's History of the Eng. Law, vol. 1. p. 386. & vol. 2. p. 73, 74. 148. it is attempted to be shewn, that tenants for life were punishable for waste at common law. 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. 1. c. 11., and indeed until the statute 21 Hen. 8. c. 15.; inasmuch as the reversioner might at any time put an end to their interest by means of a fictitious recovery.

(*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. 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 "te-

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*)

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 is not entitled to

nants for years" in Serj. Hill's notes to Vin. Ab. vol. 22. Waste. Br. Ab. Waste, pl. 52. In a modern case Lord Ellenborough refused to give a similar extension to the statute 4 G. 2. c. 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.

costs in an action against these individuals (*a*); unless indeed under the statute 8 & 9 Will. 3. c. 11. s. 3., when the damages recovered in waste do not exceed the sum of twenty nobles.

Modern instances of the action.

But the remedy by this proceeding is seldom resorted to in the present day. 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 recently revived in the case of *Redfern* v. *Smith*, 2 Bing. 262. (*b*) The Court, however, on 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 do not amount to waste; and that if the jury find a verdict for the plaintiff, and give only very small damages, the defendant is entitled to judgment (*c*): 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. (*d*)

The disuse into which this action has fallen makes it 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.*;

(*a*) 2 Inst. 289. 10 Co. 112. *Pilford*'s case, 2 Saund. 252 a. n. 7.

(*b*) And see 1 Bing. 382.

(*c*) *Vide* 1 Jac. & Walk. 653.

(*d*) 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.

Fitz. Nat. Brev. Writ of Waste; Com. Dig. Waste; Bl. Com. vol. 2. p. 281. vol. 3. p. 223.; *Bul. N. P.* 119 *a.*; and in *Mr. Serj. Williams*'s notes to the case of *Green* v. *Cole*, 2 *Saund.* 228. (*a*)

Action of case in the nature of waste.

For the old action of waste has now given way to the remedy by *an action on the case in the nature of waste.* This action is founded on the ancient form of proceeding, and is adapted for the redress of the same species of injuries to the freehold. It is a much more easy and expeditious remedy than the writ of waste, and is applicable to many cases, where the former remedy altogether failed. (*b*)

The 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. 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 is inapplicable to all those cases in 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

Not when the removal is by executors.

(*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 Marlebridge, and under the statute of Gloucester.

(*b*) As to the advantages of the action upon the case compared with the ancient writ of waste, see 2 Williams's Saunders, 252 a. n. 7.

his death; because, in such cases, there exists no privity of estate between the parties. (*a*)

Liability of executors for waste.

Neither can the action be maintained against the personal representative for waste committed by the testator in his life-time; because waste is a tort which in the language of the law "*moritur cum personâ.*" (*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*)

Whether case for waste may be supported against a tenant who covenants to repair, &c.

But in respect of those parties between whom this action is maintainable, it has been thought that the right to support the action will not be waived by entering into any special covenant, 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 and Thornton (*e*), a lessee covenanted quietly to yield up the demised premises at the end of the term. During the term waste had been committed in pulling down and demolishing certain fixtures mentioned in the declaration, as an ale-house bar, and divers doors, partitions, dressers,

(*a*) 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. and Stud. Dial. 2. ch. 4. 1 Taunt. 185. *et seq.*

(*b*) 2 Inst. 302.

(*c*) 1 Cru. Dig. tit. 6. ch. 2. s. 11.

(*d*) Cowp. 576. 1 P. Wms. 407. Dick. 215. Vin. Ab. Waste, 2 S.

(*e*) 2 Bl. Rep. 1111.

&c. The plaintiff 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, that the landlord by acquiring a new remedy by the special covenant did not therefore lose his old. (*a*)

It has, however, been supposed, that the authority of this decision has been impeached in some modern cases. In *Jones* v. *Hill*, 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 this case in 1 Bay. Moore. 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 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.

(*a*) See 2 Saund. 252. n. b. In *Elwes* v. *Maw*, 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 for waste. Dick. 445. 18 Ves. 455. 2 Ves. & Bea. 349.

There is another case, *Herne* v. *Benbow* (*a*), which has been thought at variance with the decision of *Kinlyside* v. *Thornton;* and is considered 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 principle which has been countenanced in some recent decisions, that an action on the case is not maintainable for permissive waste. (*c*)

(*a*) 4 Taunt. 764.

(*b*) And see Harg. Co. Lit. 54 b. n. 559. 5 Brod. & Bing. 171.

(*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 expressly been 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 c. 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*. From this reason being assigned as the ground 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 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*,

Pleading and evidence in waste.

The forms of pleading in waste, and in actions on the case in nature of waste, are treated of with much learning in a note of Mr. Serj. Williams in 2 Saund. 252 c. n. 7. 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. For the evidence, see Stark. Law Ev. vol. iii. 1668.

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 cites this 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 seem, 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 decides 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 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. See further upon this subject, 22 Vin. Ab. 525. tit. Waste. 1 Jac. & Walk. 522. 2 Sim. & Stu. 87.

SECTION II.

Of Injunction for Waste, and Equitable Relief in the case of Fixtures.

THE proceedings described in the former 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 grieved can, in general, only receive satisfaction by pecuniary damages. (*a*) But it frequently happens from the consequences attending injuries to real property, 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. The Courts of Equity, 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.

(*a*) By the old writ of waste in the *tenet*, the place wasted was recovered.

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 a very prompt and effectual protection where this species of injury is sustained, it will be useful to give a brief account of the nature of the proceeding.

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 Malbridge 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 Chan-

(*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.

cery 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 dispunishable 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 in Eden's treatise on the law of Injunctions. Ch. 9.

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 where the act complained of is a mere trespass. (*c*) This principle has been adopted only by the modern practice of the court;

(*a*) See ante, p. 125. *in notis.*

(*b*) 1 Eq. Ca. Ab. 400. 3 P. W. 268. Amb. 105. 3 Atk. 94. 210. 725. 6 Ves. 787.

(*c*) 3 Atk. 21. 1 Br. Ch. Ca. 588. 6 Ves. 147. 7 Ves. 508. 10 Ves. 290. 17 Ves. 128. 158. 281. Dick. 670. Swanst. 208.

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 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*) 3 Atk. 262. Eden. 159.

(*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 surveyor 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*)

Property must be actually affixed.

But in such 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 dove cote, 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,

(*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.*

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 dove cote, a clear act of waste is 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 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

(*a*) *Kimpton* v. *Eve*, 2 Ves. & Bea. 349. And see 2 Dy. 108 b.

(*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 part of the personalty. In *ex parte Quincey*, 1 Atk. 477. the question arose on a bankrupt petition.

(*c*) See *ante*, p. 130.

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. (*a*) And by analogy to this proceeding, a Court of Equity now very frequently interferes by injunction; as for instance, against a rector at the suit of the patron. (*b*) 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. (*c*) It seems also that bishops, deans, and chapters, may be restrained by injunction at the suit of the crown. (*d*)

(*a*) 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. 5. ch. 2. s. 74. 5 Swanst. 493. 499. A very learned account of the introduction of the writ of prohibition of waste will be found in *Jefferson* v. *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.

(*b*) 2 Atk. 217. Barn. 399, S. C. Amb. 176. 1 Bos. & Pul. 119.

(*c*) 2 Br. Ch. Ca. 552.

(*d*) Amb. 176. 3 Mer. 427.

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 lease, support trespass *quare clausum fregit* against a stranger for the removal of fixtures attached to his freehold. 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*)

(*a*) The recovery of the tenant would, perhaps, bar the reversioner of his remedy, and the damages would not be apportioned as in a case where injury is done to trees, &c. But it would appear, upon principle, that in default of the tenant suing, the landlord might proceed for the deterioration of his reversionary estate by the removal of articles, which, until an act done by the tenant, are to be considered as strictly a part of the freehold. As to analogous cases of trespass for cutting down

So, where a tenant, under colour 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 premises, the landlord cannot, pending the lease, 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 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 reduced again 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

trees, see 4 Co. 63. Br. Ab. Tresp. 275. Com. Dig. Tresp. A. 1, 2. Biens, H. Viner's Abr. Tresp. S. 7 T. R. 9. 1 N. R. 25. 2 Mau. and Sel. 499. 1 Saund. 322. n. 5. And see 1 Price, 53.

(*a*) 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. 4. p. 8. 12 Ed. 4. p. 8. Litt. § 71. Saville, 84. Dyer, 121 b.

(*b*) 21 Hen. 7. 26. 2 Mod. 7.

been demised to him, or for any other reason, has no right to take away. (*a*)

It would, therefore, 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 a late case (*c*), indeed, an action of trespass was brought by a tenant against the bailiff of his landlord, in respect of 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; 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 and the defendant who acted under him, were estopped from insisting that the tenant's interest was put an end to by the severance. (*d*)

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 which have been disannexed from the freehold, and to bring trespass *quare clausum fregit* for injuries to them previous

(*a*) For the principle, see 11 Co. 81. *Udal* v. *Udal*, Aleyn. 82. *post*, 239. 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.

(*b*) And *semb.*, not against a stranger, *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.

to the act of severance, will frequently reside in different individuals. This is further illustrated by the case of *Harrison* v. *Parker*. (*a*) In that case a person had, at his own expence, 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 wrong doer, 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.

There are, indeed, cases arising out of the law of fixtures, where an action of trespass *quare clausum fregit* may be brought against an individual for retaining possession of land to which fixtures are attached, but where an action of trespass *de bonis asportatis* could not be brought against him for severing and taking them away. For a tenant who wrongfully continues in possession of the premises after the expiration of his term, is held not to abandon his right of property in his fixtures; but may, nevertheless, be sued in trespass *quare clausum fregit* by his landlord, because his property in the fixtures does not give him a right of onstand on the land. (*b*)

(*a*) 6 East. 154. See also 8 Taunt. 614. *et seq.*

(*b*) *Penton* v. *Robart*, 2 East. 88. See *ante*, part I. ch. 2. s. 5. As to the tenant's right of onstand by express covenant, and his right to maintain trespass under such circumstances, see *Beaty* v. *Gibbons*, 16 East. 116.

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* (*a*), 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 "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."

If the principle contained in this passage be correct (*b*), it would seem to apply equally to the case of fixtures. The question, however, does not appear to have undergone much discussion (*c*); 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 respect to the form of declaring in an action of trespass for injuries to fixtures; if the plaintiff has both an interest in the land, and also the right of

(*a*) Aleyn. 82.

(*b*) 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.

(*c*) Vide *Spooner* v. *Brewster,* 2 Bing. 136. *Ward* v. *Andrews,* 2 Chit. Rep. 636.

property in the severed chattel, the declaration should contain a count *quare clausum fregit, &c.* with an *asportavit* count in the usual form. In the latter count the articles must be treated as of a personal and chattel nature; but in the former, it seems advisable, in order to meet objections upon this point, to describe the property in terms applicable to it only in a fixed state. (*a*)

Plea. As to the form of pleading, it may be observed, that the plea of the general issue will, in ordinary cases, raise the question between the parties respecting the right of property in fixtures; because, in trespass, whether to real or to personal property, the defendant may, under the general issue, give in evidence a title in himself, or those under whom he claims.

And upon this subject it may not be unimportant to make some observations upon the case of *Welsh* v. *Nash*, which appears, at first sight, to be at variance with the above rule, and has, moreover, been thought to involve a general question as to the property in personal chattels annexed to land. 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. (*b*) But it is to be observed of this case, that the question in controversy came be-

(*a*) See, however, *Pitt* v. *Shew*, 4 Bar. & Ald. 206., where 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.

(*b*) 8 East. 394. And see 5 Bar. & Ald. 603.

fore the Court upon a case reserved, in which, as it was said by the Court, 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*)

(*a*) The legal effect of the annexation of a personal chattel to the freehold by a stranger was adverted to on a former occasion, and reference was then made to the present part of the work. The following authorities have laid down the law upon this subject with much particularity. 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 any thing, and before the timber is fastened with nails, or the trees "have taken root." To the same effect as the above is the language of Bracton. *De acq. rerum dom.* chap. 3. s. 4. 6. And his observations are copied with very little alteration by Fleta, lib. 3. c. 2. s. 12. The reader will also find some curious illustrations of the same rule in Perkins, tit. Dower, 329. Cowell's Inst. book 2. tit. 1. s. 27. Fulbeck's Par. tit. Devises, 59.

Costs.

It may be useful to add a remark in respect of the costs in an action of trespass, as applying to the case of personal chattels annexed to land. The statute 22 & 23 Car. 2. c. 9. which restrains the plaintiff's right to costs in an action of trespass where the damages are under 40*s.* and the judge does not certify, extends to trespass *quare clausum fregit* for injuries done to things fixed to the freehold. (*a*) And it is held that a case is within the statute, although the declaration charges the defendant with taking and carrying away a portion of the freehold, if the taking and carrying away is merely a mode or qualification of the injury done to the land, as distinguishable from an asportation of personal property. (*b*) But an injury to mere personal property, or to chattels severed from the freehold, is not within the statute. And, therefore, whenever the circumstances of the case will admit of the act complained of being considered as an act distinct from the trespass to the land, it is advisable to insert a count *de bonis asportatis*, for the purpose of avoiding the restrictive operation of the statute.

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

(*a*) 11 Mod. 198. 6 Vin. Ab. 557. (*b*) And see Hull. on Costs, p. 68. Tidd's Prac. 976. *et seq.* 7 Ed.

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. (*a*)

Not whilst they remain annexed.

But as trover is not maintainable except for the conversion of personal chattels, it cannot be brought for the recovery of fixtures so long as they are annexed to and remain parcel of the realty. This rule is plainly recognized by Lord Hardwicke in the case *Ex-parte Quincey*. (*b*) And in *Lee* v. *Risdon* (*c*), Ch. J. Gibbs observes, that it never was heard of that trover could be brought by a tenant for his fixtures, after the expiration of his term. So also, in the case of *Davis* v. *Jones* (*d*), 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, as mere moveable chattels. (*e*) 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

(*a*) Bac. Abr. Trover A. And see 2 Mod. 245. Bull. N.P. 44. b.
(*b*) 1 Atk. 478.
(*c*) 7 Taunt. 191.
(*d*) 2 Bar. & Ald. 165.
(*e*) 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*.

the action of trover was maintainable in respect of personal chattels only. (*a*)

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. (*b*) 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 hand-mill, 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 bonis 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 shewn in the defendant's plea. (*c*)

(*a*) And see 2 Bar. & Cres. 79. Cro. Jac. 129. See also the remarks of Lord Ellenborough in *Horn* v. *Baker*, 9 East, 237.

(*b*) It will have been observed, that several of the most important questions respecting fixtures have, in fact, been determined in actions of trover; as in the instance of the cyder-mill before Ch. Bar. Comyns; the hangings and tapestry in *Harvey* v. *Harvey*; and the salt-pans in *Lawton* v. *Salmon*. See also *ante*, p. 197. note *a*. It does not distinctly appear, whether the articles in these cases had been separated from the land before the commencement of the action.

(*c*) *Wood* v. *Smith*, Cro. Jac. 129. Com. Dig. Action on the case, Trover, G. 1. See also Dyer, 108. 2 Ves. & Bea. 349. As to 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. See the principle upon which the case of *Niblet* v. *Smith*, 4 T. R. 503. was decided, *post*, 252.

Whether trover lies where the severance and asportation are one continued act.

From the nature of the action of trover, as thus applied to the subject of fixtures, a question arises, whether this action can be supported, if the severing and carrying away of the article is one continued and entire 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 *Berrie* & *Herde*, adjudged upon a special verdict in B. R.

This case of *Berry* v. *Heard* is found in several of the books 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, 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, which determined the instant it was cut down. This

(*a*) Palmer, 327. Sir W. Jones, 255. Bend. 141. Cro. Car. 242.

was the principal question 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 consider the objection as to the cutting and carrying away of the trees being one continued act. For they advert to the rule, 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. (*a*)

Another case, *Udal* v. *Udal*, in which the same point arose, has been mentioned on a former occasion. (*b*) 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 given by Rolle.

There is another case which may perhaps deserve

(*a*) And see *per* Houghton J. in the same report.

(*b*) *Ante*, p. 239.

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 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 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 a recent 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?

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. 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.

There does not appear to be the same objection, upon principle, to the action of trover being maintainable when the severance and asportation are one entire act, as where an action of trespass *de bonis asportatis* is brought. For the subsequent

(*a*) 3 B. Moore, 107. And see *Davis* v. *Connop*, 1 Price, 53.

detention of the article in a chattel state may perhaps be thought to amount to a conversion, for which the action of trover might be sustained. At all events, a very short interval between the acts of severing and taking away the fixture will 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.

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 of 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 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, even during the continuance of the tenant's term. (*a*)

Is a concurrent remedy with trespass.

Upon this subject, however, the reader is referred to the remarks in the preceding division respecting the action of trespass; and as an action

(*a*) *Farrant* v. *Thompson*, 5 Bar. & Ald. 826. 5 Stark. C. N. P. 131. And see *Berry* v. *Heard*, *ante*, p. 245. 1 Price, 53.

of trover may be supported whenever trespass *de bonis asportatis* is maintainable, the observations that have been made 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 a more extensive remedy than trespass, and is frequently 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. (*a*) It is presumed, however, that an action of trover would have been maintainable in this case, at least after a demand and refusal. (*b*)

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.

Actions founded upon Contract.

Actions, *ex contractu*, in respect of fixtures.

Fixtures are frequently 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

(*a*) 2 Roll. Ab. Tresp. 556. pl. 50. Br. Ab. Tresp. pl. 48. Cro. Eliz. 574. 16 Hen. 7. fol. 3. 21 Hen. 7. fol. 39. And see 9 Price, 287.

(*b*) See a point as to the form of the demand for fixtures, in *Colegrave v. Dias Santos*, 1 Bar. & Cres. 77.

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, may be prevented from removing articles which by the general law of fixtures he would be allowed 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 property, which would amount to a breach of an implied contract under which the premises are held. And in like manner a variety of cases occur, 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* would be the proper remedy.

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 is upon this principle, that a compensation may 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 his personal estate has thereby received any benefit, his executor will be answerable to that extent in an action for money had and received.(*a*)

(*a*) *Hambly* v. *Trott*, Cowp. 371. And see Cases and Opinions, vol. 2. p. 304.

Pleadings. Mode of describing the property.

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 while it continues 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*. (*a*)

Price of fixtures not recoverable as goods sold.

There an outgoing tenant had left on the premises certain fixtures, consisting of grates and other fixed articles, which the defendant, the incoming 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.

The same point was afterwards expressly adjudged by the Court of Common Pleas, in the case of *Lee* v. *Risdon*. (*b*) 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

(*a*) 5 Esp. N. P. C. 176. 4 Bay. Moore, 73. *Knowles* v. *Michel*, 15 East, 248. *Horn* v. *Baker*, 9 East, 215.
(*b*) 7 Taunt. 188. 2 Marsh. 496. S. C. And see *Watson* v. *Salmon*,

and chattels again, by severing them during the term, yet until they were severed, they were parts of the freehold.

The necessity 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 shewn 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: 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 moveable 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. But it is probable that the fixtures there in dispute had been severed from the freehold some time before the sale by the defendant. It is, however, to be observed, that Chief J. Abbott 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

(*a*) *Niblet* v. *Smith*, 4 T. R. 504. (*b*) 4 Bar. & Ald. 206. *ante*, p. 240.

execution under a *fieri facias*, which contains similar words. (*a*)

However, notwithstanding this decision, it cannot be considered safe 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 fixtures from the freehold. And no difficulty will result in practice from this rule, because the pleader will in every case be safe, if he adheres to the popular term of "fixtures."

Form of the 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 where a general count will suffice. Thus, if a party has agreed 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 the 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. (*b*) But, where there was an agreement between the plaintiff and the defendant, that the defendant was to accept an assignment of a lease from the plaintiff, and to take the fixtures, &c. at a valuation, and the fixtures were valued and pos-

(*a*) 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*.

(*b*) *Salmon* v. *Watson*, 4 Bay. Moore, 73.

session given, but the lease was never assigned; it was held under Lord Ellenborough's direction, that *indebitatus assumpsit* would not lie for the fixtures, but that the plaintiff should have declared upon the special agreement. (*a*)

It will not, however, be necessary on the present occasion, to enter more minutely into the rules and forms of pleading; 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.

(*a*) *Neal* v. *Viney*, 1 Camp. N.P.C. 471.

CHAPTER II.

OF OTHER LEGAL PROCEEDINGS IN RESPECT OF FIXTURES.

SECTION 1. On the Exemption of Fixtures from Distress.
SECTION 2. 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

(*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. p. 34. 48. And see the reasons assigned in *Simpson* v. *Hartopp*, Willes, 514.; and *Pitt* v. *Shew*, 4 Bar. & Ald. 207.

"lord, to compel the tenant to pay the 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, "what-"ever 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 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 H.7. c. 13. the Court in discussing the right of the heir to take furnaces, fixed tables, the covering of beds, &c.

(*a*) Upon the origin of the right of distress, and the principles by which it ought to be governed, see Pothier, *Traité du Contrat de Louage*, part 4. ch. 1.

(*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 lies against a lessee for not repairing a house erected by himself on the demised land, and the writ may be in *domibus dimissis*. Lord *Darcy* v. *Askwith*, Hob. 234. Upon this subject, see 7 Taunt. 157. And see Serj. Hill's MS. note in Vin. Abr. Waste, E. Linc. Inn. Lib.

treat such things as being clearly exempt from distress; and a similar opinion is expressed in the year book 21 H. 7. 26. (*a*) In conformity with these 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 the principle to be a part of the common law. (*c*)

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 that are constructively annexed to the freehold. For the doors and windows of a house hanging only upon hooks, and which are moveable, are not distrainable. And so of a mill-stone, which, though not annexed to the freehold, is yet essentially parcel of the mill. (*e*)

(*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. *Powel*, 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.

(*e*) 14 Hen. 8. p. 25. Finch, Bk. 2. p. 155. Charters, &c. cannot be distrained; for they are not chattels in law. Br. Ab. Dist. 29. Replevin, 34. Brownlow, 168.

Though removed for a temporary purpose.

And it is held, that even a temporary removal of such things for purposes of necessity, is not sufficient to destroy the privilege. Thus, in the year-book 14 Hen. 8. p. 25., it was adjudged, that if a millstone 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*.

Chief Baron Gilbert, in alluding to this subject, 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 modern occasion, appears to consider that the ancient authorities respecting the smith's anvil, proceeded altogether upon the ground of its being itself affixed to the freehold. (*c*)

In a late case in the Exchequer, (*d*) it was argued,

(*a*) And as to this, see Br. Ab. Dist. pl. 23. Finch, *ub. sup.* 11 Rep. 50. Gilb. Dist. 49. 6 Mod. 187.

(*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 millstones, 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 Comyns's Dig. Distress, C.

(*d*) *Duck* v. *Braddyll*, 1 M'Cleland Rep. 217.

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 on that occasion, 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.

Growing corn distrainable.

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*) But this is now altered by the statute 11 G. 2. c. 19. s. 8., as between landlord and tenant. For by that statute, landlords are enabled to distrain 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

(*a*) 5 Ed. 2. pl. 135. 18 Ed. 3. 4. 4 Bar. and Ald. 208. *per* Abbot, C. J. 2 Inst. 82. 1 Roll. Abr. 666. 2 Mod. 61.

Nursery trees not distrainable.

in a late case, 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. (*a*)

(*a*) 8 Taunt. 431. 2 Bay. M. 491. S. C. *Acc.* 8 Taunt. 742. 5 Bay. M. 96. S. C.

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 moveable goods and chattels of the debtor. (*a*) But this rule has been altered in modern times; for *fixtures* are now considered, in favor of creditors, to be so far in the nature of personal chattels, that 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 that decision related to *trade* utensils, and a distinction seems to have been taken by Lord Holt on this particular ground, yet it appears to be now generally understood that the rule is the same with respect to other fixtures, whether put up for ornament or any other purpose. (*c*)

(*a*) 20 Hen. 7. 15. 21 Hen. 7. 26. *Day* v. *Austin*, Cro. Eliz. 374. Owen, 70. S. C. And see 1 Roll. Ab. Execution, 891. Com. Dig. Execution, C. 4. Process, D. 6. Gilb. Exec. 19. Under the writ of attachment in real actions, the sheriff could only take the moveable 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.

(*b*) 1 Salk. 368. 1 Brod. & Bing. 512. And see *Ryall* v. *Rolle*, 1 Atk. 170. 176.

(*c*) *Vide* Tidd's Pr. 1018. (7th Ed.) See also 5 Bar. & Ald. 625. 1 Stark. N. P. C. 45. 4 Bar. & Ald. 207. *per*

There is, however, no case which determines 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 late case of *Steward* v. *Lombe* (*a*), 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 erected by, and 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 in consequence of the private agreements of parties. Thus 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 waste*; for in the latter case he said that the sheriff could not cut down and sell, though the tenant himself might.

Nor under process against the owner in fee.

Moreover, it appears 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

Abbot Ch. J. In the case of *Allen* v. *Allen*, Mosely 112., it seems admitted in argument, that marble chimney-pieces and glasses are ornaments every day taken down by tenants, and also upon executions.

(*a*) 1 Brod. & Bing. 506.

the late 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 seized 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.

It does not, however, appear to be clearly established, that articles erected by the owner of the freehold can in no instance whatever be taken 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 assumed that the property in question would descend to the heir as an essential part of the freehold, and would not

(*a*) 5 Bar. & Ald. 625.

pass as personalty to the executors. The decision, therefore, is perhaps not an authority for exempting, generally, the fixtures which tenants for life, in tail, or even in fee, may set up, and which their executors will become entitled to, as partaking of the nature of personalty. (*a*)

Fixed articles demised, seizable 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; though he cannot sell the articles as divided chattels in separation from the freehold. (*b*)

But if the tenant wrongfully severs things which have been demised to him together with the premises, 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. (*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. 568. *per* Richardson J. 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 I. ch. III. s. 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.

(*c*) *Farrant* v. *Thompson*. 5 Bar. & Ald. 826.

When sheriff must sell fixtures separately.

Where the sheriff takes 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. (*a*)

(*a*) *Barnard* v. *Leigh*, 1 Stark. N. P. C. 43.

CHAPTER III.

OF CRIMINAL LAW IN ITS APPLICATION TO PROPERTY AFFIXED TO THE FREEHOLD: WHEREIN OF DEODANDS.

Fixtures not the subject of larceny.

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*)

The principle, that the taking of property fixed to the freehold, though done *animo furandi*, does not

(*a*) *Vide* Bract. Lib. 3. c. 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.

amount to felony unless an interval elapse 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 na- "ture 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 lar- "ceny could be committed by the rules of the com- "mon law; but the severance of them was, and in "many things is still, merely a trespass; which de- "pended 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 moveables, 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 proprietor, in this their newly-ac- "quired 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."

(*a*) *Vide* 3 Inst. 109. Hale's P.C. 22. Aleyn. 83. Palm. 327. Str. 510. Hawk. Bk. 1. ch. 33. s. 21. 1134. Leach, C.C. 587. East, P.C. 587. And see Freem. (*b*) 4 vol. p. 232.

The reasoning contained in this passage may not, perhaps, be deemed very satisfactory at the present day. (*a*) The rule, however, is to be understood as clearly established in criminal law; and it is applicable to every species of property annexed to land, except in certain cases which have been made the subject of express legislative provision.

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 be relaxed in cases where it would operate to the prejudice of a prisoner. Thus 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 constitute the breaking it open to be burglary, or an offence within the statutes relating to housebreaking. 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 moveables, partaking of the nature of those utensils, and adapted to the same use. (*b*)

Fixtures protected by statutes.

There are, however, certain particular cases in which the legislature has interfered to afford protection to property fixed to the freehold, where, from its nature, it would be particularly exposed to theft. For by the stat. 4 G. 2. c. 32. to steal, rip (*c*), cut, &c., with

(*a*) Concerning the reasonableness of this rule of Criminal Law, see Hobbes' Dialogue between a Philosopher and Student. Hobbes' Tracts, Vol. 2. p. 118.

(*b*) Fost. C. C. 109. And see Hale, P.C. Vol. 1. p. 555. Vol. 2. 355. 358. East, P.C. 489. Kelynge, 59. 69.

(*c*) It has been questioned whether this term denotes a complete severance from the freehold.

intent to steal, any lead, or iron bar, iron grate, iron palisado, or iron rail whatsoever, being fixed to any dwelling-house, &c., or to any building, &c., or fixed in any garden, &c., is made felony, and subject to transportation for seven years. And this provision is by the stat. 21 G. 3. c. 68. extended to copper, brass, bell metal, utensils, or fixtures, being fixed to any dwelling-house, outhouse, &c. (*a*)

Lead, &c. affixed.

Also, by statutes 9 G. 3. c. 29.; 41 G. 3. c. 24.; and 52 G. 3. c. 130. the pulling down or demolishing engines or machinery belonging to mills or manufactories, by riotous assemblies of persons, is made felony; and the same remedy is given to the party injured, in respect of the damages sustained, as in the riot act, 1 G. 1. st. 2. c. 5. (*b*)

Machinery of mills, &c.

And, by 56 G. 3. c. 125. the demolishing, destroying, &c. of engines, erections, or works belonging to collieries or mines, by riotous assemblies, is felony; and there is a like remedy for the damage sustained as in the last-mentioned cases.

Engines in collieries or mines.

Also, by the statute 57 G. 3. c. 19. s. 38. the remedy and protection afforded by the riot act in respect of *buildings* demolished by riotous assemblies,

Fixtures riotously destroyed.

(*a*) As to the construction of these statutes, and the cases that are within them, 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.

(*b*) The determination, whether the machinery destroyed is part of the works belonging to the mill, or is independent of it, forms a question for the decision of the jury. 1 Price, 345.

is expressly extended to *fixtures*, &c. destroyed, taken away, or damaged.

Trees, shrubs, &c.

There are also several statutes relating to the destruction and stealing of timber trees, shrubs, roots, minerals, engines, &c.; and which may be found collected in Hawkins' P. C. Bk. 1. c. 58. Appendix: and in East, P. C. 588. *et seq.* And see the Statutes, 4 G. 4. c. 46—54. and 7 G. 4. c. 69.

Deodands.

Things affixed, not deodands.

The peculiar nature of personal chattels after their annexation to the realty, has given rise to some nice questions connected with the subject of deodands. It will not be necessary, on the present occasion, to discuss the origin and general principles of this curious branch of law; because they have been very fully treated of by Mr. Justice Blackstone in his Commentaries. (*a*) With reference, however, to the subject of the present treatise, it is to be observed, that the ancient authorities considered, that if 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 moveable chattel. But it would appear from later opinions, that there cannot be a deodand in such a case, unless the thing was actually separated from the freehold before the accident happened.

(*a*) Bl. Comm. Book 1. ch. 8. p. 300. And see Foster on Homicide, Disc. 11. ch. 1.

Thus, in the Axminster parish case, a man ringing a bell in a church was drawn up and strangled by the rope. Two justices, Hide Ch. J. and Windham, were of opinion, that the bell was not forfeited, because parcel of the freehold; but the other two justices, *semb. contra.* The case was adjourned, and was not afterwards moved. (*a*) Bell in a church.

However, in the discussion of the above 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.* (*b*) Door or gate.

And, in like manner, it is said to have been held by Clench and Fenner, justices, that the sail of a windmill, which causes a death by striking against a man, cannot be a deodand. (*c*) 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. Sail of a windmill.

So a mill-stone, or the wheel of a forge, or mill, which occasions a death, cannot be accounted a deodand. (*d*) Mill-stone, &c.

And so a tree, not severed, but which is blown by the wind against another (*e*). Tree.

(*a*) 1 Sid. 207. 1 Leon. 136. S.C. 1 Keb. 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. *Sed vide Norff* v. *Caudray*, Dyer, 77. a. *in notis.* Another argument was urged against the king, in the above case, viz., that the bell had been already dedicated to God. In *Woodward* v. *Mackpeth*, Comberb. 132., it is said that church bells are chattels not fixed to the freehold, though the frames are. As to which, see *ante*, 173. n. a.

(*b*) 1 Sid. 207. 1 Keb. 745.

(*c*) 1 Sid. 207.

(*d*) 6 Mod. 187. Sir T. Ray, 97. 3 Inst. 57. Keb. 745. And see 1 Salk. 220. *per* Pollexfen Ch. J., in the Case of the Lord of the Manor of Hampstead. See also Finch. B. 3. c. 18.

(*e*) 1 Sid. 207. And see 1 Salk. 220. Hale's P. C. 420.

Bell or mill-stone falling.

But if a bell falls from a steeple, or a mill-stone falls from the mill, and kills any one in its descent, then it shall be forfeited, as a deodand; because it was a chattel from the moment of its severance. (*a*)

Jack-weight.

And so if a jack-weight falls and kills a man, the weight shall be forfeited; but not the jack which moves it. (*b*)

For further authorities upon the subject of deodands, the reader is referred to 1 Hale, P. C. 420.; 1 Hawk. c. 26. Com. Dig. Waife, E. 2. 2 Bac. Ab. 393. 7 Vin. Ab. 535.

(*a*) 1 Keb. 725. (*b*) *Arg.* 1 Sid. 207.

APPENDIX.

APPENDIX:

CONTAINING

A SUMMARY OF PRACTICAL RULES AND DIRECTIONS RELATING TO FIXTURES.

No. I.

General Rules respecting Fixtures between Landlord and Tenant; shewing what Fixtures a Tenant may take away; the Time for removing them, &c. &c.

I. A TENANT may take away things which he has himself affixed to the premises for the purpose of *trade and manufactures.*

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, and the like. (1 Salk. 368. 3 Atk. 13. Amb. 113. 1 Hen. Black. 259. 3 East, 56. Bul. N. P. 34.)

Machinery in breweries, collieries, mills, &c.; such as steam-engines, cyder-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.)

Buildings for trade, such as a varnish house; at least if built on plates laid on brick-work. (2 East, 88.)

And so, as it should seem, sheds 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.)

It is by reference to these instances, that the tenant must be guided in removing the ordinary articles which he puts up in the course of his trade. (*a*)

It has not been distinctly established in the courts of law, that a tenant may remove substantial and permanent additions to the premises, although he has built them exclusively for the convenience of his trade: such as lime-kilns, pottery or brick-kilns; wind or water-mills (*b*); or work-shops, store-houses, and other buildings of that description. Nor, indeed, is it satisfactorily laid down, that trade erections of a less substantial nature than these, are in all cases removable by a tenant: as, for example, the furnaces and flues of a smelting-house glass-house, &c., or the stoves and floors of a malting-house. Cases, therefore, of this description, will be subject to considerable doubt; and particularly where the removal of the article would very much deteriorate the freehold to which it is attached, or where the structure and substance of the thing itself must be destroyed before it can be taken away.

In questions respecting the right to remove erections of this description, the reader must refer to the observations in the concluding part of the first Section of Chap. II. Part I.

II. Besides trade-fixtures, a tenant may also remove certain matters that he has put up at his own expence *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, 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 erected in manufactories, shops, or warehouses, for the convenience of trade.

(*b*) With respect to kilns, see 4 T. R. 504. 2 Bar. & Cres. 608. As to windmills, see 4 Leon. 241. 6 T. R. 377. 1 Brod. & Bing. 506.

And under this class of fixtures, it appears that 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.*

Of the first class, the following examples are found in the authorities: —

Hangings, tapestry, and pier-glasses, nailed to the walls or pannels of a house; and even, as it is said, where they are put up in lieu of wainscot; marble, or other ornamental chimney-pieces; marble slabs; window-blinds; wainscot, fixed to the walls by screws, and the like. (*a*) (2 Freem. 249. Moseley, 112. 1 P. Wms. 94. Str. 1141. 3 Atk. 12. Amb. 113. 1 Hen. Blac. 260. 2 Saund. 259. n. 11. 3 East, 53. 7 Taunt. 191. 2 Brod. & Bing. 58. 1 Bar. & Cres. 77.) (*b*)

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 meant for ornament merely, 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. (3 Esp. C. N. P. 11.)

Thus it has been held, that he is not entitled to pull down a conservatory built on a brick foundation, and which is inti-

(*a*) As to chimney-pieces and wainscots, see the notes, p. 79. 81. Upon which subject, and the removal also of marble slabs, the reader may refer to *Allen* v. *Allen*, Moseley, 112.; as cited by Mr. Serjeant Hill, in his notes to Viner's Abridgment, in Lincoln's Inn library, vol. xv. p. 43.

(*b*) Some of these cases 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.

mately connected with the dwelling-house. (2 Brod. & Bing. 54. 4 B. Moore, 440.)

Nor a pinery erected on brickwork, although built in a garden and detached from the house itself. (Id. ibid.)

With respect to the *second* class of fixtures, viz. those put up 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 brickwork; iron backs to chimnies; beds fastened to the ceiling; fixed tables; furnaces, coppers; 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. 7. 12.; 20 Hen. 7. 13.; 21 Hen. 7. 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. & Cres. 77. 4 Bar. & Cres. 686. Burn Ecc. Law, 301.)

But, in respect of 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. (*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 expence *for purposes which are merely agricultural.*

(*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: bookcases, cabinets, &c. planned and fitted; dressers, shelves, presses, bins; fixed cisterns and sinks; iron chests; bells, external and internal; turret and other clocks; lamps; and other articles of similar nature and construction.

Thus it has been held, that a tenant could not remove a beast-house, carpenter's-shop, fuel-house, cart-house, pump-house, or fold-yard wall, erected for the use of his farm, *even though he left 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 relation to a *trade* of any description, the tenant may take it away, notwithstanding it is the means or instrument of obtaining the profits of land.

Thus, a tenant may take away a mill for making cyder; 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 nature 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 Sect. III. Ch. II. Part I.; as the questions to which they give rise are sometimes attended with much difficulty.

IV. *A nursery-man or gardener* is legally entitled, at the end of his term, to remove and dispose of the trees, shrubs, &c. which he has planted for the purpose of sale. (2 East. 7 Taunt. 191. 4 Taunt. 316.)

It has been held, however, that he cannot plough up strawberry-beds in full bearing at the close of his term, without having any reasonable object in view. (1 Camp. N. P. C. 227.)

But a private person is not at liberty to sell and remove young fruit-trees planted by himself. (4 Taunt. 316.)

The better opinion seems to be, that a gardener or nursery-man cannot 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 I. Ch. II. Sect. III.)

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. Com. Dig. Waste, D. 2.)

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 is 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. And as to this case, see Part I. Ch. II. Sect. V.)

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.)

If, however, the interest which the tenant claims in the demised premises is uncertain, as, if he is tenant strictly at will, or tenant *pour auter vie*, &c. in this case it is apprehended, that 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 a parol demise. And, with respect to the description of fixtures which a tenant is authorized to remove, there is no distinction whether the party is lessee for life, for years, or merely tenant from year to year, &c.

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 the circumstances under which it was originally entered into.

Thus, if a tenant covenants to repair the demised premises and all erections, &c. built, or that should 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.)

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. (See *ante*, Part I. Chap. II. Sect. VI.)

VII. A tenant may so construct an erection or building, that it shall 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 moveable chattel.

Thus, if a tenant erects a barn, granary, stable, or any other building, upon blocks, rollers, stilts, or pillars, the landlord is not entitled to consider it as a part of his freehold. (3 East, 55. 3 Esp. N. P. C. 1 Taunt. 20. 11 Vin. Ab. 154. Bul. N. P. 34.)

So a varnish-house, laid upon a wooden plate resting on brickwork, the quarters being morticed into the plate, is a chattel, and removable by the tenant. (4 Esp. N. P. C. 33. 2 East, 88. See *ante*, p. 34.)

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.)

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 erected 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 avoid much litigation, to have special clauses inserted in their leases relative to the disposal of fixtures at the end of their term. It may be provided in 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 incoming 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 the produce and profits of land, as in the instance of nursery-grounds. (*a*)

(*a*) The following precedents are inserted with a view of shewing the nature of the provisions recommended in the text.

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, rail-roads, 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 thereto, 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.)

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 whatsoever, 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 His Majesty's woods, forests, and land-revenues, or the surveyor-general for the time being of His Majesty's land revenue, or His 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 His Majesty, his 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 His Majesty, his heirs, and successors; any thing herein contained to the contrary thereof in anywise notwithstanding.

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.)

Provision in the same that the Landlord shall take the Trees by Appraisement at the End of the Term.

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 execu-

tors, 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.)

No. II.

Miscellaneous Rules and Directions respecting the Purchase, Valuation, &c. of Fixtures, between Landlord and Tenant, and between Outgoing and Incoming 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 most commonly arise in practice; as 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.

However, in all these cases, the valuation should be made with reference to what appears to be the real meaning of the parties, as collected from the language of the whole agreement and the general nature of the transaction.

Upon agreements between landlord and tenant for the purchase of fixtures, it would seem to be requisite that the contract should be in writing, and signed, &c. (*a*) And it appears also, that where there is a written agreement between the parties, it cannot be received in evidence unless it is stamped with an agreement stamp. The point has, indeed, been so ruled by Best Ch. J. at *Nisi Prius*, in a very late case; in which he held, that an agreement for the sale of fixtures to be taken at a valuation by an incoming tenant, did not come within the exception in the stamp act in favor of agreements "for or relating to the sale of goods, wares, or merchandizes." (Wick v. Hodgson. Sit. after Mic. T. Guildhall, Dec. 8, 1826.) (*b*)

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, it seems they would 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 reference should be expressly made to them in the instrument of conveyance, by schedule or otherwise. (*c*)

(*a*) See *ante*, 203.

(*b*) As to the principle of this decision, see 5 Esp. N. P. C. 176. 4 T. R. 504. 9 East. 215. 7 Taunt. 191.; with which compare 4 Bar. & Ald. 206. 1 Bing. 6. 3 Bar. & Cres. 560.

(*c*) 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, chimney-pieces, 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.

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. &c.) shall be taken by the said A. B. (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 A. B. and the said C. D. (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 A. B. to the said C. D. within the space of days after it shall have been so ascertained as aforesaid, and the said A. B. 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).

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 land, or makes any other engagement with his landlord in respect of the same premises, 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 he must replace every thing in its former situation. If the premises sustain damage (however unavoidable it may be), by taking away the fixtures, it seems that the landlord may compel the tenant to make it good.

In some leases, as of mills, breweries, &c. the fixed machinery and utensils, which form a very valuable part of the premises, are specifically demised to the tenant. In these cases, the tenant will be bound, under the general covenant to repair, not only to keep in proper condition the buildings, &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 conceived, 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, it is presumed that he would be entitled to remove these at the end of the term.

The qualified property which, in these cases, a tenant has in the fixed articles demised to him together with the premises, subsists only 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*)

With respect to Transactions between Outgoing and Incoming Tenants ; —

When it is agreed between these parties, that fixtures are to be taken at a valuation, the broker should value those things to the incoming tenant, which, 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 have in fact been originally purchased of the landlord by the outgoing tenant. (*b*)

But the outgoing tenant cannot insist on things being appraised which, as against his landlord, he is not legally authorized to sever; nor will he be entitled to any allowance for them, notwithstanding he may have put them up at his own expence.

And with respect to things which are generally removable by tenants, if any of these were affixed to the premises prior to the demise to the first tenant, and were not purchased by

(*a*) Sometimes an express covenant is inserted in leases of mills, mines, &c. with machinery, 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.

(*b*) As to agreements for the sale of fixtures between outgoing and incoming tenants, being in writing, and requiring an agreement stamp, see *ante*, p. 287.

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 incoming tenant.

If the property purchased by the incoming from the outgoing tenant, turns out in fact to belong to the house, and was scheduled in the original lease, the incoming tenant may recover the sum he paid for it, in an action against the outgoing 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 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. (Ibid.)

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 *ground 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 underlease 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 underlessee 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 frequently happens that the purchase-money of fixtures is advanced by a third person on behalf of the incoming 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 the assignment of the commissioners. (See 9 East, 215.; and compare 3 Taunt. 256. in respect of an execution.)

Where an incoming tenant enters into an arrangement with the outgoing 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 perhaps afterwards insist, that as the articles were not actually removed during the outgoing 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.

In like manner, if a tenant is desirous of leaving his fixtures at the end of his term to be valued to an incoming tenant, it is absolutely necessary that he should obtain the consent of the landlord, before he quits possession of the premises. If, however, there is a covenant in his lease that the fixtures shall remain for the benefit of the incoming tenant, on paying their value, it would seem 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 mean time. (See 16 East, 116.)

The rights of incoming and outgoing 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 a late occasion, that a custom of valuing a particular article as between outgoing and incoming 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.)

No. III.

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 last general stamp act, 55 G. 3. c. 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*l.* a duty of 2*s.* 6*d.*; where it exceeds 50*l.*, but does not exceed 100*l.*, a duty of 5*s.*; where it exceeds 100*l.*, and does not exceed 200*l.*, a duty of 10*s.*; where it exceeds 200*l.*, and does not exceed 500*l.*, a duty of 15*s.*; and where it exceeds 500*l.* a duty of 20*s.*

And by the same act, a licence to use and exercise the calling or occupation of an appraiser is subject to a duty of 10*s.*; to be taken out yearly by every person who shall exercise the said calling or occupation, or make any appraisement or valuation (charged with a duty by the act), for or in expectation of any gain, fee, or reward; except licensed auctioneers.

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.)

A written appraisement made merely for the private information of the persons employing the valuer, and which is not

intended to be obligatory as a contract between parties, does not require an appraisement stamp. (5 M. & S. 240.)

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 farther 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 possession delivered of them upon such an inventory and appraisement, 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.)

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ADDENDA.

*** The following are the Ancient Records referred to in the concluding page of the Introduction.

The Ordynaunce of the Cite for Tenauntȝ 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° Regȝ Edwardi Tercij. xxxix.

Ordinatum est quod si aliquis cōdicat teñtm 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'rteriū, si huius inteneus aliqua appencia seu alia asiamenta in huiusmodi tentiuȝ vel in domibus fecerit, eciam ad mereniuȝ dcōz tntoz vel domos clauos ferios aut ligneos attachiamēt nōlicebit tali tenēnti huiusmodi appēcicia seu asiamenta in fine terminū vel aliquo alio tempore abradicare sed semper permanebūt dño 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 Lōdon of suche thingis which by tenātis 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 tenement3 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 plant3 be roetid in the groūd as vynes trees graffe stoūk3 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*, fol. 137, 138.

THE END.

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