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OF THE LAW OF FIXTURES, AS BETWEEN THE HEIR AND EXECUTOR.[1]

1. The rule now depends mainly upon the intention of the party in affixing the article to the soil.
2. Most writers upon the subject treat it with reference to the relations out of which such questions are likely to arise.
   (1.) As between landlord and tenant the construction favors removal by the tenant, where that was the evident intention.
   (2.) As between executor and heir, vendor and vendee, all erections and fixtures, intended for permanent use on the land, go with the land.
   (3.) As between the executor of the tenant for life and the remainder-man.
3. The later English cases seem to settle the matter in that country. Cases stated.
4. Statement of some of the American cases. They seem not to follow any clear principle.
5. Enumeration of classes of cases where the decisions have been conflicting.
6. The mode of attaching personalty to the freehold sometimes decides its character, as a fixture.
7, and n. [1]. Illustrations drawn from the reported cases upon different subjects connected with fixtures.
8. Instances illustrating the question among the recent decisions.
9. A late English case between mortgagor and mortgagee.
10. The English courts now regard the question as one of intention mainly.
11. The subject of ornamental furniture, attached to the walls and foundation, considered.
12. The devisee will take the fixtures, the same as the heir, and more extensively, in some cases.

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[1] The following article is from the forthcoming work of Judge REDFIELD upon Devises, Legacies, and the Duties of Executors and other Testamentary Trustees, which may be expected in a short time.

13. The tests which are to determine cases of fixture.
(1.) The character and use of the article will settle most cases.
(2.) When that leaves the case doubtful, custom and usage control.
(3.) If there is still doubt, the agreement, expectation, or understanding of the parties may be resorted to.

1. THE full discussion of this topic would carry us much beyond the limits allowable in such a treatise as the present. The inquiry in every case of the kind is, whether the article is attached to the freehold in such a manner, as that it is fairly presumable that it was not intended to be ever separated by the person who placed it there. Hence, in determining what articles are to be regarded as fixtures and what are not, the customs of business, of husbandry, and the general usages of the country in regard to the subject-matter, will have great influence in the decision, more than the particular mode in which the article is affixed to the soil or freehold.[1] So that the old rule of *quicquid plantatur solo, solo cedit*, will now be of but slight weight. And the old case of *Culling* v. *Tuffnal*, where it was held that a barn erected upon pattens or blocks, might be removed, but that if it had been let into the soil it could not have been, would now be regarded as resting on no sound distinction: Bull. N. P. 34.

2. Some writers have subdivided the question of fixtures into the relations out of which the question ordinarily arises.

(1.) As between landlord and tenant, where the construction is made most favorable to the tenant, for the advancement of good husbandry. But it was said in the early cases, *Elwes* v. *Maw*, 3 East 38, s. c. 2 Smith Lead. Cas. 99; *Horn* v. *Baker*, 9 East 215, s. c. 2 Smith Lead. Cas. 122,[2] that there appears to be a

[1] This may be well illustrated by different articles. An ordinary grindstone may be placed upon stakes driven firmly into the ground, for convenience of use So a carpet is firmly nailed to the floor, for the same reason. But no one would ever regard either of these articles as fixtures. On the other hand, some kinds of fence are made to slide upon the land, resting upon a frame; and grates and fire-places are often merely laid into the chimney, and removable without the use of force, as are also window-blinds, and doors even. Yet no one would regard them as any the less a part of the realty.

[2] In the former of these cases, which is still regarded as a leading case upon the subject, it was decided, as between landlord and tenant, that where the tenant erected, at his own expense, and for the more necessary and convenient occupation of his farm, a beast-house, carpenter's shop, fuel-house, cart-house, pump-house, and fold-yard wall, which buildings were of brick and mortar, and tiled and let into the ground, he could not remove the same even during his term, and although he thereby left the premises in the same state as when he entered.

distinction between annexations to the freehold, for the purposes of trade, and those made for the purposes of agriculture, and better enjoying of the immediate profits of the land, in regard to the tenant's right to remove the same. But that distinction is not much regarded, of late, in the English courts; and seems never to have gained much foothold in this country, where agriculture is regarded as one of the most important public interests. In the case of *Elwes* v. *Maw*, Lord ELLENBOROUGH, Ch. J., considered that the law, at that time, as indicated by the prior cases, *Lawton* v. *Lawton*, 3 Atk. 13; *Lord Dudley* v. *Lord Warde*, Ambler 113; *Lawton* v. *Salmon*, 1 H. Black. 259, note (*b*), came to this,—"That where the fixed instrument, engine, or utensil (and the building covering the same falls within the same principle), was an accessory to a matter of a personal nature, that it should be itself considered as personalty." But this, like many other rules upon the subject, will afford but slight aid in deciding the multiplicity of questions arising in the relation of landlord and tenant. The true rule, as between landlord and tenant, seems to be, that all annexations and erections made by the tenant for temporary convenience of enjoying the premises, and with the evident purpose of removal, may be disannexed during the term, where that can be done without sensible injury to the other erections, and where the removal is consistent with the known usages of the business.

(2.) In regard to the law of fixtures, between the heir and the executor, the construction has always been more strict in favor of the inheritance. In this relation it seems that nothing which was erected for the permanent use and advantage of the land, and which, at the time of its erection, was intended to remain permanently upon, or attached to, the soil, can ever be removed by the executor. And the same rule, substantially, obtains between grantor and grantee, or vendor and vendee; and equally between mortgagor and mortgagee.

(3.) The third case named by the judges and text-writers, as between the executor of the tenant for life and the remainder-man, will rest much upon the same ground as that between landlord and tenant. For the tenant for life should at least have the same right, which any other tenant has, to hold anything of a personal nature, temporarily affixed to the freehold, which was not designed by him to constitute a permanent fixture, and which could be removed

without essential injury to the permanent structures upon the land.

3. But to return from a consideration of these different classes to the general question, it seems to be now reasonably well settled in the English courts, the matter having received a very thorough discussion in the House of Lords in a somewhat recent case: *Fisher* v. *Dixon*, 12 Cl. & Fin. 312. It was here held, that where the owner of the land in fee, for the purpose of better enjoyment of the land, erected upon and affixed to the freehold certain machinery, such as is in use in working coal and iron mines, the purpose for which this was erected, it will go to the heir as part of the real estate. And it was further held, that if the corpus of the machinery belongs to the heir, all that belongs to that machinery, although more or less capable of being detached from it, and of being used in such detached state, to a greater or less extent, must, nevertheless, be considered as belonging to the heir. And in a still later case, *Mather* v. *Fraser*, 2 Kay & Johns. 536, this question is carefully considered by Vice-Chancellor WOOD, in regard to the machinery in use in a copper-roller manufacturer's works. It is here decided, that even in regard to manufactures, all articles fixed to the freehold, whether by screws, solder, or by any other permanent means, or by being let into the soil, partake of the nature of the soil, and will descend to the heir, or pass by conveyance of the land; that the rule of law by which fixtures are held less strictly, when erected for manufacturing purposes, has no application to fixtures erected by the owner of the land in fee; that machinery standing merely by its own weight does not become a fixture. But when part of a machine is a fixture, and another and essential part of it is movable, the latter also shall be considered a fixture: *The Met. Co. Society* v. *Brown*, 26 Beav. 454.

4. There is no great uniformity in the decisions in the different American states. In some of the states almost all kinds of machines which are complete in themselves, and which are susceptible of use in one place as well as another, and which do not have to be fitted or accommodated to the building where used, and which are fixed to the building to give the machinery steadiness, are held to be personalty. Of this character are carding machines, looms, and other machinery used in manufacturing cloth: *Tobias* v. *Francis*, 3 Vt. Rep. 425; *Gale* v. *Ward*, 14 Mass. Rep.

352.[1] But there are many other American cases by which any kind of machine permanently attached to or erected in a building for manufacturing purposes has been treated as a fixture, and not removable, either by the vendor or mortgagor, or by the executor of the owner in fee: *Winslow* v. *Merchants' Ins. Co.*, 4 Met. 306, 314; *Richardson* v. *Copeland*, 6 Gray 536; *Baker* v. *Davis*, 19 N. H. R. 325; *Murdock* v. *Harris*, 20 Barb. 536; *Rice* v. *Adams*, 4 Harr. 322. There are, unquestionably, numerous cases, both English and American, where, as between landlord and tenant, the latter has been allowed to remove almost any kind of machinery, erected by himself with intention to remove the same. Although, under ordinary circumstances, the same kind of machinery, in the same situation, if placed there by the owner in fee, would have been regarded as constituting a permanent fixture. Thus it has been held, that an engine, put in a saw-mill by the mortgagee in possession, who is but a trustee, did not thereby become a fixture: *Cope* v. *Romeyne*, 4 McLean 384. But it seems to have been held in an early case, that where the agent of the owner of a grist-mill placed his own mill-stone and mill-irons in the mill, they thus became the property of the owner of the mill, as part of the freehold, and could not be again separated therefrom, without the consent of the owner: *Goddard* v. *Bolster*, 6 Greenl. 427.

5. There are a considerable number of subjects, in regard to which the cases are by no means in agreement with each other. Thus, boilers and large kettles set in brick and mortar, and indispensable to the permanent use of the building and machinery with which they are connected, at least for present purposes, have nevertheless been regarded as mere personalty: *Wetherby* v. *Foster*, 5 Vermont 136; S. P. *Hill* v. *Wentworth*, 28 Vermont 428. But this view is generally dissented from in

[1] The same principle is strenuously maintained, with great learning and ingenuity, in the later cases in Vermont: *Hill* v. *Wentworth*, 28 Vt. R. 428; *Fullam* v. *Stearns*, 30 Vt. R. 443. But in Massachusetts the tendency seems to be somewhat more in the direction of the English cases: *Yale* v. *Seely*, 15 Vt. 24. See *Preston* v. *Briggs*, 16 Id. 124; *Leland Admr.* v. *Gassett*, 17 Id. 403; *Powers* v. *Dennison*, 36 Id. 752. A personal chattel becomes a fixture, so as to form part of the real estate, when it is so affixed to it as not to be removable without injury thereto; whether the annexation were for use, or for ornament, or from caprice: *Providence Gas Co.* v. *Thurber*, 2 R. I. 15.

the American states (*Union Bank* v. *Emerson*, 15 Mass. 159), although it has been said other cases confirm the rule as first declared in *Wetherby* v. *Foster: Reynolds* v. *Shuler*, 5 Cow. 323; *Raymond* v. *White*, 7 Id. 319. But we cannot believe there is any just ground to question that kettles and boilers fastened in brickwork for permanent use, and which cannot be removed without removing the masonry, must be, as between the executor and the heir, treated as fixtures.

6. There are, no doubt, a large number of cases in regard to machinery and other personalty, where the question of fixture or not has been determined, to a great extent, by the manner in which it was attached or fastened to the freehold. And it has been often said, that machinery, neither fastened nor adapted to the freehold, does not become a fixture: *Ante*, pl. 3, and note. But this feature must be regarded as rather accidental than decisive in the case; and especially, as is often the case, where the fastening of the machinery to the building is done to give it greater steadiness, and is therefore no indication of a purpose of attaching it permanently to the freehold. Where the fastening is of the latter character, it may properly enough be regarded as indicative of an intention to thereby attach it permanently to the realty, but this is not the ordinary case.

7. There has been considerable controversy, first and last, in regard to many articles, like stoves and furnaces, which are indispensable to the use of dwellings, in high latitudes, and which are obtained and intended for permanent use in the places where found, and which would therefore, upon general principles, be justly enough regarded as fixtures; and that is the more common rule in regard to furnaces, even where they are portable, and in no way permanently attached to the realty. But in regard to stoves the rule is now entirely well settled, that they are to be regarded as mere personalty, unless laid in brick and mortar, or in some other way permanently attached to the freehold: *Squire* v. *Magee*, 1 Wms. Exrs. 655; *Blethen* v. *Towle*, 40 Maine 310.[1]

[1] And a cistern standing on blocks in the cellar, although in some sense a fixture, may be removed by the tenant, if placed there for his own temporary convenience, and with the purpose of removing the same at the end of his term: *Wall* v. *Hinds*, 4 Gray 256. Indeed there are many things, such as gas-fittings, pumps, and sinks, and the like, which if put into a tenement at the beginning of the term by the landlord, will remain his at the end of the term, and will pass by deed or

8. There are a considerable number of late English decisions upon the general question of fixtures, but we are not aware that any new principle is involved in them. Green-houses, built in a garden, and constructed of wooden frames fixed by mortar to foundation walls of brickwork, were held to be fixtures, and not removable by the occupier who built them: *Jenkins* v. *Gething*, 2 Johns. & Hem. 520. A boiler, too, built into the masonry of the green-house, becomes immovable; but the pipes of a heating apparatus connected with the boiler by screws are removable: Id. And it has been held that green-houses, forcing-pits, and hotbed-frames, erected by nursery gardeners for the purposes of their

mortgage. But if placed there by the tenant, during his term, they may be removed by him at the end of it. The same has been held in regard to a knocker upon the door, and a crane in the chimney. See *Grymes* v. *Boweren*, 6 Bing. 437; *Elliott* v. *Bishop*, 10 Exch. 512. And manure in heaps belongs to the executor, or to the tenant, and is no part of the realty: *Higgon* v. *Mortimer*, 6 Car. & P. 616; 1 Wms. Exrs. 650. But if it be spread upon the land it becomes realty, of course, and even where laid in heaps upon the land for spreading: *Fay* v. *Muzzey*, 13 Gray 53. Some things merely resting upon the soil will no doubt be regarded as fixtures, from the nature of their use, such as troughs for watering cattle. But it was held, that a large wooden box, heavy and lined with zinc, which was erected in the room of a tavern for an ice-chest, and which was incapable of being removed from the same without being taken to pieces, was nevertheless personalty, and did not pass by deed of the premises: *Park* v. *Baker*, 7 Allen 78. But the New York Court of Appeals, in *Snedeker* v. *Warring*, 2 Kernan 170, held that a statue, erected as an ornament to grounds, may pass by deed of the realty, although not fastened to the base upon which it rested. So also in the same case, it was held, that a sun-dial, erected upon a permanent foundation of stone, without being in any way fastened to it, was a part of the real estate, although removable without difficulty. And although there is an early case where it was decided that a cider-mill might be removed as personalty, that has not been followed; *Wadleigh* v. *Janvrin*, 41 N. H. R. 503; and the same rule is applied to the fixtures in a barn, such as the stanchion-blocks, chains, &c., which had been taken out for the convenience of repairing the barn, but were nevertheless held not divested of their character of fixtures. So also in another late case in New Hampshire (*Burnside* v. *Twitchell*, 43 N. H. R. 390), where it was held, that saw-mill saws, purchased by the owner of the mill for use therein, and attached to the mill and in use there, without any intention of removing them at the time, became parts of the realty, and passed by a conveyance of the land. And the same was here declared, in regard to leather belting in use in the mill, and indispensable to connect the machinery with the motive power. But it was here held, that the fact that the owner of the mill had purchased saws, with the purpose of using them in the mill, and had kept them in the mill for a long time with that intent, if not actually attached to the mill, would not change their character of personalty. We might multiply cases upon this subject, from the American reports, almost indefinitely; but that would not be desirable in a book of this character.

trade, may, so far as not consisting of brickwork, be removed by them at the expiration of their lease: *Syme* v. *Harvey*, 24 Sc. Sess. Cas. 202; s. c. 8 Jur. N. S.; Dig. 79. And upon the demise of a music-hall, chandeliers and seats attached by the lessee by screws are removable: *Dumergue* v. *Rumsay*, 10 W. R. 844.[1]

9. In a recent case (*Walmsley* v. *Milne*, 7 C. B. N. S. 115; s. c. 6 Jur. N. S. 125) in the Common Pleas, where it appeared that the owner of the inheritance annexed thereto fixtures (which would, in the ordinary case of landlord and tenant, be removable by the latter during his term), for a permanent purpose, and for the better enjoyment of his estate, it was held they will become part of the freehold. In this case the owner of the fee mortgaged it, and afterwards erected certain buildings thereon, to which, for the more convenient use of the premises in his business of an inn-keeper, brewer, and bath proprietor, he affixed a steam-engine and boiler, a hay-cutter, malt-mill or corn-crusher, and a pair of grinding-stones. The lower grinding-stone was boxed on the floor of part of the premises, by means of a frame screwed thereto, the upper one being fixed in the usual way, and the steam-engine and other articles (except the boiler) were fastened by means of bolts and nuts to the walls or floors for the purpose of steadying them, but were all capable of being removed without injury, either to themselves or the premises. The engines were used also to supply water to the baths, and to put the other machines in motion; and the whole were subservient to the business carried on by the mortgagor; and it was held that these erections became fixtures, and passed with the land to the assignee of the mortgagee.[2]

10. In a somewhat recent case (*Lancaster* v. *Eve*, 5 C. B.

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[1] But it was held in the Exchequer Chamber, where the judgment was reversed, that where the lease contained a condition, that the fixtures to be put in by the tenant should not be removed during the term, and that if any writ of execution should be levied upon the premises it should be lawful for the lessor to re-enter, and to seize and retain for her own, all fixtures, whether tenant's or otherwise; that this condition defeated the right of the execution-creditor of the lessee to levy upon tenant's fixtures: *Dumergue* v. *Rumsay*, 10 Jur. N. S. 155.

[2] In the case of *Walmsley* v. *Milne*, supra, the question of fixtures and the cases are considerably discussed, and the following proposition maintained: That assuming the fixtures in question to be removable, as between tenant for years and landlord, yet assuming them to be trade fixtures, they were not removable by the mortgagor, in the absence of all evidence of such an expectation and understanding, between the mortgagor and the owner of the mortgage.

N. S. 717; 5 Jur. N. S. 683) the Court of Common Pleas held, that it was a question of evidence depending on circumstances, and the intention of the parties, whether A.'s chattel, fixed on B.'s soil, becomes part of the soil, or remains the chattel of A.

11. It has sometimes been made a question how far pier-glasses and other mirrors, pictures, and matters of that character could be removed, where they have been let into and formed a portion of the wainscoting, and this was done by the owner of the fee, at the time of making the erections. In *Beck* v. *Rebow*, 1 Peere Wms. 94, it was said by Lord Keeper COWPER, 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 it is suggested by Mr. Williams (1 Executors 657) that where such articles of furniture are so framed into the house as to take the place of panels, they shall go to the heir, because they could not be removed by the executor without disfiguring the house. But it seems entirely well settled, that marble chimney-pieces, or any other pieces of ornamental furniture, which are placed in a dwelling by the tenant by way of ornament, may be removed by him during the term: *Dudley* v. *Warde*, Amb. 113. And hangings, tapestry, and iron backs of chimneys have been held removable by the executor (*Harvey* v. *Harvey*, 2 Strange 1141) as not belonging to the heir.

12. There seems no question that the devisee of real estate will take it with all fixtures fairly belonging to it, the same as the heir. And there are some cases in the books where, from the language of the will and the surrounding circumstances, where works for carrying on mechanical or manufacturing business are devised, that a clear intendment will sometimes arise, that it must have been the purpose of the testator to have the machinery and tools, indispensable to carrying on the business, go with the realty: *Wood* v. *Gaynon*, 1 Amb. 395.

13. In conclusion, without going more into detail, it may be safely said, that in determining whether a particular article is to be regarded as a fixture or not, a few general considerations may commonly be regarded as decisive.

(1.) The character and use of the article will commonly indicate, with more or less clearness, whether, according to the general custom of the country, it is to be regarded as a fixture.

(2.) As to those classes of articles where there is fair ground