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SUNDARJI DAMJI v. DAHIBAI.

Order, therefore, that Rs. 1,500 be given by the Receiver out of the estate in his hands belonging to the deceased Damji Luckmichand to Dahibai for the performance of the ceremonies by herself and the minor jointly at Cutch Mandvi and that she should account to the Receiver for the expenditure of the amount within one month from this date. The applicant Velji Luckmichand should allow the minor to attend at the ceremonies to be associated with Dahibai in their performance and should raise no objections to, or place obstacles in the way of, such attendance and association. Any breach on his part of this order shall be dealt with by the Court as gross contempt. Costs of this motion to come out of the estate of the deceased and to be paid by the Receiver.

Attorneys for the plaintiff.—*Messrs. Kanga and Patell.*

Attorneys for the defendant.—*Messrs. Little & Co.*

R. R.

ORIGINAL CIVIL.

Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Batchelor.

1904. *November* 22.

CHATURBHUJ MORARJI (PLAINTIFF), APPELLANT, *v.* THOMAS J. BENNETT AND OTHERS (DEFENDANTS), RESPONDENTS.*

Landlord and tenant—Lease—Assignment of lease—Privity of contract—Fixtures—Liability to repair—Transfer of Property Act IV of 1882, section 3.

The word *fixture* is one of common use in English law but in India the word is not so familiar, and the maxim '*quicquid plantatur solo solo cedit*,' on which the law of England as to fixtures seems to have been originally founded, has never received so wide an application here as there. For anything to be a *fixture* it must be "attached to the earth" as that expression is defined in section 3 of the Transfer of Property Act.

Where the occupiers of premises continue in possession in the belief common to them and the owner of such premises that they hold under the terms of a lease which had never been assigned to them by the original lessee and which had expired, they are bound to carry out such covenants as to repairs, etc., as would have to be performed under the lease within a period of similar duration to that during which they hold possession, their liability being based on the footing of a tenancy that commenced at the expiration of the lease, and not on any privity of contract or estate, whether legal or equitable, created by the lease.

* Suit No. 594 of 1903; Appeal No. 1343.

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THE plaintiff was the owner of a building situated in Pársi Bazar Street, Bombay. The building was a very old one and was formerly used for the purposes of printing and publishing the *Times of India*, a well known newspaper in Bombay.

By a lease, dated 8th January 1888, the Land Mortgage Bank, then owners of this property, leased to one Colonel Nassau Lees this building with its appurtenances for a period of 20 years, which expired on the 31st December 1899, at a monthly rental of Rs. 850.

The lessee covenanted, *inter alia*, as follows:—

"The lessee . . . . . will throughout the said term well and sufficiently repair, maintain, and keep the said hereditaments and premises and all fixtures and additions thereto in good condition and complete repair, structural repairs and the usual monsoon repairs only excepted, and particularly will paint with two coats of best oil paint and in workmanlike manner in every third year of the said term all the outside wood iron and other work previously or usually painted, and in every fifth year all the inside wood iron and other work previously or usually painted, and will at the expiration or sooner determination of the said term deliver up the same premises, and all new fixtures and additions thereto in good condition and repair (saving any want of condition or repair from want of or defective structural repairs and the usual monsoon repairs which are to be made by the lessors, and reasonable wear and tear only excepted)."

On 26th August 1886 the lessors assigned all these interests under the lease to the plaintiff. The lessee died on 9th March 1889, having made arrangements that two persons, namely Messrs. Curwen and Kane, should carry on the business of the press in connection with the *Times of India* newspaper. Accordingly on the 17th August 1889 a deed of partnership was drawn up between Messrs. Curwen, Kane and Meakin.

On the 29th January 1890 the attorney of the original lessee assigned to Messrs. Curwen, Kane and Meakin the goodwill and debts of the *Times of India* for a sum of Rs. 50,000.

On the 22nd March 1892 another partnership was entered into by Messrs. Meakin, Kane and Bennett, Mr. Curwen having in the meanwhile died.

On the 4th January 1899, owing to the deaths of Messrs. Meakin and Kane, a further partnership was entered into between Messrs. Bennett, G. A. Meakin, J. O'Connell and Coleman on the same terms as the two former partnerships.

The original lease having expired on the 31st December 1899 the last named partners entered into a correspondence with the plaintiff with reference to the terms on which the lease was to be continued; the most material letters of this correspondence ran as follows:—

Bombay, 16th August 1900.

Chaturbhuj Morarji, Esq.

Dear Sir,

* * * * * *

I am now on the point of deciding the question of whether it is desirable or not for us to erect a new building for our works or to lease a cheaper one elsewhere or to remain here. If I decide to remain where we now are I should be willing to enter into a new lease for 10 years. I shall be obliged, therefore, if you will let me know whether you are prepared to agree to this proposition and on what terms.

* * * * * *

Yours faithfully,
(Sd.) F. M. COLEMAN,
Business Manager.

Bombay, 28th August 1900.

Messrs. Bennett, Coleman & Co.

Dear Sirs,

In supersession of my letter to you of the 21st instant, and in reply to yours of yesterday, I have to say that taking into consideration the fact that you are my old tenants I shall be willing to let you have my property in Parsi Bazar Street on lease for 10 years on a monthly rental of Rs. 900 (nine hundred only). The terms of the new lease are to be the same as those of the old one which has already expired. If you see your way to accept these conditions kindly write to me immediately on receipt of this that you are willing to enter into a new lease on the terms abovementioned. If not, it is with great reluctance that I have to ask you to treat this letter of mine as one month's notice to you from the 31st of this month.

Yours faithfully,
(Sd.) . . . . .
i. e., CHATURBHUJ MORARJI.

Bombay, 31st August 1900.

Messrs. Bennett, Coleman & Co.

Dear Sirs,

Since you have not replied to my letter of the 28th instant I beg to give you notice hereby to vacate the premises in your occupation within one

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calendar month from the receipt hereof and to give me a peaceful possession of the same.

Yours faithfully,
(Sd.) . . . . ,
i.e., CHATURBHUJ MORARJI.

Bombay, 4th September 1900.

Chaturbhuj Morarji, Esq.

Dear Sir,

With reference to our Mr. Nanabhoy's conversation with you we shall be willing to continue as your tenants from date, at a monthly rental of nine hundred rupees.

Yours faithfully,
(Sd.) BENNETT, COLEMAN & Co.

On this basis the defendants remained in possession until the 31st of May 1903.

In 1884 or 1885 a shed was erected by the occupiers of the premises in connection with their business of printing. The circumstances under which the shed was erected and the nature of its structure are fully set out in the following letter dated the 14th May 1903 from the defendants to the plaintiff's attorneys, which was sent after due notice was given to the plaintiff of the defendants' intention to vacate the premises on the 31st May 1903 :—

Dear Sirs,

Some years ago the then proprietors of this paper erected at their expense a shed in the compound of your client's building in Párai Bazar Street. It was erected so as not to interfere with the walls of the building and with a view to removing same at the termination of our tenancy.

As we are about to vacate the said premises we write to ask whether your client will desire to purchase the same from us, at a reasonable sum, or whether he would prefer us to otherwise dispose of it.

For your client's satisfaction we enclose a copy of a report which we have received from our architect Mr. D. Gostling who erected the shed for us.

Yours truly,
(Sd.) BENNETT, COLEMAN & Co.

The report mentioned in the last paragraph of this letter was as follows :—

Bombay, 7th May 1903.

1. I on the 6th instant at the request of Messrs. Bennett, Coleman & Co., made a long and careful inspection of the printing shed situate in the courtyard of their old printing press building, Párai Bazar Street.

2. This building was erected under my personal superintendence, years ago, as partner in the firm of Gostling & Morris, Architects, at the request of Messrs. Curwen, Bennett & Co., the then proprietors of the *Times of India* Press.

3. In superintending the erection of the building I used to deal personally with Mr. T. J. Bennett.

4. The instructions I received from him were "so to fix the pillars, roof and the general construction of the building as that no portion of the building except the foundations and floor could be considered a fixture if ever it was deemed necessary to remove the building."

5. I certify that the shed consists of six rows of cast-iron pillars fixed east and west. Each row contains six pillars.

Each of these pillars is supported upon a cast-iron base plate. The joint of the pillars to the base plate is above 6 inches below the floor level. A dish-shaped cup is made in the masonry floor round each pillar so that each pillar can be taken out of its place without disturbing the floor. This floor was also constructed by me at the same time.

6. I certify that on each row of these pillars is constructed a cast-iron gutter and on these gutters are constructed four ⩘ saw shaped roofs and one ∧ shaped roof.

7. Each of these six rows of gutters are so fixed on the square flanges on the top of the 36 pillars that the roof would stand upright in firm construction even were the four walls of the landlord's courtyard removed.

8. The south side of the south gutter in part touches the south wall. The north side of the north gutter in part touches the north wall and the east and west ends of each line of gutters touch in part the east and west walls but are not built into the same.

9. I certify that nothing has been done by the proprietors since the construction of the shed which in any way affects, injures or destroys the essential character of the building being no fixture.

10. I certify therefore that the shed is no fixture and can be removed or sold by the proprietors during the currency of their lease.

(Signed) D. GOSTLING.

Mr. Gostling had also written to Mr. Kane at the time the shed was being contemplated the following letter :—

Bombay, 10th May 1884.

Dear Sir,

We herewith enclose you an estimate for roofing the courtyard of your building, so as to form a printing house.

* * * * * *

You will notice with reference to your lease with the Land Mortgage Bank that any work done below the level of the ground will be a fixture and become the property of the Bank, the upper portion will be moveable and remain your

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property. The pillars are of cast-iron of the ordinary mill construction, the base of the pillars being joined with base plates without bolts or fixings of any kind.

* * * * * *

D. GOSTLING.

To the letter of the 14th May 1903 and report the plaintiff's solicitors sent the following reply :—

Bombay, 20th May 1903.

Gentlemen,

We are instructed by our client Mr. Chaturbhuj Morarji to write to you under the following circumstances.

We are instructed that by an indenture of lease, dated the 8th day of January 1880, and made between the Land Mortgage Bank of the one part and William Nassau Lees of the other part, the former leased to the latter the house and premises situate at Pársi Bazar Street which is now occupied by the offices of the above paper for 20 years from the 1st January 1880 at the rents and upon the terms and conditions in the said lease mentioned.

We are instructed that our client is now the owner of the said house and premises and that you are the proprietors of the above paper and have continued to occupy the said house and premises after the expiration of the term created by the said lease as our client's monthly tenants and we are instructed that during the term of the said lease certain erections and fixtures have been made and placed by you or your predecessors on the said premises which according to the terms of the said lease became the property of our client on the termination of the term created by the said lease and which erections and fixtures have been in your occupation and use in connection with the said house and premises.

We are instructed that you have given our client notice of your intention to quit the said premises at the end of the current month and our client is informed that you propose to remove the erections and fixtures which have been made and placed in the said premises.

We are therefore instructed to give you notice that the said erections and fixtures are our client's property and that you are not entitled to remove or take away the same and that if notwithstanding this notice you remove or take away the same you will do so at your own risk and peril.

We are further instructed to draw your attention to the fact that under the lease you are bound to hand over the premises in good condition and repair. Our client has viewed the premises and finds them much dilapidated and we have to inform you that he will claim against you in respect of such dilapidation.

If you so desire our client is willing to have a joint survey of the premises for the purpose of assessing the dilapidation : please let us hear what you have to say to this.

Yours faithfully,

(Signed) LITTLE & Co.

The plaintiff and defendants respectively appointed surveyors to ascertain the amount of repairs which were required to be executed by the defendants, but their reports varied so considerably that the plaintiff declined to leave the matter to the arbitration of a third surveyor and filed the present suit. The material prayers of the plaint ran as follows :—

(*a*) That it may be declared that the plaintiff is absolutely entitled to the corrugated iron shed erected upon the premises in question in this suit and mentioned in paragraph 4 of the plaint and that the defendants are not entitled to remove the same.

(*b*) That the defendants may be ordered to pay to the plaintiff the sum of Rs. 7,988-15 or such other sum as this Honourable Court may think proper and reasonable for making good the dilapidations and for making the repairs and for painting, etc., of the premises in the plaint mentioned as provided by the said indenture of lease and as damages for breach of the covenants contained in the said lease.

(*c*) That the defendants may be ordered to pay to the plaintiff damages for loss of rent of the unoccupied portions of the said premises from the 1st day of June 1903 until such time as the said premises shall be repaired and made fit for occupation by another tenant.

Scott (Advocate-General) with *Carnac* for the plaintiff.—As regards the shed the maxim *quicquid plantatur solo solo cedit* applies and the plaintiff is entitled to it as a fixture on the termination of the lease. It is, moreover, attached to the earth within the meaning of section 3 of the Transfer of Property Act. Even supposing the shed were a trade fixture and as such the property of the defendants, the defendants are not entitled to remove it, inasmuch as their lease had expired long before they vacated the premises. As regards repairs the defendants are clearly liable, for even if they are not liable under the lease they are liable as having held over after the expiration of the term (*Digby* v. *Atkinson*,[1] *Ecclesiastical Commissioners* v. *Merral*,[2] *Martin* v. *Smith*,[3] *Walsh* v. *Lonsdale*[4]). The defendants are also liable for rent during repairs (Contract Act, section 76).

Inverarity and *Lowndes* for the defendants.—The shed is in no sense a fixture; it is merely a chattel. It is not fixed to the ground but rests there by its own weight (*Naylor* v. *Collinge*,[5]

(1) (1815) 4 Camp. 275.
(2) (1869) L. R. 4 Exch. 162.
(3) (1874) L. R. 9 Exch. 50.
(4) (1882) 21 Ch. D. 9.
(5) (1807) 1 Taunt 19.

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Wansbrough v. *Maton*,(1) *Mears* v. *Callender*,(2) *Holland* v. *Hodgson*(3)). Even if it were a fixture it is a trade fixture and as such distrainable at law for rent and therefore is the property of the defendants (*Hellawell* v. *Eastwood*(4)).

As to repairs the defendants are not liable under the lease as there is no privity between them and the plaintiff (*Cox* v. *Bishop*(5)).

RUSSELL, J.—[His Lordship, after stating the facts and reading the correspondence set out above, continued as follows]:—

Two questions now arise:

1. Is the shed a fixture or an addition, within the meaning of the lease, or is it, as argued by Mr. Inverarity, a chattel merely?

2. Are the defendants under the covenant liable to repair, and subsidiary to this are they liable for any further rent during the progress of such repairs?

I shall deal with these questions separately.

In the first place, I will proceed to describe the shed, and in doing so I do not think, I can do better than read Mr. Gostling's report dated 7th May 1903, Exhibit T, and Mr. Gostling's letter to Mr. Kane, dated 10th May 1884, Exhibit 11.*

Now it will be observed that in paragraph 4 of his report of the 7th May 1903, Mr. Gostling puts in inverted commas, the instructions which he says he then received from Mr. Bennett. I confess that it seems to me when he wrote that, he must have had something in writing before him, which he gives in the form of a quotation. However, he was not cross-examined as to this and he is unable to find any such writing as there appears to be quoted.

Exhibit 11 is a very important document, as it shows that Mr. Gostling's attention was drawn to the desirability or necessity or the wish of the proprietors that this building was to be constructed so as not to be a fixture. Mr. Gostling in his examination-in-chief before me says, in erecting the pillars that

* These exhibits referred to by his Lordship are set out above.

(1) (1836) 4 A. and E. 884.
(2) (1901) 2 Ch. 388.
(3) (1872) L. R. 7 C. P. 328.
(4) (1851) 6 Exch. 295.
(5) (1857) 8 De M. & G. 815.

he had in his mind that they were not to be fixtures. And that he had a conversation with Mr. Kane, and that Mr. Kane asked him if he could "not make it so as not to be a fixture," and that he replied, "yes, you can remove it at the end of the lease."

No doubt the Advocate General was perfectly justified in laying stress on the fact that Mr. Gostling's report T 1 showed that he had a conversation with *Mr. Bennett* whereas Mr. Bennett had not then appeared on the scene: and the Advocate General asked Mr. Gostling about the imaginary conversation with *Mr. Bennett* referred to in Exhibit 11. I do not think that the Advocate General intended to suggest that the conversation was an entire invention on the part of Mr. Gostling. But I think Mr. Gostling made a mistake between Mr. Kane and Mr. Bennett in his report. If it was a fabrication it was very unlikely that he would have made such a mistake and he would have taken care to fix the conversation with Mr. Kane and not with Mr. Bennett. Looking at the circumstances, I find that as a matter of fact, that when Mr. Gostling was instructed to put up this building, it was intended that it was not to be a fixture.

Mr. Gostling's report T 1 to a certain extent gives a detailed account of this shed. I must supplement that by the evidence that has been given before me, and I had also the opportunity of going to the premises and making minute examination necessary to further supplement that evidence.

Now the material thing to notice is, that these pillars which support the roof which is made of tiles, Mr. Gostling says, are not fixed to the ground at all, but that they rest by their own weight hoisted on spigots—[little projections about ½ or ¾ inch]—or bed-plates, which are fixed to the foundation stone let into the floor. If the roof and the superstructure is removed, the pillars can be taken down, as the spigots will not keep them.

Then with regard to the roof of the shed. On the east side of the roof cornices are cut to prevent the rain from plashing against the walls. We had a portion of the dammer and canvas taken away from the east side of the shed, and it was apparent that there were no nails or any fastenings to the shed. Mr. Payne however in his evidence says that he did see nails, when he came to see the place with us. We did not see anything to indicate any nails or permanent fastening on the east side.

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On the north side there is one iron gutter running along the pillars as also on the south side. Mr. Gostling specially constructed them so as not to be a fixture and really so as not to touch the south wall at all.

The top of the south wall compound is one level wall and is just below the level of the lip, if I may so call it, of this gutter. Over this wall is constructed a slab of Porebunder stone for the purpose of preventing rain-water dripping below into the shed. Between the gutter and the Porebunder slab there is a space of about 2 inches which is covered with dammer and canvas one or two inches thick and it is clear that there is no fixing whatever.

Now as to the west wall also, I found that there was no fixing. Then again as to the north wall also, there is no fixing whatever of the shed to the main building.

However, there is this much to be said, that owing to the necessity of having some substantial protection against the rain which would trickle down the wall into the shed, cement in some places has been put over the edge of this roof connecting it with the main wall of the building and canvas and dammer are placed over it. In other places merely canvas and dammer are placed. I cannot find that by this means this shed is fixed to the walls of the main building. I must add that this dammer, canvas and cement are only found in the north, south and east side of the shed.

One other detail which I have to consider, and as to which considerable body of evidence was given, is as regards certain hollow "cups", as they have been called, which are left in the cement at the base of the pillars. Mr. Gostling says that he left these hollow cups to enable the pillars to be taken down. There can be no doubt that Mr. Gostling left these hollow cups at the base of the pillars, for they appear in the photos. At the base of each pillar there is what has been called a "fillet," a narrow projecting rim, which no doubt gives a certain amount of steadiness to the pillar. Having regard to what we have seen, and the photographs put in, I think Mr. Gostling left the hollows for the purpose stated by him, otherwise he would have cemented them.

On the other hand we have the evidence of Messrs. Stevens and Payne who say that these cup-like hollows were left open

to catch rain-water. This suggestion is not a likely one, because the architect, when he designs a building, would not be likely to leave such large hollows, which are sufficient to hold several quarts of water each, for the purpose of allowing rain-water to trickle in the way suggested by Messrs. Stevens and Payne. Mr. Coleman and a Parsi assistant, who have been employed in the press for a number of years, swear as to these hollow cups being there from the beginning.

So much therefore for the state of facts.

In course of the Advocate General's reply I raised the point, as to whether there was anything to show that the defendants or their predecessors have paid for this shed. Mr. Coleman was accordingly recalled, and in his evidence he put in Exhibit 23; it appears from that, that depreciation was charged with regard to this new shed, as it was against various items of other plant and machinery and that it has been so charged ever since 1885. This seems to show that the defendants treated this new shed as their own property, which they had bought from Col. Nassau Lees.

These are the facts relating to the shed. Mr. Inverarity has argued that it was a chattel. It seems upon the authorities I cannot hold this to be a fixture at all.

In *Naylor* v. *Collinge*[1] it is held that "a covenant, by a tenant, to yield up in repair at the expiration of his lease, all buildings, which should be erected during the term, upon the demised premises, includes buildings erected and used, by the tenant, for the purposes of trade and manufacture, if such buildings be let into the soil or otherwise fixed to the free-hold, but not where they merely rest upon blocks or pattens." And in *Wansbrough* v. *Maton*[2] it is held that "a tenant is entitled, at the expiration of his term, to remove a wooden barn, which he has erected on a foundation of brick and stone, the foundation being let into the ground, but the barn resting upon it by weight alone." Then again in *Mears* v. *Callender*[3] where the defendants erected ten glass houses, of which one had concrete sides, and its glass span-roof substantially rested on the sides,

(1) (1807) 1 Taunt 19. (2) (1836) 4 Ad. & E. 884.
(3) (1901) 2 Ch. 388.

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and could be removed without damaging the walls it was held that the defendants could lawfully remove, unless precluded by the lease.

Again I find that in *Holland* v. *Hodgson*[1] Mr. Justice Blackburn observed that "There is no doubt that the general maxim of the law is, that what is annexed to the land becomes part of the land, but it is very difficult, if not impossible, to say with precision what constitutes an annexation sufficient for this purpose. It is a question which must depend on the circumstances of each case, and mainly on two circumstances, as indicating the intention, *viz.*, the degree of annexation and the object of the annexation. When the article in question is no further attached to the land, than by its own weight, it is generally to be considered a mere chattel."

In *Hellawell* v. *Eastwood*[2], it has been held that, "machinery for the purpose of manufacture, *ex. gr.* 'Mules' used for spinning cotton—fixed, by means of screws, some into the wooden floors of a cotton-mill, and some by being sunk into the stone flooring, and secured by molten lead, are at law distrainable for rent".

As to intention, here we have the intention of the defendants, that this shed was not to be a fixture. Then although it may be said that it is fixed to the walls by the dammer and canvas, with regard to a portion of this shed, they are so slightly attached that they can be removed without any damage.

In *Wake* v. *Hall*[3], the law on the subject is summarized and bears out what I have referred to above in *Holland* v. *Hodgson*[1].

In page 371, Encyclopædia of English Laws [4], Fixtures—, after quoting the definition of fixtures (Amos and Ferard, p. 2) it is stated that, "neither the circumstance that the article has been placed in a special bed or receptacle fixed in the soil, (*Ex parte Astbury*[5]), nor that subsequently to its erection it sinks into the soil, (*Duke of Beaufort* v. *Bates*[6]), necessarily makes any difference."

(1) (1872) L. R. 7 C. P. 328 at p. 334.
(2) (1851) 6 Ex. 295.
(3) (1883) 8 App. Cas. 195 at p. 204.
(4) 5th Volume.
(5) (1869) L. R. 4 Ch. 630.
(6) (1862) 3 De G. F. & J. 381 at p. 390.

I have on the authorities quoted above come to the conclusion that this shed is not a fixture. I agree with Mr. Inverarity that it is a mere chattel.

Even supposing it to be held to be a fixture, then it is admittedly a shed put up for business, and is a trade fixture, and therefore it could be removed.

Then it was argued by the Advocate General, that assuming that it was a trade fixture, that the defendants were not entitled to remove it now, inasmuch as their lease expired on the 31st December 1899. It is not open to the plaintiff to raise this plea now, because by Ex. V he expressly allowed the defendants time for removal. It seems to me from the correspondence to which I have referred, that there has been what is called the excrescence or extension of the lease after the 31st December 1899. There was no re-entry by the landlord, but there was an agreement (sufficient to satisfy the statute of frauds) under which the defendants agreed to become tenants till the 31st December 1903 on the same terms as those contained in the lease, but that they paid a monthly rental of Rs. 900 instead of Rs. 850.

The next question is, is this shed an addition?

Now in the first place, as I have found it cannot be said to be added to the main building. I have expressly found that it is not fixed either to the building or to the walls in any way. I have found three cases which are analogous, although no doubt they depend on the word "addition" as used in the "Settled Land Act," in England.

In *In re Blagrave's Settled Estates*[1], it is held that "the word 'additions' in section 13, sub-section ii, of the Settled Land Act, 1890, means structural additions; and, therefore, an electric lighting installation for the improvement of the mansion-house is not an 'addition,' to buildings within the meaning of that sub-section." And in this case, Romer and Cozens-Hardy L. JJ. held, "An engine house for electric lighting apparatus, erected some little distance from the mansion-house, is not an 'addition' or 'alteration' within the meaning of this sub-section."

Then in *In re Clarke's Settlement*[2], it is held that "the word 'additions' in section 13, sub-section ii, of the Settled Land Act,

(1) (1903) 1 Ch. 560. (2) (1902) 2 Ch. 327.

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1890, means structural additions; and, therefore, an electric lighting installation, even if exclusive of fittings such as would be ordinarily supplied by a tenant, is not an addition to a building within the sub-section."

Similarly in *In re Gaskells Settled Estates*(1), it was held that the providing of heating apparatus and pipes, though rendering a mansion-house more comfortable and convenient, is not an "addition to, or alteration in the building" within the meaning of the Settled Land Act, 1890, section 13, sub-section ii.

Now the words used in the lease are, "fixtures and additions." On the analogy of the above judgments an addition, as it seems to me, must be in the nature of a fixture, and where an addition is not in fact an addition, it does not come within the meaning of the words used in the lease. I have found that this shed forms no part of the main building, therefore it cannot be said to be added to or an addition to the main building.

I should here point out that if the Transfer of Property Act was applicable, this question could not be argued, for section 108, clause (*h*), of that Act provides that the lessee may remove, at any time during the continuance of the lease, all things which he has attached to the earth: provided he leaves the property in the state in which he received it.

This disposes of the first question, as to the shed.

Now the second question is, are the defendants liable under the covenant to repair; and are they liable for any further rent.

It has been argued between the parties, that the actual amount (if any) due by the defendants beyond the sum already paid by them, shall be ascertained by a special Commissioner, as it would take too much of the time of this Court to ascertain it.

The points for consideration are:

(*a*) Whether the defendants are liable to repair.

(*b*) If they are, what principles are applicable for the guidance of the special Commissioner.

With regard to (*a*), I am of opinion that the defendants are liable to repair. The two letters, I have referred to above, expressly show that the defendants intended their position to be treated as being under the lease. This is a question of fact, as

(1) (1894) 1 Ch. 485.

has been held in *Harris* v. *Hickman*[1] where Mr. Justice Wright observes, "It is not disputed that the question, what are the terms upon which a tenant holds over after the expiration of his tenancy is one of fact; but at the same time there is a presumption that he does so upon such of the terms of the lease as are applicable to a yearly tenancy."

And in IX, Ruling Cases, p. 435 (Dilapidations), *Richardson* v. *Gifford*[2] is quoted, in which it is observed that "It was contended that a covenant to repair was inconsistent with a tenancy from year to year, implied from the payment of rent under a demise void by the Statute of Frauds . . . but the Court rejected the contention." And *Digby* v. *Atkinson*[3] is quoted as follows: "Where a tenant holds over he will be presumed to hold upon the terms as to repair or otherwise contained in the original demise."

The cases cited by the Advocate General are, *Ecclesiastical Commissioners* v. *Merral*[4], where it was held that "One who enters upon, occupies, and pays rent for corporate property under a demise for a term of years, made on behalf of the corporation, but not sealed with their common seal, becomes tenant from year to year of the corporation, on such terms of the demise as are applicable to a yearly tenancy." And in *Martin* v. *Smith*[5] where "By an agreement not under seal, the plaintiff agreed to let to the defendant, and the defendant to take of the plaintiff, a house and premises for seven years, upon the terms (amongst others) that the defendant would, in the last year of the term, paint, grain, and varnish the interior, and also whitewash and colour. The defendant entered under the agreement, and occupied and paid rent during the whole period of seven years. In an action for not painting, etc., the interior and whitewashing and colouring in the seventh year, it was held that the defendant must be taken to have occupied on the terms that, if he should continue to occupy during the whole period of seven years, he would do those things which were by the agreement to be done in the seventh year; and that he was therefore liable."

(1) (1904) 1 K. B. 13 at p. 18.
(2) (1834) 1 Ad. and E. 52.
(3) (1815) 4 Camp. 275.
(4) (1869) L. R. 4 Ex. 162.
(5) (1874) L. R. 9. Ex. 50.

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Moreover it would be equitable in the present case, that if these letters are construed so as to exonerate the defendants from their liability to lose their shed, they should not be so construed as to expose their landlord to the liability to do the repairs necessary.

Mr. Inverarity relied on *Cox* v. *Bishop*[1], but looking at the remarks of Jessel M. R. in *Walsh* v. *Lonsdale*[2], where he observed :—"A tenant holding under an agreement for a lease of which specific performance would be decreed, stands in the same position as to liability as if the lease had been executed. He is not, since the *Judicature Act*, a tenant from year to year, he holds under the agreement, and every branch of the Court must now give him the same rights." I am of opinion that the relation of landlord and tenant is not now to be treated as so strictly legal as it was in *Cox* v. *Bishop*[3]. In *Wright* v. *Pitt*[4] that case of *Cox* v. *Bishop* [3] was considered by Sir R. Malins, V.C., who held "That the company, as *cestuis que trust* of a lease, are not liable to be directly sued; they must, I think, be treated as having worked under the authority of the lease, and as subject, therefore, to the payment which it imposes; or they must be treated as trespassers, and liable to account as such."

I must hold that Messrs. Bennett, Coleman and Co., as having entered into possession under the authority of the lease, and as I have pointed out in one of the letters, it is expressly stated that the agreement is continued for a period of 2 years and 3 months, from the date of the expiry of the lease, are liable under the covenant to repair.

Now as to (*b*) I have to lay down the principles, so far as I am able, which are to guide the special Commissioner in his enquiry. We must bear in mind the words of the lease which I have set out above. The special Commissioner should act upon the following principles laid down in *Proudfoot* v. *Hart*[5] :—"Under an agreement to keep a house 'in good tenantable repair' and so leave the same at the expiration of the term, the tenant's obligation is to put and keep the premises in such repair as,

(1) (1857) 8 De G. M. & G. 815.
(2) (1882) 21 Ch. D. 9 at p. 14.
(3) (1857) 8 De G. M. & G. 815.
(4) (1870) L. R. 12 Eq. 408 at p. 417.
(5) (1890) 25 Q. B. D. 42.

having regard to the age, character, and locality of the house, would make it reasonably fit for the occupation of a tenant of the class who would be likely to take it." The special Commissioner would look to the age, the position of the house and the class of tenants likely to take it. The shed is in excellent condition. Messrs. Kemp and Co. have already occupied it as a warehouse for their stock. The special Commissioner will consider how much the plaintiff has already done to put this place in thorough repair, and arrive at a fair estimate of the proportionate cost which the defendants should bear.

Under the covenant the defendants had to do the painting, and they are responsible for the painting, exclusive of painting any new walls the plaintiff may have added.

As to wear and tear, it has been held in *Davies* v. *Davies*[1] that a tenant for years is liable for permissive waste. *Manchester Bonded Warehouse Company* v. *Carr*[2] is also another authority which I quote for the guidance of the special Commissioner. In the Encyclopædia of English Laws, Wear and Tear, it is laid down, "that what is fair wear and tear must be a question of fact to be determined in each case."

Then as regards rent during repairs, *Woods* v. *Pope*[3] was cited. I am inclined to accede to the Advocate General's contention that the defendants are liable under section 76 of the Contract Act, in respect of the rent during the period occupied in carrying out the repairs in dispute. I mean such repairs which reasonably flow from the defendants' breach of the covenant to repair. The special Commissioner will have to bear in mind that the defendants are not liable to pay rent during the time any structural repairs were being carried on.

Both the parties appealed against this decision.

Basil Scott (Advocate General), with *Lang*, for the appellant.

Lowndes, with *Strangman*, for the respondents.

JENKINS, C. J.:—The plaintiff is, and for some time past has been, the owner, and the defendants, who are the proprietors of the "Times of India" press and newspaper, were until recently

(1) (1888) 38 Ch. D. 499. (2) (1880) 5 C. P. D. 507.
(3) (1835) 1 Bing. N. C. 467.

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the occupiers, of the property to which the suit relates; and the questions at issue between them are: (1) whether a shed standing on a part of the property belongs to the plaintiff; and (2) whether the defendants are under any liability to the plaintiff in respect of the repairs and painting of the property. The material facts are fully and correctly stated by Mr. Justice Russell, from whose decree the present appeal has been preferred, and I need not now do more than give an outline of them.

On the 8th of January 1880, the property was demised to Colonel William Nassau Lees, the then proprietor of the "Times of India" press and the "Times of India" newspaper, and the lessee thereby covenanted that his executors, administrators or assigns would

"throughout the said term well and sufficiently repair, maintain, and keep the said hereditaments and premises and all fixtures and additions thereto in good condition and complete repair, structural repairs and the usual monsoon repairs only excepted, and particularly will paint with two coats of best oil paint and in workmanlike manner in every third year of the said term all the outside wood iron and other work previously or usually painted, and in every fifth year all the inside wood iron and other work previously or usually painted, and will at the expiration or sooner determination of the said term deliver up the same premises, and all new fixtures and additions thereto in good condition and repair (saving any want of condition or repair from want of or defective structural repairs and the usual monsoon repairs which are to be made by the lessors, and reasonable wear and tear only excepted)."

In 1884 or 1885 the shed in dispute was erected; in March 1889, Colonel Lees died; in August 1889, a partnership agreement was made between Messrs. Curwen, Meakin and Kane to carry on the "Times of India" press and newspaper; on the 29th of January 1890, a transfer was executed on behalf of Colonel Lees' executors in favour of Messrs. Curwen, Meakin and Kane of all the beneficial interest and good-will of the executors in the trade of business of the "Times of India," and there was in the deed a recital of an agreement for the sale to Messrs. Curwen, Meakin and Kane "as a going concern of all the interest and good-will of the said William Nassau Lees, deceased, in the said business and of the debts, machinery, plant, stock in trade, and effects thereof"; and it was further recited that the purchasers had obtained possession of the machinery, stock in trade and effects, and had requested an assignment of the good-will and debts.

No assignment of the lease, however, was ever executed.

The business ultimately came into the hands of the present defendants, who occupied the premises, took possession of the shed, paid rent to the reversioner, but never obtained an assignment of the lease.

The reversion expectant on the lease during its currency became and remained vested in the plaintiff.

At the end of the lease the defendants continued in occupation, and negotiations were opened between them and the plaintiff for a new lease, but, as they were unable to agree, on the 31st August 1900 notice to quit the premises was given.

On the 4th of September 1900, however, the defendants wrote to the plaintiff: "With reference to our Mr. Nanabhoy's conversation with you, we shall be willing to continue as your tenants from date, at a monthly rental of nine hundred rupees."

On this basis the defendants remained in possession until the 31st of May 1903.

Prior to this the defendants advertised the shed for sale and removal, but the plaintiff denied their right: an arrangement was, however, made between him and them, whereby it was agreed that the defendants should postpone the sale until the question of ownership of the shed was decided.

The plaintiff further maintains that the defendants have allowed the premises to fall into disrepair and dilapidation, and have omitted to do the painting work they should.

Under these circumstances the present suit has been brought by the plaintiff, who alleges that the defendants became the assignees of the unexpired period of the term, and prays as follows:

(*a*) That it may be declared that the plaintiff is absolutely entitled to the corrugated iron shed erected upon the premises in question in this suit and mentioned in paragraph 4 of the plaint, and that the defendants are not entitled to remove the same; (*b*) that the defendants may be ordered to pay to the plaintiff the sum of Rs. 7,988-15-0 or such other sum as this honourable Court may think proper and reasonable, for making good the dilapidations and for making the repairs and for painting, etc., of the premises in the plaint mentioned as provided by the said indenture of lease and as damages for breach of the covenants contained in the said lease; (*c*) that the defendants may be ordered to pay to the plaintiff damages for loss of rent of the unoccupied portions of the said premises from the 1st day of June 1903 until such time as the said premises shall be repaired and made fit for occupation by another tenant; (*d*) that

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such damages may be awarded to the plaintiff at the rate of Rs. 675 per month or such other sum as to this honourable Court may seem proper; (e) that the defendants may be ordered to pay the costs of this suit; and (f) that the plaintiff may have such further or other relief as the nature of the case may require.

The written statement did not traverse the allegation that the defendants became assignees, but when the case came on for trial before Russell, J., the following, among other issues, was raised: Whether defendants are the assignees of the lease in paragraph 2 of the plaint referred to?

The result of the hearing was that Russell, J., decided against the plaintiff's claim to the shed, but in favour of his claim in respect of disrepair and dilapidation.

From this decree both sides have appealed.

I will first deal with the claim to the shed.

The architect employed in its erection was Mr. Gostling, and there can be no doubt that the intention was that it should be so constructed as not to be a fixture within the meaning of the lease.

This was the object Mr. Gostling had in view, and which he believed he had secured.

Mr. Justice Russell, who inspected the premises, came to the conclusion, as a result of his inspection and consideration of the evidence, that the shed was not attached to the land or the adjoining building.

My learned colleague and I also after an inspection of the premises and hearing the evidence have no doubt that Mr. Justice Russell's conclusion is correct.

It is true that Mr. Payne, one of the plaintiff's witnesses, says he saw nails. The suggestion that there were nails by which the shed was in any way attached to the earth or the adjoining building has not been made before us, and we were expressly told that no reliance was placed for the plaintiff on this statement of Mr. Payne's. I do not think it necessary to repeat the accurate picture Russell, J., has given of the position and condition of the shed and its surroundings, beyond referring to the dammer placed between the edge of the shed's roof and the adjoining walls. And I make this reference for the purpose of expressing

my opinion that this cannot be regarded as an attachment: it was simply used, as the common practice is in Bombay, to keep out the rain.

Can it then be said that this shed is a fixture within the meaning of the lease?

The word *fixture* is one of common use in English law, though Lord Campbell in *Wiltshear* v. *Cottrell*, (1) said it had no precise legal meaning.

In India the word is not so familiar, and I do not find it as a separate heading in any of the recognised digests, and the maxim *quicquid plantatur solo solo cedit*, on which the law of England as to fixture seems to have been originally founded, has never received so wide an application here as there.

But the case has been argued before us on the basis of English law, and it certainly is not unfavourable to the landlord so to treat it.

Though the word *fixture* does not necessarily in England mean affixed to the freehold, that is the sense it bears in ordinary parlance (*Sheen* v. *Rickie* (2)) and, in my opinion, we ought in constructing this lease to ascribe a similar sense to it, and hold that for anything to be a fixture within the meaning of the lease it must be "attached to the earth," as that expression is defined in section 3 of the Transfer of Property Act. But on the facts found the shed clearly is not so attached; it simply rests by its own weight on the foundation prepared for it.

There is no such annexation as would make the shed a fixture within the lease.

Nor do I think that the shed is an *addition*; for that word, in the context in which it is used, to my mind, implies such a union with the hereditaments demised as would make that to which it is applicable an integral part of those hereditaments. And that cannot be said of the shed.

Therefore, I agree with Russell, J., that the plaintiff has not made out a title to the declaration he seeks in respect of the shed.

Nor does it make any difference in this respect that there has been no assignment by document of the shed to the plaintiff; in the view I take, it is, and always has been, a chattel, as were

(1) (1853) 22 L. J. Q. B. 177. (2) (1839) 8 L. J. Ex. (N. S.) 217.

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the buildings which rested on blocks in *Naylor* v. *Collinge* (1), the barn erected on a foundation of brick and stone in *Wansbrough* v. *Maton* (2), and the granary resting by its mere weight on staddles in *Wiltshear* v. *Cottrell* (3).

And being a chattel the ownership of it passed by delivery of possession, and so it became vested in the defendants.

Then has the plaintiff made good his claim to damages in respect of dilapidations and failure of repair and paint?

No privity either of contract, or estate, has been established between the plaintiff and the defendants, therefore the defendants are not directly liable under the covenants in the lease; nor can they be made liable under those covenants on equitable grounds by reason of their occupation of the premises and payment of rent (*Cox* v. *Bishop* (4)).

Russell, J., appeared to think that the decision in that case was qualified by *Walsh* v. *Lonsdale* (5); but I cannot agree, and that *Cox* v. *Bishop* (4) still stands in its integrity is apparent from *Ramage* v. *Womack* (6), *Gentle* v. *Faulkner* (7), and *Bagot Pneumatic Tyre Company* v. *Clipper Pneumatic Tyre Company* (8).

But at the same time, I think, the defendants have come under some liability, for though there was not in strictness a holding over, still I think, had the point been worked out in the first Court, it would have been established there that the defendants continued in possession in the belief, common to them and the plaintiff, that they held under the terms of the lease so far as the same were applicable. It has been most fairly admitted by Mr. Lowndes on his clients' instructions that this is so, and he agrees to our dealing with this part of the case on that footing.

As the defendants thus held for three years after the expiration of the lease, I think, they became liable to paint in the third year all the outside wood iron and other work previously or usually painted as in the lease provided, but as their tenancy did not extend to a fifth year they came under no liability to paint inside.

(1) (1807) 1 Taun. 19.
(2) (1836) 4 Ad. & E. 884.
(3) (1853) 22 L. J. Q. B. 177.
(4) (1857) 8 De G. M. & G. 815.
(5) (1882) 21 Ch. D. 9.
(6) (1900) 1 Q. B. 116.
(7) (1900) 2 Q. B. 267.
(8) (1902) 1 Ch. 146 at p. 156.

They also became liable to "well and sufficiently repair, maintain, and keep the hereditaments," etc., in good condition and complete repair and deliver up in good condition and repair as in the lease provided, but in applying this covenant it will be on the footing of a tenancy that commenced at the expiration of the lease.

The importance of this is pointed out in *Payne* v. *Haine* (1), a leading authority, and recently recognised as such in *Lister* v. *Lane & Nesham* (2). A practical discussion of the position is to be found in *Proudfoot* v. *Hart* (3), and the result of the cases appears to me to be that under the covenant in this case an obligation was incurred by the defendants to put the premises (if necessary) into good repair in January 1901, and to keep and deliver them up in that condition: but that they did not become liable to restore to their original condition structural alterations prior to that date, and that the extent of the obligation is to be measured by the age, character and locality of the premises in January 1901, the duty being to make them reasonably fit for occupation by a reasonably minded tenant, having regard to those circumstances. The parties desire that we should give them an opportunity to see whether they can come to any arrangement on the basis of this decision; we, therefore, say nothing at present as to costs. The case may be mentioned to us on notice.*

Attorneys for the appellant: *Messrs. Little and Co.*

Attorneys for the respondents: *Messrs. Smetham, Byrne and Noble.*

W. L. W.

(1) (1847) 16 M. & W. 541. (2) (1893) 2 Q. B. 212.
(3) (1890) 25 Q. B. D. 42.

* On the 20th December 1904 Mr. W. A. Chambers was appointed a special commissioner to ascertain the liability of the defendants for non-repairs and the value of the shed.

On the 14th of April 1905 Mr. Chambers reported as follows:—"that the defendants should pay to the plaintiff Rs. 1,222-5-6 for non-repairs and (2) that the plaintiff should pay to the defendants Rs. 6,625 for the shed."

On the 3rd July 1905 the report was confirmed. The plaintiff was ordered to pay the costs, including the costs of the suit and appeal, but damages were disallowed. (Reporter).