## EFFECT OF RENEWAL OF LEASE ON REMOVABLE FIXTURES.

The effect of the renewal of a lease on the ownership of fixtures removable under a prior lease, is one which has perplexed the Courts of this country for a great many years. The rules of law on this subject are by no means settled, and there is a surprising lack of harmony in the decisions of the Courts of different jurisdictions. It is not the purpose of this note to attempt to cover the whole field, but particular attention will be paid to the effect of the renewal of a lease on the ownership of trade fixtures, since this question probably arises oftener than any other.

The English rule,[1] and the rule probably supported by the weight of authority in this country, is that a tenant who renews his lease without removing fixtures placed on the demised premises during the prior tenancy or without reserving a right to do so in the new lease, even though such fixtures were removable during the existence of the original tenancy, can no longer avail himself of that privilege. Such fixtures have become a part of the freehold and cannot be removed without the consent of the owner thereof.[2] Practically all the Courts draw a distinction, however, between a renewal lease which simply incorporates the conditions and terms of a prior lease, and which is held to be simply a continuation of the original tenancy, and a renewal lease which is essentially a new one as to terms and conditions.[3] In the former case it is

1. Pronguey v. Gurney, 37 U. C. Q. B. 347.
2. Merritt v. Judd, 14 Cal. 59; Marks v. Ryan, 63 Cal. 107; Hedderich v. Smith, 103, Ind., 203; Chicago Sanitary District v. Cook, 169 Ill., 184; Shepard v. Spaulding, 4 Metc. 416; Watriss v. Cambridge First Nat. Bank, 124 Mass. 571; Carlin v. Ritter, 68 Md. 478; Bauernschmidt Brewing Co. v. McColgan, 89 Md. 135; Gerbert v. Sons of Abraham, 59 N. J. L. 160; Loughran v. Ross, 45 N. Y. 792; Precht v. Howard 187 N. Y. 136; Unz v. Price, 27 Ky. 791; Spencer v. Commercial Co. 30 Wash. 520; Williams v. Lane, 62 Mo. App. 66.
3. Hedderich v. Smith, 103 Ind. 203; Watriss v. Cambridge Nat. Bank 124 Mass., 571; Crandall Investment Co. v. Ulyatt 40 Colo., 35; Estabrook v. Hughs, 8 Neb. 496; Young v. Implement Co. 23 Utah 586; Carlin v. Ritter 68 Md. 478.

held that the tenant does not lose the right to remove his fixtures, while in the latter, the courts which recognize the majority doctrine hold that, since under the new lease there is a new tenancy, the tenant by not reserving a right therein to remove his fixtures, is deemed to have abandoned them as effectively as if he had withdrawn from the demised premises without removing them.[4]

One of the first cases involving this point to be adjudicated in this country was that of Merritt v. Judd,[5] in which the Court adopted the English rule. This was an action of replevin to recover a pump and steam engine used in the operation of a gold mine. The Court decided that these articles were trade fixtures, and that there would be no doubt of the right of the tenant's assignor to recover them, if it were not for the fact that the tenant had taken a new lease of the premises subsequently to making the improvements. The Court said, at page 72: "Upon the execution of a new lease, he (the tenant) is in the same position as if the landlord being seized of the land, had leased both land and fixtures to him."

One of the leading cases in this country is that of Watriss v. First Nat. Bank of Cambridge.[6] This was an action for breach of a covenant in a lease to quit and deliver up the premises to the lessor peaceably and quietly at the end of the term. The breach complained of was the taking down and removal of a safe and vault, a portable furnace, and certain counters. Plaintiff and one Hyde owned the premises as tenants in common, and had leased them for five years to the Harvard Bank with a privilege of renewal for an additional five years. Under this lease the property in controversy was placed on the premises. During this tenancy, the Harvard Bank was reorganized under the present name of the defendant, succeeding to all its rights, and the plaintiff acquired a sole interest in the premises. Shortly before the expiration of

4. Carlin v. Ritter, 68 Md. 478; Loughran v. Ross, 45 N. Y. 792.
5. 14 Cal. 59.
6. 124 Mass. 571; *l. c.* 575-6.

this lease the defendant elected to avail himself of the privilege of renewal, and a new lease was drawn up, which took effect at the expiration of the first. This second lease was materially different from the first in certain respects. The new lease contained no reservation of a right to remove the improvements. At the expiration of the second lease, the defendant attempted to remove them. The Court held that they were trade fixtures, but denied that they could be removed. Judge Endicott said: "The general rule is well settled, that trade fixtures become annexed to the real estate, but the tenant may remove them during his term, and if he fails to do so, he cannot afterwards claim them against the owner of the land. * * * But a very different question is presented when the same tenant continues in possession under a new lease containing different terms and conditions, making no reference to the old lease, reserving no rights to the lessee in fixtures annexed during the previous term, and not removed before its expiration * * *. This is not an extension or holding over under an old lease; it is the creation of a new tenancy and it follows that whatever was a part of the freehold when the lessee accepted the new lease must be delivered up at the end of the term, and cannot be severed on the ground that it was put in as a trade fixture under a previous lease which had expired."

Another leading case is Carlin v. Ritter,[7] which contains a very thorough exposition of the majority doctrine. This case involved a controversy over the ownership of certain buildings erected on the demised premises while the tenant occupied them under an oral agreement as tenant from year to year. After having received notice to quit, the tenant secured a written lease for five years, which contained no reference to the former tenancy, or to improvements made thereunder. It was held that the buildings were trade fixtures. Judge Miller, speaking for the Court, said: "As between landlord and tenant, the property of the latter in fixtures of any description

7. 68 Md. 478; *l. c.* 483.

which he has annexed to the demised premises during his term, consists simply in the right or privilege of removing them, and if this is not exercised in due time, they become the property of the landlord. In using the term "fixture" we, of course, use it in its legal sense, as something so attached to the realty as to become for the time being a part of the freehold and as contradistinguished from a mere chattel." Considering the effect of the new lease the Court said, page 487: "The question then immediately before us is, what effect had the acceptance of this lease and continuing in possession under it, upon the tenant's right to remove these trade fixtures. And here again in answer to this question, all the elementary writers concur in laying down the proposition that if a tenant having the right to remove fixtures accepts a new lease of such premises without reservation or mention of any claim to such fixtures, and enters upon a new term thereunder, the right of removal is lost, notwithstanding his possession has been continuous." The reason for this is, that since the fixtures set upon the premises at the time of the lease are a part of the thing demised, the tenant will be deemed to have abandoned them, and by accepting the new lease he acknowledges the right of the landlord to them.

The doctrine as here outlined, that the acceptance of a new lease implies an abandonment of them by the tenant and an acknowledgment of the paramount right of the lessor is followed by a great many Courts in this country.[8] This rule preserves the fundamental principles of the law of fixtures, that such improvements become a part of the realty, but that in the case of trade fixtures, or "removable fixtures," there is a privilege or license in the lessee to remove them during the term. By not exercising this privilege, or reserving a right to do so, he forfeits it and the fixtures which were originally removable become a permanent part of the realty.

In several instances, while following the majority rule, the Courts of some States have based their decisions on the con-

8. See cases cited in Note 2.

struction of covenants in the lease. In Chicago Sanitary District v. Cook,[9] the Court, while apparently recognizing the principles of Carlin v. Ritter, *supra*, based its decision on a covenant in the second lease that the lessee would keep the premises and improvements in reasonable repair, and would surrender and deliver up the premises in as good condition as they were at the beginning of the term, reasonable wear and deterioration excepted. Since the trade fixtures were on the premises at the time the new lease was executed, the Court puts great weight upon this covenant as evincing an intention on the part of the lessee that the fixtures should become part of the realty and the right of removal be abandoned. In Davis v. Carsley Mfg. Co.,[10] which presented essentially the same question, this principle was reiterated. In Hedderich v. Smith[11] the new lease contained a covenant to keep the premises in repair and surrender them in good condition. The Court held that to allow the lessee to say that the buildings were trade fixtures and removable would be directly contradicting the terms of the lease.

In some States this majority doctrine has been repudiated.[12] Judge Cooley, in Kingsbury v. Kerr,[13] the leading case on the other side, very strenuously opposed the application of the doctrine, and his opinion has been extensively quoted by those Courts which incline to his views. This case involved a controversy between a mortgagee and the lessees of certain property as to whether or not buildings (trade fixtures) erected on the demised premises were part of the realty and included in the mortgage. The contention of the plaintiff was that the defendant lost the right to remove the buildings by accepting a new lease of the premises without reserving a

9. 169 Ill. 184.
10. 112 Ill. App. 112.
11. 103 Ind. 203.
12. Kerr v. Kingsbury, 39 Mich. 150; Waverly Park Amusement Co. v. Traction Co., 197 Mich. 92; Daly v. Simonson, 126 Ia. 719; Ray v. Young, 160 Ia. 613; Radey v. McCurdy, 109 Pa. St. 306; Robinson v. Harrison 237 Pa. St. 613, Sassen v. Haegle, 125 Minn. 441; Ogden v. Garrison, 82 Neb. 302.
13. 39 Mich. 150.

right of removal. Cooley's opinion, which is so frequently quoted, is in part as follows (page 154): "But why the right should be lost when the tenant, instead of surrendering possession, takes a renewal of his lease is not very apparent. There is certainly no reason of public policy to sustain such a doctrine; on the contrary, the reasons which saved to the tenant his right to the fixtures in the first place are equally influential to save to him on a renewal what was unquestionably his before. What could possibly be more absurd than a rule of law which should in effect say to the tenant who is about to renew: 'If you will be at the expense and trouble, and incur the loss of removing your erections during the term, and of afterwards bringing them back again, they shall be yours, otherwise you will be deemed to abandon them to your landlord.'" Manifestly, with little regard for authority, the decision is based on public policy and on the assumption that to hold otherwise would give the lessor an unconscionable advantage. The contention that a lessee who intends to renew his lease, in order to safeguard his removable fixtures would have to remove them during the first term, and then have the trouble of replacing them on the premises after the new lease began to operate, is obviously absurd. The Courts unanimously hold that a lessee may retain his right to remove his fixtures by putting a reservation to that effect in the new lease. This case was followed in a later Michigan case, Waverly Park Amusement Co. v. Traction Co., where the opinion just quoted was cited with approval.

The Courts of Pennsylvania have seized upon this doctrine. Radey v. McCurdy,[14] Robinson v. Harrison.[15] In the first case the Court extensively reviewed the Michigan cases and adopted them as law. The Court held that there was no apparent intention to abandon the fixtures, and that it would be absurd to hold that the lessee would make a gift of them to his lessor, when clearly no such intention could be imputed

14. 109 Pa. St. 306.
15. 237 Pa. St. 613.

to him during the first term. In its opinion, however, the Court speaks of the second lease as substantially embodying the terms of the first; if so, there was but one tenancy and it would not be necessary to reserve a right to remove fixtures in the second lease.

In Iowa the Michigan doctrine has been followed with somewhat different reasoning. In Ray v. Young,[16] the case came up on a rehearing as to the granting of an injunction restraining the defendant from removing certain buildings from the demised premises. Such buildings were used solely for the purposes of trade and could be removed without doing substantial damage to the freehold. The plaintiff attempted to invoke the rule that when a lessee takes a new lease of the premises without making reservations as to fixtures, his right of removal is lost. The Court directly repudiates such a doctrine. It held that trade fixtures, whether buildings or articles simply annexed to buildings, if they can be removed without doing substantial injury to the land, are personal property of the lessee and never lose their character as such. Consequently the theory that when a lessee takes a new lease of the premises without making any reservations, such lease includes the land and the fixtures attached thereto at the time of the demise has no application. Since such articles have retained their character as personal property, they have never become a part of the realty and so could not pass under a demise of the land. In Daly v. Simonson[17] the Court held that when buildings were placed on the premises under a lease which gave the lessee a right to remove them at the expiration of his term, they were personal property, and that notwithstanding that in a new lease he covenanted to keep them in repair, and made no reservation for their removal, they never lost their character as personal property, nor the lessee his right of removal.

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16. 160 Ia. 613.
17. 126 Ia. 719.

The principles of the Iowa cases are followed in Minnesota and Nebraska.[18] This doctrine really begs the whole question of fixtures. By definition a fixture is a chattel so attached to the realty as to become for the time being a part of the freehold.[19] When so attached it loses its character of personalty, there being the power in the lessee, however, to convert it again into personalty by exercising his privilege of severance. If an article never loses its character as personal property, it never becomes a "removable fixture," although some courts through a loose use of terminology have in effect so held. There is, however, a growing tendency in the courts, which is clearly marked, to regard articles annexed for the purposes of trade, which can be severed from the realty without doing substantial damage to the freehold, as personal property. In a late Missouri case[20] trade fixtures were held to be personal property.

In New York, Missouri and Kentucky,[21] the Courts have grafted an exception in favor of certain classes of trade fixtures onto the majority rule.

In New York, in the early case of Loughran v. Ross,[22] the Court held, in conformity with the majority rule, that when a lessee who has a right to remove fixtures under a lease, takes a new lease of the premises without reservations, such lease will include the fixtures and he will be deemed to have abandoned them notwithstanding his possession has been continuous. In a later case, Lewis v. Ocean Navigation & Pier Co.,[23] the Court held that the rule laid down in Loughran v. Ross was a harsh one and should not be extended to a case where the lessee simply remains in possession after the expiration of his lease

18. 125 Minn. 441; 82 Neb. 302.
19. Carlin v. Ritter, 68 Md. 478.
20. Cunningham v. Von Mayes, 194 Mo. App. 56.
21. Bernheimer v. Adams, 70 App. Div. 113. Affirmed without opinion 175 N. Y. 472; Thomas v. Gayle, 134 Ky. 330; Red Diamond Clothing Co. v. Steideman, 169 Mo. App. 306.
22. 45 N. Y. 792.
23. 125 N. Y. 341.

in his character as tenant, where there has been no acceptance of a new lease.

In Bernheimer v. Adams[24] the Court held that the articles in question which were attached as trade fixtures, were not in their nature, nor were they so attached as to become, necessarily a part of the freehold, since they could be removed without doing material injury. The Court, through Judge Laughlin stated: "We think no rule of law or public policy requires in these circumstances that the tenants * * * should lose their rights by a failure to specify in the lease that a right of removal was reserved, and such doctrine would be most inequitable. We deem the true rule to be, that if fixtures are distinctively realty, the right to remove must be reserved in the lease. The right to remove fixtures which are distinctively realty is in the nature of a license and must be exercised while the tenant is in possession under the lease that granted it. Taking a new lease without reserving the right is deemed an abandonment thereof."

In Thomas v. Gayle[25] and Bergh v. Herring-Hall-Marvin Safe Co.,[26] substantially the same doctrine is adhered to. In the latter case, the articles in question were certain engines, boilers, shafting, pulleys, etc., which were trade fixtures. Judge Coxe, in referring to Bernheimer v. Adams, *supra*, said: "The Court makes a distinction which we think is a proper one, between fixtures which are distinctively realty such as buildings, fences, bank vaults and the like, and chattels known as trade fixtures which are capable of being removed without injury to the freehold. With this distinction observed no injustice can be done. If the fixtures are appurtenant to the land so that a deed or lease of the premises will necessarily include them, a reservation should be made if the tenant desires to retain them, but as to chattels which can be removed and carried away without injury, no such exception should be necessary."

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24. 175 N. Y. 472.
25. 134 Ky. 330.
26. 136 Fed. 368.

In a line of authorities beginning with Williams v. Lane,[27] the courts of Missouri have adhered to the doctrine of abandonment. In that case the lessor of a building brought an action of waste against the lessee for removing certain shelving which had been affixed to the premises under a prior lease. The articles in question were held to be trade fixtures, but the Court held that since they were not removed during the original term, that by the acceptance of a new lease they had become an integral part of the real estate to which they were affixed.

In a late case, however, Red Diamond Clothing Co. v. Steideman,[28] the Court inclined to the New York view and drew a distinction between trade fixtures which were in their nature distinctively personal and those which were distinctively a part of the realty. In this case there was an action brought for the conversion of certain property annexed to defendant's building. The articles in question were an engine, boiler, steam pump and blow-off tank, all parts of a manufacturing plant, and a furnace and automatic sprinkler. All this property had been annexed to the demised premises under an oral agreement that the lessee should have the right of removal after the expiration of his first term. At the expiration thereof, said lessee took a new lease without making any reservations as to the improvements. The Court held that as far as the furnace and automatic sprinkler were concerned, they could not be removed, for because of the mode of annexation, they could not be taken off without doing substantial injury to the building. Since they were not trade fixtures, they had become a part of the realty. The Court decided that the other articles in question were trade fixtures and could be removed without doing substantial injury to the freehold. That notwithstanding the decision in Williams v. Lane, *supra,* the rule there laid down was a harsh one and should not be ex-

27. 62 Mo. App. 66; Champ Spring Co. v. Roth Tool Co., 103 Mo. App. 103; St. Louis v. Nelson, 108 Mo. App. 210.
28. 169 Mo. App. 306.

tended to a case like this where the trade fixtures never became essentially a part of the realty, but have retained their character as personal property. Thus it can be seen, that on this question the Courts of Missouri hold to practically the same doctrine which prevails in New York.

When confronted with hard cases, Courts frequently hesitate in applying fixed rules of law. Manifestly, the exceptions made in Missouri, New York and Kentucky in favor of trade fixtures, are for the purpose of aiding and stimulating industry. The great difficulty is to determine just what the criterion will be by which the Courts will pronounce certain trade fixtures "distinctively personalty" and others "distinctively realty."

It is clear that there has been of late years a drifting away from the old doctrine. Whether these changes are based on public policy, whether on the character of the improvements as personal property where a right of removal once existed, or whether they are based on the doctrine as it apparently exists in Missouri, the changes, made undoubtedly in the interests of commerce and industry, have introduced a confusion into the body of the law from which it will be difficult for the Courts to extricate themselves.

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