

1938. administer the Act in a proper manner : cf. *Re Railway and Electric Appliances Co. Ltd.*(1)

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COMMON-
WEALTH
OF
AUSTRALIA.
—
Jordan C.J.

For these reasons I am of opinion that there should be judgment for the defendant on the demurrer.

NICHOLAS and OWEN JJ., concurred.

Solicitor for the plaintiff : *W. Lieberman.*

Solicitor for the defendant : *H. F. E. Whillam* (Commonwealth Crown Solicitor).

[On the 17th November, 1938, the High Court refused leave to appeal against the above decision.]

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Davidson J.
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Fixtures—Intention of parties on annexation—Degree of annexation.

If a chattel is actually fixed to land to any extent, by any means other than its own weight, then *prima facie* it is a fixture ; and the burden of proof is upon anyone who asserts that it is not : if it is not otherwise fixed but is kept in position by its own weight, then *prima facie* it is not a fixture ; and the burden of proof is on anyone who asserts that it is. The test of whether a chattel, which has been to some extent fixed to land, is a fixture is whether it has been fixed with the intention that it shall remain in position permanently or for an indefinite or substantial period, or whether it has been fixed with the intent that it shall remain in position only for some temporary purpose. In the former case, it is a fixture, whether it has been fixed for the better enjoyment of the land or building, or fixed merely to steady the thing itself, for the better use or enjoyment of the thing fixed. If it is proved to have been fixed merely for a temporary purpose it is not a fixture. The intention of the person fixing it must be gathered from the purpose for which and the time during which user in the fixed position is contemplated. If

(1) 38 Ch. D. 597 at 607-8.

a thing has been securely fixed, and in particular if it has been so fixed that it cannot be detached without substantial injury to the thing itself or to that to which it is attached, this supplies strong but not necessarily conclusive evidence that a permanent fixing was intended.

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Trover and Detinue—Conversion—Necessity for physical interference.

Semble, there is no authority for the proposition that there can be conversion by a defendant unless there has been some physical interference with the goods or with access to the goods by the defendant or someone for whose act he is responsible; or some change of the character in which a person in actual possession of the goods holds that possession, the defendant or someone for whose act he is responsible, being responsible for the change.

Assignment—Leasehold interest in chattels.

Observations on the assignability of leasehold interests in chattels. Distinction between rights arising under a contract of hiring merely and rights arising under a single and inseverable transaction by which land is leased together with chattels, discussed.

NEW TRIAL MOTION.

This was a motion by the defendant that a verdict and judgment for the plaintiff be set aside and a verdict and judgment entered for the defendant, or that a new trial be directed, in an action for conversion in which a verdict was entered for the plaintiff for the sum of £792 10s. 0d. The declaration contained two counts, the first alleging that the defendant converted to its own use or wrongfully deprived the plaintiff of the use and possession of a number of specified chattels, and the second that the defendant seized and took the plaintiff's said goods and carried away the same and disposed of them to its own use. As the case proceeded, no evidence was tendered of any trover based upon a trespass *de bonis asportatis* such as was alleged in the second count, and the action was fought on the basis that the conversion sought to be proved was a wrongful disposition of the chattels in premises called the Strand Theatre at Cessnock alleged to have taken place on 28th January, 1936.

Three questions were left to the jury: (1) which of the articles in the list were fixtures, (2) which of these articles in the list were on the premises on 28th January 1936, and (3) what value do you fix to the articles, if any, found to be not

1938. fixtures and on the premises as in Question 2. To these

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(2) all of them, and (3) £792 10s. 0d.

At the trial, the act of conversion relied on by the plaintiff was the execution by the defendant company on 28th January, 1936, of an unregistered memorandum of lease by which the defendant purported to lease to the Kurri Kurri and South Maitland Amusement Co. Ltd. the land on which the Strand Theatre was erected together with a number of specified articles which included all those claimed in the action and also a few that were not claimed. At one time counsel for the plaintiff had sought also to rely alternatively upon an act of conversion alleged to have been constituted by a failure on the part of the defendant to comply with a letter dated 26th October, 1936, by which the plaintiff called upon the defendant to return and deliver up to him the articles claimed; but, his Honour having ruled that this could not amount to an act of conversion, the case proceeded on the footing that the issue to be determined was whether or not a conversion had occurred on 28th January, 1936, and the questions were put to the jury on this footing.

Other material facts are set out in the judgment of his Honour the Chief Justice.

Monahan K.C., Gain and G. P. Donovan for the appellant. On the 28th January, 1936, the plaintiff was not in possession and had no right to possession. He had not been in possession for nearly ten years. Therefore no action of conversion lies. In any event it will be submitted that some if not all of the articles in respect of which a claim is made were not fixtures. The company were acting as the rightful possessors and paying the rent. A demand and refusal is not evidence of conversion unless the person to whom the demand is addressed is in possession and able to hand the goods over. Defendant company can only establish a title to the chattels if they are fixtures and has no rights otherwise unless the sale under mortgage effected a sale of the chattels. Even after the expiry of the lease a fresh lease affected the defendant company's right to possession. The Kurri Kurri and Greater Union Companies have never given up possession.

[DAVIDSON J. referred to *Craig v. Marsh* (1); *Oakley v. Lyster*.(2)] 1938.

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There is a different test between landlord and tenant and life tenant and remainderman on the one hand and mortgagor and mortgagee on the other. The test is not one of intention of the mortgagor but the intention for what use the articles were put in. The jury's finding as to certain of the goods being on the premises is perverse and cannot be allowed to stand. With respect to the chairs the evidence is that they were used in other theatres before 1936.

[They referred to Bullen and Leake on Pleading 3rd edn p. 291.] The plaintiff must have a right to immediate possession: *Bradley v. Copley* (3) and *Bloxam v. Saunders*.(4) Mere selling without delivery does not amount to a conversion: *Lancashire Waggon Co. v. Fitzhugh*.(5) That case is also an authority for the proposition that the hiring of a chattel does not create any estate. The act of the defendant which is complained of must be such as to deprive the plaintiff of the present right to his goods: *Hiort v. Bott* (6); *Jelks v. Hayward* (7); *England v. Crowley*.(8) The judgment of Scrutton L.J. in *Oakley v. Lyster* (9) is based on the statement of Lord Atkin in *Lancashire and Yorkshire Railway Co. v. MacNicol*.(10) The act complained of is alleged to have taken place on the 28th January. The lease did not expire until October, 1936, on which date the right to the goods was in the defendant. The act complained of did not alter any right of the plaintiff. The plaintiff was not on any view of the facts entitled to possession as he had neither possession nor the right to it on the day of the act complained of: *Craig v. Marsh*.(1) The answers brought in by the jury left the question of a conversion undetermined but this Court can now enter a verdict. The defendant cannot be sued if the goods are held for himself and not for the defendant. Mere sale does not amount to conversion unless followed by an attempt to give up possession. The lease is only a form of contract and

(1) 35 S.R. 323; 52 W.N. 123.

(2) [1931] 1 K.B. 148.

(3) 1 C.B. 685.

(4) 4 B. & C. 941.

(5) 6 H. & N. 502.

(6) L.R. 9 Ex. 86.

(7) [1905] 2 K.B. 460 at 465.

(8) L.R. 8 Ex. 126.

(9) [1931] 1 K.B. 148 at p. 153.

(10) 118 L.T. 596; 88 L.J.K.B. 601.

1938. has only the same effect as if the defendant had agreed to sell the goods. If conversion in October is alleged, the defendant was still in a position of being unable to comply with any demand as he was not then in control of the goods. The mere fact that a tenant is in possession does not mean that he holds possession for the lessor. Conversion involves dealing and transfer of possession or documents of title. An abortive transaction, for example, a purported sale of another's property can give no rise to a claim for possession. In respect of conversion a person not in possession who gives instructions cannot be held guilty with the person who actually carried them out. The act complained of must affect the rights of the owner of the goods.

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The next question which arises is whether or not the goods were fixtures. This resolves itself into whether they were all fixtures, in which case the defendant would be entitled to a verdict, or whether some only, in which case there must be a new trial, because the jury has proceeded on the basis that all were fixtures. It is submitted that for practical purposes they were all fixtures. This does not depend on the fact that they were used for a picture show. The test to be applied is whether they were put there for the purpose of the owner getting a better beneficial interest in his freehold or for the purpose of better enjoying the chattels. *Prima facie* wiring, installation and switchboard must be fixtures: *Climie v. Wood*.⁽¹⁾ In mortgagor and mortgagee cases the presumption is in favour of a mortgagee that a chattel is a fixture. The electrical machine was an integral part of the building. [They referred to *Holland v. Hodgson*.⁽²⁾] In *Reynolds v. Ashby & Son*⁽³⁾ it was held that the matter was not one of fact for the jury. Even slight evidence of annexation will cast the onus on the party claiming to establish that chattels are not fixtures: *Vaudeville Electric Cinema Co. v. Muriset*.⁽⁴⁾ The present case is stronger than that.

[JORDAN C.J. referred to *Colledge v. H. C. Curlett Construction Co. Ltd.*⁽⁵⁾]

The relevant date would be the date when the mortgagee went into the building and not the date of the sale. In respect

(1) L.R. 3 Ex. 257.

(4) [1923] 2 Ch. 74.

(2) L.R. 7 C.P. 328 at 335.

(3) [1903] 1 K.B. 87; [1904] A.C. 466.

(5) [1932] N.Z.L.R. 1060.

of a hall equipped and carried on as a picture show, the same incidental use for other purposes does not affect the possession of the chattels as to whether they are fixtures or not.

[JORDAN C.J. referred to *Gough v. Wood & Co.*(1)]

The transaction here was a lease of building and plant solely for use as a picture show, and possession of the chattels was parted with on the basis of improving the enjoyment of the building. The projector machine was essential for the carrying on of the business. The trial Judge should have ruled that the chairs were fixtures. The ticket office was so obviously a fixture that the defendant is entitled to a new trial on that issue only. It is submitted further that this Court should find that it is a fixture. The rheostat, the starter, and the switchboard were fixtures all being physically connected. The evidence as to certain of the chattels shows that the jury's answer to the second question was unreasonable. The evidence shows that from the date the Kurri Kurri Co. took over the building was not used as a picture theatre, and establishes that at the relevant date many of the articles had been removed. If the second finding cannot stand then the third finding on damages must be reversed also. No direction was given that the relevant date for valuation was the date of conversion and there is no finding by the jury on conversion at all.

Watt K.C., Amsberg and Isaacs, for the respondent. It is admitted that the plaintiff must have had possession or the right to possession, and it is claimed that the evidence established that the plaintiff had the right to possession at the relevant date. The date of the expiry of the original lease was October, 1936, and on that date the plaintiff wrote a letter of demand which was unanswered. This letter was tendered at the trial but was rejected. The original lease granted by the plaintiff was surrendered by the company on the execution of the second lease. The effect of that was to vest in the plaintiff the articles which had been included in the lease to Smyth and under that lease the plaintiff had the immediate right to possession. The defendant dealt with the plaintiff's property in such a way as to disregard the rights of the plaintiff, and used the plaintiff's property for its own benefit against the executory

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(1) [1894] 1 Q.B. 713.

1938. rights of the plaintiff. The surrender of a lease under the Real Property Act may be effected by the granting of a new lease even though the new lease be unregistered: *Josephson v. Mason* (1); Redman's Landlord and Tenant, 6th ed., 514. There cannot be two tenancies of the same property at the same time, and the document of 1934 only operates as an agreement: *Bird v. Baker* (2); *Cooper v. Robinson*. (3) If there is a necessity for possession then the plaintiff claims the right of possession by reason of the surrender. The act of conversion consists in the assumption of dominion over the chattels in agreeing to grant a lease. The statement in the *habendum* would not in itself be available to the plaintiff to rely on for the purposes of a surrender in 1934, but when the new lease was executed that coupled with possession operates as a surrender because it sets up a state of affairs inconsistent with the old lease. Surrender can arise by operation of law when there is an intention established to discard the old lease: *Ex parte Vitale*; *Re Young*. (4)

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[DAVIDSON J. referred to *Doe d. Biddulph v. Poole* (5); *Lyon v. Reed* (6); *Buchanan v. Byrnes*. (7)]

Section 54 of the Real Property Act 1900 provides for surrender and registration. The plaintiff is only relying on the document as an admission and is not in the same position as if he were claiming specific performance.

[DAVIDSON J. referred to Woodfall's Landlord and Tenant, 16th ed. 318.]

The document and the circumstances evidence an intention to get rid of the old lease. The admission is a statement against the defendant that in 1934 the Kurri Kurri Co. paid rent under a new arrangement, and this admission stands even though the agreement itself be inoperative. The plaintiff really bailed chattels for a definite period to Smythe and this bailment ceased on the 28th January, 1936. [They referred to Salmond on Torts, 8th ed., 330.] There may be a conversion without a physical dealing with the goods: *Salmon v. Matthews* (8); *Van Oppen & Co. Ltd. v. Tredegars Ltd.* (9)

(1) 12 S.R. 249; 29 W.N. 78.

(2) 1 E. & E. 12.

(3) 10 M. & W. 694.

(4) 47 L.T. 480.

(5) 11 Q.B. 713.

(6) 13 M. & W. 285.

(7) 3 C.L.R. 704; 12 Austn Digest 976.

(8) 8 M. & W. 827.

(9) 38 T.L.R. 504.

[JORDAN C.J. referred to *The Munster and Leinster Bank Ltd. v. Hollinshead*.(1)]

Van Oppen's Case was followed in *Public Trustee v. Jones* (2) and in *Motor Dealers Credit Corporation Ltd. v. Overland (Sydney) Ltd.*(3) [They referred to *Burrows and Another v. Bayne*.(4)] The question as to whether the chattels were fixtures was a matter of fact for the jury to decide and unless their verdict is unreasonable will not be disturbed. [They referred to *Horwich v. Symond* (5); *Hutchinson v. Kay* (6); *Holland v. Hodgson* (7); *Hobson v. Gorringer* (8); *Vaudeville Electric Cinema Limited v. Muriset* (9); *Lyon v. London City and Midland Bank* (10); *M'Combie v. Davies* (11); *Fine Art Society Ltd. v. Union Bank of London Ltd.*(12)]

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Monahan K.C. in reply. Section 40 of the Real Property Act makes a registered sub-lease conclusive evidence. The right to the chattels was in a sub-lessee and no dealing between the head lessor and lessee could affect the rights of the sub-lessee. Even if the defendant did something which operated as a surrender of the lease, the plaintiff had no reversion in the chattels and nothing that the defendant did could affect any right to the chattels.

JORDAN C.J. [after stating the abovementioned facts, proceeded :] It is evident that it was assumed by both parties that the nature of the verdict to be entered would depend primarily upon the view taken as to whether as a matter of law the execution of the document did or could operate as a conversion, and secondarily, if so, upon the jury's findings of incidental facts going mainly to the question of damages.

His Honour, apparently taking the view that there would be an appeal in any event, did not express an opinion himself upon the question of conversion or no conversion, but simply entered a verdict for the plaintiff. Exception is now taken to this on behalf of the defendant, not on the formal ground that the verdict should have been obtained from the jury upon a

(1) [1930] I.R. 187.

(2) 25 S.R. 526; 42 W.N. 173.

(3) 31 S.R. 516; 48 W.N. 205.

(4) 29 L.J. Ex. 185 at 187-189.

(5) 84 L.J.K.B. 1083; 112 L.T. 1011.

(6) 23 Beav. 413.

(7) L.R. 7 C.P. 328.

(8) [1897] 1 Ch. 182.

(9) [1923] 2 Ch. 74.

(10) [1903] 2 K.B. 135.

(11) 6 East 538.

(12) 17 Q.B.D. 705.

1938. direction and not entered by the judge (because it seems clear that it was impliedly if not expressly agreed that the judge should determine the question of law and enter a verdict accordingly), but on the ground that his Honour should have formed and expressed his own opinion on the question of law. I think that this view is correct. If the parties had had the benefit of the reasoned opinion of the learned and experienced judge who tried the case, upon the questions of law involved, the losing party might have been satisfied that an appeal would be fruitless ; and, in any event, it was important that the Court sitting in Banco should have had the benefit of his Honour's views upon the question. However, the point is not otherwise material, because, although we have been deprived of that benefit, we are in a position to order a verdict to be entered under s. 7 of the Supreme Court Procedure Act, 1900.

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Nothing turns on the point that a general verdict was entered, because only the first count was treated as being in issue either at the trial or before this Court.

Since it is conversion that was complained of, the burden of proof was on the plaintiff to establish that the articles in question were chattels and that at a time when he had a common law right to the immediate possession of these chattels, namely on 28th January, 1936, the defendant company, with intention to deny the right or to assert an inconsistent right, interfered with them in a way inconsistent with the plaintiff's right : *Lancashire & Yorkshire Railway Co. v. MacNicol*.(1)

The material facts are as follow. The plaintiff Coroneo in or about the year 1924 purchased a piece of land at Cessnock which was under the provisions of the Real Property Act. He then proceeded to erect a hall upon the land, which was afterwards called the Strand Theatre, and in order to obtain the necessary funds he executed a number of registered mortgages of the land. The first in point of time was executed on 24th December, 1924, and was a second mortgage, because postponed to the next which was executed as a first mortgage on 3rd March, 1925. A third mortgage was executed on 17th October, 1925 ; and subsequently on 27th April and 9th August, 1927, respectively a fourth and a fifth mortgage were

(1) 118 L.T. 596 at 598 ; 88 L.J.K.B. 601 at 605.

executed. When the building had been erected, the plaintiff proceeded to equip it so that it could be used for the display of moving pictures. For this purpose he installed the necessary apparatus, most of which was to a greater or less extent fixed to the building. He also provided a large number of chairs. During his occupancy of the theatre, he used it on two days a week for moving pictures, and for the rest of the time it was used for such purposes as concerts, meetings, boxing contests, and euchre parties, as opportunity offered. The chairs, which were of two sorts, were fastened together in rows; and these rows were fixed to the floor when the chairs were in use. They were unfixed and moved about as occasion required. For example, when moving pictures were displayed, the best were put at the back and the others at the front; and this order was reversed in the case of concerts. When euchre parties were given, a large number of the chairs were removed from the body of the hall and stacked at the sides to make room for tables. Sometimes also some of the chairs were hired out, which involved their absence from the hall during the period of hire.

On 29th November, 1926, the plaintiff, with the consent of the then mortgagees (whose mortgages, since they extended only to the land, gave them no interest in any chattels which had not become fixtures) leased to one J. H. T. Smythe the land on which the Strand Theatre was erected together with a large number of specified articles of which the most important were the moving picture equipment including two biograph machines, 278 spring seat chairs, and 667 padded seat chairs, at a rental of £20 per week for the term of ten years from 18th October, 1926. The lease was subject to the conditions that the plaintiff might substitute an ordinary piano for the pianola, and might at any time remove the two biograph machines; but it contained no covenant not to assign or sublet. Smythe, who was interested in other moving picture shows in the neighbourhood, acquired the theatre for the purpose of closing it as a moving picture theatre; and it has not been since used for that purpose but only for the miscellaneous purposes of a hall.

On 13th September, 1928, Smythe, by memorandum of transfer of lease registered on 2nd October, 1928, transferred

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1933. to the Kurri Kurri & South Maitland Amusement Co. Ltd.
 AUSTRALIAN all the estate and interest of which he was the registered
 PROVINCIAL proprietor together with all his rights and powers in respect
 ASSURANCE thereof as comprised and set forth in the memorandum of lease
 Co. LTD. dated 29th November, 1936, of the land comprised in the
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At this stage, the second mortgagee on 27th February, 1929, in exercise of a power of sale contained in the second mortgage, sold the land on which the theatre was built to the defendant company, which, on 9th March, 1929, became the registered proprietor of the land by transfer. Neither the sale nor the memorandum of transfer purports to deal with anything but the land. The first mortgage has been discharged.

On 22nd April, 1931, the Kurri Kurri company, by memorandum of lease dated 22nd April, 1931, registered on 11th August, 1931, subleased to Union Theatres Ltd. (*inter alia*) the land the subject of the said lease "together with all the seating, furniture, fixtures, fittings, plant, biograph machines, electrical and other machinery, musical instruments and other articles and things of whatsoever description in or upon or about the premises erected on the land above described of which an inventory has been taken" from 26th July, 1930, up to and including 15th October, 1936. The defendant company, described as registered proprietor of the land, consented to the sublease on 18th May, 1931.

This sublease having been surrendered on 15th June, 1932, the Kurri Kurri company by memorandum of lease dated 9th September, 1932, registered on 30th November, 1932, subleased to Greater Union (Extension) Ltd., *inter alia*, the land the subject of the lease, together with things according to the above description for a term from 19th October, 1931, up to and including 15th October, 1936. To this sublease the defendant company gave a similar consent dated 5th October, 1932.

On 19th June, 1935, the Kurri Kurri company executed under seal an agreement with the Greater Union company by which it agreed to sublease to the Greater Union company (*inter alia*) the land on which the Strand Theatre was built, together with the theatre, together with articles of which a general description was given identical with that contained in the sub-

lease dated 22nd April, 1931, but accompanied by an inventory setting out the articles with their replacement cost totalling £508 7s. 0d. Of these, the most important items were 371 padded seats costed at £185 10s. 0d., 326 wooden seats costed at £32 12s. 0d., 56 wooden forms costed at £42, a pianola costed at £100, a motor generator costed at £100, and a boxing ring costed at £25. The sublease was to be for a period commencing on 28th September, 1934, and terminating on 12th September, 1943. The plaintiff disclaimed any right to the 326 wooden seats.

Finally, on 28th January, 1936, the defendant company and the Kurri Kurri company executed a memorandum of lease, which has not been registered, by which the defendant company purported to lease to the Kurri Kurri company the land on which the Strand Theatre was erected "together with the undermentioned articles." Then followed a list which, since it is identical with the list contained in the lease granted by the plaintiff of 29th November, 1926, had evidently been copied by someone verbatim from that lease. The lease was for a term of ten years commencing on 1st November 1934, at the yearly rental of £468 payable by weekly payments of £9, "the first of such payments having been made on the — day of — 1934." There was evidence that on 10th August, 1936, the Kurri Kurri company paid the defendant company £39 as rent for the Strand Theatre, Cessnock, for the month of July, 1936, which is at the rate of £9 per week, and that other monthly payments at this rate were afterwards made for subsequent months. On 7th September, 1936, at a board meeting of the defendant company it was resolved that its seal be affixed to a surrender of the lease dated 29th November, 1926, plaintiff to Smythe; but there is no evidence that it was affixed or that any surrender was ever registered. On 18th October, 1936, the lease from the plaintiff to Smythe expired.

It may be said at the outset that it is quite clear that the verdict cannot stand; because it is evident, from facts which are not in dispute, that some of the articles on the list of alleged chattels which the jury found to be none of them fixtures were in fact fixtures, and that there was no evidence that they were not.

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A fixture is a thing once a chattel which has become in law land through having been fixed to land. The question whether a chattel has become a fixture depends upon whether it has been fixed to land, and if so for what purpose. If a chattel is actually fixed to land to any extent, by any means other than its own weight, then *prima facie* it is a fixture; and the burden of proof is upon anyone who asserts that it is not: if it is not otherwise fixed but is kept in position by its own weight, then *prima facie* it is not a fixture; and the burden of proof is on anyone who asserts that it is: *Holland v. Hodgson*.(1) The test of whether a chattel which has been to some extent fixed to land is a fixture is whether it has been fixed with the intention that it shall remain in position permanently or for an indefinite or substantial period: *Holland v. Hodgson* (2), or whether it has been fixed with the intent that it shall remain in position only for some temporary purpose: *Vaudeville Electric Cinema Ltd. v. Muriset*.(3) In the former case, it is a fixture, whether it has been fixed for the better enjoyment of the land or building, or fixed merely to steady the thing itself, for the better use or enjoyment of the thing fixed: *Holland v. Hodgson* (4); *Reynolds v. Ashby & Son* (5); *Colledge v. H. C. Curlett Construction Co. Ltd.*(6); *Benger v. Quartermain*.(7) If it is proved to have been fixed merely for a temporary purpose it is not a fixture: *Holland v. Hodgson* (8); *Vaudeville Electric Cinema Ltd. v. Muriset*.(3) The intention of the person fixing it must be gathered from the purpose for which and the time during which user in the fixed position is contemplated: *Hobson v. Gorringe* (9); *Pukuweka Sawmills Ltd. v. Winger*.(10) If a thing has been securely fixed, and in particular if it has been so fixed that it cannot be detached without substantial injury to the thing itself or to that to which it is attached, this supplies strong but not necessarily conclusive evidence that a permanent fixing was intended: *Holland v. Hodgson*(1); *Spyer v. Phillips*.(11) On the other hand, the fact that the fixing is very slight helps to support an inference that it was not intended

(1) L.R. 7 C.P. 328 at 335.

(2) L.R. 7 C.P. 328 at 336.

(3) [1923] 2 Ch. 74 at 87.

(4) L.R. 7 C.P. 328.

(5) [1904] A.C. 466.

(6) [1932] N.Z.L.R. 1060.

(7) [1934] N.Z.L.R. s. 13.

(8) L.R. 7 C.P. 328 at 337.

(9) [1897] 1 Ch. 182.

(10) [1917] N.Z.L.R. 81.

(11) [1931] 2 Ch. 183 at 209-210.

to be permanent. But each case depends on its own facts. In *Pukuweka Sawmills Ltd. v. Winger* (1), a bush tramway introduced on the land for the temporary purpose of removing logs in the course of timbergetting and clearing, and capable of being moved from place to place, was held not to be a fixture; notwithstanding that a relatively secure degree of fixation was necessary whilst the tramway was in use in any particular place. On the other hand, a wooden building, resting on land by its own weight but brought there for the purpose of being permanently used as a dwelling house, was held in *Reid v. Smith* (2) to be a fixture.

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In the present case there was evidence that at all relevant times the building in which the alleged chattels had been placed had been used for miscellaneous purposes. At no time since the end of the year 1926 was it used as a picture theatre. Prior to that it was used on some occasions as a picture theatre and on others for purposes which necessitated its being to some extent dismantled as a picture theatre. It appears from evidence which was unchallenged that some articles, the secure and permanent fixing of which was necessary in order that the place could be used for moving pictures at all, were fixed with the evident intention that they should remain in position indefinitely, so as to admit of the use of the place for moving picture purposes as and when occasion might require. To take two instances, there was a switchboard which was admittedly screwed to the wall, and a Crompton generating set, which was admittedly fastened to a concrete bed by means of bolts that went through the concrete. These were evidently intended to remain in position permanently, and have in fact remained in position through all the vicissitudes which the theatre has experienced. A verdict that these are not fixtures cannot be supported. The chairs are in a somewhat different position; and having regard to the evidence as to the purposes for which they were provided and used, and the extent and reason of their fixation on the occasions when they were fixed, I do not think that a verdict that they did not become fixtures is incapable of being supported.

(1) [1917] N.Z.L.R. 81 at 90, 91,
120.

(2) 3 C.L.R. 656; 9 Austr
Digest 176.

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Apart from this, the jury's finding that the whole of the articles claimed were on the Strand premises on 28th January, 1936 (assuming this finding to be necessary to maintain the verdict) could not be supported in view of the unchallenged evidence that 166 of the chairs had been moved by someone other than the defendant to the Empire Theatre in the year 1929 and the plaintiff's admission that he saw them still in the Empire Theatre in the year 1937.

It is contended, however, for the appellant that no new trial is required, for the reason that, assuming that there is evidence that some of the articles in question are chattels, there is no evidence that the defendant company converted them. The argument for the respondent has been that the execution by the defendant company and the Kurri Kurri company of the unregistered memorandum of lease on 28th January, 1936, operated as a surrender by operation of law of the lease of the chattels by the plaintiff to Smythe made on 29th November, 1926, that the plaintiff became thereby remitted to his possession of the chattels, and that the purported letting of the chattels by the defendant company so interfered with the defendant's right to possession as to amount to a conversion.

The first question is as to the nature of the rights which came into existence by virtue of, and under, the lease by the plaintiff to Smythe, with respect to such of the chattels mentioned in the lease as were not fixtures. As a general rule, any proprietary interest is assignable; and this now extends, even at common law, to contractual rights in the nature of choses in action. A lease of land vests in the lessee a right to assign or sublet, in the absence of some provision to the contrary; and the hirer of the chattels may similarly dispose of his right in the chattels in the absence of a stipulation to the contrary, unless the particular contract of hiring involves some special personal element: *Whiteley Limited v. Hilt* (1); although a chattel may be used only for the purposes for which it is hired. The law relating to land has so developed as to invest the lessee with a proprietary, though chattel, interest in the land the subject of the lease; but there has been no corresponding development of the law with respect to ordinary chattels; and a mere hirer of a chattel has no proprietary

(1) [1918] 2 K.B. 808 at 822-3.

interest in the thing hired which he can pass by delivery of the thing: his rights are contractual only: *Helby v. Matthews*.⁽¹⁾ Hence, in order to assign his rights as hirer, in a case in which they are assignable, so that the assignment may be effectual at common law, he must, where there is nothing but a contract of hiring, comply with s. 12 of the Conveyancing Act 1919, i.e., the assignment must be in writing, and express notice in writing must be given to the owner; and if this be done the rights pass at law to the assignee from the date of the notice. Where, however, chattels are hired, not separately, but as part of a single inseverable transaction by which land is leased together with chattels with which the land is furnished, it is conceived that, in the absence of a covenant not to assign or sublet, or of some special circumstance, the lessee is impliedly authorised by the lessor to create, as against him, in the course of any dealing with the land, all such rights with respect to the chattels as the law enables the lessee to create with respect to the land; and where this is so, the rights of assignees and sub-lessees with respect to the chattels are common law rights and not merely equitable rights, notwithstanding that the formalities of s. 12 of the Conveyancing Act, 1919, have not been complied with: cf. *In re Agra and Masterman's Bank; Ex parte Asiatic Banking Corporation*.⁽²⁾ Indeed, in the case of the letting of a furnished house, it is conceived that the lessee would have no right, without the lessor's consent, to remove the furniture and use it in other premises.

In the present case, the lease made by the plaintiff on 29th November, 1936, vested in Smythe a common law right to the possession of the chattels until 18th October, 1936. There were subsequent dealings with the chattels by virtue of which equitable rights to possession were at various times acquired by the Kurri Kurri company, Union Theatres Ltd., and the Greater Union company; but it is open to doubt whether anyone other than Smythe ever had a common law right to possession. So far as s. 12 of the Conveyancing Act, 1919, is concerned, there is no evidence that written notice was given to the plaintiff of the transfer of lease or of the subleases or of the agreement for a lease of 19th June, 1935; and apart from this, the transfer of lease does not in terms purport to deal

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(1) [1895] A.C. 471 at 481.

(2) L.R. 2 Ch. 391 at 396-7.

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with anything but the land. The sub-leases could not operate to pass common law rights with respect to the chattels under s. 12, because they are for a shorter period than the lease, and under the section a chose in action cannot be assigned in part so as to pass common law rights : *Williams v. Atlantic Assurance Co. Ltd.*(1) But although the transfer of lease by Smythe to the Kurri Kurri company dated 13th September, 1928, does not mention the chattels, everyone has assumed that the right to use them passed to the Kurri Kurri company and this was evidently intended. It may well be, therefore, that by virtue of acts done in pursuance of an authority from the plaintiff to be implied from the nature of the lease of 29th November, 1926, a common law right to the possession of the chattels became vested in the Greater Union company and was vested in that company on 28th January, 1936. If it was not vested in that company, the common law right to possession must have still been vested in Smythe. On 28th January, 1936, therefore, when the unregistered memorandum of lease was executed by the defendant company to the Kurri Kurri company, the position with respect to the chattels was that the defendant company had no interest in them whatsoever, the common law right to possession was vested either in Smythe or the Greater Union company, and the equitable right to possession, and also the actual possession, were vested in the Greater Union company. The plaintiff's rights were reversionary, and would not fall into possession until 18th October, 1936. What happened on 28th January, 1936, was that the defendant company agreed with the Kurri Kurri company that the latter should have the right to possess the plaintiff's chattels until 1st November, 1944, i.e., for about eight years after 18th October, 1936, the date when the plaintiff would acquire a legal right to repossess his own chattels. There is no evidence that any change thereupon occurred in the character of the actual possession of the chattels by the Greater Union company. Now, in order to establish conversion, the plaintiff must give evidence of an immediate right to possession in himself when the alleged act of conversion was done by the defendant, and the doing by the defendant of an act which interfered with that immediate right of possession. It is clear, upon the evidence,

(1) [1933] 1 K.B. 81.

that immediately before the execution of the unregistered memorandum of lease by the defendant on 28th January, 1936, the plaintiff had no right to possession of the chattels. That right was outstanding until 18th October, 1936. Neither the defendant company nor the Kurri Kurri company had then either a common law right to possession or actual possession of the chattels; and there is no evidence that by, or by virtue of, the execution of that lease any change took place in the character of the immediate actual possession of the goods; or that anything occurred in the nature of a wrongful dealing with the goods which at one and the same time remitted the plaintiff to a right of immediate possession and operated as a wrongful interference with that right: cf. *Nyberg v. Handelaar*.(1) Even a purported sale of the chattels would not have operated as a conversion if unaccompanied by delivery of possession or other interference with the character of the actual possession: *Lancashire Waggon Co. v. Fitzhugh* (2); *Bloxam v. Saunders*.(3) There does not appear to be any authority which decides that there can be conversion by a defendant unless there has been some physical interference with the goods or with access to the goods by the defendant or someone for whose act he is responsible: *Oakley v. Lyster* (4); *Public Trustee v. Jones* (5); *Motor Dealers Credit Corporation Ltd. v. Overland (Sydney) Ltd.* (6); or some change of the character in which a person in actual possession of the goods holds that possession, the defendant or someone for whose act he is responsible, being responsible for the change: *Van Oppen & Co. v. Tredegars Ltd.* (7)

It is unnecessary to determine whether, as a matter of law, the execution of the unregistered memorandum of lease on 28th January, 1936, if and when rent was paid under it brought into existence a monthly tenancy of the land which operated as an implied surrender of the lease on 29th November, 1926. The defendant had no interest in the character of lessor in the lease of the chattels, and it therefore could not have operated as a surrender of any lease of the chattels.

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(1) [1892] 2 Q.B. 202.

(2) 6 H. & N. 502.

(3) 4 B. & C. 941.

(4) [1931] 1 K.B. 148; 47 L.Q.R.
168-171.

(5) 25 S.R. 526; 42 W.N. 173.

(6) 31 S.R. 516; 48 W.N. 205.

(7) 37 T.L.R. 504.

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In the present case, there is no evidence that the act of the defendant in executing the unregistered memorandum of lease on 28th January, 1936, interfered with any right to possession of the chattels which the plaintiff then had : nor indeed is there any evidence that if, after the plaintiff acquired a right to the present possession of his chattels on 18th October, 1936, he experienced any difficulty in obtaining possession of them, those difficulties were in any way caused or contributed to by the fact that some draftsman when making use of the memorandum of lease of 29th November, 1926, as a draft for that of 28th January, 1936, copied into the latter a list of articles which was contained in the former.

For these reasons, I am of opinion that there was no evidence of any conversion by the defendant company of any chattels of the plaintiff by the alleged act of conversion relied upon by the plaintiff in the action, namely the execution on 28th January, 1936, of the unregistered memorandum of lease. It follows that the appeal should be allowed with costs, the verdict and judgment for the plaintiff set aside, and a verdict and judgment entered for the defendant.

DAVIDSON and NICHOLAS JJ., concurred.

Solicitors for the appellant : *Allen, Allen & Hemsley.*

Solicitor for the respondent : *S. D. Ratner.*

END OF VOLUME 38.