

1921

COCKBURN
AND
ANOTHER
v.

COCKBURN
AND OTHERS.
Sim, A.C.J.

COCKBURN AND ANOTHER V. COCKBURN AND OTHERS

1921, June 8, 22. Supreme Court, Invercargill
Sim, A.C.J.

*Landlord and Tenant — Fixtures — Removal of—
Surrender and grant of new lease—Right of
removal lost—Form of relief.*

On the death of her husband, C. became the owner of his farm and three of her sons arranged with her to carry it on, under what one of the sons called a verbal lease for five years. They paid no rent, but C. lived on the farm and some of her daughters also lived there from time to time. At some unspecified date a fourth son joined the others as one of the tenants of the farm. At the end of the five years no fresh agreement was made, and the sons occupied the farm as before. C. died in 1916, and in March, 1919, an agreement in writing was made between all parties interested in her estate, by which it was stipulated that all parties should consent to letters of administration being granted to plaintiffs, and that the tenants of the farm, the defendants in this action, should remain in possession of the farm for 18 months, paying the administrators therefor a rent of £350 in three half-yearly instalments. Prior to the end of this tenancy the tenants removed from the farm certain articles, including a water wheel, an electric light installation in the dwelling-house and a motor shed, all of which, it was held on the facts, had been annexed to the soil by defendants for the more convenient use of the farm and dwelling-house with the intention that they should remain there during their tenancy. On a claim for the return of the articles,

Held,—(1) That the articles were fixtures, and assuming that defendants had originally a right to remove fixtures, they had lost that right by the agreement of March, 1919, for that contained no stipulation that defendants should be entitled to remove fixtures at the end of the new term, and the inference was that it was the farm in its then actual condition that was intended to be surrendered and re-demised. *Orr v. Davis* (17 N.Z.L.R. 106) followed.

(2) That the proper relief in the circumstances was to award damages for the wrongful removal of the articles.

Callan and R. Stewart for plaintiffs
Haggitt and E. C. Smith for defendants.

SIM, A.C.J.—The plaintiffs are the administrators of the estate of Helen Cockburn, deceased. She was the widow of William Cockburn, who died in the year 1909, leaving all his estate to his wife. He was the owner of a farm at Mataura, part of which was known as Kanadale and part as Dunview. After his death his three sons, the defendants Andrew Cockburn, Arthur Cockburn, and Charles Cockburn arranged with their mother to carry on the farm. They had what Arthur Cockburn called a verbal lease of the farm for five years. They did not pay any rent for it, but the widow lived on the farm and some of her daughters lived there also from time

to time. At the end of the five years no fresh agreement was made, and the sons continued in occupation of the farm as before. At some unspecified date the defendant William Alexander Cockburn became associated with his brothers as one of the tenants of the farm. After Helen Cockburn's death in the year 1916 there was litigation about her supposed testamentary dispositions, and on the 5th of March, 1919, an agreement in writing was made between all the parties interested in the estate by which it was stipulated that all parties should consent to letters of administration being granted to the plaintiffs with a will annexed which had been made by Helen Cockburn in March, 1910. The following was one of the provisions contained in the agreement: "A. M. Cockburn, A. H. Cockburn, C. G. Cockburn, and W. A. Cockburn to remain in possession of Kanadale and Dunview farms for a period of eighteen months from 1st March, 1919, paying to the administrators therefor a rental of three hundred and fifty pounds (£350), payable in three instalments of equal amounts on 1st September, 1919, 1st March, 1920, and 1st September, 1920." In pursuance of this agreement the four defendants remained in possession of the farm up to the 31st August, 1920. Between the 21st August and that date they removed from the farm a number of articles. The plaintiffs allege that these articles were fixtures and were wrongfully removed, and they claim damages accordingly.

The first question to be determined is whether these articles were fixtures or not. In *Holland v. Hodgson* (L.R. 7 C.P. 328, 334), Blackburn, J., in delivering the judgment of the Exchequer Chamber, stated the law on the subject in these terms: "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: See *Wiltshire v. Cottrell* (1 E. and B. 674) and the cases there cited. But even in such a case, if the intention is apparent to make the article part of the land, they do become part of the land: See *D'Eyncourt v. Gregory* (L.R. 3 Eq. 382). . . Perhaps the true rule is that articles

not otherwise attached to the land than by their own weight are not to be considered as part of the land unless the circumstances are such as to show that they were intended to be part of the land, the onus of showing that they were so intended lying on those who assert that they have ceased to be chattels, and that, on the contrary, an article which is affixed to the land even slightly is to be considered as part of the land unless the circumstances are such as to show that it was intended all along to continue a chattel, the onus lying on those who contend that it is a chattel." For the purposes of this rule the circumstances to show intention must be circumstances patent for all to see, showing the degree of annexation and the object of such annexation, and do not include anything extraneous such as the existence of a hire-purchase agreement with a third party relating to the article: *Hobson v. Gorringe* (1897, 1 Ch. 182, 193). The principles laid down in *Holland v. Hodgson* were applied by the Court of Appeal in the case of *Monti v. Barnes* (1901 Q.B. 205), and by the High Court of Australia in *Reid v. Smith* (3 C.L.R. 656). These principles appear to be of general application whether the question arises between a landlord and a tenant, or between an heir and an executor, or between a tenant for life and a remainderman: *Leigh v. Taylor* (1902 A.C. 157, 159). In 18 *Halsbury* (p. 419, par. 877) there is a summary of cases in which the chattel, although firmly fixed, could have been removed without great damage to the land or building. In such cases the article, it is said, is a fixture if it is placed in its position permanently and in order to make the land or building more valuable for the special purpose for which it is used; but it is not a fixture if placed in position temporarily, or for the purpose of the more convenient use of the chattel as a chattel. In the case of a tenant, if the primary intention is that the article should remain affixed in its place while the tenant's interest in the premises endures, the article is really a fixture: *Foa* (5th ed., p. 679).

I proceed now to deal with the articles in question in this case. There is some conflict of evidence as to the extent to which some of them were annexed to the soil. Where there is such a conflict, the evidence given on behalf of the plaintiffs is more trustworthy, I think, than that given on behalf of the defendants. The principal item in the plaintiffs' claim was for an iron water-wheel, which had been put in by the defendants to replace an old wheel. It turned on a shaft which was in bushes, and the bushes were

bolted to a concrete foundation. The water-wheel worked a vacuum pump, two force pumps, and a dynamo. From the wheel there was a cog-wheel driving an intermediate shaft, and then there were two overhead shafts. One of these had driven the two pumps and the dynamo and the separator.

Another large item in the plaintiffs' claim was in connection with the electric light installation in the dwelling-house on the farm. This had been put in by the defendants for the more convenient use of the dwelling-house during their tenancy, and the installation had been effected in what appears to have been the usual way. It consisted of the ordinary electrical installation, piping, switchboard and dynamo, the dynamo being bolted to a concrete bed-plate. It was removed by Mr. Stewart, an electrical engineer at Gore, and he gave evidence on behalf of the defendants. He removed the installation, he said, without any damage to the building. The installation was not so secure as it might have been; Mr. Stewart would have preferred to see more saddles, but otherwise the system, he said, was the normal one to adopt. I am satisfied from the evidence that this electrical installation and incidental plant and also the water-wheel already referred to were annexed to the soil, and had been annexed by the defendants for the more convenient use of the farm and dwelling-house, and with the intention that they should remain there during their tenancy thereof. The position is the same, I think, with regard to the motor shed which had been erected by the defendants. It was bolted to a concrete foundation let into the soil. The position is the same also, I think, with regard to all the other items specified in paragraph 4 of the statement of claim, except the last two, which were abandoned at the hearing as being already included in other items, and except also the wash-tubs, the six cow tie-up chains, and the stable door on hinges. With regard to the claim in connection with ten gates, the evidence established the claim in connection with only eight of these. As to the claim in connection with barbed wire removed, it was not proved that the defendants had removed more than about 12 chains.

The plaintiffs made also a separate claim in respect of a galvanised iron tank put on the farm by the defendants and removed on the 11th of September, 1920. I am not satisfied from the evidence that this was annexed to the soil, and the plaintiffs' claim as to this must fail.

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There remains, then, the question whether or not the defendants were entitled to remove any of the articles which I have held were fixtures. It was contended on their behalf that they were entitled to remove them all as articles which had been annexed for the purposes of trade or convenience. I assume in favour of the defendants that they originally had such a right, but, in my opinion, they lost that right by the agreement which was made on the 5th of March, 1919. That was, in effect, a surrender by operation of law of the existing tenancy and the creation of a new tenancy for a definite term of eighteen months: *Foa* (5th ed., p. 617); *Lyon v. Reed* (13 M. and W. 285; 67 R.R. 593). There was no stipulation that the defendants were to be entitled to remove any fixtures at the end of the new term, and the inference I draw from the circumstances is that what was intended to be surrendered and redemised was the farm in its then actual condition. On such a surrender the tenant loses his right to remove any fixtures, and he is in the same position as if the landlord, being seized of the land together with the fixtures, had demised both to the tenant: 2 *Smith's L.C.* (12th ed., p. 221); *Foa* (5th ed., p. 693); *Orr v. Davis* (17 N.Z. L.R. 106); *Leschallas v. Woolf* (1908, 1 Ch. 641, 652, 654). It is clear, therefore, that the defendants were not entitled to remove any fixtures from the farm, and it is not necessary to consider the question raised by Mr. Callan as to the effect on the rights of the parties in such a case of the Imperial Statute 14 and 15 Vict., c. 25, which was continued in force in New Zealand by the English Laws Act, 1908.

The result is that the plaintiffs are entitled to relief in connection with the articles which I have held to be fixtures. They claim the return of them, but the proper relief, I think, in the circumstances, is to award damages for their wrongful removal. The evidence as to the value of the articles removed was not satisfactory, and I have had some difficulty in assessing damages. I fix these at £350, and give judgment against the defendants for that amount, with costs according to scale and disbursements for fees of Court and the expenses of the following witnesses to be fixed by the Registrar: the two plaintiffs, James Dunbar, Henry Cockburn, and Alexander Martin.

The defendants are entitled to judgment on the claims contained in paragraphs 5, 7, and 8 of the statement of claim and to their costs in connection with these claims. They are entitled also to costs on the claim in connection with the

furniture, which was struck out at the hearing. The total amount claimed by the plaintiffs in connection with the causes of action as to which they have failed is £236 15s. 6d. The plaintiffs are ordered to pay costs to the defendants as on a claim for £236, with disbursements for fees of Court to be fixed by the Registrar, but without any allowance for witnesses' expenses.

Solicitors: for plaintiffs: *D. Stewart and Son*, Balclutha; for defendants: *Watson and Haggitt*, Invercargill.

KYLE V. ELLIS AND BURNAND LTD.

1921, July 1, 2. Court of Arbitration, Auckland.
 Frazer, J.

Workers' Compensation—Compensation—Loss of and mutilation of fingers of right hand—Growth of tissue—Ultimate degree of injury doubtful—Schedule rates inapplicable.

Plaintiff, by accident arising out of and in the course of his employment, had lost the little and ring fingers of his right hand and the top joint and part of the middle joint of the middle finger and forefinger of the same hand. The stump of the middle finger had also been mutilated so as to impair its usefulness, and in addition a growth of tissue had manifested itself, extending well into the palm of the hand, which had contracted the stump of the middle finger and to a less extent affected the stump of the forefinger. Medical experts agreed that plaintiff had suffered more than schedule injuries, and it was doubtful to what extent the hand might be further injured by changes in the growth of the tissue already referred to. Plaintiff's earnings prior to the accident had been £4 17s. and were now £2 5s. per week. The Court held that the schedule rates were inapplicable, and awarded plaintiff £175 in respect of the permanent partial incapacity.

O'Regan for plaintiff.

Bagnall for defendant.

FRAZER, J.—This is a claim for compensation in respect of injuries suffered by the plaintiff through an accident that occurred on 2nd November, 1920. It is admitted that the accident arose out of and in the course of his employment with the defendant company.

The plaintiff has lost the little and ring fingers of his right hand, and has lost the top joint and part of the middle joint of the middle finger and forefinger of the same hand. In addition to these injuries, the stump of the middle finger has been mutilated so severely as to impair its usefulness. A growth of tissue, either an extension of the

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