[HIGH COURT OF AUSTRALIA.]

REID . . . . . APPELLANT;
PLAINTIFF,

AND

SMITH . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

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BRISBANE, *Dec.* 6, 8.

Griffith C.J., Barton and O'Connor JJ.

Landlord and tenant—Fixture—Annexation to freehold—House resting by its own weight on piers—Principle for determining whether chattel or part of freehold—Intention—Degree and object of annexation—Extension of covenants to insure under Real Property Act 1861 (*Q.*) *to buildings erected on the land in excess of the value agreed upon—Real Property Act* 1861 (*Q.*) (25 *Vict. No.* 14), *sec.* 73.

The fact that a house erected by a lessee rests by its own weight upon piers or piles fixed into the ground, and is not otherwise affixed to the freehold, does not necessarily constitute it a chattel removable at the will of the lessee.

Whether such a building does or does not form part of the freehold depends upon intention, in determining which regard must be had to the object, as well as the degree, of annexation.

The respondent was the transferee of a lease, granted by the appellant's predecessor in title, which contained a covenant by the lessees to erect on the land a building of a value not less than £50. In pursuance of this covenant the lessee had already erected on the land a small wooden building, actually affixed to the soil, before the respondent became the transferee. To this he attached another wooden building which he used as a dwelling-house, and on another part of the land he erected another wooden building, also used as a dwelling-house. Both these dwelling-houses rested by their own weight on piers or piles. A flight of steps was nailed to the verandah of each building, the bottom tread of which rested on a piece of timber sunk into the ground. In order to check the ravages of white ants it is the practice in Northern Queensland to build houses upon piers or piles, with iron plates to break the continuity between the superstructure and the ground. The lease contained

a covenant to insure against fire all buildings to be erected upon the land. In a suit for an injunction by the appellant to restrain the respondent from removing the buildings at the termination of the tenancy :

Held, reversing the decision of the Supreme Court of Queensland (*Chubb* J.), that, having regard to the intention of the parties as manifested by the degree and object of the annexation, the buildings in question had become part of the freehold, and that the injunction should be granted.

APPEAL from a decision of Supreme Court of Queensland.

The facts are stated in the judgment of *Griffith* C.J.

Shand, for the appellant. Annexation is not the only test, or even the chief test, as to whether the house in question formed part of the freehold. Houses are not ordinarily looked upon as chattels, but are intended to form part of the freehold. It seems to have been thought that, if an article is admittedly a fixture, the tenant's right to remove it would depend upon its being erected for trade purposes or ornament; but the English cases do not support that view. The question whether an article is a fixture and whether it is removable are two distinct questions: *Gibson* v. *Hammersmith Railway Co.* (1). The question whether an article is removable or not is not the only consideration in determining whether it is a fixture.

[GRIFFITH C.J.—The term "fixture" generally implies something fixed.]

In its wider sense it means everything attached to the freehold. The only form of annexation of the buildings in this case is their resting on the ground by their own weight. The mode of annexation, however, is not the sole test: *D'Eyncourt* v. *Gregory* (2). "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 . . . But even in such a case, if the intention is apparent to make the articles part of the land, they do become part of the land": *Holland* v. *Hodgson* (3); *Monti* v. *Barnes* (4). In the latter case the Court of Appeal accepted the rule as laid down by *Blackburn* J., in *Holland* v. *Hodgson* (5), and the example given by him of blocks of stone placed one on top of another for

(1) 32 L.J. Ch., 337.
(2) L.R. 3 Eq., 382.
(3) L.R. 7 C.P., 328, at p. 334, *per Blackburn* J.
(4) (1901) 1 K.B.., 205.
(5) L.R. 7 C.P., 328.

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the purpose of forming a dry stone wall becoming fixtures is apposite to the present case: *Perkins & Co. Ltd.* v. *Galloway* (1). The fact that houses are built in a certain way should not operate to disprove the manifest intention that they were to form part of the freehold: *Leigh* v. *Taylor* (2). The house, if held to be a chattel, could only be mortgaged by bill of sale. It is purely a question of intention whether in a case of this nature the article in question is a chattel or forms part of the freehold: *Brilliant Gold Mining Co.* v. *Craven* (3); *Boileau* v. *Heath* (4). Here the nature of the article itself raises a very strong presumption of what the intention was.

The object and purpose of the annexation must also be considered as far as they can be inferred from the circumstances of the case: *In re De Falbe*; *Ward* v. *Taylor* (5); *Boyd* v. *Shorrock* (6); *Turner* v. *Cameron* (7); *State Savings Bank* v. *Kircheval* (8).

MacGregor, for the respondent. It is admitted that the superstructure could be a chattel. In itself it does not possess the character of realty. There must be some *de facto* annexation before it can be said that the article has lost its character of a chattel. Some degree of annexation is in all cases necessary: *Holland* v. *Hodgson* (9); *Elwes* v. *Maw* (10). The fact of annexation is said to be the turning point as to the onus of proof. The case of *Penton* v. *Robart* (11) shows that a building may in some cases be looked upon as a trade fixture: *The King* v. *Otley* (12).

[GRIFFITH C.J.—Can that be said to be the law now after what was said by *Blackburn* J. in *Holland* v. *Hodgson* (13)?]

There must be some degree of annexation before there can be any question at all. A house has been held to be a proper subject of an action of trover: *Wansbrough* v. *Maton* (14); *Elwes* v. *Maw* (10); *Climie* v. *Wood* (15). Even if intention is the controlling consideration, there is not sufficient proof here of what the inten-

(1) (1903) Q.S.R. W.N., 6.
(2) (1902) A.C., 157.
(3) 9 Q.L.J., 144.
(4) (1898) 2 Ch., 301.
(5) (1901) 1 Ch., 523, at p. 535, *per Vaughan-Williams* L.J.
(6) L.R. 5 Eq., 72.
(7) L.R. 5 Q.B., 306.
(8) 27 Am. Rep., 310.
(9) L.R. 7 C.P., 328, at p. 334.
(10) 3 East., 38.
(11) 4 Esp., 33; 2 East, 88.
(12) 1 B & Ad., 161.
(13) L.R. 7 C.P., 328.
(14) 4 A. & E., 884.
(15) L.R. 3 Ex., 257, at p. 260.

tion was. Assuming the question of fixture does not depend on whether or not the foundation is let into the soil, there must be clear evidence of the nature and character of the act by which the structure is put in place, and the intentions of those concerned in the act: *Meigs' Appeal* (1); *Ottumwa Woollen Mill Co.* v. *Hanley* (2); *Griffin* v. *Ransdell* (3); *Curtiss* v. *Hoyt* (4). Where there is no degree of annexation at all the house is a mere chattel. If the intention is capable of altering its character as a chattel, the plaintiff has not discharged his onus.

Shand in reply.

Cur. adv. vult.

GRIFFITH C.J. The short point raised in this case is whether an ordinary dwelling-house, erected upon an ordinary town allotment in a large town, but not fastened to the soil, remains a chattel or becomes part of the freehold. The question must be determined according to the rules of the common law. It arises in an action brought by the plaintiff, who is the owner of a piece of land in Townsville, against the defendant, who has been his tenant under a lease for twenty-one years, and who, after the expiration of the term, proposed to remove from the land two dwelling-houses that he had erected upon it during and near the beginning of the term. The motion for an injunction was treated by consent as the hearing of the action, and, after consideration, the learned Judge dismissed the action, holding that the dwelling-houses were chattels. I take the facts as stated by the learned Judge himself. In his judgment he says :—

"On 24th June, 1884, the plaintiff's predecessor in title leased, under the *Real Property Act*, to Adlam and Hinton, the land in question, for twenty-one years, from the 1st June then instant, at a yearly rental of £30. The lease contained a covenant by the lessees to erect on the land, within twelve months, a building of a value of not less than £50, which they did. The building was on the land when the defendant in May 1885, became the transferee of the term of the lease. It is a wooden structure, resting partly on brick piers, and partly on wooden piles sunk into the ground,

(1) 1 Am. Rep., 372.
(2) 24 Am. Rep., 719.
(3) 71 Ind., 440.
(4) 48 Am. Dec., 149.

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the floor plates of the building being nailed to at least three of the wooden piles. Whether this building is attached to the soil physically or otherwise, is of no consequence; it was built in performance of the covenant for the improvement of the inheritance, and belongs to the landlord. It must, therefore, be regarded as annexed to the freehold; in other words, as part of the realty. To this building the defendant has attached a house built of wood, and used as a dwelling (which I will call A), the old building being used as a kitchen, bathroom, and wash-house, to the new building. The floor plates of this building rest on brick piers, and are not otherwise attached to the piers. On another part of the land subject to the lease the defendant has erected another wooden dwelling-house (which I call B), on brick piers, similar to building A. Both A and B rest by their own weight only on the piers. To each building wooden steps, nailed to the verandah, are attached, and the bottom tread of each rests on a piece of timber on the ground, around the bottom part of which, by course of time, earth has accumulated, so that to that extent, they are partly in the ground. According to the evidence of an expert builder, it is not the practice in Queensland, even in the case of large buildings, such as hotels and halls, when they are built of wood, to attach them to the piles on which they stand otherwise than by their own weight."

Now, the rule relied upon by the defendant in support of his claim to remove the buildings is a rule of the common law. He contends that it is a rule that chattels of any kind placed upon the soil, but not annexed to it, remain chattels. In considering whether a suggested rule, for which there is no direct authority, is a rule of common law or not, regard may generally be had to a remark made by Sir William Blackstone, that the rules of the common law are rules of common sense, and, if any rule is suggested the application of which would lead to any absurd result, there is at least a *primâ facie* presumption that it is not a rule of the common law. In the present case the original building was erected under a building lease, and it is not disputed that it must be regarded as having become annexed to the freehold. It happens that there were only one or two nails driven into the stumps, but, apart from that, it is conceded that, having been put there with the intention that it

should become part of the freehold, it did become part of the freehold. In front of this building, which was of comparatively small value, a dwelling-house was erected afterwards, which was attached to the original building. The mode of attachment is not clear, but it is found that it was attached; so that, *primâ facie*, this building is also attached to the freehold, although, as a matter of fact, it is not nailed to the supports on which it rests. That building may be said, from one point of view, to be attached in part to the freehold, and in part to be not attached. The other dwelling-house only differs in that it all rests of its own weight on the piers. It is not distinguishable from the first by the passer-by. We have, then, two similar buildings on the same piece of land, and anyone on passing would take them to be houses of the same kind, but one of them, it is said, belongs in part only to the freehold, and the other not at all; and, in order to discover whether it does or does not, according to the suggested rule you must disturb the house, because you cannot tell whether there is any annexation of the wooden structure to the piers without taking down the structure, or taking away the pier, or making some investigation of that sort. It would be a singular thing if the question whether a building is part of the freehold or not should depend upon a fact which can only be ascertained by a partial destruction of the building itself. Again, suppose in such a case the owner made a devise of his real estate to one person, and of his personal estate to another—according to the suggested rule, the legatee of the personal estate might remove the buildings, and if the owner had demised them in his lifetime, the tenant would have two lessors, one his landlord as to the land, and another his landlord with respect to the buildings. Again, if the property remains a chattel, and, apparently, subject to the *Bills of Sale Act*, it could not pass under a real property mortgage. It would have a singularly disturbing effect on the securities of a great number of institutions established for the purpose of encouraging the erection of houses—most of which in Queensland are wooden houses—if it were declared that such houses are only chattels. I may remark in passing that the reason in Queensland why wooden buildings of this sort are frequently not fixed by spikes or nails to the piers or stumps, is in order to break the continuity between the ground and the

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wood-work, so that white ants may not be able to reach the wood. Generally iron plates are placed on the top of the piers or stumps, and if there is any hole made in them at all there is a danger that the white ants may get through and get at the building itself. These considerations make me hesitate to hold that a structure of this sort is not part of the freehold. There is a provision in the *Real Property Act* also. Sec. 73 of that Act contains definitions of the meaning of certain short forms of covenant that may be put in leases and mortgages. Amongst others is a definition of the words "that he will insure." Those words are declared to imply as follows:—"That he will insure and so long as the term expressed in the said mortgage or lease shall not have expired will keep insured in some public insurance office to be approved by such mortgagee or lessee against loss or damage by fire to the full amount specified in such lease or bill of mortgage or if no amount be specified then to their full value all buildings tenements or premises erected on such land which shall be of a nature or kind capable of being insured against loss or damage by fire."

That certainly assumes that buildings erected upon the land are something to the benefit of which the lessor is entitled. It does not say buildings erected on the land at the time of the lease; it says all buildings erected on the land capable of insurance. Is there, then, any authority for such a rigid rule as would prevent buildings of this sort being considered part of the freehold? The discussion in these matters is generally a discussion about what are called fixtures. It will be observed that I have not used the word "fixtures" up to the present. Fixtures, Lord Justice *Rigby* said, in the case of *De Falbe* (1), means removable fixed things, and he remarks, in the same passage—"As regards fixtures; we all know that the time was when everything affixed to the freehold was held to go with the freehold, and it was only by slow degrees that that unbending rule was modified, and came at last to assume the proportions which it now retains."

The question generally arises as to things which are actually annexed to the freehold. Very few cases have arisen with respect to things which are not so annexed. Indeed, the term

(1) (1901) 1 Ch., 523, at p. 530.

"fixtures" assumes annexation. The question in the present case is not quite the same, but whether irremovability from the freehold of things not annexed to it mechanically may come within the rule laid down in general terms about things annexed to the freehold. Exceptions were always made in respect of such things as trade fixtures or ornamental fixtures, although they were actually fixed. That is, the original rule, being a rule of common sense, was modified, so that it should not apply to a case where it was obviously not intended to apply. Very few cases have arisen, as I said, where the question was as to things that were not fixed to the ground. It was supposed at one time that that was an imperative condition. The first doubt, perhaps, to be found in any recorded case is suggested in the well-known passage from the judgment of Mr. Justice *Blackburn*, in the case of *Holland* v. *Hodgson* (1). That was a decision of the Court of Exchequer Chamber, and it is binding in England upon all the Courts, until it is over-ruled by the House of Lords, which, I think, is extremely unlikely to happen. He said, in a passage quoted by Mr. Justice *Chubb*:—"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 *Wiltshear* v. *Cottrell* (2), and the cases there cited. But even in such a case, if the intention is apparent to make the articles part of the land, they do become part of the land." That is a distinct recognition of the possibility that property might become part of the freehold, without being actually annexed to the land. The case of *Monti* v. *Barnes* (3) was a case where the things in question were not in any way annexed to the land, but only rested upon it by their own weight. The things in question were some heavy grates, called dog grates, which had been substituted

(1) L.R. 7 C.P., 328, at p. 334. (2) 1 E. & B., 674; 22 L.J.Q.B., 177.
(3) (1901) 1 Q.B., 205.

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by the mortgagor for some fixed grates that had been in the mortgaged house. The Master of the Rolls, *A. L. Smith*, said (1): —"A question which arises in this case is whether, as between mortgagor and mortgagee, certain dog grates were fixtures or mere personal chattels. There were in the house which was the subject of the mortgage the ordinary fixed grates. The mortgagor after the mortgage removed a number of these, and substituted for them dog grates which are of considerable weight. The question, as I have said, is whether they in this case became fixtures or remained chattels. It is urged for the plaintiff that as they were not affixed in any way to the freehold, this factor shewed that they remained chattels. That circumstance *primâ facie* appears to raise a little difficulty, but it will be seen, on consideration of the cases, and particularly of what *Blackburn* J., said in *Holland* v. *Hodgson* (2), that it is not in all cases necessary that the article should be actually affixed to the freehold in order that it may become a fixture." He then read the passage I have just quoted, and he went on—"Applying these principles to the present case, we have here the fact, first, that the articles in question are of considerable weight, and, as regards the intention with which the mortgagor placed the dog grates in the house, it is obvious that he could not have intended that the house should be without grates; and I have no doubt that the dog grates were put in to fill the place of the old fixed grates, which he took out, and to pass with the inheritance. The question which has to be considered in such a case is whether, having regard to the character of the article and the circumstances of the particular case, the article in question was intended to be annexed to the inheritance or to continue a mere chattel, and not to become part of the freehold. The learned Judge has held that in the circumstances of this case these dog grates were substituted for the old fixed grates with the former intention, and not only am I unable to say that he was wrong in that conclusion, but I agree with him." *Collins* L.J. pointed out that mere weight would not be sufficient, "for everything that is brought into a house rests where it is by the force of gravity. No one would say that a footstool, or, I should think, fire-irons, were fixtures,

(1) (1901) 1 Q.B., 205, at p. 206. (2) L.R. 7 C.P., 328, at p. 334.

but I think that dog grates resting by their own weight are capable of being treated as annexed to the freehold." He might have given another illustration in the case of an iron bridge which rests by its own weight. I suppose no one will suggest now that that is an ordinary chattel.

On the authority of that case, the rule suggested by *Blackburn* J. must, I think, be taken to be the recognized rule of English law. In the case of *De Falbe*—in the House of Lords, *Leigh* v. *Taylor* (1)—the Lord Chancellor and Lord *Macnaghten* made some observations, which are relevant in the present case, with reference to the supposed rule of the old cases that annexation was necessary for the purpose of proving a change in the character of the chattel, making it become part of the realty. In that case the question was whether certain things, whether actually fixed to the freehold, or removable or not, retained their character of chattels, and the observations are equally applicable in principle to the present case. Lord *Halsbury* L.C., said (2):—"One principle, I think, has been established from the earliest period of the law down to the present time, namely, that if something has been made part of the house it must necessarily go to the heir, because the house goes to the heir and it is part of the house. That seems logical enough. Another principle appears to be equally clear, namely, that where it is something which, although it may be attached in some form or other (I will say a word in a moment about the degree of attachment) to the walls of the house, yet, having regard to the nature of the thing itself, and the purpose of its being placed there, is not intended to form part of the realty, but is only a mode of enjoyment of the thing while the person is temporarily there, and is there for the purpose of his or her enjoyment, then it is removable, and goes to the executor. My Lords, we have heard something about a suggested alteration of the law; but those two principles appear to have been established from the earliest times, and they are principles still in force. But the moment one comes to deal with the facts of each particular case, I quite agree that something has changed very much; I suspect it is not the law or any principle of law, but it is a change in the mode of life, the degree in which certain things have seemed

(1) (1902) A.C., 157.

(2) (1902) A.C., 157, at p. 158.

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susceptible of being put up as mere ornament, whereas at an earlier period the ruder constructions rendered it impossible sometimes to sever the thing which was put up from the realty." Lord *Macnaghten*, in the same case, said (1):—"Mr. Levett has spoken of the Courts changing the law. I do not think the law has changed. The change I should say is rather in our habits and mode of life. The question is still as it always was, has the thing in controversy become parcel of the freehold? To determine that question, you must have regard to all the circumstances of the particular case—to the taste and fashion of the day as well as to the position in regard to the freehold of the person who is supposed to have made that which was once a mere chattel part of the realty. The mode of annexation is only one of the circumstances of the case, and not always the most important—and its relative importance is probably not what it was in ruder or simpler times."

The earliest forms of structure, or some of the earliest familiar to us in this country, are what are called slab buildings. They are fixed to the freehold, because the slabs are let into the ground. There is, perhaps, an earlier form of structure—a structure consisting of rough saplings let into the ground side by side. I have seen many structures of that kind, which were undoubtedly fixtures; and, as civilization advanced, a more comfortable and more permanent style of building was adopted; yet, according to the contention in this case, that would not be a fixture, but remains a mere chattel. In the present case, the original building was spoken of by the learned Judge as if it was obviously part of the freehold, and as if it was quite sufficient to show that a thing was attached to the house to show that it also becomes part of the freehold. Of course, that is not conclusive. In America, the law appears to be in accordance with what one would expect it to be. We were referred to the *State Savings Bank* v. *Kircheval* (2), which is a decision of the Supreme Court of Missouri. That is valuable as containing a statement of what, in the American States, is the law on this subject. The learned Judge, in delivering the judgment of the Court, quotes from the decisions of other Courts. He first quotes this passage:—"The destination which gives a

(1) (1902) A.C., 157, at p. 162.

(2) 27 Am. Rep., 310, at p. 312.

movable object an immovable character, results from facts and circumstances determined by the law itself, and could neither be established nor taken away by the simple declaration of the proprietor, whether oral or written." After mentioning *Snedeker* v. *Warring* (1), he said:—"In *Goff* v. *O'Conner* (2) the Court said—'Houses in common intendment of the law are not fixtures, but part of the land. . . This does not depend, in the case of houses, so much upon the particular mode of attaching, or fixing and connecting them with the land, upon which they stand or rest, as upon the uses and purposes for which they are erected and designed.' In *Cole* v. *Stewart* (3) the building was intended by the owner to be temporary, and was built with a view to ultimate removal. In a contest between the mortgagee, whose mortgage was executed subsequent to the erection of the house, and a purchaser of the building from the mortgagor, it was held to be a fixture. In the light of these cases, and many others which we have examined, we do not regard the fact that the building in question was erected as a temporary building, and with an intention of ultimate removal, at all decisive as to whether it became a part of the realty or not. The manner in which a building is placed upon land whether upon wooden posts, or a rock, or brick foundation, does not determine its character. As was said by *Parker* J., in *Snedeker* v. *Warring* above cited—'A thing may be as firmly fixed to the land by gravitation as by clamps or cement. Its character may depend upon the object of its erection.' In *Teaff* v. *Hewitt* (4) it was held that:—'The intention of the party making the annexation to make the article a permanent accession to the freehold, this intention to be inferred from the nature of the article affixed, the relation and situation of the party making the annexation, the structure and mode of annexation, and the purpose and use of which the annexation has been made,' is a controlling circumstance in determining whether the structure is to be regarded as a fixture or not. In the case of *Benjamin F. Butler* (*Adm.*) v. *Page* (5), *Shaw* C.J. delivering the opinion of the Court, said—'All buildings erected and fixtures

(1) 2 Kernan, 178.
(2) 16 Ill., 422.
(3) 11 Cush., 182.
(4) 1 Ohio St., 511.
(5) 7 Metc., 42.

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placed on mortgaged premises by the mortgagor, must be regarded as permanently annexed to the freehold. They go to enhance the value of the estate, and will, therefore, inure to the benefit of the mortgagee, so far as they increase his security for his debt, and, to the same extent they enhance the value of the equity of redemption, and thereby inure to the benefit of the mortgagor." That appears to be the settled doctrine in the American States, where these questions, which can only arise in the State Courts, must depend upon the law in the particular State. There is no case in the Supreme Court that we know of, but it seems to be settled doctrine in the American States, that houses are regarded as annexed to the freehold, and form part of the freehold, unless the contrary is shown.

I agree, therefore, in the conclusion the learned Judge came to, that, the question being as stated by *Blackburn* J., there is a general principle that, if buildings are not actually annexed to the freehold, the onus may probably lie upon the person claiming them as real property to show affirmatively that they were erected with the intention that they should become part of the land. I differ from the learned Judge in thinking that it is not sufficient to show that the thing in question is a dwelling-house —an ordinary dwelling-house, on a town allotment, in an inhabited town. In the case of a similar building in another part of the country, erected under entirely different circumstances, a different conclusion might be drawn. For instance, in the case of a manager's house, erected on a gold-mining lease, the same conclusion might not necessarily follow. But in the present case, it appears to me that the proper inference to be drawn from the facts is that these houses became part of the freehold. I think, indeed, this case might be rested even on narrower grounds. This was, as I said, a building lease, and although the tenant, of whom the defendant is the assignee, was bound by the covenants of the lease only to erect a building of £50 in value, I think it ought to be inferred from the lease itself that the intention was that any dwelling-house put on the land should be considered annexed to the freehold. For these reasons I think that the conclusion of the learned Judge was erroneous, and that the appeal must be allowed.

BARTON J. Notwithstanding his advantage with regard to the onus of proof, it seems to me that the defendant has engaged in a difficult contention; that is, the contention that a dwelling-house of the kind ordinarily inhabited, and annexed to the soil with the degree of annexation ordinarily employed in the part of the country where the structure exists, is a chattel, and not to be treated as a dwelling-house. The evidence, which is succinctly stated in the judgment of *Chubb* J. is as follows:—[His Honor here stated the facts as already given by *Griffith* C.J. and proceeded]—I regard the last-stated piece of evidence as of great importance, showing, as it does, that the dwellings in question are annexed to the soil in the degree and manner found sufficient in the part of the country where they are erected. Now there is, of course, some difficulty imported into this case by the fact that a number of the decisions relied upon for the plaintiff are cases in which the relation between the parties has been that of mortgagor and mortgagee. Of English cases in the line of his contention, in which the relation has been that of landlord and tenant, there are few. On the other hand, no case has been cited for the defence which goes to show that a building which would be ordinarily known as a dwelling-house—placed on the soil without any other attachment to it, without any greater degree of immobility than its weight on the ground, or on the piers which sustain it—is a chattel, and I think that it is rather a startling proposition, especially in a country like this, to undertake to establish that a building with the ordinary substantiality of a dwelling-house such as the majority of the people live in, is not to be considered a dwelling-house but simply a chattel, because of the absence of a certain number of nails or screws, not necessary at the outset, and the absence of which would never be material unless some huge flood arose, and floated the building off the piers on which it rested. The respondent, however, argues that there must be an annexation by some method of attachment, and he cites certain cases in which, many years ago, there appeared to be an idea among Judges that there must be some kind of physical attachment made, beyond that of mere gravitation, fixing the contested building to the freehold,

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before it could be held to belong to the land. The case of *Penton* v. *Robart* (1) cited by Mr. MacGregor, had reference to a wooden structure, 7 x 12, used in the business of varnish making, which had been removed from the premises to some other place, and which was held not to be a fixture. That was a case, as between landlord and tenant, of a trade fixture, removable or capable of severance without injury. In the case of *The King* v. *Otley* (2), the question arose with reference to a pauper who had acquired a settlement by reason of the rental value of certain premises, and they included a windmill and a brick cottage and garden. The mill was of wood and had a foundation of brick; the wood-work was not inserted in the brick foundation, but rested upon it by its own weight alone. In that case it was held, probably for want of a closer or stronger annexation, that the mill could not be reckoned as an element in the rental value upon which the pauper acquired the right. There was the case of *Wansbrough* v. *Maton* (3), which was in reference to a barn, resting on brick and stone foundations which were let into the ground. The barn was resting on the foundations by its weight alone, and, under the circumstances, damages were held to be recoverable in trover by the out-going tenant, who sued his landlord for refusing to let him take it away, the principle, according to the judgment, being that, not being united to the freehold, and not attached to the stone or brickwork, it was not part of the freehold. Now, these three seem to be the principal authorities on which Mr. MacGregor relied, and not one of these, in the first place, is a case of a dwelling-house. In the second place, one was the case of a trade fixture, and another was a case of a wooden barn, resting by its own weight, and used only as a barn. The third case, that of the mill, was in relation to principles which are not the same as those which govern mortgagor and mortgagee, or landlord and tenant, and I doubt its relevancy to the matters in dispute here. It is quite clear that what has been called the rigid rule on this question has suffered some degree of relaxation in recent years, and that a structure may now be held to be annexed to the soil merely by its own

(1) 4 Esp., 33; 2 East., 88.
(2) 1 B. & Ad., 161.
(3) 4 A. & E., 884.

weight. That was very clearly put in the case of *Holland* v. *Hodgson* (1), of which the passage most important to the present case was read by the Chief Justice. Following that at some considerable distance in time, but closely following it in principle, was the case of *Monti* v. *Barnes* (2). That was a case in which the mortgagor in possession removed the ordinary fixed grates from various fire-places, and substituted what were called dog grates, of considerable weight but not attached to the structure in any way. Under the circumstances the inference was drawn that the mortgagor placed the dog grates there in place of the other fixed grates, and that they were fixtures and passed to the mortgagee. It must be recollected that there the relation was that of mortgagor and mortgagee, and not that of landlord and tenant; still there are passages in the judgment which are of considerable application to the principle which should guide us in this case. *A. L. Smith* M.R., said (3):—"A question which arises in this case is, whether, as between mortgagor and mortgagee, certain dog grates were fixtures or mere personal chattels. There were in the house which was the subject of the mortgage the ordinary fixed grates. The mortgagor after the mortgage removed a number of these, and substituted for them dog grates, which are of considerable weight. The question, as I have said, is whether they in this case became fixtures or remained chattels. It is urged for the plaintiff that as they were not affixed in any way to the freehold, this factor shewed that they remained chattels." That is to say, an article may become annexed to the freehold without, in a physical sense, being affixed to it. The case of *Holland* v. *Hodgson* (4) already referred to was cited by the Master of the Rolls, and he quotes from the judgment of *Blackburn* J. He then refers to the instance of blocks of stone, placed one on top of another, without any mortar or cement, for the purpose of forming a dry stone wall, "which nevertheless would become fixtures, and that of stones in a stone mason's yard, which would not." "Applying these principles," he said, "to the present case, we have here the fact, first, that the articles in question are of considerable weight; and, as regards the intention with which the

(1) L.R. 7 C.P., 328.
(2) (1901) 1 Q.B., 205.
(3) (1901) 1 Q.B., 205, at p. 206.
(4) L.R. 7 C.P., 328, at p. 334

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mortgagor placed the dog grates in the house, it is obvious that he could not have intended that the house should be without grates; and I have no doubt that the dog grates were put in to fill the place of the old fixed grates, which he took out, and to pass with the inheritance. The question which has to be considered in such a case is whether, having regard to the character of the article and the circumstances of the particular case, the article in question was intended to be annexed to the inheritance or to continue a mere chattel, and not to become part of the freehold." There is a principle laid down there, which has an application to the present case, due regard being had to the different relations of mortgagor and mortgagee, and landlord and tenant. *Collins* L.J., adopted that passage in *Holland* v. *Hodgson* (1), as to the circumstances, the degree of annexation, and the object of the annexation. And if care is taken to distinguish between the wide word annexation, and the more restricted word affixation, one may see that the degree of annexation may depend largely on the weight of the articles originally annexed. He said (2), "With regard to the latter"—the object of the annexation—"it is obvious that a most material consideration is the character in which a person places the article in question on the land. Here we are dealing with a case of mortgagor and mortgagee, which in this connection differs widely from that of landlord and tenant. A mortgagor bringing an article on to the mortgaged premises, although it may be after the mortgage, would generally not regard the premises as belonging to any one but himself, and would therefore be more likely to intend the article to be for the improvement of the property from which he does not contemplate being ousted. . . . Then, with regard to the degree of the annexation, there was in the case of these dog grates no doubt the difficulty that there was no physical annexation; but it is clear that, as a matter of law, there may be annexation, so as to constitute a thing a fixture, by mere weight, and without any physical attachment by nails or screws, or otherwise, as in the case of the movable statues forming part of the architectural design of a building, which were the subject of the decision in *D'Eyncourt* v. *Gregory*" (3).

(1) L.R. 7 C.P., 328, at p. 334. (2) (1901) 1 Q.B., 205, at p. 207.
(3) L.R. 3 Eq., 382.

Stirling L.J., in the same case, after expressing his approval of he law as stated by *Blackburn* J., in *Holland* v. *Hodgson*, says 1):—"The contention for the plaintiff really involved the pro- osition that some degree of physical annexation is essential"— nd that, I take it, is Mr. MacGregor's proposition—" and that an bject simply resting on the land by its own weight could not be aid to be annexed at all. But clearly, this was not the meaning f *Blackburn* J., for he proceeds to deal with the question in rela- ion to articles no further attached to the land than by their own veight, and gives as an example of fixtures blocks of stone placed ne on top of another without mortar or cement for the purpose f forming a dry stone wall." *Stirling* L.J. states the true rule as pprehended by *Blackburn* J., and uses the following illustration. Ie says:—" On the other hand, an article may be very firmly ixed to the land, and yet the circumstances may be such as to how that it was never intended to be part of the land, and then t does not become part of the land. The anchor of a large ship nust be very firmly fixed in the ground in order to bear the strain f the cable, yet no one could suppose that it became part of the and, even though it should chance that the ship-owner was also the wner of the fee of the spot where the anchor was dropped. An nchor similarly fixed in the soil for the purposes of bearing the train of a suspension-bridge, would be part of the land." That is a passage which I cite in illustration of the fact that the object and purpose of the annexation is so important, and that the same kind f article may be annexed to the soil in precisely the same way in two different instances, and yet be in one instance part of the realty, and in another part a mere chattel. That constitutes a discrimen. Now, in regard to dividing houses there was one case mentioned by Mr. Macgregor, of which he was unable to obtain a full report. I think he cited from 23 *Federal American Digest*, *Griffen* v. *Ransdell* (2), which is not in the library, and that is a case, apparently, of a dwelling-house resting on land, but not fixed otherwise than by its own weight, and it was held as between landlord and tenant, that it was realty, and that the onus lay upon anyone claiming it to be personalty, to establish the fact that it was a chattel. That was, I think, a correct

(1) (1901) 1 Q.B., 205, at p. 209. (2) 17 Indiana Reports, 404.

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decision, and of course it strongly supports the contention of the plaintiff, although cited by Mr. Macgregor in the fairness with which he dealt with the whole question. Now, as to this relationship of landlord and tenant, there is the case of *Boyd* v. *Storrock* (1). That was a case in which the looms had been put up by the lessee of a cotton mill for his convenience during the existence of his term, and fastened to the floor by nails driven through the loom feet into wooden plugs fitted into the floor. They were easily movable without injury to the freehold. The case is not of particular value to the decision of this case, but I mention it for the value of a passage in the judgment of *Page Wood* V.C. After looking at the various authorities, he says (2): "I can come to no other conclusion than that the principle enunciated in *Ex parte Barclay* (3) is the right one. That principle, which I followed in *Mather* v. *Fraser* (4), seems to be, that if the tenant has affixed to the freehold, during his tenancy, articles in such a manner as to make it appear that during the term they are not to be removed, and that he regards them as attached to the property, according to his interest in the property, then, on any dealing by him with the property to which these articles are affixed, the Court would presume that he meant to deal with the property as it stood, with all these things so attached, and to pass the property in its then condition." I am fain to confess, in view of the evidence in this case, and the nature of the structure, that I find a difficulty in seeing how any other inference could be drawn in relation to the buildings on this land, than the inference, which was said to be the true one by the Vice-Chancellor in the case I have just mentioned. There was another case—*The State Savings Bank* v. *Kircheval* (5)—on the rule of mortgagor and mortgagee, which was cited by the Chief Justice as an expression of the state of the law in the United States, or, at any rate, in some of them, and it seems to me to be a reasonable expression of what can be gathered from the cases in England. In that the learned Judge says:—"In determining whether a building is part of, and passes with the land, a good deal depends upon the object of its erection, the use for which it was designed." It would be

(1) L.R. 5 Eq., 72.
(2) L.R. 5 Eq., 72, at p. 77.
(3) 5 D.M. & G., 403.
(4) 2 K. & J., 536.
(5) 27 Am. Rep., 310, at p. 311.

hard to imagine any purpose implying greater permanency than the erection of a dwelling-house for a man to live in. "The intention of the party making the improvement, ultimately to remove it from the premises, will not, by any means, be a controlling fact. One may erect a brick or a stone house, with an intention, after brief occupancy, to tear it down and build another on the same spot, but that intention would not make the building a chattel." Certainly not, because a man might say that he would put up another dwelling-house, but in the meantime, with regard to the dwelling-house that he had erected, it would be clear that he had taken it for the purpose of an occupation to endure for whatever might be the length of life of the building. If that is clear, it is a strong factor in discharging the onus mentioned by *Blackburn* J., as resting upon the person who claims for the freehold an article wholly attached to the freehold by its own weight. "The destination which gives a movable object an immovable character, results from facts and circumstances determined by the law itself, and could neither be established nor taken away by the simple declaration of the proprietor, whether oral or written." Then the learned Judge quotes from the case of *Goff* v. *O'Conner* (1):—"Houses in common intendment of the law are not fixtures, but part of the land. . . This does not depend, in the case of houses, so much upon the particular mode of attaching, or fixing and connecting them with the land, upon which they stand or rest, as upon the uses and purposes for which they were erected and designed." That is a very strong passage, and it seems to me that it is one which must be awarded great weight in considering a question of this kind. It is evidently common sense, and it is quite consistent with all the law upon the subject. I may mention the case of *Meigs' Appeal* (2), which was cited by the defendant, which shows the law in at least one of the United States:—There was in the borough of York a certain common, which was occupied, not, perhaps, after obtaining the consent, but with the acquiescence of the authorities of the borough, by the Government of the United States, which placed upon it barrack-rooms and hospitals, to be used during the war of rebellion. It was held "that the circumstances showed that these buildings

(1) 16 Ill., 422.

(2) 1 Am. Rep., 372.

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were intended for temporary use, and not as permanent structures, and that the borough, by lying by and suffering them to be erected upon a public common where, as permanent structures, they would be nuisances, is estopped from declaring that the United States intended to annex their chattels to the freehold." The Quartermaster-General of the United States Army, when further use of the buildings for army purposes became unnecessary, or when it became necessary to remove them to some other place, possibly for similar use, began to remove them, whereupon proceedings were taken to restrain him, and on a *pro formâ* decree, the matter came before the Supreme Court of Pennsylvania. *Agnew* J., who appears to have delivered the judgment of the Court, said (1):—"The buildings were chiefly set upon posts let into the ground, and, therefore, the argument of the plaintiffs maintains that the question of fixture or not a fixture depends, not on the character of the foundation but always on the question whether it is let into the soil. This is the old notion of a physical attachment, which has long since been exploded in this State. On the contrary, the question of fixture or not depends on the nature and character of the act by which the structure is put in place, the policy of the law connected with its purpose, and the intentions of those concerned in the act." That also applies to the considerations upon which this case depends. Without saying that the present case is so strong in favour of the plaintiff as it would be if it involved the relation of mortgagor and mortgagee, still, I think, having due regard to the relation of landlord and tenant, the plaintiff has a good right to claim these erections as buildings attached to the land, which, upon their erection and use for the permanent purposes of dwellings, became part of the freehold, their attachment being sufficient for the purpose, if the object and purpose of their annexation was such as to indicate that the inference from their use was that they were part of the property on which they were built. That is the only inference we can fairly draw in this case, and I think the plaintiff, therefore, has discharged the onus laid upon him, and is entitled to succeed in this appeal.

(1) 1 Am. Rep., 372, at p. 374.

O'CONNOR J. The rights of the parties depend upon the principles of the common law. The application of those principles to the facts is comparatively simple. The real difficulty in the case has been in tracing those principles through the multitude of English cases cited, and in distinguishing those in which the principles of the common law in their broadest sense have been elucidated from those which turn merely on circumstances and conditions of English life which have no parallel in Australia. The main rule of common law bearing on the matter, and the exceptions to it, are, I think, nowhere better stated than in the judgment of *Stirling* L.J. in the case *De Falbe*—afterwards named *Ward* v. *Taylor* on appeal (1). He says—"Now undoubtedly the old rule of the common law was, that whatever became affixed to the freehold passed to the owner of the freehold; but modifications of that rule have been introduced from time to time. The first point which I think deserves consideration is—What is the ground on which that old simple rule has been modified? I find in the judgment of *Martin* B., in *Elliott* v. *Bishop* (2), a passage which expresses so exactly what I desire to say, that I prefer to read it rather than to use my own words. He said (3)—'The old rule laid down in the old books is, that, if the tenant or the occupier of a house or land annex anything to the freehold, neither he nor his representatives can afterwards take it away, the maxim being *Quicquid plantatur solo solo cedit*': *Minshall* v. *Lloyd* (4). But as society progressed, and tenants for lives or for terms of years of houses, for the more convenient or luxurious occupation of them, or for the purposes of trade, affixed valuable and expensive articles to the freehold, the injustice of denying the tenant the right to remove them at his pleasure, and deeming such things practically forfeited to the owner of the fee simple by the mere act of annexation, became apparent to all; and there long ago sprang up a right, sanctioned and supported both by the Courts of Law and Equity, in the temporary owner or occupier of real property, or his representative, to disannex and remove certain articles, although annexed by him to the freehold, and these articles have been denominated 'fixtures'; and the best definition

(1) (1901) 1 Ch., 523, at p. 538.
(2) 10 Ex., 496.
(3) 10 Ex., 496, at p. 507.
(4) 2 M. & W., 450; 46 R.R., 551.

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with which I am acquainted is that given in the judgment of this Court in *Hallen* v. *Runder* (1), namely, that they are articles which were originally personal chattels, and which, although they have been annexed to the freehold by a temporary occupier, are nevertheless removable, and of course saleable, at the will of the person who has annexed them." It will simplify matters to get rid at once of the notion that we have anything to do in this case with fixtures in the ordinary technical sense of the term, because it is not contended, and it could not be contended, that these buildings were put upon the land for purposes of trade, or for any other purpose than the more convenient occupation of the freehold.

The question here, therefore, has to be looked at altogether apart from that exception to the common law rule, and we must first of all inquire whether or not there has been an annexation of these chattels to the land. The question whether or not they have been annexed to the land depends upon the principles which have been well stated in *Blackburn* J.'s judgment, already referred to. But, in considering that judgment, it would be wise to take only that part of it as applicable which states the principle in the most general form. The maxim of the law is, that what is annexed to the land becomes part of the land; but the application of that maxim, in the words of *Blackburn* J., "must depend on the circumstances in each case, and mainly on two circumstances, as indicating the intention, viz., the degree of annexation, and the object of the annexation." In considering its application in this case, when we have got rid altogether of the notion of trade fixtures, or fixtures for domestic convenience, the question is exactly the same as if it were being considered as between vendor and purchaser—whether, on the sale of this piece of land, the house would go with it. The question then resolves itself into the very simple one, is the house annexed to the land? In the application of the principle laid down by *Blackburn* J. as to the onus of proof, I think is to be found the true solution of this case. It will be remembered that in practically all the English cases the article which was being considered really was a chattel. It was a piece of machinery, a statue, a garden-seat, or was some

(1) 1 C.M. & R., 266; 40 R.R., 551.

other article properly described as a chattel. But in this case, we are not dealing with chattels in the ordinary sense of the word at all. In discussing whether these buildings are chattels I propose to take both buildings into consideration because both, it seems to me, having regard to the broad principles upon which the case must be decided, stand upon the same footing. What are these so-called chattels, which, it is said, may, or may not, be annexed to the freehold? The first is a wooden house, 41 feet 6 inches in its frontage, and 42 feet long, which contains 7 rooms, besides an open wash-house, and a verandah round two sides, 7 feet 6 inches wide. The other is a house with 26 feet frontage, and 54 feet deep, containing 8 rooms. Before we begin to consider whether these structures have become annexed to the freehold, we may, I think, well consider, are they chattels at all? No doubt, the timbers of which they are built are chattels, but the question is whether we are not met at the very outset with the necessity of determining whether the timber does not lose its quality of chattel, and become something annexed to the freehold, from the mere fact that it is built in the form of a house. I think the statement of the law in the American cases, which is much more applicable to the circumstances obtaining in Australia than to those generally considered in the English cases, is founded upon what must be the true nature of things. It would I think be stretching the rules of the common law to a point at which they cease to be rules of common sense, if it were to be laid down as a general rule that, except in very exceptional cases, wooden houses, resting by their own weight on land, could ever be regarded as mere chattels, removable at the will of the owner of the timber of which they are built. Of course, the circumstances in each case must be considered. There are cases in which a house might be a mere chattel, not annexed to, but merely placed upon the land, and so considered not to have become part of the freehold. For instance, in carrying out some large work, the contractor's office might be built in such a way as to be removable, and the circumstances surrounding its use would indicate that it was intended to be a mere chattel, and was never to become part of the land. Similarly as to box offices which are sometimes placed on wharves; although they are in one sense houses, and are

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used for the purposes of houses, it could not be contended that they were anything else but chattels intended to be removable. These are exceptional cases. In general, it appears to me that the true test to be applied in determining whether a chattel has lost its character of chattel and become part of the freehold, is to inquire what is the object and purpose of its being attached to the freehold? If the object and purpose of its being attached to the freehold is not the enjoyment of the chattel itself, but the better enjoyment of the freehold, it is clear that it must be taken to have become annexed to the freehold, and become part of the freehold. That principle is stated in a very few words in a judgment quoted by *Stirling* L.J., *In re Falbe, Ward* v. *Taylor* (1), in which he says this:—"The question what constitutes an annexation sufficient to make the chattel part of the land '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.' *Blackburn* J. gave various examples in which the degree of annexation might be material. As regards the object of the annexation the question to be considered is, whether the object is to improve the freehold to which the annexation is made, or whether it is the more complete and better enjoyment of the chattel itself." The expression, "improving the freehold," means improving the land, to which the annexation is made, and it does seem to me that that affords a very good test of the object of the annexation.

That principle could be readily applied in most of the circumstances with which the English cases deal. For instance, a machine is annexed to the freehold, not for the better enjoyment of the freehold, but for the more effective use of the machine. So here, can there be any question that where a man puts a house on a piece of land, that he puts it there, not for the better enjoyment of the chattel, if you consider a house to be a chattel, but for the better enjoyment of the land itself. It does not matter what was the intention in the mind of the tenant when he put the structure on the land, as is stated in the American case of the *State Savings Bank* v. *Kircheval* (2):—"The intention of the party making the improvement ultimately to remove it from the

(1) (1901) 1 Ch., 523, at p. 541.

(2) 27 Am. Rep., 310.

premises, will not, by any means, be a controlling fact. One may erect a brick or a stone house with an intention, after a brief occupancy to tear it down and build another on the same spot, but that intention would not make the building a chattel. The destination which gives a movable object an immovable character, results from facts and circumstances determined by the law itself, and could never be established nor taken away by the simple declaration of the proprietor, whether oral or written." So that, whatever the intention of the lessee was in putting a house upon the land, if it was put there for the better enjoyment of the land, it has lost its character of chattel, become part of the freehold, and when the lease is at an end it goes back into the hands of the landlord.

I have not referred hitherto to another circumstance, which seems to me also very material, but as the matter has been rather fully dealt with by the Chief Justice, I will only just allude to it, and that is, the agreement under which this land was occupied. This land, to put it shortly, was let on a building lease, which provided that a building should be put upon the land of not less than £50 in value. A building was put on the land. There is also in the lease a covenant to insure. That covenant, as pointed out by the Chief Justice, becomes, by virtue of the Act, a covenant to insure all buildings on the land, and I think Mr. MacGregor would have had a good deal of difficulty in meeting the contention that the tenant was bound to insure both these buildings, if this had been an action against his client for not insuring the whole of the houses upon the land. Under that covenant, it seems to me, it would be impossible for him to say, "I have insured the original fifty pounds worth of building, and I am not going to insure the others." The covenant is to insure all the buildings on the land, and that throws additional light, if any additional light were necessary, upon the intention of both parties to the lease. If there is a covenant to build, and a covenant to insure all that the tenant builds, it does seem to me it may very well be taken to be that the buildings are put upon the land both for the better enjoyment of the land by the tenant, and the carrying out of that covenant with the landlord. For these reasons, I am of opinion that the decision of the learned Judge was erroneous, and the appeal should be upheld.

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Appeal allowed. Judgment directed for the plaintiff for a perpetual injunction and costs of action. Defendant to pay costs of appeal.

Solicitors, for appellant, *Flower & Hart*, by their agents *Unmack & Connolly.*

Solicitors, for respondent, *Roberts, Leu & Barnett.*

Cons *Elhusseini & Elsahili* 33 ACrimR 155 | Foll *R v House* (1991) 28 FCR 194 | Cons *R v Enslow* (1992) 62 ACrimR 119 | Cons *Renwick v Bell* [2002] 2 QdR 326

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[HIGH COURT OF AUSTRALIA.]

CONNOLLY . . . . . COMPLAINANT;

AND

MEAGHER . . . . . DEFENDANT.

EX PARTE CONNOLLY.

SPECIAL LEAVE TO APPEAL.

H. C. OF A. 1906.

BRISBANE, *April* 19.

Griffith C.J., Barton and O'Connor JJ.

Special leave refused—"Autrefois convict"—Queensland Criminal Code, sec. 16; *sec.* 19 (8)—*Nominal penalty.*

Special leave to appeal will be granted in criminal cases only where questions of great public importance are involved, and such leave will not be granted where it appears to the Court that the accused, who had been acquitted in the Court below, was, at most, only technically guilty of the offence charged and a merely nominal penalty might lawfully have been imposed.

The provision of the Queensland *Criminal Code*, sec. 16, that a person shall not be twice punished for the same act or omission, does not impose the same test as the Common Law defence of *autrefois convict.*

MOTION for special leave to appeal from the Supreme Court of Queensland.