

SHOULD
THE TENANT OF LAND

POSSESS THE
PROPERTY
IN THE
IMPROVEMENTS MADE BY HIM?

A PAPER READ BEFORE
THE DUBLIN STATISTICAL SOCIETY,

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Should the Tenant of Land possess the Property in the Improvements made by him? By D Caulfield Heron, Esq, Barrister at Law; Professor of Jurisprudence and Political Economy, Queen's College, Galway.

I. I WISH to discuss the question which I have prefixed to this paper for the consideration of the society, without direct reference to the existing Tenant Right of Ulster, or to the reforms in the law of real property which are now demanded.* I merely wish to ascertain whether, as a pure question of natural law, the property in improvements made by the tenant, should not be vested in him alone. It is one of the principal advantages to be gained from the study of sociology, and from the institution of a society such as this, that questions formerly termed political are brought within the domain of philosophical enquiry, and subjected to the same processes by which such great results have been obtained in the physical sciences.

Not but that it is plain the study of these social subjects transcends all others in importance. It is easy to accumulate examples of the terrible disasters which have accrued to society in consequence of the violation of those principles upon which PROPERTY ought to be based. The poor labourers of land first attract the attention of modern history in the chronicles of Froissart and Walsingham. These have told us what were the demands of the common people in the insurrection of 1381, in England, almost cotemporaneously with the Jacqueries in France and Flanders. The commoners, in 1381, only required the abolition of slavery, freedom of commerce in market-towns, without tolls, and a fixed rent on land, instead of the services due by villeinage. We, in the nineteenth century, perceive that the demands of these poor people were in conformity with natural justice and reason. And in the British Islands we have abolished slavery; there are few tolls except for the providing of public markets and convenient establishments for trade; there is a fixed money rent for land. But the persons who were in the fourteenth century the leaders of legislation, misled by ignorance of their own true interests and those of the people, delayed these reforms, and so far retarded the progress and prosperity of England.

* AUTHORITIES.—The Tenant Right of Ulster considered economically · by Professor Hancock Dublin, 1845.

Impediments to the Prosperity of Ireland, by Professor Hancock Belfast, 1850.

The Tenure and Improvement of Land in Ireland, considered with reference to the relation of Landlord and Tenant, and Tenant Right: by W. D. Ferguson, and Andrew Vance · Dublin, 1851

A Catechism of Tenant-Right Belfast, 1851.

The Irish Tenant League (a monthly journal) · Dublin, 1851-1852

Mr. W. Shauman Crawford's Tenant Right Bill 1852.

So in France, before 1789, the law of real property was full of abuses. There existed under the title of feudal right, a number of burthensome duties, having for their origin not a free contract, but a usurpation of force over weakness. It was necessary for the feudal tenant to bake his bread at the oven of his landlord; it was necessary for him to grind his corn at the lord's mill, and to buy exclusively the goods and merchandize which his feudal lord would sell him; it was compulsory on the feudal tenant to allow his grain to be devoured by his landlord's game.

In the British Islands the civilization of the middle and higher classes of society is unparalleled. We have a representative government, public liberty, wealth, knowledge, and the utmost facility of communication. But there is a blot upon this prosperity. That we may not speak of the pauperism of England, the agricultural peasantry of Ireland are worse clothed, worse lodged, worse fed, than any in Europe. In Ireland, the recovery of the legal debt of rent alone is resisted by violence. The struggle for the possession of the land alone, of all property, causes bloodshed. The laws then, which regulate the transfer and the cultivation of the land, are most important for us to study and reform.

That part of the social science which is concerned about law, is termed jurisprudence. Jurisprudence as a science, is the science of Positive Law; or in other words, the theory of that part of our rights and correlative duties which are capable of being enforced by the public authority of the state. But in the investigation of these subjects, jurisprudence obviously furnishes rules which teach us to avoid evil, and make good laws. Thus it becomes an art, the art of legislation. Similarly, logic is not only the science of thought, but also the art of reasoning.

Following out the present subject therefore as a question in jurisprudence, it will be necessary first to show that the tenant has a natural right to enjoy the complete fruits of his labour and capital expended on the improvement of the land with the consent of the owner; secondly, that this right should not be left binding in conscience upon the owner as a mere moral obligation, but that it is a proper right to be protected by the laws of the country, and enforced by them in case of violation; thirdly, it will be necessary to state the proper method of legislation on this subject, so as to secure the rights of all parties possessing property in the improved land.

Under the word tenant I include every occupier of land having a terminable interest. I use the word improvement to include every change effected by the tenant on the land, by which the value of the land has been increased.

The first principle of legislation is to provide that the greatest number of beings may enjoy the greatest amount of good. Nor is this greatest-happiness principle, as it has been termed, peculiar to jurisprudence; but it is the common object of all the arts and sciences. The universal experience of mankind attests that the best method to secure the greatest happiness for the community, so far as it

comes within the sphere of jurisprudence, is to provide by law the greatest security for person and for property. The quotation is frequently used,

“How small of all that human hearts endure,
The part that kings or laws can cause or cure.”

But there are few sayings more erroneous than this; none more ruinous for a man to have implanted in his mind, notwithstanding it was written by Dr. Johnson (as it is said), and published by Goldsmith. Upon the laws of a country, upon the security for the fruits of industry which men enjoy under the laws, civilisation and the progress of society most of all depend. All over the world there are numerous examples of countries once rich and flourishing, reduced by evil laws, by the want of security for property, to misery and pauperism. Asia Minor, Egypt, and Greece, were once the wealthiest as they are still amongst the fairest and most beautiful portions of the earth. What have these countries, once so rich in agriculture, commerce, population, and the arts, become under the absurd despotism of the Turk?—wasted and barren. Not foreign invasions, not civil wars alone have caused this. Belgium has suffered the same, and is one of the richest countries in the world. But that untiring despotism which leaves no security for industry, and robs the cultivator of the profits of his toil, has been the most certain means to change into deserts those countries which were once the gardens and the granaries of the world.

The natural rights of man being life, liberty, and property, the state protects him in the enjoyment of the two first, provided he is allowed perfect freedom of action, restrained only by laws tending to promote the greatest happiness of the community. The questions relating to property, and the actions which ought to vest it in the proprietor, are more intricate. The word property is in very frequent use. Persons speak of the rights of property. And Mr. Drummond well said,—“Property has its duties, as well as its rights.” Yet many who use these expressions would be unable accurately to define what they mean by them. But property as defined by jurists* is a right conferred and protected by the law, of deriving certain advantages from the thing said to belong to a person, in consequence of the legal relations in which he stands towards it. It always includes permanence and exclusiveness. It implies that the use will remain permanent to the possessor, and that he will be able to exclude others from the use of that which is his property. The first point connected with property upon which persons require to have a distinct idea is, that property in civil society exists entirely by force of, and through means of, the law. Property is the creature of law. It may be said that, before the institution of civilized society, property did exist. If a savage appropriated a fruit, he would use it, and no other would take it from

* Bentham's Principles of the Civil Law, part ii. c. 1. Works, Buntou's ed. vol. 1. p. 327.

him But if the possession of the fruit depended only on the strength of the possessor, property did not yet exist. Once, however, that the neighbouring savages agreed to support one another in the peaceable enjoyment of their individual appropriations, property already existed in this, that its violation would be punished by the public force.

The original titles to property, recognised the more fully by nations accordingly as they advance in civilization, are occupancy and labour. One of the first principles of society amongst uncivilized men is, that the first possessor be permitted to retain his acquisitions. But man is not destined, like the brute creatures which live upon the earth, solely to consume its spontaneous fruits. His duty is to unite knowledge to nature,—to obtain by labour the wealth from which springs material happiness, and which affords rest from toil to those who cultivate the useful arts and the advanced sciences. But if man be destined to earn his bread by the sweat of his brow, he is also naturally entitled to enjoy the fruits of that labour. And upon the security for that enjoyment does the progress of civilisation depend. In the infancy of society, man's natural rights to life, liberty, and property, are imperfectly recognised. Even yet the absolute rights of strangers are violated in the aggressive wars undertaken by the most polished nations. Even yet slavery disgraces civilisation. Even yet the right of labour to establish property is partially denied. The labour of authors in the composition of their works is not yet held to vest the complete property in these laborious workers. The labour of tenants on the land, as yet, vests no property in them. The rights of labour are, in Positive Law, imperfectly protected.

The reason for vesting property in the occupant or in the labourer are well known. The right of man to take possession of the gifts of nature are acknowledged. Originally no property is possessed in the rude material of the world. And the first occupant has a right to retain his possessions for three several reasons, as commonly given by jurists. In the first place, if he be protected in such possession, he is thereby spared the pain of disappointment which he would naturally feel at being deprived of those things which he had occupied before all others. Now this suffering to him would, other things remaining the same, be a greater suffering, than the pleasure derived from the acquisition would be a pleasure to others. And in legislation it is a well-known principle, that where we do not violate a positive natural right, we should always adopt that course which, on the whole, is productive of the greatest amount of good. In the next place the recognition of the title of occupancy prevents the personal contests which might otherwise take place between the first occupant and the successive claimants. Thirdly, the good so secured to him, acting in the character of reward, becomes a spur to the industry of others, who are led to seek for themselves similar advantages. These are the reasons given by Bentham and other great jurists. But at the same time all perceive that, independent of

these, there is the strong natural feeling, an innate first principle, that the first occupant has a right to the possession.

In time other species of property arise. Ores are worked into implements and machines; the domestic animals are reclaimed from their original savage stocks. The earth was covered with thorns. Labour has made it fertile. Man, from the unformed mass of concealed riches in the earth has wrought the precious metals,—produced the abundant harvests. The marshes are reclaimed. The rocks are built into libraries and cathedrals. Industrious labour has conquered the earth and rendered it habitable for civilised man.

Labour is now the principal of the primary titles to property, inasmuch as labour has increased the value of all material property in the most wonderful degree from the original rudeness of savage life. We at once see this if we compare the present value of the county of Middlesex with its value at the time when Cæsar landed in England. But the increased value has entirely arisen from the application of skilful labour to the natural materials of the entire British empire, whilst its fruits are centralized in London.

Now the right of property arising from labour appears even better grounded than that arising from occupancy, because though it might perhaps be contended that the goods of the earth are originally common to all, and ought to remain so, certainly, the creator at least of property ought to be permitted solely to enjoy it. And the reasons already given for the vesting of property in the occupant, apply with much greater force to the case of the labourer. Because, in addition to the strong natural feeling of right to the result of industry, if the increased value be secured to the labourer, he is spared the pain of disappointment which would otherwise accrue from seeing another enjoy the fruits of his labours; contests are prevented, and the reward acts as a spur to the industry of the community. Thus the same, or more forcible reasons exist for vesting the fruits of his labour in the labourer, as for giving the first occupant the property in the spontaneous fruits of the earth.

Locke has described the origin of property in a manner slightly differing from this. According to him, things originally common become the property of the first occupant, not by that tacit agreement to which Grotius refers, but by virtue of the occupant's mixing with them the labour of his body, which is his own, and thus making the things themselves his own. But though differing slightly in terms, all jurists agree that occupancy and labour should create property to be recognised by law.

Labour may be expended upon things already possessed by the labourer, or upon things belonging to another. All jurists have ever allowed that labour expended on a person's own property gives his title increased force. My lands, reclaimed by me, those cultivated crops grown by my labour; if it would have been an injury to me to have deprived me of the land uncultivated, of the materials in a rude state, how much would be the injury now to deprive

me of them, since each effort of my industry has given to these objects a new value, has strengthened my right and attachment to them, and the desire which I have to keep them ?

But the question arises, if any one has applied his labour to a thing which belongs to another, with the tacit consent of the owner, and without having been remunerated for his labour by the owner, to whom ought the increased value of the property belong? This is the entire Tenant-Right question. Practically, this question can arise only in districts where slavery is abolished—where there are free tenant-cultivators, and where it is not customary for the owner to make the permanent improvements necessary to carry on agriculture effectively in the progress of society.

Naturally, this question was originally, in every country, decided against the cultivator. In every case the land originally belongs to the nation or the sovereign, and no person is allowed to possess an absolute interest in it. Among savage nations which live by hunting, the whole vast district belongs to the tribe, and no one can prevent any individual member of the tribe from roaming freely over it; no one can possess, in the land, the permanence and exclusiveness which are the characteristics of property. So also in the Nomadic stage of civilisation, absolute property is possessed in the flocks, but not in the land which feeds them.

Several have written as if the principle at the root of the feudal system were something peculiar to Ancient Germany alone. But the idea of the property in land being vested not in the individual, but in the tribe or nation to which he belongs, is not peculiar to the Germanic nations, but is common to all tribes in a certain stage of civilisation. Thus by the Celtic custom of gavel kind, on the death of the Cean Finné, or head of a sept, his successor, assembling all the strong men, re-divided the lands of the sept amongst them at his discretion. So, on the death of every inferior tenant, the sept being again summoned, their lands were thrown into hotch-pot, and a new partition made.

This system of property is useful in all the early stages of society; it binds together the individuals of the tribe by the strongest tie. And if any person of the tribe were permitted to acquire absolutely large districts, his isolation from the rest would be an inevitable result. Later, as in Germany, wherever the feudal barons acquired the property in great tracts of land, they speedily endeavoured to become politically distinct from the rest of the nation.

But when this system is continued, so that the ultimate property becomes vested in the sovereign, and so that the creation of sub-interests based on the natural titles to property is prevented, the results are bad. Among the partially civilised nations of the East, the ultimate property in land was fixed in the sovereign. In India, still the petty princes exercise absolute power over the land, resuming to themselves, when they please, the subjects' property. And this alone would account for the backward condition of some districts in India, notwithstanding their marvellous fertility. The same state of things may be seen in the Pashalics of Asia Minor and

Egypt, where the wretched inhabitants raise only enough of food to keep themselves from starvation, because they have no security for the fruits of their labour.

Greece displays to us man rising from Oriental sluggishness. But though the political liberty of the Greeks was great, their laws of property were most opposed to liberty. Aristotle and Plato both agreed that land belonged no less to the state than the proprietor. Thus the Oriental idea was not yet effaced; nor was the idea of individual liberty developed. Besides the Grecian liberty did not extend to all. Slaves principally cultivated the lands. Again, the question was decided against the cultivators. So, in the early Roman law, property belonged to the state; property sprung from political rights. Although in the later Roman law, the claims of labour to establish property were almost completely recognised.

II. In any discussion upon the law of real property, we should never lose sight of its history. It is the system most dependant upon the ancient polity of the country; and a just view of that polity, and of the changes made in it, is essential to be understood by every enlightened law reformer.

The Feudal system * was derived from the customs of the northern nations, which, migrating from the Germanic forests, destroyed the Roman empire, and settled themselves in Western and Southern Europe. The individual German had no private property in the land. His tribe annually allotted him a portion of ground for his support. The ultimate property, or *dominium directum*, was vested in the tribe alone. Thus, Tacitus says, "Agri pro numero cultorum ab universis per vices occupantur, quos mox inter se secundum dignationem partiuntur. Facilitatem partiendi camporum spatia præstant; arva per annos mutant, et superest ager." †

Under the pure principles of Feudal law in Western Europe, the sovereign, or feudal lord, is the original proprietor of all the lands within his dominion. His subjects hold only by his favour, and under an authority which manifests itself at each change of tenantry. Sir Henry Spellman ‡ defines a feud to be "usus fructus rei immobilis sub conditione fidei; vel jus utendi prædio alieno." Particularly, a feud may be defined as a tract of land acquired by the voluntary and gratuitous donation of a superior, held on condition of fidelity and military service. Originally the fiefs were not even hereditary. § Hence, even in later times, when a tenant died, his lands were dis-seized into the hands of his lord, to whom the lands returned as primitive master; the heir was bound to resume them from him, and to pay him relief if the lands were fiefs, or other dues, if they were held by base tenures.

* AUTHORITIES: Sir H. Spellman's Treatise on Feuds (London 1723), Littleton's Tenures, Book 2; Sullivan's Treatise on Feudal Law; Gilbert's Law of Tenures; Cragu Jus Feudale (Edinburgh, 1732)

† Tacitus De Moribus Germ. c. 26.

‡ Treatise on Feuds and Tenures by Knight's Service, c. 1.

§ Montesquieu, b. xvi. c 23

Thus, in England, the land being vested in the sovereign as lord paramount, it was by him portioned out in districts amongst the magnates who had deserved well of him in war. And in return for their broad lands, they were bound to serve again upon occasion

These large districts were impossible to be cultivated by the lord himself, and hence they were subdivided naturally amongst two classes of tenants—those who held by military tenures, and whose duty it was to attend the lord in the field of battle—and those who held by socage tenures, the socmen, whose duty it was to plough the demesnes which the lord kept in his own hands for the support of his own table, or to make an annual return of corn and other provisions for that use and purpose. And so rent is defined by Lord Chief Baron Gilbert to be an annual return made by the tenant either in labour, money, or provisions, in retribution for the land that passes. This is properly a rent-service, and is called so, because the ancient retribution was made by the corporeal service of the tenant, in ploughing his lord's demesnes; and at this day the corporeal service of fealty is still owed

By the strict feudal law, the breach of any of the feudal services was punished by the forfeiture of the estate. But these feudal forfeitures were afterwards turned into distresses, according to the pignorary method of the civil law; that is, the land that is set out to a tenant is hypothecated, or pledged to answer the rent to be paid to the landlord. And the whole profits of the land were liable to the lord's seizure for the payment and satisfaction of it.*

The first important result of the feudal system, as bearing on the juridical question as to the tenant's right to the property in his improvements, is that no person, except the sovereign, could have the absolute interest in lands, or the dominium directum over them. He could only have an estate in them. This is still continued as a fiction of law. The ultimate ownership remains in the crown. And it is a received and fundamental principle in law, that all lands are holden mediately or immediately of the sovereign. The highest right or estate in lands which a subject can have, is a fee-simple. The term fee—feudum—is used in contradistinction to allodium—defined to be a man's own land, which he possesses merely in his own right, without any rent or service to any superior. This allodial property no subject in the British Islands can have †. But the owner of a fee-simple estate may be considered practically the absolute owner, as the whole property in the land is his, subject only to the sovereign's claims. And since the feudal tenures have been changed into socage, the tenant in fee could not have a more absolute dominion over the land, even if the whole doctrine of tenure were abolished. It is plain that the consequence of this system was the feudal rule,—*quidquid plantatur solo, solo cedit*. Because, if any feudal tenant were allowed to acquire the absolute property in the

* Gilbert on Rent, p. 10, Lintot, London, 1758.

† 2, Blackst. Com. 105.

improvements effected by him, the whole feudal system of mutual dependence and obligation would have been at an end. Besides, the modern idea of the rights of labour was unknown. The feudal baron expressed his title in the robber motto, "per Deum et ferum obtinui." Property still originated from political rights; whilst the tendency in modern times is to make political rights spring from property.

In the progress of society, however, there is an essential tendency to freedom and independence. Originally governments exercised the most absolute power over their subjects. Land in Greece and Rome, as at first in England and the other feudal monarchies of modern Europe, belonged to the state, and the possessor enjoyed it as a mere usufructuary. The liberty of the individual, and his absolute independence of the government, provided he do not improperly interfere with the comfort and happiness of others—these are political innovations upon the old systems of states. And the more advanced each nation becomes, so much the more will the liberty of the individual be developed; so much the more will his right to the property in his works be assured; so much the more will all shackles be removed from the free transfer of property.

In England this tendency to emancipate real property from the feudal system was early developed. But the political freedom enjoyed by the English people has rendered them satisfied with a very slow progress of legal reform.

After the Norman conquest, the highest estate which a subject could enjoy in lands was an estate to him and his heirs. This could not be alienated without the consent of the presumptive heir, nor without the consent of the lord from whom the land was held in chief. No estate, greater than for a term of years, could be disposed by testament, except in Kent and some other places which retained the Saxon custom. One reason is given for this: that to effect an alienation of land, a livery of seisin was necessary; that is, a symbolical delivery of possession, either on or in view of the land, by the person who had the actual seisin. This, in the nature of things, could not be effected after the death of the testator. But it is plain that originally the fiefs were at pleasure, then for life. And the feudal tenant had no property in the feud, either inheritable or devisable.

The statute "Quia Emptores," 18 Edw. I., A. D. 1295, allowed all freemen to sell their lands. The enacting part of it is remarkable for its brevity: "Our Lord the King, in his parliament of Westminster, after Easter, the 18th of his reign, that is, to wit, in the Quinzime of St. John the Baptist, at the instance of the great men of the realm, granted, provided, and ordained, that from henceforth it shall be lawful to every freeman to sell at his own pleasure his lands and tenements, or part of them, so that the feoffee shall hold the same lands or tenements of the chief lord of the same fee, by such services and customs as his feoffor held before."

Thus the feudal tenants obtained the right of selling the increased

value of their lands, the purchasers paying to the chief lord the same rent and services which the vendors had paid.

Later, the devise of lands by will was authorized by the legislature. Devises were first accomplished through means of the equitable estates recognized by the Court of Chancery. These devises were encouraged by the Ecclesiastical Chancellors who presided in that court in ancient times; they studied the civil law and despised the contracted principles of the feudal system. Accordingly, when the devisee of the use could compel its execution in Chancery, uses were frequently devised. These uses were changed into legal estates by 27 Hen. VIII, c. 10. However, the statute of wills, 32 Hen. VIII, c. 1, A. D. 1540, empowered all persons seized in fee simple, by will or testament in writing, to devise to any other person, except bodies corporate, two thirds of their land held in chivalry, and the whole of their lands held in socage. The statute 12 Car. I, 1662, changed all the feudal tenures into socage. So the right of devising lands held in fee-simple became complete; and thus the ultimate property originally, and still by fiction of law vested in the Crown, became for all practical purposes vested in the tenant in fee-simple.

Notwithstanding the strictness of the feudal rule that no person could have more than an estate in land, and that consequently it was impossible by labour to create an absolute interest in the land, many attempts were made by the judges to relax this principle. But the maxim, barbarous alike in its latinity and meaning, "quicquid plantatur solo, solo cedit," has been implanted too deeply in the foundations of our law of real property to be repealed by anything short of legislative enactment.

In the *East India Company v. Vincent* * Lord Hardwicke said— "There are several instances where a man has suffered another to go on with building upon his ground, and not set up a right title till afterwards, when he was all the time consensant of his right, and the person building had no notice of the other's right; in which case the court would oblige the owner of the ground to permit the person building to enjoy it quietly and without disturbance." In *Dormer v. Fortescue* †, there is a dictum of Lord Hardwicke which appears to say, that if the owner resort to Chancery for the recovery of the mesne profits, the bona fide possessor would be entitled to deduct the amount of his expenses for lasting and valuable improvements from the amount to be paid by way of damages for the rent and profits. So in *Stiles v. Couper*, the land had been leased for sixty-one years on a building lease by Sir John Cowper. The tenant had laid out £3000 in building, and paid the reserved rent up to 1729, when Sir John Cowper died. On his death, the defendant, who was his eldest son, became entitled as first remainder-man. From the year 1729 to 1735, the defendant thought proper to receive the rent from Mr. Stiles, and during that time the tenant, at his own ex-

* 2 Atk. 83.

† 3 Atk. 134.

pense, built new offices. The defendant then brought an ejectment, and recovered at law, for want of the usual covenants in building leases. Lord Hardwicke said—"When the remainder-man lies by, and suffers the lessee or assignee to rebuild, and does not by his answer deny that he had notice of it, all these circumstances together will bind him from controverting the lease afterwards." A new lease was decreed to be executed with proper covenants, and the plaintiff to hold the premises for the remainder of the term. Here the Lord Chancellor grounded the equity upon the landlord's tacitly permitting the tenant to rebuild. Now, this equitable doctrine would not be stretched too far, if it were held that a landlord, permitting a tenant to build, were bound to give him compensation for such improvements, or else to permit him to sell them at the expiration of the term. In *Shannon v. Bradstreet* * Lord Redesdale held, that when the remainder-man lay by, and suffered the tenant to lay out money without giving him notice of his intention to impeach his title, it was ground of relief against him. And in *The King v. The Inhabitants of Butterton* †, Lawrence J. said: "I remember a case some years ago, in which Lord Mansfield would not suffer a man to recover, even in ejectment, where he had stood by and seen the defendant build on his land." And there are many other cases relating to the implied assent which a person gives by standing by and seeing acts done by his tenants and the like without objection ‡. Still these cases apply only to an occupant with notice improving the land with knowledge of the owner, or else to a tenant holding by lease. And they have been decided on the principle of "qui tacet consentire videtur." Even in equity, no tenant from year to year is entitled to be recompensed for his expenditure, although with the knowledge of the landlord, unless he can clearly show that it was with reference to some agreement. Then, of course, "modus et conventio vincunt legem." In *Dann v. Spinner* § Lord Eldon says, "I fully subscribe to the doctrine of the cases that have been cited, that this court will not permit a man knowingly, though but passively, to encourage another to lay out money under an erroneous opinion of title; and the circumstance of looking on, is in many cases as strong as using terms of encouragement; a lessor knowing and permitting these acts, which the lessee would not have done, and the other must conceive he would not have done, but upon an expectation that the lessor would not throw an objection in the way of his enjoyment. Still it must be put upon the party to prove by strong and cogent evidence, leaving no reasonable doubt, that he acted upon that sort of encouragement."||

* 1 Sch. & Lef 73.

† 6 Term Rep. 554.

‡ 2 Hanning v. Ferris, Gilb. Eq. 85; Attorney-General v. Bahol College, 9 Mod. 11; Kenny v. Brown, 3 Ridg. 518.

§ 7 Ves 235.

|| The foregoing cases were collected by me for an article on Tenant Right, in 12 Law Review, p. 363. They are quoted by Messrs. Ferguson and Vance.

These are the principal cases in the courts of justice in England and Ireland, referring to our subject. The abstract right of the tenant to the property in his improvements is not recognised. Nor is there any case decided in England, Ireland, or the United States grounded upon common law principles, and declaring that the occupant of land was, without any special contract, entitled to payment for his improvements as against the true owner, when the latter was not guilty of fraud in concealing his title.

Landed improvements may be either in the nature of fixtures, personal chattels attached to the freehold; or they may be such as are incident to cultivation, manurage, drainage, fencing, clearance of rocks and wood, and others of the like nature. In reference to fixtures, there has been a constant tendency in the development of the laws of England to mitigate the severity of the feudal rule. In many cases the judges have so far modified the feudal principle, that the property in improvements effected by him is vested in the tenant having the terminable interest, and not in the tenant in fee-simple.

Fixtures or things of an accessory character annexed to houses or lands originally all became the property of the landlord on the determination of the tenancy. And still, the general rule of law is, that wherever a tenant has affixed anything to the demised premises during his term, he cannot sever it without the consent of his landlord. The tenant, by annexing it to the freehold, is considered to abandon all future right to it, so that it would be waste in him to remove it afterwards. But several exceptions to this rule are now admitted upon grounds of public policy.

The fixtures which a tenant erects upon the demised premises, for the purposes of trade and manufacture, are now exempted from the feudal rule. But it will be shown that they are not so completely exempted, as to vest the entire property in the tenant according to true principles. The first case which in terms recognizes the right of a tenant to remove fixtures, is in the Year Book, 20 Hen. VII., p. 13. The question was, whether a furnace attached to the freehold with mortar, should go to the executor or to the heir? And there it is said, "If a lessee for years, set up such a furnace for his advantage, or a dyer make his vats and vessels to occupy his occupation during the term, he may remove them."

Mr. Ferard,* on examination of the early authorities, considers it by no means clear, that an exception of any sort in favor of tenants was admitted in very early times. He considers, also, that when the exception was introduced, it was extended as fully to other fixtures as to those which related immediately to trade.

But the privilege of a tenant to remove fixtures set up by him in relation to his trade, is absolutely recognized by Lord Chief Justice Holt, in *Poole's case*.† And this decision is now a leading authority. There a soap-boiler, an under-tenant, for the convenience of his trade had put up certain vats, coppers, &c., all which things

* Amcs and Ferard on Fixtures, 2nd edit. p. 27.

† 1 Salk., 368.

had been taken under an execution against him, on which account the first lessee brought an action against the sheriff for the damage occasioned to the house, and which he was liable to make good. Lord Chief Justice Holt, held, that during the term, the soap-boiler might well remove the vats he set up in relation to trade; and he said, moreover, that he might do it by the common law, and not by virtue of any special custom in favor of trade and to encourage industry.

In *Lawton v. Lawton*,* where the question was, whether a steam engine set up for a colliery, by a tenant for life, should at his death go to his executors as part of the personal estate, or go to the remainder-man. Lord Hardwicke says, "to be sure in the old cases they go a great way upon the annexation to the freehold, and so long ago as Henry the Seventh's time, the courts of law construed even a copper and furnaces to be part of the freehold. Since that time the general ground the courts have gone upon, of relaxing this strict construction of law, is, that it is for the benefit of the public to encourage tenants for life, to do which is advantageous to the estate during their term."

In *Penton v. Robart*,† Lord Kenyon says, "the old cases upon this subject leant to consider as realty whatever are annexed to the freehold by the occupier; but in modern times, the leaning has always been the other way, in favor of the tenant, in support of the interests of trade, which is become the pillar of the state"

In *Dean v. Allaley*,‡ Lord Kenyon said, "if a tenant will build upon premises demised to him a substantial addition to the house, or add to its magnificence, he must lose his additions at the expiration of his term for the benefit of his landlord; but the law will make the most favourable construction for the tenant, where he has made necessary and useful erections for the benefit of his trade or manufacture, and which enable him to carry it on with more advantage. It has been so held in the case of cyder nulls, and in other cases; and I shall not narrow the law, but hold erections of this sort, made for the benefit of trade, or constructed as the present, to be removable at the end of the term."

The right of the tenant to remove trade fixtures is therefore established at common law. Lord Ellenborough said, in *Elwes v. Mawe*,§ "that this exception is founded on the principle, that trade is a matter of a personal nature; whence it followed that an article which is used as an accessory to trade ought itself to be deemed personalty, and not a part of the freehold." It is true that trade in a technical phrase does not savour of the realty. But the public benefit may be regarded as the principle reason for this exception. Enlightened judges have relaxed the strictness of the common law, "that the commercial interests of the country might be advanced by the encouragement given to tenants, to employ their capital in making improvements for carrying on trade, with the certainty of

* 3 Atk., 13.

† 2 East., 90.

‡ 3 Esp., 11.

§ 3 East., 38.

having the benefit of their expenditure secured to them at the expiration of their term.”*

However, the leading case of *Elwes v. Mawer*† expressly decides, that the tenant who erects agricultural fixtures has no absolute property whatsoever in them, and that he is not entitled to remove them, as in the case of fixtures for the purposes of trade. In this case the tenant had occupied a farm under a twenty-one years lease from the plaintiff. About fifteen years before the expiration of the lease, he had erected at his own expense a beast house, a carpenters’ shop, a fuel house, a cart house, a pump house, and fold yard. Previous to the expiration of the lease, the defendant pulled down the materials, dug up the foundation and removed the materials, leaving the premises in the same situation as when he entered upon them; and his lessor now brought an action of waste against him for so doing. The question for the court was, whether he had a right to take away those buildings, and it was decided that he had no such right. The facts which led to the action do not appear in the report of the case. It may be supposed that the tenant built either on a promise, or with the expectation that his lease would be renewed; and on his landlord refusing to do so, destroyed the buildings.

The decision in *Elwes v. Mawer*,† or rather the state of the law expressed by it, has prevented many millions from being expended on the land. Yet there are precisely the same reasons for extending to buildings erected for agricultural purposes, the same privileges which trade fixtures possess. The trade cases have been decided on grounds of public policy, since tenants ought to be enabled to make useful additions to their premises, and avail themselves of modern improvements in the arts and manufactures. Certainly, agriculture is now as much a manufacture as many other branches of industry, the fixtures necessary for which are now legally held to be the property of the tenant. In the present days of Free Trade, the farmer of these islands must use the most improved machines and scientific processes in order to compete with the foreigner. But boilers and machines will not be erected when they become the property of the landlord, by being attached to the freehold.‡

Lord Ellenborough, in his judgment, observes, “that no adjudged case has gone the length of establishing, that building subservient to purposes of agriculture, as distinguished from those of trade, have been removable by the tenant who built them during his term.” And on this ground it was decided, following the technical feudal rule, in the absence of authority to the contrary. But this decision is open to many objections, even on legal grounds. The privilege as to trade fixtures, is not confined to trade within the meaning of the Bankrupt Acts.

* Amos and Ferard on Fixtures, 2nd edit., p. 32.

† 3 East., 38.

‡ See also 9 Geo. IV., c. 56, s. 24 (Irish).

But the making of charcoal, the making of cheese on a farm, or the preparing of grain for a market by means of a thrashing machine, may be considered as much a species of trade as the making of cyder, the working of a coal mine, or the manufacture of salt from springs on the demised premises. Yet these latter occupations are held by the law of England to entitle a tenant to remove trade fixtures.* There is obviously no rule in natural law for the distinction. So gardeners and nurserymen are entitled to sell and remove trees, shrubs, and the other produce of the ground planted by them with an express view to sell, and this on the ground of carrying on a species of trade.† But it has been held, that a tenant not being a gardener, is not at liberty to take away a bordering or edging of box planted by himself, or even flowers.‡

Under the English law, the tenant is entitled to take away certain things affixed to the premises, for the purposes of ornament and furniture. Two principles appear to have concurred in effecting this exception to the general rule. The personal nature of the property, was perhaps the original reason why it was not held to be attached to the realty. For the utensils and machines described in the cases, are for the most part perfect chattels in themselves. But the inconvenience to tenants in the enjoyment of their estates, if every slight attachment to the freehold were to change the property in furniture and vest it in the landlord, undoubtedly was considered.

Now, it is plain, that all these points in the law of fixtures are the proper subject of legislative enactment. The judges should not be left to spell out exceptions to the feudal rule on grounds of public policy.

The question of Tenant Right in England has not assumed great importance, in consequence of the landlord generally making the permanent improvements on the farm. However, in some districts the custom of tenant-right has arisen. It is thus stated by Mr. Wingrove Cooke, in his Treatise on Agricultural Tenancies.§ Ordinarily the period over which the current operations and expenses are held to run is limited to the last year of the tenancy, but in some instances it extends to the unexhausted operations of the whole current course of husbandry. Recently, in Lincolnshire and some parts adjacent, it has grown to be applied to all unexhausted tenants' improvements. Sometimes, as in the weald of Kent, Surrey, and Sussex, the whole growth of underwood is the property of the outgoing tenant, but to be left on a valuation ||

Such then are the rules of the English law, and such the exceptions grafted upon it by enlightened judges, and by the customs

* Coal mine, 2 Wils. 169; 7 East., 447, cyder mill; 1 T. R., 38; salt mills, ex parte Atkinson; 1 Mont. D. & D., 300.

† 2 East., 91; 7 Taunton, 191.

‡ *Empson v. Soden*, 4 B. & Ad. 665.

§ A Treatise on the Law and Practice of Agricultural Tenancies, with forms and precedents by G. Wingrove Cooke, Esq., Barrister. London, Stevens and Norton, 1850.

|| *Ib.*, p. 220, et seq.

which naturally arise I shall now consider the rule of the Civil Law upon the question of tenants' improvements.

III. The Roman law, with respect to political institutions and public liberty, is very inferior to the common law of England; but in all that regards contracts and property, it is one of the greatest monuments of human wisdom. To use the words of Chancellor Kent,*—it was created and matured on the banks of the Tiber by the successive wisdom of Roman magistrates, statesmen, and sages; and after governing the greatest people in the world for thirteen or fourteen centuries, and undergoing extraordinary vicissitudes on fall of the Western Empire, it was revived, admired, and studied in Western Europe, on account of the variety and excellence of its principles. It is now taught and obeyed, except in the instances where the feudal law has overcome it, in France, Germany, Holland, and Scotland; in the islands of the Indian Ocean, on the banks of the Mississippi and St. Lawrence. So true it is, in the words of D'Aguesseau, "the grand destinies of Rome are not yet fulfilled, she reigns through the world by her reason, after having ceased to reign by her authority."

With respect to the use that may be made of the civil law, in considering principles to be decided in our courts of justice, the judgment of Chief Justice Tindal, in *Acton v. Burnell*† may be quoted: "the Roman law furnishes no rule binding in itself upon the subjects of these realms; but in deciding a case upon a principle, where no direct authority can be cited from our books, it affords no small evidence of the soundness of the conclusion at which we have arrived, if it proves to be supported by that law, the fruit of the researches of the most learned men, the collective wisdom of ages, and the groundwork of the municipal law of most of the countries of Europe."

Now, throughout the entire civil law, labour bestowed on the property of another, with the consent of the other expressed or implied, confers the property on the labourer. And as a consequence, the cultivator not being the owner, was entitled on eviction to be reimbursed the entire value of the improvements effected by him. At first the case did not arise, of free tenant cultivators requiring to be reimbursed the value of their improvements. In early times from the prevalence of slavery there were no free tenant cultivators. Nor do the words "landlord" and "tenant," as now understood, occur in the Greek language or in classical Latinity. Proprietors at first, in every country, cultivate their lands by slaves; and rent makes its appearance in Europe progressively with the abolition of slavery.

The question as to the property in improvements made by one person on the lands of another, first arose in the case of an occupant of land without title cultivating it, and the owner afterwards evicting him. In this case the rule of the civil law was, that before assum-

* Kent's Commentaries, Lecture XXIII.

† 12 M. & W., 324.

ing possession of the land the owner was bound to reimburse the occupant the value of his beneficial improvements. A *bonae fidei* possessor was entitled to be reimbursed by way of indemnity, for the expenses of improvements so far as they augmented the property in value; and the rule was founded upon the equitable principles, “*nemo debet locupletari alienâ facturâ:—jure naturæ æquum est neminem cum alterius detrimento et injuriâ fieri locupletariem.*”^{*} These rules have been translated into the common law maxim, “*nemo debet locupletari ex alterius incommodo.*”[†] The Roman law, also, in direct opposition to feudalism, allowed the occupant to withdraw from the land the materials by which it was improved.

Later, this principle was introduced into the contract of letting and hiring. And whatever species of property a man lets to be used by another, whether houses and lands, moveable chattels, or labour, the same principles ought to be applied. So, in the civil law, the contract of letting and hiring—*locatio et conductio*—included all these sorts of engagements. Now, under the civil law, the lessor—*dominus*—was bound to deliver the property to the lessee—*conductor*, *colonus*—in a condition to serve the use for which it was hired; and to keep it in this condition, making the necessary repairs which the tenant was not bound to make, either by his lease or by the custom of the place.[‡] These principles do not merely apply to leases as understood by the law of England, but to any contracts by which lands are let.[§] Now, it appears to have been the custom for the owner to furnish to the tenant materials for manuring the ground, and gathering in the fruits, such as barns, tubs, and presses for making wine || “*Illud nobis videndum est, si quis fundum locaverit, quæ soleat, instrumenti nomine, conductori præstare; quæque si non præstet, ex locato tenetur.*”^{¶¶}

If the farmer made any repairs, or had been at other necessary charges which he was not bound to by his lease, nor by the custom of the place, the proprietor was obliged to reimburse him what he had laid out, or to discount it on the rent.^{**} “*In conducto fundo, si conductor suâ operâ aliquid necessario vel utiliter auxerit, vel ædicaverit, vel instituerit, cum id non convenisset; ad recipienda ea quæ impendit ex conducto cum domino fundi experiri potest.*”^{††} So, if a farmer made improvements which he was not bound to make, as if he planted a vineyard, or an orchard, or made other improvements of this kind which increased the revenue of the farm, he was entitled under the civil law to recover the expense he had been at on this account.^{‡‡} “*Colonus, cum lege locationis non esset comprehensum, ut vineas poneret, nihilominus in fundum vineas instituit, et propter earum fructum denis amplius aureis annuis ager locari cœperat. Quæsitum est, si dominus istum colonum fundi ejectum,*

^{*} Digest, 50, 17, 206.

[†] Jenkins' Centenary, 4.

[‡] Domat's Civil Law, book i., title 4, sec. 3, 1. (Dr. Strahan's Translation, London, 1737, fol. vol. 1., p. 96.)

[§] Domat, vol. 1., p. 98.

|| Domat, vol. i., p. 101.

¶¶ *Ib.*, l. 19, s. 2, f. f. loc.

^{**} *Ib.*, vol. 1., p. 102.

†† *Ib.*, b. 55, s. 1, f. f. loc.

‡‡ *Ib.*, vol. 1., p. 102.

pensionum debitarum nomine, conveniat, an sumptus utiliter factos in vineis instituendis reputare possit, opposita doli mali exceptione? Respondit, vel expensus consecuturum, vel nihil amplius præstaturum.”

This reimbursement was made on the following principles, as laid down by Domat in estimating the charges laid out by the purchaser of an estate on improvements. As if he made a plantation on it; the charges laid out were balanced against the fruits arising from the improvements; so that if the fruits reaped from the improvements acquitted the principal sum with interest of the moneys laid out on them, there would be no reimbursement due. However if the fruits came short of the charges laid out on the improvements, the tenant was entitled to recover the remainder of the money he had laid out, both principal and interest. But if the fruits which the tenant reaped from the improvements exceeded the charges he had been at, he was entitled to the advantage of them.*

In considering the system of real property under the Roman law, it would be improper to omit the *jus emphyteusis*, as the principle upon which this contract was founded, is directly applicable to the case of land reclaimed by the tenants' industry. Emphyteutical leases were either in perpetuity or for a very long term of years. Since the owners of barren lands could not easily find tenants for them, a method was invented to give in perpetuity such kind of lands, on condition that the grantee should cultivate, plant, or otherwise improve them. Hence the derivation of the word *emphyteusis*, from *ἐν, φυτεύω*. It is under contracts of this classification that lands ought to be reclaimed; though now, if, from circumstances, a number of persons be located in a waste district, they cultivate it, and the ultimate owner principally reaps the benefit of their toil.

The law of Scotland has generally adopted the rules of the civil law in reference to tenants' improvements.†

In the United States of America questions of this nature have arisen between the squatters who have settled on the lands without title, and who cleared and cultivated them, and the proprietors who purchased the land from the government. The labour of these squatters, or others similarly circumstanced, has been allowed to create an interest in land, called betterment; and this has been the subject of several legislative enactments and judicial decisions. In the Massachusetts Revised Statutes, 1835, it is provided that in the writ of entry upon disseisin for the recovery of any estate of freehold, that the tenant shall be entitled in case of judgment against him, to compensation for the value of buildings and improvements made by him, or those under whom he claims, had been in possession for six years before suit brought, or for a less time, provided

* Domat's Civil Law, book i., title 2, sec. 10, art. 17, referred to by book i., title 4, sec. 6, art. 5, vol. i. p. p. 77 and 102.

† Bell on Leases, 321, Lyons' Landlord and Tenant, 64-69. Erskine's Institutes
This statement is taken from Ferguson and Vance, p. 361.

he held them under a title which he had reason to believe good. The amount is to be assessed by the jury on suggestion on record of the claim. The amount allowed may be set off against the rent and profits. The demandant may also require to have the value of the land, without the improvements, ascertained; he may relinquish the land on being paid the price; and which the tenant must pay, or lose the value of the improvements. Similar statutes have been passed in Maine, New Hampshire, Vermont, Virginia, Alabama, Ohio, and Illinois. If it is true, that some of these statutes have been declared by the Supreme Court of the United States to be unconstitutional, and the law is consequently in an unsettled state. The Americans, from their great abundance of fertile unoccupied land, can afford to let it remain so.

Though there has been no decision to the effect that the occupant was entitled to the absolute payment, by the owner, of the value of the improvements, still it has been decided in the United States that these considerations have afforded just ground for mitigation of damages in an action for the mesne profits; and the value of the permanent improvements made in good faith upon the land, has been allowed to the extent of the rents and profits claimed by the plaintiff.*

So, in the United States, the rule of law as laid down by Lord Ellenborough in *Elwes v. Mawe*† does not exclusively prevail. And fixtures for agricultural purposes have received the same protection in favour of the tenant, as those fixtures made for the purposes of trade, manufacture, and domestic convenience. In *Whiting v. Burton*‡ the agricultural tenant received a liberal application of the exception in favour of the removal of fixtures. He was allowed to remove from the freehold all such improvements as were made by him, the removal of which would not injure the premises, or put them in a worse plight than they were in when he took possession.

IV. Now, all the reasoning upon which the Civil Law gave the value of improvements to the occupant in certain cases, or to the farmer in others,—all the reasoning which has guided the enactment of the betterment statutes in the United States,—all the reasoning upon which the greatest judges in law and equity have relaxed the rigour of the feudal rule—*quicquid plantatur solo, solo cedit*—applies a fortiori at the present day to the case of tenants making improvements on the soil. It might have been said under the civil law, that the owner should not be compelled to reimburse the occupant for the value of improvements made without his knowledge, and when the occupant originally may have committed a tort in entering on the land at all; it might have been said in the United States, why legalise the claims of these lawless squatters? In England the feudal rule was precise. Yet in all these cases the greatest jurists, whether as legislators or judges, have decided that labour gave the right to the property

* *Hylton v. Brown*, C. C., April, 1808, Wharton's Dig. Title Ejectment; *Jackson v. Loomis*, 4 Cowan's Rep. 168; *Dowd v. Fawcett*, 4 Dev. N. C. Rep. 95, per Ruffin, C. J.

† 3 East. 38.

‡ 4 Pick. Rep. 310.

created by it. The tenant may well be presumed in law to make no improvements without his landlord's knowledge. And if the landlord consent to the tenant's investment of his capital and labour he has no natural right to confiscate it. Rent is the price or hire paid to the owner for the use of the land. If the land rise in value from other causes than the expenditure of the tenant's labour and capital, the landlord has the sole natural right to such increased value. But if the land be improved by the tenant, on every principle which has led to the institution of property, and upon which property is based, the improvement ought to be the property of the tenant. The owner's present right in this country is derived from the feudal law, which belonged to a past age, and was instituted for the purpose of maintaining what has long since ceased to exist, an hereditary military aristocracy.

The tenant, therefore, having a natural right to the property, it is a proper subject for legislation, and should not be left binding on conscience only, inasmuch as all questions of property are capable of being decided by the government, and damages can always be adjudged for any violation of a right to property.

By what legislative means then must the tribunals of the country enforce the natural right of the tenant to the property in his improvements? The first step required, is a short declaratory act of the legislature vesting in the tenant the property in the improvements effected by him. This property, under whatever name it might be denominated, whether betterment, as in America, or tenant-right, as in England and Ireland, should, of course, be left to the operation of the ordinary laws and ordinary tribunals of the country. Perhaps it would be advisable to declare it personal property, to be divided, in case of intestacy, according to the Statute of Distributions.

This property so recognised must be considered under two phases. The tenant may either remain in possession of the land,—or may leave it voluntarily or involuntarily. Where the tenant remains in possession, it is not in all cases sufficient that he possess the property in the improvements. The mere recognition of the property of the tenant in his improvements would not be sufficient in the case of long leases, where the value of the land happened to diminish, and the old rent was retained.

The much vexed question of abatement was thus settled by the Civil Law. And it is very important in the present state of Ireland to consider it. The continued failure of the potato crop combined with the opening of the ports to foreign corn, has materially diminished the present value of land. Consequently, in the North of Ireland the value of the tenant-right interest has been greatly lessened, whilst the rent has not been proportionably abated.

Now, the rules of the Civil Law on the question of abatement are thus stated by Domat:—"The covenant which obliged the farmer to pay his rent, did not extend to that which happened by the hand of man, such as an open force, a war, a fire, and other accidents of

the like kind, which no man could foresee. However, the covenant extended to whatever fell out naturally through the injury of the weather, and which it was reasonable to expect, such as a frost, an inundation, and other cases of the like nature.* The words "reasonable to expect," are important, as they confine the rule to the ordinary incidents of the weather.

He who held a farm on condition to give to the proprietor a certain portion of the fruits, and to keep the remainder for himself, for his manuring and sowing the ground, could claim nothing from the proprietor either for the tillage or the seed, whatever loss may happen by an accident, even although he should have no crop at all. For their lease made between them a kind of partnership, in which the proprietor gives the land, and the farmer or tenant the seed and the tillage, each of them hazarding the portion of the fruits which this partnership entitled them to.†

Such was the rule under the metayer system, to which our system of conacre is something similar. But the rule of the Civil Law was the reverse, where the farmer paid a fixed money rent. If a farmer, who had a lease only for one year, and was obliged to pay his rent in money, reaped nothing because of some accident, such as a frost, a storm of hail, an inundation, and other causes of the like nature; or even because of some act of man; as if, in time of war, their whole crop was destroyed or taken away by force, he was discharged from paying his rent, or was entitled to receive it if he had already paid it.‡ "Si labes jacta sit, omnemque fructum tulerit, damnum coloni non esse; ne supra damnum seminis amissi, mercedes agrum præstare cogatur"§ For, as Domat says, "It was but reasonable that in the case of a lease, where the lessor secures to himself a rent, the lessee should be secure of enjoying something; and besides the lease was of the fruits which the farmer should reap, and which it was pre-supposed that he would reap."

The farmer, of course, had no right to an abatement of his rent for inconsiderable losses. But if the damage which happened to a lessee for a year [tenant from year to year] proved to be considerable, although the loss were not of all the fruits of the farm, yet the farmer was entitled to an abatement of some part of his rent, such as the judge in his prudence should think fit to decree || And so in the Digest: "Omnem vim cui resisti non potest, dominum colono præstare debere"¶

And again, if the lease were for two or more years, there happened in some of them, accidents which occasioned losses, whether of the whole fruits, or a great part of them; and that these losses were not compensated by the profits of other years, the farmer might demand an abatement of his rent according as the quality of the loss, and the other circumstances might render his demand just.**

* I Domat, 98.

† Domat's Civil Law, Book 1, tit. 4, s. 5. 3, vol. 1, p. 100.

‡ Ib. sec. x, v. 4.

§ l. 15, s. 2, f.f. loc

|| I Domat, 100.

¶ l. 15, s. 2, f.f. loc.

** Ib. vol. 1, p. 100.

Such were the equitable rules of the Civil Law on this subject, based upon the first principles of natural justice. And if the tenant farmers, holding by leases in the United Kingdom, who have suffered by the great failure of the potato, were living under the Civil Law, they would be entitled to demand an abatement of their rent, and enforce that demand in a court of justice. This principle of course applies only to the years of failure, and has no reference to future contracts, or future tenancies.

We have next to consider the case of the tenant, whether voluntarily or involuntarily leaving the land.

Where two persons possess the property in one thing, the concurrence of both is necessary to its use. Now, in case of the tenant being desirous to leave the farm, the landlord has always the power to prevent him from selling his improvements, by refusing his consent to the purchaser's entry. This case requires consideration. The whole result of modern legislation is to leave the owner as far as possible the absolute disposal of his own property. And I do not think that it would be beneficial to society, that the landlord should not be left the absolute control as to whatever contract of tenancy he might choose to make. How, then, is the tenant to be reimbursed the value of his improvements, if his landlord virtually refuse his consent to their sale? It has been proposed by some that the tenant should have a right of action against the landlord for the value of the improvement. But it is plain that exchanges should be free. The landlord should not be compelled to purchase. The only remedy for this case, which I can at present advise, is the application of the doctrine of lien.

In the law of England, a lien is a right to retain property until a debt due to the person retaining has been satisfied*. A lien is not, in strictness, either a *jus in re* or a *jus ad rem*; but it is simply a right to possess and retain property, until some charge attaching to it is paid or discharged †. The principle of natural law, that whosoever has increased the value of property by the direction or with the consent of the ultimate owner, has a lien on the property until he has been fully reimbursed for his services, is already recognised in favour of artisans and others who have bestowed labour upon the property in its repair, improvement, or preservation. And it may be stated as law, that where an individual has so bestowed labour and skill in the improvement of any species of property, except what is known to our law as real property, he has a lien on it for his charge. Thus a miller and a shipwright have each a lien. ‡ Even a trainer has a lien for the expense of keeping and training a race-horse, for he has by his instruction wrought an essential improvement in the animal's character and capabilities. § There are many other cases distinct from the principle of improvement by labour, in which lien is recognised by our courts of law and equity.

* 2 East. 233.

† Story, Eq. Jur. s. 506.

‡ *Ex parte Ockenden*, 1 Atk 235; *Franklin v Hosier*, 4 B. and A. 341.

§ *Bevan v. Waters, M. and M.*, 236.

Thus, upon grounds of public policy, the rescuer of goods from the perils of the sea has, at common law, a lien for salvage. And it also, in numerous instances, exists by the usages of trade recognised and upheld. I shall now consider what are the reasons to exclude real property and its improvements from the principle of natural law, recognised in the case of personal [moveable] property.

In procedure, the right of lien and set off are analogous so far, that the effect of each is to prevent circuity of action. Lord Mansfield says in *Green v. Farmer* :* “Natural equity says that cross demands shall compensate each other by deducting the less sum from the greater, and that the difference is the only sum that can be justly due.” The principle is obviously correct, that where two parties are mutually indebted, the balance only shall be paid; and that one of the parties shall not be compellable first to pay the debt which he has incurred, and then left to sue for that to which he is entitled. This principle was long ago recognised by the Romans in the doctrine of the civil law, termed *compensatio*. By the common law of England the equitable principle of set off was not recognised. And to remedy the inconvenience resulting from the circuitous mode of procedure, various legislative enactments have been passed from the 4 and 5 Anne, c. 17, to the 6 Geo. 4, c. 16. This series was only applicable to mutual credits in cases of bankruptcy; but the 8 Geo. 2, c. 24, enables defendants, in all cases, to set off debts due to themselves, against those for which they were sued. The courts soon extended the statutable doctrine of set off to the cases of lien: and by a liberal construction of the meaning of mutual credit, effected substantial relief in favour of creditors holding the goods of bankrupts. Lord Hardwicke says, in *ex parte Deeze*, † “It would have been indeed a hardship to have said that mutual credit should be confined to pecuniary demands, and that if a man had goods in his hands belonging to a debtor of his, which could not be got from him without an action at law, or a bill in equity, that it should not be considered as mutual credit.” And in all possible cases the courts extended their protection in behalf of creditors holding the goods of their debtors. “Convenience of commerce and natural justice,” says Lord Mansfield, in *Green v. Farmer*, † “are on the side of liens.” It appears to me that the property in his improvements being acknowledged to be rightfully vested in the tenant, the most simple method to insure him its enjoyment, in case of disputes, is to give him a lien on the improved property.

I would, therefore, propose that the doctrine of lien ought to be extended to the case of a tenant improving his land; and that he ought to be permitted to retain the land so improved, until he be either reimbursed in money, or by perception of the profits of the land.

A lien, as distinguished from a pledge, can generally be retained only as a security for the debt due, and, with a very few exceptions, cannot be sold or parted with without a waiver of the right already

* 6 Burr 220.

† 1 Atk. 228.

‡ 4 Burr 220.

possessed. It is necessary to allude to this principle in reference to the present question. The tenant may be anxious to remove, and employ his labour and capital elsewhere. I do not see any valid objection to his being permitted to sell or deal with it like any other species of property. I do not at present enter into all the details of legislation on the subject, but hope to do so in a subsequent paper.

V. The feudal laws were well adapted to maintain a territorial military aristocracy. They were natural and inevitable in the progress to civilized life. At the beginning of the feudal times, all Europe was in a state of warfare. Nation contended with nation, tribe with tribe; the barons rebelled against their sovereigns and made war with one another. The right of private war was, of the privileges of feudalism, the most difficult to abolish, and those who contended for it to the last, have been regarded as heroes,—witness Goetz von Berlichingen. So hard a task is it to prevent barbarians from plunder and massacre. So hard a task is it to instil into their minds, that all men have positive natural rights to life, liberty, and property. In those disastrous times the great majority of the population were slaves, from whom there was continual apprehension of revolt. It was therefore necessary to keep on foot a military force equipped in the best manner, and ready on a moment's notice to take the field. The idea of a standing army, raised principally from the lower classes of society, and supported out of the public general taxation, was almost unknown. The difficulty of collecting a large revenue by taxation, prevented it from being accomplished. The only means remained to allot the land under military tenures. The system of holding land by military services to this day prevails amongst the nations of the East Indies, the Cossacks of Russia, the Tartar tribes subject to China, and amongst all nations arrived at a similar stage of civilization.

Under the feudal system, the distribution and tenure of property were required which should always supply the feudal nobility with arms. Hence arose primogeniture, which kept property in large masses, sufficient to maintain bodies of equipped retainers under individual feudal chieftains. No absolute property in land could have been permitted, because then the land would have been possessed, discharged of the feudal burdens. No property in land could have been permitted to be created by labour; because no right was recognised in the enslaved cultivators to hold land, except at the will of the governing classes. These institutions were natural in the progress of society from slavery to freedom; they were there most beneficial; they perpetuated the feudal chivalry, the feudal liberty, which are amongst the most prominent features of modern European civilization.

The feudal system is now obsolete, except in its injurious results in preventing the free transfer and cultivation of land. In its most prominent features it has been eliminated from civilization by the good sense of mankind; but its influence remains in preventing labour from being expended on the earth, by the confiscation of its

fruits; in preventing the labourer from rising in the social scale, by keeping the land bound in large portions, and rendering its sale in small farms almost impossible. Homage and fealty to a feudal suzerain are abolished. Rent is no longer service to a lord, but it is the hire paid to an owner for permission to use the land. The taxation of the country is no longer paid in rent-service to the crown. The institution of standing armies, a result of the division of labour natural in the progress of society, has abolished the necessity for the system of military tenures,—and, as a consequence, the necessity for the rule of law which vests in the ultimate owner the sole absolute property in the land, with all expended upon it. It may be safely laid down, that all the remains of the feudal system in the law of landlord and tenant, by which contracts in respect of land are distinguished in their incidents from mercantile contracts,—all the extraordinary privileges of landlords are injurious to society at large.

During the process of civilization, different classes are successively emancipated, and legal protection is given to the fruits of their industry. In the Oriental nations castes are originally established in the strictest manner; from which it was impossible for those in the lowest ranks to free themselves. It was useless for those in the lowest caste to labour, except for the mere purpose of subsistence, since the fruits of their labour were not secured to them. They consequently did not labour. Fortunately for Europe, only one caste was retained by the Grecian civilization,—the great caste of slavery. The early Greek philosophers, and especially Plato, advocated the system of castes; because, although perceiving that the division of labour was necessary to the progress of society, they did not also perceive that the division of labour arose naturally and inevitably, and that there was no necessity for legislative enactment to secure it. But the Hellenic energy burst through the shackles which philosophy thus endeavoured to cast around individual freedom.

Originally, we find the cultivators all slaves. And, consequently, throughout Europe, until the Christian religion abolished slavery, the masses of the population were steeped in wretchedness, worse even than that of the South and West of Ireland of the present day. Even in this state, the inherent tendency to freedom is developed. The master found it impossible to deprive his slave of the whole fruits of his toil. He secreted a portion, which finally became legally his own, under the name of *peculium* in the civil law. In the next stage the slave becomes a serf, a villein labouring his lord's demesne, giving him the greater portion of his labour, and liable to the uncertain feudal services. The cultivators next cease to be *adscripti glebæ*; but the feudal services still continue uncertain. Finally, a fixed money rent is adopted. However, the tenant-cultivator is not yet completely free; for the fruits of his labour expended on the land are not yet completely his own.

But the right of labour to confer property in all other cases being

acknowledged, why should it be denied only in the case of the tenant of land? It may be hoped, therefore, that in the absence of political or social reasons to the contrary, this extension of the great principle of PROPERTY, one of the original bases of society and civilization, will speedily be adopted.

Throughout all free countries persons are now permitted, with few exceptions, to devote themselves to whatever pursuits in life they please, and to enjoy in the fullest manner the fruits of industry. Property is by degrees being emancipated from every political element. The property of man in men has been abolished by those states the farthest advanced in civilisation. Monopolies of all kinds are disappearing. The freedom of commerce, and the freedom of labour are at last recognised in most instances. It remains for society to emancipate the labour of the cultivators now personally free, and by simply vesting in them the property in the result of their labours, to permit their willing industry to be expended on the land.

My conclusion, therefore, is briefly this, that whereas the present law, based on the feudal system, gives the property in the tenant's improvements to the owner of the land in the absence of agreement to the contrary; I propose that in the absence of agreement to the contrary, the property in the improvements should be vested in the tenant, and that no such tenant should be evicted without being reimbursed the full value of his improvements* at the time of his eviction. I entertain a strong opinion as to the beneficial results of such a change.

Behold the man who rents his acres without security for the fruits of his industry. His cabin is only half thatched; his fields are slovenly; whatever money he has is hid; it is not freely expended on the soil, for there is no certainty that he can reap the fruits of it. He is clothed in rags; he dare not even appear prosperous, lest the rent be raised. On the other hand, behold the peasant who has the consciousness of security protected by the law. This indefatigable worker waters the earth with the sweat of his brow, and obtains by labour the pacific conquest of the soil. He takes from the hours of the day all that human strength can give to industry; and the kindly earth repays his labour with interest. Need I say how much civilized society would gain, if those peasants who now have their labour only partially free, were enriched by that consciousness of property which security for its fruits would give them. Thus arriving into the ranks of property, they would be in all things more worthy citizens of a free community. Soldiers of agriculture, let them become—their labour free, and its fruits secured to them—the best guardians of public order!

* In a future paper I hope to enter into the legislative details of this important subject.