

**Van Ness Vs. Pacard**

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**Court :** US Supreme Court

**Decided On :** 1829

**Appeal No. :** 27 U.S. 137

**Appellant :** Van Ness

**Respondent :** Pacard

**Judgement :**

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**Van Ness v. Pacard**

**27 U.S. (2 Pet.) 137**

*ERROR TO THE CIRCUIT COURT OF THE COUNTY*

*OF WASHINGTON IN THE DISTRICT OF COLUMBIA*

## **SYLLABUS**

Action on the case against the defendant for waste, committed by him while tenant of the plaintiff, the owner of the reversionary interest, by pulling down and removing from the demised premises a dwelling house erected thereon and

attached to the freehold. The question raised in the case was what fixtures erected by the tenant during his term are movable by him.

The general rule of the common law undoubtedly is that whatever is once annexed to the freehold becomes part of it, and cannot be afterwards removed except by him who is entitled to the inheritance. This rule, however, never was inflexible and without exceptions. It was construed most strictly between executor and heir in favor of the latter, and more liberality between tenant for life and in tail and remainderman or reversioner in favor of the former, and tenant in favor of the tenant. A more extensive exception to the rule has been of fixtures erected for the purposes of trade. Fixtures which were erected to carry on trade and manufactures were from an early period of the law allowed to be removed by the tenant during his term, and were deemed personalty for many other purposes.

The common law of England is not to be taken in all respects to be that of America. Our ancestors brought with them and adopted only that portion which was applicable to their situation.

It might deserve consideration whether, if the rule of the common law of England which prohibits the removal of fixtures erected by the tenant for agricultural purposes were not previously adopted in a state by some authoritative practice or adjudication, it ought to be assumed by this Court as a part of the jurisprudence of such state upon the mere footing of its existence in the common law.

The question whether fixtures erected for the purposes of trade are or are not removable by the tenant does not depend upon the form or size of the building, whether it has a brick foundation or not, or is one or two stories high or has a brick or other chimney. The sole question is whether it is designed for the purposes of trade or not.

If the house were built principally for a dwelling house for the family, independently of carrying on a trade, then it would doubtless be deemed a fixture falling under the general rule, and irremovable. But if the residence of the family were merely an accessory for the more beneficial exercise of the trade and with a view to superior

accommodation in this particular, then it is within the exception.

Every demise between landlord and tenant in respect to matters in which the parties are silent may be fairly open to explanation by the general usage and custom of the country or of the district where the land lies. Every person, under such circumstances, is supposed to be conversant of this custom and to contract with a tacit reference to it.

A court cannot be required to give an instruction to the jury as to the relation, right, and credibility of the testimony adduced by the parties in a cause.

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The plaintiffs in error instituted their action of trespass on the case, in the court below to recover damages for the removal of certain buildings from a lot of ground in the City of Washington, the property of the plaintiffs, which had been leased to the defendant by the plaintiffs for a term of years, reserving a rent. The jury gave a verdict in favor of the defendant.

Upon the trial of this cause, the plaintiffs gave in evidence to the jury an indenture of lease between them and the defendant for a lot of ground in the City of Washington for a term of years, reserving a certain rent, with the privilege to purchase out the fee at a stipulated sum, and offered evidence to the jury to prove that after the defendant had taken possession of the land described in the lease, he erected thereon a building, two stories high in front, with a cellar of stone or brick and a shed of one story, and that the principal building, which had a brick chimney, rested upon this stone or brick foundation. That the defendant was a carpenter by trade, and resided in the house from the commencement of his lease to about the period of its expiration, and that, before the term had expired, he took down and removed the said house from off the premises.

The defendant gave evidence that upon obtaining the said lease, he erected the building with a view to carry on the business of a dairyman and for the residence of his family and servants engaged in his said business, and that the cellar, in

which was a spring, was made and used exclusively for a milk cellar; that in the upper part of the house were kept and scalded and washed the utensils of his said business, and that that part was also occupied as a dwelling for his family; that he was also a carpenter, and had tools and two apprentices in the house and a workbench out of doors; and that he worked in said house at his trade of a carpenter; that the house was in a rough unfinished state, and made partly of old materials, and that he also erected on said lot a stable for his cows of plank and timber fixed upon posts fastened into the ground, and that the stable

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was pulled down and removed at the same time with the principal building.

Upon this evidence, the counsel for the plaintiffs prayed the instructions of the court to the jury that if it should believe the same to be true, the defendant was not justified in removing the house from the premises, and that he is liable in this action to the plaintiffs for the value of the house, which instructions the court refused to give.

The defendant also offered evidence to prove that a usage and custom existed in the City of Washington which authorized a tenant to remove any building which he might erect upon leased premises, provided the same was removed before the expiration of the term.

Upon this evidence, the counsel for the plaintiffs asked from the court instructions to the jury that the same was not competent to establish the fact that a general usage did exist in the City of Washington which authorized a tenant to remove such a house as that which has been erected by the defendant, nor was it competent for the jury to infer from the evidence that such a usage existed. These instructions were refused by the court.

The plaintiffs then gave evidence by the examination of a number of persons who, as owners of real property in the City of Washington, were claimed to know all that appertained to it, to show that the usage under which the defendant asserted a right to remove the buildings erected by him did not exist, and thereupon moved

the court to instruct the jury that upon the evidence, it is not competent for it to find a usage or custom of the place by which the defendant could be justified in recovering the house in question, and that, there being no such usage, the plaintiffs are entitled to a verdict for the value of the house which the defendant pulled down and destroyed. These instructions were also refused.

The plaintiffs by their bill of exceptions presented the whole of these matters for the consideration of this Court.

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MR. JUSTICE STORY delivered the opinion of the Court.

The original was an action on the case brought by the plaintiffs in error against the defendant for waste committed by him while tenant of the plaintiffs to their reversionary interest by pulling down and removing from the demised premises a messuage or dwelling house erected thereon and attached to the freehold. The cause was tried upon the general issue, and a verdict found for the defendant upon which a judgment passed in his favor, and the object of the present writ of error is to revise that judgment.

By the bill of exceptions filed at the trial it appeared that the plaintiffs, in 1820, demised to the defendant for seven years a vacant lot in the City of Washington at the yearly rent of \$112.50, with a clause in the lease that the defendant should have a right to purchase the same at any

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time during the term for \$1,875. After the defendant had taken possession of the lot, he erected thereon a wooden dwelling house, two stories high in front, with a shed of one story, a cellar of stone or brick foundation, and a brick chimney. The defendant and his family dwelt in the house from its erection until near the expiration of the lease, when he took the same down and removed all the materials from the lot. The defendant was a carpenter by trade, and he gave evidence that upon obtaining the lease he erected the building above mentioned

*with a view to carry on the business of a dairyman* and for the residence of his family and servants engaged in his said business, and that the cellar, in which there was a spring, was made and exclusively used for a milk cellar, in which the utensils of his said business were kept and scalded and washed and used, and that feed was kept in the upper part of the house, which was also occupied as a dwelling for his family. That the defendant had his tools as a carpenter and two apprentices in the house, and a workbench out of doors, and carpenter's work was done in the house, which was in a rough unfinished state and made partly of old materials. That he also erected on the lot a stable for his cows of plank and timber fixed upon posts fastened into the ground, which stable he removed with the house before the expiration of his lease.

Upon this evidence, the counsel for the plaintiffs prayed for an instruction that if the jury should believe the same to be true, the defendant was not justified in removing the said house from the premises, and that he was liable to the plaintiffs in this action. This instruction the court refused to give, and the refusal constitutes his first exception.

The defendant further offered evidence to prove that a usage and custom existed in the City of Washington which authorized a tenant to remove any building which he might erect upon rented premises, provided he did it before the expiration of the term. The plaintiffs objected to this evidence, but the court admitted it. This constitutes the second exception.

Testimony was then introduced on this point, and after

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the examination of the witnesses for the defendant, the plaintiffs prayed the court to instruct the jury that the evidence was not competent to establish the fact that a general usage had existed or did exist in the City of Washington which authorized a tenant to remove such a house as that erected by the tenant in this case, nor was it competent for the jury to infer from the said evidence that such a usage had existed. The court refused to give this instruction, and this constitutes the third

exception.

The counsel for the plaintiffs then introduced witnesses to disprove the usage, and after their testimony was given he prayed the court to instruct the jury that upon the evidence given as aforesaid in this case, it was not competent for them to find a usage or custom of the place by which the defendant could be justified in removing the house in question, and there being no such usage, the plaintiffs were entitled to a verdict for the value of the house, which the defendant pulled down and destroyed. The court was divided and did not give the instruction so prayed, and this constitutes the fourth exception.

The first exception raises the important question what fixtures erected by a tenant during his term, are removable by him.

The general rule of the common law certainly is that whatever is once annexed to the freehold becomes part of it, and cannot afterwards be removed, except by him who is entitled to the inheritance. The rule, however, never was, at least as far back as we can trace it in the books, inflexible and without exceptions. It was construed most strictly between executor and heir in favor of the latter, more liberally between tenant for life or in tail, and remainder man or reversioner, in favor of the former, and with much greater latitude between landlord and tenant in favor of the tenant. But an exception of a much broader cast, and whose origin may be traced almost as high as the rule itself, is of fixtures erected for the purposes of trade. Upon principles of public policy and to encourage trade and manufactures, fixtures which were erected to carry on such business were allowed to be removed by the tenant during his

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term, and were deemed personalty for many other purposes. The principal cases are collected and reviewed by Lord Ellenborough in delivering the opinion of the court in *Elwes v. Maw*, 3 East 38, and it seems unnecessary to do more than to refer to that case for a full summary of the general doctrine and its admitted exceptions in England. The court there decided that in the case of landlord and

tenant, there had been no relaxation of the general rule in cases of erections *solely for agricultural purposes*, however beneficial or important they might be as improvements of the estate. Being once annexed to the freehold by the tenant, they became a part of the realty and could never afterwards be severed by the tenant. The distinction is certainly a nice one between fixtures for the purposes of trade and fixtures for agricultural purposes, at least in those cases where the sale of the produce constitutes the principal object of the tenant and the erections are for the purpose of such a beneficial enjoyment of the estate. But that point is not now before us, and it is unnecessary to consider what the true doctrine is or ought to be on this subject. However well settled it may now be in England, it cannot escape remark that learned judges at different periods in that country have entertained different opinions upon it down to the very date of the decision in *Elwes v. Maw*, 3 East 38.

The common law of England is not to be taken in all respects to be that of America. Our ancestors brought with them its general principles and claimed it as their birthright, but they brought with them and adopted only that portion which was applicable to their situation. There could be little or no reason for doubting that the general doctrine as to things annexed to the freehold, so far as it respects heirs and executors, was adopted by them. The question could arise only between different claimants under the same ancestor, and no general policy could be subserved by withdrawing from the heir those things which his ancestor had chosen to leave annexed to the inheritance. But between landlord and tenant, it is not so clear that the rigid rule of the common law, at least as it is expounded in 3 East 38,

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was so applicable to their situation as to give rise to necessary presumption in its favor. The country was a wilderness, and the universal policy was to procure its cultivation and improvement. The owner of the soil as well as the public had every motive to encourage the tenant to devote himself to agriculture and to favor any erections which should aid this result, yet in the comparative poverty of the country, what tenant could afford to erect fixtures of much expense or value if he

was to lose his whole interest therein by the very act of erection? His cabin or log-hut, however necessary for any improvement of the soil, would cease to be his the moment it was finished. It might, therefore, deserve consideration whether, in case the doctrine were not previously adopted in a state by some authoritative practice or adjudication, it ought to be assumed by this Court as a part of the jurisprudence of such state upon the mere footing of its existence in the common law. At present it is unnecessary to say more than that we give no opinion on this question. The case which has been argued at the bar may well be disposed of without any discussion of it.

It has been already stated that the exception of buildings and other fixtures for the purpose of carrying on a trade or manufacture is of very ancient date, and was recognized almost as early as the rule itself. The very point was decided in 20 Henry VII 13, a. and b., where it was laid down that if a lessee for years made a furnace for his advantage, or a dyer made his vats or vessels *to occupy his occupation*, during the term, he may afterwards remove them. That doctrine was recognized by Lord Holt in *Poole's Case*, 1 Salk. 368, in favor of a soap boiler who was tenant for years. He held that the party might well remove the vats he set up in relation to trade, and that he might do it by the common law (and not by virtue of any custom) *in favor of trade and to encourage industry*. In *Lawton v. Lawton*, 3 Atk. 13, the same doctrine was held in the case of a fire engine set up to work a colliery by a tenant for life. Lord Hardwicke there said that since the time of Henry the Seventh, the general ground the courts have gone upon of relaxing the strict construction of law is that it is for the

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benefit of the public, to encourage tenants for life to do what is advantageous to the estate during the term. He added,

"one reason which weighs with me is its being a mixed case between enjoying the profits of the land and carrying on a species of trade, and in considering it in this light, it comes very near the instances in brewhouses, &c.;, of furnaces and coppers."

The case too of a cider mill, between the executor and heir, &c.;, is extremely strong, for though cider is a part of the profits of the real estate, yet it was held by Lord Chief Baron Comyns, a very able common lawyer, that the cider mill was personal estate notwithstanding, and that it should go to the executor.

"It does not differ it, in my opinion, *whether the shed be made of brick or wood*, for it is only intended to cover it from the weather and other inconveniences."

In *Penton v. Robart*, 2 East 88, it was further decided that a tenant might remove his fixtures for trade even after the expiration of his term if he yet remained in possession, and Lord Kenyon recognized the doctrine in its most liberal extent.

It has been suggested at the bar that this exception in favor of trade has never been applied to cases like that before the Court where a large house has been built and used in part as a family residence. But the question whether removable or not does not depend upon the form or size of the building, whether it has a brick foundation or not, or is one or two stories high or has a brick or other chimney. The sole question is whether it is designed for purposes of trade or not. A tenant may erect a large as well as a small messuage, or a soap boiler of one or two stories high and on whatever foundations he may choose. In *Lawton v. Lawton*, 3 Atk. 13, Lord Hardwicke said (as we have already seen) that it made no difference whether the shed of the engine be made of brick or stone. In *Penton v. Robart*, 2 East 88, the building had a brick foundation, let into the ground, with a chimney belonging to it upon which there was a superstructure of wood. Yet the court thought the building removable. In *Elwes v. Maw*, 3 East 37, Lord Ellenborough expressly stated that there was no difference between the building covering any fixed engine,

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utensils, and the latter. The only point is whether it is accessory to carrying on the trade or not. If *bona fide* intended for this purpose, it falls within the exception in favor of trade. The case of the Dutch barns, before Lord Kenyon, [ [Footnote 1](#) ] is to the same effect.

Then as to the residence of the family in the house, this resolves itself into the same consideration. If the house were built principally for a dwelling house for the family, independently of carrying on the trade, then it would doubtless be deemed a fixture, falling under the general rule and immovable. But if the residence of the family were merely an accessory for the more beneficial exercise of the trade and with a view to superior accommodation in this particular, then it is within the exception. There are many trades which cannot be carried on well without the presence of many persons by night as well as by day. It is so in some valuable manufactories. It is not unusual for persons employed in a bakery to sleep in the same building. Now what was the evidence in the present case? It was

"that the defendant erected the building before mentioned *with a view to carry on the business of a dairy man, and for the residence of his family and servants engaged in that business.* "

The residence of the family was then auxiliary to the dairy; it was for the accommodation and beneficial operations of this trade.

Surely it cannot be doubted that in a business of this nature, the immediate presence of the family and servants was or might be of very great utility and importance. The defendant was also a carpenter, and carried on his business as such in the same building. It is no objection that he carried on two trades instead of one. There is not the slightest evidence of this one being a mere cover or evasion to conceal another, which was the principal design, and unless we were prepared to say (which we are not) that the mere fact that the house was used for a dwelling house as well as for a trade superseded the exception in favor of the latter, there is no ground to declare that the tenant was not entitled to remove it. At most, it would be deemed only a mixed

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case, analogous in principle to those before Lord Chief Baron Comyns and Lord Hardwicke, and therefore entitled to the benefit of the exception. The case of *Holmes v. Tremper*, 20 Johns. 29, proceeds upon principles equally liberal, and it

is quite certain that the supreme court of New York was not prepared at that time to adopt the doctrine of *Elwes v. Maw* in respect to erections for agricultural purposes. In our opinion, the circuit court was right in refusing the first instruction.

The second exception proceeds upon the ground that it was not competent to establish a usage and custom in the City of Washington for tenants to make such removals of buildings during their term. We can perceive no objection to such proof. Every demise between landlord and tenant in respect to matters in which the parties are silent may be fairly open to explanation by the general usage and custom of the country or of the district where the land lies. Every person under such circumstances is supposed to be conusant of the custom and to contract with a tacit reference to it. Cases of this sort are familiar in the books, as for instance to prove the right of a tenant to an away-going crop. [ [Footnote 2](#) ] In the very class of cases now before the Court, the custom of the country has been admitted to decide the right of the tenant to remove fixtures. [ [Footnote 3](#) ] The case before Lord Chief Justice Treby turned upon that point. [ [Footnote 4](#) ]

The third exception turns upon the consideration whether the parol testimony was competent to establish such a usage and custom. Competent it certainly was if by competent is meant that it was admissible to go to the jury. Whether it was such as ought to have satisfied its mind on the matter of fact was solely for its consideration, open indeed to such commentary and observation as the court might think proper in its discretion to lay before it for its aid and guidance. We cannot say that it was not at liberty, by the principles of law, to infer from the evidence the existence of the usage. The evidence might be somewhat loose

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and indeterminate, and so be urged with more or less effect upon their judgment, but in a legal sense it was within their own province to weigh it as proof or as usage.

The last exception professes to call upon the court to institute a comparison between the testimony introduced by the plaintiff and that introduced by the

defendant against and for the usage. It requires from the court a decision upon its relative weight and credibility which the court were not justified in giving to the jury in the shape of a positive instruction.

Upon the whole in our judgment there is no error in the judgment of the circuit court, and it is

*Affirmed with costs.*

This cause came on to be heard on a transcript of the record from the Circuit Court of the United States for the District of Columbia holden in and for the County of Washington and was argued by counsel, on consideration whereof it is the opinion of this Court that there is no error in the judgment of the said circuit court. Whereupon it is considered, ordered, and adjudged by this Court that the judgment of the said circuit court in this cause be and the same is hereby affirmed with costs.

[ [Footnote 1](#) ]

*Dean v. Allalley*, 3 Esp. 11; Woodfall's Landlord & Tenant 219.

[ [Footnote 2](#) ]

2 Starkie on Evidence Part IV 453.

[ [Footnote 3](#) ]

Woodfall's Landlord & Tenant 218.

[ [Footnote 4](#) ]

Buller's Nisi Prius 34.