

## PART II.

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## PAPERS.

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14TH MARCH, 1895.

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### ADDRESS BY THE PRESIDENT.

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MR. A. D. NELSON,

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THE first and most agreeable duty of the President of this Association upon assuming office always has been, and, naturally, always must be, to thank the members who have done him the honor to elect him to that office. It is not duty alone that prompts me to thank you most warmly for the honor you have conferred on me; it is a higher sense of appreciation that impels me to do so, and in thanking you let me say that I fully recognise the responsibilities of the office, having filled it before, and I am prepared to meet them, knowing from experience the members of my Council will at all times ably and loyally support me, and that I shall also have the support of the whole body of Members and Associates so long as my efforts are directed to the promotion of the best interests of this Association. This being so, I ask you to accept my assurance that it is my intention, during my term of office, ever to study the welfare of our Association, and to do my best to at least maintain it in the position in which I find it, if not to raise its status still higher, as it will be my aim to do. Following the custom of my predecessors, I will first briefly outline the work

of the Association during the past year, after which I will touch upon one or two questions which are of interest to the engineering community.

Turning first to our Association, I regret having to record the loss of one of our members by the hand of death, viz., the late Mr. William Scott. Mr. Scott was one of our oldest members, having joined the Association when it was quite in its infancy (in 1870). He for many years filled the position of Locomotive Superintendent on our railways; his genial manner and kind disposition made him many friends, not only in this Association, but wherever he was known, and although it is essential that we should pass off this sphere, yet we cannot speak of one who has been so long with us without feelings of regret and pain.

Turning from the serious to the every-day life, it is a matter of gratification to me to be able to congratulate the members on the continued success of this Association. Although the great depression which has existed for some time past has induced some of our members to send in their resignations, yet we have added almost the same number of new members, leaving our roll practically the same as last year. Looking at our Balance Sheet, it must be admitted that our finances have been heavily drawn on during the past year, but I am sure that if members will only pay prompt attention to the communication from the Secretary, your Association will recover its losses. It is to the advantage of the Association to obtain as many members as we possibly can—they bring new ideas amongst us, and thereby extend our usefulness. I trust the members present will use their personal efforts to induce their friends who are qualified to become members.

Noticing the work of the Association for the past year, it is a matter for congratulation that the papers contributed by members were instructive in the best sense of the word, and interesting discussions followed the delivery of each. The subjects were varied. We had papers on Railway Brakes;

Refrigeration and Ice-making ; the Presidential Address ; a paper upon the Treatment of Minerals ; also on Hydraulic Power Supply ; on Bricks and Brick-making in and around Sydney, and also a paper on the Double-ended Screw Ferry Steamer. So that you will see the subjects were varied, and I am sure that a great deal of information was obtained by the interesting papers, as well as by the discussions which followed.

Now the subject which I wish to bring before you this evening is, in the broad sense of the word, connected more with law than with engineering, but from my past experience as a witness in the Court, and in valuing and reporting upon plants of machinery, I have been so struck with the peculiarities of the law, and the singular position the people who own machinery are placed in by that law, that I felt it a duty to make an effort to lay before you, as far as time will permit, my views on this question, viz., the " Law of Fixtures." It is a question which not only affects engineers and manufacturers who own machinery, but it is one of vital importance to banking and financial institutions, and I trust the few remarks which I may make this evening upon this question will have a tendency to induce those who are most interested in this important question to use their utmost efforts to have some fixed line to define what are, and what are not, fixtures.

In referring to the ninth edition of Chitty on Contracts, page 330, a definition of the term of fixtures is given as follows:—"The term fixtures is often used as well with reference to articles which are not by law severable when once attached to the freehold, and to those which are severable therefrom. But in its correct sense the term fixtures is confined to personal chattels, which, although they have been annexed to the freehold, are nevertheless removable at the will of the person who has annexed them. For when a thing is annexed to the land it is irremovable ; it is viewed in law as part of the freehold, and is subject to all the incidents of real property. The general rule, as laid down in old books, is, that if the present owner, or

the occupier of the land, annex anything to the freehold, neither he nor his representatives can afterwards take it away. And as between mortgagor and mortgagee, this rule is strictly applied, but as between other parties, the strictness of this rule is from time to time relaxed, and at the present day the question whether a chattel has or has not become parcel of the freehold is regarded as a question of fact depending on the circumstances of each case, and principally upon the following,—first, the mode of annexation to the soil or fabric of the building, and the extent to which it is united to them, *i.e.*, whether it can easily be removed or not without injury to itself or the fabric of the building; and secondly, on the subject and purpose of annexation, *i.e.*, whether it was for permanent and substantial improvement of the freehold, or merely for a temporary purpose, or the more complete enjoyment and use of the chattel as such. In every case, therefore, the term fixtures naturally leads to one or both of the following enquiries,—first, what kind of annexation confers upon chattels the character of fixtures? and then, secondly, what particular rules or exceptions regulate the right of removing, as between persons standing in different relative situations, with reference to the premises to which such chattels have been united? As to the former question, that is, as to the mode of annexation, we would merely observe that by the term annexed to the freehold is meant fastened to or connected with it, and that, therefore, no object—not even a building of the most ponderous description—will fall within the operation of the law of fixtures if it is merely laid upon the earth without being let into it. The article must be fixed or let into the ground, or to some substance previously rendered a portion of the freehold, or it does not cease to be a chattel. When, therefore, a chattel is merely placed upon, without being let into, a brick or the foundation, and if it can be taken from such foundation without injuring it, it may be legally removed, although the foundation itself is part of the freehold, and cannot be severed therefrom, and

although it was constructed for the express purpose of supporting the superincumbent weight."

The work from which I have extracted the foregoing has now reached its ninth edition, by John A. Russell, a man who, I am given to understand, has always borne a very high reputation in the legal world.

If, according to the law laid down, it is absolutely necessary for a chattel—to wit, a piece of machinery or a building—to be fixed securely, nay, further let into the freehold, before it becomes a fixture, how is it that the ruling of the Courts in this country is so diametrically opposed to the principles laid down by Russell? In this colony we have had instances where important cases have been tried in our Supreme Court, where some of the most eminent barristers have been engaged for and against, where the best expert witnesses have given evidence upon matters before the Court, and yet the ruling of the Court has been opposed to the principles laid down in the articles which I have just read by Russell. To endeavour to make myself more clear on the matter I will cite a case which we will consider to be parallel to, at least, one case which has been tried in our Courts.

A owns a block of ground on which there is a building, and in that building a plant of machinery. A, wishing to borrow money on that land and building, applies to B, and asks for a sum which is supposed at the time to be less than one half of the value of the land and building. A gets into further difficulties and applies to C for another loan of money on his machinery and plant. C advances this sum of money and takes a mortgage on the machinery. The strange part of the business is that B's solicitor is acting for C, and already having drawn the mortgage between A and B, is then called on by C to prepare the mortgage on the machinery between A and C. This you would think was *prima facie* evidence that the solicitor in drafting the first mortgage never intended the machinery to be included in that document, yet when difficulties arose between

the contending parties, and the value of land decreased to a great extent, it was found that fixtures in the legal sense covered everything on the ground. Things eventually became complicated between A, B and C, A in the first instance having mortgaged the land and property to B, and in the second instance mortgaged the machinery to C. The peculiarity of the case is that the documents A to B, instead of specifying that a mortgage had been given on the land and buildings, it specified land and fixtures. Now comes the peculiar part. C forecloses on A and seizes the machinery and sells, claiming his right to do so by the mortgage which was given by A to C. The next difficulty arising is, that B, the party who lent the money on the land and building, enters an action against C for the removal of fixtures, which B claims as being his, under his mortgage. The case as tried in the Court was rather singular, the arguments being, on the one side, that the machines were securely fixed to concrete foundations and bolted thereto. On the other side it was claimed that they were simply laid upon pieces of timber buried in the ground. Although the evidence taken on oath was of the most contradictory nature for and against, the case lasted something like four days. It was suddenly found that by the ruling of the Judge, it mattered not whether the machinery stood upon a solid foundation or stood upon the bare earth, it nevertheless was a fixture. For his contention was that the fact of a belt coming from one pulley from the overhead shafting to the machine for the purpose of driving it converted it into a fixture. Speaking to you as practical men, you will know that the plant and machinery of an engineer is, in the true sense of the word, the stock and tools whereby he makes his livelihood. As practical men we know that they are in no way connected with the earth, and if we take a common sense view which our experience in this special line of life has taught us, we can only say that the ruling such as I have just described may be according to law, but it is not according to common sense. Various contentions

arose between the barristers upon this case, and one argument which seemed to me to be rather extraordinary was that although the land and building were mortgaged for a given sum, yet when that sum was lent upon the land and building, and not upon the machinery, it was lent upon the supposition that it was a going concern, although it is stated that the machinery was in no way connected with the loan named.

Now according to the arguments used on this occasion, the proprietor or mortgagee of that establishment is not allowed by law to remove one single piece of this machinery, they all becoming fixtures according to law, and the man who has the misfortune to be placed in this unsatisfactory condition is simply in the hands of the institute which has lent the money on his land and building. This, according to a judge, is law ; but many of us know to our cost that the law is very peculiar. One of the most eminent barristers that we have in our Colony, in addressing a jury, gave a very singular definition of law. He said : If it is essential that you should find out what the law of a subject is, take a common sense view of the facts, reason out all the details, and when you thoroughly understand that which common sense has taught you, take the opposite view, and you have the law.

Another peculiarity regarding the law of fixtures came under my notice some months ago. I was requested to value a plant of machinery and to report what were fixtures and what were not. It would appear that there were two contending parties with regard to this plant of machinery. I think that you will admit that if there is a possibility in straining the law, it was on this occasion strained to the utmost extent.

A piece of machinery was standing upon a boarded floor driven by manual power, neither belts nor screws to hold it to the boards, the only attachment being a piece of copper wire secured to a nail driven in the floor, the other end attached to a small spring forming part of the machinery. This is claimed

as a fixture by one of the contending parties. I think you will admit that I was justified in declining to admit it.

Another case, which was tried in England, in *Gibson versus Hammersmith Railway Company*: It would appear that the Railway Company were purchasers of a piece of land on which was a manufactory. They claimed that they were not bound to take the fixed machinery in the manufactory because they said that such machinery would have to be removed by the tenant as a trade fixture, and it could not be considered as part of the works. The Judge in this case, however, said that the company must take the machinery as well as the building in which it was fixed, for that both were equally part of the land, and therefore, passed with it.

Another case that I might mention which referred to the law of fixtures annexed to land by a person during his possession and under an incomplete agreement for the purchase of that land. In this case the defendant agreed to sell and convey certain land to one Hinkley, who was to have immediate possession, the purchase money being paid in instalments. Hinkley at once went into possession, erected large and substantial buildings and machinery for the purpose of a factory. Subsequently he made a personal mortgage of them to the plaintiffs. Hinkley having made default in the payment of the instalments, and having become bankrupt before he was entitled to conveyance, the defendant re-entered upon the land, took possession, not only of the land, but of the buildings and machinery also, and it was held that as the buildings and machinery had become part of the reality, on annexation that passed as such to the defendant on Hinkley's failure to complete, that they were the personal property of the plaintiffs under their mortgage.

The few cases which I have cited to you will give you some slight idea of the peculiar position that business men are placed in with regard to the law of fixtures. A man may erect works costing fabulous sums of money, and through some slight

difficulty or flaw in connection with his legal documents loses the whole of it. One of my chief aims in touching this question to-night is to see if it is possible to have some definite line drawn as to what is and what is not a fixture.

From what one of the highest legal authorities in Sydney has stated to me, that of all questions he finds the greatest difficulty in advising his clients, is the law relating to fixtures. There have been so many cases tried in the Court not only in this colony, but in other parts of the world, and there have been parallel cases with verdicts one opposed to the other, and I am justified in saying that in attempting to deal with a question such as this is, I have taken more in hand than I feel qualified to deal with. It is a subject that would take many months to deal with on anything like a broad and extended basis. To make it clear to you it would be necessary to cite many cases which have been tried, giving the verdicts of each individual case, so that you could see how peculiar it is, and why people often times step into the Court believing that they have got a case in which they are bound to get a verdict, and very often times their opponent has it.

I have heard men, who have had some experience, say that we should have specialists in law; it would be a good idea, I think. In technical cases, to have a man to whom the Judge could apply to, for information on technical questions, or go further and have a special jury, to be men connected with a business which gave them a knowledge of the special case that was being heard. This might get over the difficulty in the course of time, for there have been so many law cases tried according to the law books, and so many verdicts given, which are troublesome to say the least, more especially to the client, for, as a rule, a lawyer can turn up a case parallel to the case you are consulting him about, for there have been a great many cases heard on "Law of Fixtures." He will say "There you are, my boy, just your case, *Brown versus Jones*, before Chief Justice Robinson, exactly your case, go on with it, you are bound to

knock him into a cocked hat." Yes; but what a difference in the afternoon. The lawyer on the other side has gone through the different cases on the "Law of Fixtures," and selects one to suit his client. He knocks the bottom out of the case your lawyer cited, and, consequently, gets a verdict, and so things go on.

One more item, gentlemen, that I would like to speak about. I dare say that it is within the provisions of almost any member connected with this association to be called in as witness in a case such as I have just been describing. I have oftentimes thought that an expert witness does not receive that consideration that is justly due to him. I will endeavour to make what I wish to say to you as clear as possible. Presuming that any member present here this evening were called in as an expert witness to give evidence, for argument sake, to say, on foundations. If he is doing his duty he tells the Court the actual facts he has seen. When he has done that he has completed all the law wishes him to do, or that he has undertaken to do, either for his client or the oath which he has taken in the Court. But how often is it that an expert witness has to give evidence in a case where either the defendant or the plaintiff is actuated by a desire or motive to do something for his individual interest, and gives evidence which is opposed, in every sense, to that which the expert has already given. Now, gentlemen, if one of you in the Court say that beneath a certain machine there are simply two blocks of wood, and the defendant or plaintiff, whichever may be, swears that there is a solid concrete foundation, it stands to common sense that either the expert witness or the other man has committed perjury, and I think in justice to both sides, it ought to be the duty of the Court, when instances of that kind arise, to take the matter with a strong hand and teach the party, who has perjured himself in the box, a lesson which will never be effaced from his memory.

Before closing, I would like to say a few words on the question of the "Boiler Inspection Bill." This bill has been

drafted, nay, more, it has passed the Assembly and got to the Upper House, and there it has stopped. I would like to ask is it possible to get it through the House, and let it become law of the country. I have been dealing with the "Law of Fixtures" to-night, but I can assure you, gentlemen, there are many boilers in the country that you never know how long they are going to remain fixtures; they will no doubt move, like the digester at Gunnedah some days ago. The bill should become law, and the inspection of digesters included in it. Yes, gentlemen, I consider this one of the most important bills that has been before our Parliament for a long time, for human life may, at any moment, be sacrificed. We have had three explosions lately; in one case two lives were lost, and others injured; in another case several badly injured; the third, fortunately, no one was hurt. If matters such as this were dealt with in our Parliament, instead of the members throwing mud at each other, it would be better for the country. I trust that every influence that can be brought to bear on the Parliament will be tried to have this bill passed.

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