protection of General Butler's proclamation of the 1st of May following; and, also, to the effect of that capture upon the status and property of the inhabitants of the captured city.*

The view I have taken of the proofs in the case, do not involve these questions.

Ashby left the city of New Orleans in this vessel soon after the breaking out of the war, and before the establishment of the blockade, and has never returned to it. During all this time and down to the seizure of the vessel, 26th of May, 1862, he has been in command of it, and engaged in the Gulf trade; and the greater portion of the time with the rebel territory. In answer to the first interrogatory, in *preparatorio*, he says, "that he was born in New York; he now lives in Louisiana, and owes allegiance to Louisiana and the Confederate States; is not a citizen of the United States." In answer to the fourth interrogatory, under an order allowing further proofs, he says that he left New Orleans with the vessel anticipating a blockade, that she might not become useless property, and that he did not expect to communicate with that city while the blockade continued. The proofs, as we have seen, show how he has been engaged during all this period.

On the above ground, I agree that the vessel was properly condemned in the court below, as enemy's property; and, also, the cargo, which the court have adjudged belonged to him.

DECREE AFFIRMED.

KUTTER *v.* SMITH.

1. The law imposes no obligations on a landlord to pay the tenant for buildings erected on demised premises. The innovation on the common law, that all buildings become part of the freehold, has extended no further than the right of removal while the tenant is in possession.

* See *supra*, p. 263, The Venice; also, The Baigorry preceding case. REP.

Statement of the case.

2. Where a lease binds a landlord to pay his tenant, *on the efflux of the term*, for buildings erected by the tenant, or to grant him a renewal, the landlord is not bound to pay when the lease has been determined by *non-payment of rent before such efflux*, and by forfeiture and entry accordingly.
3. This is true, even though by the terms of the lease the repossession by the landlord is to be "*as in his first and former estate;*" and though the erections were not on the ground at the date of the lease.

LINK demised, on the 1st of May, 1857, to Sherman, a lot in Chicago, for twelve years from that date. The lessee covenanted to pay all the taxes and assessments levied on the premises during the term.

It was provided that, in case of a failure by the lessee to pay the rent when due, the lessor, his heirs or assigns, should have the right to enter into the demised premises, with or without process of law, and expel the lessee or any persons occupying them, "and the said premises again to repossess and enjoy, *as in his first and former estate;*" and the lessee covenanted that, if the term should at any time, at the election of the lessor, or his assigns, be ended, he, and all those occupying the premises under him, would immediately and peaceably surrender the possession of the premises to the lessor or his assigns. Sherman contemplated making an erection upon the premises, which it was agreed he might do; and the lease contained the following covenant:

"It is agreed upon, by and between the parties, that at the expiration of ten years from the first day of May, one thousand eight hundred and fifty-nine, it shall be at the election of the first party either to purchase the buildings erected on said leased premises at the appraised value at that time, or renew the lease of the said demised premises for the term of ten years longer, and the value of the buildings as well as the value of the rent of the said demised premises, to be appraised by three disinterested persons, who are to decide the value of the buildings, as well as the value of the rent of the above-mentioned premises, as the case may be. And it is further agreed upon, by and between the parties, that at the expiration of each and every ten years from May first, one thousand eight hundred and sixty-nine, for and during the term of *ninety-nine years* from the date

Statement of the case.

of this indenture, that the party of the first part is either to renew the lease or purchase the buildings as above stipulated."

The lessee did erect a brick structure or storehouse on the premises, valued at $2500 to $4000.

The rights of the lessee, Sherman, became afterwards vested in one Kutter, and those of Link, the lessor, in a certain Smith.

On the 1st of May, 1862, Smith, as assignee of Link, went upon the premises, and demanded the rent due that day on the lease, which was not paid, and the next day he gave notice that he had elected to forfeit the lease for non-payment of rent, due May 1, 1862.

In July, 1862, Kutter (assignee of Sherman) notified to the defendant that, owing to the forfeiture of the lease from Link to Sherman, for non-payment of rent, he (Kutter) was entitled to have the brick building on the demised premises appraised under the terms of the lease, and the value of it paid to him. Smith refusing to join in any effort to have it appraised, this suit, *an action on the case*, was brought in the Circuit Court for the Northern District of Illinois.

The declaration set out the lease by Link to Sherman; the subsequent vesting of the lessor's title in the defendant, Smith, and of the lessee's in the plaintiff, Kutter; and that the defendant had declared the lease forfeited, and taken possession of the demised premises, and refused to join the plaintiff in having an appraisement of the building standing on said premises, and also neglected and refused to pay plaintiff the value of that building; whereby he became liable to plaintiff for its value, and this action was brought to recover it.

On the trial, the court instructed the jury as follows:

"By the terms of the lease from Link to Sherman, it seemed to be contemplated that the lessee should have power to put improvements upon the land which might remain there on the 1st of May, 1869 ('ten years from the 1st day of May, 1859'), and it was by the terms of the lease then left optional with the lessor to purchase the buildings erected on the land at the ap-

praised value, or renew the lease for ten years longer; but up to that time, that is to say, till May, 1869, the clause of forfeiture for the non-payment of rent was nevertheless in force and binding on the lessee; and notwithstanding improvements may have been in the mean time put upon the land, if the lessee did not pay the rent according to the terms of the lease, it was competent for the lessor to declare 'the term' ended, and to re-enter, and in case of a determination of the lease in that way prior to the time fixed (viz., May 1st, 1869), no provision seemed to be made by the lease for the payment by the lessor of any improvements put by the lessee upon the land; and in the case supposed, in the absence of such provision, the lessee could not recover for the improvements; and the plaintiff can be in no better position than Sherman. Consequently, if, on the 1st day of May, 1862, there was rent due and in arrear, unpaid, after demand made for the payment thereof, and the lessor or his assigns exercised the option given by the lease, and declared 'the term' ended, and re-entered and took possession of the premises, of which the lessee and his assignee had due notice, then the plaintiff cannot recover against the defendant in this action the value of the improvements made by Sherman or his assignee."

Verdict and judgment went accordingly; and the plaintiff, Kutter, took a writ of error to reverse the judgment.

Mr. E. S. Smith, for Kutter, plaintiff in error.

The court below—we may remark in the outset—treated the case as if it had been an action of covenant,—a suit to enforce, as against defendant Smith, the *provisions of the lease upon the covenants* on the part of Link, as to the purchase of the building at the end of the term. This was a mistake. The law, which, in an action of covenant, would have governed the case, has no direct application here, except as to the construction of the provisions of the lease, and the rights of the parties as they stood at the time of the suit. The action is an action on *the case;* an action, that is to say, on the special facts of this case; a form of action which in the plastic hands of the pleader becomes pliant, and takes a form as various as the business of men.

Argument for the plaintiff in error.

Now, here the owner of the soil has got possession of and is enjoying a house built by us; he has come into the use of buildings erected by our money and labor. We set forth those circumstances; make, in other words, an action on the case; and show that, *ex æquo et bono*, the defendant should pay us for that which of our money and labor he is enjoying and chooses to enjoy. The law is well settled, that a lessor cannot take buildings and fixtures placed on a lot by express agreement that he place them there; and that the lessee has the right to remove those buildings, whether it be at the end of the term, or on declaration of forfeiture by the lessor, at the expiration of the lease. Time is given by law for the removal of such fixtures, and any interposition, on the part of the lessor, to prevent the removal, is, in law, a conversion and an injury resulting from the act of the lessor, for which he must respond in damages.

Since the great case of *Elwes* v. *Mawes*, given in Smith's Leading Cases,* the rigor of the common law has been greatly relaxed, both in this country and in England, and courts of law have adopted the principle, that it is for the benefit of the public to encourage tenants to make improvements in trade, and to do what is advantageous for the estate during the term, with the certainty of their still being benefited by it at the end of the term. We hold that the rule is the same, and that it applies, whether the tenancy be for years or at will. It matters not whether the building is erected upon blocks or upon stone masonry; whether of wood, stone, or brick. It is the property of the tenant, and he has the right to remove it at the end of the term, and the landlord cannot interfere unless the tenant damages the freehold. The rule is founded upon a high principle of justice and right, and in this country, especially, should be maintained as tending everywhere to improvements.

This general principle has been applied, as the court knows, in a case where vats had been put up for the convenience of the trade of the tenant; also, in a case of a mill

* 2 Smith, 228, 6th ed., reported from 3 East, 38.

and furnace, steam engines, and copper stills, erected to carry on distilling, though fixed to the building; also, in a case where a building had been erected on the demised premises for the purposes of trade, and placed upon a foundation of brick masonry in the ground; also, in a case where a building had been erected upon stone posts set in the ground. Many other cases, equally decisive of the question, can be found in the books, even in the old ones.*

Concede that Smith became owner of the lot originally vested in Link, he holds it *quatenus et quodam modo;* he holds in subjection to the lease which Link had previously made. However viewed, the question comes to this: "Does the lease provide, under any state of the case, or position of the parties, and for any cause, that Link, or any one, may at any time take the property in the building without paying for it?" We answer that it does not, in any way or manner, so provide, nor does the lease in any one sentence so intimate. How, then, can counsel justify the high-handed act of the defendant in forcibly taking and holding the building?

It will be observed that, by the express words of the contract, the right to re-enter and to declare the term ended for non-payment of rent at the time due, only gives the right to *repossess Link's "first and former estate."* It does not give the right to take anything *but* the land. This is an important consideration, and one which should interpret and settle the rights of the parties. If, therefore, the defendant preferred to re-enter in the name of Link, or to take possession of the property under the covenant, instead of trusting to the chances to collect the rent, then, if he did so, he was obliged to *let the owner take* off the buildings, and leave the property as it was, so that the defendant could enjoy it as in Link's first and former estate; that being all the lease gave, or which any one claiming under it could enjoy.

Mr. Fuller, contra.

* Beck *v.* Rebow, 1 Peere Williams, 94; Lawton *v.* Lawton, 3 Atkyns, 13; Poole's Case, 1 Salkeld, 368; Van Ness *v.* Packan, 2 Peters, 137; Union Bank *v.* Emerson, 15 Massachusetts, 159; Holmes *v.* Tremper, 20 Johnson, 29.

Opinion of the court.

Mr. Justice MILLER delivered the opinion of the court.

If we correctly understand plaintiff's counsel, one of the positions assumed by him in argument is, that the fact that under these circumstances defendant comes into the use and possession of the building, erected by the labor and money of plaintiff's assignor, entitles plaintiff to recover the value of that building, without aid from the contract on that subject in the lease, which we will consider hereafter. The authorities cited to support this position relate to the class of cases in which tenants have been permitted to remove fixtures from the premises which they have placed there during the tenancy.

Without elaborating the argument, it may be remarked that none of these authorities are applicable, for two reasons.

1. The character of the building, in the present case, does not bring it within any of the principles upon which certain erections have been held removable as fixtures.

2. The doctrine concerning this class of fixtures, which is a strong innovation upon the common law rule that all buildings become a part of the freehold as soon as they are placed upon the soil, has extended no further than the right of removal while the tenant is in possession; and has never been held to give a right of action against the landlord for their value.

We can very well understand that if defendant wrongfully entered upon the building, and retains wrongful possession of it, he may be liable to plaintiff in action of trespass *quare clausum fregit*. But, as we understand the facts, there is no such wrongful entry; and plaintiff bases his right to recover upon a very different view of the matter.

There was in the contract of lease between Link and Sherman a covenant that, at the expiration of ten years from the first day of May, 1859, it should be at the election of the lessor to purchase the buildings erected on the leased premises at their appraised value at that time, or renew the lease of said premises for the term of ten years longer, at a rent to be appraised in like manner; and this election, on the part of the lessor, was to be exercised at the expiration

of every ten years for the period of ninety-nine years. The plaintiff now contends,—because the defendant terminated the lease before the first ten years had expired, by virtue of a clause authorizing the lessor to do so for non-payment of debt,—that, therefore, defendant became liable to pay him the appraised value of the building. He accordingly gave a notice of his claim, and of his readiness to join in appointing appraisers, and then brought this suit.

It will be observed that while the right thus claimed is one growing out of the contract, and, as would reasonably be supposed, is for the failure to perform some obligation which that contract imposed, the action is neither covenant nor assumpsit, nor any other form of action founded on contract, but is an action on the case. And the counsel who framed the declaration objects in this court, "that the court below treated the case as one in an action of covenant, to enforce as against defendant Smith, the provision of the lease, upon the covenant on the part of Link as to the purchase of the building at the end of the term."

One obvious reason why plaintiff does not wish to be considered as suing on the contract is, the difficulty of holding that the covenant to purchase is one which runs with the land, or which, in any other manner, binds Smith as assignee of Link. An action of covenant would also be liable to the objection that the contingency on which the lessor was bound either to renew the lease or purchase the building, had never arisen.

To avoid these difficulties, the plaintiff brings an action on the case, in which he sets out this covenant with the entire lease and the other facts of the case, and seems to suppose that by virtue of the flexibility of this form of action, it may be found to embrace some principle which will justify a recovery. We have already seen that the law imposes upon the defendant no obligation to pay for the building apart from the contract. If the contract, when examined in the light of the facts proved, imposes no such obligation, we are at a loss to perceive what other ground of liability can be asserted against defendant.

Opinion of the court.

It is argued that the plaintiff's assignor became the owner, and had title or estate in the building as separated and distinguished from the land; and while the defendant had the right to enter, take possession, and hold for a failure to pay rent, that right was in some way subordinate to plaintiff's right to the house. But if we concede so singular a proposition as that the title to the soil was in defendant, while that of the building was in plaintiff, it by no means follows that defendant is bound to purchase plaintiff's building. The utmost that can be claimed on that subject is that Smith is bound by the covenant of Link, the lessor, to purchase at the end of ten years *or renew the lease.* He may always exercise his option in favor of the latter proposition, and by the contract may never be bound to purchase. So that if the title to the building is in plaintiff, and defendant has wrongful possession of it, we revert again to the proposition that trespass, or some form of action for use and occupation, is all the legal remedy which the plaintiff has.

But we cannot concede that plaintiff or his assignor had at any time the legal title to the building as distinct from the lot. The well-settled rule is, that such erections as this become a part of the land as each stone and brick are added to the structure. The only exceptions to this rule are the class of fixtures already adverted to, and such rights as may grow out of express contract. The contract before us was not intended to change this rule. The agreement to purchase means nothing more than that, in a certain event, the lessor will pay the lessee the value of such building, but there is no implication of any general title or ownership in the lessee apart from that event. This contingency has not occurred, and that it can never occur is the fault of the plaintiff and his assignor. This observation is also applicable to the supposed hardship of taking the building, the product of the plaintiff's money and labor, without compensation. It is from plaintiff's own default that the right to do this arises. He had his option to pay the rent due defendant, and retain the right to payment for his building when the time should arrive, or to give up his building, and with its loss relieve

himself of the burden of paying rent. He chose the latter with full knowledge, and there is no injustice in holding him to the consequence of his choice.

The covenant for re-entry provides that, in default of payment of rent, the lessor may enter "and the said premises repossess and enjoy, as in his first and former estate."

The plaintiff insists that the building is no part of such former estate, and defendant, therefore, does not become its owner by virtue of the re-entry. We have already shown that the building does become a part of the *land* as it is built. No such meaning was ever before attached to the use of the word estate in a legal document. It is used in reference to the nature of defendant's interest in the property, and not to the extent of improvements on the soil. As if the lessor had a fee simple estate, it reverted to him again as a fee simple. If he had a term for years, he was in again as part of his term. But it had no relation to the question of whether that estate might be more or less valuable when repossessed, or might bring to him more or less buildings.

We hold, then,

1. That without the aid of a special contract, the law imposes no obligation on the landlord to pay his tenant for buildings erected on the demised premises.

2. That treating the parties to this suit as standing in the places of the original lessor and lessee, no obligation arises from the contract in this case, that the lessor shall purchase or pay for the building erected on said premises, except as an option, to be exercised at the end of each period of ten years.

3. That the act of defendant in re-entering and possessing himself of the premises for plaintiff's failure to pay rent, imposes upon him no obligation to pay plaintiff the value of the building.

As the ruling of the court, to which exception was taken, was in conformity to these principles, the judgment must be

AFFIRMED WITH COSTS.