

the mortgagee should not sell or lease (even if construed a covenant not to enter) until after notice, since both the certainty as to the time, and the affirmative words of the right of enjoyment are wanting, which are essential to create a term for years."

I apprehend, therefore, that the rule as to fixtures, which applies as between mortgagor and mortgagee, must govern in this case. There can be no doubt, I think, that the ancient rigor of the rule has been somewhat mitigated in modern times, and that the tendency and spirit of recent decisions, both in this country and in England, is to a still greater relaxation. It is most manifest, that the Supreme Court of the United States, in the case of *Van Ness vs. Pacard*, 2 *Peters*, 137, was by no means disposed to recognise the distinction drawn by Lord Ellenborough, in *Elwes vs. Maw*, 3 *East*, 83, between annexations to the freehold for the purposes of trade or manufacture, and those made for the purposes of agriculture, and I strongly incline to think, that whenever the question is directly presented to that Court for adjudication the distinction will be disregarded. That it was not viewed with favor by Mr. Chancellor Kent may be fairly inferred from the remarks made by him on pages 346 and 347 of the 2d volume of his Commentaries. Whilst, however, I think there exists a disposition to soften the rule, not only as between landlord and tenant, but as between parties standing towards each other in relations in which it has hitherto been applied with more strictness, I certainly do not feel myself at liberty to apply it with a moderation not sustained by the adjudicated cases.

If the law upon the subject is still too stringent to comport with the policy of the country and the spirit of the age, it is far better it should be modified by the legislature, as was done in New York, as between heir and executor or administrator, 2 *Revised Statutes*, 24, sec. 6, than that the Courts should undertake it, influenced by what they may believe to be required by the exigencies of the times in which we live.

Entertaining these views, I shall proceed as briefly as possible to dispose of the remaining questions in the cause.