

*THE LAW IN RELATION TO CROPS—FRUCTUS  
INDUSTRIALES.*

It is well known that a fundamental distinction is taken between fruits, produced by the annual labor of man in sowing and reaping, mowing and cultivating, and such as constitute the natural growth of the soil. That corn, wheat, oats, barley, potatoes, etc., being *fructus industriales*, are considered as the representatives of the labor and expense bestowed upon them, and regarded as chattels; while grass, trees, fruit on trees, etc., being *fructus naturales*, are, in contemplation of law, a part of the soil of which they are the natural growth.

This distinction was fully and clearly taken in the noted and leading case of *Evans v. Roberts*.<sup>1</sup> The facts in that case were that a verbal contract had been made for the sale of potatoes not yet dug, and the objection was made that the agreement was void, on the ground that it was a contract of sale of an interest in or concerning land, within the meaning of the Statute of Frauds. The objection, however, was not sustained, and Mr. Justice Bayley distinguished the case of *Crosby v. Wadsworth*,<sup>2</sup> which involved the sale of growing grass. He said: "In that case the contract was for the growing grass, which is the natural and permanent produce of the land, renewed from time to time without cultivation. Now, growing grass does not come within the description of goods and chattels, and cannot be seized as such under a *feri facias*; it goes to the heir, and not to the executor; but growing potatoes come within the description of emblements, and are deemed chattels by reason of their being raised by labor and manurance. They go to the executor of tenant in fee simple, although they are fixed to the freehold,<sup>3</sup> and may be taken in execution under a *feri*

<sup>1</sup> 5 Barn. & Cress. 836.    <sup>2</sup> 6 East, 602.    <sup>3</sup> Com. Dig. tit. Biens, G.

*facias* by which the sheriff is commanded to levy the debt of the goods and chattels of the defendant." This case was decided in 1826, and established the doctrine that a contract of sale of *fructus industriales* was not a contract of sale of any interest in or concerning land, within the meaning of the fourth section of the Statute of Frauds. But the distinction, so clearly and satisfactorily stated in the case we have considered, is one that was taken in the earliest times. It was stated by Chief Justice Hobart, in the early and oft-quoted case of *Grantham v. Hawley*<sup>1</sup> (13 Jac. Rol. 3131), and his language shows that the distinction was then well known between the "*natural fruits,—as of grass or hay, which run merely with the land,*"—and the *fructus industriales*, adding that corn is "*fructus industriales*; so that he that sows it may seem to have a kind of property *ipso facto* in it divided from the land, and therefore the executor shall have it, and not the *heirs*." The case of *Evans v. Roberts* is therefore not important as taking for the first time the distinction between *fructus naturales* and *fructus industriales*, but it has nevertheless been considered as of the greatest importance, as establishing the doctrine that a sale of *fructus industriales* is not a sale of an interest in land, within the meaning of the Statute of Frauds. Upon the authority of that case that doctrine has been generally recognized and adopted, both in England, in Ireland, and in this country.<sup>2</sup> While, on the other hand, a contract for the sale of growing crops, *fructus naturales*, is governed by the fourth section of the Statute of Frauds, if it provides for vesting an interest in

<sup>1</sup> Hob. 132.

<sup>2</sup> *Jones v. Flint*, 10 Ad. & E. 753; *Dunne v. Ferguson*, 1 Hayes, 541; *Whipple v. Foote*, 2 Johns. 422; *Stewart v. Doughty*, 9 Johns. 112; *Austin v. Sawyer*, 9 Cow. 39; *Cutler v. Pope*, 13 Me. 377; *Bryant v. Crosby*, 40 Me. 9, 21; *Buck v. Pickwell*, 27 Vt. 157; *Ross v. Welch*, 11 Gray, 235; *Kingsley v. Holbrook*, 45 N. H. 313, 318; *Howe v. Batchelder*, 49 N. H. 204, 208; *Marshall v. Ferguson*, 23 Cal. 65; *Purner v. Piercy*, 40 Md. 212; *Davis v. McFarlane*, 37 Cal. 634; *Bernal v. Hovious*, 17 Cal. 541; *Graff v. Fitch*, 58 Ill. 377; *Bull v. Griswold*, 19 Ill. 631; *Bellows v. Wells*, 36 Vt. 600; *Carson v. Browder*, 2 Lea, 701.

the vendee before a severance of the crops from the soil.<sup>1</sup> As to the distinction between *fructus naturales* and *fructus industriales*, it is to be remarked that a growing crop of grass, even if grown from the seed, cannot be regarded as *fructus industriales*, for this reason: that it cannot be distinguished from the natural product.<sup>2</sup> Of course, when the agreement is for the sale of an interest in lands, under that section of the Statute of Frauds it is necessary that the agreement, "or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized." On the other hand, if the agreement for the sale of *fructus industriales* is an agreement for the sale of "goods, wares, and merchandise," within the meaning of the seventeenth section of that statute, then it is necessary that the agreement should be in writing if the value is over a specified amount, unless there has been a payment made or an acceptance of a part of the goods.<sup>3</sup>

The general rule is, that while as between vendor and vendee, and as against strangers and trespassers, the title to personal property passes without delivery, yet as against subsequent purchasers and attaching creditors an actual or constructive delivery is essential to the validity of the sale.<sup>4</sup> But while the general policy of the law will not permit the owner of personal property to sell it, and still continue in possession of it, it is necessary that the rule be somewhat modified in the case of a sale of growing crops. To require the purchaser of growing crops to take manual possession of them before the time to harvest comes, would be to practi-

<sup>1</sup> Rodwell v. Phillips, 9 Mee. & W. 502; Crosby v. Wadsworth, 6 East, 602; Campbell v. Roots, 2 Mee. & W. 248.

<sup>2</sup> Reiff v. Reiff, 64 Pa. St. 134. And see 1 Will. on Ex'rs, 783.

<sup>3</sup> Benj. on Sales, sect. 114.

<sup>4</sup> Ludwig v. Fuller, 17 Me. 162; Vining v. Gilbreth, 39 Me. 496; Fairfield Bridge Co. v. Nye, 60 Me. 372; Packard v. West, 4 Gray, 307; Mt. Hope Iron Co. v. Buffington, 103 Mass. 62; Thorndike v. Bath, 114 Mass. 116; Haak v. Linderman, 64 Pa. St. 499; Ticknor v. McClelland, 84 Ill. 471, 474; Webster v. Granger, 78 Ill. 230; Lewis v. Swift, 54 Ill. 436; Morgan v. Taylor, 32 Texas, 363.

cally deny the right of the owner to sell such crops until harvest time. The latest case we have been able to find in which this question has been considered is the case of *Ticknor v. McClelland*,<sup>1</sup> decided in the Supreme Court of Illinois. In that case there had been a sale of standing corn, which was afterwards levied on as the property of the vendor and sold at execution sale. But the court held that in case of the sale of standing crops, the possession is in the vendee until it is time to harvest them, and that until then he is not required to take manual possession of them. Such is undoubtedly the proper view to take of this question, so far as the validity of the sale is concerned. Strictly speaking, however, we doubt the correctness of saying that the possession is in the vendee. "We know of no rule or principle of law by which the possession of a crop growing upon land can be separated from the land, so as to place the possession of the land in one, and the crop in another. The crop while growing is attached to and composes part of the land, and must necessarily be in the possession of whomsoever the land is possessed."<sup>2</sup> Instead of declaring that the possession is in the vendee, it would be better to say that the possession is in the vendor in trust for the vendee, and that the rule that there must be a change of possession does not extend to property which is not susceptible of delivery as a growing crop.<sup>3</sup> In a case in Maine, it was held that a purchase of growing crops, though paid for, would pass no title against the creditors of the vendee until possession or delivery was had, and that unless such possession and delivery was had prior to the death of the vendor, and to the issuing of a commission of insolvency upon his estate, the title would be in the administrator in trust for creditors.<sup>4</sup> The purchaser of a growing crop, whether at private or at execution sale, has of course a right to enter upon the premises to

<sup>1</sup> 84 Ill. 471.

<sup>2</sup> *Foster v. Fletcher*, 7 T. B. Mon. 534; *s. c.*, 18 Am. Dec. 208.

<sup>3</sup> See *Robbins v. Oldham*, 1 Duv. 28; *Cummings v. Griggs*, 2 Duv. 87; *Morton v. Ragan*, 5 Bush, 334; *Bellows v. Wells*, 36 Vt. 602.

<sup>4</sup> *Stone v. Peacock*, 35 Me. 385.

gather the crop.<sup>1</sup> The purchaser of a growing crop is not only entitled to a reasonable time after the crop matures in which to gather it, but to a reasonable time after notice given to him by the vendor. So that an instruction that unless a purchaser of a crop of corn gathered it within a reasonable time after maturity, the owner of the field could turn in his cattle without responding to his vendee for the damage suffered by the destruction of the crop, was held erroneous.<sup>2</sup>

Property not in being could not be the subject of a valid mortgage at common law, and a mortgage of an unplanted crop has, therefore, generally been held void at law.<sup>3</sup> But in equity, the rule was that the lien attached as soon as the subject of the mortgage came into existence, and was enforced against the mortgagor and those holding under him with notice.<sup>4</sup> In a case in Illinois it was said:—

“There is some conflict in the authorities, but we think the reason and common sense of the thing is, the crop of wheat, corn, and oats, the seed for which even might not have been in existence when the mortgage was made, and was not put into the ground until the spring of 1878, had no potential existence on the third day of January, 1877, at which time the mortgagor had no idea, in all probability, as to the particular parts of land he would put into this or that crop, or how much of it, if any, he would cultivate for any particular crop. Such crops, *fructus industriales*, are entirely

<sup>1</sup> Davidson v. Waldron, 31 Ill. 120; Stewart v. Doughty, 9 Johns. 108, 112; Whipple v. Foot, 2 Johns. 423.

<sup>2</sup> Ogden v. Lucas, 48 Ill. 492.

<sup>3</sup> Tomlinson v. Greenfield, 31 Ark. 558; Cressey v. Cressey, 17 Hun, 120; Milliman v. Neher, 20 Barb. 37; Otis v. Sill, 8 Barb. 102; McCaffrey v. Woodin, 65 N. Y. 459; Vinson v. Hallowell, 10 Bush, 538; Hutchinson v. Ford, 9 Bush, 318; Ross v. Wilson, 7 Bush, 29; Stowell v. Bair, 5 Bradw. 104; Comstock v. Scales, 7 Wis. 159; Redd v. Burrus, 58 Ga. 574; Bank of Lansingburgh v. Crary, 1 Barb. 542, 551; Gettings v. Nelson, 86 Ill. 593; Butt v. Ellett, 19 Wall. 544; Cayce v. Stovall, 50 Miss. 396. And see Cudworth v. Scott, 41 N. H. 456.

<sup>4</sup> Apperson v. Moore, 30 Ark. 56; Butt v. Ellett, 19 Wall. 544; White v. Thomas, 52 Miss. 49; Everman v. Robb, 52 Miss. 653, 662; Sellers v. Lester, 48 Miss. 513; Mitchell v. Winslow, 2 Story, 631; Ellett v. Butt, 1 Woods, 214, 218.

distinguishable from those of fields already in grass for hay, fruit orchards, etc., planted and in bearing condition, the products of which are *fructus naturales*; for, as to the former, it depends upon the will, determination, labor, and industry of the farmer, when or how they exist at all, and when produced, as in this case, they are after-acquired property, while the latter class have their roots—the living agencies—already in the soil, and, being perennial, they are dependent only on the succession of the seasons for their growth and maturity. Therefore, the law regards them as having a potential existence, even before they commence to grow in the form of the product. But the crops in this case, the seeds for which were not put into the ground until fifteen months after the mortgage, can no more properly be regarded as having a potential existence in the soil at the time of the mortgage than does the unbuilt ship in the timbers of the forest, or boots and shoes in the skins of the living herd.”<sup>1</sup> There are, however, cases which declare that a mortgage of an unplanted crop made by one in possession of the land will be held valid at law; and a distinguished writer even lays it down that such a mortgage “is generally regarded as valid at law.”<sup>2</sup> But we think the statement that it is *generally* so regarded can hardly be sustained. We think the weight of authority is against its validity at law. But whether the mortgage is to be considered as valid at law or not, it is certain that if the mortgagee takes possession under the mortgage when the crops come into existence, his rights will be recognized and maintained in the courts of law. For while the mortgage may not have conveyed any legal title to the property, yet it was a valid license to enter and seize the property as soon as it was acquired or came into existence; and after such entry title vested in the mortgagee even at law. *Licet dispositio de interesse futuro sit inutilis, tamen*

<sup>1</sup> *Stowell v. Bair*, 5 Bradw. 107, 108, per McAllister, J.

<sup>2</sup> *Jones on Chattel Mort.*, sect. 143; *Arques v. Wasson*, 51 Cal. 620; *Robinson v. Ezzell*, 72 N. C. 231; *Thrash v. Bennett*, 57 Ala. 161; *Van Hoozer v. Cory*, 34 Barb. 9, 12; *Conderman v. Smith*, 41 Barb. 404; *Emerson v. Eastport*, etc., R. Co., 67 Me. 387, 392; *Farrar v. Smith*, 64 Me. 74, 77.

*potese fieri declaratio precedere quæ sortiatur effectum interveniente novo actu.*

As expressed by Mr. Commissioner Dwight: "The general idea running through these cases in a court of law, appears to be that the executory agreement operates as a license, authority, or power, revocable in its nature, until the creditor is either put into possession of the goods at the time, or after they come into existence, or are vested in the debtor. As soon as that new act has intervened, the lien of the creditor becomes perfect, and in the absence of statutory regulation, prevails over the liens of subsequent executions."<sup>1</sup> And as between mortgagor and mortgagee, the mortgagor cannot recover from the mortgagee the property thus taken possession of. Having enjoyed the consideration, he will not be allowed to repudiate the agreement under which he obtained it, but will be estopped from maintaining an action for the property.<sup>2</sup>

It may be noted, however, in this connection, that it has been held that the lessor of land may stipulate in a lease that the crops grown on the premises shall remain the property of the lessor until the rent is paid. That such a stipulation will be upheld as between the parties and third persons.<sup>3</sup> It is conceded in these cases that the sale of a thing not in existence is inoperative, but it is insisted that when the thing thereafter to be produced is the produce of land, the *owner* of the land may retain the general property of the thing produced, unless there is some fraud in the contract.

A valid mortgage may be made of a part of a growing crop if the part so mortgaged is so described as to be capable of identification. Thus it has been held by the Supreme Court of Georgia that a mortgage, made in May, of six bales of cotton growing and being grown and produced on a des-

<sup>1</sup> McCaffrey v. Woodin, 65 N. Y. 463. And see Congreve v. Evetts, 10 Exch. 298; Carr v. Allatt, 3 Hurl. & N. 964.

<sup>2</sup> Moore v. Byrum, 10 S. C. (N. S.) 462, 463.

<sup>3</sup> Bellows v. Wells, 36 Vt. 601; Gray v. Stevens, 28 Vt. 1; Briggs v. Oaks, 26 Vt. 138; Smith v. Atkins, 18 Vt. 461; Lewis v. Lyman, 22 Pick. 437.

ignated plantation cultivated by the mortgagor, such bales to average a certain designated weight, to be covered with bagging and bound with iron ties, and delivered at a certain warehouse on or before the fifteenth day of October following, was sufficiently specific in the description of property mortgaged, and that the mortgagee could prove that the mortgagor severed such cotton from the rest of the crop, and delivered it at the warehouse according to his agreement.<sup>1</sup> But it has been held that a mortgage of so much cotton as will make two bales, each to be of a certain weight, is void on the ground that no definite part of the crop was mortgaged.<sup>2</sup> A mortgage of growing crops, executed, acknowledged, and recorded in due form, is valid as against third parties without delivery of possession of the property mortgaged; but it is held that the lien of such mortgage ceases as against subsequent purchasers, after the crop is harvested, unless when harvested it is delivered to the mortgagee.<sup>3</sup> But it has been held that a chattel mortgage upon a growing crop, as against an attaching creditor, continues to be a lien on the crop, in possession of the mortgagor, after severance and removal from the land.<sup>4</sup>

A landlord has no such interest in crops grown on rented lands as can be made the subject of a valid mortgage.<sup>5</sup> And a mortgage of crops by one who is cultivating the farm upon shares covers only his share.<sup>6</sup> A crop being a chattel interest, the mortgage of it should, of course, be recorded as a chattel mortgage.<sup>7</sup>

In England, the legal mortgagee of real property is entitled to enter immediately after the execution of the mortgage, by virtue of the estate thereby vested in him.<sup>8</sup> And so long as he abstains from taking possession, the mortgagor is not

<sup>1</sup> *Stephens v. Tucker*, 55 Ga. 543.

<sup>2</sup> *Williamson v. Steele*, 3 Lea, 527. And see *Thurman v. Jenkins*, 2 Baxt. 426.

<sup>3</sup> *Quiriauque v. Dennis*, 24 Cal. 154; *Goodyear v. Williston*, 42 Cal. 11.

<sup>4</sup> *Rider v. Edgar*, 54 Cal. 127.

<sup>5</sup> *Broughton v. Powell*, 52 Ala. 123.

<sup>6</sup> *McGee v. Fitzer*, 37 Texas, 27.

<sup>7</sup> 1 *Jones on Mort.*, sect. 151.

<sup>8</sup> 1 *Fish. L. of Mort.*, sect. 715.

bound to account to him for the rents and profits, and the mortgagee is not entitled to the growing crops which have been removed by the mortgagor between the date of the mortgage and the recovery of possession, unless he can claim them as emblements under an express contract of tenancy.<sup>1</sup> But he has a right to all crops growing on the premises when he takes possession.<sup>2</sup> In this country, on the other hand, the rule is that the legal estate is in the mortgagor until foreclosure of the mortgage, upon default being made, and the growing crops pass with the soil to the purchaser under the foreclosure deed.<sup>3</sup>

It is to be noted, however, that in Ohio a different rule was laid down from that which has been elsewhere recognized. While it was conceded that on a sale of realty the crops would pass to the grantee, in the absence of a reservation thereof, yet that the doctrine did not apply to judicial sales when conducted under their system of appraisements. "Between a mortgagor and mortgagee, a mortgagor in possession is a tenant at will," said the court, "and if the emblements are not protected in his hands, it is because he may obtain their value in account on bill to redeem. But he may lawfully lease, subject to the mortgage; and when the mortgagee defeats the estate, either by entry or judicial sale, the annual crops are saved for the tenant, under the common rule relating to emblements, because the term of the lease is uncertain."<sup>4</sup> This, of course, cannot be regarded as law outside the State of Ohio. Not only does the purchaser take the crop, but it has even been held that, as between the mortgagee of land who purchases at the foreclosure sale, and the execution creditors of the mortgagor in possession, the former is entitled to the growing

<sup>1</sup> 2 Fish. L. of Mort., sect. 1491.

<sup>2</sup> *Ibid.* Ex parte Temple, 1 G. & J. 216.

<sup>3</sup> *Jones v. Thomas*, 8 Blackf. 428; *Scriven v. Moote*, 36 Mich. 64; *Ruggles v. First National Bank*, 43 Mich. 192; *Gossom v. Donaldson*, 18 B. Mon. 230; *Bank of United States v. Voorhees*, 1 McLean, 221; *Gray v. Brignardello*, 1 Wall. 634; *Lane v. King*, 8 Wend. 584; *Aldrich v. Reynolds*, 1 Barb. Ch. 613; *Ledyard v. Phillips*, 13 Rep. 595.

<sup>4</sup> *Cassilly v. Rhodes*, 12 Ohio, 88.

crops.<sup>1</sup> As the rule is that the crops pass with the soil, it has been said that on proper application the court may provide for their preservation until possession is given to the purchaser.<sup>2</sup> The confirmation of a foreclosure sale, covering growing crops, relates back to the time of sale, and entitles the purchaser to control the crops from that time, if no equities prevent, and after due notice has been given to interested parties.<sup>3</sup>

It has been held by the Supreme Court of California that where a debtor gives to his creditor the possession of a growing crop, under an agreement that such creditor shall harvest it and apply the proceeds to the payment of the debt, the creditor thereby obtains a lien on the crop superior to the lien acquired by another creditor to whom the debtor gave a mortgage on the crop after the first creditor had taken possession, and with notice of the rights of the first creditor.<sup>4</sup>

Laborers on a farm have no lien on the crop produced for their wages. The Supreme Court of Tennessee was, not long since, called on to pass on this question, and the law was declared as we have stated it. "If we should decide," said the court, "that the farm laborer has a lien on the crop, or is entitled out of the proceeds of the crop to be paid for his services, to the exclusion of all other demands until he is paid, it would be *jus dare*, not *jus dicere*."<sup>5</sup>

In Louisiana, however, the law has secured to the laborers a lien on the crops, and it has a preference over the lien secured to the landlord.<sup>6</sup>

It is held, in a recent case in Florida, that a vendor of land has not, by virtue of his lien for the unpaid purchase-money, any lien on the crops grown on the land. This doctrine is announced in a recent case in Florida, where the question was whether a vendor had such an

<sup>1</sup> *Crews v. Pendleton*, 1 Leigh, 297; *s. c.* 19 Am. Dec. 750.

<sup>2</sup> *Ruggles v. First National Bank*, 43 Mich. 192.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Lovensohn v. Ward*, 45 Cal. 8.

<sup>5</sup> *Hunt v. Wing*, 57 Tenn. (10 Heisk.) 139, 149.

<sup>6</sup> *Duplantier v. Wilkins*, 19 La. An. 112.

equitable lien upon the crops, by virtue of his right to charge the land for his purchase-money, as would give him a preference over a subsequent *bona fide* mortgage-creditor with or without notice of the lien on the land.<sup>1</sup> So, mere ownership of the land confers no right to possess and dispose of the crop raised thereon by tenants. The landlord's right to rent must be asserted and perfected in accordance with and under the provisions of law.<sup>2</sup> At the common law, as is well known, the landlord had a right to charge the goods of the tenant remaining on the premises for his rent. But this right of distress, at the ancient common law, did not extend to growing crops.<sup>3</sup> But by the statute 11 Geo. II., c. 19, landlords were empowered to distrain growing crops on the estate demised, and to cut and gather them when ripe. And in Massachusetts the courts have held, that while goods that could not be returned in the same plight in which they were taken could not be distrained,<sup>4</sup> yet that corn or other annual product of the soil, if ripe and fit for harvest, could be cut down and attached.<sup>5</sup> While, independent of statutes the landlord has no lien on the crops,<sup>6</sup> yet such a lien has been secured to him by statutory provision in many of the States. He has such lien in Alabama, Arkansas, Georgia, Illinois, Indiana, Kansas, Kentucky, Maryland, Mississippi, Missouri, Texas, and possibly elsewhere.<sup>7</sup> A material distinction, and one of great importance, exists between the right to levy a distress on the crop, and the statutory lien thereon. The right to distrain

<sup>1</sup> *Wooten v. Bellinger*, 17 Fla. 289.    <sup>2</sup> *Robinson v. Kruse*, 29 Ark. 575.

<sup>3</sup> 1 Roll. Abr. 666; Co. Lit. 47 b.    <sup>4</sup> *Bond v. Ward*, 7 Mass. 123.

<sup>5</sup> *Penhallow v. Dwight*, 7 Mass. 34; *Heard v. Fairbanks*, 5 Metc. 111.

<sup>6</sup> *Loomis v. Lincoln*, 24 Vt. 153; *Doty v. Heth*, 52 Miss. 530, 536; *Arbuckle v. Nems*, 50 Miss. 556.

<sup>7</sup> Alabama Code (1876), p. 785, sects. 3474, 3477; *Sevier v. Shaw*, 25 Ark. 609; Georgia Code (1873), p. 344, sect. 1977; Illinois Rev. Stats., vol. 1, p. 661, sect. 31; Indiana Rev. Stats. (1881), sect. 5224; Kansas Gen. Stats. (1868), p. 542, sect. 24; Kentucky Gen. Stats. (1873), pp. 604, 608, sects. 1, 13; Maryland Rev. Code (1878), p. 706, sect. 14; Mississippi Rev. Code (1880), sect. 1301; Missouri Rev. Stats. (1879), vol. 1, p. 516, sect. 3083; Texas Rev. Stats. (1879), p. 450, art. 3107.

was limited, and could only be exercised on the goods or property of the tenant so long as such property continued to be on the demised premises. The right was lost if not exercised before the expiration of the term. On the other hand, the statutory lien of the landlord is not impaired by an expiration of the term or the removal of the crops. It continues until the crop passes into the possession of a purchaser without notice.<sup>1</sup> If the crops pass to one with notice, and he sells them, an action on the case can be maintained against him.<sup>2</sup> The crops being on the place owned by the landlord is notice to all the world of the relation between him and his tenant, and of his lien.<sup>3</sup> His lien is paramount<sup>4</sup> and has priority over a mortgage of the crops,<sup>5</sup> and can be enforced by attachment.<sup>6</sup> But the lien of the landlord confers on him no title to the crops which would authorize him to bring an action of trover for them against one who should convert them to his own use.<sup>7</sup> And when there are separate contracts of renting, the landlord's lien extends to the crop grown on each of the parcels of land, but only for the rent of such parcel.<sup>8</sup>

When provision is made in a lease of a farm that the crops shall be holden for the rent and be at the disposal of the lessor, in the same manner as if he were in the actual occupation of the farm, as against subsequent purchasers and creditors of the lessee, they remain the property of the lessee until the lessor takes actual possession of the same.<sup>9</sup> If the lease is of such a character, however, that the lessor and lessee are tenants in common, then it would not be necessary that there should have been a delivery of the crop to the lessor.<sup>10</sup> But where the statute gives to the landlord a

<sup>1</sup> *Lomax v. Le Grand*, 60 Ala. 537; *Governor v. Davis*, 20 Ala. 366.

<sup>2</sup> *Hussey v. Peebles*, 53 Ala. 432. See, too, *Neifert v. Ames*, 26 Kan. 515.

<sup>3</sup> *Lomax v. Le Grand*, *supra*. <sup>4</sup> *Atkins v. Womeldorf*, 53 Iowa, 150.

<sup>5</sup> *Sevier v. Shaw*, 25 Ark. 609.

<sup>6</sup> *Rotzler v. Rotzler*, 46 Iowa, 189; *Crawford v. Coil*, 69 Mo. 588; *Hubbard v. Moss*, 65 Mo. 647.

<sup>7</sup> *Folmar v. Copeland*, 57 Ala. 588. <sup>8</sup> *Nelson v. Webb*, 54 Ala. 436.

<sup>9</sup> *Butterfield v. Baker*, 5 Pick. 522; *Munsell v. Carew*, 2 Cush. 50.

<sup>10</sup> *Beaumont v. Crane*, 14 Mass. 400.

lien on crops grown on the premises in any year for the accruing rent, it is held to be not necessary that the landlord should obtain an attachment against the property, and that the courts will enjoin the removal or disposition of the crop while the lien continues.<sup>1</sup>

It being settled that a crop, whether growing or standing in the field ready to be harvested, is no part of the realty, but personal estate, it follows that such crops are liable to be seized on execution, and to be sold as other personal estate.<sup>2</sup> And such was the common-law rule.<sup>3</sup> But in *Adams v. Turner*,<sup>4</sup> the Supreme Court of Alabama, in 1843, evidently doubted whether an immature crop could be taken on execution at common law, but without determining the point. It was then held, however, that if the right existed at common law, it did not exist in Alabama, where the statute provided it should not be lawful to levy an execution on crops until the crop was gathered. "The idea that the lien attached," said the court, "upon the planted crop as soon as the execution was delivered to the sheriff, though the right to levy it was postponed until a severance took place, is attempted to be deduced from the last words of the section cited, viz.: 'until the crop is gathered.' These words cannot, upon any just principles of construction, be regarded so potent as to give to an execution a retrospective effect. They do not refer to the lien, if they did they would postpone it until the crop was gathered; but it is the levy they relate to and postpone until that event takes place." The lien and the right to levy were said to be so intimately connected, that if the latter was taken away or suspended, it amounted to a destruction of the former. This ruling was affirmed in 1852,<sup>5</sup> but at a later period the common-law rule

<sup>1</sup> *Price v. Roetzell*, 56 Mo. 500.

<sup>2</sup> *Smith v. Tritt*, 1 Dev. & B. 241; *Shannon v. Jones*, 12 Ired. 206; *Coombs v. Jordan*, 3 Bland, 312; *McKenzie v. Lampley*, 31 Ala. 526; *Hartwell v. Bissell*, 17 Johns. 128; *Shepard v. Philbrick*, 2 Denio, 175; *Stewart v. Doughty*, 9 Johns. 108; *Parham v. Thompson*, 2 J. J. Marsh, 159; *Whipple v. Foot*, 2 Johns. 422; *Patapsco v. Magee*, 86 N. C. 350.

<sup>3</sup> *Poole's Case*, 1 Salk. 368; *Scorell v. Boxall*, 1 Y. & J. 398.

<sup>4</sup> 5 Ala. 744.

<sup>5</sup> *Evans v. Lamar*, 21 Ala. 333.

prevailed.<sup>1</sup> It may be remarked, too, that growing crops may be sold as personalty on execution, although the land is mortgaged.<sup>2</sup> It has been held in a case recently decided in Illinois that, while as between the parties to a judgment, the seizure and sale of growing crops, on execution issued on the judgment, constitutes a severance from the realty, yet as respects the grantee in a deed of trust given by the execution-debtor before the execution became a lien, such seizure and sale will not work a severance. The purchaser at the sheriff's sale will take subject to the rights of the grantee in the trust deed.<sup>3</sup> Under the laws of Kentucky, a growing crop is not subject to execution.<sup>4</sup>

The question has been raised whether an action of replevin may be maintained for the carrying away of crops. In *De Mott v. Hagerman*,<sup>5</sup> decided in the Supreme Court of New York in 1828, it was held that where one enters and ousts the owner of land, continues in possession, and cuts and removes the crops, though they were sown by the owner, yet replevin will not lie for crops removed. "If the entry was lawful, the property of the wheat and rye was in the defendants. If it was unlawful and worked a disseisin, trespass *quare clausum fregit*, might have been maintained for the first entry, and after a recovery in ejectment, damages would follow for the mesne profits. But I do not see how the parties can maintain an action for the wheat and rye raised, disconnected from the remedy by trespass. If that be allowable, a plaintiff may sue in trover for wheat or corn raised on land of which he has been disseised, and that, too, before his re-entry. The action of replevin does not lie in such a case." But, as is pointed out by the Supreme Court of Indiana, in *Rowell v. Klein*,<sup>6</sup> decided in 1873, that decision was rendered when much importance was attached to the form rather than to the substance of the action, and

<sup>1</sup> *McKenzie v. Lampley*, 31 Ala. 526. <sup>2</sup> *Preston v. Ryan*, 45 Mich. 174.

<sup>3</sup> *Anderson v. Strauss*, 98 Ill. 485.

<sup>4</sup> *Blincoe v. Lee*, 12 Bush, 358; *Brewer v. Crosby*, 8 Bush, 388; *Morton v. Ragan*, 5 Bush, 334.

<sup>5</sup> 8 Cow. 220.

<sup>6</sup> 44 Ind. 296.

was based on a misconception of form. "The ruling in the above case," said the court, "is technical and presents a degree of nicety not recognized by many very high authorities.<sup>1</sup> We believe it was always the rule that, when trespass would lie for the severing from the realty of that which by the severance became personalty, replevin would lie for the recovery of such personalty, and that trespass could be maintained in any and all cases where the plaintiff had the right of property, and also the right of immediate possession, although the actual possession was in another."

In Missouri, the court has ruled that replevin will not lie for a certain number of bushels of corn, the crop standing ungathered in the field.<sup>2</sup> But in a case subsequently decided in the same court, it was held that corn in the stalk was the subject of replevin, and that without regard to whether it was growing or not.<sup>3</sup> We think there can be no doubt but that replevin may be maintained for crops wrongfully severed and carried away.<sup>4</sup> And it is equally clear and well established that replevin will not lie at common law, by one out of possession of the realty against one in possession, under claim of title, for chattels which have become such by severance from the realty.<sup>5</sup> So, it has been held that trover would not lie for stone and gravel, the defendant being in possession and claiming adversely,<sup>6</sup> and that an action would not lie for money had and received under the circumstances.<sup>7</sup> The reason assigned was that the right to the land was the foundation of the action, and that it was not in the power of a party to change a local into a transitory action.

When the occupant of land, whether possessed of an

<sup>1</sup> *Waterman v. Matteson*, 4 R. I. 539; 1 Chitty Pl. 149, and note 1; *Nelson v. Burt*, 15 Mass. 204; *The People v. Alberty*, 11 Wend. 161; *Schermerhorn v. Buell*, 4 Denio, 422; *Haythorn v. Rushforth*, 4 Harrison, 160; *Ely v. Ehle*, 3 N. Y. 506.

<sup>2</sup> *Jones v. Dodge*, 61 Mo. 368.

<sup>3</sup> *Garth v. Caldwell*, 72 Mo. 622.

<sup>4</sup> See *Wells on Replevin*, sect. 74; *Jarratt v. McDaniel*, 32 Ark. 604.

<sup>5</sup> *Renwick v. Boyd* (Supreme Court of Pennsylvania, Feb. 20, 1882), 13 Reporter, 571. And see *Brown v. Caldwell*, 10 Serg. & R. 114.

<sup>6</sup> *Mather v. Trinity Church*, 3 Serg. & R. 509.

<sup>7</sup> *Baker v. Howell*, 6 Serg. & R. 476.

estate in fee simple or of an estate determining with his own life, has planted a crop and died before it has been harvested, the rule at common law was, that as between the executor and the heirs at law, the crop went to the executor as compensation for the expense incurred in getting the land ready for the crop—the tilling, manuring, and sowing the land.<sup>1</sup> But the rule was different as between the executor and the devisee of the land. As between them the crop goes to the devisee.<sup>2</sup> The rule does not hold, however, if a contrary intention has been manifested by the testator.<sup>3</sup> In this connection it may be interesting to read the language of Mr. Justice Walton, of the Supreme Court of Maine, in a recent case in that court.<sup>4</sup> After noticing the fact that the common-law rule had been changed in some of the States by statute, he says: “We are inclined to think the law is best as it is; that, although the rule which gives to the devisee of the land the unharvested crops, and denies them to the heir at law, may seem to be unphilosophical, it is nevertheless founded in practical wisdom. Not unfrequently the heirs at law are mere children, without discretion of their own to enable them to care for the growing crops, and without legal guardians to aid them. They are sometimes scattered and far away. The death of the ancestor may be sudden, and the condition

<sup>1</sup> *Fisher v. Forbes*, 9 Vin. Abr. 373, tit. Emblements, pl. 82; *Latham v. Atwood*, Cro. Car. 515; *Gwin v. Hicks*, 1 Bay, 503; *Laurin v. McCall*, 3 Strob. 21; *Evans v. Inglehart*, 6 Gill & J. 173; *Singleton v. Singleton*, 5 Dana, 92; *Thornton v. Burch*, 20 Ga. 791; *Penhallow v. Dwight*, 7 Mass. 34; *Wadsworth v. Allcott*, 6 N. Y. 64.

<sup>2</sup> Cro. Eliz. 61; Co. Lit., sect. 68, note 2; 4 Bac. Abr. (Bouvier's ed.) 83; Bull. N. P. 34; *Spencer's Case*, Winch, 51; *West v. Moore*, 8 East, 339; *Cox v. Godslave*, 6 East, 604, note; *Dennett v. Hopkinson*, 63 Me. 353; *Hathorn v. Eaton*, 70 Me. 219; *Budd v. Hiler*, 29 N. J. L. 43; *Shofner v. Shofner*, 5 Sneed (Tenn.) 94; *Fetrow v. Fetrow*, 50 Pa. St. 253; *Pratt v. Coffman*, 27 Mo. 424; *Carnagy v. Woodcock*, 2 Munf. 234; *Grubb's Appeal*, 4 Yeates, 23; *Creel v. Kirkham*, 47 Ill. 344; *Smith v. Barham*, 2 Dev. Eq. 420; *s. c.*, 25 Am. Dec. 721.

<sup>3</sup> *Spencer's Case*, 1 Winch, 51; *Cox v. Godslave*, 6 East, 604, note; *Fetrow v. Fetrow*, 50 Pa. St. 253; *Pratt v. Coffman*, 27 Mo. 424; *Shofner v. Shofner*, 5 Sneed (Tenn.), 94.

<sup>4</sup> *Dennett v. Hopkinson*, 63 Me. 350, 355.

of his family such that the crops, unharvested as well as harvested, may be needed for their immediate support. Will it not be better, therefore, in the great majority of cases, that all the crops, the unharvested as well as the harvested, should be regarded as personal property, and go to the administrator? We cannot resist the conviction that it is better that it should be so. Not so, however, of a devisee of the land. He is the selected object of a specific donation. If, for any cause, it is probable that he will not be in a condition to take charge of it at the donor's death, the contingency can be provided in the will. It is a matter which the testator would be likely to think of and provide for if necessary. If there is no such provision, and the gift is unconditional, without words of limitation or restraint, we think it may fairly be presumed that it was the intention of the donor that his donee should take the land as a grantee would take it,—with the right to immediate possession and the full enjoyment of all that is growing upon it, as well the unsevered annual crops, as the more permanent growth." It has been laid down that if A., seized in fee, sows the land and devises to B. for life, remainder to C. in fee, and dies before severance, (1) that the executor of A. shall not have the emblements; (2) and that if B. dies before severance, his executor shall not have them, but they shall go to him in remainder; (3) but if the devise had been only to B., and B. had died, then the executor of B. should have had the emblements, though B. did not sow.<sup>1</sup>

By the common law the widow is entitled to the crops growing, at the death of her husband, upon that part of the homestead farm which is assigned to her by the heir for her dower.<sup>2</sup> And the reason assigned is that the wife is in *de optima possessione viri*,—i.e., that she derives title and possession directly from her husband, and therefore above the title of the executor or heir. But the widow remaining in possession of the mansion and plantation of her husband

<sup>1</sup> Co. Lit. 55 b.

<sup>2</sup> 2 Inst. 81; Dyer, 316; Park on Dower, 355; Parker v. Parker, 17 Pick. 236; Catlin v. Ware, 9 Mass. 218.

until her dower is assigned to her, is held not to be entitled to the crops growing on the plantation at the time of the death of her husband.<sup>1</sup> So, where dower has not been assigned, and the widow continues in possession of the mansion house and plantation under statutory provisions, the rule is the same, and she is not entitled to the crops.<sup>2</sup> And where a doweress in possession of land on which she had sown a crop of wheat, consented, in a suit for partition, that her dower in the premises might be sold, and the property was sold, and she received her share of the proceeds of the sale, it was held that the growing crop passed by the sale, and that she could not claim the same as emblements, her estate having terminated by her own act in consenting to the sale.<sup>3</sup>

As to tenants at will, it is laid down as follows in Littleton's Institutes: "If the lessee soweth the land, and the lessor, after it is sown and before the corne is ripe, put him out, yet the lessee shall have the corne, and shall have free entry egress and regress to cut and carrie away the corne, because he knew not at what time the lessor would enter upon him."<sup>4</sup> The comment of Sir Edward Coke is: "The reason of this is, for that the estate of the lessee is uncertaine, and therefore, lest the ground should be unmanured, which should be hurtfull to the commonwealth, he shall reape the crop which he sowed in peace, albeit the lessor doth determine his wil before it be ripe. And so it is if he set rootes, or sow hempe or flax, or any other *annual* profit, if, after the same be planted, the lessor oust the lessee; or if the lessee dieth, yet he or his executors shall have that yeare's crop. But if he plant young fruit-trees or young oaks, ashes, elmes, etc., or sow the ground with acornes, etc., then the lessor may put him out notwithstanding, because they will yeeld no present annual profit." From the earliest times to the present, then, the law has been that where an estate is of an

<sup>1</sup> Budd v. Hiler, 3 Dutch. 43.

<sup>2</sup> Budd v. Hiler, *supra*; Whaley v. Whaley, 51 Mo. 36; Kain v. Fisher, 6 N. Y. 598.

<sup>3</sup> Talbot v. Hill, 68 Ill. 106.

<sup>4</sup> Lib. I., ch. 8, sect. 68.

uncertain termination, and is suddenly concluded by the act of God, or that of the lessor, the lessee or his legal representatives may claim the emblements.<sup>1</sup> But the rule is otherwise where the tenant's interest is to terminate at a fixed time, or if he by his own act has brought his lease to an end.<sup>2</sup> In such cases he is not allowed to claim the emblements, inasmuch as it is by his own folly that he has sowed that which he could not reap. So, where a woman held an estate in lands during her widowhood, and sowed the land, and before severance married, it was held that the crop belonged to the landlord of whom she held, and not to her or to her husband.<sup>3</sup> So, too, where the tenant for life forfeits his estate by committing waste.<sup>4</sup> And where a minister of a church, entitled to the possession of the parsonage land, while in possession thereof sowed the land with grain, then sold the growing crop, and voluntarily ceased to be the minister of that church, and removed from the parsonage land before the crop was harvested, it was held that his vendee did not obtain such title as would entitle him to maintain trover for the crop.<sup>5</sup> The sale could not vest in the purchaser any greater right than would have remained in the seller.

If the tenant at will was ousted before the crop was put in, the rule at common law was that he could not recover

<sup>1</sup> Noy's Maxims, 51; 1 Cruise's Dig. tit. 9, Estate at Will, ch. 1, sect. 12; Graves v. Weld, 5 Barn. & Ad. 105; Weem's Exr. v. Bryan, 21 Ala. 302, 308; Rising v. Stannard, 17 Mass. 287; Debow v. Titus, 10 N. J. L. 151, 153; Davis v. Thompson, 13 Me. 209, 215; Comfort v. Duncan, 1 Miles, 229; Kittredge v. Woods, 3 N. H. 503, 505; Davis v. Brocklebank, 9 N. H. 73; Sherburne v. Jones, 20 Me. 70; Stewart v. Doughty, 9 Johns. 108, 112; Bennett v. Bennett, 34 Ala. 53; Brown v. Thurston, 56 Me. 126; Reilly v. Ringland, 39 Iowa, 106; Burrowes v. Caines, 2 Upper Canada, Q. B. 228.

<sup>2</sup> See the cases cited in the note above. Also Caldecott v. Smythies, 7 Car. & P. 808; Whitmarsh v. Cutting, 10 Johns. 360; Harris v. Carson, 7 Leigh, 632; Hawkins v. Skegg, 10 Humph. 31; Talbott v. Hill, 68 Ill. 106; Chandler v. Thurston, 10 Pick. 210; Clark v. Rannie, 6 Lans. 210; Reeder v. Sayre, 70 N. Y. 180, 185; Harris v. Frink, 49 N. Y. 24; Bain v. Clark, 10 Johns. 424; Dircks v. Brant, 56 Md. 500.

<sup>3</sup> Oland's Case, 5 Co. 116.

<sup>4</sup> Cro. Eliz. 461; Co. Lit. 55, a; 2 Bla. Comm. 123, 145.

<sup>5</sup> Debow v. Colfax, 10 N. J. L. 151.

for the expense of ploughing and manuring the land, but that if the ouster took place after the crop was put in that he was entitled to the emblements.<sup>1</sup>

An interesting question relating to the right of a tenant to emblements, the tenancy being for an indefinite period, was considered a few years ago by the Supreme Court of Tennessee. In that case the plaintiff or tenant had sowed on the land in November, 1872, a crop of English winter oats, and had harvested the same in the following June. He then ploughed in the *stubble* so as to get another crop, which was the custom. And this crop was growing in November, 1873, when he was compelled to leave the place. The defendant cut and harvested the oats, and the plaintiff sued in replevin, claiming that he was a tenant at will, and his term having been terminated by his landlord, that he was entitled to the growing crop as emblements. The question was, therefore, whether the crop was of that character secured to tenants in such cases. The court held it was not. "When the tenancy is of uncertain duration and is terminated by the landlord after the crop is sown, but before it is severed from the freehold, the tenant or his representative shall be entitled to one crop of that species only, which ordinarily repays the labor by which it is produced within the year within which that labor is bestowed, though the crop may in extraordinary seasons be delayed beyond that period. \* \* \* If this second crop of oats had grown without labor by the plaintiff, he would not have been entitled to it after the expiration of his term, as he had already harvested the crop sown by him, and the additional labor bestowed upon it does not change the result. \* \* \* Ploughing in the stubble, we think, is not equivalent to sowing another crop, though it produce the same result."<sup>2</sup>

While, as we have seen, the rule is that a tenant cannot reap who plants a crop which he knows cannot mature until after the termination of his tenancy, yet a custom that

<sup>1</sup> Bro. Abr., tit. Emblements, pl. 7 tit. *Tenant per copie de court roll*, pl.

3. And see *Stewart v. Doughty*, 9 Johns. 108, 112.

<sup>2</sup> *Hendrickson v. Cardwell*, 9 Baxt. 389.

tenants, whether by parol or deed, shall have the way-going crop after the expiration of their terms, is good. It was so determined in the court of King's Bench as early as 1779, in *Wigglesworth v. Dallison*.<sup>1</sup> The opinion of the court was by Lord Mansfield, and was as follows: "We have thought of this case, and we are all of opinion that the custom is good. It is just, for he who sows ought to reap, and it is for the benefit and encouragement of agriculture. It is, indeed, against the general rule of law concerning emblements, which are not allowed to tenants who know when their term is to cease, because it is held to be their fault or folly to have sown, when they know their interest would expire before they could reap. But the custom of a particular place may rectify what otherwise would be imprudence or folly. The lease being by deed does not vary the case. The custom does not alter or contradict the agreement in the lease, it only superadds a right which is consequential to the taking, as a heriot may be due by custom, although not mentioned in the grant or lease." And such is the law in this country.<sup>2</sup> In the same way it is held, that a custom that a tenant may leave his way-going crop in the barns of the farm for a certain time after the expiration of the lease and his quitting the estate, is good.<sup>3</sup> The way-going crop to which the tenant is entitled under the above decisions is the grain sown in the autumn before the expiration of the lease, and which comes to maturity in the summer after the determination of the lease. But if he puts in the spring crop, as oats, before he leaves, he is not entitled to gather it, but

<sup>1</sup> *Douglas*, 201. And see *Boraston v. Green*, 16 East, 71; *Holding v. Pigott*, 7 Bing. 465.

<sup>2</sup> *Van Doren v. Everitt*, 5 N. J. L. 460; *Templeman v. Biddle*, 1 Harr. (Del.) 522; *Stultz v. Dickey*, 5 Binn. 285; *Shaw v. Bowman*, 91 Pa. St. 414; *Diffendorfer v. Jones*, cited 5 Binn. 289; *Biggs v. Brown*, 2 Serg. & R. 14; *Comfort v. Duncan*, 1 Miles, 231; *Derwie v. Bossler*, 1 Pa. St. 224; *Foster v. Robinson*, 5 Ohio St. 90; *Iddings v. Nagle*, 2 Watts & S. 22; *Lewis v. McNatt*, 65 N. C. 63; *Dorsey v. Eagle*, 7 Gill & J. 331. And see *Reeder v. Sayre*, 70 N. Y. 180, 185; *Brown v. Parsons*, 22 Mich. 28.

<sup>3</sup> *Lewis v. Harris*, cor. *Skyner*, C. B. Hereford, Sum. Assizes, 1778; *Beavan v. Delahay*, 1 H. Bl. 5; 3 Bac. Abr. 23 (*Bouvier's Ed.*).

loses it, unless protected by an express contract.<sup>1</sup> In a case decided in West Virginia in which the court conceded the doctrine that where the lease was for a fixed period, and was silent as to who was entitled to the way-going crop, the off-going tenant would not be entitled to the crop, it was held that where the lease recognized the right of the tenant to sow in the last year of the term, he would have the right to reap the way-going crop, the lease being silent as to who should be entitled thereto.<sup>2</sup>

The rule is that one recovering in ejectment is entitled not only to the soil, but to the crops growing on it and constituting part of it.<sup>3</sup> After judgment is obtained in ejectment, the defendant is to be considered as a trespasser from the date of the demise laid in the declaration. If he has not harvested the crops he has no right to do so; and if they have been harvested, the landlord, in an action for mesne profits can recover their value.<sup>4</sup> So, if a tenant sows a crop during the pending of ejectment against his landlord, and with notice of the pendency of the suit, he has no right to enter after having surrendered the possession, and cannot remove the crops so sown.<sup>5</sup> And if the defendant in ejectment, after execution of a writ of possession, enters, cuts, and removes a crop, the plaintiff in ejectment may recover its value from him in trover.<sup>6</sup> But where one sows, cultivates, *and harvests* a crop upon the land of another, he is held to be entitled to the crops as against the owner of the land, whether he came to the possession of the land lawfully or not, provided he remained in possession until the crop was harvested.<sup>7</sup> While the owner may recover for use and occupation, he can in no case be held to be the owner of crops grown and actually harvested on the land

<sup>1</sup> Taylor's L. & T., 420, note 3 (6th ed.).

<sup>2</sup> Kelley v. Todd, 1 W. Va. 197.

<sup>3</sup> Rowell v. Klein, 44 Ind. 290, 295; McLean v. Bovell, 24 Wis. 295. See Doe v. Witherwick, 3 Bing. 11.

<sup>4</sup> Hodgson v. Gascoine, 5 Barn. & Ald. 88.

<sup>5</sup> Rowell v. Klein, *supra*.

<sup>6</sup> Altes v. Hinckler, 56 Ill. 275.

<sup>7</sup> Adams v. Leip, 71 Mo. 597.

by the defendant while in possession.<sup>1</sup> And where one purchases land of another, which had been planted and cultivated by a stranger without the grantor's consent, and the stranger continued in possession and harvested the crop, the grantee cannot sue for the value of the crop. For, while the stranger would be liable for the use of the property, the value of the crop would not be the measure of damages.<sup>2</sup> A person who settles on public land and plants thereon a crop, cannot maintain trespass *quare clausum fregit* against one who thereafter purchases the land from the government, and enters for the purpose of gathering and converting such crop to his own use. As against such vendee the trespasser has no remedy. The crop passes with the land to the vendee.<sup>3</sup> As between vendor and vendee, growing crops are real estate, and unless removed, pass to the purchaser by a deed of the land as being a part of the freehold.<sup>4</sup> And the rule is that the reservation of the crops cannot vest in parol, but must be in writing.<sup>5</sup>

In an early case the Supreme Court of Pennsylvania held that growing grain did not pass to the vendee of the land, on the ground that it was personal property.<sup>6</sup> But in 1838 the same court overruled that case, and placed itself in line with adjudications elsewhere.<sup>7</sup> And while it is now held in that State that growing crops will pass to the vendee of the realty, yet it is held that a parol reservation of the crops may be shown. "To confine a party," said Chief Justice Black, "to the terms of a written agreement, from which

<sup>1</sup> Page *v.* Fowler, 39 Cal. 412.

<sup>2</sup> Jenkins *v.* McCoy, 50 Mo. 348.

<sup>3</sup> Floyd *v.* Ricks, 14 Ark. 286.

<sup>4</sup> Talbot *v.* Hill, 68 Ill. 106; Powell *v.* Rich, 41 Ill. 466; Smith *v.* Price, 39 Ill. 28; Bull *v.* Griswold, 19 Ill. 631; Gibbons *v.* Dillinghamton, 5 Eng. 9; Floyd *v.* Ricks, 14 Ark. 286, 291; Forte *v.* Calvin, 3 Johns. 222; Crews *v.* Pendleton, 1 Leigh, 305; Hancock *v.* Caskey, 8 S. C. 282; Porche *v.* Bodin, 28 La. An. 761; Jones *v.* Thomas, 8 Blackf. 428; Pitts *v.* Hendrix, 6 Ga. 452.

<sup>5</sup> Powell *v.* Rich, 41 Ill. 466; Smith *v.* Price, 39 Ill. 28; Dixon *v.* Nichols, 39 Ill. 372; Austin *v.* Sawyer, 9 Cowen, 39; Wintermute *v.* Light, 46 Barb. 283; McIlvaine *v.* Harris, 20 Mo. 457; Brown *v.* Thurston, 56 Me. 126.

<sup>6</sup> Smith *v.* Johnson, 1 Penrose, 471.

<sup>7</sup> Wilkins *v.* Vashbinder, 7 Watts, 378.

an important part of the actual bargain is omitted at the request of the other party, and on his solemn assurance that it shall be performed, though not inserted, is such a fraud as the jurisprudence of no civilized country will tolerate. The evidence was admissible beyond a doubt. The vendor was entitled to relief in equity, though not perhaps under the head of mistake."<sup>1</sup>

In Ohio, the courts have held that the reservation of the crop may be shown by parol evidence, as between vendor and vendee. "However little favor should be shown," said Mr. Justice Worden, "to reservations made by the vendor by parol, when he is in possession, there must be some such reservations which are valid. It is, in such instances, a question of intent. When that intent relates to things which may sometimes be treated as realty and sometimes as personalty, the evidence of its manifestation in the conduct of the parties, or in their words at the date of the deed, does not seem to alter, enlarge, or limit their written contract. For, as already observed, that contract does not necessarily embrace such things."<sup>2</sup> But that court holds that a parol reservation of trees, which were the spontaneous growth of the land, would be inadmissible, inasmuch as they were not raised by labor for the purposes of trade, and could not be levied on as personalty even with the consent of the owner of the land.<sup>3</sup>

A question has been raised as to whether any distinction is to be made between ripe and unripe crops standing unharvested at the time of conveyance. Such a distinction seems to have been taken in Illinois, where the court declared as follows: "It has been uniformly held that by a conveyance of land, without a reservation in a deed, the crops and all things depending upon the soil for sustenance belong to and pass with the land. After the crops have matured, however, it is otherwise; but until they are matured they constitute such an interest in real estate as to

<sup>1</sup> *Lauchner v. Rex*, 20 Pa. St. 464.

<sup>2</sup> *Baker v. Jordan*, 3 Ohio St. 438 (1854). Followed in *Youmans v. Thomas*, 4 Ohio St. 76, 79.

<sup>3</sup> *Jones v. Timmons*, 21 Ohio St. 605.

bring them within the Statute of Frauds. And to pass by a sale by the owner of the soil, it must be evidenced by a written agreement; or, if reserved from the operation of a conveyance, it must be in writing.”<sup>1</sup> If the court meant, in the language above quoted, to express an opinion that ripe, but unharvested, crops would not pass by a conveyance of the realty, the opinion can only be regarded as an *obiter dictum*, for it was by no means essential to the decision of the case. The question, however, was fairly raised in a case recently decided in the Supreme Court of Iowa, and the conclusion reached was, that matured crops, ready for the harvest, but not actually severed from the soil, did not pass by a sheriff’s deed, executed upon a foreclosure sale.<sup>2</sup> As the subject is one of importance, and the authorities in point are few, it is well to notice the reasons upon which the conclusions of the court were supported. The court said: “The grain being mature, the course of vegetation has ceased, and the soil is no longer necessary for its existence. The connection between the grain and the ground has changed. The grain no longer demands nurture from the soil. The ground now performs no other office than affording a resting-place for the grain. It has the same relations to the grain that the warehouse has to the threshed grain, or the field has to the stacks of grain thereon. It will not be denied that when the grain is cut it ceases to be a part of the realty. The act of cutting it, it is true, appears to sever the straw from the land. But it is demanded by the condition of the grain. It is no longer growing. It is no longer living blades, which require the nourishment of the soil for its existence and development. It is changed in its nature from growing blades of barley or oats to grain mature and ready for the reaper. Now, the mature grain is not regarded by the law like the growing blades, as a part of the realty, but as grain in a condition of separation from the soil. \* \* \* There is no valid reason why the act

<sup>1</sup> Powell v. Rich, 41 Ill. 466.

<sup>2</sup> Hecht v. Dittman, 20 Am. L. Reg. (N. S.) 615.

of cutting should change the property in the grain. \* \* \* We think the ownership of the grain should be determined by its condition, not by the act of cutting, which cannot be done as soon as it is demanded by its condition." In arriving at its conclusion, the court evidently overlooked the fact that the same question had been previously raised in the Supreme Court of Michigan, in a case in which a directly opposite conclusion was reached.<sup>1</sup> The question there raised was whether a crop of corn standing on the premises in December, the date of the deed, passed with the land. And the court held that the question could no more depend upon the maturity or immaturity of the crop, than the passage of a standing forest tree, by a conveyance of the land, would depend upon whether the tree was living or dead. Stress was laid on the fact that the question of severance could be ascertained with certainty, while the fact of the maturity of the crop would be determined in many cases with great difficulty. "It is true," said the court, "that the authorities in alluding to this subject generally use the words 'growing crops,' as those embraced by a conveyance of the land; but this expression appears to have been commonly employed to distinguish crops still attached to the ground, rather than to mark any distinction between ripe and unripe crops." Thus the question stands at the present time, and future adjudications must determine, as between these conflicting cases, which of them laid down the rule which ought to govern in such controversies. It is to be remarked, however, that so far as the Statute of Frauds is concerned, it has been laid down that a sale of standing crops, *fructus industriales*, is not a sale of an interest in land, within the meaning of the fourth section of that statute, without respect to the maturity or immaturity of the crop.<sup>2</sup> It is difficult to see why the same principle should not be applicable in both cases.

<sup>1</sup> Tripp v. Hascilg, 20 Mich. 254.

<sup>2</sup> Jones v. Flint, 10 Ad. & E. 753; Buck v. Pickwell, 27 Vt. 157, 163; Carson v. Browder, 2 Lea, 701.

When there is a parol contract for the sale of lands, and under such contract the vendee, with the consent of the vendor, enters into possession of the land and puts in crops, the question arises whether the invalidity of the contract to sell and convey affects the title of the vendee to the crops, provided the vendor refuses to perform, repudiates the contract, and ejects the vendee from the land. Such a question arose in the Supreme Court of New York,<sup>1</sup> in a case where the vendor had ejected the vendee and harvested the crop. That court was of opinion that the vendee could not maintain an action against the vendor for taking the crop, and a nonsuit was accordingly granted on the ground that the crop was part of the realty, and that the vendee having no legal title to the land, could have none to the crop. But the Court of Appeals reversed the judgment, declaring that "the invalidity of the parol agreement to sell and convey the land, did not affect the plaintiff's title to the crop. If the agreement had remained executory in all its parts, of course, none of its stipulations could have been separately enforced, though if standing alone they might have been valid. But although, by reason of the entirety of the contract, the plaintiff could not have enforced the stipulation allowing him to possess and work the farm, so long as it remained executory, yet after it had been so far executed that the crop had been sown and was growing, the invalidity of the other provisions of the contract, under the Statute of Frauds, could not be invoked by the party who refused to complete, as against the party not in default, for the purpose of invalidating that part of the contract which had been executed, and divesting the plaintiff's title to the crop raised in pursuance of it."<sup>2</sup>

In a case recently decided in Missouri, it is held that the courts will take judicial notice that certain crops mature at certain seasons—in that case, that corn was mature in December.<sup>3</sup> And so in Arkansas judicial notice was taken that

<sup>1</sup> *Harris v. Frink*, 2 Lans. 35.

<sup>2</sup> *Harris v. Frink*, 49 N. Y. 29.

<sup>3</sup> *Garth v. Caldwell*, 72 Mo. 622.

a crop of corn could not have matured by the 10th of August.<sup>1</sup> But in Illinois it is held that the courts will not take judicial notice of the time when crops of wheat, barley, and oats mature. The reason given for the ruling was the fact that the time for those crops to mature varied greatly in the different parts of that State, and even in the same locality.<sup>2</sup>

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<sup>1</sup> *Floyd v. Ricks*, 14 Ark. 286.

<sup>2</sup> *Dixon v. Niccolls*, 39 Ill. 373.