SAMUEL K. KAIN,

Plaintiff-Appellant, Respondent

vs

MORRIS S. COBLE,

Defendant-Appellee, Appellant,

SAMUEL K. KAIN,

Plaintiff-Respondent, Appellant,

vs

HELEN B. AMES,

Defendant-Appellant, Appellee.

****

ELSA R. WOLF,

Plaintiff-Appellant,

vs

ALBERT OESTREICHER,

Defendant-Appellee,

and

LOUISE FISCHER,

Defendant.

****

BERNHARD KOEPPEL,

Prosecutor-Appellant,

vs

IRVINGTON WINDOW CLEANING CO., INC., and NEW JERSEY MANUFACTURERS CASUALTY INSURANCE CO.,

Respondents-Appellees.

****

JOSEPH A. NATALE,

Plaintiff-Appellant,

vs

AUTOMOBILE FINANCE CO., a corporation of the State of Pennsylvania, and WARREN D. JANES, individual.

Defendant-Respondents.

****

ISADORE MANDEL,

Petitioner-Respondent.

vs

FEDERAL SHIPBUILDING & DRY DOCK COMPANY,

Respondent-Appellant.

****

NEWARK FARMER MARKET, INC. a corporation of the State of New Jersey,

Prosecutor-Appellee,

vs

THE STATE BOARDOF TAX APPEALS OF THE STATE OF NEW JERSEY and THE CITY OF NEWARK,

Defendants - Appellants.

THE CITY OF NEWARK,

Prosecutor-Appellant

vs

THE STATE BOARD OF TAX APPELAS OF THE STATE OF NEW JERSEY and NEWARK FARMERS MARKET, INC.,

DEFENDANTS-Appellees.

****

CHARLES GLANTON,

Defendant-Appellant,

vs

JOSEPH A. SHAFTO,

Prosecutor-Appellee.

****

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Notice of Appeal.

(Filed April 3, 1944.)

Second Judicial District Court

MIDDLESEX COUNTY.

A-14438.

SAMUEL K. KAIN, Plaintiff, *vs.* MORRIS S. COBLE, Defendant.	Action at Law. (In Tort.)

To Morris S. Coble or David T. Wilentz, Attorney for Morris S. Coble:

Sirs:

Please take notice that the plaintiff Samuel K. Kain hereby appeals to the New Jersey Supreme Court from the judgment of no cause for action rendered on March 17, 1944, in the above stated action which was tried together with case No. A-14508 as one case, by stipulation of counsel of the various parties in open Court, in the Second Judicial District Court of Middlesex County, at Perth Amboy, New Jersey.

Perth Amboy, N. J.
March 29, 1944.

ALFRED D. ANTONIO.
Attorney for Plaintiff.

District Court Summons.

Service of a copy of the within notice of appeal is hereby acknowledged this 30th day of March, 1944.

DAVID T. WILENTZ,
Attorney for Morris S. Coble.

District Court Summons.

(Filed October 2, 1943.)

SECOND JUDICIAL DISTRICT COURT
OF MIDDLESEX COUNTY,

PERTH AMBOY, NEW JERSEY.

STATE OF NEW JERSEY,
MIDDLESEX COUNTY,
CITY OF PERTH AMBOY, } ss.:

THE STATE OF NEW JERSEY: To the Sergeant-at-Arms of the Second Judicial District Court of Middlesex County, Perth Amboy, New Jersey, or any Constable of the County of Middlesex

(L. S.)

SUMMON Morris S. Coble to appear before the Second Judicial District Court of Middlesex County, Perth Amboy, N. J., to be held at the Court Room, 313 State Street (10th Floor), in said city, on the 8th day of October, One Thousand Nine Hundred and Forty-three, at ten o'clock in the forenoon (Wartime), to answer unto Samuel K. Kain in an action at Law (in Tort) Demand Five Hundred ($500.00) Dollars. Hereof fail not.

District Court Summons.

WITNESS JAMES P. HANEY, ESQ., Judge of said District Court, at Perth Amboy, aforesaid, the 2nd day of October in the year One Thousand Nine Hundred and Forty-three.

HARRY J. HARDIMAN,
Clerk.

ALFRED D. ANTONIO,
Plaintiff's Attorney.
Address 175 Smith St.,
Perth Amboy, N. J.

(Endorsement): No. A-14438—Second Judicial District Court of Middlesex County, Perth Amboy, New Jersey, 313 State Street (10th Floor)—Summons in Tort—Samuel K. Kain, Plaintiff *vs.* Morris S. Coble, 231 State St., Defendant.—Demand $500.00—Court Costs $3.60—Returnable Oct. 8th A. D. 1943, 10 o'clock A. M. (Wartime).

Complaint.

(Filed October 2, 1943.)

SECOND JUDICIAL DISTRICT COURT
OF MIDDLESEX COUNTY.

SAMUEL K. KAIN, Plaintiff. *vs.* MORRIS S. COBLE, Defendant.	Action at Law. (In Tort).

Plaintiff complaining of the defendant says that:

FIRST COUNT.

1. Plaintiff is the owner of premises known as 100-102 Washington Street, Perth Amboy, New Jersey; and has been the owner of said premises since March of 1943.

2. In September of 1943 the defendant did unlawfully enter said premises and unlawfully remove therefrom, and convert to his own use and possession, an oil burner which had been part of said premises and which was owned by the plaintiff.

3. Though plaintiff has on several occasions demanded of the defendant that he deliver said oil burner to plaintiff, yet the defendant, well knowing that said oil burner was the property of the plaintiff, fraudulently intending to deprive plaintiff of said oil burner refused and still refuses to deliver and has not yet delivered to plaintiff said oil burner.

Judgment will be claimed in the sum of Two Hundred Fifty ($250.00) Dollars besides costs of suit on the first count.

SECOND COUNT.

1. Plaintiff repeats paragraphs 1 and 2 of the First Count.

2. In fraudulently and unlawfully removing said oil burner from said premises, which was the property of the plaintiff, the defendant did damage the said premises of the plaintiff in the sum of Two Hundred Fifty ($250.00) Dollars.

Judgment will be claimed in the sum of Two Hundred Fifty ($250.00) Dollars on the Second Count, besides costs of suit.

ALFRED D. ANTONIO,
Attorney for Plaintiff.

Docket Entries.

A-14438

STATE OF NEW JERSEY, }
COUNTY OF MIDDLESEX. } ss.:

SECOND JUDICIAL DISTRICT COURT
OF MIDDLESEX COUNTY.

PERTH AMBOY, NEW JERSEY.

SAMUEL K. KAIN,
Plaintiff.

vs.

MORRIS S. COBLE,
Defendant.

Tort—
Demand
$500.00.

ALFRED D. ANTONIO, Plaintiff's Attorney.

DAVID T. WILENTZ, Defendant's Attorney.

	COSTS	
	CITY	AL
Summons	1.50	
Service		.60
Trial Fee	1.50	
Order 4/11/44	1.00	
Order 5/1/44	1.00	
Order 5/20/44	1.00	
Order 6/9/44	1.00	
Order 6/29/44	1.00	

Summons was issued tested Oct. 2nd A. D. 1943, Returnable Oct. 8th A. D. 1943.

The summons returned was as follows, viz.:

I served the within Summons Oct. 2, 1943, on Morris S. Coble the defendant by reading the same to him and delivering to him a copy thereof.

Louis Daitz, Sergeant-at-Arms.

Plaintiff's demand was filed Oct. 2nd, A. D. 1943.

Oct. 8th, A. D. 1944. This cause was adjourned until 10-15 10-20 11-10 12-10 1-26-44 2-16 3-3 3-8 3-10.

Feb. 16th, A. D. 1944. This cause was called at ten o'clock in the forenoon.

Plaintiff appeared by Alfred D. Antonio.

Defendant appeared by David T. Wilentz.

Sworn for plaintiff:

Samuel K. Kain
Grace Kain
William Rubin
Julia Hochfelder

Sworn for defendant:

Dr. Morris S. Coble
Jack Rosenberg
John P. Falby

Ex. P-1 Contract
Ex. P-2 Deed
Ex. P-3 Bill for identification.

No cause for action March 17th, 1944.

Exception to Judgment filed March 31, 1944.

Notice of Appeal filed April 3rd, 1944.

Seventy-five Dollars ($75.00) deposited with the Court in lieu of Bond April 3rd, 1944.

Docket Entries.

Stipulation for Settlement of State of Demand filed April 11, 1944.

Order Extending time for State of Case filed April 11, 1944.

Order Extending time for State of Case filed May 1, 1944.

March 17, 1944. Judgment was rendered for defendant.

Order Extending time for State of Case filed May 20, 1944.

Order Extending time for State of Case filed June 9, 1944.

Order Extending time for State of Case filed June 29, 1944.

Defendants objections filed June 27, 1944.

State of Case Agreed Upon filed June 27, 1944.

Exception to Judgment.

(Filed March 31, 1944.)

SECOND JUDICIAL DISTRICT COURT
OF MIDDLESEX COUNTY.

No. A-14438.

SAMUEL K. KAIN, Plaintiff. *vs.* MORRIS S. COBLE, Defendant.	Action at Law. (In Tort).

To Harry J. Hardiman, Clerk of Second Judicial District Court of Middlesex County:

Sir:

Please take notice that the plaintiff, Samuel K. Kain, hereby excepts to the judgment rendered by the Court on March 17, 1944 in the absence of Counsel of either party. This exception is entered formally for the purpose of showing that an exception would have been taken by counsel for the plaintiff if he had been apprised that a decision would be made on the date aforesaid.

ALFRED D. ANTONIO,
Attorney for Plaintiff.

Payment of Judgment Costs in Lieu of Bond.

(Filed April 3, 1944.)

SECOND JUDICIAL DISTRICT COURT
OF MIDDLESEX COUNTY.

No. A-14438.

SAMUEL K. KAIN, Plaintiff. *vs.* MORRIS S. COBLE, Defendant.	On Appeal.

To Harry J. Hardiman, Clerk of Second Judicial District Court of Middlesex County:

Plaintiff hereby pays the sum of $75.00, in cash, the possible costs of appeal, in lieu of appeal bond with security to abide by the results of the appeal of the above stated cause, and conditioned for the payment thereof if plaintiff does not prosecute his appeal or the appeal is dismissed.

ALFRED D. ANTONIO,
Attorney for Samuel K. Kain.

Permitted:

JAMES P. HANEY,
Judge.

Stipulation for Settlement of State of the Case.

(Filed April 11, 1944.)

SECOND JUDICIAL DISTRICT COURT
OF MIDDLESEX COUNTY.

No. A-14438.

SAMUEL K. KAIN, Plaintiff. *vs.* MORRIS S. COBLE, Defendant.	In Tort.

Whereas the attorneys for the above named parties cannot agree on the state of the case for appeal.

It is stipulated by and between Alfred D. Antonio, attorney for the plaintiff, and David T. Wilentz, attorney for the defendant, that the Judge of the above Court is hereby appealed to, to settle and sign the state of the case.

Dated: April 11, 1944.

ALFRED D. ANTONIO,
Attorney for Plaintiff.

DAVID T. WILENTZ,
Attorney for Defendant.

State of Case Agreed Upon.

(Filed June 27, 1944.)

SECOND JUDICIAL DISTRICT COURT
OF MIDDLESEX COUNTY.

No. A-14438.

SAMUEL K. KAIN, Plaintiff. *vs.* MORRIS S. COBLE, Defendant.	In Tort. On Appeal.

ALFRED D. ANTONIO, Attorney for Plaintiff-Appellant.

DAVID T. WILENTZ, Attorney for Defendant-Appellee.

The parties hereto (by their respective attorneys) submit the following as the state of the case for appeal:

Samuel K. Kain sued Morris S. Coble, case No. 14438, returnable October 8, 1943, in tort, on two counts: (1) for unlawfully removing and converting to his own use an oil burner which had been part of the premises owned by the plaintiff, and converting same to his use, with intent to deprive the plaintiff of said oil burner, and (2) in fraudulently removing said oil burner from the premises.

Samuel K. Kain sued Helen B. Ames, case No. 14508, returnable November 11, 1943, on contract, stating that Helen B. Ames had breached a warranty in a warranty deed dated January 27,

1943, and recorded March 18, 1943, in that she had contracted on February 4, 1943, to deliver with certain described premises, "Gas and electric fixtures, gas stove, hot water heaters and heating apparatus, if any, and all other personal property appurtenant to or used in the operation of said premises * * *"

By stipulation, by and among counsel of the respective parties, the two cases were tried together on February 16, 1944.

Certain facts as to the indicia of title were agreed upon, to wit:

That Dr. Morris S. Coble had acquired the property known as 100-102 Washington Street, Perth Amboy, New Jersey, on June 16, 1924. That he had mortgaged the property to the Service Corporation on the same date, June 16, 1924; that said Service Corporation had assigned its mortgage to William Ames on November 3, 1924. That Dr. Coble lost the premises through mortgage foreclosure. That the Sheriff deed to Helen B. Ames, et al., was dated August 23, 1933 (the said William Ames having died in the meantime). That Helen B. Ames contracted to sell the property to Samuel K. Kain by contract dated February 4, 1943, and did deliver the deed to said property to said Samuel K. Kain on March 17, 1943, by deed recorded March 18, 1943, in the office of the Clerk of Middlesex County.

Further, it was admitted that the said mortgage, recorded in Book 433, Page 644, from Morris S. Coble to Service Corporation, contained the clause, "Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging."

Further, it was conceded by Henry Spitzer, appearing for David T. Wilentz, attorney for Mor-

ris S. Coble, that by virtue of the Sheriff deed the property and fixtures, such as heating plant, passed to the mortgagee-grantee, on August 23, 1933, after the foreclosure.

Also, that Morris S. Coble, the former owner, continued to be a tenant from the time of foreclosure in August, 1933, down to September 1, 1943; that Helen B. Ames was his landlord from August, 1933, to March, 1943; that Samuel K. Kain was his landlord from March, 1943, to September 1, 1943.

When Dr. Coble became the owner of the premises in June, 1924, the premises contained a coal burning furnace which was part of a steam-heating plant, used to heat the house.

In 1927, while still the owner, the doctor converted the coal heating apparatus to oil heating apparatus, and installed an oil burner, an oil tank, piping from tank to furnace, and other oil heating features. In September, 1941, while a tenant, the doctor replaced the first oil burner of 1927, with a new and better type of oil burner, and left the old oil burner in the basement. Whatever he took out, he placed against the wall.

The doctor was still a tenant for six months after the premises were sold by Mrs. Ames to Samuel K. Kain. The doctor remained in the premises as a tenant until September 1, 1943, when he moved from the premises. On September 7, 1943, he came back to the house and removed the oil burner.

The above facts were admitted by all the parties concerned.

The following named witnesses testified for the plaintiff Samuel K. Kain: Mrs. Samuel K. Kain, Samuel K. Kain, Mrs. Hochfelder and Mr. Rubin.

Dr. Coble, Mr. Rosenberg and Mr. Palfey testified for the defendant Morris S. Coble.

Mrs. Samuel K. Kain testified that when Dr. Coble called her, about the middle of August, and asked her to buy the oil burner, he said he intended taking it with him, since it was his. She told the doctor that she would take it up with her husband who was in the service at the time.

Plaintiff Samuel K. Kain, testified that before September 1, 1943, he had instructed Mrs. Hochfelder, the new tenant of the premises commencing September 1, 1943, that she was not to allow Dr. Coble, or any one on his behalf, to enter the house; that he particularly instructed her to stop any one who tried to remove the oil burner.

Samuel K. Kain testified that after he got his wife's message previous to September 1, 1943, he had called Dr. Coble; that Dr. Coble claimed the oil burner belonged to him and he wanted to know if Samuel K. Kain would buy it. Samuel K. Kain testified that he told the doctor to get in touch with his attorney, Alfred D. Antonio.

Mrs. Hochfelder testified that she had received certain instructions from Samuel K. Kain, the owner of the property. That when Dr. Coble and a plumber, Mr. Palfey, appeared at her house, she tried to stop them from entering the house. That Dr. Coble said, "Everything is all right." That the doctor and the plumber brushed by her, proceeded down the cellar stairs into the furnace-room, and that the plumber, who had tools with him, removed the oil burner. That she heard the noise of breaking up of the furnace. That they left the house by a rear door. That she went to the cellar immediately. That there were many bricks lying around the base of the furnace. That no bricks had been lying around, previous to the time that Dr. Coble and his man Palfey entered the cellar. Upon cross examina-

tion, she testified that she did not know where these bricks came from but did not recall seeing them before.

Mrs. Samuel K. Kain had also testified to being notified by Mrs. Hochfelder of the removal, and to the fact that she saw loose bricks which were lying on the ground, on September 7, 1943. Upon cross examination she admitted that this was the first time she had ever been in the cellar and did not know whether the bricks had been there before or where they might have come from.

Mr. Rubin, an oil heating dealer, testified that he had installed the original oil equipment in the year 1927, for Mr. Coble; that he had at that time put in an oil tank and oil burner and had installed piping leading from the outside of the house, where the 500 gallon tank was placed six feet under the ground, to the furnace-room in the cellar of the house. The oil burner was of the gun-type, fitted into the combustion chamber, and bricked in. That the burner could not be removed without removing the bricks which were cemented in.

That in September, 1943, when he was called to fix the oil heating apparatus, he found evidence of the destruction of the brick work of the furnace; that many bricks were on the ground; that the combustion-chamber had to be rebuilt because it had all fallen in; that the price for the new burner and installation was $155.00, the labor being $65.00 and the parts $90.00. That Samuel K. Kain paid this bill, which was reasonable in amount. The bill was marked in evidence. He also testified that the brick work had to be rebuilt; that previous to the removal of the burner it had been solidly cemented together; that the burner could not be removed without disturbing the brick work. He testified that some old incomplete parts of an

oil burner were lying about, but they were useless and worthless. He also found that the oil lines which were connected by unions had been cut off, and that the electric wires had been cut off. That the burner which had been removed had originally been installed so that the head was supported and held firm by the cemented brick work, and the back thereof was supported by stands which in turn rested on the floor.

The defendant in his own behalf testified that he had installed the new oil burner without consulting the then owner Mrs. Ames, because he did not want to bother her with the expense of a new oil burner; that his fuel bill was too high and that he had purchased a new oil burner for himself, paying for it himself. He testified that the plaintiff did not tell him to get in touch with his attorney about the burner, but rather that he should leave it there until Samuel K. Kain spoke to his own attorney about it. He further testified that after he left the premises with instructions by the plaintiff to leave the burner there, he began to doubt the plaintiff's motives and his delay in giving an answer to the question whether he wanted to purchase it, and he said possession was nine-tenths of the battle so he returned to the premises and removed the new burner which he had installed when a tenant. He further testified that he was present with Mr. Palfey, the plumber, when he removed the oil burner and that no bricks were removed and only some asbestos was looseed and a few wires cut. Upon cross examination he stated that the first time he had spoken to Samuel K. Kain about the purchase of the oil burner was in mid-August of 1943; that he did not believe he was under duty to mention it prior to that time, and as a matter of fact, it had just never entered his mind to do so until he was close to the point

of leaving the premises, when the matter was brought to his attention by events.

Mr. Rosenberg of the Jersey Tire Co. testified that he had sold a 1941 oil burner to Dr. Coble and had supervised the actual installation. He testified that it was a newer, more efficient and compact type of burner, that it had not been bricked in but had a brick wall surrounding it, and that it could be removed without disturbing the brick work. He further testified that the burner was in no way attached to the premises and that there was only an asbestos covering upon it.

Mr. Palfey testified that he removed the burner without any damage, that he lifted it up and pulled it out from the brick structure without displacing any of the bricks, that it was not cemented in. He further testified that when working in prior years for Mr. Rubin he had done repairs on the removed oil burner and that it was a workable burner. He stated, on cross examination, that he had not done any work on the burner since it had been removed and that he did not, on the day of removal of the oil burner in question, attempt to make the old oil burner work. It was Mr. Palfey's testimony that just by glancing at it and from his prior knowledge of the burner, that he could make it run. He testified also that in removing the oil burner he had loosened the asbestos and cut a few wires, that the asbestos was around the nozzle of the burner. He testified that he did not have to cut the wires but did do so that whoever installed the other burner would know which wires belonged where since each is a different color. Mr. Palfey testified that the burner stood on legs not attached to the floor, that there was only this asbestos around the nozzle of the burner and that the brick work did not cement the burner in, but was so constructed so that the burner could be lifted

out without disturbing the brick. On cross examination he testified that he could make any oil burner work, if he had the parts.

Harry Spitzer, attorney for defendant Helen B. Ames, at the end of plaintiff's case stated that he would rely on the same facts and testimony as presented in the plaintiff's case, and that he would offer no witnesses; and further stated that his client, Helen B. Ames, at all times believed that she was the owner of all the fixtures belonging to the heating plant and that as such they went with the property, and that she intended to convey them to the plaintiff, Samuel K. Kain, by deed of warranty.

At the end of the case Henry Spitzer, of David T. Wilentz's office, attorney for Dr. Coble, moved for a non-suit, which was denied.

On March 17, 1944, judgment was rendered in favor of the defendant Morris S. Coble in case No. A-14438 against Samuel K. Kain, of "no cause for action," and in favor of the plaintiff Samuel K. Kain against the defendant Helen B. Ames, in case No. A-14508, judgment for $155.00 plus costs.

Formal written exception was taken.

ALFRED D. ANTONIO,
Attorney for Plaintiff-Appellant.

DAVID T. WILENTZ,
Attorney for Defendant-Appellee.

Dated: July 14, 1944.

Exhibit P-1.

This Agreement, made the fourth day of February, in the year of our Lord One Thousand Nine Hundred and forty-three, Between Helen B. Ames, widow, of 528 East Avenue, Sewaren, in the Township of Woodbridge, County of Middlesex and State of New Jersey, Oliver B. Ames and Linda H. Ames residing at Ramsonville, in the County of Niagara and State of New York, party of the first part; And Samuel K. Kain of 433 State Street, in the City of Perth Amboy, in the County of Middlesex and State of New Jersey, party of the second part;

Witnesseth, That the said party of the first part, for and in consideration of the sum of Five thousand ($5000.00) dollars to be paid and satisfied as hereinafter mentioned, and also in consideration of the covenants and agreements hereinafter mentioned, made and entered into by the said party of the second part, doth agree to and with the said party of the second part, that they the said party of the first part, will well and sufficiently convey to the said party of the second part, his heirs, and assigns by Deed of Warranty free from all encumbrances on or before the fifteenth day of February next ensuing the date hereof, All the following lot, tract, or parcel of land and premises, hereinafter particularly described, situate, lying and being in the City of Perth Amboy, in the County of Middlesex and State of New Jersey, described and bounded as follows, to wit:

Beginning at a point on the northerly side of Washington Street, distant one hundred and eight (108) feet westerly from the northwest corner of Washington and Mechanic Streets; and running thence northerly, parallel with Mechanic Street one hundred (100) feet; thence westerly

parallel with Washington Street, forty-two (42) feet; thence southerly parallel with Mechanic Street one hundred (100) feet to Washington Street; thence easterly along Washington Street, forty-two (42) feet to the place of BEGINNING.

Being the same premises conveyed to Helen B. Ames by Deed of Helen B. Ames and National Newark & Essex Banking Company of Newark, N. J., dated March 4th, 1941, and about to be recorded in the Clerk's Office of the County of Middlesex. The said Helen B. Ames, deceased, late of Middlesex County, New Jersey.

And the said Samuel K. Kain, for himself, his heirs, executors and administrators, doth covenant, promise and agree to and with the said party of the first part, their heirs, executors, administrators and assigns, that he the said party of the second part, will pay and satisfy, or cause to be paid and satisfied, unto the said party of the first part, the said sum of Five Thousand ($5000.00) Dollars as and for the purchase money of the foregoing described land and premises, in the following manner, that is to say:

On deposit for which this is also a receipt	$ 500.00
On delivery of deed	4500.00

This Contract is entered into upon the knowledge of the parties as to the value of the land and whatever buildings are upon the same, and not on any representations made as to character or quality.

And the said party of the first part hereby agrees to pay to the licensed and authorized agent Irma Molten, a commission of 5% on the purchase price aforesaid, at time of delivery of deed.

And it is further Agreed by the parties to these presents, that the said party of the second part,

his heirs and assigns, may enter into and upon the said land and premises on the 15th day of February, next ensuing the date hereof, and from thence take the rents, issues and profits to and their use.

And it is further Agreed by the parties hereto, that the said deed shall be delivered and received at the office of Harry Spitzer, 175 Smith Street, Perth Amboy, New Jersey, between the hours of 10 o'clock in the forenoon and 5 o'clock in the afternoon on the said fifteenth day of February, next ensuing the date hereof.

The rents of said premises, insurance premiums, water rents, taxes, if any, shall be adjusted, apportioned and allowed as of the day of delivery of said deed.

Gas and electric fixtures, gas stoves, hot water heaters and heating apparatus, if any, and all other personal property appurtenant to or used in the operation of said premises is included in this sale.

And for the performance of all and singular the covenants and agreements aforesaid, the said parties do bind themselves and their respective heirs, executors, administrators and assigns.

Exhibit P-1.

In Witness Whereof, the said parties have hereunto interchangeably set their hands and seals the day and year first above mentioned.

HELEN B. AMES L.S.
OLIVER B. AMES L.S.
LINDA H. AMES L.S.
SAMUEL K. KAIN L.S.

By Carrie Kanoi,
Attorney.

Signed, Sealed and Delivered
in the presence of

Harry Spitzer as to

[*Arrow indicates Helen B. Ames above.*]

T. Robert Traverse
A. Antonio as to Kain

Exhibit P-2.

This Indenture, made the 27th day of January, in the year of Our Lord One Thousand Nine Hundred and forty-three,

Between Helen B. Ames, widow, of 528 East Avenue, Sewaren, Township of Woodbridge, Middlesex County, State of New Jersey, and Oliver B. Ames and Linda H. Ames, his wife, of Ramsonville, in the County of Niagara and State of New York, party of the first part;

And Samuel K. Kain, of 433 State Street, of the City of Perth Amboy, in the County of Middlesex and State of New Jersey, party of the second part:

Witnesseth, That the said party of the first part, for and in consideration of One ($1.00) dollar and other good and valuable consideration, lawful money of the United States of America, to them in hand well and truly paid by the said party of the second part, at or before the sealing and the delivery of these presents, the receipt whereof is hereby acknowledged, and the said party of the first part being therewith fully satisfied, contented and paid, have given, granted, bargained, sold, aliened, released, enfeoffed, conveyed and confirmed, and by these presents do give, grant, bargain, sell, alien, release, enfeoff, convey and confirm unto the said party of the second part, and to his heirs and assigns, forever, All the following tract or parcel of land and premises, hereinafter particularly described, situate, lying and being in the City of Perth Amboy, in the County of Middlesex, and State of New Jersey, described and bounded as follows, to wit:

Beginning at a point on the northerly side of Washington Street, distant one hundred and eight (108) feet westerly from the northwest cor-

ner of Washington and Mechanic Street; and running thence northerly, parallel with Mechanic Street, one hundred (100) feet; thence westerly parallel with Washington Street, forty-two (42) feet; thence Southerly parallel with Mechanic Street, one hundred (100) feet to Washington Street; thence easterly along Washington Street, forty-two (42) feet to the place of beginning.

Being the same premises conveyed to Helen B. Ames and Oliver B. Ames, as joint tenants, by deed of Helen B. Ames, widow, dated March 6, 1941, and recorded in Book 1187 of Deeds, on page 527.

Together with all and singular the houses, buildings, trees, ways, waters, profits, privileges, and advantages, with appurtenances to the same belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and the profits thereof, and of every part and parcel thereof;

Also all the estate, right, title, interest, property, claim and demand whatsoever, of the said party of the first part, of, in and to the same, and of, in and to every part and parcel thereof,

To have and to Hold, all and singular the above described land and premises, with the appurtenances, unto the said party of the second part, his heirs and assigns, to the proper use, benefit and behoof of the said party of the second part, his heirs and assigns forever:

And the said Helen B. Ames, widow, and Oliver B. Ames and Linda H. Ames, his wife, do for themselves, their heirs, executors and administrators covenant and agree to and with the party of the second part, his heirs and assigns, that they the said Helen B. Ames, widow, and Oliver B. Ames, are the true, lawful and right owners of all and singular the above described land and

premises, and of every part and parcel thereof, with the appurtenances thereunto belonging; and that the said land and premises, or any part thereof, at the time of the sealing and delivery of these presents, are not encumbered by any mortgage, judgment or limitation, or by any encumbrance whatsoever, by which the title of the said party of the second part, hereby made or intended to be made, for the above described land and premises, can or may be changed, charged, altered or defeated in any way whatsoever:

And Also that the said party of the second part, his heirs and assigns, shall and may at all times hereafter, peaceably and quietly have, hold, use, occupy, possess and enjoy the above granted premises, and every part and parcel thereof, with the appurtenances, without any let, suit, trouble, molestation, eviction or disturbance of the said party of the first part, their heirs or assigns, or of any other person or persons lawfully claiming or to claim the same.

And Also that the said party of the first part now have good right, full power and lawful authority, to grant, bargain, sell and convey the said land and premises in manner aforesaid;

And Also that Helen B. Ames, widow, and Oliver B. Ames and Linda H. Ames, his wife, will Warrant, secure, and forever defend the said land and premises unto the said Samuel K. Kain, his heirs and assigns, forever, against the lawful claims and demands of all and every person or persons, freely and clearly freed and discharged of and from all manner of encumbrance whatsoever.

And the said party of the first part, their heirs and assigns shall and will at any time or times hereafter, upon the reasonable request, and at the

proper cost and charges in the law of the said party of the second part, his heirs and assigns, make, do, and execute or cause or procure to be made, done and executed, all and every such further or other lawful and reasonable acts, conveyances and assurances in the law for the better and more effectually vesting the premises hereby intended to be granted to the party of the second part, his heirs and assigns forever, as shall be reasonably required.

In Witness Whereof, the said party of the first part have hereunto set their hands and seals the day and year first above written.

Helen B. Ames,	L.S.
Oliver B. Ames,	L.S.
Linda H. Ames,	L.S.

Signed, Sealed and Delivered
in the presence of

Harry Spitzer.
T. Robert Traverse.
(Seal)

Exhibit P-2.

STATE OF NEW JERSEY, }
COUNT OF MIDDLESEX } SS.:

Be it Remembered, that on this 17th day of March, in the year of Our Lord One Thousand Nine Hundred and Forty-Three, before me, the subscriber, A Master in Chancery of New Jersey, personally appeared Helen B. Ames, widow, who, I am satisfied, is the grantor mentioned in the within instrument, and to whom I first made known the contents thereof, and thereupon she acknowledged that she signed, sealed and delivered the same as her voluntary act and deed, for the uses and purposes therein expressed.

HARRY SPITZER,
A Master in Chancery of N. J.

($5.50 cancelled Documentary stamps affixed.)

STATE OF NEW YORK }
COUNTY OF NIAGARA. } SS.:

Be it Remembered, That on this 8th day of February 1943 in the year of our Lord One Thousand Nine Hundred and Forty three, before me, the subscriber, A Notary Public of New York personally appeared Oliver B. Ames and Linda H. Ames, who, I am satisfied, are the grantors mentioned in the within Instrument to whom I first made known the contents thereof, and thereupon they acknowledged that, they signed, sealed and delivered the same as their voluntary act and deed, for the uses and purposes therein expressed.

PAUL F. STRATIFF,
Notary Public of New York.

(Seal)

Exhibit P-2.

STATE OF NEW YORK,
NIAGARA COUNTY CLERK'S OFFICE. } ss:

I, Jesse Read, Clerk of the County of Niagara, and also Clerk of the Supreme and County Courts in and for said County, do hereby certify:

That said Courts are Courts of Record, having by law a seal, That Paul F. Stratiff whose name is subscribed to the attached certificate of acknowledgement, proof or affidavit, and before whom the same was taken, was at the time of taking such acknowledgment, proof or affidavit, a Notary Public, residing in said County and duly authorized to take and certify the same, and that the same is taken and certified in all respects as required by the laws of said State of New York. That I am well acquainted with the hand writing of said Notary Public and verily believe that the signature to the said certificate is genuine.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Courts at Lockport, in said County, this 9th day of February, A. D., 1943.

(Seal)

JESSE READ,
Clerk.
By ROSS G. BUCHANAN,
Deputy Clerk.

No. 4620

Endorsed: 1033—Deed—Helen B. Ames, *et als.*, to Samuel K. Kain—Dated: January 27, 1943 —Received in the Clerk's Office of the County of Middlesex on the 18 day of Mar. A. D., 1943, at 9:18 o'clock, in the forenoon and Recorded in Book 1232 of Deeds for said County, on page 472 —Edward J. Patten, Clerk.

Exhibit P-3.

(Rubber Stamp): Block 231—Lot 2A-B—Assessment Maps—The City of Perth Amboy—Examined March 18 1943—Jos. Housby Collector of Revenue M

Comp. A. Sutton I Berney

Recorded 1943 Mar. 18 A. M. 9:18—Middlesex Cty. Clerks Office New Bruns, N. J. E. J. Patten Cl'k.

Exhibit P-3.

Fluid Fuel & Engineering Co.

Contractors and Distributors—Domestic, Commercial and Industrial Oil Burning Systems Power Plant Equipment and Specialties-Heating and Air Conditioning Systems - High and Low Pressure Boilers - Boiler Settings and Furnace Construction - Fuel Oils—187 South First Street, Perth Amboy, N. J., Perth Amboy 4-0476

Sold To:
S. P. Kanai, Funeral Director,
State St. & Washington St.,
City.

Terms:

Date Sept. 30, 1943
Invoice No.
Ticket No.
Order No.

In re: 100 Washington St. Property
1 - Quiet Heet Oil Burner $155.00

$155.00

Paid
10-4-43
Wm. Rubin.

Specification of Determinations.

NEW JERSEY SUPREME COURT.

SAMUEL K. KAIN, Plaintiff-Appellant, *vs.* MORRIS S. COBLE, Defendant-Appellee.	On Appeal from Second Judicial District Court of Middlesex County. Case No. A-14438.

Specification of determinations of the Second Judicial District Court of Middlesex County, with respect to which appellant is dissatisfied in point of law:

1. The Court erred in its judgment of "no cause for action" in favor of the defendant and against the plaintiff and appellant is dissatisfied with same in point of law, in that:

(1) The institution theory relating to fixtures was applicable to the facts in the case, that the building in the instant case had always had a heating plant since 1924, an oil heating plant since 1927, and that the property could not function properly as a dwelling if the oil burner was removed, and therefore the Court should have found that the oil burner was "realty."

2. The Court erred in its judgment of "no cause for action" in favor of the defendant and against the plaintiff and appellant is dissatisfied with same in point of law, in that:

(1) Morris S. Coble had abandoned the fixture when he removed from the premises on Sep-

tember 1, 1943, and that he trespassed when he returned on September 7, 1943, with his plumber to break up the furnace, and fraudulently took away the oil burner, and therefore the Court should have rendered a judgment in favor of the plaintiff and against the defendant for damages of $155.00.

NOTATION.

It is to be noted that this case was tried together with case No. A-14508, Samuel K. Kain plaintiff, and Helen B. Ames, defendant, inasmuch as all the parties were involved, and were necessary to a final and proper determination of the issues.

ALFRED D. ANTONIO,
Attorney for and Of Counsel with
Plaintiff-Appellant.

Service acknowledged April 20, 1944 by David T. Wilentz.

Opinion of Supreme Court.

(Filed January 2, 1945.)

NEW JERSEY SUPREME COURT.

Nos. 412 and 413. October Term, 1944.

Samuel K. Kain, Appellant, *v.* Morris S. Coble, Respondent.	No. 412. Appeals from Second Judicial District Court of Middlesex County. Before Justices Parker and Colie.
Samuel J. Kain, Respondent, *v.* Helen B. Ames, Appellant.	No. 413.

Submitted October Term, 1944; decided

On the facts stipulated in these cases, the oil burner installed by respondent Coble while owner of a dwelling house and removed by him after his ownership had ceased, *held* to be a part of the realty.

For the appellant-respondent Kain, Alfred D. Antonio.

For the appellant Ames, Harry Spitzer.

For the respondent Coble, David T. Wilentz.

The opinion of the court was delivered by Parker, *J.*

These two cases arise out of the same state of facts, were tried together in the District Court and were submitted together in this court; there

being no oral argument. The question is entirely one of law and, stated shortly, is whether an oil burner that was installed in a house by defendant Coble when he was a tenant and which, after vacating the premises, he disconnected and removed, was personal property or, on the contrary, was in contemplation of law a part of the realty. The trial court seems to have ruled that it was personal property, and based on that ruling awarded judgment in the first case above entitled in favor of the defendant Coble.

Mrs. Ames, the defendant in the second suit, was the holder of a mortgage on the property in 1927 when Coble, dissatisfied with the existing heating plant, installed a complete oil plant consisting of an outside tank, pipe connection into the cellar, and oil burner in the cellar. She foreclosed her mortgage in 1933 and purchased the property at sheriff's sale in August of that year, Coble still being in occupancy of the premises and becoming her tenant therein. This situation continued for about eight years until 1941 when Coble, being dissatisfied with the burner which was part of the oil plant, disconnected it and installed a new oil burner in connection with the rest of the oil plant. It was claimed that he left the old oil burner in the basement, but we fail to see that this is material to a decision. In March, 1943, Coble being still a tenant of the premises, Mrs. Ames conveyed to the plaintiff Kain with warranty. Coble continued as tenant until about September first of that year when he vacated the premises, but a very few days later he entered the premises and disconnected and removed the second oil burner that was part of the oil plant. This action gave rise to the present suits, No. 412 being the suit of Kain, who purchased from Mrs. Ames, against Coble for damages for removing the oil burner on the theory that it was part of the

realty; No. 413 being the suit of Kain against Mrs. Ames, based on the warranty in her deed, and claiming damages on the theory that the removal of the oil burner by Coble was conceivably legal and that Mrs. Ames was liable on her warranty because of that removal. The cases were tried together and the trial court seems to have held that the oil burner was personalty, that Coble rightfully removed it, and that because of this Mrs. Ames was liable on her warranty. Accordingly, there was a judgment for the defendant in the case against Coble and a judgment in favor of Kain in his suit against Mrs. Ames on her warranty.

We conclude that both judgments were erroneous. It seems to us indubitable that when in 1927 Coble, who was then owner of the fee subject to his mortgage, removed the coal furnace and substituted the oil plant, that oil plant became part of the realty and thereby subject to the mortgage; that the oil burner was an essential part of the oil plant; and that when, after Coble had lost his title and became a tenant, he tore out the original oil burner and substituted a new one, this made no change in the legal situation. *Erdman* v. *Moore,* 58 N. J. Law 445; *Cunningham* v. *Seaboard Realty Co.,* 67 N. J. Equity 212.

The judgment in each of the two cases under consideration will be reversed; and in No. 412, the case of *Kain* v. *Coble,* judgment will be entered in this court in favor of the plaintiff; and as the damages were apparently stipulated or conceded to amount to $155., judgment will be entered in favor of the appellant Kain against respondent Coble in No. 412 for that amount with interest from March 17, 1944, besides costs. In the case of *Kain against Ames* judgment will be entered in this court in favor of the defendant Ames and against the plaintiff Kain, with costs.

Rule for Judgment on Reversal.

(Filed January 11, 1945.)

NEW JERSEY SUPREME COURT

No. 412. October Term, 1944.

Samuel K. Kain, Appellant, *vs.* Morris S. Coble, Respondent.	Rule for Judgment on Reversal.

An appeal having been heretofore taken in the above entitled matter to this Court from the Second Judicial District Court of Middlesex County, and the cause having been duly submitted on briefs at the October Term of 1944 in this Court by Alfred D. Antonio, attorney for and of counsel with appellant; and David T. Wilentz, attorney for and of counsel with the respondent; and the Court having inspected the record and the judgment below and considered the grounds of appeal therein;

It is on this 11th day of January, 1945, ordered that the judgment of the said Second Judicial District Court of Middlesex County be in all things reversed, set aside and for nothing holden;

And it is further ordered that judgment final be and is hereby entered in this Court in favor of appellant Samuel K. Kain and against the respondent Morris S. Coble in the sum of One Hundred Fifty-five ($155.00) Dollars, together with interest from March 17th, 1944, besides costs.

Entered January 11th, 1945, on motion of Alfred D. Antonio, Attorney for and of counsel with Appellant.

Notice of Appeal and Grounds of Appeal.

(Filed April 2, 1945)

NEW JERSEY SUPREME COURT.

SAMUEL K. KAIN, Plaintiff. *vs.* MORRIS S. COBLE, Defendant.	Notice of Appeal and Grounds of Appeal.

To: Alfred D. Antonio,
Attorney for Plaintiff, Samuel K. Kain

Sir:

TAKE NOTICE that Morris S. Coble appeals to the Court of Errors and Appeals of New Jersey from the whole of the judgment entered in the above-named cause in the Supreme Court of New Jersey, reversing the judgment of the Second Judicial District Court of Middlesex County, on the grounds that:

1. The New Jersey Supreme Court reversed the judgment of the Second Judicial District Court of Middlesex County, although there was error in doing so.

2. The New Jersey Supreme Court erred in ruling that the oil burner was part of the realty.

3. The New Jersey Supreme Court erred in refusing to recognize that as between tenant and landlord, the law permits the tenant to remove that which is severable without physical damage to the premises.

Notice of Appeal and Grounds.

4. The New Jersey Supreme Court erred in its refusal to recognize the facts as found by the Second Judicial District Court of Middlesex County.

5. As between landlord and tenant, the Institution Doctrine has no application.

6. The defendant did not abandon the oil burner by leaving it upon the premises when he removed therefrom.

David T. Wilentz,
Attorney for Defendant.

Acknowledged,
March 1, 1945
Alfred D. Antonio,
Attorney for Plaintiff-Appellee

Rule for Judgment on Reversal and for Judgment Final.

(Filed January 17, 1945.)

NEW JERSEY SUPREME COURT.

No. 413. October Term, 1944.

Samuel K. Kain, Plaintiff-Respondent, *vs.* Helen B. Ames, Defendant-Appellant.	Rule for Judgment on Reversal and for Judgment Final.

An appeal having been heretofore taken in the above entitled matter to this Court from the Second Judicial District Court of Middlesex County, and the cause having been duly submitted on briefs at the October Term of 1944 in this Court by Alfred D. Antonio, attorney for and of counsel with respondent, and Harry Spitzer, attorney for and of counsel with appellant; and the Court having inspected the record and the judgment below and considered the grounds of appeal therein;

It is on this 17th day of January, 1945, ordered that the judgment of the said Second Judicial District Court of Middlesex County be in all things reversed, set aside and for nothing holden;

And it is further Ordered that judgment final be and is hereby entered in this Court in favor of appellant Helen B. Ames and against the respondent Samuel K. Kain.

Entered January 17, 1945, on Motion of Harry Spitzer, Attorney for and of counsel with Appellant.

Notice of Appeal and Grounds of Appeal.

(Filed March 12, 1945.)

NEW JERSEY SUPREME COURT.

SAMUEL K. KAIN, Plaintiff, *vs.* HELEN B. AMES, Defendant.	Notice of Appeal and Grounds of Appeal.

To: Harry Spitzer, Esq.,
Attorney for defendant, Helen B. Ames.

Sir:

TAKE NOTICE that Samuel K. Kain appeals to the Court of Errors and Appeals of New Jersey from the whole of the judgment entered in the above-named cause in the Supreme Court of New Jersey reversing the judgment of the Second Judicial District Court of Middlesex County on the grounds that:

1. The New Jersey Supreme Court reversed the judgment of the Second Judicial District Court of Middlesex County, although there was error in doing so.

2. The New Jersey Supreme Court erred in ruling that the oil burner was part of the realty.

3. The New Jersey Supreme Court erred in refusing to recognize that as between tenant and landlord, the law permits the tenant to remove that which is severable without physical damage to the premises.

Notice of Appeal and Grounds of Appeal.

4. The New Jersey Supreme Court erred in its refusal to recognize the facts as found by the Second Judicial District Court of Middlesex County.

5. As between landlord and tenant, the Institution Doctrine has no application.

6. The tenant did not abandon the oil burner by leaving it upon the premises when he removed therefrom.

ALFRED D. ANTONIO,
Attorney for Plaintiff.

Service of a copy of within Notice of Appeal and Grounds of Appeal is hereby acknowledged this 1st of March, 1945.

HARRY SPITZER,
Attorney for defendant, Helen B. Ames.

Stipulation.

NEW JERSEY ~~SUPREME COURT~~ Court of Errors and Appe

SAMUEL K. KAIN,
Appellant,

vs.

MORRIS S. COBLE,
Respondent.

SAMUEL K. KAIN,
Respondent,

vs.

HELEN B. AMES,
Appellant.

Stipulation.

It is hereby stipulated by and among Alfred D. Antonio, Attorney for and of Counsel with Samuel K. Kain; Harry Spitzer, Attorney for and of Counsel with Helen B. Ames; and David T. Wilentz, Attorney for and of Counsel with Morris S. Coble, that the respective appeals in each of the above cases, and which have been taken to the Court of Errors and Appeals, be submitted and heard together; that one State of The Case be submitted for both cases; ~~that one brief by each party be submitted~~; that the "State of Case Agreed Upon" as submitted in the case of Samuel K. Kain, Plaintiff-Appellant vs. Morris S. Coble, Defendant-Appellee in the New Jersey Supreme Court be submitted to the Court of Errors and Appeals as the facts agreed upon in both cases—the whole State of Case to include the other usual

and necessary papers in both cases together with this Stipulation.

ALFRED D. ANTONIO,
Attorney for and of Counsel with Samuel K. Kain.

HARRY SPITZER,
Attorney for and of Counsel with Helen B. Ames.

DAVID T. WILENTZ,
Attorney for and of Counsel with Morris S. Coble.

Judgment.

NEW JERSEY SUPREME COURT.

SAMUEL K. KAIN,
Appellant,

vs.

MORRIS S. COBLE,
Appellee.

Judgment.

This cause having been duly submitted on briefs at the October Term of 1944 in this Court by Alfred D. Antonio, attorney for and of counsel with appellant, and David T. Wilentz, attorney for and of counsel with appellee, and the Court having inspected the record and the judgment below and considered the grounds of appeal therein, and having ordered that the judgment of the said Second Judicial District Court of Middlesex County be in all things reversed, set aside and for nothing holden, and having further ordered that judgment final be entered in this Court in favor of appellant, Samuel K. Kain, and against the appellee, Morris S. Coble, in the sum of One hundred fifty-five ($155.00) dollars, together with interest from March 17, 1944, besides costs,

Whereupon it is adjudged that the judgment of the Second Judicial District Court of Middlesex County, entered in favor of appellee and against the appellant, be reversed, set aside and for nothing holden and judgment final is hereby entered in favor of appellant, Samuel K. Kain and against the appellee, Morris S. Coble, and that said appel-

lant, Samuel K. Kain, to recover of the said appellee, Morris S. Coble, the sum of one hundred and fifty five dollars damages together with his costs, which have been taxed at the sum of ninety-two dollars, making in the whole the sum of two hundred and forty-seven dollars, together with interest on damages from March 17, 1944.

Damages	$155.00
Costs	92.00
	$247.00

Int. on damages from March 17, 1944.

Judgment entered and signed January 11, 1945.

THOMAS J. BROGAN,
Chief Justice.

Judgment.

NEW JERSEY SUPREME COURT.

No. 413. OCTOBER TERM, 1944

SAMUEL K. KAIN,
Plaintiff-Appellee,

vs.

HELEN B. AMES,
Defendant-Appellant.

Judgment.

This cause having been duly submitted on briefs at the October Term of 1944 in this Court by Alfred D. Antonio, attorney for and of counsel with appellee, and Harry Spitzer, attorney for and of counsel with appellant, and the Court having in-

spected the record and the judgment below and considered the grounds of appeal therein, and having ordered that the judgment of the said Second Judicial District Court of Middlesex County be in all things reversed, set aside and for nothing holden and having further ordered that judgment final be entered in this Court in favor of appellant, Helen B. Ames, and against the appellee, Samuel K. Kain,

Whereupon it is adjudged that the judgment of the Second Judicial District Court of Middlesex County, entered in favor of the plaintiff-appellee and against the defendant-appellant, be reversed, set aside and for nothing holden and judgment final is hereby entered in favor of defendant-appellant Helen B. Ames, and again the plaintiff-appellee, Samuel K. Kain and that said defendant-appellant Helen B. Ames, do recover of the said plaintiff - appellee, Samuel K. Kain, her costs, which have been taxed at the sum of $.....

Costs $

Judgment entered and signed January 17, 1945.

THOMAS J. BROGAN,
Chief Justice.

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Notice of Appeal.

(Filed April 3, 1944.)

Second Judicial District Court

MIDDLESEX COUNTY.

A-14508.

SAMUEL K. KAIN, Plaintiff, *vs.* HELEN B. AMES, Defendant.	Action at Law. (On Contract).

To Samuel K. Kain or Alfred D. Antonio, Attorney for Samuel K. Kain.

Sir:

Please take notice that the defendant Helen B. Ames hereby appeals to the New Jersey Supreme Court from the judgment rendered on March 17, 1944, in the above stated action which was tried together with Case A-14438 as one case, by stipulation of counsel of the various parties in open Court, in the Second Judicial District Court of Middlesex County, at Perth Amboy, New Jersey.

Perth Amboy, New Jersey,
March 29, 1944.

HARRY SPITZER,
Attorney for Defendant,
Helen B. Ames.

Service of a copy of the within notice of appeal is hereby acknowledged this 30th day of March, 1944.

ALFRED D. ANTONIO,
For Samuel K. Kain.

Complaint.

(Filed November 1, 1943.)

SECOND JUDICIAL DISTRICT COURT
OF MIDDLESEX COUNTY.

SAMUEL K. KAIN, Plaintiff, *vs.* HELEN B. AMES, Defendant.	Action at Law. (On Contract).

1. On February 4th, 1943, and for a long time prior thereto, the defendant Helen B. Ames was the owner of a tract of land situated in the City of Perth Amboy, County of Middlesex and State of New Jersey, and commonly known as 100-102 Washington Street.

2. On said date the defendant did enter into a contract with the plaintiff for the sale of said premises in the usual form. Said contract also contained the following provision: "Gas and electric fixtures, gas stove, hot water heaters and heating apparatus, if any, and all other personal property appurtenant to or used in the operation of said premises is included in this sale."

3. By Warranty Deed dated January 27th, 1943, and recorded in the Middlesex County Clerk's office on March 18th, 1943, the said Helen B. Ames, defendant, conveyed said premises to the plaintiff.

4. Said Warranty Deed was a full covenant warranty deed containing the usual covenants and warranities.

5. After the delivery of said warranty deed by the defendant to plaintiff one Morris S. Coble claimed of the plaintiff that he was the lawful owner of an oil burner which was attached to said premises and demanded possession of same from the plaintiff, and plaintiff refused to deliver same to him.

6. Plaintiff notified the defendant of the said claim and demand of the said Morris S. Coble.

7. Thereafter the said Morris S. Coble removed said oil burner from said premises without the consent or permission of the plaintiff.

By reason of the premises aforesaid, the covenants and warranties contained in said Warranty Deed have been breached to the damage of the plaintiff in the sum of Two Hundred and Fifty ($250.00) Dollars.

Judgment will be claimed in the sum of $250.00 together with interest and costs of suit.

ALFRED D. ANTONIO,
Attorney for Plaintiff.

Exception to Judgment.

(Filed March 31, 1944.)

SECOND JUDICIAL DISTRICT COURT
OF MIDDLESEX COUNTY.

No. A-14508.

SAMUEL K. KAIN, Plaintiff, *vs.* HELEN B. AMES, Defendant.	Action at Law. (On Contract).

To Harry J. Hardiman,
Clerk of Second Judicial District Court
of Middlesex County.

Sir:

Please take notice that the defendant, Helen B. Ames, hereby excepts to the judgment rendered by the Court on March 17th, 1944, in the absence of counsel of either party. This exception is entered formally for the purpose of showing that an exception would have been taken by counsel for the defendant if he had been apprised that a decision would be made on the date aforesaid.

HARRY SPITZER,
Attorney for Defendant,
Helen B. Ames.

Specification of Determinations.

NEW JERSEY SUPREME COURT.

Case No. A-14508.

SAMUEL K. KAIN, Plaintiff-Appellee, *vs.* HELEN B. AMES, Defendant-Appellant.	On Appeal from Second Judicial District Court of Middlesex County.

Specification of determinations of the Second Judicial District Court of Middlesex County, with respect to which appellant is dissatisfied in point of law:

1. The Court erred in its judgment of finding in favor of the plaintiff and against the defendant in the sum of $155.00, and appellant is dissatisfied with same in point of law, in that:

(1) The institution theory relating to fixtures was applicable to the facts in the case, that the building in the instant case had always had a heating plant since 1924, an oil heating plant since 1927, and that the property could not function properly as a dwelling if the oil burner was removed, and therefore the Court should have found that the oil burner was "realty."

2. The Court erred in its judgment of finding in favor of the plaintiff and against the defendant in the sum of $155.00, and appellant is dissatisfied with same in point of law, in that:

(1) A tenant Morris S. Coble had abandoned the fixture when he removed from the premises

on September 1, 1943, and that he trespassed when he returned on September 7, 1943, with his plumber to break up the furnace, and fraudulently took away the oil burner, and therefore the Court should have rendered a judgment in favor of the defendant and against the plaintiff for "no cause for action."

NOTATION.

It is to be noted that this case was tried together with case No. A-14438, Samuel K. Kain, plaintiff, and Morris S. Coble, defendant, inasmuch as all the parties were involved, and were necessary to a final and proper determination of the issues.

HARRY SPITZER,
Attorney for Defendant-Appellant,
Of Counsel.

Service acknowledged April 20, 1944 by Alfred D. Anatonio.

New Jersey Court of Errors and Appeals

SAMUEL K. KAIN, Plaintiff-Appellant, vs. HELEN B. AMES, Defendant-Appellee.	On Appeal from New Jersey Supreme Court.

BRIEF OF PLAINTIFF-APPELLANT.

Statement of Facts.

The Plaintiff-Appellant has appealed from an order of the Supreme Court reversing a judgment entered in the Second Judicial District Court of Middlesex County which was in favor of the Plaintiff-Appellant and against the Defendant-Appellee in the sum of $155.00. The Plaintiff-Appellant filed an appeal solely because the Defendant-Appellant Morris S. Coble appealed to this Court from the Supreme Court in the case of *Samuel K. Kain, Plaintiff-Appellee v. Morris S. Coble, Defendant-Appellant.* Plaintiff-Appellant Kain is in the anomalous position of having to appeal this case solely because the other case was appealed and so that both cases may be before the Court. At the time this case was tried in the District Court it was tried together with the case of *Samuel K. Kain* v. *Morris S. Coble.* In the *Kain-Coble* case, Kain sued Coble for conversion of the oil burner. The *Kain-Coble* case resulted in a verdict for Coble of "no cause for action," which was reversed by the Supreme Court where judgment was entered against Coble. At the time of the trial the attorney for the De-

fendant-Appellee Helen B. Ames relied upon the same facts and testimony as presented in Kain's direct case and stated "that his client, Helen B. Ames, at all times believed that she was the owner of all the fixtures belonging to the heating plant and that as such they went with the property, and that she intended to convey them to the plaintiff, Samuel K. Kain, by deed of warranty." (State of Case, page 19, lines 4 to 18.)

In the case of *Samuel K. Kain, Plaintiff-Appellee* v. *Morris S. Coble, Defendant-Appellant,* the writer has filed a Brief arguing against the contention of Coble that the oil burner did not become part of the realty and which the writer again reiterates should be the holding in this Court and the Supreme Court judgments should be affirmed. The grounds for appeal in this case were made by the writer exactly the same as the grounds for appeal raised by the Defendant-Appellant Coble in the case of *Kain* v. *Coble.* The Plaintiff-Appellant Kain respectfully asks the Court to consider his anomalous position in that it would be impossible for the writer to elaborate the grounds of appeal in this case and argue against his brief in the case of *Kain* v. *Coble.*

Plaintiff-Appellant Kain respectfully asks the Court to consider these two appeals together since they involve the same subject matter.

We do not contend that we are entitled to a judgment against both defendants. The cases were not tried on that theory nor are they so argued on appeal. Plaintiff-Appellant Kain is certainly entitled to a judgment against either Coble or Ames.

Respectfully submitted,

Alfred D. Antonio,
Attorney for and of Counsel
with Plaintiff-Appellant.

Grounds of Appeal.
(As set forth in S. C., page 40)

1. The New Jersey Supreme Court reversed the judgment of the Second Judicial District Court of Middlesex County, although there was error in doing so.

2. The New Jersey Supreme Court erred in ruling that the oil burner was part of the realty.

3. The New Jersey Supreme Court erred in refusing to recognize that as between tenant and landlord, the law permits the tenant to remove that which is severable without physical damage to the premises.

4. The New Jersey Supreme Court erred in its refusal to recognize the facts as found by the Second Judicial District Court of Middlesex County.

5. As between landlord and tenant, the Institution Doctrine has no application.

6. The tenant did not abandon the oil burner by leaving it upon the premises when he removed therefrom.

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New Jersey Court of Errors and Appeals

SAMUEL K. KAIN, Plaintiff-Appellant, vs. HELEN B. AMES, Defendant-Appellee.	On Appeal from New Jersey Supreme Court.

BRIEF OF DEFENDANT-APPELLEE.

(All italics are our own. For convenience and to avoid confusion said parties are hereinafter designated by their surnames.)

Statement.

This is an answer to the appeal of the plaintiff-appellant, Samuel K. Kain, who is appealing an order of the New Jersey Supreme Court reversing a judgment of the Second Judicial District Court of Middlesex County, at Perth Amboy, New Jersey, which trial court had entered a judgment in favor of Kain, and against Ames in the original suit, in the sum of $155.00. This case was based on the warranty in a deed conveying property, from Ames to Kain. This case was tried together with the case of *Samuel K. Kain* v. *Morris S. Coble,* which sounded in tort for fraudulent conversion. In the original trial, the District Court found in favor of Coble and against Kain, and entered a verdict of no cause for action.

On appeal to the Supreme Court, the two cases were submitted on briefs, and considered by the

Court together. One opinion was delivered by Justice PARKER, who reversed the judgment in each of the two cases.

Plaintiff-appellant Kain is in an anomalous position. He must appeal, because Coble appeals. However, the discussion is academic as to Kain, because he must succeed in any event—whether the final decision is in favor of Coble or Ames—either Coble is guilty of fraudulent conversion or Ames is liable on the warranty in the deed. The grounds of appeal set forth by Kain in the appeal to the Court of Errors and Appeals are identical with the grounds set forth by Coble in his appeal to the Court of Errors and Appeals. The object of both appeals is to present the issue to the Court of Errors and Appeals. The real contest is between Coble and Ames. This brief is intended primarily to present an answer to the brief in the case of *Kain* v. *Coble,* though entitled in the name of *Kain* v. *Ames,* as a matter of procedure.

Specification of Defenses listed in State of Case, pg. 31, by *Kain* v. *Coble,* and Specification of Defenses listed in Addenda to State of Case, pg. 5, by *Ames* v. *Kain,* are identical, and will again be relied upon by defendant-appellee, Helen B. Ames.

Facts.

Dr. Morris S. Coble had acquired the property known as 100-102 Washington Street, Perth Amboy, New Jersey, on June 16, 1924. He had mortgaged the property to the Service Corporation on the same date, June 16, 1924. Said Service Corporation had assigned its mortgage to William Ames on November 3, 1924. Dr. Coble lost the premises through mortgage foreclosure. The Sheriff deed to Helen B. Ames, *et al.,* was dated August 23, 1933, (the said William Ames having died in the meantime). Helen B. Ames contracted to sell the property to Samuel K. Kain by contract dated February 4, 1943, and did deliver the deed to said property to said Samuel K. Kain on March 17, 1943, by deed recorded March 18, 1943, in the office of the Clerk of Middlesex County.

It was admitted that the said mortgage, recorded in book 433, page 644, from Morris S. Coble to Service Corporation, contained the clause, "Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging."

It was conceded by Henry Spitzer, appearing for David T. Wilentz, attorney for Morris S. Coble, that by virtue of the Sheriff deed the property and fixtures, such as heating plant, passed to the mortgagee-grantee, on August 23, 1933, after the foreclosure.

Morris S. Coble, the former owner continued to be a tenant from the time of foreclosure in August, 1933, down to September 1, 1943; Helen B. Ames was his landlord from August, 1933, to March, 1943; Samuel K. Kain was his landlord from March, 1943, to September 1, 1943.

When Dr. Coble became the owner of the premises in June, 1924, the premises contained a coal burning furnace which was part of a steam-heating plant, used to heat the house.

In 1927, while still the owner, the doctor converted the coal heating apparatus to oil heating apparatus, and installed an oil burner, an oil tank, piping from tank to furnace, and other oil heating features. In September, 1941, while a tenant, the doctor replaced the first oil burner of 1927, with a new and better type of oil burner, and left the old oil burner in the basement. Whatever he took out, he placed against the wall.

The doctor was still a tenant for six months after the premises were sold by Mrs. Ames to Samuel K. Kain. The doctor remained in the premises as a tenant until September 1, 1943, when he moved from the premises. On September 7, 1943, he came back to the house and removed the oil burner.

The above facts were admitted by all the parties concerned. (S. C., p. 13, l. 16 to l. 34, p. 14).

ARGUMENT.

POINT ONE.

An oil burner attached to a heating plant and used to heat a dwelling house is realty.

1. The institution theory relating to fixtures was applicable to the facts in the case, that the building in the instant case had always had a heating plant since 1924, an oil heating plant since 1927, and that the property could not function properly as a dwelling if the oil burner was removed, and, therefore, the oil burner was "realty."

Definition.

Fixtures—The doctrine of property arising from accession is grounded on the right of occupancy. The original owner is entitled to property under its state of improvement. Blackstone, Book II. The rights of Things. Page 404.

The underlying principle of the law of fixtures is represented by the maxim, *Quicquid plantatur solo, solo cedit,* that is, that whatever is annexed to the soil becomes part of it, this being but one application of the theory of accession, as it existed in the Civil Law.

The courts ordinarily refer, in determining the question, to the intention with which the article was annexed to the land, the mode of the annexation, and the character of the article as related to the use to which the land is devoted.

Whether an article annexed to the land has become a part thereof has been more usually said to be a mixed question of law and fact. 26 C. J. 652.

In New Jersey, the institutional, or functional, doctrine, relating to fixtures, has prevailed since 1895. "When a chattel is permanently essential to the completeness of a structure, having regard to the character of that structure and the functioning of it in the use for which it was obviously designed, is actually, purposely and lawfully affixed to and into the structure, it becomes a part of the realty."

* * * * *

The leading case in New Jersey under the functional theory is the case of *Smyth Sales Corp.* v. *Norfolk Building and Loan Association,* 116 N. J. Law, 293. Argued October 17, 1935 and decided April 2, 1936, by the Court of Errors and Appeals.

> In this case the plaintiff sued in replevin to recover possession of certain portions of an oil burner equipment which, in its entirety, had been sold to the owner of the premises upon a filed conditional sales contract. A party named LaFerra was the owner of a four-family house with a single heating plant. In October, 1930, he entered into a written contract with the Smyth Sales Corporation whereby the latter undertook to install an oil burner tank and the additional equipment incident thereto, including a pump, the same to be and remain the personal property of the seller, notwithstanding the manner in which the property might be attached to the premises, until the entire purchase price should have been paid. The conditional sales contract was filed August 28, 1930. The actual installation took place on September 30, 1930. The tank was buried three feet under ground. It was connected with the pump and the burner by piping which passed through the foundation wall of the house, and was so encased that its removal would require the breaking of the concrete cellar floor. Plaintiff's suit is directed against the burner,

the tank, and the pump. If any of such articles are removed, no heat can be generated unless other appliances are installed in their stead.

On September 9, 1930, La Ferra executed a mortgage recorded October 3, 1930, to defendant Norfolk Building and Loan Association. On April 24, 1931, a party named Scrocco obtained a judgment against La Ferra on mechanic's lien and defendant purchased the premises at the execution sale held thereunder. Defendant thus acquired and still holds record title. The position of the defendant Norfolk Building and Loan Association, is that of a purchaser whose acquisition of the realty was subsequent both to the filing of the conditional sale agreement and to the installation of the equipment but who did not assent to a reservation of title in the chattels.

In determining whether the removal of the replevined goods would result in material injury to the freehold we do not weigh the destructive effect of the breaking up of the concrete floor of the cellar incident to the removal of an essential part of the equipment because we reach our conclusion on broader grounds, but we note that the physical affixation of the equipment to the realty here clearly appears. Many years ago our courts stated a principle that has more recently become known as the institution doctrine.

It is clear from the stipulated facts that *the articles which respondent sought to recover are indispensable parts of the heating system which is itself an essential part of a building designed for use as an apartment house* and that the articles were lawfully and intentionally affixed for that purpose. It follows, therefore, that the heating system became incorporated with the realty, and is not severable without material injury to the freehold.

> "When a chattel which, clearly, is permanently essential to the completeness of a structure, having regard to the character of that structure and the functioning of it in the use for which it was obviously designed, is actually, purposely and lawfully affixed to and into the structure, it becomes a part of the realty; and if severance of it will prevent the structure from being used for the purposes for which it was erected or for which it has been adapted, then the article is not severable without material injury to the freehold. By that standard the articles sought by the plaintiff are not severable without material injury to the freehold. The willingness on the part of the plaintiff to abandon parts of the equipment does not alter the relationship which the equipment, as a whole, bears to the remaining parts of the structure. In such a situation, the degree of affixation is less important than the indispensability of that which is affixed."

The above case is followed by and cited in the case of *Mugler Auto Pit Company* v. *Tide Water Oil Co.,* 14 N. J. Misc. 471, decided May 25, 1936, and directly quotes that part of the decision of the *Smyth* case which is set forth in quotations hereinabove. It further states that the application of the "institution" theory was, however, limited and circumscribed to apartment houses by the case of *Independent Aetna Sprinkler Corp.* v. *Morris,* 114 N. J. Law 23, 175 Atl. 102, which concerned a sprinkler case in a store and office building, and followed *H. G. Vogel Co.* v. *295 Halsey Street Co.,* 109 N. J. Law 83, 160 Atl. 364, which involved a sprinkler system in a garage. The case of *Smyth Sales Corp.* v. *Norfolk Building and Loan Association, supra,* expressly overruled the *Independent Aetna Sprinkler Corp.* and *H. G. Vogel Co.* cases, and declares the rule

to apply to any structure in the following language, 116 N. J. Law 293, at page 298, 184 Atl. 204, 206.

> 'Let us consider the property presently in litigation. Advancing needs of society and marked refinements in living and working conditions and in the design and function of buildings as contrasted with furnishings or severable fixtures—speaking broadly, of what is land as contrasted with chattels. It is logical that the legal conception of what we refer to, with varying shades of meaning, as "building," or "realty," or "freehold" should keep pace with actual changes in the substance which the conception represents. Particularly is this so with regard to houses, and more particularly apartment houses, and with respect to certain living facilities which must be provided by the owner as, essentially, parts of the structure. Formerly tenants took their own stoves to and from the leased premises; so too oil lamps, ice boxes, bathing vessels, and the like. Those ways are now largely outmoded, but to a degree eliminated, necessarily so in many of the habitations provided for the multiple of housing of tenants. In this climate conditions of habitation must include the means of heat in the winter and refrigeration in the summer. In our case the building is a dwelling, housing four families, built for year-round occupancy and heated by a system wherein the heat is generated in the cellar by a single oil burning equipment. *The structure cannot function for the purpose, and the only purpose, for which it was built unless it has a heating system. If the equipment or any part thereof necessary to the generation of heat is taken out, it must be replaced.* It is a part of the house. It is entirely separate and apart from furniture or furnishings. It is something that must be in and of the building instituted as an apartment dwelling house, before the structure so instituted

can, as a structure, properly function. The removal of it would be, *pro tanto,* a disintegration of the structure. With as little physical disturbance doors could be lifted from their hinges, windows from their frames, radiators from their pipes, chandeliers and brackets from the ceilings and walls, bathtubs from their settings, and numerous other accessories, personalty in their manufacture but by attachment and function part of the completed house, could be taken out. If dwelling houses consisted simply of floors and roof with supporting walls masoned into the ground, the extent of physical disruption incident to the severance of an object would perhaps furnish a satisfactory and workable rule as to whether that object could be removed without injury to the freehold. But that type of construction does not prevail and that test is wholly inadequate. *When a chattel which, clearly, is permanently essential to the completeness of a structure, having regard to the character of that structure and the functioning of it in the use for which it was obviously designed, is actually, purposely, and lawfully affixed to and into the structure, it becomes in our opinion, a part of the realty*; and if the severance of it will prevent the structure from being used for the purposes for which it was erected or for which it has been adapted, then the article is not severable without material injury to the freehold. By that standard the articles sought by the plaintiff are not severable without material injury to the freehold. The willingness on the part of the plaintiff to abandon parts of the equipment does not alter the relationship which the equipment, as a whole, bears to the remaining parts of the structure. In such a situation the degree of affixation is less important than the indispensability of that which is affixed. That principle has been thoroughly established in our more recent

cases. Domestic Electric Co., Inc. v. Mezzaluna, *supra*; MacLeon v. Walter J. Satterthwait, Inc., 109 N. J. Eq. 414, 157 Atl. 670, affirmed 113 N. J. Eq. 238, 166 Atl. 163; Russ Distributing Corporation v. Lichtman, 11 N. J. Law 21, 166 Atl. 513; Lumpkin v. Holland Furnace Co., Inc., 118 N. J. Eq. 313, 178 Atl. 788; Fidelity B. & L. Ass'n v. Elizabeth Ave. Holding Co., 119 N. J. Eq. 11, 180 Atl. 881.'

In General Motors Acceptance Corporation v. Capital Associates, Inc., 110 N. J. Law 61, 164 Atl. 20, we sustained the Supreme Court (108 N. J. Law 421, 158 Atl. 107) in finding that the recording of the conditional sale contract was not sufficiently informing to reserve title in the conditional seller against a subsequent purchaser of the realty. The bare statement of fact in the Supreme Court opinion that the equipment sued for was severable without material injury to the freehold does not present an arguable precedent in the instant appeal. Layne New York Co., Inc. v. President Hotel Co., 11 N. J. Law 338, 168 Atl. 442, follows Domestic Electric Co., Inc. v. Mezzaluna, *supra*. Pflieger v. Holland Furnace Co., 114 N. J. Law 43, 174 Atl. 720, turned upon the fact that the conditional sale contract was made long before but not recorded until after the filing of the notice of lis pendens in the foreclosure suit whereby any interest of either the buyer or the seller under the conditional sale contract was cut off; for this reason and because of other distinguishable facts it is not, in any implication contra, a precedent on our present issue. To the extent that Vogel Co. v. 295 Halsey Street Co., 109 N. J. Law 83, 160 Atl. 374, and Independent Aetna Sprinkler Corporation v. Morris, 114 N. J. Law 23, 175 Atl. 102, are in conflict herewith they are overruled.''

The case of *Lumpkin* v. *Holland Furnace Co.*, 178 Atl. 789, is almost identical with the instant case. In the *Lumpkin* v. *Holland Furnace Co.* case it was held that as to the chattels and fixtures therein considered title cannot be reserved, even in an agreement to reserve such title. The oil burner in the instant case falls within the definition of the fixtures described in that case, and for a stronger reason should be considered a fixture, since at no time did Dr. Coble contend that there was a reservation of title by him in the oil burner until he was ready to remove from the premises.

We quote from that case as follows:

> "The question presented is whether the system, or any of its essential parts, could be removed without material injury to the freehold.
>
> Whether removal could be effected without doing material physical damage to the building, considered alone as such, was a disputed question of fact at the trial, and an adverse finding on this phase of the case was amply justified by the proofs.
>
> There is, however, a broader question involved. In the case of Domestic Electric Co. v. Mezzaluna, 109 N. J. Law 574, 162 Atl. 722, 723, which was the sale and installation of a refrigerating plant in an apartment house (original as a system of refrigeration) it was held that title in that case could not be reserved in the seller, and the equipment or its parts removed without material injury to the freehold. The ground upon which this conclusion was reached was that the act, as applied to the given case, contemplated something more than the mere physical injury which might result from the severance of the equipment or its parts from the building considered as a building alone, and that it connoted injury to the

apartment house as an institution as well. It was commented in the opinion that 'refrigeration in this day of advanced domestic housekeeping is almost as essential in the home as gas ranges, or other cooking appliances and heating equipment.' *It was further said that if the heating equipment were a heating plant comprising boilers, radiators, piping, etc., it would hardly be contended that the pipes, radiators, or other essential parts of the heating system could be separated from the whole and removed without material injury to the freehold.* This has been followed and reiterated in Russ Distributing Corporation v. Lichtman, 111 N. J. Law 21, 166 Atl. 513.

While a private dwelling house may not be deemed to be an institution within the strict meaning of the word as commonly understood, and while the installation of an entire new equipment, which may be easily severable from the freehold without doing material injury to the building as such, may not come within the purview of the cited case, yet, *where the installation to which title is sought to be reserved is but the replacement of other equipment already existing and serving the needs of the property, it cannot, we think, be said that the removal can be effected without material injury to the property when its needs and uses are taken into consideration. A heating plant in a dwelling house in this climate is as essential as doors and windows.* While the latter may be removed from their hinges, without doing material injury to the remainder of the building, in a purely physical sense, yet depriving a dwelling of all means of excluding cold on the one hand cannot be contemplated without recognizing material injury as a result. *Where, as here, it is but a replacement of one type of equipment for another, title cannot be reserved as against a prior mortgagee with-*

out doing violence to the broader intent of the statute.

The decree is affirmed."

The case of *Oradell Gardens* v. *Mooney,* 13 N. J. Misc. 365, may be differentiated from the *Smyth* case in that it concerned an advertising sign which was put up for temporary use and, therefore did not belong to the freehold. In this case the intention controls.

The case of *Sunshine Building and Loan Association* v. *Meola,* 122 N. J. Eq. 381, is also a different case in that the machinery installed on the premises was specially reserved as chattels until paid for, and in that the chattel mortgage was subsequent to the real estate mortgage.

The case of *McDonald* v. *McDonald Construction Co.,* 117 N. J. Eq. 181, concerns a sand and gravel washing plant which could be dismantled and taken down in sections and, therefore, was held not to be part of the realty and was not covered by the realty mortgage. The Court stated that the structure described was employed by the corporation for the prosecution of its business; that the plant machinery had no permanent relation to the improvement of the land, and that its use at no time indicated an intention by the corporation or the owner of the land to treat the structure as real estate.

A recent case, and the case which should be controlling, is the case of *Rinbrand Well Drilling Co.* v. *L. & H. Theatres, Inc.,* decided May 26, 1941, and affirmed by the Court of Errors and Appeals on May 31, 1941, in an unanimous decision. 126 N. J. Law 446, 127 N. J. Law 604. *Per Curiam.*

"Plaintiff below brought an action in replevin against appellants, owners and tenants respectively of a theatre property, and recovered a judgment awarding it possession of a turbine pump. The facts disclose that appellants in 1936 entered into an agreement to build a theatre. The theatre was erected and included a cooling system, of which the pump later became a part. L. & H. Theatres, Inc., then rented the building and appurtenances for twenty-one years.

In 1937 respondent sold the pump in question to Brooks Motors, Inc. and it was installed in the theatre. Brooks Motors, Inc. did not pay in full for the motor and in 1938 respondent recovered judgment against it in the sum of $617.44, issued execution thereon and in 1939 purchased the pump at the execution sale. Thereafter, it made written demands upon appellants for possession, which were refused. The State of Case settled by the District Court Judge states: 'The Court found as a matter of fact that the pump remained a chattel, and decided as a matter of law that the pump remained a chattel' * * *

In Feder v. VanWinkle, 53 N. J. E. 370, decided in 1895, the Court of Errors and Appeals stated a principle that has since become known as the institutional doctrine and which has more recently been reaffirmed in Smyth Sales Corp. v. Norfolk B. & L. Assn., 116 N. J. L. 293. In that case, the Court of Errors and Appeals, speaking through Mr. Justice Case said: 'When a chattel which, clearly, is permanently essential to the completeness of a structure, having regard to the character of that structure and the functioning of it in the use for which it was obviously designed, is actually, purposely and lawfully affixed to and into the structure, it becomes, in our opinion, a part of the realty.'

> The instant case is controlled by that principle and the judgment of the District Court is, therefore, reversed with costs."

The institution doctrine is also followed in the case of *Future Building and Loan Association* v. *Mazziochi, et al.,* 107 N. J. Eq. 422, decided January 12, 1931.

> Material injury in detaching, not intention in attaching, is the test. When it is considered that refrigerators and gas ranges are part of the plant of an apartment house and that the building cannot function without them, it may well be doubted that they are removable without material injury to the freehold as against a mortgagee which advanced its money in contemplation of a completed structure. See General Electric Co. v. Transit Equipment Co., 57 N. J. Eq. 460. They are no more removable without material injury than would be the carrying away of the front door, although the unhinging of the door would be less difficult. The word "material," as used in the statute in one sense, means material injury to the structure, but it also connotes injury to the institution of which the structure is a part.

The institution doctrine was also followed in the case of *Farmers National Bank* v. *Salmon,* 118 N. J. Eq. 241. Decided May 15, 1935. This case concerned equipment in a creamery.

The case of *Greenspan-Greenberger Co.* v. *Goerke Co.,* 111 N. J. Eq. 249, does not follow the institution doctrine because the chattels involved in that case are store fixtures and are not lost to a tenant who fails to remove or reserve them before entering upon a new term. In that case Vice Chancellor Backes said, "According to the common law, where a tenant erects a substan-

tial structure upon demised premises and leaves it when his term is up, it is presumed that he intends to abandon it, and, as he cannot reenter, it amounts to a gift to the landlord, and upon a renewal of the term it is lost to him unless he expressly reserves it; such an intention cannot be imputed to a tenant whose shop fixtures are put in a leased store for his convenience and affixed only for the purpose of carrying on his trade.'' Common law rule does not apply to store fixtures. This is a receivership case. The purchaser is allowed to remove trade fixtures.

The institution doctrine was not followed in the case of *Amusement Supply Co.* v. *Kaybe Amusement Co.,* 128 N. J. Law 98, because this involved a conditional sales contract, the court stating that reservation of title to equipment essential to the operation of a motion picture machine in the conditional seller was valid against the owner and lessee of the theatre not consenting to the reservation. The ''institution doctrine'' was inapplicable. This concerned special equipment in a conditional sales contract.

In the case of *Provident Mutual Life Insurance Co.* v. *Doughty,* 6 A. 2nd 184, 125 N. J. Eq. 442, lessee tenant wished to take away an entrance structure attached to a theatre building. Where entrance structure erected by tenant was merely an extension of front of theatre building and was valuable only when used in connection with building, and building and new entrance made one complete theatre building, and structure was erected pursuant to lease providing therefor and that on termination of lease possession (of chattels) should be surrendered together with ''improvements,'' the entrance fixture did not constitute a ''trade fixture'' that could be removed by tenant even with consent of landlord against objection

of mortgagee, but was an "improvement" which is a valuable addition or betterment, such as a building on land, and under terms of lease and mortgage passed to mortgagee. This case followed the institution doctrine and distinguishes chattels that are trade fixtures. Court held that even though the original owner and lessee had said that possession is to be given to owner on expiration of lease, and the defendant now contends that entrance is a trade fixture, the institution doctrine prevails.

A very recent case appearing in N. J. Law Journal of August 3, 1944, *Arco Company versus Hawthorne Fuel & Ice Inc.*, 38 Atl. 2d 290, follows the institutional doctrine in the following words:

> The building in question seems to have been specifically constructed for an ice plant and the equipment installed was designed to carry out that purpose.
>
> It is now well settled that whenever chattels have been annexed to a building by their owner to carry out the purposes for which the building was erected or has been adapted, with the intention of permanently increasing the value of both, they become, as between the owner and his mortgagee, fixtures and as much a part of the realty as the building itself. And this is true even if the chattels may be severed from the building without damage. This theory, known as the institutional theory, is not new.
>
> It is apparent that the facts here bring this case within the theory or doctrine, and that the mortgage is a real estate mortgage.

ARGUMENT IN ANSWER TO POINT I OF DEFENDANT-APPELLANT'S BRIEF.

Defendant-appellant Coble puts great stress on the case of *Amusement Supply Co.* v. *Kaybe Amusement Co.,* 128 N. J. L. 98 (Supreme Court 1942). This case involved a conditional bill of sale. In a conditional sales contract, the intention of the parties with respect to the characteristics of the property is expressed in writing and the Courts always and properly exert their power to give effect to such written manifestation of intention. In the *Kain-Coble-Ames* case, no such contract exists. The installation of an oil heating plant indicates an intention of permanent fixation. "In the absence of an agreement with the landowner, the person who erects such structures as are ordinarily attached to the land is presumed to intend that they shall be permanent annexations." *Thompson on Real Property,* Vol. 1, p. 272, Sec. 198.

Defendant-appellant attacks the cases of *Erdman* v. *Moore & Co.,* 58 N. J. L. 445 (Supreme Court 1896), and of *Cunningham* v. *Seaboard Realty Co.,* 67 N. J. E. 210 (Chancery 1904), which were cited by Justice PARKER in his Supreme Court decision, *Kain* v. *Coble,* 40 Atl. 2nd 350, 132 N. J. L. 315;—defendant-appellant states that they are not authority for the proposition that "a tenant who formerly owned the house remains in a legal status equivalent to the owner as regards any chattel which he may affix while a tenant, no matter how slightly." (Brief of Defendant-appellant, p. 10, last paragraph.) Defendant-appellee does not limit a tenant to any such category. This is Coble's own construction.

Justice PARKER held, "It seems to us indubitable that when in 1927 Coble, who was then owner of the fee subject to his mortgage, *removed the coal furnace and substituted the oil plant, that the oil plant became part of the realty* and thereby subject to the mortgage; *that the oil burner was an essential part of the oil plant*; and that when, after Coble had lost his title and became a tenant, he tore out the original oil burner and substituted a new one, this made no change in the legal situation." "*Erdman* v. *Moore,* 58 N. J. Law 445; *Cunningham* v. *Seaboard Realty Co.,* 67 N. J. Equity 212."

There is no such narrow interpretation in this decision, as defendant-appellant claims. The crux of the opinion is that the oil burner was an essential part of the oil plant, and that a tenant, or any one else, could not remove a fixture, permanently incorporated with the land or structure to which it is attached, that he had *substituted* for the original fixture. Of course, the simple facts of the instant case show a mortgagor-mortgagee relationship in the beginning, as in the cited cases. However, the factors in a mortgagor-mortgagee case are not antagonistic to the logic of the institutional doctrine.

The right to remove domestic or ornamental fixtures is subject to the limitation which prevails as regards trade fixtures, that the removal is not permissible if it will cause substantial damage to the freehold, and that an article or structure was substituted by the tenant for one there at the time of the lease may also be a reason for denying the right to remove it. It has been held that a domestic or ornamental fixture is not removable if it is so affixed as to become permanently incorporated with the land or structure to

which it is attached. 36 Corpus Juris Secundum p. 977, Sec. 40.

Defendant-appellant further states "we do not find intent from the fact that a tenant installed the burner. We must look to the manner of annexation." (Brief of Defendant-appellant, p. 13, second paragraph.) Defendant-appellee quotes *Campbell* v. *Roddy,* 44 N. J. Equity 248, "whether property is or is not a fixture arises frequently between the tenant of a particular estate and those in reversion or remainder. As between these parties, it is held, by a well settled line of cases, that the intention of the tenant making the annexation is one of the three tests to be resorted to in ascertaining the nature of the property. It is equally well settled that, in instances, aside from those, the mental attitude of the person making the annexation cannot modify the legal effect resulting from an incorporation into the realty of that which was personal property. Thus a structure erected on the land of another will become that of the owner of the land, although built with a view of enforcing an adverse right in the land." Coble in his own behalf testified that he had installed the new oil burner without consulting the then owner Mrs. Ames, because he did not want to bother her with the expenses of a new oil burner; that his fuel bill was too high and that he had purchased a new oil burner for himself, paying for it himself. (State of Case, p. 17, l. 13 - l. 19.)

The case of *Bank of America National Association* v. *La Reine Hotel Corp.,* 108 N. J. Equity 567 (Ch. 1931) pointed out by defendant-appellant as "*the instant case, it appearing that the burner was attached to the premises only by wires for electrical connection.*" (Brief of Defendant-appellant, p. 14, last 4 lines italicized),

is not a similar case. It is controlled by a conditional bill of sale;—an agreement between the parties thereto.

Defendant-appellant's further contention that the extension of the institutional doctrine would lead to absurdities, and is against public policy, can easily be guarded against by a tenant's consultation with the owner before he installs any new fixtures. It is more absurd to allow a tenant to remake, remodel, alter, or renovate the owner's property, than for an owner to insist on the right to ownership of a chattel which has become affixed to the structure.

Of all the parties involved in the instant case, who is the one at fault. Who took the law in his own hands by changing over the oil burner? Who removed it, by force? Defendant-appellant decries forfeitures. Who caused the damage in the Kain cellar by tearing out the oil burner, cutting wires and loosening asbestos? Kain was compelled to spend $155 through no fault of his own. Mrs. Ames was never consulted about the new burner; nor did she ever know anything about it. Coble states he did not wish to bother her with the expense at the time (State of Case, p. 17, l. 4). Then why should he bother her and her grantee two and one-half years later? As a matter of public policy alone, Coble, the wrong-doer, should be compelled to pay for the damage he has caused to the premises.

The question as to whether an article belonging to one person but annexed to the freehold of another shall be regarded as personal property or realty, as between such parties, may be controlled by agreement, and the general rules of law pertaining to fixtures yield to the provisions of such an agreement. *Thompson on Real Property,* Vol.

1, sec. 156, p. 189. If one erects a building or other structure with his own materials on the land of another without the owner's consent, it is presumptively a fixture, which the builder cannot remove without the owner's consent, though this presumption may be repelled by the attendant circumstances. If there is no previous or contemporaneous agreement that the building shall remain personal property, it becomes a part of the realty, and cannot afterwards be made a chattel by parol. *Thompson on Real Property,* Vol. 1, Sec. 149, p. 181.

Defendant-appellant claims that removal of the burner did not constitute physical damage. As well he might claim that the removal of doors, windows, radiators, and other items do not cause great physical damage. But what kind of a dwelling house would we have if defendant-appellant's test of fixtures was to prevail? Wherefore, the claim that the oil burner was easily removable is not a license for taking away an essential part of a heating plant belonging to a dwelling house.

Defendant-appellee cites the case of *Schofer* v. *Hoffman, et ux* (Court of Appeals of Maryland) 34 Atl. 2nd p. 350, as a case having almost identical facts with the instant case.

> The heater and tank were not installed on the order of the defendants, who knew nothing about its installation until long after it was done. The defendants had leased the property to Harry F. White and Lillian E. White, his wife, by lease dated February 16, 1940, for the term of six years beginning May 1, 1940, and ending May 1, 1946, at the monthly rental of $325.00, with an option to purchase. This arrangement continued until October 2, 1941, when the lease was canceled, and thereafter, until about April 1, 1942, the Whites occupied

part of the leased premises at $100.00 per month.

There was owing to the plaintiff, when the Whites vacated the property and stopped paying, $477.75. The original lease, with the option to buy, was cancelled October 2, 1941; the Whites paid all installments due to November 3, 1941.

There can be no denial on this record that the Whites, when they made this heating contract, regarded themselves as the owners of the property, and the plaintiff so dealt with them. When the Whites leased the property the house was heated by a complete hot water system. Mrs. White was not satisfied with it and promptly had a modern single unit oil heater and water tank installed and the old heater and tank removed. Mr. Hoffman said at the trial he thought the old furnace was all right. "The tenants had been there years before without any trouble." It was in the cellar when the Whites leased and undertook to buy.

There is no pretense by the plaintiff or Mrs. White (Mr. White not testifying) that the defendants knew anything about the new heating system for at least fifteen months after it was installed. Hugo R. Hoffman testified that he knew nothing about the oil heater in his house until the Whites were leaving it, and the defendants were, therefore, not on notice of or bound by any of the terms of the agreement between the plaintiff or their vendees (Whites).

In another case * * * in showing the difference between personal property and fixtures it was said "if one sold a steamheating system, which, if used at all, must necessarily be permanently annexed to and incorporated with some freehold, he would be bound to know that, when so incorporated,

it would lose its character as personalty and become real estate."

Where landlords, until their tenants with option to purchase left house after lease was cancelled, did not know that tenants had purchased an oil heating system under an unrecorded conditional sales contract and installed the system in the house, landlords were not bound by the contract in determining whether system was a fixture.

POINT II.

Dr. Coble abandoned the fixtures when he removed from the premises on September 1, 1943.

1. A tenant Morris S. Coble had abandoned the fixture when he removed from the premises on September 1, 1943, and that he trespassed when he returned on September 7, 1943, with his plumber to break up the furnace, and fraudulently took away the oil burner, and, therefore, Morris S. Coble was guilty of fraudulent conversion.

If a tenant quits possession of land without removing such fixtures as he is entitled to, the property in them immediately vests in the landlord.

ARGUMENT IN ANSWER TO POINT II OF DEFENDANT-APPELLANT'S BRIEF.

The case of *Torrey* v. *Burnett,* 38 N. J. Law 457 (Errors and Appeals 1875) mentioned by plaintiff-appellant with approval is not at all in point. It concerns a trade fixture;—a steam engine. In the same case, Justice Beasley said, "It is undoubtedly the settled rule of law, that where a tenant has the right to remove fixtures, he must exercise his right during the continuance of his term, or before he surrenders the possession of the premises; he cannot reenter for such purpose.

This inference, that the notification by the tenant of a reservation of his right (to the fixtures) (steam-engine) would be inefficacious, I have little doubt would be sustained if ever a case should arise, presenting the precise point for decision, as it would seem utterly inconsistent with all legal science to permit a man to reserve a right which involves, in its enjoyment, a plain trespass to the property of another."

The tenant's failure to remove fixtures within the proper time is generally held to have the effect of vesting title thereto in the landlord.

A number of cases recognize the right of the tenant to remove fixtures even after the term, provided he does so before he relinquishes possession of the land, * * *. 36 C. J. Secundum, p. 978, Sec. 41.

Coble did not call Kain, "prior to removal." (Last paragraph of Point II—p. 25 of defendant-appellant's brief.) He had called Kain in mid-August the first and only time (State of Case, p. 17, l. 36 - l. 38). Coble on cross-examination stated that he did not believe he was under duty

to mention it prior to that time, and as a matter of fact, it had never entered his mind to do so until he was close to the point of leaving the premises, when the matter was brought to his attention by events (State of Case, p. 17, l. 38 - l. 4 & 5, p. 18).

Our Courts have held that "he who does not forbid, when he can forbid, assents. He who is silent appears to consent; no one acquires the right of action from his own wrong where one of two innocent must suffer; he through whose act the loss occurred must sustain it. No one can maintain an action for a wrong when he has consented to the act which occasions his loss." The United States Supreme Court said in a case where title of land was in question, "that a man shall be stopped by matter of fact though there be no writing by deed or otherwise."

This defendant-appellee certainly is an innocent victim under the circumstances. She sold property, including the appurtenances, to a bona fide purchaser for value. This defendant-appellee was not consulted by, made no contract with the defendant-appellant, pertaining to the oil-burner. She knew nothing of the substitution of a new oil-burner. She had every right to believe that she owned the heating plant, an essential adjunct of a dwelling house.

REASONING.

Can the property be used as living quarters without a heating system, under the functional and institutional theory of the later cases?

The property in issue was never used without a heating system. Devoid of a heating system, the character of the dwelling will change. Therefore, the burner properly belongs to the property, and should not have been removed.

It is to be remembered in the instant case, that when Dr. Coble originally purchased the property in 1924 the building was equipped with a heating system. The coal heating system was still in the premises when Dr. Coble mortgaged the property. That subsequent to the placing of the mortgage, Dr. Coble in 1927 replaced the coal burner with an oil burner, and that in March, 1941, he replaced the first oil burner with a newer type of oil burner, which he stated he installed for the reason that it would save him money on his oil bill (S. C., p. 17, ll. 17-18). Dr. Coble originally became a tenant in 1933 when he lost the premises through mortgage foreclosure. Further, it was conceded by Henry Spitzer, appearing for David T. Wilentz, attorney for Morris S. Coble, that by virtue of the Sheriff deed the property and fixtures, such as heating plant, passed to the mortgagee-grantee, on August 23, 1933, after the foreclosure (S. C., p. 13, l. 39; p. 14, l. 7). When then, could the burner become a chattel? Certainly not in 1941 when he changed over to a new type of oil heater, because he himself admits he never consulted Mrs. Helen B. Ames, the owner of the premises. In 1941, he replaced an old outworn

heater which was fourteen years old. Under the institution doctrine the new heater became a part of the premises as it was necessary for the functioning of the property as a dwelling place. When then did the doctor first make up his mind that the burner was a separate instrumentality, that is, personal property? It must be on August 15, 1943, when he first asked the new owner, Samuel K. Kain, if he wished to buy the burner. This was nineteen years after he himself had purchased the property which at that time had a heating system complete. Can the doctor now be heard to say, after nineteen years, that the burner, an essential part of the realty, became personalty?

Defendant Coble has contended and undoubtedly will again contend that he did not intend to benefit the landlord when he put in the new oil burner in 1941, that no tenant intends to benefit the landlord. But in the case *sub judice,* the said Coble was not a pure and simple tenant in the beginning. Of the three parties involved, he was the first owner. He became the owner in 1924. He continued to be an owner until 1933, when through foreclosure he became a tenant. In 1927, he changed from coal to oil. In 1941, fourteen years later, he put in a newer type of oil burner, because he wanted to save money on fuel. He never consulted the owner, Mrs. Helen B. Ames in 1941, because he did not want to bother her with the expense of a new oil burner. (S. C. p. 17, ll. 13-17.) He never received her consent. He never told her that he intended to remove the burner whenever he would move away. Evidently, he had no intentions of moving in 1941, when he put in the oil burner; he made no reservations with the owner about the oil burner. There is no doubt that if he had remained as a tenant, he would never have made any demand

on anyone for payment for the oil burner. For two and a half years, he did not ask Mrs. Ames for payment. It saved him money on his fuel bill. It was a permanent fixture. It only became a temporary one in August of 1943, when he decided to move. Yet the premises—a dwelling house— had had an oil heating plant—(installed by Coble while owner to replace coal heating outfit)—since 1927.

It may be true that a tenant ordinarily does not intend to benefit the landlord by installing fixtures, *ab initio*. But in the instant case, Dr. Coble did not install fixtures. He merely changed or renewed fixtures already in the premises; premises primarily used for a dwelling unit; he furnished fixtures, that replaced old and valueless fixtures.

He intimates that owner should be satisfied with the old parts that were left in the cellar two and a half years before he removed. He did nothing to reset the old oil burner. His man Palfey, the plumber, said that anything could be made to run. It is hardly credible that old parts lying in the cellar for two and a half years are usuable. The new oil heater was in the premises for two and a half years. In spite of what Dr. Coble says, his actions speak louder than words. Not once in two and a half years, did he claim the oil burner as his to remove, or ask to be paid for it. On the eve of his moving he first became invested with the idea of claiming the oil burner. During the last six months of his tenancy, while Samuel K. Kain was owner, Dr. Coble did not once state to Samuel K. Kain that the oil burner was his own. For the first time on August 15, 1943, Dr. Coble asked payment, from Samuel K. Kain, for the oil burner. He removed it on September 7, 1943, stating that possession was nine-

tenths of the battle. But might does not make right in this situation. Possession is not nine-tenths of the law.

It would indeed be a sorry state of affairs if the owner of a dwelling were to be subject to the whims of a tenant, who takes it upon himself to remove fixtures that have been part and parcel of a dwelling for a number of years. There would result instability and confusion.

Conclusion.

The institution doctrine has been the law in the State of New Jersey, as shown by the various cases since the year 1895, and is the law today. The only exceptions as shown by the cases cited above, are those in which the chattels are trade chattels or are special equipment, such as sand and gravel machinery or motion picture machines, which do not improve the property and have no essential value in the permanent use of the property, or those cases that are covered by conditional bill of sales where the agreement of the parties govern. In our case, however, a burner is a necessary and important feature in the heating equipment of a property which is primarily used as a dwelling place. It is for this reason that the oil burner in question must be considered a real estate fixture.

Respectfully submitted,

HARRY SPITZER,
Attorney for and of Counsel with
Defendant-Appellee, Helen B. Ames.

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New Jersey Court of Errors and Appeals

SAMUEL K. KAIN, Plaintiff-Appellee, vs. MORRIS S. COBLE, Defendant-Appellant.	On Appeal from New Jersey Supreme Court.

BRIEF OF PLAINTIFF-APPELLEE.

Statement of Facts.

This is an appeal from an order of the Supreme Court reversing judgment of No Cause for Action by the Judge of the Second Judicial District Court of Middlesex County in a case instituted by the Plaintiff-Appellee against the Defendant-Appellant as stated in Complaint set forth on pages 4 and 5 of the State of the Case. The case was tried together with the case of *Samuel K. Kain* v. *Helen B. Ames* in which case the said Samuel K. Kain sued Helen B. Ames for breach of contract based on contract of sale and warranty deed. The two cases were tried together by agreement of all counsel and for the reason that both cases involved the ownership of an oil burner. The other case is now on appeal before this Honorable Court and the one State of the Case (and addenda) has been used for both cases. In the case of *Kain* v. *Ames,* a judgment was given in the District Court for the plaintiff Kain against the defendant Ames for the value of the oil burner, to wit, $155.00. The Supreme Court reversed this judgment and ordered judgment for

the same amount plus costs to be entered in that court against the Defendant-Appellant Morris S. Coble.

The history of the transfer of the real property in which the oil burner was installed is very succinctly set forth in the "State of the Case Agreed Upon" (S. C., pages 12, 13 and 14) and the Plaintiff-Appellee sees no purpose in reiterating same. It is significant to note that the Defendant-Appellant Coble was the owner of these premises at the time that the heating plant therein was converted from a coal burning system to an oil burning system. At the time that the conversion was made to oil a 500 gallon tank was placed 6 feet in the ground in the premises in question but outside of the building itself, and pipes leading underground from the oil tank to the oil burner were installed. After the Defendant-Appellant Coble lost said premises by foreclosure and became a tenant therein he then replaced the oil burner (the first oil burner which he had originally installed) with a new oil burner at his own cost and expense. In this respect it is important to note that the Defendant-Appellant Coble, by his own admission, stated that this was done without consulting the then owner Helen B. Ames because he did not want to bother her with the expense of a new oil burner *and because his fuel bill was too high.* (S. C., p. 17, ll. 13 to 17.)

In Defendant-Appellant's Brief at page 2 the impression is given that the oil burner was only attached to the premises by three wires. This is not so. An examination of the "State of the Case Agreed Upon" (S. C., pages 15 to 19) will show the true condition.

ARGUMENT.

The Plaintiff-Appellee will answer the points in the same order as raised in Defendant-Appellant's Brief.

POINT ONE.

Defendant-Appellant, while former owner of the property, installed the oil burning system and later when tenant installed a new burner which then became part of the realty.

Counsel for Defendant-Appellant would try to impress the Court with the argument that the fact that the Defendant-Appellant was a former owner of the property and while a former owner of the property installed the original oil burning system should not make any difference in the determination of this case. Plaintiff-Appellee respectfully states to the Court that in his opinion it is about the most important feature of the case.

A. As between Defendant-Appellant Coble and the landlord the oil burner which he, Coble, placed upon the premises became part thereof.

Under this sub-point the Defendant-Appellant cites to the Court a great many cases on the general law of fixtures, no case of which is directly in point for in no one of these cases cited in the Defendant-Appellant's Brief is there a case where the tenant who installed the fixture in question was a previous owner who had originally installed the system of which the fixtures later became a part.

In each of the cases cited by the Defendant-Appellant the Court points out that even though the fixture is installed by a tenant that the main question to be determined is one of intention. In arriving at the Defendant-Appellant's intention, the Court is not greatly concerned with his actions or expressions of some years after the installation but his intention at the time of the installation. Defendant-Appellant, Coble, himself testified that "He had installed the new oil burner without consulting the new then owner, Mrs. Ames, because he did not want to bother her with the expense of a new oil burner, that his fuel bill was too high." (S. C., p. 17, lines 13 to 17.) It must be remembered that Defendant-Appellant Coble knew when he replaced the old oil burner that the oil burning system that he himself had previously installed in the premises was an integral part of the building. If he had then had any intention not to make the new oil burner part of the building the logical thing that any reasonable person would have done in his position would have been to communicate with Mrs. Ames, the former mortgagee, and his then landlady.

As to the degree of attachment of the fixture to the premises, counsel wishes to point out to the Court that even in the argument of the Defendant-Appellant, Coble, he admits some attachment. However, the State of the Case, is replete with testimony that the attachment was of a much greater degree. The writer of this Brief sees no point in repeating that testimony because it is so thoroughly and briefly stated in the 'State of the Case Agreed Upon' (S. C., pages 14 to 17).

Defendant-Appellant, in his Brief, deals extensively with the cases of *Erdman* v. *Moore & Co.*, 58 N. J. Law 445 and *Cunningham* v. *Seaboard*

Realty Co., 67 N. J. Eq. 210, for the obvious reason that these two cases were cited by the Supreme Court in its opinion, which opinion is set forth in full on pages 33 to 35 of the State of the Case. In the *Erdman* v. *Moore* case at page 461 the Court in an opinion by Chief Justice BEASLEY stated as follows: "The weight of the modern authorities establishes the doctrine that the true criterion for determining whether a chattel has become an immovable fixture consists in the united application of the following tests: 1. Has there been a real or constructive annexation of the article in question to the realty? 2. Was there a fitness or adaption of such article to the uses or purposes of the realty with which it is connected? 3. Whether or not it was the intention of the party making the annexation that the chattel should become a permanent accession to the freehold." And, further, the author remarks: "And of these three tests preeminence is given to the question of intention. Heaters and ranges are fixtures. Whether a given article is a fixture or not depends on the intention, and that, in general, is judged mainly by the method of attachment and the use." The last sentence of the above quoted statement is particularly pertinent as it applies to the facts of our case. The whole question for determination of the Court is the intention of the person who puts in the fixture and in this respect the Plaintiff-Appellee respectfully submits that the intention of the Defendant-Appellant, Coble, as gleaned from all of the surrounding circumstances; his previous ownership; his desire to save fuel for himself in order to make more efficient a system he had originally installed as an owner, all points to his intention as a matter of law to make the oil burner part of the premises.

In the case of *Cunningham* v. *Seaboard Realty Co.,* the Defendant-Appellant particularly emphasizes the following quotation from page 212: "If any of the screens have been put in, not by the owner of the real estate, but by the owners of the personal property, this conclusion will not reach to these, and, if necessary, further evidence or a reference may be taken on this point."

The Court in the above quotation does not state that if the articles were put in by the owners of the personal property that then they would not be part of the realty. It merely stated "And if necessary further evidence or a reference may be taken on this point," showing again that the intention of the party would be the main factor. A further quotation from the *Cunningham* v. *Seaboard Realty* case at page 12 is as follows: "I have not been able to consider that they were affixed for mere temporary use and not as permanent fixtures." Can it fairly be argued and reasoned in our case that Defendant-Appellant, Coble, intended the new oil burner—the very heart of the oil burning system which he had originally installed—for merely temporary use. Counsel respectfully suggests that the question answers itself.

B. The institution doctrine does apply to the instant case.

The institutional doctrine as applied to fixtures was first applied in this State as early as 1895. *Feder* v. *Van Winkle* (E. & A. 1895) 53 Eq. 370, where the Court held:

> 3. The fact that the chattels in controversy may be removed and sold for other uses, or that they were not made for special adaption to the buildings in which they are

placed, is not decisive of their character. Those qualities are mere circumstances to be considered.

4. There must be actual annexation with an intention to make a permanent accession to the freehold, but it is not necessary that there be an intention to make the annexation perpetual. The intention must exist to incorporate the chattels with the real estate for the uses to which the real estate is appropriated and there must be the presence of such facts and circumstances as do not lead to but repel the inference that it is intended to be a temporary annexation.

For an interesting and very learned discussion of the manner in which the institutional doctrine has been consistently enlarged by the courts of this State see the case of *Bank of America Nat. Assn* v. *LaReine Hotel Corp.*, 108 N. J. Eq. 567.

In the case of *Lumpkin* v. *Holland Furnace Co.*, (E. & A. 1935) 118 N. J. Eq. 313, the Court in a controversy over a conditional sale contract for a Holland furnace between the furnace company and a prior mortgagee held that the title could not be reserved even in an agreement to reserve such title. The Plaintiff-Appellee respectfully submits that the *Lumpkin* case is very similar to our case for the reason that the system installed by the Holland Company in the *Lumpkin* case replaced an old heating system in the premises. The Court at pages 315 and 316 said:

"Whether removal could be effected without doing material physical damage to the building, considered alone as such was a disputed question of fact at the trial and an adverse finding on this phase of the case was amply justified by the proofs.

"There is, however a broader question involved. In the case of Domestic Electric

Co. v. Mezzaluna, 109 N. J. Law 574 which was the sale and installation of a refrigerating plant in an apartment house (original as a system of refrigeration) it was held that title in that case could not be reserved in the seller, and the equipment or its parts removed without material injury to the freehold. The ground upon which this conclusion was reached was that the act, as applied to the given case, contemplated something more than the mere physical injury which might result from the severance of the equipment or its parts from the building considered as a building alone, and that it connoted injury to the apartment house as an institution as well. It was commented in the opinion that 'refrigeration in this day of advanced domestic housekeeping is almost as essential as gas ranges or other cooking and heating equipment.' It was further said that if the heating equipment were a heating plant comprising boilers, radiators piping &c., it would hardly be contended that the pipes, radiators or other essential parts of the heating system could be separated from the whole and removed without material injury to the freehold. This has been followed and reiterated in Russ Distributing Corp. v. Lichtman, 111 N. J. Law 21.

"While a private dwelling house may not be deemed to be an institution within the strict meaning of the word as commonly understood, and while the installation of an entire new equipment which may be easily severable from the freehold without doing material injury to the building as such, may not come within the purview of the cited case, *yet where the installation to which title is sought to be reserved is but the replacement of other equipment already existing and serving the needs of the property, it cannot we think, be said that the removal can be effected without material*

> *injury to the property when its needs and uses are taken into consideration. A heating plant in a dwelling house in this climate is as essential as doors and windows. While the latter may be removed from their hinges without doing material injury to the remainder of the building, in a purely physical sense yet depriving a dwelling of all means of excluding cold on the one hand and providing warmth on the other cannot be contemplated without recognizing material injury as a result.* Where as here, it is but a *replacement* of one type of equipment for another, title cannot be reserved as against a prior mortgage without doing violence to the broader intent of the statute." (Italics ours.)

It may be here pointed out that there was a serious dispute at the trial of our case of the degree of annexation of the oil burner to the premises. However, under the institutional doctrine this becomes relatively unimportant.

The leading case on the institutional theory is *Smythe Corp.* v. *Norfolk Assn.* (E. & A. 1935) 116 N. J. L. 293. The *Smythe* case is very similar to our case as will be seen from the following quotations:

> "The tank was buried three feet under ground. It was connected with the pump and the burner by piping (a part of the equipment) which passed through the foundation wall of the house, * * * If any of such articles are removed, no heat can be generated unless other appliances are installed in their stead."

The Court in determining the case at pages 296 to 298 said:

> *"Those adjudications were between owner and mortgagee, but they enunciate a principle of wider application.* (Italics ours.)

"Let us consider the property presently in litigation. Advancing needs of society and marked refinements in living and working conditions and in the design and function of buildings to meet those conditions have made necessary a developement of the conception of what really constitutes a building as contrasted with furnishings or severable fixtures—speaking broadly, of what is land as contrasted with chattels. It is logical that the legal conception of what we refer to, with varying shades of meaning, as 'buildings,' or 'realty,' or 'freehold' should keep pace with actual changes in the substance which the conception represents. Particularly is this so with regard to houses, and more particularly apartment houses, and with respect to certain living facilities which must be provided by the owner as essentially, parts of the structure. Formerly tenants took their own stoves to and from the leased premises; so, too, oil lamps, ice boxes, bathing vessels, and the like. Those ways are now largely outmoded, particularly in the cities; not only outmoded but to a degree eliminated, necessarily so in many of the habitations provided for the multiple housing of tenants. In this climate conditions of habitation must include the means of heat in the winter and of refrigeration in the summer. In our case the building is a dwelling, housing four families, built for year-round occupancy and heated by a system wherein the heat is generated in the cellar by a single oil burning equipment. *The structure cannot function for the purpose, and the only purpose, for which it was built unless it has a heating system. If the equipment or any part thereof necessary to the generation of heat is taken out, it must be replaced. It is a part of the house. It is entirely separate and apart from furniture or furnishings.* It is something that must be in and of the building instituted as an

apartment dwelling house, before the structure so instituted can, as a structure, properly function. The removal of it would be, *pro tanto*, a disintegration of the structure. With as little physical disturbance doors could be lifted from their hinges, windows from their frames, radiators from their pipes, chandeliers and brackets from the ceilings and walls, bathtubs from their settings and numerous other accessories, personalty in their manufacture but by attachment and function part of the completed house, could be taken out. If dwelling houses consisted simply of floors and roof with supporting walls masoned into the ground, the extent of physical disruption incident to the severance of an object would perhaps furnish a satisfactory and workable rule as to whether that object could be removed without injury to the freehold. But that type of construction does not prevail and that test is wholly inadequate. When a chattel which, clearly, is permanently essential to the completeness of a structure, having regard to the character of that structure and the functioning of it in the use for which it was obviously designed, as actually, purposely and lawfully affixed to and into the structure, it becomes in our opinion, a part of the realty; and if the severance of it will prevent the structure from being used for the purposes for which it was erected or for which it has been adapted, then the article is not severable without material injury to the freehold. By that standard the article sought by plaintiff are not severable without material injury to the freehold. *The willingness on the part of the plaintiff to abandon parts of the equipment does not alter the relationship which the equipment, as a whole, bears to the remaining parts of the structure. In such a situation the degree of affixation is less important than the indispensibility of that which is affixed.* That principle has

> been thoroughly established in our more recent cases. Domestic Electric Co., Inc., v. Mezzaluna, *supra;* MacLeod v. Walter J Satterthwaite, Inc., 109 N. J. Eq. 414; affirmed, 113 Id. 238; Russ Distributing Corp. v. Lichtman, 111 N. J. L. 21; Lumpkin v. Holland Furnace Co., Inc., 118 N. J. Eq. 313; Fidelity B. & L. Assn. v. Elizabeth Ave. Holding Co., 119 Id. 11." (Italics ours)

In the case of *Amusement Supply Co.* v. *Kaybe Amusement Co.* (Sup. Ct. 1942) 128 N. J. L. 98, it might appear at first blush that the Court did not follow the institutional doctrine. However, the case turned upon the point that the movie projector part or parts were not so affixed to the realty as to become part thereof. See page 100 where the Court said:

> "The removal of a projector part or parts does no material damage to the freehold nor does it damage the institution as such."

In this respect Plaintiff-Appellee respectfully submits to the Court that the oil burner in our case was so attached to the realty as to become a part thereof. Even under testimony of the Defendant-Appellant's witnesses it will be found that the attachment consisted of electric wires to operate the motor and oil lines so that oil could be fed from the outside tank to the burner. Further, analysis of the *Amusement Co.* case above cited shows that there was a conditional sales agreement involved, something which does not appear in our case. It is also important to note that the equipment in the *Amusement* case was purchased by the *lessee.* The attention of the Court is called to this point because in determining the *Amusement* case the Court made no distinction between the fact that the equipment was purchased by the

lessee and the fact that in many other cases, where the institutional doctrine was applied, the equipment involved was purchased by the then owner.

In arguing this case the Defendant-Appellant makes much of the fact that he, Coble, was a tenant at the time that he replaced the oil burner. The *Amusement* case turned not upon the fact that equipment was purchased by a lessee rather than an owner, but upon the fact that no affixation was present.

POINT TWO.

Defendant-Appellant abandoned the oil burner.

Coble, or any other tenant, could have protected himself by an agreement with the landlord. Having failed to do this; having seen the property sold without saying anything; having paid rent for months to the new owner without saying anything until he was about to move; having moved and then, and only then, entering the premises on a subterfuge, he should not now be heard to say the burner belonged to him (S. C., page 17, lines 35 to p. 18, line 2).

Counsel respectfully suggests that this point must be considered in the light of the installation of the fixture in question and all of the surrounding circumstances. It then becomes clear that Defendant-Appellant Coble's actions amounted to an abandonment.

Conclusion.

The institutional doctrine as applied to fixture cases has been logically expanded by the Courts of this State and it is best stated in the scholarly decision in the *Smythe Sales* case. Following the language as used in the *Smythe Sales* case, the Plaintiff-Appellee respectfully submits to the Court that the case *sub judice* is clearly one for application of the doctrine.

The Defendant-Appellant Coble was a former owner of the property and it was he who originally installed the oil burner system. The oil tank was placed in the ground outside the building, the oil lines were connected with the oil burner and electrical lines installed. Then, while he was a tenant, he *replaced* the old obsolete 1927 oil burner with a new one. When he did this he was accommodating himself by saving on his fuel bill. Being a former owner of the property he was in a different position than an ordinary tenant and was also in a different position by reason of the fact that he furnished his own oil.

Respectfully submitted,

ALFRED D. ANTONIO,
Attorney for and of Counsel
with Plaintiff-Appellee.

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New Jersey Court of Errors and Appeals

SAMUEL K. KAIN, Plaintiff-Appellee, *vs.* MORRIS S. COBLE, Defendant-Appellant.	On Appeal from New Jersey Supreme Court.

BRIEF OF DEFENDANT-APPELLANT.

(All modes of emphasis, except where otherwise indicated, are our own.)

Facts.

This matter arises on an appeal by the defendant-appellant from an order of the New Jersey Supreme Court reversing a judgment of the Second Judicial District Court of Middlesex County, which trial court had entered a verdict of no cause of action on the following grounds*:

In the month of September, 1941, the appellant was a tenant upon the premises which were owned by a Mrs. Ames. In that month, the Doctor exchanged the old oil burner, which was a part of the heating system, for a new one, placing the old one against the wall in the cellar. He did this for his own convenience, since the old one was not operating too well and he did not want to bother Mrs. Ames because he felt it would be a financial hardship upon her.

* The facts are stipulated on Pages 12 through 19 of the State of the Case and counsel sets forth here those facts believed to be relevant to the issues raised.

On March 17, 1943, Mrs. Ames conveyed the property to the plaintiff-appellee, and the appellant remained as a tenant until September 1, 1943. On or about August 15, 1943, Doctor Coble called the new owner and spoke to his wife, asking her whether or not she or her husband desired to purchase this oil burner which he had placed into the heating system in September of 1941. He was advised that the matter would be taken up with her husband.

Prior to September 1, 1943, the date when he took out the oil burner in question, that is, the 1941 burner, from the premises, the defendant-appellant had a conversation with the plaintiff-appellee. The appellee stated that he told the appellant to call his, the appellee's lawyer, but the appellant denied this, stating that the appellee had told him to leave the burner upon the premises and that he, the appellee, would let him know what he intended to do. After leaving the premises and not hearing from appellee, he returned on September 7, and took out the burner he had installed in 1941, leaving the old one there.

The testimony is clear that the only connection to the premises of the oil burner was by three electric wires which could be unscrewed but which were cut in order to facilitate the return of the old oil burner. The testimony of the plumber who removed the burner and stated that such was not fastened to the floor and could be lifted up and out of its socket, and that it was not cemented in, was uncontradicted. He also stated that the old burner was still workable. The testimony of Mr. Rubin, testifying for the appellant, concerned itself with the burner which had been replaced and not with the new one.

Dr. Coble owned this same house on June 16, 1924. He lost the premises through a mortgage

foreclosure, and Mrs. Ames, wife of the then mortgagee, received the sheriff's deed on August 23, 1933. In 1927, while still the owner, the doctor converted the coal furnace to oil heat and installed an oil tank, pipe from tank to furnace, and other necessary equipment, including a burner. This is not the burner in question in the instant case. The present controversy revolves around the burner which the doctor, after being a tenant on these premises for approximately eight years, installed and used for the period of his tenancy from 1941 to 1943.

After Doctor Coble removed the oil burner, Mr. Kain, the new owner, issued a complaint alleging conversion and trespass on the above facts. The District Court entered a verdict of no cause for action. On appeal, the New Jersey Supreme Court reversed this verdict and held that the burner was part of the realty under the authority of *Erdman* v. *Moore & Co.*, 58 N. J. L. 445 (S. C. 1896) and *Cunningham* v. *Seaboard Realty Co.*, 67 N. J. E. 210 (Ch. 1904).

Preliminary Analysis.

Appellant has asserted and urges the following grounds of appeal in this Brief:

1. The New Jersey Supreme Court reversed the judgment of the Second Judicial District Court of Middlesex County, although there was error in doing so.

2. The New Jersey Supreme Court erred in ruling that the oil burner was part of the realty.

3. The New Jersey Supreme Court erred in refusing to recognize that as between tenant and landlord, the law permits the tenant to remove

that which is severable without physical damage to the premises.

4. The New Jersey Supreme Court erred in its refusal to recognize the facts as found by the Second Judicial District Court of Middlesex County.

5. As between landlord and tenant, the Institution Doctrine has no application.

6. The defendant did not abandon the oil burner by leaving it upon the premises when he removed therefrom.

Counsel submits that under the above Grounds of Appeal there are but two distinct legal questions in the instant case:

1. Does the institution doctrine apply where the controversy is between landlord and tenant?

The appellee, in filing his specifications of determinations, in the first appeal from the Second Judicial District Court of Middlesex County, specified that the District Court had erred because the "Institution theory relating to fixtures was applicable to the facts in the case, * * *"* There was no allegation or argument to the effect that there was such an annexation as to cause physical injury to the premises by the removal thereof, and the District Court must have necessarily found *as a fact* that no such physical damage was actually caused when it brought in a judgment of no cause for action.

Amusement Supply Co. v. *Kaybe Amusement Co.*, 128 N. J. L. 98 (Sup. Ct. 1942).

* State of the Case, page 31.

2. Was there an abandonment of the chattel?

Counsel submits that the answers to both questions are in the negative, on the following argument:

ARGUMENT.

POINT I.

The part of the fuel oil system in question in the instant case was placed upon the premises by the appellant while a tenant and the appellant was justified in removing same since no physical damage to the premises was entailed therein.

Counsel wishes to emphasize that the facts of this case show that the burner in question was one installed *while the defendant-appellant was a tenant.* It is submitted that whether the doctor owned this house previously, or not, or whether he installed the heating system originally while owner of these premises, or not, is totally irrelevant to a decision in the instant case. *The question is purely and simply one involving a part of a fuel oil system put in by a person who was a tenant of the premises for eight years at the time of installation.* The case, it is submitted, could be decided no differently if the defendant-appellant had never owned the house. The fact is that he was not the owner when he put in the burner in question, but was a tenant.

A. As between tenant and landlord, tenant may remove that which he has placed upon the premises and which is severable without physical damage thereto.

The law of this State and other states recognizes that the rules concerning fixtures are ap-

plied differently, dependent upon the relationship of the parties; and it has been stated time and time again that as between landlord and tenant the application is liberal, in favor of the tenant.

General Elec. Co. v. *Transit Equipment Co.,* 57 N. J. E. 460 (Ch. 1898);
Rogers v. *Brokaw,* 25 N. J. E. 496 (Ch. 1875);
Potts v. *N. J. Arms & Ordnance Co.,* 17 N. J. E. 395 (Ch. 1866);
Crane v. *Brigham,* 11 N. J. E. 29 (Ch. 1855);
Pond v. *Harrison,* 96 Kan. 542, L. R. A. 1916 B., 1264.

In the case of *Crane* v. *Brigham, supra,* the Court said, at page 34, as follows:

> "That all these articles are fastened to realty, or in other words, that they are fixtures, is placed beyond question by the evidence, but although they are fixtures, whether they may be separated from the real estate, and converted into or be treated as personal by a person claiming adversely to the owner of the real estate, is a question to be determined by other considerations, *the solution of which will in some measure depend upon the capacity in which the respective parties make their claim.*
>
> "*The rule with regard to fixtures has been much relaxed,* as between tenant for life or entail and remainderman *and also as between landlord and tenant;* but as between heir and executor, grantor and grantee, the rule has undergone no change."

The Court continues, at page 35, as follows:

> "Or if a mortgagor makes a permanent improvement to a water-mill by a steam-engine, to increase the motive power of the

> mill, the engine becomes a permanent fixture. He makes the improvement for the benefit of the inheritance, which is his, and the improvement attaches to that inheritance. *As between landlord and tenant, it would not, because the tenant made the improvement for the benefit of the term, and not of the reversion.*"

In the case of *Potts* v. *N. J. Arms & Ordnance Co.*, 17 N. J. E. 395 (Ch. 1866), the Court said, at page 403:

> "Whether property, which ordinarily treated as personal, becomes annexed to, and goes with the realty as fixtures or otherwise, must depend upon the particular circumstances of each case. *The rule, as is well known, is differently applied, as the question may arise between landlord and tenant,* heir and executor, mortgagor and mortgagee, etc."

In the case of *Pond* v. *Harrison,* 96 Kan. 542, L. R. A. 1916 B., 1264, the right to prevail of the plaintiffs, landlords, depended upon whether the tenants had a right of removal. The property involved was wood used in the reconstruction of a burned house wherein the tenants had possession. The court found that the wood had become part of the realty because it could not be severed without physical damage, but in its discussion of the relationship between landlord and tenant, said, at page 1266:

> "The right of the occupant of real property to remove improvements which he has placed upon it is more favored between tenant and landlord than in the case of any other relationship * * *. A purpose to increase the value of the real estate at his own expense is not readily to be attributed to the ordinary tenant at will."

It is submitted that as between tenant and landlord, the law permits a tenant to remove fixtures where no physical damage to the premises would result.

> *Amusement Supply Co.* v. *Kaybe Amusement Co.*, 128 N. J. L. 98 (Sup. Ct. 1942);
> *Greenspan-Greenberger Co.* v. *The Goerke Co.*, 111 N. J. E. 249 (Ch. 1932);
> *Brearly* v. *Cox*, 24 N. J. L. 287 (Sup. Ct. 1854);
> *In re Shelar*, 21 F. 2d 136 (D. C. Pa. 1927);
> *Thompson on Real Property* (1929 Supp. Sec. 170).

In *In re Shelar, supra,* the Court, at page 138, said:

> "It is true that the general rule is that all annexations of a permanent character pass with the realty; but the rules of law with respect to fixtures between landlord and tenant are much relaxed and are not held with the same firmness as between vendor and vendee or mortgagor and mortgagee.
> "Between the landlord and tenant there are three well-recognized exceptions to the general rule relative to the removal of fixtures:
>
> (a) * * *.
>
> (b) * * *.
>
> (c) Domestic fixtures, attached to dwelling house, for purpose of convenience or comfort."

The case of *Amusement Supply Co.* v. *Kaybe Amusement Co., supra,* would appear to be dispositive of the instant case. In this case a tenant purchased some motion picture camera equipment under a conditional sales agreement. This equip-

ment was placed in a projector fastened to the floor by angle irons. The parts which they replaced were in effect destroyed. The owner of the building distrained upon all equipment because of default in rent. Since there was also a default under the conditional sales agreement, there was a contest for the particular equipment between the conditional sales owner and the landlord, who claimed it to be part of the realty and offered as an argument that if this equipment were removed by the conditional vendor the theater could not be operated as a moving picture house until replacements were installed, and thus the institution would be damaged. The landlord offered as legal argument *Smyth Corp.* v. *Norfolk Assn.*, 116 N. J. L. 293 (E. & A. 1935) and cases following.

The Court, speaking through Chief Justice Brogan, rejected the application of these cases and, although it recognized that the theatre would be unable to show moving pictures until new parts were substituted for those being taken by the conditional sales vendor, stated that the equipment could be removed without physical damage to the premises, and, therefore, the conditional sales vendor was entitled to the chattels. This case is exactly the same as the case at bar. In the instant case there was a heating system with certain parts, one of which was a burner. In the cited case there was a motion picture projecting machine with two lamp houses, one rectifier, two rear shutters and two rheostats. Just as the burner is essential to the operation of a heating equipment, these parts were equally essential to the operation of the motion picture machine. In the instant case, a new burner was placed by the tenant into the heating system and the old one was placed against the wall. In the cited case, the old parts were used for a credit on the sale.

In the instant case, the burner stood on its own legs and was not fastened to the floor. It was connected to the rest of the heating equipment by three wires. In the cited case, the projector for which the equipment was purchased, was fastened to the floor by angle irons. It would appear that the cited case of *Amusement Supply Co.* vs. *Kaybe Amusement Co.,* 128 N. J. L. 98 (Sup. Ct. 1942), is distinct authority for deciding the instant case in favor of the tenant. Actually the instant case is a stronger case since in the instant case the old part was not destroyed but was left upon the premises.

To say, anticipating appellee's argument, that the case of *Amusement Supply Co.* vs. *Kaybe Amusement Co., supra,* is to be distinguished from the instant case, because the court found in the cited case that there was no affixation present is not a valid argument because the court stated that that question had been decided by the trial court and would not be disturbed as long as there was evidence to justify that determination. Just so was that question of fact decided in the instant case by the trial court, and it is submitted that the evidence in the instant case justifies the conclusion drawn. To say that the case is to be distinguished because it involves a conditional sales agreement is also not a valid argument. Cases, which appellee has been citing from the time of trial as authority for his position, themselves deal with controversies between conditional sales vendors and mortgagees. Two such cases upon which appellee has relied, and upon which we anticipate he will continue to rely, are the cases of *Smyth Corp.* v. *Norfolk Assn.,* 116 N. J. L. 293 (E. & A. 1935), and *Lumpkin* v. *Holland Furnace Co.,* 118 N. J. E. 313 (E. & A. 1935). It is submitted that the only valid distinction between

the case of *Amusement Supply Co.* v. *Kaybe Amusement Co.*, 128 N. J. L. 98 (Sup. Ct. 1942) and the two mentioned cases is that the former case concerns itself with a chattel installed by a tenant and the other two cases with a chattel installed by an owner.

Therefore, the case of *Amusement Supply Co., supra,* indicates that under the present state of law, where the intention is not to make the property part of the realty, it remains personalty so long as the removal thereof does not physically damage the premise. And when a tenant places a chattel on realty, the presumption is that he does so for his own comfort and does not intend to affix it permanently to the freehold.

22 Am. Jur., Fixtures, Sections 40, 55, 67.

The general rule as regards the removability of heating apparatus, as between landlord and tenant, has been set forth in *22 Am. Jur., Fixtures,* Section 56, wherein it is stated:

> "In determining whether a heating apparatus installed by a tenant is a fixture, a more liberal rule is applied in favor of the tenant than is applied between grantor and grantee, or mortgagor and mortgagee, *and generally, the tenant is permitted to remove such apparatus.*"

Counsel anticipates that appellee may cite as contrary authority to this proposition the cases of *Erdman* v. *Moore & Co.*, 58 N. J. L. 445 (Sup. Ct. 1896) and *Cunningham* v. *Seaboard Realty Co.*, 67 N. J. E. 210 (Chancery 1904). It may be alleged that these two cases are authority for the proposition that a tenant, who formerly owned the home in which he is now a tenant, remains in a legal status equivalent to the owner as regards any chattel which he may affix while a tenant, no

matter how slightly, to the premise. It is submitted that these two cases are not authority for any such alleged proposition of law, nor has counsel been able to find any authority for such alleged proposition. The fact of the matter is that Dr. Coble, the appellant, was a tenant when he installed the oil burner in question and it should make no difference whether he originally had installed a heating system while owner, or whether John Jones had originally installed that heating system when he was the owner.

The case of *Erdman* v. *Moore & Co.*, 58 N. J. L. 445 (Sup. Ct. 1896) was a dispute between one claiming under the mechanics' lien law and the holder of a mortgage not in existence at the time of the commencement of the building. It appeared that when the *owner* of the building was constructing same, he installed a heater and a range. The Court held that the heater and range were to be considered as part of the realty, stating at page 460:

> "The ground of this construction is that it was the intention of the owner of the building to make them such."

There are no facts in this case from which one could say that once an owner, always thereafter treated as an owner. It is a simple case holding that a heater and range are fixtures when put in by the owner of the premises with the intention of making them part of the realty. The same intent certainly cannot be adduced from a tenant putting in a heater and range!

The case of *Cunningham* v. *Seaboard Realty Co.*, 67 N. J. E. 210 (Chancery 1904), stands for the same proposition of law as the *Erdman* case, *supra*. This was a question between a mortgagee of real estate and certain vendees of personal

property. The chattels involved were gas logs, gas chandeliers and window screens, all of which had been originally put in by the owner of the premises. The Court stated, at page 211:

> "Under our decisions, they thereafter become fixtures, so far as the owner was concerned, and as against persons subsequently claiming under him in the character of mortgagees."

The Court recognized that its decision in this case did not make every instance of affixation of gas fixtures such an affixation as to make it part of the realty, stating, at pages 211 and 212, as follows:

> "* * *, and even if the decisions above referred to should not be considered as establishing a general rule that gas fixtures used in a house are *prima facie* fixtures, the special circumstances of the case indicating the owner's intention that they should permanently belong to the houses are decisive of the case. So far, therefore, as these gas fixtures or the window screens have been affixed by the owner or owners of the premises, I have not been able to consider that they were affixed for merely temporary use and not as permanent fixtures, intended by the person who put them there to be part of the houses."

Very pertinent is the last paragraph of this decision, which clearly indicates that the state of the law differs with regard to the individuals who may have placed the chattel upon the real estate. The Court, at page 212, in conclusion, said:

> "*If any of the screens have been put in, not by the owner of the real estate, but by the owners of the personal property, this conclusion will not reach to these,* and, if necessary, further evidence or a reference may be taken on this point."

Clearly, the Court recognizes the distinction counsel seeks to draw between annexation by an owner as against annexation by a tenant, it is recognized that the tenant, who is the owner of the personal property, places it upon the premises for so long as he is to enjoy the use of same. If the instant case were concerned with the burner installed in 1927, when Dr. Coble was the owner, then the cited cases of *Erdman V. Moore & Co.*, 58 N. J. L. 445, (Sup. Ct. 1896) and *Cunningham* v. *Seaboard Realty Co.*, 67 N. J. E. 210 (Chancery 1904), would be relevant, *but* that is not this case. *We are concerned with the burner which was installed in September of 1941, by Dr. Coble, who had been a tenant on these same premises from August, 1933, and not with the heating system including a burner which was installed in 1927 by Dr. Coble when he was the owner.*

We do not find intent, therefore, from the fact that a tenant installed the burner. We must look to the manner of annexation. May it be said that the affixation here was such so as to cause physical damage by the removal thereof, sufficient to rebut the presumption that a tenant does not intend to affix the chattel permanently? Counsel submits that there was no such annexation or affixation in the instant case so as to cause physical damage by the removal of the burner.

See:

Amusement Supply Co. v. *Kaybe Amusement Co.*, 128 N. J. L. 198 (Sup. Ct. 1942);

Sunshine B. & L. Assn. v. *Meola*, 122 N. J. E. 381 (Ch. 1937);

Provident B. & L. Assn, v. *Wm. Day, etc., Inc.*, 122 N. J. E. 326 (Ch. 1937);

McDonald v. *H. B. McDonald Cons. Co. Inc.*, 117 N. J. E. 181 (Ch. 1934);

Sellito v. *Heating & Plumbing Finance Co.*, 116 N. J. E. 247 (Ch. 1934);
Reliable Building, &c. Newark v. *Purifoy*, 111 N. J. E. 575 (Ch. 1932);
Bk. of America Nat. Assn. v. *La Reine Hotel Corp.*, 108 N. J. E. 567 (Ch. 1931).

In the case of *Provident B. & L. Assn.* v. *Day, etc. Inc.*, 122 N. J. E. 326 (Ch. 1937), the Court held that a *boiler* which could be readily removed without substantial injury to the premises remained personalty, and approved the case of *Reliable Building, &., Newark,* v. *Purifoy,* 111 N. J. E. 575 (Ch. 1932).

In the case of *Sunshine B. & L. Assn.* vs. *Meola,* 122 N. J. E. 381 (Ch. 1937), the Court held that certain machinery, whether attached to the premises or not, could be readily removed, and, therefore, was personalty, and cited with approval the cases of *Bk. of America Nat. Assn.* vs. *La Reina Hotel Corp.,* 108 N. J. E. 567 (Ch. 1931), and *McDonald* v. *H. B. McDonald Cons. Co. Inc.,* 117 N. J. E. 181 (Ch. 1934). It is to be noted that the *Meola* and *Day* cases arose after the decision in *Smyth Corp.* v. *Norfolk Assn.,* 116 N. J. L. 293 (E. & A. 1935), and apparently, the manner of annexation is still important, whether the institution doctrine is or is not said to apply.

In the case of *Bk. of America Nat. Assn.* v. *LaReine, supra,* the Court stated that refrigerators that could be removed by loosening bolts and nuts, disconnecting certain pipes, joints and electrical connections, were considered personalty, as were transformers attached only by wires, which wires were readily detachable by loosening screw connections, *which, if the Court please, is the instant case, it appearing that the burner was attached to the premises only by wires for electrical connection.*

There was no argument by appellee in the Supreme Court that the burner was so affixed as to cause physical damage by removal. As a matter of fact, appellee's Specifications to the Supreme Court (State of Case, p. 31) states only that the institutional theory should have been applied and not that physical damage was caused to the premises. At the trial there was some conflicting testimony on this point, and the Court must have found, as a fact, that no such physical damage was caused to the premises, there being some evidence to justify that conclusion which should not be disturbed.

See:

Amusement Supply Co. v. *Kaybe Amusement Co.*, 128 N. J. L. 198 (Sup. Ct. 1942).

B. The institution doctrine does not apply to the instant case and should not be extended to the facts herein as a matter of public policy.

1. The institution doctrine has never been applied in a case involving the ownership of chattels affixed to the premises by a tenant as against the landlord.

The case of *Feder* v. *Van Winkle,* 53 N. J. E. 370 (E. & A. 1895), is the leading case for that theory of law regarding fixtures, now known as the "institution doctrine." This case was a controversy concerning machinery placed upon the premises for business purposes by the *owner of the premises* and was a contest betwen a mortgagee and a receiver of the business for this machinery.

The institution doctrine as adduced by this leading case has been lucidly set forth in the case

of *Knickerbocker Trust Co.* vs. *Penn Cordage Co.*, 66 N. J. E. 305 (E. & A. 1903), where the Court, at page 309, said:

> "Whenever chattels have been placed in and annexed to, a building *by their owner,* as a part of the means by which to carry out the purposes for which the building was erected or to which it has been adopted, and with the intention of permanently increasing its value for the use to which it is devoted, they become *as between the owner and his mortgagee,* fixtures, and as much a part of the realty as the building itself."

It is to be noted that the rule is stated insofar as it has application as between the owner and his mortgagee, and while it may be a bit ambiguous from the quotation, it is apparent from the case that the Court is speaking of *an owner of the premises* who installs the chattel. This point is clearer in the case of *Temple Co.* v. *Penn Mutual Life Ins. Co.,* 69 N. J. L. 36 (Sup. Ct. 1903), which decision was written by *J.* Van Syckel, who also wrote the opinion in the case of *Feder* v. *Van Winkle,* 53 N. J. E. 370 (E. & A. 1895), and where he said, at page 38:

> "A heater and range are fixtures, although but slightly attached to the building, *if put in by the owner of the premises with the intention of making them such."*

Thus, it would appear to this point that a prerequisite to the application of the institution doctrine is that the chattel be placed upon the premises *by the owner thereof* and that the application be as between said owner and his mortgagee.

The doctrine was expanded in the case of *Smyth Corp.* v. *Norfolk Assn.,* 116 N. J. L. 293 (E. & A. 1935) and *Lumpkin* v. *Holland Furnace Co.,* 118 N. J. E. 313 (E. & A. 1935). In these cases the doc-

trine was expanded so that it applied in a contest between a conditional sales vendor who had sold the chattel to the owner of the premises, who, in turn, had affixed said chattel, and the owner's mortgagee, but the original requisite that the owner of the premises should have placed the chattel on the land is still present. This distinction is implicit from a reading and comparison of the cases of *Sunshine B. & L. Assn.* v. *Meola,* 122 N. J. E. 381 (Ch. 1937), and *Provident B. & L. Assn.* v. *Wm. Day, &c., Inc.,* 122 N. J. E. 326 (Ch. 1937), with the case of *Smyth Corp.* v. *Norfolk Assn.,* 116 N. J. L. 293 (E. & A. 1935); and, also, the case of *Amusement Supply Co.* v. *Kaybe Amusement Co.,* 128 N. J. L. 98 (Sup. Ct. 1942) with the case of *Temple Co.* v. *Penn Mutual Life Ins. Co.,* 69 N. J. L. 36 (Sup. Ct. 1903).

Counsel for appellant anticipates that appellee will not be able to present a case relevant to the case at bar not cited in this brief involving the landlord and tenant relationship, and counsel further anticipates that the appellee will not be able to show an adjudication where the institution doctrine was applied to such a relationship, in a situation similar to the instant case. In the trial court and in the written argument to the Supreme Court, all cases cited by appellee involved the relationship between owner and mortgagee, or one in the position of the owner, as a conditional sales vendor, and a mortgagee. *In each case the chattel involved was installed by the owner of the premises.*

There is in this State one case which definitely deals with the landlord and tenant relationship and refuses distinctly to apply the institution doctrine thereto. That is the case of *Amusement Supply Co.* v. *Kaybe Amusement Co.* 128 N. J. L. 98 (Sup. Ct. 1942). There are two that seem to

deal with the landlord and tenant relationship. They are the cases of *Mugler Auto Pit Co. Inc.* v. *Tide Water Oil Co.,* 14 N. J. Misc. 471 (2nd Dist. Ct. Hudson Co. 1936) and *Rinbrand Well, &c.* v. *L. & H. Theatres, Inc.,* 126 N. J. L. 446 (Sup. Ct. 1941). There is one that recognizes the question but does not answer it. That is the case of *Provident Mutual Life Ins. Co.* v. *Dougherty,* 125 N. J. E. 442 (Ch. 1939).

The case of *Amusement Supply Co.* v. *Kaybe Amusement Co.,* 128 N. J. L. 98 (Sup. Ct. 1942), has been set forth before in this brief, and, as previously stated, refuses to apply the institution doctrine. The *Mugler* case, *supra,* is not very clear on its facts, but the Court talks of the defendant being in possession "by various lease assignments" and, therefore, counsel conclude he was a tenant. Assuming that to be so, it is submitted that the *Mugler* case, *supra,* is erroneous in its attempt to apply the institutional theory and that the annexation of the chattel was such so that it might have properly been said that the removal thereof would cause physical damage to the premises. Also the case could have been decided on other grounds. It appears that this case was never law as regards its attempt to apply the institution doctrine to a landlord and tenant relationship where the chattel was placed upon the premises by the tenant. If it were, it has been overruled by *Amusement Supply Co.* vs. *Kaybe Amusement Co., supra.* The facts of the cited case are set forth on page 7 of this brief. In refusing to apply the institution doctrine to this case involving a chattel installed by a tenant, the Court said, at page 100:

> "To carry the institution doctrine to the extreme for which appellants contend might be justified as a matter of logic but as a practical matter it could lead to absurdities."

As noted before, in the instant case, there was no destruction of the old part comparative to the destruction of the equipment parts in the cited case, but said old part was still upon the premises and capable of operating, according to the testimony. It would thus appear to be *a fortiori* reasoning to hold that the institution doctrine does not apply in the instant case.

The reported case of *Rinbrand Well, &c.* v. *L. & H. Theatres, Inc.,* 126 N. J .L. 446 (Sup. Ct. 1941) is not clear as to whether or not a pump which was installed was installed by the tenant or the landlord. Counsel for appellant was advised before the decision in the instant case was reached by the District Court by an attorney who represented one of the parties that the pump in question was, in fact, installed by the landlord and that the tenant had been included in the suit because it had refused access to the premises. The appellee's counsel was present when counsel for appellant related such facts to the District Court Judge, James P. Haney.

In the case of *Provident Mutual Life Ins. Co.* v. *Dougherty,* 125 N. J. E. 442 (Ch. 1939), the Court stated, at page 449, that it would not consider the question of the institution doctrine and its applicability to the relationship existing between landlord and tenant because the case was decided upon other grounds.

To use those cases, involving owner and mortgagee, or conditional sales vendor and mortgagee, as authority for the application of the institution doctrine in the instant case, does not seem to be proper. The courts have always recognized a distinction in the application of the law of fixtures depending upon the relation of the parties to the action. As noted in this brief, the courts

have jealously guarded the rights of tenants and have continuously held so as to prevent forfeitures of personalty paid for and belonging to the tenant.

Cf. Greenspan-Greenberger Co. v. *The Goerke Co.*, 111 N. J. E. 249 (Ch. 1932).

It is submitted that the institution doctrine established by *Feder* v. *Van Winkle*, 53 N. J. E. 370 (E. & A. 1895), and expanded in the case of *Smyth Corp.* v. *Norfolk Assn.*, 116 N. J. L. 293 (E. & A. 1935), is not applicable where the chattel is placed upon the premises by a tenant, and that the case of *Amusement Supply Co.* v. *Kaybe Amusement Co.*, 128 N. J. L. 98 (Sup. Ct. 1942) is the prevailing law.

This is logical because intention is the important thing, especially where the annexation is so slight, as in the instant case, and, generally, a tenant does not intend to affix permanently, whereas an owner does. Of course, if the premises were to be physically damaged by removal, then the tenant would have forfeited his interest in and to the chattel. In the instant case, a question of fact was raised before the District Court as to whether or not physical damage had been caused by the severance of the chattel from the realty. In returning a verdict of no cause for action, the District Court must have found that there was no physical damage to the premises and this should not be disturbed since the evidence justifies such a finding.

See:

Amusement Supply Co. v. *Kaybe Amusement Co.*, 128 N. J. L. 98 (Sup. Ct. 1942).

2. The institution doctrine as a matter of public policy should not be extended to a case involving tenant and landlord.

It is submitted that to apply the institution doctrine to the instant case would be to extend a principle for which, at the present time, there is no authority. The rules which have been developed regarding landlord and tenant, for the protection of the tenant, would be abrogated. Tenants would be faced with forfeitures, and further, absurdities which the Supreme Court sought to prevent in the case of *Amusement Supply Co.*, 128 N. J. L. 98 (Sup. Ct. 1942), would accrue. If the instant case were to be decided upon the authority and reasoning of the case of *Smyth Corp.* v. *Norfolk Assn.*, 116 N. J. L. 293 (E. & A. 1935), then the following is illustrative of where our reasoning would lead us:

Let us suppose a tenant moves into a home where there is a refrigerator inadequate for his own use. Let us suppose he purchases a better one, disconnects the older, and connects the one which he has just purchased. In the case of *Domestic Electric Co., Inc.*, v. *Mezzaluna*, 109 N. J. L. 574 (E. & A. 1932), the Court held that refrigeration was a part of the institution and that the refrigerators which had been placed in the apartment house by the owners of the premises were a part of the realty, and, therefore, the mortgagee prevailed as against the conditional sales vendor thereof. This case was cited with approval by the Court of Errors & Appeals in the case of *Smyth Corp.* v. *Norfolk Assn., supra.*

If this court is to determine that the institution doctrine is to be extended to the instant case, and that the tenant loses his oil burner, then it is submitted that the logic would extend further

to the tenant who installed a refrigerator, and just as the case of *Smyth Corp.* v. *Norfolk Assn.*, 116 N. J. L. 293 (E. & A. 1935), would be authority for the application of the doctrine to the instant case, so would the case of *Domestic Electric Co., Inc.* v. *Mezzaluna,* 109 N. J. L. 574 (E. & A. 1932), be authority for the tenant's losing his refrigerator in the supposed facts. If so, there must be thousands of tenants in this State in danger of losing their refrigerators. Many other illustrations along the same line could be given, such as heating ranges, screens, venetian blinds, and what might even show such an application to be more ridiculous, toasters and electrical broilers. We submit that such a holding would be absurd and against public policy. This is the type of absurdity of which the Court warned in the case of *Amusement Supply Co.* v. *Kaybe Amusement Co.,* 128 N. J. L. 98 (Sup. Ct. 1942).

The same public policy which has protected the tenants, which abhors forfeitures, which policy is set forth in the case of *Greenspan-Greenberger Co.* v. *The Goerke Co.,* 111 N. J. E. 249 (Ch. 1932), and which seeks to permit intent to prevail where possible, would deny the extension of the application of the institution doctrine to the instant case.

It is submitted that when the institutional theory was developed, it was developed with the contemplation that the chattel be affixed to the premises by the owner of the premises and not by the tenant.

See:

Temple Co. v. *Penn Mutual Life Ins. Co.,* 69 N. J. L. 36 (1903).

When an owner of the premises, whether it be business or residential, places a fixture upon the

premises, it may be logical and just to say that he intends to make it part of the freehold and that the question should not be merely physical damage to the freehold, but damage to the institution as well. However, when a tenant purchases the fixture it becomes unjust to cause him to forfeit his proprietory rights when the severance of the fixture from the freehold constitutes no physical damage whatsoever.

From the aforegoing cited cases and reasoning it would appear that the law as regards landlord and tenant permits the tenant to remove a fixture where no physical damage to the property would result, and since there was no such damage in the instant case, Dr. Coble was justified in removing his burner from the premises.

POINT II.

The facts in the instant case indicate that there was no abandonment of the oil burner by the appellant.

A tenant, where the duration of his tenancy is uncertain, is allowed a reasonable time after the termination of his tenancy to remove fixtures.

See:

22 *Am. Jur. Fixtures,* 43; *Thompson on Real Property* (1929 Supp.) Sec. 172.

Not only is this so, but the landlord's conduct was such as to permit the tenant a reasonable time within which to remove the chattels even if it be said that the tenancy was for a fixed and definite term. The tenant, Dr. Coble, testified that the landlord had requested him to leave the oil burner upon the premises until such time as he and his

attorney decided whether he, the landlord, was going to purchase the same. The landlord testified that he told the Doctor to call his, the landlord's lawyer, and nothing more. This was then a question of fact which the Trial Judge must have concluded in the Doctor's favor in order to return a no cause for action.

> *Cf*: *Amusement Supply Co.* vs. *Kaybe Amusement Co.,* 128 N. J. L. 98 (Sup. Ct. 1942).

Where the tenant leaves a chattel upon the premises because of conduct emanating from the landlord, the landlord is estopped from claiming a forfeiture or abandonment and the tenant is entitled to a reasonable time within which to remove said chattel from the premises.

See:

> *Torrey* v. *Burnett,* 38 N. J. L. 457 (E. & A. 1875);
> 22 *Am. Jur.* 43;
> *Thompson on Real Property* (1929 Supp.) Section 174.

In the case of *Torrey* v. *Burnett, supra,* Chief Justice Beasley, in delivering the opinion of the Court, said at pages 459-460:

> "For a landlord to claim a chattel affixed to the land, on the ground that the tenant had failed to remove it while in possession, when such failure had been occasioned by his own promise to sell the fixture for the benefit of the tenant, would, in morals, be a sheer fraud, and the general legal principle above stated is not so inflexible that it is to be so applied as to render such an attempt, when made, successful."

And again, on page 461, the Chief Justice said:

> "The agreement on the part of the landlords to endeavor to effect a sale of the fixture for the benefit of the tenant, carried with it an implied permission that it might be removed, if such endeavor proved to be unsuccessful. Such arrangement, of necessity, involved the fact that the tenant did not intend to abandon the fixture to the landlord, and it is quite unreasonable to suppose that such an abandonment was meant in case a sale was not effected. The engine was left on the property for a specific purpose, and with the assent of the land-owner; such purpose having failed, the tenant did not lose his property, but was entitled to remove it within a reasonable time."

Just so in the instant case, did the tenant leave the oil burner on the premises. His calling of the landlord prior to removal was evidence of the fact that he did not intend to abandon the burner to the landlord. It is submitted that his removal within a week after the termination of the tenancy was a removal effected within a reasonable time.

Conclusion.

It is submitted, upon the basis of the authorities cited in this brief, that the present state of the law permits a tenant to remove a chattel which he has affixed to the premises so long as it is severable without physical damage thereto. The institution doctrine is not applicable and should not be extended to cover the facts of the instant case.

It is further submitted that the defendant-appellant did not, upon the facts set forth, abandon the oil burner by leaving it upon the premises

and that under the law, his removal of the oil burner was justified.

Wherefore, counsel for appellant respectfully submits that the order of the Supreme Court reversing the judgment of no cause for action entered by the Second Judicial District Court of Middlesex County be reversed and for nothing holden and that the judgment of no cause for action entered by said District Court be reaffirmed.

Respectfully submitted,

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To be Argued Orally
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