

entry, as well before as after the death of the lessor, and such an interest as he might before entry grant over to another, or if he died before entry would go to his executors, or if the grant were made to two jointly, to the survivor and his executors, any one of whom might enter at their pleasure and so reduce the contract into an actual execution, for it was perfect and complete on the lessor's part, and the perfecting of it on the lessee's part was entirely in his own power and left to his own discretion, to use when and as he saw fit."

Such then was the interest which the defendant Mandas had in the demised premises at the time of his repudiation of the lease, and there can not, it is submitted, be much doubt that it is an interest in lands within the meaning of the Statute of Frauds, R.S.O. 1897, c. 338, and which cannot be granted, assigned or surrendered except by deed or note in writing or by operation of law.

Thus it may be argued that the defendant's oral repudiation of the lease was ineffectual as an assignment or release of his interest in the demised premises, and that this interest continued until determined by the act of the landlords in leasing to Neeley. It would seem then that the relationship of landlord and tenant existed when the action was brought and continued to exist until the re-letting to Neeley, and it would follow that the claim of the landlords in that action would be limited necessarily to the rent in arrear when the writ was issued, for, in the words of Mr. Justice Maclellan, the attempted repudiation was no breach, and gave the plaintiff no additional cause of action.

It is submitted, therefore, with very much respect that the doctrine of anticipatory breach of contract was not applicable to the facts of *Fitzgerald v. Mandas* and that the plaintiff's verdict should not have been for more than \$500 and interest. It must be borne in mind, however, that the defendant at the trial evidently did not raise the points discussed here, and apparently invited an assessment of damages in favour of the plaintiffs along the lines followed by the learned trial Judge. But as the case has found its way into the reports, it may not be amiss to point out that the soundness of the reasons given for the decision is perhaps not altogether free from doubt.