A TREATISE ON THE LAW

OF

LANDLORD AND TENANT

IN CANADA.

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PREFACE.

In these pages I have aimed to set forth the law of Landlord and Tenant that is in force in the Provinces and Territories of Canada, other than Quebec, as declared by the courts and legislatures. The book is divided into five parts, the first four of which are concerned with the following subjects respectively: (1) Creation of the Relationship; (2) Terms of the Relationship; (3) Change of Parties to the Relationship; (4) Determination of the Relationship. Part five consists of a collection of forms which it is hoped will be found generally useful.

To Mr. Herbert L. Dunn, who kindly read the work in manuscript, my thanks are due for many valuable suggestions.

EDWIN BELL.

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THE LAW OF
LANDLORD AND TENANT.

CHAPTER I.

INTRODUCTION—SOURCES OF CANADIAN LAW.

The sources of the law of Landlord and Tenant in the Provinces and Territories of Canada, other than the Province of Quebec, are mainly as follows: first, the common law of England as declared and interpreted by the English and Canadian Courts; secondly, English statutes passed prior to the time when local legislatures were established; thirdly, statutes, mainly provincial, having the force of law in the several Provinces and Territories respectively.

In any attempt to set forth the principles of a branch of law as it exists in the Canadian provinces, reference must be made to the laws of England upon which our own are based. More especially is such a reference necessary in stating the law of Landlord and Tenant, which has its roots in a remote part, and the main principles of which were developed and ascertained in England before English law generally became the rule of decision here.

The laws of England, including the common law and the statute law, were introduced, or declared to be in force, or continued, and local legislatures were established, in the several provinces at different times, and hence some Imperial statutes are in force in one or more of the pro-

vinces and not in others. The common law as modified by statutes passed prior to the accession of George III., is the basis of the law in all the provinces, as it was not until about that time that any of the provinces were empowered to legislate for themselves.

Ontario, 15th October, 1792.

In Ontario it has been enacted that "in all matters of controversy relative to property and civil rights, resort shall continue to be had to the laws of England as they stood on the 15th day of October, 1792, as the rule for the decision of the same, and all matters relative to testimony and legal proof in the investigation of fact and the forms thereof in the several Courts in Ontario, shall continue to be regulated by the rules of evidence established in England, as they existed on the day and year aforesaid—except so far as the said laws and rules have been since repealed, altered, varied, modified or affected by any Act of the Imperial Parliament still having the force of law in Ontario, or by any Act of the late Province of Upper Canada, or of the Province Canada, or of the Province of Ontario, still having the force of law in Ontario"(*a*).

Nova Scotia.

In Nova Scotia, which was ceded by France to Great Britain in 1713, the laws of England up to the time of its organization as a colony in 1758, are in force there, save as altered by subsequent legislation. The legislature has power to alter or repeal the provisions of any Imperial Act, in so far as it applies to that province, and the passing of a local Act which is inconsistent with an Imperial Act, is in effect a repeal(*b*).

New Brunswick.

In New Brunswick the laws of England, as they stood when the province was organized in 1784, are in force

(*a*) 32 Geo. III. c. 1; R.S.O. (1897), c. 111, s. 1.

(*b*) See *Uniacke* v. *Dickson* (1848), 2 N.S.R. 287; *Murphy* v. *McKinnon* (1889), 21 N.S.R. 307.

there. In case a provincial statute affirming an Imperial Act is afterwards repealed, the Imperial Act revives(*c*).

Prince Edward Island.

In Prince Edward Island, which was ceded to Great Britain by France in 1758, and annexed to Nova Scotia in 1763, the laws of England were in force from the time of its organization as a separate colony in 1769.

Manitoba, 15th July, 1870.

In Manitoba the laws of England relative to property and civil rights, as the same existed on the 15th July, 1870, are in force, so far as the same are applicable except where they have been altered by legislative enactment(*d*).

North-West Territories, 15th July, 1870.

By the North-West Territories Act(*e*) it is provided as follows:

Subject to the provisions of this Act the laws of England relating to civil and criminal matters, as the same existed on the 15th day of July, 1870, shall be in force in the Territories, in so far as the same are applicable to the Territories and in so far as the same have not been or are not hereafter repealed, altered, varied, modified or affected by any Act of the Parliament of the United Kingdom applicable to the Territories, or of the Parliament of Canada, or by any Ordinance of the Lieutenant Governor in Council, or of the Legislative Assembly.

British Columbia, 19th November, 1858.

In British Columbia it is provided by the *English Law Act*(*f*) that "the Civil Laws of England, as the same existed on the 19th day of November, 1858, and so far as the same are not from local circumstances inapplicable, shall be in force in all parts of British Columbia; provided, however, that the said laws shall be held to be modified

(*c*) See *Lamb* v. *Cleveland* (1891), 19 S.C.R. 78.

(*d*) 51 Vict. (1888) (Dom.), c. 33; R.S.M. (1902), c. 40, s. 24; see *Sinclair* v. *Mulligan* (1888), 5 Man. L.R. 17.

(*e*) R.S.C. (1886), c. 50, s. 11.

(*f*) R.S.B.C. (1897), c. 115, s. 2.

and altered by all legislation still having the force of law of the Province of British Columbia, or of any former colony comprised within the geographical limit thereof" (*g*).

In ascertaining or stating the law applicable to any province, it is necessary therefore to consider, *first*, what was the law of England as it stood on the day it was introduced, or declared to be in force therein; *secondly*, how far the law of England is applicable to that province; *thirdly*, how far, if at all, it has been repealed, altered, varied, modified or affected by subsequent legislation having the force of law in that province.

In accordance with these principles an attempt is made in the following pages to set forth the general law applicable to all the provinces alike, and to note the particular modifications of the general law that have been made from time to time in each province.

(*g*) See *Reynolds* v. *Vaughan* (1872), 1 B.C.R. 3.

PART I.

CREATION OF THE RELATIONSHIP OF LANDLORD AND TENANT.

CHAPTER II.

FREEHOLD TENANCIES.

1. *Tenancy in Fee Simple.*
2. *Tenancy in Fee Tail.*
3. *Tenancy for Life.*

Tenant and Tenancy.

A tenant is one who holds, uses or enjoys the property of another with his consent or by his permission or letting. A tenancy is, as the name implies, a holding and signifies the right, interest or estate which a tenant has in such property.

Freehold and leasehold.

The law of Landlord and Tenant as the words are commonly used, comprises that portion of the law dealing with estates or tenancies less than freehold which may be described with sufficient accuracy for our purpose as leasehold tenancies, in contradistinction to estates of freehold or freehold tenancies. In order to understand more clearly the nature and incidents of leasehold tenancies, it will be useful to consider briefly and in outline the subject of freehold tenancies, upon which leasehold tenancies depend and out of which they arose.

Kinds of freehold tenancies.

In English law there are two kinds of freehold tenancies: a tenancy in fee and a tenancy for life. Of tenancies in fee there are two principal classes: a tenancy in fee simple which on the death of the grantee descends to his heirs generally or simply, and a tenancy in fee tail, *feudum talliatum*, which descends and is limited by the grant to a particular class of heirs, namely, to the heirs of the body of the grantee.

1. *Tenancy in Fee Simple.*

Incidents of freehold tenancies.

A tenancy in fee simple is the highest and most extensive interest which a British subject can hold in lands. The most important characteristics of a tenancy in fee simple are: (1) It is an estate held of a superior lord and mediately or immediately of the sovereign who is the supreme landlord or lord paramount; (2) it is an estate of inheritance of indefinite duration; (3) it may be freely aliened; (4) in default of heirs of the last grantee it escheats to the sovereign, by whom or by whose predecessors it was originally granted.

It is worthy of note that, in early times, property in land had none of these characteristics, and only acquired them in the course of a long process of development.

Allodial ownership.

The earlier, perhaps the earliest, form of individual property in land, was known as *allod*, or *allodium*, and signified the whole or entire estate in land and was held in absolute independence, without being subject to any rent or other service, or acknowledgment to a superior. It was probably equivalent to, and directly descended from, the share which each man took in the appropriated portion of the domain of the group to which he belonged—tribe, family, or village community(*a*). In remote times allodial ownership gave place to an estate in land called

(*a*) Maine: Early Law and Custom, p. 339.

a feud or fee so named from a word appearing under a variety of forms—*feudum, feod, feof, fief,* or *feu*—which signified property in general.

Feudal tenure.

Before the Norman conquest of England, the feudal system of land tenure obtained in western Europe, and if not in existence in England under the Saxon kings, was introduced by William the Conqueror, and its main features were incorporated in the common law under the Norman kings and their courts of justice. After the battle of Hastings, the lands of those who opposed the Conqueror were treated as forfeited and were granted by him in extensive tracts to the great barons and chief lords who were hence called tenants in chief. The chief lords in turn subdivided part of their lands among their own followers, a class of inferior tenants called vassals or feudatories.

These grants of land were regarded, according to the construction placed upon them by the King and his officers of justice, not as absolute gifts, but as held of the king or chief lord, as the case might be, on condition of fealty and service to him, in which if they failed, the lands would be forfeited and the king or chief lord might resume them as his own. In other words the estate which a tenant took was called a feud or fee and was an estate in land granted by and held of the king or a superior lord, usually as a reward for military service and allegiance, and on condition of services to be rendered in the future, in default of which the land was to revert to the grantor in whom the dominion or ultimate property resided, and who was hence called the *dominus* or lord of the land.

The essential and fundamental principle of a *feud* was, that it was land held of another by a limited or conditional

estate, the property being in the lord, the usufruct in the tenant(*b*).

Feuds originally not inheritable.

When lands came to be first divided into feuds by a king or military leader on the conquest or occupation of new territory, they were not inheritable. As they were free gifts of the lord to his vassal, they were held merely at the will of the lord, who was the sole judge whether his tenant performed his services faithfully. Afterwards as the necessity for military services became less pressing, and agriculture more important, the tenancy of the feuds became more certain and permanent. They came to be held for one or more years, then for the life of the tenant on whose death they reverted to the grantor, and at length were inherited by the adult sons of the tenant; infants, females and others incapable of bearing arms, or rendering the services required, being excluded. In process of time, under the influence of new conditions, they came to be inheritable generally, and a feud granted to a man and his heirs in general terms, descended to all his male descendants *in infinitum*, the sons at first taking in equal shares, and afterwards the eldest son to the exclusion of all the rest, by analogy to honorary feuds or titles of nobility which came to be introduced, and which, not being of a divisible nature, descended according to the rule of primogeniture(*c*). And as early as the time of Henry II. land held in fee simple descended on an intestacy to collateral as well as lineal heirs, and to female in default of male heirs.

Primogeniture.

The rule by which the eldest son succeeded to the feud or fee under a grant to a man and his heirs, to the exclusion of other children, commonly called the law of primogeniture, is, with some exceptions, still in force in Eng-

(*b*) Sullivan: Introduction to O'Curry's Ancient Irish, p. ccxxii. Armour: Real Property, p. 32.

(*c*) Armour: Real Property, p. 34.

land. In certain boroughs and in the County of Kent, the equal division of lands continues to prevail as a local custom(*d*). The law of primogeniture was also in force in this country until the first day of January, 1852, when it was abolished by the *Inheritance Act*(*e*), which provided that in case of intestacy all the children should inherit the estate in equal shares.

Feuds originally inalienable.

As feuds were at first not inheritable, so they were originally inalienable. A tenant of a fee could neither sell, mortgage nor even devise it without the consent of his lord; nor could the lord transfer his interest to another without consent of the vassal. The feudal obligation between lord and tenant was personal and reciprocal in its nature. The lord was entitled to the personal services of his tenant, and could object to the transfer of the land to one who might prove less able to preform them. On the other hand the tenant was entitled, in return for military services and allegiance, to the protection of his lord and could object to the transfer by the lord of his dominion in the land to one who might be less able to give such protection. But the law gradually underwent a change and it became customary to make transfers without consent until the passing of the statute *Quia Emptores* which gave entire freedom of alienation.

Fee simple escheats to the Crown.

At the present day, as we have seen, a fee simple, on a failure of heirs of the last grantee, escheats to the sovereign.

Prior to the year 1290, where a tenant held lands of a superior lord he might have granted to another the whole of his lands to be held of the lord, and such a grant would have operated to create a tenancy between the lord and the new grantee. In case, however, the tenant granted

(*d*) Digby: History of the Law of Real Property, p. 84.

(*e*) 15 Vict. (1851), c. 6.

only a part of the lands held by him, it operated under the common law to create anew the relation of lord and tenant with all its incidents, between grantor and grantee, the original tenant becoming a lord to the new grantee and having the advantageous rights over the land which formerly belonged to the chief lord. This practice on the part of tenants of subdividing their feuds, or *sub-infeudation* as it was called, and granting them to inferior tenants to be held of themselves, soon became general. One effect of this was that on a failure of heirs of the last grantee the land escheated not to the chief lord, but to the last grantor.

Statute *Quia Emptores.*

In the year 1290, the Statute of Westminister III.(*f*), commonly called the statute *Quia Emptores*, from the Latin words with which it begins, was passed. It was in effect a compromise, as it recognized on the one hand the right of every tenant in fee simple to sell the whole or part of his lands, but on the other, provided that a sale, whether of the whole or of a part of the land, should have the effect of creating a tenancy between the chief lord and the new grantee who simply stepped into the place of the original tenant and assumed all the duties and obligations under which he held. The first three sections of this Statute as re-enacted in Ontario(*g*) are as follows:

2. Forasmuch as purchasers of lands and tenements of the fees of great men and other lords, have many times heretofore entered into their fees, to the prejudice of the lords to whom the freeholders of such great men have sold their lands and tenements to be holden in fee, of their feoffors, and not of the chief lords of the fees, whereby the same chief lords have many times lost their escheats, marriages, and wardships of lands and tenements belonging to their fees; which thing seemed very hard and extreme unto those lords and other great men, and moreover in this case manifest disinheritance: It is therefore provided, and ordained, that from henceforth, it shall be lawful

(*f*) 18 Edw. I. (1290), c. 1.

(*g*) R.S.O. (1897), Vol. III., c. 330, ss. 2, 3 and 4.

to every freeman to sell at his own pleasure his lands and tenements, or part of them, so that the feoffee shall hold the same lands or tenements of the chief lord of the same fee, by such service, and customs as his feoffor held before.

3. And if he sell any part of such lands or tenements to any, the feoffee shall immediately hold it of the chief lord, and shall be forthwith charged with the services, for so much as pertaineth, or ought to pertain to the said chief lord for the same parcel, according to the quantity of the land or tenement so sold: And so in this case the same part of the service shall remain to the lord, to be taken by the hands of the feoffee, for the which he ought to be attendant and answerable to the same chief lord, according to the quantity of the land or tenement sold, for the parcel of the service so due.

4. And it is to be understood, that by the said sales or purchases of lands or tenements, or any parcels of them, such lands or tenements shall in no wise come into mortmain, either in part or in whole, neither by policy nor craft, contrary to the form of the statute made thereupon. And it is to wit, that this and the two preceding sections of this Act extend only to lands holden in fee simple.

From that time forward the transferee of land became tenant to the chief lord or to the king. By successive transfers the tie between the mesne lord and the tenant became weakened and in many cases altogether obliterated. Finally when, by a statute passed in the year 1660(*h*), all the valuable incidents enjoyed by the chief lord were abolished, the relation between the chief lord and his tenant of the freehold fell into abeyance, and the freeholder became for all practical purposes the owner of the soil. In England at the present day, in the great majority of cases, no intermediate lord is recognized, the tenant of the fee holding directly of the Sovereign, as chief lord or lord paramount, to whom as the successor of the original grantor the land in a failure of heirs escheats(*i*).

(*h*) 12 Car. II. (1660), c. 24.

(*i*) Digby: History of the Law of Real Property, p. 190; Armour: Real Property, p. 55.

2. *Tenancy in Tail.*

There is a reversion expectant on an estate tail, but not in fee simple.

The fee or estate held by a tenant in tail is one that is limited by the grant to the heirs of the body of the tenant, and is called a fee tail, (*feudum talliatum*), as opposed to a fee simple which is granted to the tenant and his heirs generally or simply. As this species of estate is rare in this country(*k*), it is unnecessary to outline the course of its development, or the modes by which it may be converted into a fee simple. While, however, it remains an estate tail it differs in one important respect from a fee simple. On a failure of heirs the estate reverts to the person by whom it was created or his representative, who is thence called the reversioner and who has an estate in reversion expectant upon the estate tail. When a person grants an estate in fee simple he thereby divests himself of all estate in the land which on a failure of heirs, in this country at least, reverts to the crown. "There cannot," said Lord Selborne, "in the usual and proper sense of the term, be a reversion expectant upon an estate in fee simple"(*l*). The only exception to this rule appears to be where a corporation is the grantee of an estate in fee simple and is dissolved whilst holding the lands. In that case the lands go by reversion to the grantor and not to the Sovereign(*m*). This contingent interest should perhaps be called, not a reversion, but a possibility of reverter.

Exception.

3. *Tenancy for Life*

The last species of freehold tenancies which remains to be noticed is a tenancy for life. The estate of a ten-

(*k*) Estates tail have been abolished in Nova Scotia and New Brunswick by statute.

(*l*) *Attorney-General of Ontario* v. *Mercer* (1883), 8 App. Cas. 767.

(*m*) Armour: Real Property, p. 270.

ant for life is an estate of freehold, but it is not a fee as a fee implies an estate of inheritance. But an estate for life like an estate tail, is held of the immediate reversioner or his representative, to whom it reverts on the death of the tenant or person for whose life it is held.

Modes of creating freehold tenancies.

A freehold tenancy was created by a grant of the land by the lord to his vassal, accompanied by open and notorious delivery of possession in the presence of other vassals. In later times a grant of land was commonly evidenced by deed, although at common law a deed was unnecessary, the use of appropriate words, *dedi et concessi*, and corporal investiture, called *livery of seisin*, being all that was essential to vest an estate in the grantee. A grant of land in this way to a man simply, without adding anything to limit the estate he was to take, operated as a conveyance of an estate or tenancy for his life. In order to create a tenancy in fee it was necessary that the grant should be expressly made to the grantee *and his heirs*, in the case of a fee simple, or to the grantee *and the heirs* of *his body* in the case of a fee tail. In some provinces of Canada this is still necessary, but in Ontario on the 1st of July, 1886, an Act was passed which dispensed with the necessity to use technical words of inheritance in a conveyance of an estate in fee simple or in fee tail. It is sufficient if the words "fee simple," "in tail," be used, or any other words sufficiently indicating the limitation intended(*n*).

(*n*) R.S.O. (1897), c. 119, s. 4.

CHAPTER III.

LEASEHOLD TENANCIES.

1. *Leasehold Tenancies Generally.*
2. *Tenancies at Will.*
3. *Tenancies for Recurring Periods.*
4. *Tenancies for a Fixed Term.*
5. *Tenancies for Life.*
6. *Tenancies by Sufferance.*

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1. *Leasehold Tenancies Generally.*

It being a settled principle of English law that all land is held ultimately of the Sovereign, the relation of Landlord and Tenant in its widest sense is nearly co-extensive with the possession or ownership of land(*a*). But it is in a narrower sense that the words are ordinarily used. As the relations of lord and tenant and the incidents of freehold tenancies gradually came to be of less importance, and in great part to disappear, the words landlord and tenant began to be used with reference to a new species of estate of growing importance, called a term or an estate for years, until at the present day the words are used to designate almost exclusively the parties interested in such an estate.

A term is created wherever a person being possessed of an interest in real property grants to another an estate or interest generally less than the grantor possesses therein, to hold for a time certain or capable of being made certain, usually in consideration of a periodical payment of rent in money or money's worth. A term (*terminus*)

(*a*) Co. Litt. 65a; 2 Black. Com. 51.

or a term of years is so called because its duration is limited or is capable of being determined at a fixed time, as distinguished from a freehold estate the duration of which is uncertain.

A term or an estate for years is created by a lease, which means in law simply a letting into possession, and is hence called a leasehold estate or tenancy, and the parties to it lessor and lessee.

Termor and reversioner.

The lessee is sometimes called the *termor*, or owner of the term, the word "term" being used to signify not only the period during which the tenancy is to exist, but also the estate or interest of the tenant. The lessor being the person to whom the property reverts on the termination of the tenancy is sometimes called the reversioner or owner of the reversion.

Reversion and remainder.

Reversion must be distinguished from remainder. A reversion is the undisposed of interest in land which reverts to the grantor after the exhaustion of the particular estate, as, for example, an estate in tail, an estate for life, or an estate for years, which he may have created.

A remainder, on the other hand, is that residue of an estate in land depending upon a particular estate and created at the same time. Thus if A. being possessed of an estate in fee simple grants an estate for life to B., his interest in the land is then a reversion expectant on the estate for life. If however at the same time A. grants an estate to B. for life and subject thereto an estate to C. in fee, A. no longer has a reversion, and C.'s estate is called, not a reversion, but a remainder expectant on the estate for life. A reversion, although it may be assigned, conveyed or devised, can never be created by deed or will. A remainder on the other hand can never arise except under a deed or will(*b*).

(*b*) Armour: Real Property, p. 234.

A leasehold tenancy is called an estate for years, although the period for which it is granted is less than a year, a year being the shortest term of which the law takes notice(*c*).

Freehold and leasehold tenancies.

The distinctive characteristic of a freehold tenancy is the uncertainty of the period at which it will come to an end. It is essential to an estate for years that the period of its temination shall be fixed from the beginning, or at least be capable of being fixed(*d*).

History of a leasehold tenancy.

Originally a term of years was not regarded as an estate but merely as a personal right. The only estates known to the early law were estates of freehold, the feudal organization not properly including the relation of a reversioner and a termor for years. The steps by which terms of years became established and recognized by law as estates, although at present of little practical importance, yet serve to show in what way they came to be classed as personal property, and to descend to the executor instead of the heir, as well as to illustrate other legal principles of leasehold tenancies.

Terms of years were in early times, as at the present day, often granted by deed and otherwise to farmers and husbandmen who in consideration thereof agreed to pay rent in corn, cattle or money. Yet their possession was deemed of little consequence, and they themselves were looked upon more as mere bailiffs who accounted to the freeholder for the profits of the land at a fixed price than as having any property of their own. From this conception of the early relation is derived the principle that the possession of the tenant is the possession of the landlord(*e*).

(*c*) Armour: Real Property, p. 134.

(*d*) Digby: History of the Law of Real Property, p. 197.

(*e*) Armour: Real Property, p. 140.

The lease creating the term conferred no estate, and hence if the lessee was wrongfully dispossessed by the landlord, he had no means of recovering possession, as, by the doctrine of the common law, possession of land could only be recovered by one having an estate therein, that is, an estate of freehold. The lessee's only recourse was a personal action for breach of the agreement. To remedy this injustice, a particular form of the *writ of covenant* was invented to enable the lessee to recover the *term*, as well as damages. This new remedy, however, afforded only a partial relief, as it was effective only against the landlord, who might part with his estate after creating the term, and put the grantee in possession. In such a case the tenant could not bring his action of covenant to recover the term against the landlord, as he was not in possession, nor against the grantee as the grantee had not made the covenant, covenants running with the land being as yet unknown. To provide a further remedy, a new writ was invented in the reign of Henry III. called *Quare ejecit infra terminum*, by which the lessee was enabled to recover possession from the grantee of the landlord. Another writ, called *ejectio firmae*, first introduced in the reign of Edward III., enabled the tenant to proceed against a stranger who had ousted him from possession. This writ was afterwards greatly extended in its scope and became in the form of an action of ejectment the appropriate means of asserting the right to the possession of land in all cases, and was used as a substitute for all forms of real actions.

Writ of ejectment.

Notwithstanding these provisions there was still one case where a lessee's right to possession could be defeated. If a reversioner in a collusive action to recover possession allowed judgment to go against him by default, or as it was technically called, suffered a recovery, a lease pre-

viously granted by him had no validity against the successful plaintiff, who claimed on a supposed title paramount to the title of the reversioner, and the lessee could not prevent the destruction of his term because, having no estate he had no *locus standi* to intervene in an action of recovery. This hardship was partly remedied by the Statute of Gloucester(*f*), but it was not until the year 1530 that the leaseholder was wholly protected against a proceeding of this nature by an Act which enabled termors to falsify judgments obtained in collusive actions of recovery(*g*).

Thus the interest of a tenant for years was protected at all points and became recognized by law as an estate in land, or a right of property which he might assert, not only against the landlord, but against all the world(*h*).

Before a term became thus established as an estate it was looked upon as a mere personal right, and devolved on the death of the lessee within the term, like other personal property, upon his executor or administrator. After it came to be regarded as property in land it continued to devolve, as was natural, upon the personal representatives of the lessee and thus came to be classed with personal property.

Chattels real.

In this way terms of years, being estates in land and so partaking of the nature of real property, and also being of the nature of personal property by reason of its devolving on the personal representatives, acquired in the language of jurists the hybrid name of *chattels real*(*i*).

Kinds of leasehold tenancies.

Leasehold tenancies may be conveniently divided into five classes: (1) a tenancy at will; (2) a periodic tenancy,

(*f*) 6 Edw. I., c. 11.

(*g*) 21 Henry VIII (1530), c. 15.

(*h*) Challis: Real Property, p. 46; Digby: History of the Law of Real Property, p. 199; Armour: Real Property, p. 140.

(*i*) Digby: History of the Law of Real Property, p. 145.

as from week to week, from month to month, from quarter to quarter, or from year to year; (3) a tenancy for a fixed term; (4) a tenancy for life, either for the life of the tenant or for the life of another; and (5) a tenancy by sufferance which is the tenancy of one who comes in by right and holds over without right, as for example, a tenant for a fixed term who continues in occupation without the owner's permission after his term has expired.

How distinguished.

These tenancies are distinguished by the manner in which they arise, by their duration or by the modes in which they are determined.

Mode of creation.

Tenancies may arise by express agreement or by implication of law, or partly by express agreement and partly by implication of law. Thus, a tenancy for a fixed term, or for life, can only arise by express agreement between the parties. A tenancy by sufferance can only arise by operation of law; it can never arise by agreement for if the person entitled to possession assented, it would be a tenancy at will. A tenancy at will or a periodic tenancy may arise by express agreement or, as more frequently happens, by construction or operation of law.

The relation of landlord and tenant or a tenancy arises or is created expressly by a lease or letting, technically called a demise, a transaction by which the one permits the other to enter into or retain possession either for a definite term or for an indefinite term that may be ended by definite acts of the parties.

Duration.

Tenancies are further distinguished by their duration. Thus a tenancy by sufferance, or at will, or a periodic tenancy, not being for a fixed time, may continue indefinitely until some act is done to put an end thereto, while a tenancy for a fixed term or for life endures no longer than the time agreed upon.

Mode of determination.

The important distinction between these classes of tenancies is the mode by which they may be determined. A tenancy at will may be determined at any time by either party. A periodic tenancy may be determined by either party upon a specified notice to the other. A tenancy for a fixed term, or for life, comes to an end, in the absence of any express stipulation to the contrary, by effluxion of time, or by the death of the tenant or other person for whose life he holds. A tenancy by sufferance, it would seem, is only determined by the tenant's going out of possession or by his eviction.

2. *Tenancies at Will.*

How they arise.

A tenancy at will may, like a tenancy for years, be created by express contract but it more often arises by implication of law, as, for example, where an intending purchaser enters upon the land before the conveyance is executed. In that case he is not a trespasser for he enters by permission of the owner, and as he is not yet the owner and may never be if the transaction falls through, the law considers him a tenant at will(*j*).

Occupation by permission without more.

The mere fact of occupation by permission of the owner, without more, creates a tenancy at will(*k*).

Where a person is permitted to occupy premises rent free, as for example, a *cestui que trust* by his trustee, or a minister of a church by the trustees of his congregation, he is *prima facie* a tenant at will(*l*).

A tenancy at will also arises where a person has entered, or continues in occupation with the owner's permission,

(*j*) *Doe* v. *Chamberlaine* (1839), 5 M. & W. 14; *Howard* v. *Shaw* (1841), 8 M. & W. 118.

(*k*) *Doe* v. *Wood* (1845), 14 M. & W. 682.

(*l*) *Day* v. *Day* (1871), L.R. 3 P.C. 751; *Lynes* v. *Smith*, [1899] 1 Q.B. 486; *Garrard* v. *Tuck* (1849), 8 C.B. 231; *Melling* v. *Leak* (1855), 16 C.B. 652; *Doe* v. *Jones* (1830), 10 B. & C. 718.

but no definite agreement has been made for the continuance of the occupation or for the rent to be paid. Thus where a person is let into possession pending negotations for a lease or sale of the premises to him a tenancy at will arises by implication of law(*m*), and if the negotations are not concluded the tenancy may be determined by a demand of possession(*n*). And so a debtor in possession of lands which have been sold for a debt at a sheriff's sale on a judgment against him is *quasi* tenant at will to the purchaser(*o*). And generally speaking wherever a person, other than a servant or agent, is placed in possession by the owner for no stated time he becomes tenant at will(*p*).

Statute of Frauds.

So where the term agreed on is for a longer period than three years from the making thereof, or the rent reserved is less than two thirds of the full improved value of the land, and the demise is not evidenced by writing the tenancy is declared by the Statute of Frauds to be a tenancy at will only(*q*).

Under an agreement for a lease.

Formerly, where a tenant entered into possession under an agreement for a lease, as opposed to a present demise, he became a tenant at will, and if he paid rent with reference to a holding for a year he became a tenant from year to year. But since the passing of the Judicature Act by which equitable as well as legal jurisdiction may be exercised by the same court it has been held that an agreement for a lease, if capable of specific performance, confers on

(*m*) *Howard* v. *Shaw* (1841), 8 M. & W. 118; *Doe* v. *Pullen* (1836), 2 Bing. N.C. 749.

(*n*) *Lennox* v. *Westney* (1889), 17 Ont. 472.

(*o*) *Doe d. Armour* v. *McEwen* (1834), 3 O.S. 493.

(*p*) *Doe* v. *Jones* (1830), 10 B. & C. 718; 34 R.R. 485; *Doe* v. *McKaeg* (1830), 10 B. & C. 721; 34 R.R. 551.

(*q*) 29 Car. II., c. 3, s. 1; R.S.O. (1897), Vol. III., c. 338, s. 2.

a tenant in possession under it a tenancy for the whole term(*r*).

In the case of letting for a year where the tenant holds over with the consent of his landlord, the implication arises not of a tenancy at will but of a tenancy from year to year(*s*).

A tenancy at will may become a periodic tenancy, as a tenancy from year to year, on payment and acceptance of rent with reference to a yearly holding or some aliquot part of a year(*t*). But rent may be reserved upon a lease expressed to be at will, and in such a case the payment of rent will not operate to change an express tenancy at will to a periodic tenancy(*u*).

Modes of determination.

A tenancy at will may be determined at any time either by act of the parties or by implication of law. A mere demand of possession by the lessor, an assignment of the lease or the reversion, or the death of either party, or any act inconsistent with such a tenancy, will operate to determine it. Thus where the lessor entered on the premises and cut stone without the permission of the lessee the tenancy was held to be determined(*v*). So, if the lessee assign his holding to another and the lessor have notice of the assignment this will determine the tenancy, for a tenancy at will is not assignable; and if the assignee enter the land he becomes a trespasser. But if the landlord have no notice of the assignment he may distrain for rent(*w*).

(*r*) *Walsh* v. *Lonsdale* (1882), 21 Ch. D. 9; see Chapter VI.

(*s*) *Dougall* v. *McCarthy*, [1893] 1 Q.B. 736.

(*t*) *Cox* v. *Bent* (1828), 5 Bing. 185.

(*u*) *Doe* v. *Cox* (1847), 11 Q.B. 122; *Doe* v. *Davies* (1851), 7 Ex. 89.

(*v*) *Doe* v. *Turner* (1840), 7 M. & W. 226; 9 M. & W. 643.

(*w*) *Carpenter* v. *Collins* (1605), Yelv. 73; *Pinhorn* v. *Souster* (1853), 8 Ex. 763.

A tenancy at will is determined by a mortgage of the premises by the landlord as soon as such mortgage comes to the knowledge of the tenant. If the tenant continues in possession, a new tenancy may be created for the purpose of preventing the Statute of Limitations running against the landlord, notwithstanding the fact that such tenancy would not have been valid as against the mortgagee(*x*).

Where a mortgagor, remaining in possession upon the execution of the mortgage, has the right under the provision for quiet possession until default to enjoy the premises, but for no determinate period, his tenancy thereunder becomes a tenancy at will, and such provision is, therefore, not inconsistent with an express tenancy at will at a half-yearly rent(*y*). And where in such a case the mortgagor has made default his continuance in possession is still as tenant at will(*z*).

3. *Tenancies for Recurring Periods.*

Kinds of periodic tenancies.

The principle kinds of periodic tenancies are weekly, monthly, quarterly and yearly tenancies, and their chief characteristics are (1) that they may be determined by the landlord or the tenant on giving notice to the other of a specified length of time, ending with a recurring period of the tenancy, and (2) that they may continue indefinitely if notice is not given to determine them. Thus a tenancy from year to year does not determine and recommence every year. The tenant has a term of one year at least, and a growing interest during every year thereafter springing out of the original contract, until notice

(*x*) *Jarman* v. *Hale*, [1899] 1 Q.B. 994.

(*y*) *Pegg* v. *Independent Order of Foresters* (1901), 1 Ont. L.R. 97, following *Doe d. Dixie* v. *Davies* (1851), 7 Ex. 89.

(*z*) *Ibid.*

is given to determine it; and the rule is the same with regard to other periodic tenancies(*a*).

Determined by notice to quit.

The notice that is necessary to determine a periodic tenancy, technically called a notice to quit, was originally required to be a notice of such length as was reasonable under the circumstances of each particular case; but the length of notice that in the absence of express stipulation is sufficient and necessary to determine a weekly, monthly, quarterly or yearly tenancy has now been fixed (except in Nova Scotia and New Brunswick), either by statute or judicial decision or both, at a week, month, quarter, or half-year respectively, and ending with same week, month, quarter or year of the tenancy. Thus, a yearly tenancy which commenced on the first of March can only be determined on some subsequent first of March by notice given half a year or more previously thereto.

In Nova Scotia, the length of notice required to determine a weekly, monthly or yearly tenancy has been fixed by statute at a week, month and three months respectively(*b*).

In New Brunswick, a week's notice is required to determine a weekly tenancy; a month's notice, for a monthly or quarterly tenancy; and three months' notice, for a half-yearly or yearly tenancy(*bb*).

A fuller discussion of the law respecting determination of periodic tenancies is to be found in chapter XXVI.

On a tacit re-letting from year to year after a term of years, the new tenancy is deemed to have commenced on the same day as the day of commencement of the original term(*c*). But this is a question of fact to be decided

(*a*) *Cattley* v. *Arnold* (1859), 1 J. & H. 651; *Gandy* v. *Jubber* (1865), 9 B. & S. 15; *Bowen* v. *Anderson*, [1894] 1 Q.B. 164.

(*b*) R.S.N.S. (1900), c. 172, s. 16.

(*bb*) C.S.N.B. (1904), c. 153, s. 27.

(*c*) *Roe d. Jordan* v. *Ward* (1789), 1 H. Bl. 96.

upon a consideration of all the circumstances of the case(*d*).

How they arise.

A periodic tenancy as, for example, a tenancy from year to year may be created by express agreement. But a tenancy from year to year more commonly arises by implication of law from the acts of the parties after the lessee has been let into possession. Such a tenancy usually arises after a tenancy by sufferance, a tenancy at will, or after a term that has expired, or has been otherwise determined; or it may arise after entry under a lease that is void by reason of the omission of some legal requirements.

A tenancy at will was the earliest form of tenancy less than freehold known to the law, and out of it arose the tenancy from year to year. It was found by both parties to a tenancy at will to be exceedingly inconvenient to have interests so much at the mercy of the other, and the lessee especially suffered hardships, as he might, after sowing his crop, lose the benefit of his industry at the mere caprice or pleasure of his lessor. Hence arose the doctrine of *emblements* whereby if a lessee at will should sow his land, and the lessor should, before harvest, determine the tenancy the lessee should have the crop, and free ingress, egress and regress to reap and carry it away(*e*).

Payment of rent.

Tenancies at will were not favoured by courts of law and in order to prevent injustice, the judges seized upon every circumstance tending to show a contrary intention. Thus, if the rent was paid yearly, the law presumed that the parties intended to create a yearly tenancy, and not a tenancy at will. And it seems now to be settled that if a person enters into, or remains in, possession under circumstances which would constitute him tenant at will, and

(*d*) *Walker* v. *Godè* (1861), 6 H. & N. 594.

(*e*) Armour: Real Property, p. 144.

pays a yearly rent, he will, in the absence of express stipulation and of circumstances which rebut that presumption, be deemed to be a tenant from year to year(*f*).

But a yearly rent may be reserved upon a lease expressed to be at will, and in such a case the payment of rent will not have the effect of creating a tenancy from year to year against the expressed intention of the parties(*g*).

A tenancy from year to year, created by the attornment of a mortgagor to a mortgagee, is not turned into a tenancy at will by a power to re-enter without notice(*h*).

Mere occupation of premises and payment of a yearly rent to the owner, without a more definite agreement, is sufficient to constitute a yearly tenancy(*i*).

Where A., a tenant for life of two lots, gave B. oral permission to occupy one lot and build upon it, on condition that he should pay the taxes on both lots, and B. accordingly went on and built, and paid the taxes for several years, it was held that a yearly tenancy had been created, and that A. could not eject B.'s sub-tenant without notice to quit(*j*).

A letting at an annual rent constitutes a yearly tenancy, which continues at the same rent for the second year as the first, if the tenant remains in possession of the premises; and the landlord may distrain for the first year's rent at the end of the second year; and the fact that half a year's rent is in arrear does not determine the tenancy

(*f*) *Doe d. Martin* v. *Watts* (1797), 7 T.R. 85; *Doe d. Tucker* v. *Morse* (1830), 1 B. & Ad. 365; *Berry* v. *Lindley* (1841), 3 M. & Gr. 498; *Lee* v. *Smith* (1854), 9 Ex. 662; *Doe* v. *Crago* (1848), 6 C.B. 90.

(*g*) *Doe* v. *Cox* (1847), 11 Q.B. 122.

(*h*) *In re Threlfall* (1880), 16 Ch. D. 274.

(*i*) *Birchall* v. *Reid* (1874), 35 U.C.R. 19.

(*j*) *Davis* v. *McKinnon* (1871), 31 U.C.R. 564.

at the end of the first year, so as to make it necessary to distrain within six months afterwards(*k*).

Where a lease for ten years at a yearly rent contained a proviso that if the lessor should sell the lands during the term, the lessee should give up possession on six months' notice, and a sale was made and notice given, it was held that acceptance of rent by the purchaser after expiry of the notice, gave rise to a yearly tenancy(*l*).

The receipt of rent by the wife, with the husband's assent, from a tenant of her estate after the expiration of a term, creates a tenancy from year to year(*m*).

Where an incorporated company occupied certain premises under a verbal agreement for a year, and continued in possession thereafter and then went out, paying rent for the time the company was actually in possession, it was held that, as there was no lease under seal, the company was not liable as tenant from year to year, but only for use and occupation while actually in possession(*n*).

Under void lease.

A yearly tenancy may arise under a lease that is void at law by reason of some informality in the lease if rent is paid with reference to a yearly holding(*o*). Thus a lease by a tenant for life which he is not empowered by any instrument or Act of Parliament to make, is void as against the remainderman; but acceptance of rent by him

(*k*) *McClenaghan* v. *Barker* (1844), 1 U.C.R. 26.

(*l*) *Manning* v. *Dever* (1875), 35 U.C.R. 294.

(*m*) *Johnson* v. *McLellan* (1871), 21 U.C.C.P. 304.

(*n*) *Garland Co.* v. *Northumberland Co.* (1900), 31 Ont. 40, following *Findlay* v. *Bristol and Exeter Railway Co.* (1852), 7 Ex. 409.

(*o*) *Doe* v. *Bell* (1793), 5 T.R. 471; *Clayton* v. *Blakey* (1798), 8 T.R. 3; 4 R.R. 575; *Richardson* v. *Giffard* (1834), 1 A. & E. 52; *Doe* v. *Collinge* (1849), 7 C.B. 939; *Lee* v. *Smith* (1854), 9 Ex. 662; *Doe v. Taniere* (1848), 12 Q.B. 998; *Martin* v. *Smith* (1874), L.R. 9 Ex. 50.

from the lessee after the death of the tenant for life raises a presumption of a new tenancy from year to year(*p*).

A lease for life at a nominal rent, although it could not pass a freehold interest, would operate as a lease from year to year(*q*).

A lease at a yearly rent, to come to an end as soon as a third person "shall vacate the said premises or cease to reside thereon," does not operate as a lease for years owing to the uncertainty of the termination thereof, but as a tenancy at will until payment of rent, when it becomes a tenancy from year to year, and such tenancy can be determined only by a proper notice to quit(*r*).

Agreement for a lease.

Formerly where possession was taken under an agreement for a lease, and a yearly rent paid, the tenant was deemed in law to be a tenant from year to year, upon such of the terms of the agreement as were consistent with a yearly tenancy(*s*).

Thus, a lease in writing, but not under seal, for five years, was held to create a tenancy from year to year for five years determinable during that time by half a year's notice, and after the end of the term the lessee was bound to give up possession without notice(*t*).

So, where an agreement was made whereby the lessor agreed to permit the lessee to work a farm during the lessor's life, on condition that he should do so in a farmer-like manner, and deliver as rent one-third of the crops, it was held, as the instrument was inoperative to create

(*p*) *Doe d. Martin* v. *Watts* (1797), 7 T.R. 83; 4 R.R. 387. See Chapter IX.

(*q*) *Doe d. Lawson* v. *Coutts* (1837), 5 O.S. 499.

(*r*) *Reeve* v. *Thompson* (1887), 14 Ont. 499.

(*s*) *Doe* v. *Smith* (1827), 1 Man. & Ry. 137.

(*t*) *Caverhill* v. *Orvis* (1862), 12 U.C.C.P. 392; see also *Tress* v. *Savage* (1854), 4 E. & B. 36; *Osborne* v. *Earnshaw* (1862), 12 U.C.C.P. 267.

a life estate, the lessee became a tenant from year to year on the terms of the agreement(*u*).

Where the lessee claimed title by virtue of an agreement contained in letters written to him under the terms of which he was to have possession for ten years upon certain conditions, which he had performed, it was held that, as there was no lease under seal, he became a yearly tenant(*v*).

But since the passing of the *Judicature Act*, it has been held that a tenant, who is in possession under an agreement for a lease that is capable of specific performance, is in the same position as if a lease had been actually granted(*w*).

A lease in writing but not under seal for a term exceeding three years is void at law as a lease(*wa*), but is deemed to be valid in equity as an agreement for a lease(*wb*). It would appear that where an agreement for a lease is, for any reason, incapable of specific performance, a tenancy from year to year may still arise under it, if a yearly rent is paid.

Terms of former lease continued.

Where a tenant holds over after a lease for a term has expired, or has been otherwise determined, and becomes a tenant from year to year under a tacit agreement, all the terms and stipulations of the original lease that are applicable to a yearly tenancy are, in the absence of circumstances rebutting that presumption, implied in the new tenancy(*x*).

(*u*) *Sheldon* v. *Sheldon* (1863), 22 U.C.R. 621.

(*v*) *White* v. *Nelson* (1860), 10 U.C.C.P. 158.

(*w*) *Walsh* v. *Lonsdale* (1882), 21 Ch. D. 9. See Chapter VI.

(*wa*) 8 & 9 Vict. (Imp.), c. 106, s. 3; R.S.O. (1897), c. 119, s. 7.

(*wb*) *Parker* v. *Taswell* (1858), 2 De G. & J. 559.

(*x*) *Roe d. Jordan* v. *Ward* (1789), 1 H. Bl. 96; *Hyatt* v. *Griffiths* (1851), 17 Q.B. 509; *Digby* v. *Atkinson* (1815), 4 Camp. 275; *Bishop* v. *Howard* (1823), 2 B. & C. 100.

Terms applicable to a yearly tenancy.

The following terms and stipulations in a prior lease have been held to be applicable to a yearly tenancy following thereon: a covenant to pay rent (*y*); a covenant to repair (*z*); a covenant that the outgoing tenant shall be paid for plowing (*a*); a covenant that the tenant shall leave all the manure on the farm at end of the tenancy (*b*); a stipulation providing for a rotation of crops (*c*); a proviso for re-entry on non-payment of rent or non-performance of covenants (*d*); a stipulation in a mining lease that the tenancy may be determined on six months' notice expiring at any time (*e*).

Terms inapplicable.

The following stipulations in the prior lease have been held to be inapplicable to a tenancy from year to year following thereon: a covenant by the tenant to build, or to do substantial repairs, such as a yearly tenant would not ordinarily agree to do (*f*); to paint once in three years unless he occupies for that time (*g*); a proviso for two years' notice to quit (*h*); or that the tenant will not be disturbed or his rent raised (*i*).

Under a covenant in a prior lease to pay all "taxes and outgoings whatsoever in respect of the said premises," a tenant, who continues to occupy as a yearly tenant after

(*y*) *Bennett* v. *Ireland* (1858), E.B. & E. 326.

(*z*) *Richardson* v. *Gifford* (1834), 1 A. & E. 52; *Arden* v. *Sullivan* (1850), 14 Q.B. 832; *Ecclesiastical Commissioners* v. *Merrall* (1869), L.R. 4 Ex. 162.

(*a*) *Brocklington* v. *Saunders* (1864), 13 W.R. 46.

(*b*) *Roberts* v. *Barker* (1833), 1 Cr. & M. 808.

(*c*) *Doe* v. *Amey* (1840), 12 A. & E. 476.

(*d*) *Thomas* v. *Packer* (1857), 1 H. & N. 669; *Crawley* v. *Price* (1875), L.R. 10 Q.B. 302.

(*e*) *Bridges* v. *Potts* (1864), 17 C.B.N.S. 314.

(*f*) *Bowes* v. *Croll* (1856), 6 E. & B., at p. 264.

(*g*) *Martin* v. *Smith* (1874), L.R. 9 Ex. 50.

(*h*) *Tooker* v. *Smith* (1857), 1 H. & N. 732.

(*i*) *Kusel* v. *Watson* (1879), 11 Ch. D., at p. 133.

the term, is not liable for the expense of reconstructing a drain which was a nuisance under the Public Health Act (*ii*).

A lease that is void for any informality, and hence cannot operate to create a term, may be looked at to ascertain the conditions of the tenancy (*j*).

Periodic rent.

Payment of rent, however, will not operate to convert a tenancy, which would otherwise be a tenancy at will, into a tenancy from year to year unless it be made with reference to a yearly holding. Where the lease specifies no time during which the occupation is to last, and the rent paid has no reference to a year, or any aliquot part of a year, it has been held that a tenancy at will only was created (*k*).

Presumption of periodic tenancy may be rebutted.

Payment and acceptance of rent is not conclusive evidence of a yearly tenancy, and the presumption may be rebutted by facts and circumstances showing that such was not the intention of the parties (*l*). Thus a landlord who has accepted rent from a tenant holding over, may show that he did so in ignorance of the death of the person for whose life the tenancy endured (*m*).

A wide difference between the rent paid and the actual value of the premises, may be sufficient to rebut the presumption of a yearly tenancy arising under a void lease(*n*).

Although payment of rent in aliquot proportions of a year is the leading circumstance which turns tenancies for uncertain terms into tenancies from year to year, yet such payment does not create the tenancy, but is only evidence

(*ii*) *Harris* v. *Hickman*, [1904] 1 K.B. 13.

(*j*) *Lee* v. *Smith* (1854), 9 Ex. 662; *Kelly* v. *Patterson* (1874), L.R. 9 C.P. 681; *Galbraith* v. *Fortune* (1860), 10 U.C.C.P. 109; *Lyman* v. *Snarr* (1861), 10 U.C.C.P. 462.

(*k*) *Richardson* v. *Langridge* (1811), 4 Taunt. 128; see also *Braythwayte* v. *Hitchcock* (1842), 10 M. & W. 494.

(*l*) *Smith* v. *Widlake* (1877), 3 C.P.D. 10.

(*m*) *Doe* v. *Crago* (1848), 6 C.B. 90.

(*n*) *Smith* v. *Widlake* (1877), 3 C.P.D. 10.

from which the court or jury may find the fact; therefore, where the landlord, before he accepted any rent after expiry of a lease, told the tenants that he would not consent to any tenancy from year to year, but that they should remain as they were on expiry of the lease, to which they assented, the parties were not tenants from year to year, but tenants at will, although rent continued to be paid as under the lease (*o*). Tenants who, on expiry of lease, are permitted to continue in possession pending a treaty for a further lease, are not tenants from year to year, but tenants at will (*o*).

Presumption as to terms may be rebutted.

The presumption in an implied tenancy from year to year that the terms and conditions of the void or expired lease, as the case may be, are continued in the new tenancy, may also be rebutted by evidence, and the question is one of fact (*p*).

A mere alteration in the amount of rent to be paid is not of itself sufficient to rebut the presumption that the other terms of an expired lease are still in force (*q*).

A reversioner, who, under a lease for a term made by a tenant for life which determines on the death of such tenant for life, accepts rent thereafter in ignorance of a covenant contained in the lease, is not bound by it (*r*).

Weekly, monthly and quarterly tenancies.

A weekly, monthly, or quarterly tenancy is deemed to arise, in the absence of other controlling circumstances implying a different intention, where rent is paid or agreed to be paid by the week, month, or quarter respectively (*s*).

Thus an instrument under seal as follows: "This is to certify that we agree to give (to the lessor) $5.00 per month

(*o*) *Idington* v. *Douglas* (1903), 6 Ont. L.R. 266.

(*p*) *Mayor of Thetford* v. *Taylor* (1845), 8 Q.B. 95.

(*q*) *Digby* v. *Atkinson* (1816), 4 Camp. 275; *Doe* v. *Geekie* (1844), 5 Q.B. 841.

(*r*) *Oakley* v. *Monck* (1866), L.R. 1 Ex. 159.

(*s*) *Wilkinson* v. *Hall* (1837), 3 Bing. N.C. 508.

for the use of the farm (describing it) for so long a time as he may let us have it; and moreover we fully bind ourselves to give up to him quiet and peaceable possession of said farm when he may require it," was held to create a tenancy from month to month (*t*).

Where a lease was made "from the 1st November now next ensuing for and until the 1st April following, a period of five months," at a monthly rent, it being further agreed that if the lessee should withhold possession of said premises, and should remain longer than the 1st April, he should pay at the rate of $50 per annum as rent, to be paid monthly, it was held that the lease was a demise till the 1st April, with an option to the lessee to remain afterwards as a monthly tenant (not from year to year) at the rate of $50 a year (*u*).

Where an offer in writing as follows: "We are prepared to rent that store where the 'Herald' offices used to be and will give $400 a year for the whole of the ground floor as well as the cellar. We will rent for 11 months from the 1st August next at the rate of $400 per year," was accepted and the lessee, having occupied the premises for a year and seven months, no new agreement having been made after the eleven months expired, and having paid rent monthly during that period, gave a month's notice and quitted the premises, and the landlord, asserting that the tenancy was from year to year, brought an action for rent for the two months after the tenancy ceased according to the notice, it was held that the tenancy was one from month to month after the original term ended, and the month's notice to quit was sufficient (*v*).

But payment of rent by the week or month does not necessarily create a periodic tenancy. It may be inferred

(*t*) *Orser* v. *Vernon* (1865), 14 U.C.C.P. 573.
(*u*) *McPherson* v. *Norris* (1856), 13 U.C.R. 472.
(*v*) *Eastman* v. *Richard* (1900), 29 S.C.R. 438; 2 Terr. L.R. 169

from the instrument creating it that a more definite term was intended.

Thus where a lessee of a shop, under a lease which expired on the 24th of June, 1901, wrote in June, 1900, to a prospective sub-lessee, who afterwards entered into possession: "I shall be pleased to accept you as tenant for barber's shop at the rental of seven shillings per week, the rent not to be raised during my present tenancy," it was held that the sub-lessee was not a tenant from week to week but entitled to a term which would not expire until the 24th June, 1901 (*w*).

The fact that a yearly rent is payable quarterly does not make the tenancy a quarterly tenancy (*x*).

Where a tenant after the determination of a lease for a specific term, held possession for five months, paying by agreement £75 for the first three and the same amount for the last two months (£150 in all), and afterwards occupied without any specific agreement, it was held that no definite tenancy was created by the last overholding (*y*).

A periodic tenancy is not implied from the payment of rent for lodgings, although the rent is paid by the week, or month, or other period (*z*).

4. *Tenancy for a Fixed Term.*

A tenancy for a fixed term is the normal form of a leasehold tenancy. It differs from other kinds of tenancies by the certainty of the period of its duration; a demand of possession or a notice to quit is not necessary, in the absence of express stipulation, to determine it, as it comes to an end by mere lapse of time; and it is always the result of express agreement and never arises by implication of law.

(*w*) *Adams v. Cairns* (1902), 85 L.T. 10.
(*x*) *King* v. *Eversfield*, [1897] 2 Q.B. 475.
(*y*) *McInnes* v. *Stinson* (1858), 8 U.C.C.P. 34.
(*z*) *Wilson* v. *Abbott* (1824), 3 B. & C. 88.

A lease may be made for any term however long. A lease in perpetuity is unknown to the common law, although a covenant for perpetual renewal in a lease for a term, is valid and will be enforced (*a*). Lease in perpetuity.

A lease expressed to continue forever at a rent operates, if made by deed to the lessee and his heirs, as a conveyance in fee simple subject to a rent charge, and if not made by deed, it becomes, on payment of a yearly rent, a tenancy from year to year (*b*).

But a lease for a term of years may be made determinable on the happening of an event, as for example, a lease for ninety-nine years determinable on the death of the tenant, or of one or more other persons; or it may be made for a fixed term or so long as the tenant shall continue to occupy the premises, or for a fixed term of years determinable on a specified notice to be given by either party to the other (*c*). Lease for a term determinable on a death.

A lease for alternative terms as a lease for three, six or nine years, is a lease for the longest period determinable at the end of either of the alternative periods (*d*). Alternative terms.

5. *Tenancy for Life.*

A tenancy for life, as we have seen, is strictly a freehold tenancy, and it is often created by deed or will without reserving a rent or containing any of the usual incidents of a leasehold tenancy. Tenancy for life is a freehold estate.

But it is a common practice in England to create tenancies for life, either for the life of the lessee or for the

(*a*) *Sevenoaks Railway Co.* v. *London, Chatham and Dover Railway Co.* (1879), 11 Ch. D. 625; *Pollock* v. *Booth* (1875), Ir. R. 9 Eq. 229.

(*b*) *Doe* v. *Gardiner* (1852), 12 C.B. 319.

(*c*) See *Doe* v. *Clarke* (1807), 8 East 185; *Doe* v. *Steward* (1834), 1 A. & E. 300; *Nesham* v. *Selby* (1872), 13 Eq. 191; *Grey* v. *Friar* (1854), 4 H.L.C. 565.

(*d*) *Goodright* v. *Richardson* (1789), 3 T.R. 462.

life of another, or for the joint lives, or the life of the survivor, of two or more persons, which have all the ordinary incidents of tenancies for years, such as covenants for the payment of rent, the making of repairs and the like. The estate thus created, however, is an estate of freehold, although it is often called a leasehold estate. Leases creating such estates are construed in general according to the same rules as are applicable to a tenancy for years.

It has been held that property held on a lease for life is properly described as leasehold, having regard to Parliamentary qualification (*e*).

A lease, however, for a fixed term, as, for example, ninety-nine years determinable on the death of one or more persons, does not create an estate of freehold, as, although it may determine sooner than the time fixed and is therefore uncertain, a time is fixed beyond which it cannot last.

A distinction is made in England under the *Settled Land Act*, 1882, between a tenant for life under a settlement, and a tenant for life or lives under a lease at a rent; the former can, and the latter cannot, exercise the powers of leasing thereby conferred. That Act, however, is not in force in Canada, and no distinction appears to have been made by the *Settled Estates Act*, which includes a tenant for a term of years determinable with any life or lives (*f*).

If a grant of lands be made by deed, and no estate or term is limited thereby, the grantee takes an estate for life, unless the whole deed taken together suggests a different construction (*g*).

Life of lessee or of lessor.

A lease for life simply, without mentioning for whose life, is deemed to be for the life of the lessee; if however the lessor has only power to grant a lease for the term of

(*e*) *Jones* v. *Jones* (1869), L.R. 4 C.P. 422.

(*f*) R.S.O. (1897), c. 71, s. 42. See Chapter IX.

(*g*) See *Doe* v. *Dodd* (1838), 5 B. & Ad., at p. 692.

his own life, but not for the life of the lessee, such a lease will be construed as for the life of the lessor (*h*).

A lease made to A. during the life of B. and C. will continue during the life of the survivor (*i*). But a lease for a term of years if A. and B. shall so long live continues only until the death of the first one who dies (*j*).

A lease for the lives of A., B. and C., where C. is not living at the time, is good for the lives of A. and B. (*k*).

A demise of lands from year to year containing a stipulation that the lessee shall not be disturbed so long as the rent is duly paid, operates as a lease for the life of the lessee; but such a stipulation will be void at law if not made by deed, and no relief will be given in equity (*l*).

But a stipulation in a lease from year to year that it is to continue so long as the rent is paid and as the lessor has power to lease the premises is void for uncertainty (*m*).

The rule, however, appears to be different where there is no present demise, but only an agreement for a lease. In such a case a stipulation that the lessee is to retain possession so long as the rent is paid, or for so long as the lessor has power to lease, entitles the lessee to a life tenancy, and will be enforced by a court of Equity (*n*).

Where the lessor has a leasehold interest, the lessee is entitled, under such an agreement, to a sub-lease for the residue of the term less one day should he so long live (*o*).

(*h*) *Ibid.*

(*i*) *Doe* v. *Smith* (1805), 6 East 530.

(*j*) *Ibid.*

(*k*) *Doe* v. *Edwards* (1836), 1 M. & W. 553.

(*l*) *Doe* v. *Browne* (1807), 8 East 165; *Browne* v. *Warner* (1807). 14 Ves. 156, 409; *Cheshire Lines Committee* v. *Lewis* (1880), 50 L.J.Q.B. 121.

(*m*) *Wood* v. *Beard* (1876), 2 Ex. D. 30.

(*n*) *In re King's Leasehold Estates*, (1873), 16 Eq. 521; *Mardell* v. *Curtis*, (1899), 43 Sol. Journ. 587; *Kusel* v. *Watson* (1879), 11 Ch.D.

(*o*) *Kusel* v. *Watson* (1879), 11 Ch. D. 129.

A tenant for the life of another, who holds over after the death of the person for whose life he holds, is, contrary to the usual rule, not a tenant by sufferance but a trespasser (*p*).

6. *Tenancy by Sufferance.*

Tenant by sufferance.

A tenant who comes into possession lawfully, as under a demise, and after his estate is ended, wrongfully holds over, is regarded in law as a tenant by sufferance (*q*); as, for example, a tenant who holds over after his lease has been determined by the death of the lessor who was only tenant for life (*r*); or a tenant for years who holds over after the expiration of his term (*s*); or an under-tenant who remains in possession after the determination of the superior lease (*t*); or a tenant at will who continues in possession after the tenancy has been ended by the death of the lessor or otherwise (*u*).

When a trespasser.

But a tenant for the life of another who holds over after the death of the person for whose life he holds is not a tenant by sufferance but is deemed a trespasser and is liable as such (*v*). This is provided by section 5 of the statute 6 Anne, chapter 72, which, as re-enacted in Ontario, is as follows:—

> 20. Every person who as guardian or trustee for any infant, and every husband seized in right of his wife only, and every other person having any estate determinable upon any life, who, after the determination of such particular estate or interest, without the ex-

(*p*) 6 Anne, c. 72, s. 5; R.S.O. (1897), Vol. III., c. 330, s. 20.

(*q*) Co. Litt. 57b.

(*r*) *Roe* v. *Ward* (1789), 1 H. Bl. 96; *Shields* v. *Atkins* (1747), 3 Atk. 562.

(*s*) *Bayley* v. *Bayley* (1848), 5 C.B. 396.

(*t*) *Simkin* v. *Ashurst* (1834), 4 Tyr. 781.

(*u*) *Doe* v. *Turner* (1840), 9 M. & W. 643; see also *Doe* v. *Quigley* (1810), 2 Camp. 505; *Day* v. *Day* (1871), L.R. 3 P.C. 751.

(*v*) 6 Anne, c. 72 (or c. 18 in Ruffhead's ed.), s. 5; R.S.O. (1897), Vol. III., c. 330, s. 20.

press consent of him who is next and immediately entitled upon and after the determination of such particular estate or interest, shall hold over and continue in possession of any lands, tenements or hereditaments, shall be deemed a trespasser, and every person who is or shall be entitled to any such lands, tenements or hereditaments, upon and after the determination of such particular estate or interest, may recover in damages against every such person so holding over as aforesaid, the full value of the profits received during such wrongful possession as aforesaid(*w*).

A tenant of the Crown, also, who wrongfully holds over after his tenancy has been determined, is not a tenant by sufferance, but is a trespasser (*x*).

It would seem to be a contradiction in terms to call such occupation a tenancy, since it only arises after the tenancy proper is at an end. It can never arise by agreement, either express or implied, since, if the person entitled to possession assented, it would be a tenancy at will. Strictly speaking it is not a tenancy at all and the expression seems to have been invented as a name for the occupation under such circumstances, as distinguished from that which would otherwise be a trespass, and to prevent adverse possession from taking place(*y*).

Notice to quit not necessary.

A tenancy by sufferance is determined by the tenant's going out of possession or by his eviction; the landlord is not required to demand possession or give notice to quit before action, nor entitled to receive notice from the tenant before he goes out of possession (*z*).

A tenancy by sufferance may become a tenancy at will upon the owner assenting to such occupation; but the assent must be affirmative, and cannot be implied from the mere

(*w*) R.S.O. (1897), Vol. III., c. 330, s. 20.

(*x*) Co. Litt. 57b.

(*y*) See *Nepean* v. *Doe* (1837), 2 M. & W. 894; 46 R.R. 789.

(*z*) *Doe* v. *Lawder* (1816), 1 Stark. 308; *Doe* v. *Turner* (1840), 7 M. & W. 226, at p. 235.

fact that the landlord suffers him to remain in possession (*a*).

Liability for use and occupation.

A tenant by sufferance is liable in an action to pay the landlord compensation for the time he remains in possession, as a contract to pay a reasonable sum for use and occupation, is, in such a case, implied by law (*b*).

(*a*) *Ley* v. *Peter* (1858), 3 H. & N. 108.

(*b*) *Bayley* v. *Bradley* (1848), 5 C.B. 396; *Leigh* v. *Dickeson* (1884), 15 Q.B.D. 60.

CHAPTER IV.

REQUISITES OF A TENANCY.

1. *Property in respect of which a tenancy may be created.*
2. *Exclusive possession.*
3. *Reversion in the lessor.*
4. Bona fide *intention.*
5. *Contract properly evidenced.*
6. *Parties capable of making and taking a lease.*
7. *Registration.*

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1. *Property in Respect of Which a Tenancy May be Created.*

Tenancies of land only.

The relation of landlord and tenant, strictly so called, can arise only with respect to corporeal tenements and hereditaments, that is, land or some interest therein. This includes land of every description, and for whatever purpose it may be used, whether for mining, agricultural, lumbering, grazing, fishing, building or other purpose, as well as things such as buildings which, by reason of being affixed to the land, are in contemplation of law part of the land and pass with it.

Distress the incident of every tenancy.

The characteristic incident of every tenancy is the right of the landlord to distrain for rent in arrear, even in the absence of any express stipulation to that effect. This is a common law right implied in every tenancy where rent has been reserved.

Rent issues out of land.

Rent is deemed in law to issue out of land, and a distress for rent in arrear is lawful (except in cases of fraudulent removal of goods) only on the lands out of which it issues, unless the right to distrain elsewhere is given by express agreement.

Leases of chattels.

Although so called leases are often made of movable chattels alone, of horses, cattle and sheep, for racing, breeding and other purposes, or of farm implements, furniture, machinery, railway rolling stock and other movable chattels, and the words "lessor" and "lessee" are applied to the parties thereto, these so called leases are more properly contracts of hiring (*a*). Such leases do not create a leasehold interest, and the right of distress does not, in the absence of express stipulation, attach thereto (*b*).

Land and chattels.

But the relation of landlord and tenant may be created by a lease of land with the stock or implements upon it (*c*), or of a house with the furniture in it (*d*).

Where, however, a single rent is reserved under a lease of land and chattels, it is deemed to issue out of the land alone and may be distrained for (*e*).

Incorporeal hereditaments.

Leases of incorporeal hereditaments such as rents, annuities, rights of way, rights of common, rights of shooting or fishing, do not create a tenancy strictly so called, nor do they give rise to the right of distress. The rent or compensation payable under such leases can only be recovered, in the absence of express provision, by action. But a valid tenancy may be created of a corporeal and an incorporeal hereditament (*f*).

2. *Exclusive Possession.*

Possession necessary.

An agreement for a present demise, even if made by deed, is not alone sufficient to create the relation of land-

(*a*) *Jones* v. *Commissioner of Inland Revenue*, [1895] 1 Q.B. 484.

(*b*) *Sheffield Waggon Co.* v. *Stratton* (1878), 48 L.J. Ex. 35.

(*c*) *Holme* v. *Brunskill* (1877), 3 Q.B.D. 495; *Tudgay* v. *Sampson* (1874), 30 L.T. 262.

(*d*) *Farewell* v. *Dickenson* (1827), 6 B. & C. 251; *Newman* v. *Anderton* (1806), 2 N.R. 224; 2 B. & P. 224.

(*e*) *Newman* v. *Anderton* (1806), 2 N.R. 224; 2 B. & P. 224; *Selby* v. *Greaves* (1868), L.R. 3 C.P. 594.

(*f*) See *Gardiner* v. *Williamson* (1831), 2 B. & Ad. 336.

lord and tenant; the lessee, if he is not already in possession, must enter into possession before a tenancy is created or any estate becomes vested in him. Under an instrument of lease by deed, a lessee takes before entry what is called an *interesse termini*, or an interest in the term, but not an estate, except in the case of a lease operating under the *Statute of Uses* (*g*), where possession is transferred to the lessee by virtue of the statute.

Legal possession.

The kind of possession required to create a tenancy is not mere physical occupation, but possession in the legal sense. A tenancy is not created, for example, by the possession or occupation of a caretaker, or of a servant or agent, of premises which he is required by his master or principal to occupy for the performance of his duties (*h*), although the servant or agent uses the premises for a business of his own (*i*), or although there is express provision for terminating such occupation by notice (*j*). But a tenancy may be created between master and servant where he is permitted to occupy premises in return for his services (*k*).

Exclusive possession.

Moreover, a tenancy will not be created unless the right of exclusive possession is conferred on the lessee. Permission to use premises in common with the lessor or others, or where the control of the premises is retained by the lessor, will be construed as a mere license and not as a demise, although the instrument by which such permission

(*g*) 27 Hen. VIII., c. 10; R.S.O. (1897), Vol. III., c. 331.

(*h*) *Fox* v. *Dalby* (1874), L.R. 10 C.P. 285; *Clark* v. *Overseers of Bury* (1856), 1 C.B.N.S. 23; *Reynolds* v. *Metcalfe* (1864), 13 U.C. C.P. 382.

(*i*) *White* v. *Bayley* (1861), 10 C.B. N.S. 227.

(*j*) *Mayhew* v. *Suttle* (1854), 4 E. & B. 347.

(*k*) *Hughes* v. *Overseers of Chatham* (1843), 5 M. & Gr. 54, at p. 78; *Smith* v. *Seghill* (1875), L.R. 10 Q.B. 422; *Marsh* v. *Estcourt* (1889), 24 Q.B.D. 147.

is granted is called a lease and contains the usual words of demise (*l*).

Thus where standing room was let for lace-machines in a factory at a weekly rent, the lessor retaining control for the purposes of supplying power, it was held not to be a tenancy, and the lessor consequently could not distrain for rent (*m*). So where the owner of a farm agreed with another to work it on shares, each supplying half the seed and labour, and taking half the profits, and the owner was to be paid the sum of $160 as rent, it was held that no tenancy had been created between the parties, and that a distress for such sum was illegal, as the owner had not divested himself of the exclusive possession (*n*). And where an owner of land put others in occupation of it who agreed to work it, to keep up fences, and deliver two-thirds of the produce to the owner, it was held that, as they had agreed to do the work as the owner directed, it was not a letting but a mere contract for work and labour (*o*). So where a hall is let for the purpose of giving a limited number of entertainments, and the lessor retains control, it is not a tenancy (*p*). The letting at a weekly rent of a stall at an exhibition, from which the person taking it is excluded for a certain portion of the day, is a mere license and does not create a tenancy (*pp*).

Permission to use premises for a temporary purpose or only at a particular time, as the loan of a shed, or permis-

(*l*) *Taylor* v. *Caldwell* (1863), 3 B. & S. 826; *London and Northwestern Railway Co.* v. *Buckmaster* (1875), L.R. 10 Q.B. 70, 444; *Smith* v. *Lambeth Assessment Committee* (1882), 9 Q.B.D. 585; 10 Q.B.D. 327.

(*m*) *Hancock* v. *Austin* (1863), 14 C.B.N.S. 634.

(*n*) *Oberlin* v. *McGregor* (1880), 29 U.C.C.P. 460; see also *Dacksteder* v. *Baird* (1848), 5 U.C.R. 591.

(*o*) *Park* v. *Humphrey* (1865), 14 U.C.C.P. 209.

(*p*) *Taylor* v. *Caldwell* (1863), 3 B. & S. 826; but see *Smallwood* v. *Sheppards*, [1895] 2 Q.B. 627.

(*pp*) *Rendell* v. *Roman* (1893), 9 Times L.R. 192.

sion to store coal upon land, does not amount to a demise or create a tenancy (*q*). A mere license to use premises does not create an estate therein, and the lessor cannot, without an express power, distrain for any sum payable as rent (*r*).

Lease and license.

In determining whether a transaction is a lease or a mere license, the substance of the agreement will be considered more than the words (*s*); and if the nature of the acts to be done by the lessee imply the right of exclusive possession, the transaction will be deemed to be a demise (*t*).

Lodger and guest.

A lodger is not a tenant although he has exclusive possession of a particular room, if the owner resides in the house and supplies "attendance," or has exclusive control of the outer door (*tt*). The position of a boarder or guest at an hotel is not that of a tenant (*u*).

Possession of part only.

Where possession of the whole of the lands demised cannot be given to the lessee, by reason of the occupation by a prior tenant of part of them, it has been held that the demise, if made by parol, is wholly void as to the part thus held, and that the rent under it is not apportionable and cannot be distrained for (*v*). But a demise in such a case, if made by deed, is valid, and operates as a grant of the reversion expectant on the prior tenancy, and puts the lessee in the position of landlord to the prior tenant (*w*).

3. *Reversion in the Lessor.*

Reversion in the lessor necessary.

Subject to an exception to be presently mentioned, a reversion in the landlord is essential to the relation of land-

(*q*) *Williams* v. *Jones* (1864), 3 H. & C. 256; *Wood* v. *Luke* (1751), reported in 13 M. & W., at p. 848, note (a).

(*r*) *Ward* v. *Day* (1863), 4 B. & S. 337; *Hancock* v. *Austin* (1863), 14 C.B.N.S. 634.

(*s*) *Smith* v. *St. Michael's* (1860), 3 E. & E. 383, at p. 390.

(*t*) *Roads* v. *Trumpington* (1870), L.R. 6 Q.B. 56.

(*tt*) *Smith* v. *St. Michael's* (1860), 3 E. & E. 383; *R.* v. *St. George's Union* (1871), L.R. 7 Q.B. 90.

(*u*) *Bradley* v. *Baylis* (1881), 8 Q.B.D. 195, at p. 216.

(*v*) *Neale* v. *Mackenzie* (1837), 1 M. & W. 747.

(*w*) *Holland* v. *Vanstone* (1867), 27 U.C.R. 15; *Kelly* v. *Irwin* (1867), 17 U.C.C.P. 357, not followed.

lord and tenant. In other words, a tenancy is an estate carved out of a larger estate, leaving a residue or reversion in the lessor upon which the tenancy or term of years depends.

Sub-lease and assignment.

Thus, if the owner of an estate in fee or for life, after having made a lease for years, assigns his reversion, the relation of landlord and tenant is thereby created between the assignee and the lessee, and the relation no longer exists between the original lessor and lessee. "A lease doth properly signify a demise or letting of lands, rent, common, or any hereditament unto another for a lesser time than he that doth let it hath in it. For when a lessee for life or years doth grant over all his estate or time unto another, this is more properly called an assignment than a lease"(*x*).

Right of distress.

A demise or under-lease by deed for a term of years extending to the whole of the term vested in the lessor, operates as an assignment of the term (*y*), and no right of distress remains to him unless expressly reserved to him by the sub-lease (*z*). The common law right of distress for rent in arrear can only be exercised by the owner of the reversion, and the reversion must be vested in him at the time of the distress (*a*).

In Ontario reversion not necessary.

In Ontario, under the *Landlord and Tenant's Act* (*b*), a reversion is declared not to be necessary in order to create the relation of landlord and tenant, and a landlord, it would seem, may now distrain although he has no reversion in the lands. This is provided by section 3 of that Act which is set out and discussed more fully in Chapter XIII.

(*x*) Touch. 266.

(*y*) *Beardman* v. *Wilson* (1868), L.R. 4 C.P. 57.

(*z*) *Pascoe* v. *Pascoe* (1837), 3 Bing. N.C. 898; *Parmenter* v. *Webber* (1818), 8 Taunt. 593.

(*a*) *Stavely* v. *Allcock* (1851), 16 Q.B. 636.

(*b*) R.S.O. (1897), c. 170.

4. Bona Fide *Intention.*

Good faith of parties to tenancy.

In order to create a valid tenancy it is also necessary that the parties should have a *bona fide* intention of creating a tenancy. It must be a real tenancy entered into in good faith and intended to be acted upon. Thus it is well settled that the parties to a mortgage of real property may agree that, in addition to their principal relation of mortgagee and mortgagor, they shall also stand towards each other with regard to the mortgaged lands in the relation of landlord and tenant (*c*). But it is essential to the validity of such an arrangement that it should be a *bona fide* transaction, and not merely a scheme to give the mortgagee, under colour of a demise, an additional security by way of a right of distress against third parties (*d*).

It is material in determining the *bona fides* of such a tenancy to consider the amount of rent reserved. If the rent is out of all proportion to the annual value of the lands, the inference will be drawn that the transaction was unreal and fictitious, and it will not be supported (*e*).

So where a creditor of a lessee took an assignment from him of the residue of his term to secure advances made to pay rent and for other purposes, and forthwith granted a new lease to his debtor for three months, the rental being the amount of his advances, it was held that such a lease, however binding between the parties, could not create the relation of landlord and tenant so as to enable the creditor to distrain the goods of third parties on the premises, the

(*c*) *Ex parte Jackson, in re Bowes* (1880), 14 Ch. D. 726.

(*d*) *Hobbes* v. *Ontario Loan and Debenture Co.* (1890), 18 S.C.R. 483.

(*e*) *Hobbes* v. *Ontario Loan and Debenture Co.* (1890), 18 S.C.R. 483; *Imperial Loan and Investment Co.* v. *Clement* (1896), 11 Man. L.R. 428, and 445.

intention being manifestly not to create such relation except as a scheme with that end in view (*f*).

Where unlicensed hotel premises are leased by the occupant to another, as a mere cover to enable the occupant to continue the business, and the lease is unreal in purpose and design, to the knowledge of both parties, no title passes, and the lessor who remained in possession of the premises is liable, as the occupant thereof, to be convicted in respect of an illegal sale of liquor made therein (*g*).

5. *Contract Properly Evidenced.*

Common law and statutory requisites.

In addition to the foregoing common law requisites, which are applicable to all tenancies, there are statutory conditions which must be observed in the creation of certain tenancies, in default of which the law either declares them to be void, or attaches to them a certain character and imposes certain restrictions as to their duration and as to their determination.

In certain cases it is necessary that the lease or demise or an agreement therefor, should be evidenced by writing, as required by the *Statute of Frauds*, or by deed as required by a later statute. These statutory requirements will be discussed in chapters V. and VI.

6. *Parties Capable of Making and Taking Leases.*

Parties.

It is also necessary to the validity of a tenancy that the parties to it should be legally qualified to create and accept a lease respectively, that is to say, they should be under no disability, and the lessor should have sufficient interest in the lands out of which the tenancy is to be created. What is required by statute to enable persons under disability,

(*f*) *Thomas* v. *Cameron* (1885), 8 Ont. 441.
(*g*) *Reg.* v. *McNutt* (1900), 33 N.S.R. 14.

and persons having a limited interest, to create or take valid leases will be more fully discussed in chapter IX.

7. *Registration.*

Registration of the instrument of lease is required in some cases by statute, either to complete the creation of the tenancy, or to preserve it when created. This subject will be discussed in chapter X. Registration.

CHAPTER V.

INSTRUMENT OF DEMISE.

1. *What is a Lease.*
2. *Lease and agreement for a lease.*
3. *Statute of Frauds.*
4. *Formal parts of a lease.*
   (a) *Premises.*
   (b) *Habendum.*
   (c) *Reddendum.*
   (d) *Covenants.*
5. *Short forms of covenants.*

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1. *What is a Lease.*

Meaning of lease; letting; instrument; estate.

The instrument by which a demise is evidenced is called a lease; but the word "lease" does not in law import exclusively a written instrument (*x*).

In its primary and original sense, "lease" means simply the act of letting or putting into possession; "to lease," in this sense, and "to demise" are equivalent expressions. Like many other words used in law, as for example, "deed," "assignment," "mortgage," "agreement," "attornment," the word "lease" has acquired a secondary meaning, and is used to signify, not only the act of letting, but also the instrument by which the letting is evidenced. In a third sense "lease" means the estate or interest, granted; thus, when we speak of an assignment or a mortgage of a lease, we mean an assignment or mortgage of the estate demised (*y*).

(*x*) *Bridgland* v. *Shapter* (1839), 5 M. & W. 381, per Abinger, C.B.; see also *Bicknell* v. *Hood* (1839), 5 M. & W. 107.

(*y*) See *Beardman* v. *Wilson* (1868), L.R. 4 C.P. 57.

Form of instrument.

No particular form of words is necessary to make a valid demise; any words clearly shewing the intention of the parties may be sufficient, and it is not necessary that it should be evidenced by a formal instrument. A valid demise may be made by a by-law of a municipal or other corporation, or by a covenant or stipulation in a mortgage deed, or by an attornment, or it may be made by correspondence, or a receipt or other informal instrument, and in any form of words, provided the intention of the parties is clearly expressed.

Lease by by-law.

Thus, where a municipal corporation by by-law granted to the defendant, upon certain conditions, a right to build a dam and bridge across a river, in consideration of which he agreed to keep it in repair for forty years at his own expense, but if he should make default the privilege granted by the corporation was to cease, and the dam and bridge were built and kept in repair by the defendant, it was held that the contract amounted to a lease (*z*).

Lease by correspondence.

A., living at Collingwood, wrote to B. at Toronto, on the 5th July, 1859, to the effect that he would give £40 a year for his house, and pay taxes, adding "If you telegraph at once to that effect I will take it." On the 6th B. telegraphed: "You may have the house for one year on terms of your letter." It was held that, on entry made, there was a perfect demise (*a*).

Where a farm was let upon the condition that the lessee was to harvest and thresh and deliver one-half of the wheat raised thereon, it was held that under this agreement the parties were not partners in the wheat while it grew in the field, but stood to each other in the relation of landlord and tenant (*b*).

(*z*) *Regina ex rel. Patterson* v. *Clarke* (1874), 5 P.R. 337.
(*a*) *Prosser* v. *Henderson* (1861), 20 U.C.R. 438.
(*b*) *Haydon* v. *Crawford* (1835), 3 O.S. 583.

2. *Lease and Agreement for a Lease.*

Distinction between lease and agreement.

It is important to distinguish between a lease and an agreement for a lease. An agreement for a lease is an executory undertaking, or an engagement to make a demise in the future.

Before entry, a lease is also, in a sense, executory; but there was formerly this distinction: a lease, if it conformed to statutory requirements, could be enforced at law; the lessee was upon its execution possessed of an interest in the term (*interesse termini*), and could bring an action at law to recover possession if possession was refused him; but an agreement for a lease could only be enforced in a Court of Equity. The intended lessee, before entry, was not possessed of an interest in the term, as no term was yet created, and he could not recover possession until he had first obtained a decree for specific performance; and if the agreement was one of which specific performance would not be decreed by a Court of Equity, he was without a remedy.

There was also this further distinction between a lease and an agreement for a lease: entry under a lease operated to create a tenancy for the term agreed on, while entry under an agreement for a lease operated only to create a tenancy at will, which on payment of rent might ripen into a tenancy from year to year.

Distinction modified.

By the passing of the *Judicature Act*, the distinction between a lease and an agreement for a lease has been somewhat modified (*c*).

Intention.

The general rule in deciding whether an instrument is a lease or an agreement for a lease, is that the intention of the parties, as expressed by the words used, must govern the construction.

Examples of informal leases.

An instrument containing all the material terms by which it appears that one party is to give, and the other to

(*c*) See chapter VI.

take possession, will, in general, operate as a lease unless it can be gathered from the instrument itself that it is not intended to operate as a lease but only as an engagement to make a lease thereafter (*d*). But an instrument can operate only as an agreement, where it contains a stipulation that it shall not operate as a lease (*e*); or where the parties contemplate that something further should be done before the relation of landlord and tenant should arise between them (*f*); or where material terms are left to be settled afterwards, as, for example, the time when the tenancy is to begin or end, or the amount of rent to be paid(*g*). But the mere fact that an informal instrument contains a term that a lease shall afterwards be drawn up will not of itself prevent it from operating as a lease (*h*).

Such expressions as "I demise" or "I agree to let," amount to words of present demise (*i*); so the words "agrees to let or hire" are words of a present demise, where the contrary does not appear to be the intention in the instrument in which they are contained (*j*).

An informal document which acknowledges the receipt of rent of premises for a future definite term, and under which possession is taken by the person paying the rent, is

(*d*) *Poole* v. *Bentley* (1810), 12 East 168; *Curling* v. *Mills* (1843), 6 M. & Gr. 173; *Doe* v. *Powell* (1844), 7 M. & Gr. 980.

(*e*) *Perring* v. *Brook* (1835), 7 C. & P. 360; *Brooke* v. *Biggs* (1836), 2 Bing. N.C. 572.

(*f*) *Jones* v. *Reynolds* (1841), 1 Q.B. 506; *Doe* v. *Clarke* (1845), 7 Q.B. 211; *Marshall* v. *Berridge* (1881), 19 Ch. D. 233; *Swain* v. *Ayres* (1888), 21 Q.B.D. 289.

(*g*) *Chapman* v. *Towner* (1840), 6 M. & W. 100; *Dunk* v. *Hunter* (1822), 5 B. & A. 322; *Clayton* v. *Burtenshaw* (1826), 5 B. & C. 41; *John* v. *Jenkins* (1832), 1 Cr. & M. 227; 1 Platt on Leases, p. 582.

(*h*) *Alderman* v. *Neate* (1839), 4 M. & W. 704; *Doe* v. *Benjamin* (1839), 9 A. & E. 644; *Chapman* v. *Bluck* (1838), 4 Bing. N.C. 187.

(*i*) *Staniforth* v. *Fox* (1831), 7 Bing. 590; *Furness* v. *Bond* (1888), 4 Times L.R. 457.

(*j*) *Cumming* v. *Hill* (1838), 6 O.S. 303.

a contract of letting and hiring, and not merely an agreement for a lease (*k*).

In the following memorandum: "I agree to pay F. £50 for his right to the house I live in, the farm at present occupied by me, known as the Morrison farm, and the stables now used by me, for six months from the 1st April next" was held to be evidence of a letting (*l*).

An agreement in writing, whereby A. agreed to rent to B. for three years from date, for £50 per annum, with taxes, payable quarterly during occupation, B. to spend £25 in improvements, was held to be a lease and not a mere agreement for a lease (*m*).

Agreement only.

But an instrument containing memoranda or heads of agreement, ascertaining no certain amount of rent, being preparatory to a letting, and under which no rent was paid before a distress, was held not to constitute a present demise entitling the landlord to distrain (*n*).

So when an agreement to let is entered into, and it appears to have been the intention of the parties that something further should be done to ensure the interests of either party, such an instrument is not a present lease but a mere contract for a lease to be granted in future (*o*).

3. *Statute of Frauds.*

Leases must be in writing.

At common law, a valid lease might be made without writing; but by the first section of the *Statute of Frauds* it is provided that all leases (with certain exceptions mentioned in the second section), made or created by parol, and not put in writing and signed by the parties, or their agents, shall have the force and effect of leases or estates at will

(*k*) *Wolfe* v. *McGuire* (1897), 28 Ont. 45.
(*l*) *Fairbairn* v. *Hilliard* (1867), 27 U.C.R. 111.
(*m*) *Grant* v. *Lynch* (1856), 6 U.C.C.P. 178; 14 U.C.R. 148.
(*n*) *Cheney* v. *Taylor* (1844), 1 U.C.R. 166.
(*o*) *Hamerton* v. *Stead* (1824), 3 B. & C. 480; *Kyle* v. *Stocks* (1870), 31 U.C.R. 47.

only. The first section of the statute, as re-enacted in Ontario, is as follows:

2. For prevention of many fraudulent practices which are commonly endeavoured to be upheld by perjury, and subornation of perjury, all leases, estates, interests of freehold, or terms of years, or any uncertain interest of, in, to, or out of, any messuages, lands, tenements, or hereditaments, made or created by livery and seizin only, or by parol, and not put in writing and signed by the parties so making, or creating, the same, or their agents thereunto lawfully authorized by writing, shall have the force and effect of leases or estates at will only, and shall not, either in law or equity, be deemed or taken to have any other or greater force or effect: any consideration for making any such parol leases or estates, or any former law or usuage to the contrary notwithstanding (*p*).

Except leases not exceeding three years.

Leases not exceeding the term of three years from the making thereof, whereby the rent reserved amounts to two-thirds of the annual value, are excepted by the second section of the statute which, as re-enacted in Ontario, is as follows:

3. Except, nevertheless, all leases not exceeding the term of three years from the making thereof, whereupon the rent reserved to the landlord during such term shall amount unto two-third parts at the least of the full improved value of the thing demised (*q*).

Leases for more than three years must be made by deed.

By section 3 of the *Real Property Act, 1845*, in England, and section 7 of the *Act respecting the Law and Transfer of Property*, in Ontario (*r*) it is provided that a lease required by law to be in writing shall be void at law unless made by deed. Section 7 of the Ontario Act, which is taken from the Imperial Act, is as follows:

7. A partition and an exchange of land, and a *lease required by law to be in writing* of land, and an assignment of a chattel interest

(*p*) 29 Car. II. c. 3, s. 1; R.S.O. (1897), vol. III. c. 338, s. 2; R.S.N.S. (1900), c. 141, s. 2; R.S.B.C. (1897), c. 85, s. 2.

(*q*) 29 Car. II. c. 3, s. 2; R.S.O. (1897), vol. III. c. 338, s. 3; R.S.N.S. (1900), c. 141, s. 2; R.S.B.C. (1897), c. 85, s. 3.

(*r*) 8 & 9 Vict. (Imp.) (1845), c. 106, s. 3; R.S.O. (1897), c. 119, s. 7.

in land, and a surrender in writing of land not being an interest which might by law have been created without writing, shall be void at law, unless made by deed.

Effect of the statutes

The effect of these two statutes has been to make a letting for a term exceeding three years, that is not made by deed, a tenancy at will only. But it has been decided that such a tenancy is one at will, only in the first instance, and may be converted into a yearly tenancy by the subsequent acts of the parties (*s*). And where an instrument of demise is made in writing but not under seal, it has been held that the words of the statute "void at law" mean void *as a lease*, but the instrument may be valid as an agreement for a lease, and capable of being specifically enforced by a Court of Equity (*t*).

Void lease good as an agreement.

A verbal lease, uncompleted by entry, cannot be enforced by either party. The lessee cannot obtain possession, and the lessor cannot recover rent agreed to be paid, nor can an action for damages be maintained against the lessor for refusing to give possession to the lessee, even where the lease is for a term not exceeding three years from the making thereof (*v*). So a lease for three years from a future day cannot be made by parol, as it exceeds three years "from the making thereof" (*w*).

Where the tenant enters under an oral lease void under the statute, a tenancy from year to year may be implied, though no rent has been paid. Thus, where a farm was leased orally on the 15th of April, 1873, for five years, at $100 a year, and the lessee entered on the 17th, and did some clearing, and put in peas and oats, of which the lessor was aware, and the lessor having died on the 5th September,

(*s*) *Doe d. Rigge* v. *Bell* (1793), 5 T.R. 471; 2 R.R. 642.

(*t*) *Parker* v. *Taswell* (1858), 2 DeG. & J. 559; see chapter VI.

(*v*) *Moore* v. *Kay* (1878), 5 Ont. App. 261; *Edge* v. *Strafford* (1831), 1 Tyr. 295; *Bank of Upper Canada* v. *Tarrant* (1861), 19 U.C.R. 423; see chapter VI.

(*w*) *Foster* v. *Reeves*, [1892] 2 Q.B. 255.

his devisee entered in the same month and took the crops which the lessee had sown, it was held that the lessee was a tenant from year to year, and that the devisee was a trespasser in entering upon him(*x*).

4. *Formal Parts of a Lease.*

The instrument of demise under seal by which a lease or letting is commonly made by conveyancers, consists of parts technically called (1) the premises, (2) the *habendum*, (3) the *reddendum*, and (4) the covenants, provisoes or conditions.

The form of lease provided by the *Act respecting Short Forms of Leases* (*a*) is as follows: PREMISES.

This indenture made the day of Date.
in the year of our Lord one thousand nine hundred and in pursuance of the *Act respecting Short Forms and Leases:*

Between of hereinafter called the Parties.
lessor of the first part, and of hereinafter called the lessee of the second part.

Whereas, etc., Recitals.

Witnesseth that in consideration of the rents, covenants, Words of demise.
and agreements hereinafter reserved and contained on the part of the said lessee his executors, administrators, and assigns, to be paid, observed and performed, the said lessor hath demised and leased, and by these presents doth demise and lease unto the said lessee his executors, administrators and assigns,

All that parcel or tract of land situate, lying and being Description.
in the of in the county of .

To have and to hold the said demised premises for and HABENDUM.
during the term of years, to be computed from

(*x*) *Gibboney* v. *Gibboney* (1875), 36 U.C.R. 236.

(*a*) R.S.O. (1897), c. 125, schedule A; for forms of leases, see Part V.

the day of one thousand nine hundred , and from thenceforth next ensuing and fully to be complete and ended.

REDDENDUM. Yielding and paying therefor, yearly and every year during the said term hereby granted unto the said lessor his heirs, executors, administrators or assigns, the sum of dollars to be payable on the following days and times, that is to say:—

The first of such payments to become due and be made on the day of .

COVENANTS. And that the said lessee covenants with the said lessor to pay rent. And to pay taxes. And to repair (reasonable wear and tear, and damage by fire, lightning and tempest only excepted). And to keep up fences. And not to cut down timber. And that the said lessor may enter and view state of repair. And that the said lessee will repair according to notice, in writing, reasonable wear and tear and damage by fire, lightning and tempest only excepted. And will not assign or sub-let without leave. And that he will leave the premises in good repair, reasonable wear and tear and damage by fire, lightning and tempest only excepted.

Provided that the lessee may remove his fixtures.

Provided that in the event of fire, lightning or tempest rent shall cease until the premises are rebuilt.

Proviso for re-entry by the said lessor on non-payment of rent or non-performance of covenants.

The said lessor covenants with the said lessee for quiet enjoyment.

In witness whereof, the said parties hereto have hereunto set their hands and seals.

Signed, sealed and delivered, in the presence of

(a) *Premises.*

Premises. The premises include the date of the instrument, the names and descriptions of the parties to it, the recitals, if

any, the consideration, the words of demise, the description of the property demised, with the exceptions and reservations, if any.

Date.

It is not essential that a deed should be dated; and it may be valid although it contains a false or impossible date (*b*).

Delivery.

A lease under seal is presumed to have been delivered on the day of its date; but it may be shewn that it was delivered on a different day, and in such a case it takes effect from its delivery in the absence of any stipulation to the contrary (*c*).

Words of demise.

The operative words generally used in a lease are "demise and lease," but any words clearly indicating an intention of making a present demise are sufficient.

The use of the word "demise" implies a covenant on the part of the lessor for quiet enjoyment (*e*).

Description.

A lease of land at common law includes all buildings, woods and water thereon. Under the term "house," or "house and premises," will be included the garden and orchard, and the stables and other out-houses necessary for the convenient occupation of the house (*f*).

In Ontario, by section 12 of the *Act respecting the Law and Transfer of Property* (*g*), it is provided as follows:

What passes in a lease.

12.—(1) Every conveyance of land, unless an exception is specially made therein, shall be held and construed to include all houses, out-houses, edifices, barns, stables, yards, gardens, orchards, commons, trees, woods, underwoods, mounds, fences, hedges, ditches, ways, waters, water-courses, lights, liberties, privileges, easements, profits, commodities, emoluments, hereditaments and appurtenances what-

(*b*) *Lovelock* v. *Franklyn* (1846), 8 Q.B. 371.

(*c*) *Steele* v. *Mart* (1825), 4 B. & C. 272.

(*e*) See chapter XI.

(*f*) *Salter* v. *Metropolitan District Railway Co.* (1870), 9 Eq. 432; *Doe* v. *Collins* (1788), 2 T.R. 498; *Steele* v. *Midland Railway Co.* (1866), 1 Ch. 275; *Francis* v. *Hayward* (1882), 22 Ch.D. 177.

(*g*) R.S.O. (1897), c. 119; in British Columbia a similar provision is contained in R.S.B.C. (1897), c. 117, s. 4.

soever, to the lands therein demised, held, used, occupied, and enjoyed, or taken or known as parcel or part thereof; and if the same purports to convey an estate in fee, also the reversion or reversions, remainder or remainders, yearly and other rents, issues and profits of the same lands and of every part and parcel thereof, and all the estate, right, title, interest, inheritance, use, trust, property, profit, possession, claim and demand whatsoever, of the grantor, in, to, out of, or upon the same lands, and every part and parcel thereof, with their and every of their appurtenances.

(2) Except as to conveyances under the former Acts relating to short forms of conveyances, this section applies only to conveyances made after the 1st day of July, 1886.

It is provided by another section that "conveyance" shall include a lease, and "convey" shall have a meaning corresponding with that of conveyance (*h*).

The description of the property intended to be demised should contain such particulars as are sufficient to identify it. If lands are described in general terms, a particular description superadded controls the general description (*i*).

"More or less."

When a definite description is qualified by the words "more or less" it will cover only a reasonable deviation (*j*).

Property may be sufficiently described as being in the occupation of a specified person. If, however, a property is described by name and as being in the occupation of a certain person, and only part of the property is so occupied, that part alone will pass (*k*).

It is a question of fact whether anything is or is not part of the demised premises (*l*).

A lease of rooms in a house which constitute a separate dwelling includes the outer walls of the house, so far as they belong solely to the rooms let, so that a lessor or another

(*h*) Section 1, sub-section 6.

(*i*) *Cowen* v. *Truefit*, [1899] 2 Ch. 309.

(*j*) *Davis* v. *Shepherd* (1866), L.R. 1 Ch. 410.

(*k*) *In re Seal*, [1894] 1 Ch. 316.

(*l*) *Lyle* v. *Richards* (1866), L.R. 1 H.L. 222.

tenant is not entitled to put up advertisements on such outer walls (*m*).

A lease of a house or other building includes the land on which it stands (*n*).

Under a lease of "that certain frame house now standing and being on lot No. 10, being the house now occupied by the lessee, also the use of half of the barn standing on said lot, for five months," at a monthly rent, there was held to be a demise not of the whole lot but of the specified parts (*q*).

Mine.

The word "mine" means strictly "vein or seam," but in mining leases it is commonly used to include the subterranean excavations made to get to the vein (*r*). The word "mine" includes not only coal and other substances ordinarily called minerals, but also limestone and clay; it is, however, restricted to underground workings, and does not comprehend an open working on the surface (*s*).

Minerals.

The word "minerals," however, includes every substance which may be obtained from beneath the surface of the earth for the purpose of profit, whether from a mine or open working, including clay, china, brick-clay, gravel and sand, and every kind of stone (*t*).

The lessee of mines is liable for injury to the surface of the land from subsidence caused by the working of them,

(*m*) *Carlisle Café Co.* v. *Muse* (1897), 46 W.R. 107.

(*n*) *Renalds* v. *Offitt* (1857), 15 U.C.R. 221.

(*q*) *McPherson* v. *Norris* (1855), 13 U.C.R. 472.

(*r*) *Ramsay* v. *Blair* (1876), 1 App. Cas. at p. 705; *Bell* v. *Wilson* (1866), 1 Ch. at p. 308; *Midland Railway Co.* v. *Haunchwood* (1882), 20 Ch.D. at p. 555.

(*s*) *R.* v. *Brettel* (1832), 3 B. & Ad. 424; *Tucker* v. *Linger* (1882), 21 Ch.D. at p. 36. But see *Lord Provost of Glasgow* v. *Fairie* (1888), 13 App. Cas. at pp. 686, 673, 680.

(*t*) *Hext* v. *Gill* (1872), 7 Ch. at p. 712, and 699; *Johnstone* v. *Crompton*, [1899] 2 Ch. 190; *Salisbury* v. *Gladstone* (1860), 6 H. & N. 127; *Errington* v. *Metropolitan Railway Co.* (1882), 19 Ch.D. at p. 571.

but not for subsidence due to an excavation made by a prior lessee (*u*).

Fixtures.

Fixtures, in the absence of an express or implied exception, or stipulation to the contrary, will pass on a demise of a house (*v*). But if certain fixtures are mentioned as included in the demise, it will be implied that others not mentioned are not intended to be included (*w*).

Right of way.

A way of necessity or a reasonable means of access to the demised premises will be implied in a lease thereof (*y*).

Where a lessor grants a right way which has not been selected, it is for the lessor to select it; but when he has done so he cannot afterwards change it (*x*).

Easement of light.

A lease of land with the buildings upon it carries with it the right to access of light sufficient for the ordinary purposes of the buildings, as against adjacent premises of the lessor (*z*); but the lessor may reserve to himself the right to obstruct an easement of light which would otherwise pass to the lessee (*a*).

Exception and reservation.

There is a distinction between an exception and a reservation. An exception is properly made of part of the thing demised, and of a thing *in esse* at the time. A reservation is made of a thing not *in esse*, and strictly applies only to rent, and to payments and services in the nature of rent, which can be said to issue out of the land (*b*). A reserva-

(*u*) *Greenwell* v. *Low Beechburn Coal Co.*, [1897] 2 Q.B. 165.

(*v*) *Colegrave* v. *Dias Santos* (1823), 2 B. & C. 76.

(*w*) *Hare* v. *Horton* (1833), 5 B. & Ad. 715.

(*x*) *Deacon* v. *Southeastern Railway Co.* (1869), 61 L.T. 377; as to a way of necessity see *Bolton* v. *Bolton* (1879), 11 Ch.D. 968; see also *Cannon* v. *Villars* (1878), 8 Ch.D. 415; *Cooke* v. *Ingram* (1893), 68 L.T. 671.

(*y*) *Osborn* v. *Wise* (1837), 7 C. & P. 761; *Brown* v. *Alabaster* (1887), 37 Ch.D. 490.

(*z*) *Corbett* v. *Jones*, [1892] 3 Ch. 137.

(*a*) *Haynes* v. *King*, [1893] 3 Ch. 439.

(*b*) *Doe* v. *Lock* (1835), 2 A. & E. 705.

tion of incorporeal rights, such as the right of shooting or fishing, is, in law, neither an exception nor a reservation, but takes effect by way of re-demise from the lessee (*c*).

Exception of timber.

Where an exception is made in a lease, everything depending on it and necessary for obtaining or using it, is excepted also. Thus, where timber is excepted, the lessor is entitled to enter on the demised premises, and shew it to intending purchasers, and he or a purchaser may enter, and cut down trees and carry them away (*d*). So where an exception is made in a lease of mines, everything is excepted that is necessary for working them, including a right of way to enter and remove the minerals, but not so as to cause subsidence of the surface (*e*). But an exception of minerals only, will not give the lessor a right to use the space occupied by them after they have been removed; but it is otherwise in an exception of mines (*f*). A reservation of a right to work minerals is not equivalent to an exception of the minerals and does not give the lessor the exclusive right to work them (*g*).

Mines.

(b) *Habendum.*

Habendum.

The function of the clause in the lease known as the *habendum*, is to limit and restrain the generality of the demise in the premises, and to specify the estate to be granted, its date of commencement and its duration.

Words of limitation.

A grant without any words of limitation confers an estate for life (*h*). Under a conveyance by deed to a person

(*c*) *Ibid.*

(*d*) *Phillips* v. *Doyle* (1887), 32 Sol. Journ. 11; *Hewitt* v. *Isham* (1851), 7 Ex. 77.

(*e*) *Proud* v. *Bates* (1865), 34 L.J. Ch. 411; *Davis* v. *Treharne* (1881), 6 App. Cas. 460; as to compensation for subsidence see *Duke of Buccleugh* v. *Wakefield* (1870), L.R. 4 H.L.C. 377.

(*f*) *Ramsay* v. *Blair* (1876), L.R. 1 App. Cas. 702; *Proud* v. *Bates* (1865), 34 L.J. Ch. 411.

(*g*) *Duke of Sutherland* v. *Heathcote*, [1892] 1 Ch. 475.

(*h*) *Boddington* v. *Robinson* (1875), L.R. 10 Ex. 270.

"and the heirs of his body, for twenty-one years, or the term of his natural life, from the first day of April, 1853, fully to be complete and ended," reserving a yearly rent, and providing that on failure to perform the covenants, the lease and the term thereby granted should cease and be utterly null and void, it was held that the grantee took a life estate (*i*).

Where, by an indenture made in 1826, lands were "granted, demised and to farm let," to the grantee, his heirs and assigns, and limited in the *habendum*, "unto the said (grantee) his heirs and assigns from the day of the date hereof, for and during the term of twenty-one years," and a yearly rent was reserved, it was held that the fee simple granted by the premises could not take effect without livery of seisin, and that the grantee took only a term of twenty-one years (*j*). As livery of seisin is no longer necessary (*k*), it would seem that such a grant would now convey the fee simple.

Future life estate.

A lease for life, being an estate of freehold, could not at common law, like a lease for a term, be made to commence *in futuro*, as livery of seisin was formerly essential to the creation of such an estate, and present livery could not be made in respect of a future estate. And although livery of seisin is not now necessary (*kk*), the rule still holds, and a lease for life, to commence at a future time, can only be made by a limitation operating under the *Statute of Uses* (*l*).

Beginning of term.

The commencement of the term must be ascertained with certainty, but it is sufficient if the date at which it is to

(*i*) *Dalye* v. *Robertson* (1860), 19 U.C.R. 411.

(*j*) *McDonald* v. *McGillis* (1866), 26 U.C.R. 458.

(*k*) 8 & 9 Vict. (Imp.), 1845, c. 106, s. 2; R.S.O. (1897), c. 119, s. 2.

(*kk*) 8 & 9 Vict. (Imp.), 1845, c. 106, s. 2; R.S.O. (1897), c. 119, s. 2.

(*l*) 27 Henry VIII. c. 10; R.S.O. (1897), vol. III. c. 331; 1 Platt on Leases, 692.

commence may be made certain by the happening of an event (*l*).

A term may be made to commence upon the performance of a condition, such as the payment of a sum of money, or upon default in making a payment (*m*).

Where possession has been taken by the lessee the term is deemed to commence from that time, if no other time is mentioned (*n*).

Delivery of lease.

The lease is deemed to take effect from, and the conditions and stipulations therein contained have relation to the time of its delivery and not its date, unless otherwise clearly expressed.

Thus, in *Bell* v. *McKindsey* (*o*), the lessor by indenture of lease bearing date the 15th of March, 1862, demised certain lands. On the 21st of the following July this lease was cancelled by an instrument under seal; the second and fourth sheets were taken out and replaced by others, and it was re-executed and re-delivered without any other alteration. As it then stood, it was dated as before, to hold "from the 1st day of April now next, for nine years," at a yearly rent, payable in advance, "that is to say, on the 1st of April, 1862, and on the 1st of April in each year during the term;" the conclusion being that the parties had thereunto "set their hands and seals, the day and year first above written." In an action by the lessor against the sheriff for taking the lessee's goods in August, 1862, without satisfying a year's rent alleged to be then due, it was held that the lease took effect from the delivery, on the 21st of July, 1862, not from the date; that the term began on the 1st April, 1863, following the delivery of the lease; that the first year's rent payable "in advance," was not due until that day, the words

(*l*) *Goodright* v. *Richardson* (1789), 3 T.R. 463.
(*m*) *Clowes* v. *Hughes* (1870), L.R. 5 Ex. 160.
(*n*) *Doe* v. *Matthews* (1851), 11 C.B. 675.
(*o*) *Bell* v. *McKindsey* (1864), 23 U.C.R. 162; 3 E. & A. 9.

"that is to say, on the 1st April, 1862," being merely *falsa demonstratio*; and that the provisions of the lease, in connection with the surrounding circumstances, did not afford sufficient evidence of a contrary intention to justify a different construction.

Where a lease purported on the face of it to have been made on the 25th of March, 1783, and to grant a term "to the lessee from the 25th of March, now last past for thirty-five years," but was not executed until after the 25th of March, 1783, it was held that the word "now" had reference to the time of delivery, and not to the date of the lease, and consequently that the term commenced on the 25th of March, 1783, and not on the 25th of March preceding the date of the deed (*q*).

Duration.

The duration of the term is reckoned exclusive of the first day and inclusive of the last. Thus, under a lease dated the 1st of October, 1857, for five years from the date thereof, it was held that the term included the whole of the first of October, 1862 (*p*). Under a demise from a given day the tenancy begins on the following day, and if that day be Sunday, then on the next following day (*q*).

Where the lessor leased a house then in course of construction for the term of one year, at $20 per month, payable in advance, tenancy to begin on the 1st of June, 1900, with a proviso that if the house was not ready for occupancy on that date there should be an abatement of rent corresponding to the delay, and the lessee entered on the 24th of June and paid rent in advance for the months of July, August, September and October, no rent being charged for June, and occupation continued until the 1st of May, 1901, when he moved out, it was held in an action for damages

(*q*) *Steele* v. *Mart* (1825), 4 B. & C. 272; 28 R.R. 256.
(*p*) *McCallum* v. *Synder* (1860), 10 U.C.C.P. 191.
(*q*) *Gray* v. *Shields* (1893), 26 N.S.R. 363.

against the landlord, for illegal distress on the ground that there was no definite agreement in existence and therefore no rent ascertained to be due, that there was a yearly letting from the 1st of June, 1900 (*r*).

It has been held that a term in a demise by deed of land "to hold so long as it should be overflowed by a mill-pond" is sufficiently certain to enable the lessee to resist an action of ejectment by a purchaser of the land (*s*).

Alternative terms.

If a lease is granted for a term stated in the alternative, it is in the option of the tenant at which of the periods the lease shall terminate (*t*).

Where a lease limited in the *habendum* for a year contained a stipulation that either party might terminate the lease at the end of the year, on giving three months' written notice prior thereto, it was held that the stipulation was repugnant to the *habendum* and must be rejected, and that the lease terminated at the end of the year without any notice (*u*).

(c) *Reddendum.*

Reddendum.

The office of the *reddendum* is to fix the amount of rent, or service in the nature of rent, to be paid, and the days and times of payment. If no time is mentioned for payment in a lease for a year or a term of years the rent will be payable at the end of the year (*a*).

Reservation to stranger.

A reservation of rent payable to a stranger to the lease may be good as a contract and will not pass with the reversion, but the rent so reserved cannot be recovered by distress (*b*).

(*r*) *Acorn* v. *Hill* (1901), 34 N.S.R. 508.
(*s*) *Kerr* v. *Bearinger* (1869), 29 U.C.R. 340.
(*t*) *Dann* v. *Spurrier* (1803), 3 B. & P. 399; 7 R.R. 797.
(*u*) *Weller* v. *Carnew* (1899), 29 Ont. 400.
(*a*) *Collett* v. *Curling* (1847), 10 Q.B. 785.
(*b*) Co. Litt. 143b.

Where the words "yielding and paying" are used, a covenant for the payment of rent is implied (*c*). But no special form of words is necessary, so long as the intention of the parties is clearly shewn. A letting "at a rent," or a proviso or agreement for the payment of it, will be a good reservation (*d*).

(d) *Covenants.*

Covenants. A covenant is simply an agreement of the parties under seal. In order to constitute a covenant, no technical words are necessary; it is sufficient if an agreement can be collected from the terms of the instrument that something is to be done, or not to be done, by the party (*e*). Every obligation which, on a fair construction of the language used, is imposed on one of the parties, will amount in law to an express covenant by him to perform it (*f*).

Warranty. A warranty differs from a covenant; a warranty is a collateral undertaking forming part of the contract by agreement of the parties express or implied, and must be given during the course of the dealing which leads to the bargain, and should then enter into the bargain as part of it. An affirmation at the time of a sale of a chattel is a warranty, provided it appears on the evidence to have been so intended; and the test of whether it was so intended is whether the vendor assumes to assert a fact of which the buyer is ignorant, or merely states an opinion or judgment upon a matter of which the vendor has no special knowledge, and on which the buyer may be expected also to have an opinion, and to exercise his opinion. In the former case it is a warranty, in the latter not. On the sale of real pro-

(*c*) *Iggulden* v. *May* (1804), 9 Ves. 330.

(*d*) *Doe* v. *Kneller* (1829), 4 C. & P. 3.

(*e*) *Duke of St. Albans* v. *Ellis* (1812), 16 East 352; 14 R.R. 361.

(*f*) *Ibid.*

perty, or upon the granting and taking of a lease, the same rule applies; consequently an affirmation by a landlord at the time of letting a house that the drains are in a perfect condition, the lease itself being silent on the point, may amount to a warranty, and if the warranty is collateral to the lease it may be given in evidence, although the affirmation was by word of mouth only, and the tenant may maintain an action for breach of it (*g*).

Covenant and condition.

The distinction between a covenant and a condition is discussed in chapter XXVI., section 7.

Express and implied.

An express covenant controls and overrides an implied covenant to the same effect (*h*).

Where the language of a covenant is indefinite, parol evidence is properly admissible to explain it (*i*).

Where a lease contained a clause that it should be "competent" for the lessee to make certain specified repairs, and the lease was declared to be on the express understanding that such repairs should be made within one year from the date of the said lease, it was held that, notwithstanding the word "competent," the lessee in effect covenanted to do the work specified (*j*).

Continuing covenant.

It was held that a covenant in these words: "And the said lessee covenants further with the said lessors that he will furnish the said hotel in a substantial and good manner" was a continuing covenant, and that the lessee was not at liberty, during the continuance of the term, to remove out of the house the furniture thereof which he had placed in it (*k*).

(*g*) *De Lassalle* v. *Guildford*, [1901] 2 K.B. 215.

(*h*) *Line* v. *Stephenson* (1838), 5 Bing. N.C. 183; *Grosvenor Hotel Co.* v. *Hamilton*, [1894] 2 Q.B. 836.

(*i*) *Houston* v. *McLaren* (1887), 14 Ont. App. 103.

(*j*) *McDonald* v. *Cochrane* (1856), 6 U.C.C.P. 134.

(*k*) *Rossin* v. *Joslin* (1858), 7 Gr. 198.

Implied covenants in demise by deed.

In Ontario it is provided that covenants for the right to convey, for quiet enjoyment, for freedom from incumbrances, and for further assurance, shall be implied in every conveyance (including a lease) made on or after the 1st day of July, 1886. This is enacted by section 17 of the *Act respecting the Law and Transfer of Property*(*l*), which is as follows:

17. (1) In a conveyance made on or after the 1st day of July, 1886, there shall, in the several cases in this section mentioned, be deemed to be included, and there shall in those several cases be implied, covenants to the effect in this section stated, by the person or by each person who conveys, as far as regards the subject-matter or share of subject-matter expressed to be conveyed by him, with the person, if one, to whom the conveyance is made, or with the persons jointly, if more than one, to whom the conveyance is made as joint tenants, or with each of the persons, if more than one, to whom the conveyance is made as tenants in common, that is to say:

(a) In a conveyance for valuable consideration, other than a mortgage, the following covenants by the person who conveys, and is expressed to convey, as beneficial owner, namely:

Covenants for right to convey;

Quiet enjoyment;

Freedom from incumbrances; and

Further assurance;

According to the tenor and effect of the several and respective forms of covenants for the said purposes set forth in Schedule B to *The Act respecting Short Forms of Conveyances* (*m*), and therein numbered 2, 3, 4 and 5, respectively, subject to the directions in the said schedule contained.

(b) In a conveyance of leasehold property for valuable consideration, other than a mortgage, the following further covenant, by the person who conveys, and is expressed to convey, as beneficial owners, namely:

That, notwithstanding anything by the person who so conveys, made, done, executed or omitted, or knowingly suffered, the lease or grant creating the term or estate for which the land is conveyed is, at the time of the conveyance, a good, valid, and effectual lease or grant of the property conveyed, and is in full force, unforfeited, unsurrendered, and in nowise become void or voidable, and that, not-

(*l*) R.S.O. (1897), c. 119.

(*m*) R.S.O. (1897), c. 124.

withstanding any thing as aforesaid, all the rents reserved by, and all the covenants, conditions and agreements contained in the lease or grant, and on the part of the lessee or grantee, and the persons deriving title under him to be paid, observed, and performed, have been paid, observed and performed, up to the time of conveyance.

Trustee.

(c) In a conveyance, the following covenant by every person who conveys, and is expressed to convey, as trustee or mortgagee, or as personal representative of a deceased person, or as committee of a lunatic so found by inquisition or judicial declaration, or under an order of the Court, which covenant shall be deemed to extend to every such person's own acts only, namely:

That the person so conveying has not executed, or done, or knowingly suffered, or been party or privy to, any deed or thing, whereby, or by means whereof the subject-matter of the conveyance, or any part thereof is, or may be impeached, charged, affected, or incumbered in title, estate or otherwise, or whereby or by means whereof the person who so conveys is in anywise hindered from conveying the subject-matter of the conveyance or any part thereof, in the manner in which it is expressed to be conveyed.

Beneficial owner.

(2) Where in a conveyance it is expressed that by direction of a person expressed to direct as beneficial owner another person conveys, then the person giving the direction, whether he conveys and is expressed to convey as beneficial owner or not, shall be deemed to convey, and to be expressed to convey as beneficial owner the subject-matter so conveyed by his direction; and a covenant on his part shall be implied accordingly.

When covenants are not implied.

(3) Where in a conveyance, a person conveying is not expressed to convey as beneficial owner, or as settlor, or as trustee, or as mortgagee, or as personal representative of a deceased person, or as committee of a lunatic so found by inquisition or judicial declaration, or under an order of the Court, or by direction of a person as beneficial owner, no covenant on the part of the person conveying shall be by virtue of this section implied in the conveyance.

(4) The benefit of a covenant, implied as aforesaid, shall be annexed and incident to and shall go with the estate or interest of the implied covenantee, and shall be capable of being enforced by every person in whom that estate or interest is for the whole or any part thereof from time to time vested.

(5) A covenant implied as aforesaid, may be varied or extended by deed, and as so varied or extended, shall, as far as may be, operate in the like manner, and with all the like incidents, effects and consequences, as if such variations or extensions were directed in this section to be implied (*n*).

(*n*) As to covenants implied in leases under the *Land Titles Act*, see R.S.O. (1897), c. 138, ss. 56, 74, and 75.

The term "conveyance" in the above section includes a lease (*o*).

It would seem that these covenants are only implied when the lease is made by deed (*p*).

Implied covenant in every demise.

In Ontario, a proviso for re-entry for non-payment of rent is implied in every demise, whether by parol or in writing, made after the 25th day of March, 1886. This is enacted by section 11 of the *Landlord and Tenant's Act* (*q*), which is as follows:

Proviso for re-entry on non-payment of rent.

11. In every demise made or entered into after the 25th day of March, 1886, whether by parol or in writing, unless it shall be otherwise agreed, there shall be deemed to be included an agreement that if the rent reserved, or any part thereof, shall remain unpaid for fifteen days after any of the days on which the same ought to have been paid, although no formal demand thereof shall have been made, it shall be lawful for the landlord at any time thereafter, into and upon the demised premises, or any part thereof, in the name of the whole, to re-enter and the same to have again, repossess and enjoy as of his former estate.

In Manitoba, under the *Real Property Act* (*r*), a covenant for the payment of rent and taxes, and to keep the demised property in tenantable repair, is implied in a lease, as provided by section 94, which is as follows:

94. In the memorandum of lease, unless a contrary intention appear therein, there shall be implied the following covenants by the lessee, that is to say:—

(a) That he will pay the rent thereby reserved at the times therein mentioned, and all rates and taxes which may be payable in respect of the demised property during the continuance of the lease; and

(b) That he will at all times during the continuance of the said lease keep, and at the termination thereof yield up, the demised property in good and tenantable repair, accidents and damage to buildings from fire, lightning, storm and tempest, and reasonable wear and tear, excepted.

(*o*) R.S.O. (1897), c. 119, s. 1, s.-s. 6.

(*p*) See R.S.O. (1897), c. 124, s. 2.

(*q*) R.S.O. (1897), c. 170.

(*r*) R.S.M. (1902), c. 148.

There is also implied a power in the lessor to enter and view the state of repair and to give notice to repair, and to re-enter on non-performance of covenants. This is provided by section 95, which is as follows:

95. In any memorandum of lease, unless a contrary intention appears therein, there shall also be implied the following powers in the lessor, that is to say:—

(a) That he may, by himself or his agents, enter upon the demised property and view the state of repair thereof, and may serve upon the lessee, or leave at his last or usual place of abode or upon the demised premises, a notice in writing of any defect, requiring him within a reasonable time, to be therein mentioned, to repair the same;

(b) That in case the rent or any part thereof be in arrear or in case default shall be made in the fulfilment of any covenant, whether expressed or implied, in such lease on the part of the lessee, and such default shall be continued for the space of two calendar months, or in case the repairs required by such notice as aforesaid shall not have been completed within the time therein specified, such lessor may enter upon and take possession of such demised premises.

In the Northwest Territories, under the *Territories Real Property Act* (*s*), covenants and powers are implied similar to those provided in Manitoba.

In British Columbia also under the *Torrens Registry Act* (*t*), covenants and powers are implied similar to those provided in the Act of Manitoba.

5. *Short Forms of Covenants.*

Short forms.

In some of the Provinces, Acts have been passed providing for the use of short forms of covenants commonly inserted in leases, the use of a given form of words in a lease expressed to be made in pursuance of the Act, having the effect of a more extended and detailed form (*a*).

(*s*) R.S.C. (1886), c. 51, ss. 71 and 72.

(*t*) 62 Vict. (1899), B.C. c. 62, ss. 74 and 75.

(*a*) In Ontario, R.S.O. (1897), c. 125; in Manitoba, R.S.M. (1902), c. 157; in the Northwest Territories, R.S.C. (1886), c. 51; in British Columbia, R.S.B.C. (1897), c. 117; 62 Vict. (1899), B.C. c. 62.

In Ontario, it is provided by section 1 of the *Act respecting Short Forms of Leases*(*b*), as follows:

1. Where a lease under seal executed on or after the 31st day of December, 1897, made according to the form set forth in Schedule A, annexed to this Act, or any other such lease expressed to be made in pursuance of this Act, or referring thereto, contains any of the forms of words contained in Column One of Schedule B, hereto annexed, and distinguished by any number therein, such lease shall be taken to have the same effect, and be construed as if it contained the form of words contained in Column Two of said Schedule B, and distinguished by the same number as is annexed to the form of words used in the lease; but it shall not be necessary, in any such lease, to insert any such number.

Directions.

Directions are given for the use of the forms provided in Schedule B as follows:

Names.

1. Parties who use any of the forms in the first column of this schedule, may substitute for the words "Lessee" or "Lessor" any name or names (or other designation), and in every such case corresponding substitutions shall be taken to be made in the corresponding forms in the second column.

Gender and number.

2. Such parties may substitute the feminine gender for the masculine, or the plural number for the singular, in the forms in the first column of this schedule, and corresponding changes shall be taken to be made in the corresponding forms in the second column.

Exceptions.

3. Such parties may introduce into or annex to any of the forms in the first column any express exceptions from or express qualifications thereof respectively, and the like exceptions or qualifications shall be taken to be made from or in the corresponding forms in the second column.

Heirs and executors.

4. Where the premises demised are of freehold tenure, the covenants 1 to 8 shall be taken to be made with, and the proviso 11 to apply to the heirs and assigns of the lessor; and where the premises demised are of leasehold tenure, the said covenants and proviso shall be taken to be made with, and apply to the lessor, his executors, administrators and assigns.

5. Where the word "lessor" occurs in the second column of this schedule, it shall be held to include the heirs and assigns of the lessor, if the premises demised are of freehold tenure, and to include the heirs, executors, administrators and assigns of the lessor, if such premises are of leasehold tenure; and where the word "lessee"

(*b*) R.S.O. (1897), c. 125.

occurs in the said second column it shall be held to include the executors, administrators and assigns of the lessee (*c*).

It is further provided that any lease or part of a lease which fails to take effect by virtue of the Act, shall nevertheless be as effectual to bind the parties thereto, as if the Act had not been passed (*d*).

Lease must be under seal.

In order that a covenant in the short form shall be construed as if it contained the words of the longer forms, the lease must be under seal and must, moreover, be expressed to be made in pursuance of the Act, or refer to it (*e*).

Reference to the Act.

A lease made in 1870, purporting to be made "in pursuance of the Act to facilitate the leasing of lands and tenements," being the title of the Act 14 & 15 Vict. ch. 8, consolidated in the *Consolidated Statutes of Upper Canada*, ch. 92, instead of "in pursuance of the *Act respecting Short Forms of Leases*," which is the title of the *Consolidated Act* and of the *Ontario Act*, was held to contain a sufficient reference to the *Consolidated Act*, to bring it within its provisions (*f*).

The addition of a further clause or stipulation to the words of a short form of covenant or proviso, will not have the effect of excluding the application of the statute. Thus, where a lease, purporting to be made in pursuance of the *Act respecting Short Forms of Leases*, contained this proviso: "Proviso for re-entry by the said lessor on non-payment of rent, '*whether lawfully demanded or not*,' or non-performance of covenants, '*or seizure or forfeiture of the said term for any of the causes aforesaid*,'" the words in italics not being in the short form given by the statute, it was held that the addition of these words did not exclude the application of the statute; and that the proviso ex-

(*c*) Schedule B, section 1.

(*d*) R.S.O. (1897), c. 125, s. 2.

(*e*) R.S.O. (1897), c. 125, s. 1.

(*f*) *Davis* v. *Pitchers* (1874), 24 U.C.C.P. 516.

tended to covenants after, as well as before it, in the lease (*g*).

Assigns.

Where, in a lease, expressed to be made in pursuance of the *Act respecting Short Forms of Leases*, the covenants, in place of the words "the lessee covenants with the lessor" were introduced with the words "the said party of the second part covenants with the said party of the first part," followed by a covenant to build a house on the demised premises, and another covenant to re-build in the event of the building so erected during the term being destroyed by fire, it was held that the covenants to build and to re-build derived no aid from the statute, and were to be read as made by the lessee for himself alone and not for his assigns (*h*).

(*g*) *Crozier* v. *Tabb* (1877), 38 U.C.R. 54.

(*h*) *Emmett* v. *Quinn* (1881), 7 Ont. App. 306.

CHAPTER VI.

AGREEMENT FOR A LEASE.

1. *Effect of an Agreement for a Lease.*
   (a) *Before the Judicature Act.*
   (b) *Since the Judicature Act.*
2. *Specific Performance—Statute of Frauds.*
3. *What Agreements are Within the Statute.*
4. *What the Memorandum in Writing Must Contain.*
   (a) *The Names of the Parties.*
   (b) *Description of the Property.*
   (c) *Beginning and Length of the Term.*
   (d) *The Amount of Rent Reserved.*
   (e) *Special terms.*
   (f) *Signature.*
5. *Part performance.*
6. *Usual covenants.*

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1. *Effect of an Agreement for a Lease.*

(a) *Before the Judicature Act.*

Agreement for a lease.

The distinction between a lease and an agreement for a lease has already been discussed (*a*). This distinction has been modified to some extent by the passing of the *Judicature Act.*

Effect of entry under.

Formerly, where an entry was made under an agreement for a lease as distinguished from a lease, the intended lessee became at law a tenant at will only. The tenancy thus created might, by the subsequent conduct of the parties, such as the payment and acceptance of rent, ripen into a

(*a*) See chapter V.

tenancy from year to year, and was subject to all the stipulations of the agreement, except the duration of the term, that were applicable to a yearly holding(*b*).

After entry under such an agreement, an action might be maintained for a breach of the terms thereof (*c*), but before entry an action would not lie at law to obtain possession (*d*).

A lease for more than three years from the making thereof is void at law, unless made by deed(*e*); and the intended lessee could not maintain an action at law to obtain possession under it. Thus, where an instrument not under seal provided for a term of three years, with a privilege to hold two years longer, at a rent payable monthly in advance, and further provided that possession was to be given whenever the first monthly payment should be made, this was held to be a lease for more than three years, and was void at law, and the lessee could not maintain an action at law to obtain possession under it(*f*).

After entry and payment of rent under such an instrument, the lessee became, as under an agreement for a lease, a tenant from year to year. Thus, where a lessee entered under a lease in writing, but not under seal, for a term of five years, it was held that he became a tenant from year to year for five years, under a tenancy, determinable during that time by half a year's notice, and after the end of the term the tenant was bound to give up possession without notice(*g*).

(*b*) *Coatsworth* v. *Johnson* (1886), 55 L.J.Q.B. 220; see chapter III.

(*c*) *Bond* v. *Rosling* (1861), 1 B. & S. 371; *Rollason* v. *Leon* (1861), 7 H. & N. 73; *Tidey* v. *Mollett* (1864), 16 C.B.N.S. 298; *Hayne* v. *Cummings* (1864), 16 C.B.N.S. 421.

(*d*) *Drury* v. *Macnamara* (1855), 5 E. & B. 612; *Hurley* v. *McDonnell* (1853), 11 U.C.R. 208.

(*e*) 8 & 9 Vict. (Imp.) c. 106, s. 3; R.S.O. (1897), c. 119, s. 7.

(*f*) *Hurley* v. *McDonnell* (1853), 11 U.C.R. 208.

(*g*) *Caverhill* v. *Orvis* (1862), 12 U.C.C.P. 392; *Tress* v. *Savage* (1854), 4 E. & B. 36.

So, where a tenant went into possession under a lease in writing, but not under seal, of lands that were afterwards mortgaged, and after the mortgage was made he obtained a lease under seal from the mortgagor for five years, it was held that as between the lessee and the lessor he was tenant for five years, but as between the lessee and the mortgagee he was a tenant from year to year under the lease made before the mortgage, and was entitled to notice to quit(*h*).

An instrument not under seal in the following form: "I agree to let to A.M. the house and lot, etc., for one, three or five years," was held to be void as a lease for five years, as not being under seal, but it might operate as a valid lease for three years, and no notice to quit was necessary to determine it at the end of that period(*i*).

Instrument void as a lease, good as an agreement for a lease.

But an instrument purporting to be a lease for a term exceeding three years, which was void at law as a lease, because not under seal, was treated in equity as an agreement for a lease(*j*).

So, a defective lease, granted in the intended exercise of a power of leasing, whether derived under a statute or under any instrument lawfully creating such power, is considered in equity as an agreement for a lease(*k*).

So under an agreement by deed, whereby one of the parties agreed that the other should work the premises during the former's life, on condition that he should do so in a farmer-like manner, and deliver to him one-third of the proceeds, it was held that as the agreement was inoperative as a conveyance of an estate for life, the party entering under the agreement and performing the conditions, became a tenant from year to year(*l*).

(*h*) *Caverhill* v. *Orvis* (1862), 12 U.C.C.P. 392.
(*i*) *Osborne* v. *Earnshaw* (1862), 12 U.C.C.P. 267.
(*j*) *Parker* v. *Taswell* (1858), 2 DeG. & J. 559.
(*k*) 12 & 13 Vict. (Imp.) c. 26, s. 2; R.S.O. (1897), vol. III. c. 330, s. 24.
(*l*) *Sheldon* v. *Sheldon* (1863), 22 U.C.R. 621.

Courts of Equity gave partial relief in such cases. Thus, where a lessor, treating his lessee under such an agreement as a yearly tenant, gave notice to determine the tenancy before the expiration of the term agreed on, and brought an action at law for possession, a court of equity would restrain the lessor from proceeding until the lessee's claim for specific performance could be heard(*ll*).

(*b*) *Since the Judicature Act.*

When agreement for a lease operates as a lease.

But, since the *Judicature Act*, the rule no longer holds that a person occupying under an executory agreement for a lease, of which the Court would decree specific performance, is only made tenant from year to year at law by the payment of rent, but he is to be treated in every Court as holding on the terms of the agreement(*m*).

Walsh v. *Lonsdale.*

In *Walsh* v. *Lonsdale*(*m*) the defendant, on the 29th of May, 1879, agreed to grant, and the plaintiff to accept, a lease of a mill for seven years at the rent of 30 shillings a year for each loom run, the plaintiff not to run less than 560 looms; and the lease was to contain such stipulations as were inserted in a certain lease of the 1st of May, which was a lease at a fixed rent made payable in advance, and contained a stipulation that there should at all times be payable in advance, on demand, one whole year's rent in addition to the proportion, if any, of the yearly rent due and unpaid for the period previous to such demand. The plaintiff was let into possession and paid rent quarterly, not in advance, down to the 1st of January, 1882, inclusive, having run in 1881 560 looms. In March, 1882, the defendant demanded payment, and put in a distress, and the plaintiff thereupon commenced an action for damages for illegal distress, for an injunction, and for specific perform-

(*ll*) *Browne* v. *Warner* (1807), 14 Ves. 156.
(*m*) *Walsh* v. *Londsdale* (1882), 21 Ch.D. 9.

ance of the agreement. It was held that a tenant holding under an agreement for a lease of which specific performance would be decreed, stands in the same position as to liability as if the lease had been executed. He is not, since the *Judicature Act*, a tenant from year to year, he holds under the agreement, and every branch of the Court must now give him the same rights; and it was held, therefore, that the plaintiff holding under the agreement was subject to the same right of distress as if a lease had been granted, and that if under the terms of the lease a year's rent would have been payable in advance on demand, a distress for that was lawful.

Jessel, M.R., in delivering judgment, said:—

"The question is one of some nicety. There is an agreement for a lease under which possession has been given. Now, since the *Judicature Act* the possession is held under the agreement. There are not two estates as there were formerly, one estate at common law by reason of the payment of the rent from year to year, and an estate in equity under the agreement. There is only one Court, and the equity rules prevail in it. The tenant holds under an agreement for a lease. He holds, therefore, under the same terms in equity as if a lease had been granted, it being a case in which both parties admit that relief is capable of being given by specific performance. That being so, he cannot complain of the exercise by the landlord of the same rights as the landlord would have had if a lease had been granted. On the other hand, he is protected in the same way as if a lease had been granted; he cannot be turned out by six months' notice as a tenant from year to year. He has a right to say, 'I have a lease in equity, and you can only reenter if I have committed such a breach of covenant as would, if a lease had been granted, have entitled you to reenter according to the terms of a proper proviso for reentry.' That being so, it appears to me that being a lessee

in equity he cannot complain of the exercise of the right of distress merely because the actual parchment has not been signed and sealed."

The rule laid down by this decision was discussed in a subsequent case, and the limits of its application stated(*n*).

Manchester Brewing Co. v. Coombs.

In *Manchester Brewing Co.* v. *Coombs*(*n*), Farwell, J., said:—"Although it has been suggested that the decision in *Walsh* v. *Lonsdale* takes away all difference between the legal and equitable estate, it, of course, does nothing of the sort, and the limits of its applicability are really somewhat narrow. It applies only to cases where there is a contract to transfer a legal title, and an act has to be justified or an action maintained by force of the legal title to which the contract relates. It involves two questions: (1) Is there a contract of which specific performance can be obtained? (2) If yes, will the title acquired by such specific performance justify at law the act complained of, or support at law the action in question? It is to be treated as though before the *Judicature Act* there had been, first, a suit in equity for specific performance, and then an action at law between the same parties, and the doctrine is applicable only in those cases where specific performance can be obtained between the same parties, in the same court, and at the same time as the subsequent legal question falls to be determined. Thus, in *Walsh* v. *Lonsdale*, the landlord under an agreement for a lease for a term of seven years distrained. Distress is a legal remedy and depends on the existence at law of the relation of landlord and tenant, but the agreement between the same parties, if specifically enforced, created that relationship. It was clear that such an agreement would be enforced in the same court and between the same parties. The act of distress was therefore held to be lawful."

(*n*) *Manchester Brewing Co.* v. *Coombs* (1900), 82 L.T. 347.

It has been held, also, that the rule applies only where the court, in which an action is brought in respect of the agreement, has concurrent jurisdiction, both at law and in equity; and hence a County Court, not having power to decree specific performance, cannot treat the parties as having the rights and liabilities which they would have, if a lease had been executed(*nn*).

2. *Specific Performance—Statute of Frauds.*

Agreement for a lease must be in writing.

Specific performance of an agreement respecting an interest in lands will not be decreed, unless it is in writing, as provided by the 4th section of the *Statute of Frauds*, or unless there is sufficient part performance to exclude the operation of the Statute(*o*). By the 4th section of the *Statute of Frauds* it is enacted as follows:—

> No action shall be brought whereby to charge any executor, or administrator, upon any special promise to answer damages out of his own estate, or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriages, of another person, or to charge any person, upon any agreement made upon consideration of marriage, or upon any contract or sale of lands, tenements, or hereditaments, or any interest in, or concerning them, or upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some person thereunto by him lawfully authorized (*p*).

3. *What Agreements are Within the Statute.*

An agreement for a lease of lands is a contract concerning an interest in lands within the meaning of this section(*q*).

(*nn*) *Foster* v. *Reeves*, [1892] 2 Q.B. 255; *Whidden* v. *Jackson* (1891), 18 Ont. App. 422; *McGugan* v. *McGugan* (1893), 21 S.C.R. 267.

(*o*) *Edge* v. *Strafford* (1831), 1 Tyr. 295; 1 Cr. & J. 391; 35 R.R. 746.

(*p*) 29 Car. II. c. 3, s. 4; R.S.O. (1897), vol. III. c. 338, s. 5; R.S.N.S. (1900), c. 141, s. 5; R.S.B.C. (1897), c. 85, s. 5.

(*q*) *Edge* v. *Strafford* (1831), 1 Tyr. 295; 35 R.R. 746; *Thursby* v. *Eccles* (1900), 70 L.J.Q.B. 91.

Furnished lodgings.

Where a verbal agreement was made to take furnished lodgings for two or three years, it was held that before entry no action could be maintained for a breach of the contract(*r*).

But a contract for board and lodging, where exclusive possession of a certain room is not bargained for, is not within the Statute, and an action may be brought for a breach thereof, although the contract is not in writing(*s*).

An agreement to enter into an agreement for a lease, if made in writing in pursuance of the Statute, is a contract for the breach of which an action can be maintained(*t*). So an agreement to procure a lease, although made by a person who has no interest therein, is also within the Statute(*u*).

Corporation.

A written agreement to grant a lease made by a corporation will not be enforced by specific performance unless it is under seal(*v*). So an agreement for a lease will not be

Infant.

enforced in favour of or against an infant(*w*). And a lessee will not be compelled to carry out an agreement to assign or sub-let, where he is under a covenant with his lessor not to assign or sub-let without leave(*x*).

But a tenant for life who has entered into an agreement to grant a lease for a longer term than he has power to grant, will be compelled to give a lease for as long a term as he lawfully can(*y*).

(*r*) *Edge* v. *Strafford* (1831), 1 Tyr. 295; 35 R.R. 746.

(*s*) *Wright* v. *Stavert* (1860), 2 E. & E. 721.

(*t*) *Foster* v. *Wheeler* (1888), 38 Ch. D. 130.

(*u*) *Horsey* v. *Graham* (1869), L.R. 5 C.P. 9.

(*v*) *Mayor of Oxford* v. *Crow*, [1893] 3 Ch. 535.

(*w*) *Lumley* v. *Ravenscroft*, [1895] 1 Q.B. 683.

(*x*) *Wilmott* v. *Barber* (1880), 15 Ch.D. 96.

(*y*) *Hanbury* v. *Litchfield* (1833), 2 Myl. & K. 629; 39 R.R. 312. As to power of a tenant for life to grant leases, see chapter IX.

Where A. has entered into a contract to demise certain premises for a term to B., and previously to the commencement of the term to repair the old premises and build a new warehouse; and B. entered accordingly at the day agreed upon, but before A. had completed the building and repairs and before the lease was executed a fire destroyed the premises, it was held that B. was not bound to execute a lease and rebuild the destroyed premises, A. not having completed his contract, and that till such completion the premises were at his risk(*z*).

Rent. Rent issuing out of land is a tenement; it partakes of the nature of land, and an agreement respecting it is within the *Statute of Frauds*(*a*).

Reduction of rent. An agreement for a reduction of rent is an agreement concerning an interest in land within the meaning of the Statute, and must be in writing, although it may be void for want of consideration(*b*); so also is an agreement for a lease of an incorporeal right, such as the right to shoot over lands(*c*).

Where a verbal agreement for a lease, which must be in writing to satisfy the Statute, includes a collateral stipulation which in itself is not required to be in writing, the agreement cannot be enforced as to the lease, or as to such stipulation, unless the whole is in writing(*d*).

The memorandum required by the Statute need not be a formal instrument; any writing embodying the terms, and signed by the party to be charged, or his authorized agent, is sufficient(*e*). Thus a receipt given for a deposit

(*z*) *Counter* v. *McPherson* (1834), 1 O.S. 22; 5 Moo. P.C. 83.

(*a*) *Hopkins* v. *Hopkins* (1882), 3 Ont. 223.

(*b*) *O'Connor* v. *Spaight* (1804), 1 Sch. & L. 305.

(*c*) *Webber* v. *Lee* (1882), 9 Q.B.D. 315; see also *McManus* v. *Cooke* (1887), 35 Ch.D. 681.

(*d*) *Mechelen* v. *Wallace* (1837), 7 A. & E. 49; *Vaughan* v. *Hancock* (1846), 3 C.B. 766; but see *Angell* v. *Duke* (1875), L.R. 10 Q.B. at p. 178; *Erskine* v. *Adeane* (1873), L.R. 8 Ch. 756.

(*e*) *In re Hoyle*, [1893] 1 Ch. 84.

of money may be sufficient(*f*); or a letter written even to a third person(*g*), or two or more connected documents which may be read together in order to satisfy the Statute(*h*). If one document is insufficient by itself, it may be completed by another(*i*).

A conveyance executed in escrow and retained in possession of the grantor, cannot be regarded as a note or memorandum in writing within the Statute(*j*). It would seem, however, that where there is an antecedent parol contract, complete in all its terms and recited in the conveyance, it may be so regarded(*k*).

But the agreement, whether contained in one instrument or in two or more connected writings, must contain all the material terms agreed on, and must disclose the following particulars:—

(*a*) *Names of the Parties.*

The proposed lessor and lessee must both be specified. If both parties sign the agreement, although not otherwise named therein, it will be sufficient(*l*). If the agreement is signed only by the party to be charged, the other party, if not named, must be identified by an adequate description admitting of no doubt, even if the party signing well knew

(*f*) *Shardlow* v. *Cotterell* (1881), 20 Ch.D. 90.

(*g*) *Wood* v. *Aylward* (1887), 58 L.T. 662.

(*h*) *Oliver* v. *Hunting* (1890), 44 Ch.D. 205; *Studds* v. *Watson* (1884), 28 Ch.D. 305.

(*i*) *Wylson* v. *Dunn* (1887), 34 Ch.D. 569; *Coombs* v. *Wilkes*, [1891] 3 Ch. 77; *Baumann* v. *James* (1868), L.R. 3 Ch. 508.

(*j*) *Phillips* v. *Edwards* (1864), 33 Beav. 440; *McClung* v. *McCracken* (1882), 3 Ont. 596; *Moritz* v. *Knowles* (1899), W.N. 40, reversed in appeal at p. 83; but see contra, *Gillatley* v. *White* (1871), 18 Gr. 1.

(*k*) *McLaughlin* v. *Mayhew* (1903), 6 Ont. L.R. 174; see *In re Hoyle, Hoyle* v. *Hoyle*, [1893] 1 Ch. 84.

(*l*) *Stokell* v. *Niven* (1889), 61 L.T. 18; see also *Williams* v. *Jordan* (1877), 6 Ch.D. 517.

who the other party was(*m*). Where it appeared that the lease was to be granted to a person who had paid a specified sum, it was held that he was sufficiently indicated on payment thereof by him(*n*).

The agreement may be made under this section by an agent duly authorized, although the authority is not in writing(*o*). If the parties to the agreement are acting as agents, it is not necessary that their principals should be named, or that the fact of agency should appear, and parol evidence is admissible in such a case to show who the principals are(*p*).

(*b*) *Description of the Property.*

The memorandum or agreement must contain a description of the property to be leased, but it need not be a specific description nor such as would be sufficient to identify the property; and parol evidence may be given on the question of "parcel or no parcel"(*q*). It need not contain any words showing that the parties agreed on a definite property, if they have in fact agreed on it and it can be shown by parol(*r*).

The following letter written by the defendant to the plaintiff: "I promise to give you $300, provided you can give me a transfer lease with privilege to make an opening between your premises and my own. Cash to be paid on

(*m*) *Jarrett* v. *Hunter* (1886), 34 Ch.D. 182; *Catling* v. *King* (1877), 5 Ch.D. 660; *Rossiter* v. *Miller* (1878), 3 App. Cas. 1124; *Coombs* v. *Wilkes*, [1891] 3 Ch. 77.

(*n*) *Carr* v. *Lynch*, [1900] 1 Ch. 613.

(*o*) *Heard* v. *Pilley* (1869), L.R. 4 Ch. 548.

(*p*) *Filby* v. *Hounsell*, [1896] 2 Ch. 737.

(*q*) *Daniels* v. *Davison* (1809), 16 Ves. 249; 10 R.R. 171; *Oliver* v. *Hunting* (1890), 44 Ch.D. 205; *Price* v. *Griffith* (1851), 1 DeG. M. & G. 80.

(*r*) *Plant* v. *Bourne*, [1897] 2 Ch. 281.

completion of transfer lease. This is as I understand it," was held to describe the premises with sufficient certainty(*s*).

Where the proposed lessor agrees to lease lands, but has title to only a part, he may be compelled to lease that part to which he has title, with an abatement of rent(*t*). Thus where an agreement provided for a lease of 249 acres at a specified rent, and the lessor had only 214 acres, it was held that he must grant a lease of what he had at a rent reduced proportionally to the number of acres(*u*).

Where the owner of an oil well lot, on which was also situate a blacksmith's shop, which was known not to be the property of the owner of the land, agreed to lease the oil well and lot for a term of years without any express exception of the blacksmith's shop, it was held that the intended lessee could not obtain specific performance except of the lot without the shop(*v*).

A description of the lands by reference to deeds in which they are described is sufficient(*w*).

(*c*). *Beginning and Length of the Term.*

Date of beginning of term.

An executory agreement for a lease does not satisfy the Statute, unless it can be collected from it on what day the term is to begin. The mere fact that the agreement bears a date, does not imply that that date is intended to be the commencement of the term(*x*).

The rule, however, is different in the case of lease or actual present demise. In such a case the term begins on the

(*s*) *Bland* v. *Eaton* (1881), 6 Ont. App. 73.

(*t*) *Barrow* v. *Scammell* (1881), 19 Ch.D. 175.

(*u*) *McKenzie* v. *Hesketh* (1877), 7 Ch.D. 675.

(*v*) *Morris* v. *Kemp* (1867), 13 Gr. 487.

(*w*) *Owen* v. *Thomas* (1834), 3 Myl. & K. 353.

(*x*) *Marshall* v. *Berridge* (1881), 19 Ch.D. 233, overruling *Jacques* v. *Millar* (1877), 6 Ch.D. 153; *Blore* v. *Sutton* (1817), 3 Mer. 237; 17 R.R. 74; *Carroll* v. *Williams* (1881), 1 Ont. 150; *Humphrey* v. *Conybeare* (1899), 80 L.T. 40.

date of the instrument, or of its delivery in the absence of other express provision(*y*).

The words "immediate possession to be given if required" in an agreement for a lease, are not sufficient to specify the beginning of the term(*z*). But where an agreement provided that the rent was to be payable from a certain date it was held that the term was to commence on that date(*a*). And where possession was to be given on payment of a certain sum, it was held that the term was to commence when such payment was made(*b*).

Where there is an agreement to grant an extension of a term already existing, the new term will begin on the expiration of the old one(*c*).

If possession has been given under an agreement for a lease, it may be implied that the term is to commence from the date of the taking possession, if a contrary intention does not appear from the instrument(*d*).

Length of the term.

The length of the term must also be specified in the agreement(*e*). But where an agreement is for an assignment of a term already existing, it will be assumed that the whole term is to pass(*f*). If, however, the agreement is for an underlease only, the duration of the term must be specified(*f*).

Under an agreement for a lease "for 7, 14 or ———

(*y*) *Marshall* v. *Berridge* (1881), 19 Ch.D. 237, per Jessel, M.R.; *Doe* v. *Benjamin* (1839), 9 A. & E. 644.

(*z*) *Rock Portland Co.* v. *Wilson* (1882), 52 L.J. Ch. 214.

(*a*) *Wesley* v. *Walker* (1878), 38 L.T. 284.

(*b*) *Erskine* v. *Armstrong* (1887), 20 L.R. Ir. 296.

(*c*) *Verlander* v. *Codd* (1823), T. & R. 352.

(*d*) *In re Lander*, [1892] 3 Ch. 41.

(*e*) *Clinan* v. *Cooke* (1802), 1 Sch. & L. 22; *Fitzmaurice* v. *Bayley* (1860), 9 H.L.C. 78.

(*f*) *Boucer* v. *Cooper* (1843), 2 Hare 408.

(*f*) *Dolling* v. *Evans* (1867), 36 L.J. Ch. 474; see also *Kusel* v. *Watson* (1879), 11 Ch.D. 129.

years," the lessee is entitled to a lease for 14 years, determinable at his option at the end of seven years(*g*).

An agreement in writing for a lease of lands not specifying the term, and requiring parol evidence in order to connect it with a writing in which the term is mentioned, does not satisfy the Statute(*h*).

(*d*) *The Amount of Rent Reserved.*

The amount of rent agreed to be paid must also be mentioned in the agreement(*i*), but an agreement for an annual rent to be settled by arbitration is sufficient(*j*).

It is not necessary that the agreement should state the time of payment, as in the absence of an express provision it will be deemed to be payable at the end of each year of the term(*k*).

(*e*) *Special Terms.*

Where any special or unusual terms have been actually agreed on, they must be embodied in the agreement and expressed with reasonable certainty(*l*).

Where some of the terms of an agreement in writing have been afterwards altered by parol, specific performance of the agreement as altered will not be decreed(*m*), as the terms of an agreement within the Statute must be wholly proved by writing(*n*). Where one party asks specific performance of a written agreement with a parol variation in

(*g*) *Powell* v. *Smith* (1872), L.R. 14 Eq. 85.

(*h*) *Clinan* v. *Cooke* (1802), 1 Sch. & L. 22; 9 R.R. 3.

(*i*) *Gregory* v. *Mighell* (1811), 18 Ves. 328; 11 R.R. 207.

(*j*) *Powell* v. *Lovegrove* (1856), 8 DeG. M. & G. 357.

(*k*) *Coomber* v. *Howard* (1845), 1 C.B. 440; *Collett* v. *Curling* (1847), 10 Q.B. 785.

(*l*) *Gardner* v. *Fooks* (1867), 15 W.R. 388; *Baumann* v. *James* (1868), L.R. 3 Ch. 508; *Price* v. *Griffith* (1851), 1 DeG. M. & G. 80.

(*m*) *Jordan* v. *Sawkins* (1791), 1 Ves. 402.

(*n*) *Goss* v. *Lord Nugent* (1833), 5 B. & Ad. 58; 39 R.R. 392.

favour of the other party, the court will grant it(*o*); and the Court will also enforce an agreement with variations, if the defendant elects to accept them, and if not, it will enforce the original agreement(*p*).

An agreement to rescind a written agreement for a lease is not within the Statute, and may be made verbally(*q*).

(*f*) *Signature.*

The memorandum required by the Statute need not be signed by both parties, but it must be signed by the party to be charged or his agent; and if it be signed by only one of the parties, it will be enforced as against him, although he cannot sue on it(*r*). A signature written in pencil, or printed, or made by initials only, is sufficient(*s*).

5. *Part Performance.*

Although the Statute requires an agreement for a lease to be made in writing, a verbal agreement for a lease may be enforced by courts of equity where the agreement has been partly performed. Such courts have held that in an action based on part performance the defendant is "charged," not on the agreement, but on the equities resulting from the acts done in carrying out the agreement, and that such acts may have the effect of excluding the operation of the Statute(*t*).

(*o*) *Martin* v. *Pycroft* (1852), 2 DeG. M. & G. 785.

(*p*) *Robinson* v. *Page* (1826), 3 Russ. 114; 27 R.R. 26.

(*q*) *Goss* v. *Lord Nugent* (1833), 5 B. & Ad. 58; 39 R.R. 392.

(*r*) *Laythoarp* v. *Bryant* (1836), 2 Bing. N.C. 735; 42 R.R. 709; *Boyes* v. *Ayerst* (1822), 6 Madd. 316; Fry, p. 220; *Evans* v. *Hoare*, [1892] 1 Q.B. 593.

(*s*) *Lucas* v. *James* (1849), 7 Hare 410; *Tourret* v. *Cripps* (1879), 48 L.J. Ch. 567; Sugden, V. & P., 14th ed., p. 144.

(*t*) *Maddison* v. *Alderson* (1881), 8 App. Cas. 467, per Selborne, L.C.

Maddison v. Alderson.

In the judgment of the Court of Appeal in *Maddison* v. *Alderson*(*t*), afterwards affirmed by the House of Lords(*u*), the conditions under which part performance will exclude the operation of the Statute are laid down as follows:—

"It is a well-recognized rule that if in any particular case, the acts of part performance of a parol agreement as to an interest in land, are to be held sufficient to exclude the operation of the Statute of Frauds, they must be such as are unequivocally referable to the agreement; in other words there must be a necessary connection between the acts of part performance and the interest in the land which is the alleged subject matter of the agreement.... They must be such as could have been done with no other view or design than to perform the agreement....The admission into possession of a stranger is, speaking in general terms, a sufficient part performance, for it is not explicable upon any ground other than that it has resulted from a contract in respect of the land of which possession has been given."

If a tenant with the consent of the owner enters into possession of land, or does any act such as clearly appears to have been done in pursuance and on the faith of an agreement for a lease or other interest which is not otherwise enforceable by reason of the Statute of Frauds, or if a tenant pay and the landlord receive rent under an agreement which is itself clearly proved, these acts will be treated as part performance to take the case out of the statute, and specific performance will be decreed accordingly. Thus, where a landlord, having verbally agreed with his tenant to grant him a lease for twenty-one years at an increased rent, with the option of purchasing the freehold, died before the execution of the lease, but before his death the tenant had paid one quarter's rent at the increased rate,

(*u*) 8 App. Cas. 467.

it was held that this constituted a sufficient part performance of the agreement to take the case out of the Statute of Frauds, and specific performance was decreed(*v*).

Verbal agreement for less than three years.

A verbal lease, or more properly speaking, a verbal agreement for a present demise, although for a term less than three years, is not valid as a lease and cannot operate to create the relation of landlord and tenant. It is only an inchoate agreement for a lease, and in the absence of acts of part performance, it cannot be enforced by either of the parties.

Such an agreement is, as has been mentioned, a contract respecting an interest in land within the meaning of the fourth section of the Statute of Frauds, which provides that no action shall be brought upon it. The intended lessee, if possession is refused him, cannot bring an action to recover possession, or for damages for such refusal(*w*).

Thus in an action for damages for refusing to give possession of premises, of which the plaintiff alleged that defendant had orally agreed to give him a lease for sixteen months, it was held that the evidence did not shew an actual letting, but that, even if it did, the plaintiff must fail under section 4 of the Statute of Frauds, as the action was brought in respect of an agreement for an interest in land(*x*).

So the intended lessee, in case he refuses to take possession, is not liable for the rent agreed to be paid in an action by the lessor(*y*). Thus, where the plaintiffs' agent offered to lease a house to defendant at £100 a year, payable quarterly, and defendant assented to the terms, but never occu-

(*v*) *Nunn* v. *Fabian* (1865), L.R. 1 Ch. 35.

(*w*) *Moore* v. *Kay* (1883), 5 Ont. App. 261; *Edge* v. *Strafford* (1831), 1 Tyr. 295; 35 R.R. 746; *Kyle* v. *Stocks* (1871), 31 U.C.R. 47.

(*x*) *Moore* v. *Kay* (1883), 5 Ont. App. 261.

(*y*) *Bank of Upper Canada* v. *Tarrant* (1860), 19 U.C.R. 423.

pied, it was held that the defendant was not liable for the rent, although he got the key by the agent's directions, and went to examine the house, and, leaving the key in the door, returned and said he would take it(*z*).

In the case of a parol agreement for a lease for more than three years, where the lessee entered and was ejected by a subsequent purchaser, it was held that he could not recover damages against his lessor, the agreement not being in writing as required by the Statute of Frauds(*a*).

But where a tenant enters under a verbal agreement, and goes out of possession before the end of the term, he is liable for the rent for the whole term, in an action for use and occupation(*b*).

A verbal agreement may, however, be relied on as a defence, although no action could be brought on it(*c*).

Possession of part sufficient.

A verbal agreement for a present demise is valid only if possession be taken under it. But where possession has been taken of part of the demised lands, it is a sufficient part performance to exclude the operation of the Statute. Thus, where the lessor had agreed orally to let certain premises for a year, to commence at a future day, and on that day put the lessee into possession of part of the demised premises, but could not give him the possession of the residue, in consequence of which the lessee suffered loss, and sued defendant on the agreement, it was held that he was entitled to recover, and the lessor could not successfully object that the agreement was void under the statute(*d*).

(*z*) *Bank of Upper Canada* v. *Tarrant* (1860), 19 U.C.R. 423; but see *Power* v. *Griffin* (1887), 20 N.S.R. 52, in which there is a dictum that the intended lessee was liable for rent under a verbal agreement for a present demise, although he never entered.

(*a*) *Draper* v. *Holborn* (1874), 24 U.C.C.P. 122.

(*b*) *Smallwood* v. *Sheppards*, [1895] 2 Q.B. 627.

(*c*) *McGinness* v. *Kennedy* (1869), 29 U.C.R. 93.

(*d*) *Clark* v. *Serricks* (1851), 2 U.C.R. 535.

Where a person entered into possession, and sowed a crop, upon an oral understanding that he should have the products thereof, but no special time for occupation was mentioned, it was held that a sufficient tenancy was created to entitle him to such crop(*e*).

Continuance in possession.

Mere continuance in possession, where an agreement for a lease is made with a tenant already in possession, is not sufficient as part performance to exclude the operation of the statute, because mere continuance in possession is not referable to the agreement alone(*f*).

Increased rent.

But payment of an increased rent by a tenant in possession under an agreement for a new lease is sufficient(*g*).

The rebuilding, by a tenant, of a party wall which was in a ruinous state during his term, is not sufficient part performance of a verbal agreement for a new lease, as such an act might equally be referred to his present tenancy(*h*). So the expenditure of money by a tenant in the ordinary course of husbandry is insufficient as part performance(*i*).

Special expenditures.

But where a tenant in possession makes special expenditures, which cannot be referred to his present tenancy, they will be deemed sufficient acts of part performance to support an agreement for a new lease(*j*).

Draft lease.

Where an agreement was made after possession had been taken, and a draft lease had been prepared, but not executed, and rent had been paid in pursuance of the terms thereof, it was held that there had been a sufficient part performance(*k*).

(*e*) *Mulherne* v. *Fortune* (1858), 8 U.C.C.P. 434.

(*f*) *Wills* v. *Stradling* (1797), 3 Ves. 378; 4 R.R. 26.

(*g*) *Nunn* v. *Fabian* (1865), L.R. 1 Ch. 35; applied in *Miller* v. *Sharp*, [1899] 1 Ch. 622.

(*h*) *Frame* v. *Dawson* (1807), 14 Ves. 386; 9 R.R. 304; see also *Lindsay* v. *Lynch* (1804), 2 Sch. & L. 1; 9 R.R. 54.

(*i*) *Brennan* v. *Bolton* (1842), 2 Dr. & W. 349.

(*j*) *Wills* v. *Stradling* (1797), 3 Ves. 378; 4 R.R. 26.

(*k*) *Hodson* v. *Henland*, [1896] 2 Ch. 428.

Jurisdiction discretionary.

The jurisdiction of the court to grant specific performance is purely discretionary, and a decree will not be made where the term agreed on has expired, or will expire before a decree can be obtained(*l*); nor where the agreement is for a yearly tenancy(*m*).

Failure of negotiations.

Where a person is let into possession pending negotiations for a lease, he becomes a tenant at will(*n*); and if the negotiations fall through, the tenancy may be determined by a demand of possession(*o*).

Thus, where A. entered into negotiations and discussed terms, with a loan company, who were the owners of a farm, for a lease, and pending the preparation of a lease he was allowed to enter into possession, but refused to execute the lease which was prepared, whereupon the company sold the land and served a demand of possession, it was held in an action by the purchaser to recover possession, that as A. was not in possession under any concluded agreement regarding the lease, he was merely in as a tenant at will to the loan company, which tenancy was determined by the demand of possession(*p*).

6. *Usual Covenants.*

"Self-contained" agreement.

When specific performance of an agreement to grant a lease has been decreed, the court will insist on the insertion in the lease of "usual" covenants, if the agreement itself provides for such covenants, or if it is not "self-contained," and contemplates a lease with usual covenants. Thus, where an agreement made between the City of Toronto and

(*l*) *Nesbit* v. *Myer* (1818), 1 Swanst. 226; *De Brassac* v. *Martyn* (1863), 11 W.R. 1020.

(*m*) *Clayton* v. *Illingworth* (1853), 10 Hare 451.

(*n*) *Howard* v. *Shaw* (1841), 8 M. & W. 118; *Doe* v. *Pullen* (1836), 2 Bing. N.C. 749.

(*o*) *Lennox* v. *Westney* (1889), 17 Ont. 472.

(*p*) *Lennox* v. *Westney* (1889), 17 Ont. 472.

the Canadian Pacific Railway Company provided, amongst other things, for a lease renewable in perpetuity, by successive terms of fifty years, at an agreed rent, payable on named days, nothing being said about covenants, it was held that the agreement was not "self-contained," but that the execution of a formal lease was contemplated, which should contain the usual covenants, and that covenants to pay taxes, and for the right of re-entry for non-payment of rent or taxes, were, under the circumstances, usual covenants(*q*).

The question as to what are usual covenants is to be determined by considerations of locality and custom, and is sometimes left to the jury as a question of fact(*r*).

Usual covenants.

A covenant for quiet enjoyment is a "usual covenant" on the part of the lessor, and covenants to pay rent, and to pay taxes, and to repair, and to allow the lessor to enter and view state of repair, are, generally speaking, "usual covenants" on the part of the lessee(*s*).

Taxes.

A covenant by a tenant to pay taxes is *prima facie* a usual covenant, and it lies on the tenant objecting to its insertion to show that it is not usual, either in general or having regard to the circumstances of the particular case(*t*).

Repair.

A covenant to repair on the part of a railway company, although, in general, a usual covenant, will not be inserted in a lease, where the jurisdiction to keep the railway in effective operation rests with the Railway Committee of the Privy Council(*u*).

Covenant not to assign.

Under an agreement for a lease, whether containing a stipulation for usual covenants or not, the lessor is not en-

(*q*) *In re the Canadian Pacific Railway Co. and the City of Toronto* (1903), 5 Ont. L.R. 717.

(*r*) *Bennett* v. *Womack* (1828), 7 B. & C. 627.

(*s*) See chapters XI., XII., XV., and XVIII.

(*t*) *City of Toronto* v. *Canadian Pacific Railway Co.* (1890), 27 Ont. App. 54; *In re the Canadian Pacific Railway Co. and the City of Toronto* (1902), 4 Ont. L.R. 134.

(*u*) *In re the Canadian Pacific Railway Co. and the City of Toronto* (1902), 4 Ont. L.R. 134.

titled to require the insertion of a covenant not to assign or sub-let without leave(*v*).

Proviso for re-entry.

The court will not direct the insertion of a proviso for re-entry for the breach of any covenant, except the covenant to pay rent(*w*). The lessor is not entitled to have inserted a proviso for re-entry on the bankruptcy of the lessee(*x*); or on an execution being issued against him(*y*); unless it is specially agreed that the lease is to contain clauses "usually inserted in leases of property of a similar description"(*z*).

A lessee of house No. 107, signed an indorsement on the lease that he would lease house No. 109, at the same rent, upon getting possession as soon as the premises should be vacated by the then tenants. It was held that from the time of his getting possession of No. 109, the lessee held it on the same terms as No. 107, and all the terms and covenants in the lease of the latter, barring the time of getting possession and the consequent difference in the length of the terms, applied to the letting of No. 109(*a*).

(*v*) *Church* v. *Brown* (1808), 15 Ves. 258; 10 R.R. 74; *Hampshire* v. *Wickens* (1878), 7 Ch.D. 555.

(*w*) *Hodgkinson* v. *Crowe* (1875), L.R. 10 Ch. 622.

(*x*) *Ibid.*

(*y*) *Hyde* v. *Warden* (1877), 3 Ex. D. 72.

(*z*) *Haines* v. *Burnett* (1859), 27 Beav. 500.

(*a*) *Mehr* v. *McNab* (1893), 24 Ont. 653.

CHAPTER VII.

ATTORNMENT.

1. *Attornment Generally.*
2. *Attornment of a Tenant to a Mortgagee.*
3. *Attornment of a Mortgagor to His Mortgagee.*

1. *Attornment Generally.*

An attornment is an agreement of a tenant or occupant of land to acknowledge some other person as his landlord. It was originally used to signify the act of a feudatory, vassel or tenant, by which he consented, upon the alienation of an estate, to receive a new lord or superior, and transferred to him his homage and service.

Attornment necessary at common law.

At common law, whenever a landlord transferred his reversion to another by grant, an attornment of the tenant to the new owner was always necessary. An attornment, however, was not necessary in the case of a transfer of the reversion by devise or descent.

4 Anne, c. 16.

By the Statute 4 Anne, chapter 16, it was provided that a grant of a reversion should be good and effectual without any attornment of the tenant(*a*). This provision, as re-enacted in Ontario, is as follows:—

Grant of reversion effectual without attornment.

24. (1) All grants or conveyances of any rents, or of the reversion, or remainder, of any messuages or lands, shall be good and effectual to all intents and purposes without any attornment of the tenant of the land out of which such rent shall be issuing, or of the particular tenant upon whose particular estate any such reversion, or remainder, shall and may be expectant, or depending, as if his attornment had been had, and made.

(*a*) 4 Anne c. 16, s. 9; R.S.O. (1897), vol. III. c. 342, s. 24; R.S.B.C. (1897), c. 110, s. 35; see chapter XXIV.

(2) No tenant shall be prejudiced, or damaged, by payment of any rent to any grantor, or conusor, or by breach of any condition for non-payment of rent, before notice shall be given to him of such grant by the conusee, or grantee.

The effect of this enactment was to create the relation of landlord and tenant, on a transfer of the reversion, between the new owner and the tenant(*b*).

By reason of this provision the creation of tenancies by attornment is confined principally to two classes of cases: (1) Where a lease is created after the lands have been mortgaged, in which case the mortgagee and the tenant may agree by an attornment to create a new tenancy; (2) Where, by an "attornment clause" in a mortgage deed, a mortgagor agrees to become tenant to the mortgagee at a rent, the purpose of the clause usually being to give to the mortgagee, by way of additional security, the right of a landlord to distrain for arrears of interest payable as rent(*c*).

2. *Attornment of a Tenant to a Mortgagee.*

Attornment of tenant to mortgagee.

The assignment of a reversion by way of mortgage is within the statute, and a mortgagee, whose mortgage was made after the lease, is entitled to payment of rent, and to be treated as landlord by the tenant, as soon as notice is given, and the tenant continues to hold on the same terms as in his former tenancy(*d*). The lessee may, however, continue to pay all rents to his lessor until notice is given by the mortgagee(*e*).

Mortgage made before lease.

A mortgagee, however, whose mortgage was made before the lease, is not an assignee of the reversion, but of the whole estate in the land, and although he may on default eject the tenant, he is not entitled to the rent or to be treated

(*b*) *Brydges* v. *Lewis* (1842), 3 Q.B. 603.

(*c*) Other cases of attornment will be discussed in chapter VIII.

(*d*) *Cornish* v. *Searell* (1828), 8 B. & C. 471.

(*e*) *McFarlane* v. *Buchanan* (1862), 12 U.C.C.P. 591.

as landlord, unless a new tenancy is created, as a mere notice to the tenant is not sufficient(*f*) to create a tenancy, or to enable him to sue or distrain for the rent(*g*).

Section 11 of the Statute 11 George II., chapter 19, provides that every attornment of a tenant to a stranger shall be null and void; but an exception is made of an attornment to a mortgagee after default. This section as re-enacted in Ontario(*h*) is as follows:— 11 Geo. II., c. 19.

23. Every attornment of any tenant of any messuages, lands, tenements, or hereditaments, within Ontario, to any stranger claiming title to the estate of his landlord, shall be absolutely null and void to all intents and purposes whatsoever; and the possession of his landlord or lessor shall not be deemed, or construed to be, anywise changed, altered, or affected, by any such attornment; provided always that nothing herein contained shall extend to vacate, or affect any attornments made pursuant to, and in consequence of, some judgment or order of a court, or made with the privity and consent of the landlord or lessor, or to any mortgagee, after the mortgage is become forfeited. Attornment to mortgagee not void.

In such a case a new tenancy may be created between a tenant of the mortgagor and the mortgagee of the land, either expressly, as by an attornment, or by implication from conduct. Thus, if the mortgagee accepts rent from the tenant, or gives him notice to pay rent, and the tenant pays accordingly, a tenancy from year to year may arise(*i*); and the tenant will be entitled to the usual notice to quit before the mortgagee can recover possession(*k*). A tenancy so created has the effect of displacing the former tenancy, at least until the arrears under the mortgage have been satisfied(*l*). New tenancy by implication from conduct.

(*f*) Except in New Brunswick. See C.S.N.B. (1904), c. 153, s. 26.

(*g*) *Evans* v. *Elliot* (1838), 9 A. & E. 342.

(*h*) R.S.O. (1897), vol. III. c. 342, s. 23.

(*i*) *Keech* v. *Hall* (1771), 1 Doug. 21; *Smith* v. *Eggington* (1874), L.R. 9 C.P. 145; *Corbett* v. *Plowden* (1884), 25 Ch. D. 678.

(*k*) *Birch* v. *Wright* (1786), 1 T.R. 378; *Canada Permanent Building and Savings Society* v. *Rowell* (1860), 19 U.C.R. 124.

(*l*) *Doe* v. *Boulter* (1837), 6 A. & E. 675.

Inference may be rebutted.

Although a new contract of tenancy may be inferred from the fact of a notice by a mortgagee to pay rent to him, and acquiescence by the tenant by payment of the rent, still such an inference will not be drawn if the facts show that it was not intended to create such a contract, but rather that, the interest being paid, the possession of the mortgagor and his tenants was to remain undisturbed(*m*).

It has been held that rent to accrue due is not a chose in action, and a tenant may attorn in respect of it(*o*).

3. *Attornment of Mortgagor to Mortgagee.*

Attornment of mortgagor to mortgagee valid.

The parties to a mortgage may agree that, in addition to their principal relation of mortgagor and mortgagee, they shall also, in respect of the mortgaged lands, stand towards each other in the relation of landlord and tenant(*p*).

In *Ex parte Jackson*(*p*), Cotton, L.J., in delivering judgment, said:—"Undoubtedly a mortgagor and a mortgagee have the right to insert in their mortgage deed a clause making the mortgagor attorn as tenant to the mortgagee, and thus by contract constituting the relation of landlord and tenant between them."

In the same case, Thesiger, L.J., said:—"There can be no doubt that such clauses contained in mortgage deeds are valid and operative in themselves, and that they may, and ordinarily do, create the relationship of tenant and landlord between the mortgagor and mortgagee, and with it the ordinary right of distress which the law attaches to that relationship."

It is essential to the validity of such an arrangement that it should be made so as to comply with the requirements of the law for the creation of leases.

(*m*) *Forse* v. *Sovereen* (1888), 14 Ont. App. 482.
(*o*) *Harris* v. *Myers* (1869), 2 Ch. Ch. 121.
(*p*) *Ex parte Jackson, In re Bowes* (1880), 14 Ch.D. 726.

When a tenancy has been created by attornment, the mortgagee, as landlord, will be entitled to exercise the rights of a landlord, including the right of distress, and the right to be paid rent in priority to other creditors, and will be subject to the liabilities arising out of the relationship of landlord and tenant(*q*).

Tenancy not created by statutory distress clause.

It has been held that the ordinary statutory distress clause in a mortgage deed operates merely as a licence, and does not create the relation of landlord and tenant, so as to give the mortgagee the rights of a landlord in regard to distress(*r*).

Where a mortgage deed contained the following attornment clause: "And the said mortgagor doth hereby attorn and become tenant of the said lands to the mortgagees, at a yearly rental of $96, to be paid in the manner, and upon the terms hereinbefore appointed for the payment of interest," this was held sufficient to create a valid tenancy(*s*).

Mortgage need not be signed by mortgagee.

It is not necessary that the attornment or the mortgage deed containing it, should be signed by the mortgagee, notwithstanding the Statute of Frauds, as the admission of the mortgagor, by his signing the mortgage deed, of the demise and its terms, amounts to an estoppel(*t*).

The attornment to the mortgagee by deed, executed by the mortgagor in possession, and delivered to the mortgagee, is sufficient evidence of the creation of the tenancy. It is not necessary that rent should be paid, or that the mortgagor should be let into possession by the mortgagee; it is

(*q*) *Hobbs* v. *Ontario Loan and Debenture Co.* (1890), 18 S.C.R. 483, at p. 493, per Strong, J.; *McKay* v. *Grant* (1893), 30 C.L.J. 70.

(*r*) *Trust and Loan Co.* v. *Lawrason* (1882), 10 S.C.R. 679, overruling *Royal Canadian Bank* v. *Kelly* (1869), 19 U.C.C.P. 196.

(*s*) *Linstead* v. *Hamilton and Provident Loan Society* (1896), 11 Man. L.R. 199.

(*t*) *Morton* v. *Woods* (1869), L.R. 4 Q.B. 293; *Hobbs* v. *Ontario Loan and Debenture Co.* (1890), 18 S.C.R. 483.

sufficient if there is a continued occupation of the mortgagor(*u*).

Legal reversion need not be vested in mortgagee.

In order to enable the mortgagee to distrain under an attornment, it is not necessary that the legal reversion of the lands should be vested in him. For example, a second mortgagee may distrain, although he has only an equitable reversion, the legal reversion being in the first mortgagee(*v*).

In *Morton* v. *Woods*(*v*), Cockburn, C.J., in delivering judgment said: "Although it may appear on the face of the deed that the lessors have not the legal estate, yet the tenant and those who claim through him are estopped, after he has attorned, from denying that the relation of landlord and tenant existed between them."

There may be two or more attornments, in respect of the same lands, by the same mortgagor to different mortgagees, who will be entitled to distrain for the purposes of their respective mortgages during the same period of time(*w*).

Fixed rent should be reserved by attornment.

It is essential to the right of distress that a fixed rent should be reserved by the attornment. Thus, where a mortgage deed contained, in addition to the ordinary statutory proviso for distress for arrears of interest, an attornment in the following words: "And the mortgagor doth attorn to, and become a tenant at will to the mortgagee, subject to the said proviso," it was held that there was no reservation of rent sufficient to entitle the mortgagee to claim a landlord's right as against an execution creditor(*x*).

But the reservation of the rent is sufficiently certain if, by calculation, it may be made certain. Thus, where the

(*u*) *West* v. *Fritchie* (1848), 3 Ex. 216; *Morton* v. *Woods* (1868), L.R. 3 Q.B. 658; 4 Q.B. 293; *Ex parte Voisey* (1882), 21 Ch.D. 442.

(*v*) *Morton* v. *Woods* (1868), L.R. 3 Q.B. 658.

(*w*) *Ex parte Punnett* (1880), 16 Ch.D. 226.

(*x*) *Trust and Loan Co.* v. *Lawrason* (1882), 10 S.C.R. 679.

rent reserved was a monthly instalment of a fixed amount together with a fine of five per cent. per month on the whole amount unpaid, it was held to be sufficiently ascertained(*y*).

No tenancy after maturity unless so provided.

Where the mortgagor becomes tenant by attornment to the mortgagee until the maturity of the mortgage, it has been held that there was no definite tenancy after maturity, and that the interest accruing thereafter, not being recoverable by the terms of the contract, but as damages, the amount payable as rent became uncertain, and there was, therefore, no right of distress(*z*).

When notice necessary before distress.

Where it is stipulated in the attornment that the mortgagor shall become tenant to the mortgagee *upon making default* in any of the payments, the mortgagee has no right to distrain, unless he first gives notice to the mortgagor that he intends to treat him as tenant(*a*).

Tenancy may be determined by will of mortgagee if so provided.

A tenancy created by attornment from year to year, or from month to month, will be a good yearly or monthly tenancy, although it is provided that it may be determined at any time by the will of the mortgagee(*b*).

Where the tenancy created by the attornment is a tenancy at will, it comes to an end with the death of the mortgagor, and the mortgagee cannot distrain on the heirs(*c*).

The existence of a tenancy created by attornment may interfere with a mortgagee's right to take possession, unless he has the power to determine the tenancy at any time(*d*), and an attornment giving a mortgagee this right is valid(*e*).

(*y*) *Ex parte Voisey* (1882), 21 Ch.D. 442.

(*z*) *Klinck* v. *Ontario Industrial Loan and Investment Co.* (1888), 16 Ont. 562.

(*a*) *Clowes* v. *Hughes* (1870), L.R. 5 Ex. 160.

(*b*) *In re Threlfall* (1880), 16 Ch.D. 274.

(*c*) *Scobie* v. *Collins*, [1895] 1 Q.B. 375.

(*d*) *In re Stockton Iron Furnace Co.* (1879), 10 Ch.D. 335.

(*e*) *Doe d. Garrod* v. *Olley* (1840), 12 A. & E. 481; *Metropolitan Counties Assurance Society* v. *Brown* (1859), 4 H. & N. 428.

Mortgagee in possession liable to account.

The effect of an attornment to a mortgagee is to render him liable, as a mortgagee in possession, to account to subsequent incumbrancers for rent which, but for his wilful default, he might have received(*f*). It is usual, therefore, to stipulate in the attornment that the mortgagee shall not be liable as a mortgagee in possession except for moneys actually received.

A form of attornment clause commonly used is as follows:

Form of attornment clause.

"The mortgagor hereby attorns to the mortgagee and becomes a tenant to him of the said lands during the term of this mortgage, at a rent equivalent to, and payable on, the same days and times as the payments of interest are hereinbefore agreed to be paid, such rent when so paid to be in satisfaction of such payments of interest. Provided that the mortgagee may, on default of payment, or on breach of any of the covenants hereinbefore contained, enter on the said lands and determine the tenancy hereby created without notice. Provided that neither the existence of this clause, nor anything done by virtue thereof shall render the mortgagee liable as a mortgagee in possession, so as to be accountable for moneys except those actually received."

An attornment does not come within the Ontario Bills of Sale Act, and does not require to be registered in pursuance thereof(*g*). But it has been held in England that it is within the English Bills of Sale Acts of 1878 and 1882, which apply expressly to instruments giving power of distress by way of security(*h*).

(*f*) *In re Stockton Iron Furnace Co.* (1879), 10 Ch.D. 335; *Ex parte Punnett* (1880), 16 Ch.D. 226; *Ex parte Harrison* (1881), 18 Ch.D. 127, at p. 135. But Bacon, V.-C., in *Stanley* v. *Grundy* (1883), 22 Ch.D. 478, decided otherwise.

(*g*) *Trust and Loan Co.* v. *Lawrence* (1881), 6 Ont. App. 286, affirmed 10 S.C.R. 679. See also *In re Stockton Iron Furnace Co.* (1879), 10 Ch.D. 335.

(*h*) *Green* v. *Marsh*, [1892] 2 Q.B. 330.

Bona fide intention.

In order to give the mortgagee a right to distrain, the tenancy under an attornment must be a real tenancy created in good faith and intended to be acted upon. If it is a mere contrivance to enable the mortgagee to seize the goods of third parties, or to obtain priority over other creditors, it will not be upheld. Thus, where the rent reserved is more than a willing tenant would pay as a *bona fide* rent, the mortgagee will not be entitled to distrain as against third parties(*i*).

Yet even if the right of distress is taken away as against third parties, the relation of landlord and tenant is not thereby destroyed as between mortgagor and mortgagee(*j*).

(*i*) *Ex parte Jackson* (1880), 14 Ch.D. 725; *Hobbs* v. *Ontario Loan and Debenture Co.* (1890), 18 S.C.R. 483; *Imperial Loan and Investment Co.* v. *Clement* (1896), 11 Man. L.R. 428, 445. See chapter IV.

(*j*) *Mumford* v. *Collier* (1890), 25 Q.B.D. 279.

CHAPTER VIII.

ESTOPPEL.

1. *Estoppel Generally.*
2. *Estoppel Against a Tenant.*
   (a) *In Favour of a Landlord Who Let Him Into Possession.*
   (b) *In Favour of a Landlord Who Did Not Let Him Into Possession.*
3. *Estoppel Against a Landlord.*

1. *Estoppel Generally.*

Estoppel.

When a person is by law prevented from asserting a fact or claim, irrespective of its truth or validity, by reason of a previous admission, representation or adjudication, he is said to be estopped from so doing, and such admission, representation or adjudication is said to form an estoppel, or in other words a bar or impediment to such assertion.

"Estoppe," says Lord Coke(*a*), "cometh of the French word *estoupe*, from whence the English word *stopped*; and it is called an estoppel or conclusion, because a man's own act or acceptance stoppeth or closeth up his mouth to allege or plead the truth."

Kinds of estoppel.

Estoppel in law is of three kinds: (1) estoppel by deed, arising from the execution of an instrument under seal, whereby a person executing it is estopped from denying the truth of anything contained in it; (2) estoppel by record, arising from the adjudication of a court of record, whereby a party to such adjudication will not be heard to maintain

(*a*) Co. Litt. 352a.

the contrary of what has been decided; (3) estoppel *in pais*, or equitable estoppel, arising from an assertion or admission, express or implied, under circumstances rendering it inequitable to allow the person making it to withdraw from the position taken, and to assume or maintain a different position. Thus, where the owner of property has stood by and allowed it to be sold as the property of another without objection, the law will not allow him in any action or proceeding to assert or maintain that he is the owner.

Estoppel as between landlord and tenant.

So the parties entering into the relationship of landlord and tenant are mutually estopped from denying or disputing that relationship; the landlord will not be allowed to set up any claim against the tenant founded on the fact or assertion that he had no title to bestow; and the tenant, so long as he continues in possession under the lease, will not be permitted to set up any defence against the landlord founded on the fact or assertion that the landlord was not entitled to make the demise.

In *Morton* v. *Woods*(*b*), Lush, J., said: "Inasmuch as the parties have agreed that they should stand in the relation of landlord and tenant, and the one accordingly receives possession from the other and enters on the premises, so long as he continues in possession he cannot be heard to deny the state of facts which he has agreed shall be taken as the basis of the arrangement: in other words he cannot set up that the landlord has no legal title."

As between landlord and tenant, estoppel as to the landlord's title is founded on the admission implied by law on the part of both parties to that relation, that at the time of the demise the landlord had a good title to the premises.

"It would be contrary to the principle," said Sir Thomas Plumer, M.R.(*c*), "upon which the relation between landlord and tenant exists to allow the tenant to dis-

(*b*) *Morton* v. *Woods* (1868), L.R. 3 Q.B. at p. 671.
(*c*) *Attorney-General* v. *Hotham* (1823), 1 T. & R. 209, at p. 220.

pute his landlord's title: for there is an implied covenant that the landlord shall protect the tenant's enjoyment and the tenant shall guard the landlord's title."

Applies to all tenancies.

The rule applies to all tenancies, whether for years, at will or by sufferance(*d*), and also to mere licensees(*e*). It also applies whether the tenancy has been created by deed(*f*), or otherwise(*g*); and although the letting has been made by an agent of the landlord whose name was not disclosed to the tenant(*h*).

Estoppel may be pleaded in all actions.

The estoppel arising from the relation of landlord and tenant applies generally and may be pleaded in all actions between them, for example, in actions for rent(*i*); in actions upon covenants contained in the lease(*j*); in actions for use and occupation(*k*); in actions of trespass(*l*); in actions of replevin(*m*); in actions for illegal distress(*n*); and in actions of ejectment(*o*).

With regard to estoppel as against the tenant and those claiming under him, there are two classes of cases that may be noticed: (a) where the tenant has received possession from the person in favour of whom the estoppel is claimed; (b) where the tenant has not received possession from the person claiming the estoppel, but by attornment or payment of rent to him, or by accepting a lease from him, has acknowledged such person as landlord.

(*d*) *Doe* v. *Foster* (1846), 3 C.B. 215.
(*e*) *Doe* v. *Baytup* (1835), 3 A. & E. 188.
(*f*) *Wilkins* v. *Wingate* (1794), 6 T.R. 62.
(*g*) *Phipps* v. *Sculthorpe* (1817), 1 B. & A. 50; 18 R.R. 426; *London and Northwestern Railway Co.* v. *West* (1867), L.R. 2 C.P. 553.
(*h*) *Fleming* v. *Gooding* (1834), 10 Bing. 549.
(*i*) *Parker* v. *Manning* (1798), 7 T.R. 537.
(*j*) *Cuthbertson* v. *Irving* (1860), 6 H. & N. 135.
(*k*) *Dolby* v. *Iles* (1840), 11 A. & E. 335.
(*l*) *Delaney* v. *Fox* (1857), 2 C.B.N.S. 768.
(*m*) *Dancer* v. *Hastings* (1826), 4 Bing. 2.
(*n*) *Downey* v. *Crowell* (1892), 24 N.S.R. 318.
(*o*) *Doe* v. *Smythe* (1815), 4 M. & S. 347.

2. *Estoppel Against Tenant*:

(a) *In Favour of the Landlord Who Let Him Into Possession.*

Estoppel against tenant.

A tenant, so long as he retains possession, is estopped from disputing that the landlord who let him into possession had, at the time of making the demise, a good title to the premises.

Tenant cannot set up want of title at the time of the demise.

A tenant will not be permitted to maintain, for example, that his landlord had previously conveyed the fee and at the time of the demise had no title(*p*); or that he had previously mortgaged the lands, and at the time of the demise had not the legal estate(*q*); or that he had previously demised to another for an interest that was still subsisting(*r*); or that he held under a grant from the Crown that was invalid(*s*); or that at the time of the demise the person entitled was his trustee in bankruptcy(*t*); for "upon the execution of the lease there is created, in contemplation of law, a reversion in fee simple by estoppel in the lessor"(*u*).

When a lessee took a lease for two years, and covenanted to leave the premises without notice at the end of that time, it was held, in an action of ejectment by the lessor at the end of the term that the lessee could not set up a former lease to himself for a longer period(*v*).

A lessee whose lease has expired cannot set up a lease from the lessor to a third party, to commence at the expira-

(*p*) *Palmer* v. *Ekins* (1725), 2 Ld. Ray. 1550.

(*q*) *Alchorne* v. *Gomme* (1824), 2 Bing. 54; *Cameron* v. *Todd* (1863), 22 U.C.R. 390; 2 E. & A. 434.

(*r*) *Phipps* v. *Sculthorpe* (1817), 1 B. & A. 50.

(*s*) *Doe* v. *Abrahams* (1816), 1 Stark. 305.

(*t*) *Cook* v. *Whellock* (1890), 24 Q.B.D. 658.

(*u*) *Cuthbertson* v. *Irving* (1860), 4 H. & N. 742; 6 H. & N. 135.

(*v*) *Doe d. Wimburn* v. *Kent* (1837), 5 O.S. 437.

tion of his lease, nor contend that the lessee under that lease was the person entitled to possession(*w*).

Although lessor had no title.

The estoppel applies to a lessee, although the lessor had no title to the land and had no power to lease it. Thus, where the lessee dealt with the lessor as personal representative of her husband's estate, and became tenant to her as such, it was held that he was estopped from objecting that the land was not hers, or that she had no power to lease it(*x*).

Even if lease discloses want of title.

Although the instrument of demise discloses a want of title in the landlord, an estoppel nevertheless arises, and the tenant will not be permitted to assert such want of title(*y*).

Or if title is tainted with illegality.

A tenant, so long as he retains possession, cannot call in question the title of the landlord who let him into possession, even if that title is tainted with fraud or illegality(*z*).

Estoppel extends to all lands.

The estoppel against the lessee extends to all the lands received by him from the lessor, although the lands of which he has taken possession include part of a lot to which the lessor had no title, but which by reason of an error in the boundary line the lessor had used as part of his own land(*a*).

A lease of a house carries with it the land, and the lessee of a house cannot dispute the lessor's title to the land on which it stands(*b*).

A tenant is estopped from denying his landlord's title and is bound by his covenants, although the lease under

(*w*) *Fox* v. *Macauley* (1863), 12 U.C.C.P. 298.

(*x*) *Christie* v. *Clarke* (1867), 16 U.C.C.P. 544.

(*y*) *Jolly* v. *Arbuthnot* (1859), 4 DeG. & J. 224; *Morton* v. *Woods* (1869), L.R. 4 Q.B. 293, overruling *Cuthbertson* v. *Irving* (1860), 6 H. & N. 135; but *Lyster* v. *Kirkpatrick* (1866), 26 U.C.R. 217, and *Patterson* v. *Smith* (1881), 42 U.C.R. 1, seem to have decided the contrary.

(*z*) *Parry* v. *House* (1817), Holt N.P.C. 489.

(*a*) *Davey* v. *Cameron* (1856), 14 U.C.R. 483; see also *In re Cockburn* (1896), 27 Ont. 450.

(*b*) *Renalds* v. *Offitt* (1857), 15 U.C.R. 221.

which he took possession was not signed by the lessor, or by anyone having authority to do so(*c*).

Lessee must restore possession.

Where a tenant who had taken a lease from a doweress and paid rent, afterwards purchased the interests of the heirs, it was held that he was estopped at the end of his term from setting up that her right to dower had been barred by the Statute of Limitations, and that he must restore possession to her before setting up an adverse claim(*d*).

An estoppel will not be allowed so as to interfere with the proper carrying out of an Act of Parliament(*f*). It has been considered doubtful whether a tenant or licensee of land is estopped from maintaining that his landlord's or licensor's title is void on a statutable ground(*g*).

Estoppel extends to all persons claiming under tenant.

The estoppel extends to all persons claiming under the tenant, as, for example, an assignee(*h*), or a sub-lessee, or an heir of the tenant(*i*). Thus where a person entered into possession under one B., who orally promised him a deed of the land to be executed as soon as he himself should receive a conveyance from the owner whose tenant at will he was, it was held that the heirs of such person were estopped from disputing B.'s title(*j*).

A person who obtains possession of lands from the tenant by paying him a sum of money, or by collusion with him, or otherwise, is estopped from denying the landlord's

(*c*) *Municipal Council of Frontenac* v. *Chestnut* (1851), 9 U.C.R. 365.

(*d*) *Pyatt* v. *McKee* (1883), 3 Ont. 151.

(*f*) *United Counties of Peterborough and Victoria* v. *Grand Trunk Railway Co.* (1860), 18 U.C.R. 220.

(*g*) *Hallock* v. *Wilson* (1857), 7 U.C.C.P. 28; but see *Cooke* v. *Loxley* (1792), 5 T.R. 4; 2 R.R. 521.

(*h*) *Taylor* v. *Needham* (1810), 2 Taunt. 278; *Jones* v. *Todd* (1863), 22 U.C.R. 37.

(*i*) *London and Northwestern Railway Co.* v. *West* (1867), L.R. 2 C.P. 553.

(*j*) *Armstrong* v. *Armstrong* (1871), 21 U.C.C.P. 4.

title to the same extent as the tenant would have been, although such person may have acquired *aliunde* a valid title, and may be entitled to possession thereunder(*k*).

Thus, where a purchaser of land at a sheriff's sale, having reason to believe that he could not get possession without legal proceedings against the former owner, contrived by collusion with the former owner's tenant to get into possession without his consent, it was held in ejectment by the former owner that the possession thus obtained was on no higher footing than that of the tenant, and that such purchaser must abandon the possession obtained through the tenant, although he might afterwards maintain an action to recover possession (*l*).

Relation of landlord and tenant must exist between the parties.

The rule, however, does not apply unless it be shown that the relation of landlord and tenant exists between the parties to the action or their predecessors in title; it is not sufficient to show that the defendant occupied as a tenant; it must be shown that he was a tenant of the plaintiff, or of his predecessor in title (*m*).

Tenant may show that title ceased at a time subsequent to demise.

But while a tenant cannot dispute that the landlord had title at the time of the demise, it is always open to him to show, as against the person who let him into possession or anyone claiming under him, that such title has ceased at a time subsequent to the demise (*n*).

Thus, he will be permitted to show that the landlord has parted with the reversion since the demise (*o*); and that his landlord was a lessee for a term of years which has ex-

(*k*) *White* v. *Nelles* (1884), 11 S.C.R. 587; *Doe* v. *Mills* (1834), 2 A. & E. 17; *Ford* v. *Ager* (1863), 2 H. & C. 279; *Bliss* v. *Estey* (1855), 8 N.B.R. 489.

(*l*) *Doe d. Miller* v. *Tiffany* (1848), 5 U.C.R. 79.

(*m*) *Baldwin* v. *Burd* (1860), 10 U.C.C.P. 511.

(*n*) *Hopcraft* v. *Keys* (1833), 9 Bing. 613; *Hartley* v. *Jarvis* (1850), 7 U.C.R. 545.

(*o*) *Harmer* v. *Bean* (1853), 3 C. & K. 307.

pired(*p*); and as against a devisee or assignee, that the landlord was only entitled during the life of another who has since died (*q*); and against the heir or devisee that the landlord had only a life estate, and that he has since died, although the lease contains a covenant that the tenant will deliver up possession at the end of the term to the landlord, his heirs and assigns (*r*).

So under a demise by a tenant for life to the person entitled in reversion, the latter is not estopped, by a covenant in the lease that he would pay rent to the lessor, her heirs and assigns, from showing that he has by her death become the owner (*s*).

Where a lease was granted by a man of his wife's land, it was held that the lessee might show, after her death without issue, that the lessor was not entitled to the land as tenant by the curtesy (*t*).

So where a woman, having possession of land but no other title, leased it for the period of her life at an annual rent, the lessee is not estopped from showing, as against her heirs, that her title determined at her death, and that she professed to have no greater title (*u*).

But payment of rent by a sub-lessee, with knowledge that the title of his lessor, who was a tenant for years, had ceased, operates as an estoppel so that he will not be allowed to show that the head lease has expired (*v*).

But on payment of rent estoppel revives.

In an action of ejectment by a landlord against a tenant whose term had expired the defendant is not precluded

(*p*) *England* v. *Slade* (1792), 4 T.R. 682.

(*q*) *Doe* v. *Ramsbotham* (1815), 3 M. & S. 516.

(*r*) *Doe* v. *Seaton* (1835), 2 C.M. & R. 728.

(*s*) *Thatcher* v. *Bowman* (1889), 18 Ont. 265.

(*t*) *Robertson* v. *Bannerman* (1859), 17 U.C.R. 508.

(*u*) *Patterson* v. *Smith* (1881), 42 U.C.R. 1; but see *Pyatt* v. *McKee* (1883), 3 Ont. 151; *Downey* v. *Crowell* (1892), 24 N.S.R. 318.

(*v*) *Clouse* v. *Cline* (1860), 19 U.C.R. 58.

from setting up that the plaintiff's title expired or was put an end to during the term; and to raise such defence it is not necessary for the tenant to go out of and then resume possession (*w*).

Eviction by title paramount.

A tenant may also show that he has been evicted by title paramount and replaced in possession by the evictor; but the mere payment of rent under a threat of eviction, to a person other than the person who let him into possession, does not amount to a constructive eviction so as to affect the estoppel (*x*).

But a tenant of a mortgagor may show that the mortgagee has become entitled to possession during the term, and that the tenant has suffered an actual or constructive eviction at his hands and has become his tenant (*y*).

Where no rent has been paid, a tenant is not estopped from showing that his landlord's title has been extinguished by the Statute of Limitations by reason of such non-payment of rent (*z*).

Owner of goods seized for rent.

It was held in an early Canadian case that a stranger whose goods have been seized on the premises of a tenant, cannot, any more that the tenant himself, question the landlord's right to demise (*a*). But it has been recently held in England that the estoppel does not extend to an owner of goods which are on the demised premises by permission of the tenant, so as to prevent such owner from disputing

(*w*) *Kelly* v. *Wolff* (1888), 12 P.R. 234; but see *Doe d. Simpson* v. *Molloy* (1849), 6 U.C.R. 302.

(*x*) *Delaney* v. *Fox* (1857), 2 C.B.N.S. 768.

(*y*) *Moss* v. *Gallimore* (1779), 1 Doug. 279; *Forse* v. *Sovereen* (1887), 14 Ont. App. 482; *Diffin* v. *Simpson* (1850), 5 N.B.R. 194; *Joplin* v. *Johnson* (1848), 4 N.B.R. 541.

(*z*) *Magdalen Hospital* v. *Knotts* (1879), 4 App. Cas. 324; *Cuhuac* v. *Scott* (1872), 22 U.C.C.P. 551.

(*a*) *Smith* v. *Aubrey* (1850), 7 U.C.R. 90.

the landlord's title in an action against him for illegal distress (*b*).

A debtor in possession of lands which have been sold for a debt at a sheriff's sale on a judgment against him, is *quasi* tenant at will to the purchaser and cannot dispute his title; and a third person defending as landlord, but showing no privity between the debtor and himself, nor any connection with the debtor's title, stands in the same relation to the purchaser as the debtor himself (*c*).

Those claiming under the landlord.

The benefit of the rule extends to, and may be claimed by, those whose title is derived from the landlord, as, for example, an assignee or devisee of the reversion (*d*).

Although a tenant may deny the derivative title of assignees or devisees, he may not deny in any action brought by them the title of his landlord through whom they claim (*e*). Thus in an action of ejectment, a defendant who, claiming to own the lands by virtue of the Statute of Limitations, acquired possession from a lessee of a former owner, cannot insist that the plaintiff, who claims through the same owner, shall prove his title prior to the entry of such lessee (*f*).

A tenant who, at the request of his landlord, has recognized another person as landlord, is estopped from disputing the latter's title (*g*).

(b) *In Favour of a Landlord Who Did Not Let Him Into Possession.*

Where possession not received from landlord.

As against a tenant in possession of land who has acknowledged some other person as landlord, not having re-

(*b*) *Tadman* v. *Henman*, [1893] 2 Q.B. 168.

(*c*) *Doe d. Armour* v. *McEwen* (1834), 3 O.S. 493.

(*d*) *Gouldsworth* v. *Knights* (1843), 11 M. & W. 337; *Doe* v. *Birchmore* (1839), 9 A. & E. 662; *Cuthbertson* v. *Irving* (1860), 6 H. & N. 135.

(*e*) *Doe* v. *Clarke* (1811), 14 East 488.

(*f*) *Cuhuac* v. *Scott*, *Cuhuac* v. *Erle* (1872), 22 U.C.C.P. 551.

(*g*) *Hall* v. *Butler* (1839), 10 A. & E. 204.

ceived possession from him, an estoppel may be claimed by such other person but not to the same extent.

A tenant let into possession by a person claiming rent cannot dispute the title of such person; nor if let into possession by one person, and having acknowledged the title of another person and agreed to pay rent to him, can he afterwards compel the latter to prove his title (*h*).

Mistake.

But such a tenant may show that the acts of recognition, such as attornment or payment of rent, were done under a mistake, or in ignorance of the facts relating to the title; or, he may show that some other person is entitled to the reversion, or that the person to whom he paid rent received it as agent for such other person (*i*).

Fraud.

A tenant may also show that he was induced to attorn by the fraud and misrepresentation of the lessor and so escape the operation of the rule. Thus, where a person in possession without title was induced to take a lease from another who falsely represented himself to be the owner, it was held that such a lessee was not estopped from disputing the lessor's title (*j*).

No estoppel will arise where the acts of recognition relied on were induced by mistake, fraud or misrepresentation (*k*).

Tenant must show better title in some one else.

But a tenant will not be permitted to dispute the title of the person whom he has acknowledged, unless he can show a better title in some other person, or in himself (*l*).

(*h*) *Smith* v. *Modeland* (1861), 11 U.C.C.P. 387.

(*i*) *Doe* v. *Francis* (1837), 2 Moo. & R. 57; *Jones* v. *Stone*, [1894] App. Cas. 122.

(*j*) *Lynett* v. *Parkinson* (1850), 1 U.C.C.P. 144; but it was considered doubtful in *Doe. d. Radenhurst* v. *McLean* (1856), 6 U.C.R. 530.

(*k*) *Doe* v. *Brown* (1837), 7 A. & E. 447; *McKinnon* v. *McKinnon* (1880), 2 P.E.I. 279; *Hughes* v. *Holmes* (1852), 6 N.B.R. 12; *Lynett* v. *Parkinson* (1850), 1 U.C.C.P. 104; *Dauphinas* v. *Clark* (1885), 3 Man. L.R. 225.

(*l*) *Carlton* v. *Bowcock* (1884), 51 L.T. 659.

Thus, after attorning to a person who derives title under a will he cannot impeach the will and maintain that, on a true construction thereof, such person has not a good title or that the devise to him was void by reason of the incapacity of the testator (*m*). So a tenant of glebe lands, after paying rent to the successor of the incumbent from whom he received possession is estopped from maintaining that his presentation to the benefice was invalid or simoniacal (*n*).

The mere payment of rent will not be sufficient to work an estoppel, if the person paying it is not in the position of a tenant. Thus where a receiver of a company paid half a year's rent in his capacity of receiver, it was held that he was not estopped, in an action for subsequent rent, from denying that he was a tenant (*o*).

Estoppel does not continue after expiry of term.

An attornment for a term by the owner of land to another person operates as an estoppel against him only during the term and not after (*p*). Thus where the plaintiff, an illiterate man, held a bond for a deed of certain land on which a balance of purchase money was unpaid, and had acquired a title to the land under the Statute of Limitations, but was not aware of his having done so, and the defendant, who had purchased the interest of the heirs of the original owner and vendor, by representing to plaintiff that he had no title, induced him to accept a lease of the land from the defendant for two years at a nominal rent, with a covenant to yield up possession at the end of that time, it was held that under the circumstances the lease must be set aside; and that even if allowed to stand it would not constitute an acknowledgment sufficient to displace the plaintiff's title, for its effect would only be to create an estoppel during its continuance (*q*).

(*m*) *Doe* v. *Wiggins* (1843), 4 Q.B. 367.
(*n*) *Cooke* v. *Loxley* (1792), 5 T.R. 4; 2 R.R. 521.
(*o*) *Justice* v. *James* (1899), 15 Times L.R. 181.
(*p*) *Clark* v. *Adie* (1877), 2 App. Cas. 423.
(*q*) *Hillock* v. *Sutton* (1883), 2 Ont. 548.

Tenant may dispute derivative title.

A tenant, although estopped from denying the title of the landlord who gave him possession, is not estopped from denying that any person claiming under the landlord has a good derivative title as assignee, heir, or devisee or otherwise (*r*). And this may be done although he has recognized such person as landlord by subsequent acts, as by payment of rent or otherwise, if such acts were done under a mistake or misapprehension of fact (*s*).

Where a person is in possession of land under a good title, but, through the mutual mistake of himself and another person claiming title thereto, he accepts a lease from the latter, he is not thereby estopped from setting up his own title in an action by the lessor to obtain possession of the land. In such a case, the Crown being a lessor, is in no better position in respect of the doctrine of estoppel than a subject (*t*).

But where an owner of land entered into an agreement to mortgage to a creditor, amongst other lands certain land known as the Dominion Hotel property, and a mortgage was on the same day executed, but by mistake the Dominion Hotel property was omitted therefrom, and another lot owned by him adjacent thereto inserted, it was held that a tenant, who had taken a lease from the owner of the Hotel after the mortgage, and attorned and paid some rent to the creditor, believing him to have a title to the lands, could not be heard to deny the creditor's title (*u*).

As in other cases, an estoppel will not arise so as to prevent a tenant from showing that the title of the person whom he has recognized as landlord has expired (*v*).

(*r*) *Doe* v. *Clarke* (1811), 14 East 488.
(*s*) *Doe* v. *Barton* (1840), 11 A. & E. 307.
(*t*) *Reg.* v. *Hall* (1898), 6 Ex. C.R. 145.
(*u*) *Bank of Montreal* v. *Gilchrist* (1881), 6 Ont. App. 659.
(*v*) *Brook* v. *Biggs* (1836), 2 Bing. N.C. 572.

Where a person has obtained a conveyance of the reversion upon the representation that he is assignee of the term, he is estopped from setting up that he obtained it in any other way than as the conveyance to him shows(*w*).

Mortgagee.

An assignee of the reversion, who has given a mortgage back to his grantor and made default, cannot recover possession after the expiration of the term from a former tenant of the grantor, and the tenant is not estopped from showing that such grantor under his mortgage is the person entitled to possession (*x*).

Estoppel against an estoppel.

Where a lessee mortgaged his term by deed containing a proviso that he should hold possession until default, and afterwards made a second mortgage with a similar proviso, and the second mortgagee acquired the first mortgage by assignment, it was held in an action of ejectment brought on the first mortgage after default made, there being no default in the second mortgage, that the plaintiff was not estopped by the proviso in the second mortgage, but that if he was, the defendant was estopped by the proviso in the first mortgage, and an estoppel against an estoppel left the matter open (*y*).

3. *Estoppel Against a Landlord.*

Estoppels are reciprocal.

Estoppels are reciprocal and unless they are so neither party is bound (*z*).

A landlord is estopped from denying that he had any estate in the land at the time the lease was executed by him, or that he had a right to dispose of the possession during the term thereby granted (*a*).

(*w*) *Building and Loan Association* v. *McKenzie* (1898), 28 Ont. 316; 24 Ont. App. 599; 28 S.C.R. 407.

(*x*) *Doe d. Marr* v. *Watson* (1846), 4 U.C.R. 398.

(*y*) *James* v. *McGibney* (1865), 24 U.C.R. 155.

(*z*) Co. Lit. 352.

(*a*) *Doe* v. *Ongley* (1850), 10 C.B. 25.

Subsequently acquired title "feeds an estoppel."

If a person having no interest in lands makes a demise by deed, and afterwards acquires title thereto, the demise will be as valid as if he had title at the time it was made. Such a demise creates an estate by estoppel, and the title subsequently acquired is said to "feed the estoppel," so that it becomes a valid and binding estate in interest which has relation back, by force of the estoppel, to the date of the demise (*b*).

The landlord may be estopped by subsequent conduct or admissions from claiming that the tenancy is still subsisting, as for example, where he has told the tenant that he has parted with his interest in the lands (*c*); or where he consents to the tenant paying rent to another person (*d*), unless such consent was given by mistake or under a misapprehension (*e*); or where he acquiesces in a transaction by which the tenant becomes lessee to another (*f*).

Ratification by conduct.

Where a person assuming to have an interest in property, though he had none, executed a lease or an agreement for a lease to a tenant, and one of the true owners shortly afterwards took an assignment of the instrument, and gave to the tenant notice of the assignment, and successive owners demanded and received rent reserved by the instrument, insisted on the building of a barn which the agreement provided for, and otherwise recognized the existence of the agreement, it was held that the agreement was thereby confirmed and adopted (*g*).

(*b*) *Webb* v. *Austin* (1844), 7 M. & Gr. 701; *Doe* v. *Oliver* (1829), 10 B. & C. 181; *Sturgeon* v. *Wingfield* (1846), 15 M. & W. 224; *Doe d. Hennesy* v. *Myers* (1835), 2 O.S. 424; *Boulter* v. *Hamilton* (1866), 15 U.C.C.P. 125; *Edinburgh Life Assurance Co.* v. *Allen* (1876), 23 Gr. at p. 235; *Nevitt* v. *McMurray* (1888), 14 Ont. App. 126; *McMillan* v. *Munro* (1898), 25 Ont. App. 288.

(*c*) *Doe* v. *Watson* (1817), 2 Stark. 230.

(*d*) *Downs* v. *Cooper* (1841), 2 Q.B. 256.

(*e*) *Williams* v. *Bartholomew* (1798), 1 B. & P. 326.

(*f*) *Neave* v. *Moss* (1823), 1 Bing. 360.

(*g*) *Simmons* v. *Campbell* (1870), 17 Gr. 612.

It has been held that the mere demand of rent by the successor of the lessor of rectory lands (after the expiration of the term) was not such an affirmance of the covenants in the lease as could estop him from disputing them (*h*).

In an action for use and occupation since the expiry of the term, the landlord is not estopped from recovering, by reason of a former action of ejectment in which mesne profits were claimed but no evidence was given, and no decision rendered in respect of them (*i*).

Manitoba.

In Manitoba, it is provided by sections 2 and 3 of the *Estoppel Act* (*j*), that covenants for title in a lease shall operate as an estoppel against the covenantor, and all persons claiming title under him. The sections are as follows:

2. Covenants for title in any deed of conveyance, deed of mortgage or deed of lease, whether such deed be made in pursuance of the Act respecting short forms of indentures or otherwise, shall operate as an estoppel against the covenantor and all persons claiming title under him.

3. The last preceding section shall apply to all conveyances, mortgages and leases made since the passing of the first Act respecting short forms of indentures, save so far as this may affect any rights in litigation on the seventh day of July in the year one thousand eight hundred and eighty-three.

(*h*) *Kirkpatrick* v. *Lyster* (1867), 13 Gr. 323; 16 Gr. 17.

(*i*) *Elliott* v. *Elliott* (1890), 20 Ont. 134; see also *Magee* v. *Gilmour* (1891), 18 S.C.R. 579.

(*j*) R.S.M. (1902), c. 56.

CHAPTER IX.

PARTIES CAPABLE OF MAKING AND TAKING LEASES.

SECTION I. PERSONS HAVING A LIMITED INTEREST.

SECTION II. PERSONS UNDER DISABILITY.

SECTION I.

PERSONS HAVING A LIMITED INTEREST.

1. *Tenants in Fee Simple.*
2. *Tenants in Common and joint Tenants.*
3. *Tenants in Tail.*
4. *Tenants for Life.*
5. *Tenants for Years.*
6. *Trustees and Executors.*
7. *Persons entitled under Settlements.*
8. *Mortgagor and Mortgagee.*

1. *Tenants in Fee Simple.*

Tenant in fee simple.

A tenant in fee simple, having the most extensive estate in land known to the law, has also powers of granting leases correspondingly wide. He may lease his land for any period of years, however long.

Lease in perpetuity.

An instrument which purports to demise lands to a lessee and his heirs forever, reserving a rent, operates, if made by deed, to convey the fee simple subject to a rent-

charge; if not made by deed, it operates, on payment of rent, to create a tenancy from year to year (*a*).

But a covenant for perpetual renewal is valid and will be enforced, although the instrument by which it is made is incapable of conveying a freehold estate (*b*). Perpetual renewal.

2. *Tenants in Common and Joint Tenants.*

A demise by tenants in common, though joint in its terms, operates as a separate demise by each tenant in common of his undivided share, and a confirmation by each of the demise made by the others.

But the benefit of the covenants upon such a demise runs with the entire reversion, and therefore in an action upon such a covenant all the tenants in common or their representatives must be joined as plaintiffs (*c*).

Tenants in common have unity of possession, but not of title, and unlike joint tenants, they have not one but several freeholds. Accordingly, it has been held that a tenant in common may by a separate demise lease his share, but only his share, either to a stranger or to his co-tenant (*d*).

But it has been held in Ontario that where one of two tenants in common of land leased part of it as a stone quarry, the other tenant in common was entitled to an injunction against further quarrying, and to an account against the lessee for one moiety of what had been already quarried (*e*).

Joint tenants of land may agree to the creation of the relationship of landlord and tenant between themselves, Tenancy between joint tenants.

(*a*) *Doe* v. *Gardiner* (1852), 12 C.B. 319; *Sevenoaks Railway Co.* v. *London, Chatham and Dover Railway Co.* (1879), 11 Ch. Div. 625, 635.

(*b*) *Pollock* v. *Booth* (1875), Ir. R. 9 Eq. 229.

(*c*) *Thompson* v. *Hakewell* (1865), 19 C.B.N.S. 713.

(*d*) *Jacobs* v. *Seward* (1872), L.R. 5 H.L. 464; *Leigh* v. *Dickeson* (1884), 15 Q.B.D. 60.

(*e*) *Goodenow* v. *Farquhar* (1872), 19 Gr. 614.

and the possession held by one under such an agreement involves all the incidents of an ordinary tenancy by him to the others as joint landlords. One or more joint tenants may demise his or their portion to a co-tenant, so as to create the relationship of landlord and tenant between them, with a right to distrain in respect of rent in arrear. Thus, three co-executors may agree that one of them shall hold land, demised to them in trust, at a fixed rent, and if the rent falls into arrear, he may be distrained upon in respect of it (*f*).

3. *Tenant in Tail.*

Tenant in tail.

A tenant in tail could always make a valid lease for a term of years that did not extend beyond the period of his own life. But at common law he could not make a lease which, after his death, would be binding either on his issue in tail, or on the remainderman or the reversioner. Such a lease was voidable by the issue in tail, who, however, might confirm it either expressly or by implication from acts, such as demanding or accepting rent, which indicated an intention to confirm it (*g*). But it was absolutely void as against the remainderman or reversioner and incapable of confirmation (*h*).

Powers of leasing.

By an Act called the *Enabling Statute* (*i*) the powers of a tenant in tail were extended so that he could, upon certain conditions, make leases for terms not exceeding three lives, or twenty-one years, that would be binding on the issue, but not on the remainderman or reversioner. Upon this statute rested the power of a tenant in tail to make a valid lease extending beyond his own life until the passing of the *Fines*

(*f*) *Cowper* v. *Fletcher* (1865), 6 B. & S. 464.

(*g*) *Doe d. Southouse* v. *Jenkins* (1829), 5 Bing. 469; 30 R.R. 780; *Doe d. Phillips* v. *Rollings* (1847), 4 C.B. 188.

(*h*) *Andrew* v. *Pearce* (1805), 1 N.R. 158; 8 R.R. 776.

(*i*) 32 Henry VIII., c. 28.

and Recoveries Act (*j*), by which tenants in tail were empowered to dispose of the lands entailed for an estate in fee simple absolute, or for any less estate, so as to bind not only the issue in tail but also the remainderman or the reversioner.

In Ontario, the power of tenants in tail to make leases is regulated by sections 34, 35 and 36 of the *Act respecting Real Property*(*k*), which are as follows: Act respecting Real Property.

34. All leases made of any lands, tenements or other hereditaments, by writing under seal, for term of years, or for term of life, by any person being of full age of twenty-one years, having any estate of inheritance in fee tail, shall be good and effectual in the law against the lessor and his heirs, and all persons entitled in remainder, or reversion, according to such estate as is comprised and specified in every such lease, in like manner and form as the same should have been if the lessor, at the time of making of such lease, had been lawfully seized of the same lands, tenements and hereditaments, comprised in such lease, of a good, perfect and pure estate of fee simple thereof to his own only use(*l*).

35. (1) Provided always that this and the preceding section shall not extend to any lease to be made by any lands, tenements, or hereditaments, being in the hands of any fermor by virtue of any old lease, unless the same old lease be expired, surrendered, or ended, within one year next after the making of the said new lease; nor shall extend to any grant to be made of any reversion of any lands, tenements or hereditaments, nor to any lease of any lands, tenements or hereditaments, which have not most commonly been let to ferm, or occupied by the fermors thereof, for the space of twenty years next before such lease thereof made; nor to any lease to be made without impeachment of waste; nor to any lease to be made above the number of twenty-one years or three lives at the most from the day of making thereof; Tenants in tail may grant leases for 21 years or three lives.

(2) Provided also that upon every such lease there shall be reserved yearly during the same lease due and payable to the lessor, his heirs, and to whom the same lands should have come after the death of the lessor, if no such lease had been thereof made, and to

(*j*) 3 & 4 Will. IV. (Imp.), c. 74.

(*k*) R.S.O. (1897), vol. III., c. 330. This is a re-enactment in part of the statute of 32 Henry VIII., c. 28.

(*l*) 32 Hen. VIII., c. 28, s. 1; R.S.O. (1897), vol. III., c. 330, s. 34; but see R.S.O. (1897), c. 122, s. 30.

whom the reversion thereof shall appertain, according to their estates and interests, so much yearly ferm or rent or more as hath been most accustomably yielded or paid for the lands, tenements, and hereditaments, so to be let, within twenty years next before such lease thereof made;

(3) Provided also that every such person to whom the reversion of such lands, tenements, or hereditaments, so to be let, shall appertain as aforesaid, after the deaths of such lessors or their heirs, shall and may have such like remedy and advantage to all intents and purposes against the lessees thereof, their executors, administrators, or assigns, as the same lessor should or might have had against the same lessees; so that, if the lessor were seized of any special estate tail of the same hereditaments at the time of such lease, the issue or heir of that special estate shall have the reversions, rents and services, reserved upon such lease, after the death of the said lessor, as the lessor himself might, or ought to have had, if he had lived(*m*).

36. Section 1 of the Revised Statutes of Ontario, chapter 119, shall extend to this Act as far as applicable.

By section 30 of the *Act respecting Assurances of Estates Tail* (*n*), it is provided that:—

Lease for 21 years or less need not be registered.

30. No assurance by which any disposition of lands is effected under this Act by a tenant in tail thereof (except a lease for any term not exceeding twenty-one years, to commence from the date of such lease, or from any time not exceeding twelve months from the date of such lease, where a rent is thereby reserved, which, at the time of granting such a lease is rack-rent, or not less than five-sixths parts of a rack-rent) shall have any operation under this Act unless it is registered in the registry office of the registry division wherein the lands referred to lie, within six months after the execution thereof.

A tenant in tail after possibility of issue extinct is in the same position, in respect of powers of leasing, as a tenant for life(*o*).

4. *Tenants for Life.*

Tenants for life.

At common law a tenant for life may make a lease that will be valid during the period of his own life but no longer.

(*m*) 32 Hen. VIII., c. 28, s. 2.
(*n*) R.S.O. (1897), c. 122.
(*o*) See next sub-section.

Powers of leasing at common law.

If a tenant for life makes a lease not authorized by statute, or by an express power in the deed, will or other instrument under which he acquires title, the lease is absolutely void as against those entitled in remainder and is incapable of confirmation by them, either by acceptance of rent, by allowing the tenant to remain in possession, or even by a conveyance of the freehold expressed to be subject to the lease (*p*).

But the receipt by the remainderman of rent, as rent which a yearly tenant might be expected to pay, raises a presumption of the new relation of a tenancy from year to year (*q*).

Thus where a tenant for life makes a lease for years, to commence on a certain day, and dies (before the expiration of the lease,) in the middle of a year, the acceptance by the remainderman of rent from the lessee (who continues in possession, but not under a fresh lease) for two years together, on the days of payment mentioned in the lease, is evidence, from which the court will presume an agreement between the remainderman and the lessee, that the lessee should continue to hold from the day, and according to the terms of the original demise; so that notice to quit ending on that day is proper (*r*).

A power to sell given to a devisee for life includes by implication a power to lease (*s*).

(*p*) *Doe d. Collins* v. *Weller* (1797), 7 T.R. 478; 4 R.R. 496; *Doe d. Martin* v. *Watts* (1797), 7 T.R. 83; 4 R.R. 387; *Smith* v. *Widlake* (1877), 3 C.P. Div. 10.

(*q*) *Doe d. Martin* v. *Watts* (1797), 7 T.R. 83; 4 R.R. 387.

(*r*) *Roe d. Jordan* v. *Ward* (1789), 1 H. Bl. 97; 2 R.R. 728; see also *Graham* v. *Newton* (1846), 3 U.C.R. 249.

(*s*) *Knapp* v. *King* (1875), 15 N.B.R. 309; *Brooke* v. *Brown* (1890), 19 Ont. 124.

Under Settled Estates Act.

In Ontario, by virtue of the *Settled Estates Act* (*t*), a tenant for life may on certain conditions grant leases of his estate for any term not exceeding twenty-one years. This is provided by section 42 of that Act which is as follows:

May grant leases for 21 years.

42. (1) It shall be lawful for any person entitled to the possession or to the receipt of the rents and profits of any settled estate for an estate for any life, or for a term of years determinable with any life or lives, or for any greater estate, either in his own right or in the right of his wife (unless the settlement shall contain an express declaration that it shall not be lawful for such person to make such demise); and also for any person entitled to the possession or to the receipt of the rents and profits of any unsettled estates as tenant by the curtesy or in dower, or in right of a wife who is seised in fee, without any application to the court (subject to the exception hereinafter mentioned), to demise the same or any part thereof, from time to time, for any term not exceeding twenty-one years, to take effect in possession, at or within one year next after the making thereof; provided that every such demise be made by deed, and the best rent that can be reasonably obtained be thereby reserved without any fine or other benefit in the nature of a fine, which rent shall be incident to the immediate reversion, and shall be made payable half-yearly or oftener; and provided that such demise is not made without impeachment of waste and does not authorize the cutting of any timber or felling of any trees except in the ordinary course of husbandry, and contains a covenant (by the lessee) for payment of the rent, and such other usual and proper covenants as the lessor shall think fit, together with a covenant or condition for re-entry on non-payment of rent for a period of twenty-eight days after it becomes due or for some less period to be specified.

(2) A tenant for life or owner entitled as in sub-section 1 may also make:—

Lease in pursuance of prior agreement covenant for renewal or confirming void lease.

(a) A lease for giving effect to a contract entered into by any of his predecessors in title for making a lease, which, if made by the predecessor, would have been binding on the successors in title; and

(b) A lease for giving effect to a covenant of renewal, performance whereof could be enforced against the owner for the time being of the settled land; and

(*t*) R.S.O. (1897), c. 71. This Act is founded on the English *Settled Estates Act* (1877), 40 & 41 Vict. c. 18, which is a re-enactment with amendments of the *Settled Estates Act* (1856), 19 & 20 Vict. c. 120. The powers of leasing of a tenant for life have been further extended in England by the *Settled Land Act* (1882), 45 & 46 Vict. c. 38.

(c) A lease for confirming as far as may be a previous lease being void or voidable; but so that every lease, as and when confirmed, shall be such a lease as might at the date of the original lease have been lawfully granted under this Act, or otherwise as the case may require.

(3) Every lease made under this section shall be by deed in duplicate, and shall be executed by the lessor and lessee, and shall be subject to the provisions of section 32 of this Act.

(4) Where two or more persons are under the same settlement or otherwise entitled in possession to concurrent estates for life, or are concurrently entitled to the possession or receipt of the rents and profits as in sub-section 1 mentioned, they shall, for the purposes of this section, act concurrently.

By section 2 of that Act it is provided that a tenant in tail after possibility of issue extinct shall be deemed for the purposes of the Act a tenant for life.

Two classes of life tenants.

It will be observed that these sections extend to two classes of life-tenants:

(1) Those whose estates arise by express grant under a settlement, including a tenant for any life; a tenant for a term of years determinable with any life or lives; two or more persons entitled to concurrent estates for life; and a tenant in tail after possibility of issue extinct;

(2) Those whose estates arise, not under a settlement but by operation of law, including a tenant by the curtesy and a tenant in dower.

Both classes of life-tenants may, without any application to the Court, (the first class if not expressly prohibited by the settlement) demise the estates or any part thereof from time to time for any term not exceeding twenty-one years, to take effect in possession, at or within one year next after the making thereof.

Requirements.

The requirements of a demise made under the Act may be summarized as follows:

Lease in duplicate and registered.

(1) Those that relate to the form, execution, and registration of the lease: it must be made by deed in duplicate, and executed by the lessee and the lessor, and regis-

tered in the proper office where the lands lie according to section 32.

Term of 21 years or less.

(2) Those that relate to the term: it may be for any term not exceeding twenty-one years, and it must take effect in possession at or within one year next after the making thereof.

Rent.

(3) Those that relate to the rent: (a) the best rent must be reserved; (b) the rent must be incident to the reversion; (c) it must be payable half-yearly or oftener; (d) there must be a covenant for the payment of rent; (e) there must be a condition for re-entry for non-payment of rent for 28 days or less.

Waste.

(4) Those that relate to waste: (a) the lease must not be without impeachment of waste; (b) it must not authorize the cutting of timber or trees except in the ordinary course of husbandry.

Covenants.

(5) Such other usual and proper covenants as the lessor shall think fit.

Lease binding on subsequent interests.

A lease granted by a life tenant in pursuance of the provisions of section 42, will be valid and binding, not only on the life tenant, but also on all persons whose estates arise subsequent to the estate of the life tenant; that is, those entitled under the settlement, in case the lands are settled, and those claiming through the deceased wife or husband, in the the case of a tenant by the curtesy or a tenant in dower. This is provided by section 43 which is as follows:

43. Every demise authorised by the last preceding section shall be valid against the person granting the same, and all other persons entitled to estates subsequent to the estate of such person under or by virtue of the same settlement if the estate be settled, and in case of unsettled estates against the wife of any husband granting such demise of estates to which he is entitled in right of such wife, and against all persons claiming through or under the wife or husband (as the case may be) of the person granting the same.

Encumbrances.

By section 47, it is provided that a person shall for the purposes of the Act, be deemed to be entitled to the possession or to the receipt of the rents and profits of an estate, although it may be charged or encumbered, either by himself, or by the settlor, or otherwise howsoever to any extent; but the estates or interests of the parties entitled to any such charge or encumbrance shall not be affected by the acts of the person entitled to the possession, or to the receipt of the rents and profits as aforesaid, unless they shall concur therein.

Leases for longer terms.

A tenant for life under a settlement, but not a tenant by the curtesy or a tenant in dower, may, on application to the Court and with its approval, grant leases for longer terms than twenty-one years, by virtue of section 3 of the *Settled Estates Act*. This will be considered more fully in a subsequent sub-section.

In British Columbia tenants for life are empowered to grant leases by the *Settled Estates Act* of that Province (*u*), which contains provisions similar to those above set forth (*v*).

Waste.

A lease which exempts the lessee from liability for "fair wear and tear and damage by tempest," is not in conformity with the provision requiring it not to be made without impeachment of waste, and is therefore void (*w*).

Omission of covenants.

The lease will not be void by reason of the omission of covenants, unless there is such a complete omission as to amount to fraud (*x*).

Lease in possession.

A power to grant a lease in possession is satisfied, although the premises are occupied by tenants at will or yearly tenants, if the lessor directs them to pay their rents

(*u*) R.S.B.C. (1897), c. 171.

(*v*) In Nova Scotia, see R.S.N.S. (1900), c. 151.

(*w*) *Davies* v. *Davies* (1888), 38 Ch. D. 499.

(*x*) *Davies* v. *Davies* (1888), 38 Ch. D. 499.

to the lessee(*y*). Where there is a power to grant leases in possession, but not by way of reversion or future interest, a lease *per verba de praesenti* is not contrary to the power, although the estate, at the time of granting the lease, was held by tenants at will, or from year to year, if, at any time, they received directions from the grantor of the lease to pay their rent to the lessee. Under a power to "lease all manors, messuages and lands, so that there be reserved as much rent as is now paid for the same," such parts of the estate enumerated in the power as have never been demised may be let (*z*).

Invalid lease good as an agreement for a lease.

A lease, granted in good faith in the intended exercise of a power of leasing derived under a statute or under any instrument, which is invalid, as against the person entitled in reversion or remainder, by reason of the non-observance of some condition, or by reason of any other deviation from the terms of the power, is deemed in equity as an agreement for a lease, and is binding on the lessor and on all persons subsequently entitled to the reversion. This is provided by section 24 of the *Act respecting Real Property* (*a*), which is as follows:

> **24.** Where, in the intended exercise of any power of leasing, whether derived under a statute, or under any instrument lawfully creating such power, a lease has been, or shall hereafter be granted, which is, by reason of the non-observance or omission of some condition or restriction, or by reason of any other deviation from the terms of such power, invalid as against the person entitled, after the determination of the interest of the person granting such lease, to the reversion, or against other than the person who, subject to any lease lawfully granted under such power, would have been entitled to the hereditaments comprised in such lease, such lease, in case the same have been made *bona fide*, and the lessee named therein, his heirs, executors, administrators or assigns (as the case may require), have entered thereunder, shall be considered in equity as a contract for a

(*y*) *Goodtitle d. Clarges* v. *Funucan* (1781), 2 Doug. 565.

(*z*) *Ibid.*

(*a*) R.S.O. (1897), vol. III., c. 330. This is taken from the Imperial Act, 12 & 13 Vict. (1849), c. 26.

grant, at the request of the lessee, his heirs, executors, administrators or assigns (as the case may require) of a valid lease under such power, to the like purport and effect, as such invalid lease as aforesaid, save so far as any variation may be necessary in order to comply with the terms of such power; and all persons who would have been bound by a lease lawfully granted under such power shall be bound in equity by such contract: Provided always that no lessee under any such invalid lease as aforesaid, his heirs, executors, administrators or assigns, shall be entitled by virtue of any such equitable contract as aforesaid, to obtain any variation of such lease, where the persons who would have been bound by such contract are willing to confirm such lease without variation(*b*).

Further provision is made with respect to invalid leases granted under powers of leasing, by sections 25 to 30 inclusive of that Act which are as follows:

Acceptance of rent deemed a confirmation.

25. Where, upon or before the acceptance of rent, under any such invalid lease, any receipt, memorandum or note in writing, confirming such lease, is signed by the person accepting such rent, or some other person by him thereunto lawfully authorized, such acceptance shall, as against the person so accepting such rent, be deemed a confirmation of such lease(*c*).

Lessee must accept confirmation if requested.

26. Where, during the continuance of the possession taken under any such invalid lease, the person for the time being entitled (subject to such possession as aforesaid), to the hereditaments comprised in such lease, or to the possession or the receipt of the rents and profits thereof, is able to confirm such lease without variation, the lessee, his heirs, executors, or administrators (as the case may require), or any person who would have been bound by the lease if the same had been valid, shall, upon the request of the person so able to confirm the same, be bound to accept a confirmation accordingly; and such confirmation may be by memorandum or note in writing, signed by the persons confirming and accepting respectively, or by some other persons by them respectively thereunto lawfully authorized, and, after confirmation, and acceptance of confirmation, such lease shall be valid and shall be deemed to have had, from the granting thereof, the same effect as if the same had been originally valid(*d*).

27. Where a lease granted in the intended exercise of any power of leasing is invalid by reason of that, at the time of the granting thereof, the person granting the same could not lawfully grant such

(*b*) 12 & 13 Vict. (Imp.), c. 26, s 2.
(*c*) 13 Vict. (Imp.), c. 17, s. 2.
(*d*) 13 Vict (Imp.), c. 17, s. 3.

lease, but the estate of such person in the hereditaments comprised in such lease shall have continued after the time when such, or the like lease, might have been granted by him in the lawful exercise of such power, then, and in every such case, such lease shall take effect, and be as valid, as if the same had been granted at such last-mentioned time, and all the provisions herein contained shall apply to every such lease (*e*).

28. Where a valid power of leasing is vested in, or may be exercised by, a person granting a lease, and such lease (by reason of the determination of the estate, or interest of such person, or otherwise) cannot have effect and continuance according to the terms thereof, independently of such power, such lease shall, for the purposes of the four preceding sections of this Act, be deemed to be granted in the intended exercise of such power, although such power be not referred to in such lease (*f*).

No right of action taken away.

29. Nothing herein contained shall extend to, or be construed to prejudice, or take away, any right of action, or other right or remedy, to which, but for the five preceding sections of this Act, the lessee named in any such lease as aforesaid, his heirs, executors, administrators or assigns, would or might have been entitled, under or by virtue of any covenant for title or quiet enjoyment contained in such lease on the part of the person granting the same, or to prejudice, or take away, any right of re-entry, or other right or remedy to which, but for the said five preceding sections the person granting such lease, his heirs, executors, administrators, or assigns, or other person, for the time being entitled to the reversion expectant on the determination of such lease, would or might have been entitled, for, or by reason of, any breach of the covenants, conditions, or provisoes contained in such lease, and on the part of the lessee, his heirs, executors, administrators, or assigns, to be observed and performed (*g*).

Leases excluded from the Act.

30. The six preceding sections shall not extend to any lease by an ecclesiastical corporation, or spiritual person, to any lease of the possessions of any college, hospital, or charitable foundation, or to any lease, where, before the 10th day of June, 1857, the hereditaments comprised in such lease have been surrendered or relinquished, or recovered adversely by reason of the invalidity thereof, or there has been any judgment or decree in any action or suit concerning the validity of such lease (*h*).

(*e*) 12 & 13 Vict. (Imp.), c. 26, s. 4.
(*f*) 12 & 13 Vict. (Imp.), c. 26, s. 5.
(*g*) 12 & 13 Vict. (Imp.), c. 26, s 6.
(*h*) 12 & 13 Vict (Imp.), c. 26, s. 7.

5. *Tenants for Years.*

Tenants for years may sub-let.

A tenant whose interest is less than freehold and who therefore holds under a lease may, in the absence of any stipulation to the contrary in his own lease, grant subleases of the whole or part of the lands held by him for any period less than his own term (*i*). If he sub-lets for the whole period of his own term, or for a longer period, it will in general have the effect of an assignment (*j*).

Tenants from year to year may sub-let.

A tenant from year to year may sub-let from year to year or for a shorter period than a year; and even a sublease made by a tenant from year to year for twenty-one years is not void, but will be good so long as his own yearly tenancy continues (*k*). In such a case a yearly tenant becomes a reversioner, and may distrain for rent due by his sub-tenant (*l*). In like manner a tenant for less than a year, as for example, a monthly tenant may sub-let.

Tenants at will or by sufferance cannot sub-let.

But a tenant at will or by sufferance cannot make a lease that will be valid as against his reversioner, although such a lease would create a tenancy by estoppel as between him and his lessee (*m*).

A tenant for a term of years determinable with a life or lives may lease for a term of twenty-one years under the provisions of the *Settled Estates Act* (*n*).

6. *Trustees and Executors.*

Trustees and Executors.

Trustees who have the management of property may grant any reasonable leases unless restrained expressly or by implication by the terms of the trust (*o*).

(*i*) Bac. Abr.: Leases.

(*j*) See Chapters IV. and XIII.

(*k*) *Mackay* v. *Macreth* (1785), 4 Doug. 213; *Oxley* v. *James* (1844), 18 M. & W. 209.

(*l*) *Pike* v. *Eyre* (1829), 9 B. & C. 909.

(*m*) *Doe d. Goody* v. *Carter* (1847), 9 Q.B. 863.

(*n*) R.S.O. (1897), c. 71, s. 42; R.S.B.C. (1897), c. 171, s. 48, see *supra*, sub-sec. 4.

(*o*) *Brooke* v. *Brown* (1890), 19 Ont. 124; *Orford* v. *Orford* (1884), 6 Ont. 6; *Whiteside* v. *Miller* (1868), 14 Gr. 396.

Trustees under a will holding the legal estate in trust to maintain themselves and their children, with remainder over to the children, and having power to sell and convey the fee simple, were held to have power to grant a building lease for twenty-one years (*p*).

Trustees with no active duties cannot grant leases.

But where trustees, although clothed with the legal estate, have no active duties cast upon them by the will, have no power to lease without the consent of those beneficially entitled to the land (*q*). Thus where trustees, to whom a testator devised his farm in trust to allow his wife the use of it during her life, and after her death to sell and divide the proceeds among his children, granted a lease of the farm without the consent of the widow, it was held to be void as against her (*r*).

Executors may exercise powers of leasing contained in the will.

In Ontario it is provided by the *Trustee Act* (*s*), that where there is in any will a power or direction, either express or implied, to lease real estate, and no one is appointed to carry out such power, it may be exercised by the executors named in the will, if any, or by the administrator with the will annexed, in as full and ample a manner as if they had been appointed by the testator for that purpose. The sections by which these provisions are made are as follows:

21. Where there is in any will or codicil of any deceased person (whether such will has been made, or such person has died before or after the first day of January, 1874) any power or direction, whether express or implied, to sell, dispose of, appoint, mortgage, incumber or lease any real estate, and no person is by the said will, or some codicil thereto, or otherwise by the testator appointed to execute and carry the same into effect, the executor or executors (if any) named in such will or codicil, shall and may execute and carry into effect every such direction to sell, dispose of, appoint, incumber, or lease such real estate, and any estate or interest therein, in as full, large and ample a manner, and with the same legal effect, as

(*p*) *Brooke* v. *Brown* (1890), 19 Ont. 124.

(*q*) *Hefferman* v. *Taylor* (1888), 15 Ont. 670.

(*r*) *Ibid.*

(*s*) R.S.O. (1897), c. 129, ss. 21 and 23.

if the executor or executors of the testator were appointed by the testator to execute and carry the same into effect.

23. Where there is any will or codicil thereto of any deceased person (whether such will has been made or such person has died before or after the first day of January, 1874), any power to sell, dispose of, appoint, mortgage, incumber or lease any real estate, or any estate or interest therein, whether such power is express, or arises by implication, and no person is by the said will, or some codicil thereto, or otherwise by the testator appointed to execute such power, and letters of administration, with such will annexed, have been by a Court of competent jurisdiction in Ontario committed to any person, and such person has given the additional security before mentioned, such person shall and may exercise every such power, and sell, dispose of, appoint, mortgage, incumber or lease such real estate, and estate or interest therein, in as full, large and ample a manner, and with the same legal effect, as if such last named person had been appointed by the testator to execute such power.

Power to sell includes power to lease.

It has been held in New Brunswick that a power to sell includes by implication a power to lease (*t*).

In Nova Scotia it is expressly provided in the *Trustee Act* of that province (*u*), that "Wherever a power to sell real property is given to any executor or trustee, such power shall include a power to mortgage or lease, unless the instrument expressly excludes it."

Where a lease is renewed by a trustee in his own name, the beneficiaries under the trust are entitled to have the new lease held in trust for them (*v*).

Executor may renew lease.

The executor of a deceased lessor has power under the *Devolution of Estates Act* (*vv*), with the approval of the official guardian where infants are interested, to make a valid renewal of a lease pursuant to a covenant of the testator to renew (*w*).

(*t*) *Knapp* v. *King* (1875), 15 N.B.R. 309.

(*u*) R.S.N.S. (1900), c. 151, s. 16.

(*v*) *Keech* v. *Sandford* (1726), Select Cas. Ch. (*temp.* King), 61, 62.

(*vv*) R.S.O. (1897), c. 127.

(*w*) *In re Canadian Pacific Ry. Co.* v. *National Club* (1894), 24 Ont. 205.

Indemnity of Trustees.

The rule that trustees are entitled to be indemnified by their *cestuis que trustent* against liabilities incurred by their holding trust property does not apply to cases where the nature of the transaction excludes it. Thus an ordinary club is formed upon the tacit understanding, judicially recognized, that no member as such becomes liable to pay to its funds or otherwise any money beyond the subscriptions required by its rules. Trustees of a club who have incurred liability under onerous covenants contained in a lease, accepted by them on its behalf, are entitled to indemnity out of any property of the club to which their lien as trustees extends. Its members are not, by reason only of being *cestuis que trustent*, personally liable to indemnify them, where there is no rule imposing such liability upon them (*x*).

Trustees of Religious bodies.

In Ontario, the power of trustees of lands granted for the use of a congregation or religious body to grant leases is regulated by sections 10, 11, 12 and 13 of the *Act respecting the Property of Religious Institutions* (*y*), which are as follows:

May grant leases for 21 years.

10. The grantees in trust named in any letters patent from the Crown, or the survivors or survivor of them, or the trustees for the time being appointed in manner prescribed in the letters patent, whereby lands are granted for the use of a congregation or religious body, and any other trustees for the time being entitled by law to hold lands in trust for the use of a congregation or religious body, may lease, for any term not exceeding twenty-one years, lands so held by them for the use of the congregation or religious body, at such rents and upon such terms as the trustees or a majority of them deem reasonable.

With covenant for renewal.

11. In such a lease the trustees may covenant or agree for the renewal thereof at the expiration of any or every term of years, for a further term of twenty-one years or a less period, at such rent and on such terms as may then, by the trustees for the time being, be

(*x*) *Wise* v. *Perpetual Trustee Company*, [1903] App. Cas. 139.

(*y*) R.S.O. (1897), c. 307.

agreed upon with the lessee, his heirs, executors, administrators or assigns, or may consent or agree for the payment to the lessee, his heirs, executors, administrators, or assigns, of the value of any buildings or other improvements which may at the expiration of any term be on the demised premises; and the mode of ascertaining the amount of such rents or the value of such improvements may also be specified in the original lease. Improvements.

12. The trustees shall not so lease without the consent of the congregation or religious body for whose use they hold the lands in trust, and such consent shall be signified by the votes of a majority of the members present at a meeting of the congregation or body, duly called for the purpose; nor shall the trustees lease any land which, at the time of making the lease, is necessary for the purpose of erecting a church or place of worship or other building thereon, or for a burial ground for the congregation for whose use the land is held. Consent of congregation.

13. The trustees for the time being entitled by law to hold land in trust for a congregation or religious body, may, in their own names, or by any name by which they hold the land, sue or distrain for rent in arrear, and may take all such means for the recovery thereof as landlords in other cases are entitled to take. Trustees may distrain.

Similar provisions are in force in Manitoba (*z*), and in the Northwest Territories (*a*).

The guardian of an infant cannot without the sanction of the Court, make a valid lease of his ward's land (*b*). Guardian of an infant.

7. *Persons entitled under a Settlement.*

In Ontario, under the provisions of the *Settled Estates Act* (*c*), the Court is empowered to authorize leases of settled estates for such term of years as the Court shall direct, if it is deemed proper and consistent with a due Settled Estates Act.

(*z*) R.S.M. (1902), c. 23.

(*a*) Cons. Ord., N.W.T., c. 38.

(*b*) *Collins* v. *Martin* (1880), 41 U.C.R. 602; *Switzer* v. *McMillan* (1876), 23 Gr. 538; *Townsley* v. *Neil* (1864), 10 Gr. 72; as to the power of the Court to order leases of infants' lands see R.S.O. (1897), c. 168.

(*c*) R.S.O. (1897), c. 71.

regard for the interests of all parties entitled under the settlement (*d*).

"Settlement." The word "settlement" as used in the Act signifies any Act of Parliament, deed, agreement, will or other instrument, or any number of such instruments, under or by virtue of which any hereditaments of any tenure stand limited to, or in trust for, any persons by way of succession (*e*).

"Settled Estates." The term "settled estates," as used in the Act, signifies all hereditaments of any tenure, and all estates or interests therein which are the subject of a settlement (*f*).

In determining what are settled estates within the meaning of the Act, the Court is to be governed by the state of facts and by the trusts or limitations of the settlement at the time it takes effect (*g*).

Conditions. The conditions to be observed in leases authorized under the Act are set forth in section 3, and are as follows:

Leases must take effect in possession. **3.** Firstly. Every such lease shall be made to take effect in possession at or within one year after the making thereof, and shall be for such term of years as the Court shall direct, where the Court shall be satisfied that it is beneficial to the inheritance to grant such a lease.

Renewal. Secondly. Any such lease may contain an agreement for the renewal, or renewals, thereof, if the Court shall think fit, and the Court may determine the length of time for which such renewal or renewals, if any, may be made.

Best rent. Thirdly. On every such lease shall be reserved the best rent or reservation in the nature of rent, either uniform or not, that can be reasonably obtained, to be made payable half-yearly or oftener without taking any fine or other benefit in the nature of a fine, and to be incident to the immediate reversion; Provided always, that in the case of a mining lease, a repairing lease or a building lease, a nominal rent or any smaller rent than the rent to be ultimately

Nominal rent.

(*d*) In British Columbia similar provisions are contained in the *Settled Estates Act* of that province, R.S.B.C. (1897), c. 171. Both Acts are founded on the English *Settled Estates Act*, 1877.

(*e*) Sec. 2.

(*f*) Sec. 2.

(*g*) Sec. 2, s.-ss. 4 and 5.

made payable may, if the Court shall think fit so to direct, be made payable during all or any part of the first five years of the term of the lease.

Lease of mines.

Fourthly. Where the lease is of any earth, coal, stone or mineral, a certain portion of the whole rent or payment reserved, shall be from time to time set aside and invested as hereinafter mentioned, namely, when and so long as the person for the time being entitled to the receipt of such a rent is a person who, by reason of his estate or by virtue of any declaration in the settlement, is entitled to work such earth, coal, stone or mineral for his own benefit, one-fourth part of such rent, and otherwise three-fourth parts thereof; and in every such lease sufficient provision shall be made to ensure such application of the aforesaid portion of the rent by the appointment of trustees or otherwise as the Court shall deem expedient.

Part of rent to be set aside.

Waste.

Fifthly. No such lease shall authorize the cutting of any timber, or the felling of any trees, except in the ordinary course of husbandry, or so far as shall in the judgment of the Court be necessary, or shall be made without impeachment of waste.

Re-entry.

Sixthly. Every lease shall be by deed, and shall be in duplicate, and shall be executed by the lessor and lessee; and every lease shall contain a condition for re-entry on non-payment of the rent for a period of twenty-eight days after it becomes due, or for some less period to be specified in that behalf.

Other terms.

Subject and in addition to these conditions every lease must contain such covenants, conditions and stipulations as the court shall deem expedient with reference to the special circumstances of the demise (*h*).

The power to authorize leases conferred by the Act shall extend to authorize leases either of the whole or any parts of the settled estate, and may be exercised from time to time (*i*).

Surrender and renewal.

Any leases, whether granted in pursuance of the Act, or otherwise, may be surrendered either for the purpose of obtaining a renewal of the same or not, and the power to authorize leases conferred by the Act, shall extend to authorize new leases of the whole or any part of the hereditaments comprised in any surrendered lease (*j*).

(*h*) Sec. 4.
(*i*) Sec. 5.
(*j*) Sec. 6.

Agreement for a lease.

The power to authorize leases extends also to authorize preliminary contracts to grant any such leases, and any of the terms of such contracts may be varied in the leases (*k*).

Power may be vested in trustees.

The Court may exercise the power conferred by the Act, either by approving of particular leases, or by ordering that powers of leasing in conformity with its provisions shal be vested in trustees(*l*).

Effect of leases under the Act.

When a particular lease or contract for a lease has been approved by the Court, the Court shall direct what person or persons shall execute it as lessor; and the lease or contract executed by such person or persons shall take effect in all respects as if he or they was or were at the time of the execution thereof absolutely entitled to the whole estate or interest which is bound by the settlement, and had immediately afterwards settled the same according to the settlement, and so as to operate (if necessary) by way of revocation and appointment of the use or otherwise, as the Court directs (*m*).

Where the Court deems it expedient that any general powers of leasing any settled estates conformably to the Act should be vested in trustees, it may, by order, vest any such powers accordingly, either in the existing trustees of the settlement or in any other persons; and such powers, when exercised by such trustees, shall take effect in all respects as if the powers so vested in them had been originally contained in the settlement, and so as to operate (if necessary), by way of revocation and appointment of the use or otherwise, as the Court shall direct; and in every such case the Court, if it shall think fit, may impose any conditions as to consents or otherwise on the exercise of such power, and the Court may also authorize the insertion of provisions in any such order for the appointment of new trustees from

(*k*) Sec. 7.
(*l*) Sec. 8.
(*m*) Sec. 10.

time to time, for the purpose of exercising such powers of leasing as aforesaid (*n*).

Leases not authorized by the settlement.

Nothing in the Act shall be construed to empower the Court to authorize any lease, or other act beyond the extent to which, in the opinion of the Court, the same might have been authorized in the settlement by the settlor (*o*).

After the completion of any lease, or other act under the authority of the Court, and purporting to be in pursuance of the Act, the same shall not be invalidated on the ground that the Court was not empowered to authorize it (*p*).

Lease must be registered.

No lease shall take effect until registered in the proper registry office, or land titles office where the lands are situate, and the registered duplicate of the lease must be signed by the lessee as well as the lessor (*q*).

Under the provisions of section 42, as mentioned in an earlier part of this chapter, leases may be made by tenants for life of settled estates for a term not exceeding twenty-one years, without an application to the Court.

Procedure.

The procedure to be followed in making an application for a lease under the *Settled Estates Act* is regulated in Ontario by Consolidated Rules 973 and following rules.

Lease for 999 years.

The Court in the exercise of its jurisdiction over settled estates, may authorize a lease for 999 years (*r*).

The Court will not not exercise the power of leasing if an express declaration to the contrary is contained in the settlement (*s*).

(*n*) Sec. 11.
(*o*) Sec. 38.
(*p*) Sec. 39.
(*q*) Sec. 32.
(*r*) *In re Watsons Trusts* (1891), 21 Ont. 528.
(*s*) *In re Peake's Settled Estates*, [1893] 3 Ch. 430.

8. *Mortgagor and Mortgagee.*

Mortgagor and mortgagee.

After the making of a mortgage of lands, neither the mortgagor nor the mortgagee can, in the absence of express stipulation, make a lease that will be valid as against the other. If the mortgagor made a lease, the mortgagee could on default eject the tenant whose interest was subsequent and therefore subject to the mortgage; and if the mortgagee made a lease, the mortgagor was entitled, on redeeming the mortgage, to have restored to him his former estate, and could oust the mortgagee's tenant (*t*).

Lease under power in mortgage deed.

As neither could make a valid lease under which the lessee would be free from disturbance in his possession, it became usual for both mortgagor and mortgagee to concur in the lease, or to provide in the mortgage deed for a power of leasing to be exercisable by the mortgagee on default in payment of the mortgage moneys. A lease made by a mortgagee in pursuance of an express power to lease will then be valid as against the mortgagor and his representatives, although he or they should redeem during its currency (*u*).

A lease made by a mortgagor, however, is valid as between him and his lessee, and if the mortgage deed contains a proviso, as is usual, that the mortgagor shall have quiet possession of the lands until default, his lessee will be free from disturbance by the mortgagee until default shall happen, and the lessor may distrain for rent due, even after the mortgagee has given notice to the tenant to pay rent to him but before payment (*v*).

(*t*) *Brethour* v. *Brooke* (1893), 23 Ont. 658; 21 Ont. App. 144; *Hungerford* v. *Clay* (1722), 9 Mod. 1.

(*u*) *Brethour* v. *Brooke* (1893), 23 Ont. 658; 21 Ont. App. 144; *Doe d. Garrod* v. *Olley* (1840), 12 A. & E. 481; *Lows* v. *Telford* (1876), 1 App. Cas. 414.

(*v*) *Trent* v. *Hunt* (1853), 9 Ex. 14; *Carpenter* v. *Parkes* (1857), 3 C.B.N.S. 206; *Wilton* v. *Dunn* (1851), 17 Q.B. 294. In the Northwest Territories see R.S.C. (1886), c. 51, s. 70.

SECTION II.

PERSONS UNDER DISABILITY.

1. *Infants.*
2. *Lunatics.*
3. *Married Women.*
4. *Corporations.*

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1. *Infants.*

Infant may make a valid lease.

An infant may make a lease of his lands that will be valid during his minority (*w*); and such a lease, if it is for his benefit, cannot be avoided by him on the ground of infancy alone (*x*), although it is voidable by him when he comes of age (*y*), or by his heir if he should die under age (*z*).

Under a lease made by an infant for his benefit, a lessee is entitled to recover possession of the demised premises, and the infant will be ordered to pay the costs of an action brought for that purpose (*a*).

Agreement for a lease.

But an agreement for a lease will not be enforced in favour of or against an infant (*b*).

Guardian of infant cannot make valid lease.

A guardian of an infant, although he has the charge and management of his real and personal estate (*c*), may grant leases only with the sanction of the Court (*d*).

(*w*) *Slator* v. *Trimble* (1861), 14 Ir. C.L.R. 342.

(*x*) *Slator* v. *Brady* (1863), 14 Ir. C.L.R. 61, 342; followed in *Lipsett* v. *Perdue* (1889), 18 Ont. 575.

(*y*) *Slator* v. *Brady* (1863), 14 Ir. C.L.R. 61, 342.

(*z*) 1 Platt on Leases, p. 32.

(*a*) *Lipsett* v. *Perdue* (1889), 18 Ont. 575.

(*b*) *Lumley* v. *Ravenscroft*, [1895] 1 Q.B. 683.

(*c*) R.S.O. (1897), c. 168, s. 19; R.S.N.S. (1900), c. 115, s. 7.

(*d*) 1 Platt on Leases 379; *Collins* v. *Martin* (1880), 41 U.C.R. 602; *Switzer* v. *McMillan* (1876), 23 Gr. 538; *Townsley* v. *Neil* (1863), 10 Gr. 72.

Act respecting Infants (1).

Leases of infant's lands may be made by the Court.

In Ontario, the Court is empowered by the *Act respecting Infants* to order a lease of an infant's land, if it is deemed necessary or proper for his maintenance or education, or if, by reason of the property being exposed to waste or depreciation, his interest requires it (*e*). This is provided by section 3 of that Act which is as follows:

3. (1) Where an infant is seized or possessed of or entitled to any real estate in fee or for a term of years, or otherwise howsoever, in Ontario, and the High Court is of the opinion that a sale, lease or other disposition of the same, or of a part thereof, is necessary or proper for the maintenance or education of the infant, or that, by reason of any part of the property being exposed to waste and dilapidation, or to depreciation from any other cause, his interest requires or will be substantially promoted by such disposition, the Court may order the sale, or the letting for a term of years, or other disposition of such real estate, or any part thereof, to be made under the direction of the Court or one of its officers, or by the guardian of the infant, or by a person appointed by the Court for the purpose, in such manner and with such restrictions as to the Court may seem expedient, and may order the infant to convey the estate as the Court thinks proper.

(2) But no sale, lease, or other disposition shall be made against the provisions of a will or conveyance by which the estate has been devised or granted to the infant or for his use.

Consent of infant.

The application is to be made in the name of the infant by his next friend, or by his guardian; but it is not to be made without the consent of the infant, if he is of the age of fourteen years or upwards, unless the Court otherwise directs or allows (*f*).

Execution of lease.

Where the Court deems it convenient that a lease should be executed by some person in the place of an infant, the Court may direct some other person in the place of the infant to execute it (*g*).

The lease, whether executed by the infant or some person appointed for that purpose, will be as effectual as if

(*e*) R.S.O. (1897), c. 168.

(*f*) Sec. 4.

(*g*) Sec. 5.

the infant had executed it, and had been of the age of twenty-one years at the time (*h*).

In Manitoba similar provisions are made by the *Infants* Act (*i*).

In British Columbia where a person in his own right seised of or entitled to land for an estate in fee simple or for any less estate, is an infant, the land shall be deemed to be a settled estate under the *Settled Estates Act* and may be leased under the provisions of that Act (*j*).

Act respecting Infants (2).

Under the *Act respecting Infants (2)*, (*k*), an infant who is entitled to an estate under a lease for the life of one or more persons, or for a term of years, or his guardian, may, with the sanction of the Court, surrender such lease and accept and take a new lease (*l*). This is provided by section 4 of that Act which is as follows:

> **4.** Where any person being under the age of twenty-one years, is entitled to any lease made or granted for the life or lives of one or more person or persons, or for any term of years either absolute or determinable upon the death of one or more person or persons, or otherwise, such person, or his guardian, or other person, on his behalf, may apply to the High Court of Justice by petition or motion: and, by the order and direction of the said Court, such infant, or his guardian, or any person appointed in the place of such infant by the said Court, may be enabled from time to time, by deed to surrender such lease, and accept and take, in the place, and for the benefit, of such person under the age of twenty-one years, a new lease of the premises comprised in such lease surrendered by virtue

(*h*) Sec. 6.

(*i*) R.S.M. (1902), c. 79, s. 37.

(*j*) R.S.B.C. (1897), c. 171. A similar provision is contained in the English *Settled Land Act*, 1882, under which leases of infants' lands as well as of settled estates may be authorized. Prior to that Act applications to lease infants' lands in England were usually made under 11 Geo. IV. and 1 Will. IV. (1830), c. 65, which has been substantially re-enacted in British Columbia in the *Infants' Contract Act*, R.S.B.C. (1897), c. 95.

(*k*) R.S.O. (1897), vol. III., c. 340. This is a re-enactment of part of the Imperial Act 11 Geo. IV. and 1 Will. IV. (1830), c. 65.

(*l*) R.S.O. (1897), vol. III., c. 340, s. 4; R.S.B.C. (1897), c. 95, s. 8.

of this Act, for and during such number of lives, or for such term or terms of years determinable upon such number of lives, or for such term or terms of years absolute, as was, or were, mentioned or contained, in the lease so surrendered at the making thereof, or otherwise as the said Court shall direct (*m*).

Lease or under-lease may be authorized.

Under this Act, a lease or an underlease of an infant's lands may be authorized by the Court, if it is for his benefit, for such term of years and subject to such rents and covenants as the Court shall direct (*n*).

The Court is also empowered to authorize the renewal of a lease which an infant might, in pursuance of a covenant or agreement if not under disability, be compelled to renew (*o*). Before an order will be granted for renewal, the lease must be produced to the Court in order that it may judge of the propriety of its terms (*p*).

Sections 5 to 11 inclusive of that Act respecting leases of infants' lands are as follows:

Renewal of lease to an infant.

5. Every sum of money, and other consideration, paid by a guardian, or other person, as a fine, premium, or income, or in the nature of a fine, premium, or income, for the renewal of any such lease, and all reasonable charges incident thereto, shall be paid out of the estate or effects of the infant for whose benefit the lease shall be renewed, or shall be a charge upon the leasehold premises, together with interest for the same, as the said Court shall direct and determine (*q*).

6. Every lease to be renewed as aforesaid shall operate, and be to the same uses, and be liable to the same trusts, charges, incumbrances, dispositions, devices, and conditions, as the lease surrendered

(*m*) R.S.O. (1897), vol. III., c. 340, s. 4; Imp. Act 11 Geo. IV. & 1 Will. IV. c. 65, s. 12.

(*n*) 11 Geo. IV. & 1 Will. IV. (1830) (Imp.), c. 65, s. 17; R.S.O. (1897), vol. III., c. 340, s. 8; R.S.B.C. (1897), c. 95, s. 12.

(*o*) R.S.O. (1897), vol. III., c. 340, s. 7; R.S.B.C. (1897), c. 95, s. 11.

(*p*) *In re Jackes* (1868), 3 C.L.J. 69.

(*q*) R.S.O. (1897), vol. III., c. 340, s. 5; Imp. Act 11 Geo. IV. & 1 Will. IV. c. 65, s. 14.

as aforesaid, was or would have been subject to in case such surrender had not been made (*r*).

Where infant compellable to grant renewal.

7. Where any person being under the age of twenty-one years, might, in pursuance of any covenant or agreement, not under disability, be compelled to renew any lease made for the life or lives of one or more person or persons, or for any term or number of years absolute, or determinable on the death of one or more person or persons, such infant, or his guardian in the name of such infant, by the direction of the said High Court of Justice, to be signified by an order to be made upon the petition or motion of such infant or his guardian, or of any person entitled to such renewal, from time to time, may accept of a surrender of such lease, and may make and execute a new lease of the premises comprised in such lease, for and during such number of lives, or for such term or terms determinable upon such number of lives, or for such term or terms of years absolute, as was or were mentioned in the lease so surrendered at the making thereof, or otherwise as the Court by such order shall direct (*s*).

Lease or under-lease may be authorized.

8. Where any person, being an infant under the age of twenty-one years, is seized or possessed of, or entitled to, any land in fee or in tail, or to any leasehold land for an absolute interest, and it shall appear to the High Court of Justice to be for the benefit of such person that a lease, or under-lease, should be made of such estate for term of years for encouraging the erection of buildings thereon, or for repairing buildings actually being thereon, or the working of mines, or otherwise improving the same, or for farming or other purposes, such infant, or his guardian in the name of such infant, may by the direction of the High Court of Justice, to be signed by an order to be made upon the petition or motion of such infant, or his guardian, make such lease of the land of such person, or any part thereof, according to his interest therein, and to the nature of the tenure of such estate, for such term of years, and subject to such rents and covenants, as the said Court shall direct; but in no such case shall any fine or premium be taken, and in every such case the best rent, that can be obtained, regard being had to the nature of the lease, shall be reserved upon such lease; and the leases and covenants and provisions therein, shall be settled and approved of by the said Court, and a counterpart of every such lease shall be executed by the lessee therein to be named, and such counterparts shall be deposited for safe custody in the Court until such infant

(*r*) R.S.O. (1897), vol. III., c. 340, s. 6; Imp. Act 11 Geo. IV. & 1 Will. IV. c. 65, s. 15.

(*s*) R.S.O. (1897), vol. III., c. 340, s. 7; Imp. Act 11 Geo. IV. & 1 Will. IV. c. 65, s. 16.

shall attain twenty-one, but with liberty to proper parties to have the use thereof, if required, in the meantime, for the purpose of enforcing any of the covenants therein contained: Provided that no lease be made of the capital mansion house and park and grounds respectively held therewith, for any period exceeding the minority of any such infant (*t*).

Exception.

Fines.

9. No renewed lease shall be executed by virtue of this Act, in pursuance of any covenant or agreement, unless the fine (if any), or such other sum or sums of money (if any), as ought to be paid on such renewal, and such things (if any) as ought to be performed in pursuance of such covenant or agreement by the lessee or tenant, be first paid, and performed, and counterparts of every renewed lease to be executed by virtue of this Act shall be duly executed by the lessee (*u*).

10. All fines, premiums, and sums of money, which shall be had received, or paid, for or on account of the renewal of any lease, by or on behalf of an infant, after a deduction of all necessary incidental charges and expenses, shall be paid to his guardian, and be applied and disposed of for the benefit of such infant, in such manner as the said Court shall direct (*v*).

Effect of leases, etc., made under the Act.

11. Every surrender, and lease, agreement, conveyance, mortgage, or other disposition, respectively, granted and accepted, executed, and made, by virtue of this Act, shall be deemed to be as valid, and legal, to all intents and purposes, as if the person by whom, or in whose place, or on whose behalf, the same, respectively, shall be granted, accepted, executed and made, had been of full age, and had granted, accepted, made and executed the same (*w*).

Authority of guardians.

In Ontario, the authority of guardians with respect to the charge and management of the real and personal property of his ward is regulated by section 19 of the *Act respecting Infants* (*x*), which is as follows:

19. Unless where the authority of a guardian appointed or constituted under sections 14 or 15 is otherwise limited, the guardian

(*t*) R.S.O. (1897), vol. III., c. 340, s. 8; Imp. Act 11 Geo. IV. & 1 Will. IV. c. 65, s. 17.

(*u*) R.S.O. (1897), vol. III., c. 340, s. 9; Imp. Act 11 Geo. IV. & 1 Will. IV. c. 65, s. 20.

(*v*) R.S.O. (1897), vol. III., c. 340, s. 10; Imp. Act 11 Geo. IV. & 1 Will. IV. c. 65, s. 21.

(*w*) R.S.O. (1897), vol. III., c. 340, s. 11; Imp. Act 11 Geo. IV. & 1 Will. IV. c. 65, s. 31.

(*x*) R.S.O. (1897), c. 168.

of any infant appointed or constituted under or by virtue of this Act during the continuance of his guardianship,

(1) Shall have authority to act for and on behalf of the said ward.

(2) May appear in any Court and prosecute or defend any action in his or her name.

(3) Shall have the charge and management of his or her estate real and personal, and the care of his or her person and education (*y*).

The application for a lease of an infant's estate should be made to the Master in Chambers (*z*).

2. *Lunatics.*

Lunatics may grant leases.

A person of unsound mind not so found by inquisition may make a lease, but it may be avoided by him, or at his instance, if the lessee was aware of his condition and took advantage of it (*a*). But the existence of insane delusions in the mind of the lessor, even though connected with the subject matter of the lease, is not sufficient to avoid it, unless he was thereby rendered incompetent to deal with his property (*b*).

If the lessee acts in good faith, and the contract has been executed and completed, it cannot be set aside by the lunatic or those who represent him (*c*).

Act respecting Lunatics (2).

The power of the Court to authorize the surrender and renewal, and the granting and taking of leases by or on behalf of lunatics is provided by the *Act respecting Lunatics (2)*, (*d*), of which sections 4 to 13 inclusive are as follows:

(*y*) In Nova Scotia, see R.S.N.S. (1900), c. 115, s. 7.

(*z*) Ont. Jud. Act, Rules No. 960 *et seq.*

(*a*) *Imperial Loan Co.* v. *Stone*, [1892] 1 Q.B. 599.

(*b*) *Jenkins* v. *Morris* (1880), 14 Ch.D. 674.

(*c*) *Molton* v. *Camroux* (1848), 2 Ex. 503; 4 Ex. 17; *Beavan* v. *McDonnell* (1854), 9 Ex. 309; 10 Ex. 184.

(*d*) R.S.O. (1897), vol. III., c. 341. This is a re-enactment of part of the Imperial Act 11 Geo. IV. & 1 Will. IV. (1830), c. 65.

Court may authorize surrender and renewal of leases to lunatics.

4. Where any person, being lunatic, is entitled to any lease made or granted for the life or lives of one or more person or persons, or for any term of years, either absolute or determinable upon the death of one or more person or persons, or otherwise, the committee of the estate of such person may apply to the High Court of Justice by petition or motion, and, by the order and direction of the said Court, such committee may be enabled from time to time, by deed in the place of such lunatic, to surrender such lease and accept and take, in the name, and for the benefit, of such lunatic, a new lease of the premises comprised in such lease surrendered by virtue of this Act, for and during such number of lives, or for such term of years, absolute or determinable as aforesaid, as was mentioned or contained in the lease so surrendered at the making thereof, or otherwise as the said Court shall direct.

Fines.

5. Every sum of money, and other consideration, paid by a committee, or other person, as a fine, premium, or income, for the renewal of any such lease, and all reasonable charges incident thereto, shall be paid out of the estate or effects of the lunatic for whose benefit the lease shall be renewed, or shall be a charge upon the leasehold premises, together with interest for the same, as the said Court shall direct and determine.

6. Every lease to be renewed as aforesaid shall operate and be to the same uses, and be liable to the same trusts, charges, incumbrances, dispositions, devices, and conditions, as the lease surrendered as aforesaid was, or would have been subject to, in case such surrender had not been made.

Court may authorize renewal of leases by lunatics.

7. Where any person being lunatic, is, or shall be, entitled, or has a right, or, in pursuance of any covenant or agreement, might, if not under disability, be compelled, to renew any lease made or to be made for the life or lives of one or more person or persons, or for any term or numbers of years absolute, or determinable on the death of one or more person or persons, or otherwise, the committee of the estate of such lunatic, in the name of such lunatic, may, by the direction of the High Court of Justice, to be signified by an order to be made in a summary way upon the petition of such committee, or of any person entitled to such renewal, accept of a surrender of such lease, and make and execute to any person a new lease of the premises comprised in such lease to be surrendered by virtue of this Act, for and during such number of lives, or for such term of years determinable upon such number of lives, or for such term of years absolute, as were mentioned or contained in such lease so surrendered at the making thereof, or otherwise as the said Court by such order shall direct; and this provision shall extend as well to cases where the lunatic shall not be compellable to renew, but it shall be for his

benefit to do so, as to cases where a renewal might be effectually enforced against the lunatic if of sound mind.

Fines, etc.

8. No renewed lease shall be executed by virtue of this Act, in pursuance of any covenant or agreement, unless the fine (if any), or such other sum or sums of money (if any), as ought to be paid on such renewal, and such things (if any) as ought to be performed in pursuance of such covenant or agreement by the lessee or tenant, be first paid, and performed, and counterparts of every renewed lease to be executed by virtue of this Act shall be duly executed by the lessee.

9. All fines, premiums, and sums of money, which shall be had received, or paid, for, or on account of, the renewal of any lease in the name of a lunatic, after a deduction of all necessary incidental charges and expenses, shall be paid to the committee of the estate of such lunatic, and be applied and disposed of for the benefit of such lunatic, in such manner as the said Court, shall direct; but upon the death of such lunatic, all such sums of money as shall arise by such fines or premiums, or so much thereof as shall remain unapplied for the benefit of such lunatic at his death, shall, as between the representatives of the real and personal estates of such lunatic, be considered as real estate, unless such lunatic shall be a tenant for life only, and then the same shall be considered as personal estate.

Committee may exercise power of leasing.

10. Where any person, being a lunatic, is seized, or possessed, of any land, either for life, or for some other estate, with power of granting leases, and taking fines, reserving small rents on such leases for one, two, or three, lives in possession or reversion, or for some number of years determinable upon lives, or for any term of years absolutely, such power of leasing which is, or shall be, vested in such person, being lunatic and having a limited estate only, shall and may be executed by the committee of the estate of such person under the direction and order of the High Court of Justice.

Court may authorize leases of lunatic's lands.

11. Where any person, being lunatic, is seized, or possessed, of, or entitled to, any land in fee, or in tail, or to any leasehold land for an absolute interest, and it shall appear to the High Court of Justice to be for the benefit of such person that a lease or under-lease should be made of such estates for terms of years, for encouraging the erection of buildings thereon, or for repairing buildings actually being thereon, or otherwise improving the same, or for farming or other purposes, the High Court of Justice may order and direct the committee of the estate of such lunatic to make such lease of the land of such person, or any part thereof, according to his interest therein, and to the nature of the tenure of such estate for such term of years, and subject to such rents and covenants, as the said Court shall direct.

Creditors.

12. Nothing in the Act contained shall extend to subject any part of the estates of any person being lunatic, to the debts or demands of his creditors, otherwise than as the same are now subject and liable by due course of law, but only to authorize the High Court of Justice to make order in such cases as are hereinbefore mentioned, when the same shall be deemed just and reasonable, or for the benefit or advantage of such lunatic.

Effect of leases, etc., made under the Act.

13. Every surrender, and lease, agreement, conveyance, mortgage, or other disposition, respectively granted, and accepted, executed, and made, by virtue of this Act, shall be and be deemed as valid and legal to all intents and purposes as if the person by whom, or in whose place, or on whose behalf, the same respectively shall be granted, or accepted, executed, and made, had been of sane mind, and had granted, accepted, made, and executed the same.

Act respecting Lunatics (1)

In Ontario, under the *Act respecting Lunatics (1)*, the committee of the estate of a lunatic may petition the Court for authority to lease or sell his real estate for payment of debts; and a lease made in pursuance of an order of the Court will be as valid as if executed by the lunatic when of sound mind (*e*).

Manitoba.

In Manitoba a similar provision is contained in the *Lunacy Act* (*f*).

British Columbia. Judge in lunacy may authorize leases.

In British Columbia under the *Lunacy Act* of that province the Judge in lunacy may authorize and direct the committee of the estate of a lunatic to grant leases of any property of the lunatic for building, agricultural or other purposes; to grant leases of minerals forming part of the lunatic's property, whether the same have been already worked or not, and either with or without the surface or other land; to surrender any lease and accept a new lease; to accept a surrender of any lease and grant a new lease; and to execute any power of leasing vested in a lunatic having a limited estate only in the property over which the power extends (*g*).

(*e*) R.S.O. (1897), c. 65, ss. 11 and 15.

(*f*) R.S.M. (1902), c. 103, s. 23.

(*g*) R.S.B.C. (1897), c. 126, s. 34. These provisions are similar to those contained in the English *Lunacy Act* (1890), 53 Vict. c. 5.

The power to authorize leases of a lunatic's property under that Act extends to property of which the lunatic is tenant in tail, and every lease granted pursuant to any order is binding on the issue of the lunatic and all persons entitled in remainder and reversion expectant upon the estate tail of the lunatic, including the Crown; and every person to whom from time to time the reversion expectant upon the lease belongs, upon the death of the lunatic, will have the same rights and remedies against the lessee, his executors, administrators, and assigns, as the lunatic, or his committee would have had (*h*).

Leases authorized to be granted and accepted by or on behalf of a lunatic under the Act may be for such number of lives, or such term of years, at such rent and royalties, and subject to such reservations, covenants and conditions as the Judge in lunacy approves (*i*).

Nova Scotia.

In Nova Scotia a guardian appointed under the *Lunacy Act* has power to manage the estate of the lunatic (*j*). Provision is also made for the appointment of a guardian of an inebriate who shall have the power to manage his estate (*k*).

3. *Married Women.*

Married women.

At common law, a lease made by a married woman, without the concurrence of her husband, of her lands not settled to her separate use, was absolutely void (*l*). And a lease made by a man of his wife's land without her concurrence in the lease, was determined by the death of the lessor during the term, and his widow or her assigns might

(*h*) R.S.B.C. (1897), c. 126, s. 36.

(*i*) R.S.B.C. (1897), c. 126, s. 37.

(*j*) R.S.N.S. (1900), c. 125.

(*k*) R.S.N.S. (1900), c. 126. See also as to habitual drunkards, R.S.M. (1902), c. 103.

(*l*) 1 Platt on Leases; *Enrick* v. *Sullivan* (1866), 25 U.C.R. 105.

eject the lessee without notice to quit or demand of possession (*m*).

Enabling statutes.

But under the various statutes relating to the property of married women, a married woman may dispose of her separate property in the same manner as if she were unmarried (*n*).

Since a power to sell includes by implication a power to lease, it follows that a married woman may grant leases as effectually as if she were unmarried (*o*), and the concurrence of her husband is not necessary (*p*).

Settled Estates Act.

By sections 42 and 43 of the *Settled Estates Act* (*q*), it is provided that any person entitled to the possession, or to the receipt of the rents and profits of land in the right of his wife may grant leases thereof, subject to the provisions of the Act, for any term not exceeding twenty-one years, which will be valid against his wife, and all persons claiming under her, or entitled to estates subsequent to her estate. The terms and conditions under which such leases may be made, have been set forth in an earlier part of this chapter (*r*).

The non-execution by the wife of a lease to her and to her husband, containing covenants to be performed by her, does not render her incapable of taking thereunder (*s*).

(*m*) *Burns* v. *McAdam* (1865), 24 U.C.R. 449.

(*n*) R.S.O. (1897), c. 163; R.S.N.S. (1900), c. 112; R.S.M. (1902), c. 106; R.S.C. (1886), (Territories Real Property Act), c. 51; R.S.B.C. (1897), c. 130.

(*o*) *Knapp* v. *King* (1875), 15 N.B.R. 309.

(*p*) *Bryson* v. *Ontario and Quebec Railway Co.* (1885), 8 Ont. 380; *In re Coulter* (1885), 8 Ont. 536; *In re Koukle* (1887), 14 Ont. 183; *Wylie* v. *Frampton* (1889), 17 Ont. 515; *Cameron* v. *Walker* (1890), 19 Ont. 212; *Hartley* v. *Maycock* (1897), 28 Ont. 508.

(*q*) R.S.O. (1897), c. 71.

(*r*) Section 1, s.-s. 4.

(*s*) *Britton* v. *Knight* (1879), 29 U.C.C.P. 567.

A married woman apart from enabling statutes can take a lease during the time of her husband's imprisonment for felony (*t*).

4. *Corporations.*

Corporations.

At common law, a lay corporation being merely an artificial person could make and take leases as freely and effectually as a natural person; but the demise must be under its common seal (*u*).

Lease must be under Seal.

Although a lease by an incorporated company may be void in consequence of the same having been executed without the corporate seal, still if the lessee enters and holds under the lease he will be liable for all rents reserved thereby during the time of his occupation (*v*).

Mortmain Act.

By *The Mortmain and Charitable Uses Act, 1902* (*w*), it is provided that land shall not be assured under penalty of forfeiture, to any corporation in mortmain except on the authority of a license from the Crown, or a statute for the time being in force (*x*).

An assurance is by the Act declared to include a lease (*y*).

License.

By section 4, the Lieutenant-Governor in Council is empowered to grant a license to a corporation to acquire land in mortmain, and to hold it in perpetuity or otherwise.

When a power to sell lands is given by statute to a corporation, it includes by implication a power to lease (*z*).

(*t*) *Crocker* v. *Sowden* (1873), 33 U.C.R. 397.

(*u*) 1 Platt on Leases, 147.

(*v*) *Findlayson* v. *Elliott* (1874), 21 Gr. 325.

(*w*) R.S.O. (1897), vol. III., c. 333, which is taken from the Imperial Acts in which the various Mortmain Acts have been consolidated, 51 & 52 Vict. c. 42, and 54 & 55 Vict. c. 73.

(*x*) Sec. 3.

(*y*) Sec. 2.

(*z*) *In re Female Orphan Asylum* (1867), 15 W.R. 1056; 17 L.T. 59.

The power of corporations to acquire, hold and dispose of lands is usually regulated by their charters, or by the general or special Acts under which they are created or by some subsequent Act.

Leases made by or for the Crown, which is a corporation sole, are restricted, unless made under special statutes, to terms of thirty-one years or three lives(*a*).

Property of the Crown.

The power to grant leases of property of the Crown, under certain terms and conditions, for purposes of mining, fishing, grazing, cutting pulpwood, timber, hay, and for other purposes, is vested by various Acts of Parliament, and of the Provincial Legislatures, in the Governor in Council, the Lieutenant-Governor in Council, or in some member or officer of the Government having jurisdiction in the premises(*b*).

Companies Act.

Under *The Companies Act, 1902*(*c*), a company may acquire, hold, mortgage, sell and convey any real estate requisite for the carrying on of the undertaking of the company, and shall, if incorporated under the Act, forthwith become and be invested with all property and rights, real and personal, theretofore held by it or for it under any trust created with a view to its incorporation, and with all the powers, privileges and immunities requisite or incidental to the carrying on of its undertaking, as if it was incorporated by a special Act of Parliament, embodying the provisions of this Act and of the letters patent.

(*a*) 1 Anne, c. 7, s. 5.

(*b*) *The Dominion Lands Act*, R.S.C. (1886), c. 54; R.S.C. (1886), c. 56; 57 & 58 Vict. (Dom.) (1894), c. 26; 1 Edw. VII. (Dom.) (1901), c. 20; 61 Vict. (1898) (Dom.), c. 34; *The Fisheries Act*, R.S.C. (1886), c. 95; *The Public Lands Act*, R.S.O. (1897), c. 28; *The Mines Act*, R.S.O. (1897), c. 36; *The Ontario Fisheries Act*, R.S.O. (1897), c. 285; *The Mines Act*, R.S.M. (1902), c. 113; *The Provincial Lands Act*, R.S.M. (1902), c. 135; *The Land Act*, R.S.B.C. (1897), c. 113; 1 Edw. VII. (1901) (B.C.), c. 30.

(*c*) 2 Edw. VII. (Dom.), c. 15, s. 21.

Bank Act.

Under *The Bank Act*(*d*), a bank may acquire and hold real and immovable property for its actual use and occupation and the management of its business, and may sell or dispose of the same, and acquire other property in its stead for the same purposes.

Companies Clauses Act.

Under *The Companies Clauses Act*(*e*), every company incorporated under any special Act, shall be a body corporate under the name declared in the special Act, and may acquire, hold alienate and convey any real property necessary or requisite for the carrying on of the undertaking of such company, and shall be invested with all the powers, privileges and immunities necessary to carry into effect the intention and objects of this Act, and of the special Act, and which are incident to such corporation, or are expressed or included in "The Interpretation Act."

Ontario Companies Act.

By *The Ontario Companies Act*(*f*), power is given to every company incorporated under it, to acquire by purchase, lease or other title, and to hold, use, sell, alienate and convey any real estate necessary for the carrying on of its undertaking and the company shall, upon its incorporation, become and be invested with all the property and rights, real and personal, theretofore held by or for it under any trust created with a view to its incorporation.

It is provided, however, that, unless other special statutory enactments apply, no parcel of land, or interest therein at any time acquired by the company and not required for its actual use and occupation, or not held by way of security, or not situate within the limits, or within one mile of the limits of any city or town in this Province, shall be held by the company, or by any trustee on its behalf, for a longer period than seven years after the acquisition thereof,

(*d*) R.S.C. (1886), c. 120, s. 47.
(*e*) R.S.C. (1886), c. 118, s. 5.
(*f*) R.S.O. (1897), c. 191, s. 25.

but shall be absolutely sold and disposed of, so that the company shall no longer retain any interest therein unless by way of security; and that any such parcel of land, or any interest therein not within the exceptions mentioned, held by the company for a longer period than seven years, without being disposed of, shall be forfeited to His Majesty for the use of the Province.

The Lieutenant-Governor in Council may, however, extend the period from time to time not exceeding in the whole twelve years.

It is further provided that no such forfeiture shall take effect, or be enforced until the expiration of at least six calendar months after notice in writing to the company of the intention of His Majesty to claim such forfeiture; and it shall be the duty of the company to give the Lieutenant-Governor in Council, when required, a full and correct statement of all lands at the date of such statement held by the company, or in trust for the company, and subject to these provisions.

Mining Companies.

By *The Ontario Mining Companies Incorporation Act*(*g*), a company incorporated thereunder is empowered to acquire by purchase, lease or other legal title, mines, mining lands, easements, mineral properties, or any interest therein, minerals and ores, and mining claims, options, powers, privileges, water and other rights, and either absolutely or conditionally, and either solely or jointly with others, and as principals, agents, contractors or otherwise, to lease, mortgage, place under license, hypothecate, sell, dispose of and otherwise deal with the same or any part thereof, or any interest therein.

Railways.

A railway company incorporated under the provisions of *The Railway Act of Ontario*(*h*), is empowered to receive,

(*g*) R.S.O. (1897), c. 197, s. 4.

(*h*) R.S.O. (1897), c. 207, s. 9.

hold and take all voluntary grants and donations of land or other property made to it, to aid in the construction, maintenance and accommodation of the railway, but the same shall be held and used for the purpose of such grants or donations only; and to purchase, hold and take of any corporation or person any land or other property necessary for the construction, maintenance, accommodation and use of the railway, and also to alienate, sell or dispose of the same.

Street Railways.

A street railway company is authorized under *The Street Railway Act*(*i*), to enter into any agreement with any other company lawfully authorized to enter into the same, or with any person for leasing, hiring, or using, any electric motors, carriages, cars, rolling stock and other movable property from such company or person, for such time and on such terms as may be agreed on; and also to enter into agreements with any railway company lawfully authorized, for the use by any contracting company of the electric motors, carriages, cars, rolling stock and other movable property of the other, for the running of the cars or carriages of the company over the track of any other railway company, with the consent of such company, on such terms as to compensation and otherwise as may be agreed on.

Electric Railways.

A company incorporated under *The Electric Railway Act*(*j*), is authorized to purchase and hold, and, when authorized in the manner mentioned in the Act, to take of any corporation or person any land or other property necessary for the construction, maintenance, accommodation and use of the railway, and also to alienate, sell or dispose of the same; and to enter into any agreement with any other company, lawfully authorized to enter into the same, or with any person, for leasing, hiring or using any electric motors,

(*i*) R.S.O. (1897), c. 208, s. 14.
(*j*) R.S.O. (1897), c. 209.

carriages, cars, rolling stock and other movable property from such company or person for such time and on such terms as may be agreed on.

A railway or canal company cannot lease the concern or delegate its powers for a specified term, without the sanction of the Legislature. This principle was held applicable to a railway company which had no power of taking land compulsorily, but had other special powers and privileges under its Act of incorporation(*k*).

Benevolent Societies.

A benevolent, provident or other like society may(*l*), in pursuance of a resolution assented to by a majority of the members present at a general meeting especially called for that purpose, of which public notice shall be given in the manner provided by the by-laws, lease any lands of the society.

A lease granted by the governors of a hospital, contrary to the provisions of the statute, 13 Elizabeth, chapter 10, section 3, is absolutely void. An eleemosynary corporation is within the meaning and operation of that statute. A lease of land belonging to such a corporation, not in conformity with the provisions of the third section of that statute, is, therefore, absolutely void(*m*).

Magdalen Hospital v. *Knotts.*

In *Magdalen Hospital* v. *Knotts*(*m*), the governors of Magdalen Hospital in 1773 granted a lease of certain land of the hospital for ninety-nine years, at the rent of "one peppercorn (if lawfully demanded)." The only covenants, on the part of the lessee, were to indemnify the governors from all taxes during the term, and to surrender the premises at its end; and, on the part of the governors, for quiet enjoyment. No act had been done to avoid the lease, or to interfere with the persons holding the land. In July, 1876,

(*k*) *Hinckley* v. *Gildersleeve* (1872), 19 Gr. 212.

(*l*) R.S.O. (1897), c. 211.

(*m*) *Magdalen Hospital* v. *Knotts* (1879), 4 App. Cas. 324.

the governors brought an action in Chancery to recover possession of the land thus leased. It was held that the lease was absolutely void within the provisions of the statute, 13 Elizabeth, chapter 10, and consequently the right of the governors to re-enter on the land existed from the moment of the execution of the lease, and that right not having been sought to be enforced till now, was barred by the Statute of Limitations. If any rent, however small, had been reserved and received, it would have created the legal relation of a tenancy from year to year, and the Statute of Limitations could not have run.

In Manitoba foreign companies may obtain a license to carry on business and will thereupon have the same power and privileges as if incorporated there(*n*).

Municipal Act.

By section 657 of *The Municipal Act*(*nn*), the corporation of any township or county, wherever minerals are found, may sell or lease, by public auction or otherwise, the right to take minerals found upon, or under, any roads over which the township or county has jurisdiction, if considered expedient so to do.

Under section 534, the council of a township, city, town or village may pass by-laws for acquiring and holding, by purchase or otherwise for the public use of the municipality, lands situate outside the limits of the municipality; but such lands so acquired shall not form part of the municipality, but shall continue and remain as of the municipality where situate; and the council of a township may pass by-laws for acquiring lands in any town or village within or partly within, the original boundaries of the township, for the purpose of erecting thereon a town hall, or for renting or acquiring a hall, within such town or village, for the purpose of a town hall.

(*n*) R.S.M. (1902), c. 28, s. 2.
(*nn*) R.S.O. (1897), c. 223.

Power is also given by section 579 to every municipality to sell, assign or lease its market fees.

It has been held in England that where a municipal corporation, empowered by charter to hold lands, tenements and hereditaments, and goods and chattels, has obtained an order from the Board of Trade conferring a right of regulating an oyster fishery under the Sea Fisheries Act, 1868, it may lawfully take a lease of the foreshore of the fishery to enable it to carry out the purposes of the order(*o*).

(*o*) *Truro Corporation* v. *Rowe*, [1902] 2 K.B. 709.

CHAPTER X.

REGISTRATION.

Registration of certain leases is required by statute. Some leases must be registered, in order to preserve the rights of the lessees under them; some leases cannot take effect until registered. Registration.

In Ontario, it is provided by the *Registry Act* (*a*), that every lease for a term not exceeding seven years shall be adjudged fraudulent and void, as against any subsequent purchaser or mortgagee of the lands or any part thereof comprised in it, for valuable consideration without actual notice, unless it is registered in the manner required by the Act. By section 87 of the Act it is provided as follows: Leases for more than 7 years void unless registered.

87. After any grant from the Crown of lands in Ontario, and letters patent issued therefor, every instrument affecting the lands or any part thereof comprised in the grant, shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration without actual notice, unless such instrument is registered, in the manner herein directed, before the registering of the instrument under which the subsequent purchaser or mortgagee claims.

By section 2, it is enacted that the word "instrument" shall include a lease. The Act does not extend to any lease for a term not exceeding seven years, where actual possession goes along with the lease. This is provided by section 39, which is as follows:

39. This Act shall not extend to any lease for a term not exceeding seven years, where the actual possession goes along with the

(*a*) R.S.O. (1897), c. 136, ss. 39, 87 and 92.

lease; but it shall extend to every lease for a longer term than seven years.

Registration is notice.

The registration of an instrument under the Act is declared to have the effect of constituting notice of the instrument to all persons claiming any interest in the lands subsequent to such registration, as provided by section 92, which is as follows:

> **92.** The registration of any instrument, under this Act, or any former Act, shall constitute notice of the instrument, to all persons claiming any interest in the lands, subsequent to such registration, notwithstanding any defect in the proof for registration, but nevertheless it shall continue to be the duty of every registrar not to register any instrument, except on such proof as is required by this Act.

Priority of registration.

It is further provided by section 97 that "Priority of registration shall prevail, unless before the prior registration there has been actual notice of the prior instrument by the party claiming under the prior registration" (*b*).

Manitoba.

In Manitoba, it is provided by the Real Property Act (*c*), that the land mentioned in any certificate of title granted under the Act shall, by implication and without any special mention in the certificate of title, unless the contrary be expressly declared, be deemed to be subject to any unregistered subsisting lease or agreement for a lease for a period not exceeding three years, where there is actual occupation of the land under the same.

British Columbia.

In British Columbia, it is provided by the *Torrens Registry Act* (*d*), that no lease of land subject to any prior registered mortgage or incumbrance, shall be valid and binding against the mortgagee or incumbrancee, unless such mortgagee or incumbrancee shall have consented to such lease prior to the same being registered.

(*b*) In Manitoba, see R.S.M. (1902), c. 150, ss. 26 and 67.

(*c*) R.S.M. (1902), c. 148, s. 70.

(*d*) 62 Vict. (1899), c. 62, s. 73.

Lease for 4 years with right of renewal for 4 years.

It has been held that a lease for four years, with a covenant to renew for four years more, where possession is taken by the lessee, is not within the section requiring leases exceeding seven years to be registered, and that the covenant for renewal was enforceable as against subsequent mortgagees of the lessor (*e*).

Nova Scotia.

Under the *Registry Act* of Nova Scotia (*f*), it has been held that an endorsement of renewal on a lease does not require registration, not being a "deed" within section 18, nor a "lease" within section 25, and that the latter section only applies to a lease for years and not to a lease for lives (*g*).

Registration of attornments.

In England, under the Bills of Sale Acts of 1878 and 1882, which apply expressly to instruments giving powers of distress by way of security, it has been held that an attornment in a mortgage deed, to be valid, as creating the relation of landlord and tenant with the usual right of distress, must be registered as a bill of sale in pursuance of those Acts (*h*).

But it would seem that, in the absence of express enactment, such instruments do not require registration for their validity (*i*).

Settled Estates Act.

Under the *Settled Estates Act* of Ontario (*j*), it is provided, that a lease executed in pursuance of the exercise of any of the powers conferred by the Act, shall not take effect until registered in the proper registry or land

(*e*) *Latch* v. *Bright* (1870), 16 Gr. 633; see also *Doe d. Kingston Building Society* v. *Rainsford* (1852), 10 U.C.R. 236.

(*f*) R.S.N.S., 5th series, c. 84.

(*g*) *Pernette* v. *Clinch* (1894), 26 N.S.R. 410; 24 S.C.R. 385.

(*h*) *Green* v. *Marsh*, [1892] 2 Q.B. 330.

(*i*) *Trust and Loan Co.* v. *Lawrason* (1881), 6 Ont. App. 286, affirmed 10 S.C.R. 679; *In re Stockton Iron Furnace Co.* (1879), 10 Ch.D. 335.

(*j*) R.S.O. (1897), c. 71, s. 32.

titles office where the lands are situate. Section 32 of the Act is as follows:

> **32.** Deeds, mortgages, leases and other instruments executed in pursuance of the exercise of any of the powers conferred by this Act shall not take effect until registered in the proper registry or land titles office where the lands are situate, and in the case of leases, the lease or duplicate to be registered shall be executed by the lessee as well as the lessor (*k*).

This section applies not only to leases authorized by the Court, but also to leases authorized by the Act to be made by tenants for life and others, without any application to the Court (*l*).

It would seem that registration is necessary under this Act even in cases where the term is for less than seven years (*m*).

Tenant in tail.

A lease made by a tenant in tail for a term exceeding twenty-one years is inoperative unless registered (*n*).

Land Titles Act.

In Ontario, it is provided by the *Land Titles Act* (*o*), that any person entitled to, or capable of disposing of, or any person who has contracted to buy for his own benefit, leasehold land held under a lease for a life or lives, or determinable on a life or lives, or for a term of years of which more than 21 are unexpired, or in respect of which the lessee or his assigns is or are entitled to a renewal term, or succession of terms amounting with the portion unexpired of the current term to 21 years or over, or to a

(*k*) In Manitoba, see R.S.M. (1902), c. 148, s. 102; in the Northwest Territories, see R.S.C. (1886), c. 51, s. 59 (The Territories Real Property Act).

(*l*) R.S.O. (1897), c. 71, ss. 3, 32, and 42; see chapter IX.

(*m*) Section 42, where a lease is authorized for *any term* not exceeding 21 years.

(*n*) R.S.O. (1897), c. 122, s. 30; see R.S.O. (1897), vol. III., c. 330, s. 34.

(*o*) R.S.O. (1897), c. 138, s. 19. In Manitoba, see the *Real Property Act*, R.S.M. (1902), c. 148; in the Northwest Territories, see the *Territories Real Property Act*, R.S.C. (1886), c. 51; in British Columbia, see 62 Vict. (1899), c. 62.

renewal for a life or lives, whether subject or not to incumbrances, may apply to the master of titles to be registered as owner of such leasehold land in the manner prescribed by the Act (*p*).

Northwest Territories.

In the Northwest Territories, it is provided by *The Territories Real Property Act* (*q*), that no instrument, until registered under the Act, shall be effectual to pass any estate or interest in any land, except a leasehold interest for three years or for a less period.

(*p*) For further provisions respecting registration under the *Land Titles Act*, R.S.O. (1897), c. 138, see sections 19 *et seq.*

(*q*) R.S.C. (1886), c. 51, s. 59.

PART II.

TERMS OF THE RELATIONSHIP.

CHAPTER XI.

LESSEE'S RIGHT TO POSSESSION AND QUIET ENJOYMENT.

1. *Lessee's Right to Possession.*
2. *Implied Covenant for Quiet Enjoyment.*
3. *Express Covenant for Quiet Enjoyment.*
   (a) *Acts of Persons Claiming "By, From or Under" the Lessor.*
   (b) *Lawful Acts.*
   (c) *What Acts Constitute a Breach.*
   (d) *Damages.*

1. *Lessee's Right to Possession.*

Lessee's right to possession.

Upon the execution of a valid instrument of demise containing an express covenant to give possession, or words from which such a covenant may be implied, the lessee is entitled to possession from the lessor. The lessor is bound to do more than simply deliver the lease to the lessee; it is his duty to put the lessee in possession. Where the demise is by deed, an action may be maintained on an implied covenant to give possession, when there are any proper words to create a covenant by implication; and it would appear that the word "demise" will have that effect (*a*).

(*a*) *Saunders* v. *Roe* (1867), 17 U.C.C.P. 344; *Coe* v. *Clay* (1829), 5 Bing. 440; 30 R.R. 699; *Jinks* v. *Edwards* (1856), 11 Ex. 775.

Implied covenant to give possession.

The use of the word "lease" in an instrument of demise has been held not to imply a covenant to give possession (*b*). And it has been questioned whether the words "lease and to farm let" imply a covenant to give possession on the day when the term is to commence (*c*).

It has been held that a refusal of the lessor to give the lessee possession or preventing him from taking possession, is a breach of an implied covenant for quiet enjoyment (*d*).

Ejectment.

Under an implied covenant to give possession, a lessee may maintain an action of ejectment against the lessor, if he is in possession, or against a stranger who has taken possession under a subsequent lease (*e*). But where a lessor granted a lease for three years from the 1st of May, and the lessee covenanted that, on or before the 1st of May, he would give two sufficient sureties for the performance of his covenants in the lease, it was held that the giving of such security was a condition precedent to the lessee's right to possession under the lease (*f*).

Damages.

A lessee may also maintain an action for damages for the breach of a covenant to give possession (*g*).

Agreement for a lease.

An action by the intended lessee would not lie at law to recover possession under an agreement for a lease, or under a lease for more than three years that was void at law for want of a seal (*h*).

Verbal lease.

Under a verbal lease, or more properly, a verbal agreement for a present demise, although for a term less than

(*b*) *Ross* v. *Massingberd* (1862), 12 U.C.C.P. 62.

(*c*) *Harvey* v. *Ferguson* (1852), 9 U.C.R. 431.

(*d*) *Smart* v. *Stuart* (1837), 5 O.S. 301.

(*e*) *Cleveland* v. *Boice* (1862), 21 U.C.R. 609.

(*f*) *Murphy* v. *Scarth* (1858), 16 U.C.R. 48.

(*g*) *Thompson* v. *Crawford* (1864), 13 U.C.C.P. 53.

(*h*) *Hurley* v. *McDonell* (1853), 11 U.C.R. 208; *Drury* v. *Macnamara* (1855), 5 E. & B. 612.

three years, a lessee before entry takes no interest, and cannot maintain an action for possession or for damages if possession is refused him. Such an agreement is a contract concerning an interest in lands within the meaning of the fourth section of the Statute of Frauds, which provides that no action shall be brought upon it (*i*).

In an action by a tenant against his landlord for refusing to give him possession of the demised premises, the proper measure of damages is the difference between what the tenant agreed to pay for the premises and what they were really worth. It is not open to the tenant to show that he rented the premises for the purpose of carrying on a certain business, of which the landlord was aware, and that he could not procure other premises, and to claim the profits which he might have made in such business if he had been let into possession (*j*).

Trespass before entry.

A lessee, before entry, cannot maintain an action of trespass against a stranger trespassing on the lands, since actual possession is necessary to maintain such an action (*k*). It is not necessary, however, that the lessee should be personally in occupation of the lands to entitle him to bring an action of trespass; possession by his servant or agent is sufficient (*l*).

2. *Implied Covenant for Quiet Enjoyment.*

Covenant implied from use of the word "demise."

In the absence of an express covenant for quiet enjoyment, a covenant on the part of the lessor may be implied.

(*i*) *Moore* v. *Kay* (1883), 5 Ont. App. 261.

(*j*) *Marrin* v. *Graver* (1885), 8 Ont. 39; *Ward* v. *Smith* (1822), 11 Price 19, not followed; *Jacques* v. *Millar* (1877), 6 Ch.D. 153, discussed.

(*k*) *Wallis* v. *Hands*, [1893] 2 Ch. 75; *Dacksteder* v. *Baird* (1849), 5 U.C.R. 591; *Harrison* v. *Blackburn* (1864), 17 C.B.N.S. 678.

(*l*) *Bertie* v. *Beaumont* (1812), 16 East 33. As to the right of a lessee to maintain an action for damages resulting from withdrawal of lateral support, see *McCann* v. *Chisholm* (1883), 2 Ont. 506; *Backus* v. *Smith* (1881), 5 Ont. App. 341.

There appears to be some difference of judicial opinion on the question under what circumstances such a covenant arises by implication, although it is well settled that the use of the word "demise," in the instrument of lease, implies a covenant for quiet enjoyment (*m*).

Is covenant implied from the mere relation of landlord and tenant?

Thus, in one case it has been held that a covenant for quiet enjoyment is not implied from the mere existence of the relation of landlord and tenant, but from the use of words in the instrument creating that relation, such as the word "demise," having a known legal operation (*n*).

In a more recent case it was held that an undertaking by the lessor for quiet enjoyment is to be implied from the mere relation of landlord and tenant (*o*).

In a case yet more recent, it was decided that an absolute covenant for quiet enjoyment is not always to be implied from the relation of landlord and tenant, or from the use of the word "let," in the instrument creating that relation (*p*).

Jones v. *Lavington*.

In *Jones v. Lavington* (*q*), by an agreement not under seal, but operating as an immediate demise, the defendant agreed to "let" to the plaintiff certain premises for the term of three years. The defendant was himself a lessee of the premises, which, by the terms of the lease to him, were subject to a restrictive covenant, of which the plaintiff had no notice, as to carrying on business thereon. The plaintiff entered into possession, and carried on his business on the premises until restrained by an injunction

(*m*) *Baynes* v. *Lloyd*, [1895] 2 Q.B. 610.

(*n*) *Baynes* v. *Lloyd*, [1895] 2 Q.B. 610.

(*o*) *Budd-Scott* v. *Daniel*, [1902] 2 K.B. 351, following *Bandy* v. *Cartwright* (1853), 8 Ex. 913, and *Hall* v. *City of London Brewing Co.* (1862), 2 B. & S. 737; *Baynes* v. *Lloyd*, [1895] 2 Q.B. 610, dissented from.

(*p*) *Jones* v. *Lavington*, [1903] 1 K.B. 253; *Baynes* v. *Lloyd*, [1895] 2 Q.B. 610, considered.

(*q*) *Jones* v. *Lavington*, [1903] 1 K.B. 253.

obtained by the superior landlord. In an action for breach of contract for quiet enjoyment, it was held that, whether or not any contract for quiet enjoyment could be implied from the word "let," the use of that word did not create an unrestricted contract for quiet enjoyment which would cover lawful interruption by a person claiming under title paramount, and that the plaintiff was not entitled to recover.

In an agreement for a lease which is capable of specific performance, it is probable that a covenant for quiet enjoyment may be implied, although before the *Judicature Act* such a covenant was not implied (*r*).

Implied covenant limited.

An implied covenant for quiet enjoyment is limited to the duration of the lessor's own interest and does not continue after his estate is determined. Thus, if the lessee is ousted by a remainderman after the death of the lessor, he has no action upon an implied covenant against the lessor's executors (*s*).

Baynes v. *Lloyd.*

In *Baynes v. Lloyd* (*t*), the defendants, being possessed of a term of years in a house, of which term there were eight and a half years then unexpired, by indenture sub-let the premises to the plaintiffs for a term of ten and a half years, acting under a mistake, but in good faith. The sub-lease did not contain any express covenant either for title or for quiet enjoyment, nor did the words of letting include the word "demise." The plaintiffs occupied the premises until the end of the eight and a half years, when they were evicted by the defendants' superior landlord. The plaintiffs having brought an action for breach of implied covenants for title and for quiet enjoyment it

(*r*) *Brashier* v. *Jackson* (1840), 6 M. & W. 549; see *Walsh* v. *Lonsdale* (1882), 21 Ch.D. 9; see also chapter VI.

(*s*) *Adams* v. *Gibney* (1830), 6 Bing. 656; 31 R.R. 514; *Baynes* v. *Lloyd*, [1895] 2 Q.B. 610.

(*t*) *Baynes* v. *Lloyd*, [1895] 2 Q.B. 610.

was held that, assuming, in the absence of the word "demise" either of such covenants could be implied in the lease, the duration of the covenant was limited by that of the lessor's own estate, and that consequently the plaintiffs could not recover.

Sub-lessee.

So, a yearly tenant, who has been evicted by the head landlord, is not entitled to sue his lessor for breach of an implied covenant, where such lessor had only a term of years which had expired (*u*).

Under an implied covenant, a sub-lessee who has paid his rent to his immediate lessor, is entitled to sue his lessor in the event of a distress by the head landlord (*v*); but not a sub-lessee who is in reality assignee of the whole term (*w*).

Lawful acts.

An implied covenant, like the usual express covenant, applies only to the lawful, and not to the wrongful acts of third parties (*x*).

It has been held also that an implied covenant, unlike the usual express covenant, extends not only to acts of the lessor and of persons claiming under the lessor, but also to the acts of persons not claiming under him (*y*).

3. *Express Covenant for Quiet Enjoyment.*

Express covenant.

A covenant for quiet enjoyment is not implied from the use of the word "demise," if the instrument contains an express covenant for quiet enjoyment (*z*).

In Ontario, the short form of covenant for quiet enjoyment given in the *Act respecting Short Forms of*

(*u*) *Schwartz* v. *Locket* (1889), 61 L.T. 719.
(*v*) *Hancock* v. *Caffyn* (1832), 8 Bing. 358.
(*w*) *Upton* v. *Ferguson* (1833), 3 Moo. & Sc. 88.
(*x*) *Wallis* v. *Hands*, [1893] 2 Ch. 75.
(*y*) *Bandy* v. *Cartwright* (1853), 8 Ex. 913.
(*z*) *Davis* v. *Pitchers* (1874), 24 U.C.C.P. 516.

Leases (*a*), is as follows: "The said (lessor) covenants with the said (lessee) for quiet enjoyment." This form, when used in a lease expressed to be made in pursuance of the Act, is construed as if it were as follows:

Statutory covenant.

"And the lessor doth hereby for himself, his heirs, executors, administrators and assigns, covenant with the lessee, his executors, administrators and assigns, that he and they paying the rent hereby reserved, and performing the covenants hereinbefore on his and their part contained, shall and may peaceably possess and enjoy the said demised premises for the term hereby granted, without any interruption or disturbance from the lessor, his heirs, executors, administrators and assigns, or any other persons or persons lawfully claiming by, from or under him, them or any of them."

Reference to Act.

A lease purporting to be made "in pursuance of the Act to facilitate the leasing of lands and tenements," which was the title of a former Act, instead of "in pursuance of the Act respecting short forms of leases," which is the title of the present Act, was held to contain a sufficient reference to the present Act to bring the lease within its provisions, and that the short form of covenant for quiet enjoyment was to be read as if it was framed in the words of the corresponding long form (*b*).

Effect of covenant.

The covenant for quiet enjoyment is an assurance against the consequences of a defective title and any disturbance arising therefrom(*c*). Its object is to secure possession to the lessee, and not to guarantee that he may use the premises for any particular purpose (*d*), even

(*a*) R.S.O. (1897), c. 125.

(*b*) *Davis* v. *Pitchers* (1874), 24 U.C.C.P. 516.

(*c*) *Howell* v. *Richards* (1809), 11 East 633.

(*d*) *Spurling* v. *Bantoft*, [1891] 2 Q.B. 384; *Dennett* v. *Atherton* (1872), L.R. 7 Q.B. 316.

when, in consequence of an Act of Parliament, the premises can no longer be used for the purpose intended (*e*).

(a) *Acts of Persons Claiming "By, From or Under" the Lessor.*

"By, from or under."

The implied covenant for quiet enjoyment extends to the acts of the lessor and all other persons (*f*), and it is consequently wider in its scope than the statutory covenant, which is restricted to the acts of the lessor, and of persons claiming "by, from or under him." The statutory covenant is binding on the lessor, his heirs, executors, administrators and assigns; but in so far as it is personal and collateral it does not run with the land (*g*).

Prior lessee.

As to the question who are persons claiming "by, from or under" the lessor in the words of the covenant, it has been held that a prior lessee of the premises is within the covenant (*h*); and also a lessee of adjacent premises holding under the same lessor (*i*).

Title paramount.

But a person claiming by title paramount to the lessor is not within the covenant (*j*).

Third party.

In an action where the plaintiff and defendant occupied adjoining shops under leases from the same landlord, the plaintiff having the prior lease, to restrain the defendant from obstructing his light and view, it was held that the defendant could not call upon his landlord

(*e*) *Newby* v. *Sharpe* (1878), 8 Ch.D. 39.

(*f*) *Bandy* v. *Cartwright* (1853), 8 Ex. 913.

(*g*) *Davis* v. *Town Properties Investment Corporation*, [1903] 1 Ch. 797.

(*h*) *Rolph* v. *Crouch* (1867), L.R. 3 Ex. 44.

(*i*) *Sanderson* v. *Mayor of Berwick* (1884), 13 Q.B.D. 547; *Harrison* v. *Muncaster* (*Lord*), [1891] 2 Q.B. 680.

(*j*) *Woodhouse* v. *Jenkins* (1832), 9 Bing. 431; *Davis* v. *Pitchers* (1874), 24 U.C.C.P. 516.

to defend him against an unfounded claim; but if the plaintiff's claim was well-founded, it was by reason of an easement expressly or impliedly granted by his lease, and the defendant took subject to such easement, and could not claim that the landlord covenanted with him for quiet enjoyment of that which did not pass under his lease; and, therefore, whether the plaintiff's claim was well or ill founded, the landlord was not a proper person to be brought in as a third party (*k*).

Head landlord.

So a superior landlord is not within the covenant. Thus, where the lessee of two houses included in one demise sub-let one of them, and the head landlord ejected the sub-lessee by reason of the sub-lessor's failure to pay rent and repair, it was held that the covenant of the sub-lessor for quiet enjoyment with the sub-lessee was not broken, as the head landlord was not a person claiming "by, from or under" the sub-lessor (*l*).

But where the covenant in a sub-lease provided against disturbance on the part of the sub-lessor, "or of any other, occasioned by his means, procurement or consent," it was held that re-entry by the head landlord for non-payment of rent by the sub-lessor, was a breach of the covenant (*m*).

Although re-entry by a superior landlord is not within the usual covenant, yet where the lessee is evicted under a judgment obtained by consent of the lessor, in an action against him by the head landlord who had no right of re-entry, it was held that the covenant was broken by giving such consent (*n*).

(*k*) *Scripture* v. *Reilly* (1891), 14 P.R. 249; *Thomas* v. *Owen* (1887), 20 Q.B.D. 225, followed.

(*l*) *Kelly* v. *Rogers*, [1892] 1 Q.B. 910.

(*m*) *Stevenson* v. *Powell* (1613), 1 Bulst. 182.

(*n*) *Cohen* v. *Tannar*, [1900] 2 Q.B. 609.

Prior mortgagee.

Where a lease of certain premises was made, containing the ordinary statutory covenant for quiet enjoyment, and the lessee was subsequently ejected by the assignee of mortgages thereon, created prior to the lease, it was held that the lessee could not recover for breach of the covenant, as the assignee of the mortgages was not a person "claiming by, from or under" the lessor, but under the lessor's predecessor in title; and the fact that the lessor had taken the estate subject to the mortgages, and was to pay them off, did not extend her liability under the covenant (*o*).

Railway company.

Where a railway company purchased under their statutory powers the reversion subject to the lease, it was held that the covenant for quiet enjoyment was in force and binding; but in the absence of negligence, no action could be maintained against the company for breach of covenant committed in the reasonable exercise of their powers, the tenant's only remedy being for compensation under the Act (*p*).

Tax-collector.

A distress on the tenant by the collector for taxes payable by the landlord is not a breach of the usual statutory covenant for quiet enjoyment, as the collector is not a person claiming by, from or under the landlord (*q*).

Under a lease containing a covenant for quiet enjoyment an action cannot be maintained for a breach which was occasioned not from the neglect, fraund, or procurement of the lessor, but from the non-fulfillment by the lessee of his own covenants (*r*).

(*o*) *Bellamy* v. *Barnes* (1882), 44 U.C.R. 315.

(*p*) *Manchester Railway Co.* v. *Anderson*, [1898] 2 Ch. 394.

(*q*) *Smith* v. *Franklin* (1892), 12 C.L.T. 414; *Stanley* v. *Hayes* (1842), 3 Q.B. 105.

(*r*) *Snarr* v. *Baldwin* (1861), 11 U.C.C.P. 353.

(b) *Lawful Acts.*

Lawful acts.

The usual covenant for quiet enjoyment in a lease only extends, so far as it relates to the acts of third parties, to lawful acts of disturbance in the enjoyment of the demised premises (*s*).

In order to constitute a breach of the covenant by a third person, it is not sufficient that he is lawfully claiming under the lessor merely; he must be lawfully claiming to do the acts complained of, that is, he must derive lawful authority from the lessor, otherwise such third person alone would be liable (*t*).

Jeffreys v. *Evans.*

In *Jeffreys v. Evans* (*u*), A. let a farm to B. reserving the exclusive right of "hunting, shooting, fishing, and sporting," and afterwards A. let to C. the exclusive right of "shooting, and sporting over and taking the game, rabbits, and wildfowl upon" the farm, and covenanted with C. for his quiet enjoyment of such right without interruption from persons claiming through him. B., the lessee of the farm, shot rabbits, and grubbed up a large quantity of gorse, whereupon C. brought an action against A. It was held first, that B. had no right to shoot rabbits and that his act therefore was a wrongful one, for which A. was not liable; secondly, that B. was entitled to grub up the gorse, in the reasonable use of the land as a farm, that there was no implied covenant with C. that this should not be done, and that A. was therefore not liable for such act of B.

Railway company.

Where a railway company, requiring lands for their station and grounds, fenced in a piece of land, with the consent of the owner, although the amount to be paid for

(*s*) *Jeffreys* v. *Evans* (1865), 19 C.B.N.S. 246.

(*t*) *Harrison* v. *Muncaster* (*Lord*), [1891] 2 Q.B. 680.

(*u*) *Jeffreys* v. *Evans* (1865), 19 C.B.N.S. 246.

it was for some reason not agreed upon, and leased a small portion of it for the purpose of a warehouse, and the owner, not having been paid for the land, afterwards put up a fence which interfered with the lessee's enjoyment, it was held that the company was not liable to the lessee on the covenant in the lease for quiet possession as the owner could not have dispossessed the company, his right to the land having been by the statute converted into a claim to compensation, and his act was therefore not a lawful act(*v*).

Purchaser.

So, no liability is imposed on the lessor under the covenant for quiet enjoyment, where a purchaser of the lands commits a trespass by entering and plowing the land before the crop is harvested, there being a stipulation in the lease that an incoming tenant may enter and plow after harvest. The act was not a lawful act and the purchaser only was liable for the damages (*w*).

It is immaterial whether the authority to do the act complained of be given before or after the lease is made, but the lessee can only complain of acts done after the making of the lease (*x*).

Under a lease to commence at a future date containing a covenant for quiet enjoyment during the term, a lessee cannot sue for a breach before the commencement of the term(*y*).

(c) *What Acts Amount to a Breach.*

What acts.

Structural injury to demised premises, or the obstruction of a right of way is a breach of the covenant; but not a mere temporary inconvenience such as rendering a

(*v*) *Clarke* v. *Grand Trunk Railway Co.* (1874), 35 U.C.R. 57.
(*w*) *Newell* v. *Magee* (1899), 30 Ont. 550.
(*x*) *Anderson* v. *Oppenheimer* (1880), 5 Q.B.D. 602.
(*y*) *Ireland* v. *Bircham* (1835), 2 Bing. N.C. 90.

right of way less convenient (*z*); nor an act of mere annoyance, although legally a nuisance, such as noise, or vibration from adjacent premises (*a*).

Obstruction of light.

The erection by the lessor of buildings on adjacent premises is a breach of the covenant if the lessee's access to light is thereby obstructed (*b*).

Causing chimneys to smoke.

A breach of the covenant is committed by the lessor if he erects, after the demise, on adjacent premises acquired by him before the demise, buildings of such a height as to cause currents of wind to be driven down the chimneys of the lessee and to make them smoke (*c*). In such a case, however, the lessor will not be liable if, at the time of the demise, he was not the owner of the adjacent premises, but acquired them subsequently thereto (*d*).

Davis v. *Town Properties Corporation.*

In *Davis* v. *Town Properties Investment Corporation* (*e*), a lease of offices for a term of fourteen years was granted to the plaintiff in 1897 by the then owner of the freehold, and the lease contained the ordinary covenant by the lessor, for himself, his executors, administrators, and assigns, for the quiet enjoyment of the demised premises by the lessee. In 1898 the lessor conveyed the reversion, subject to the lease to the defendants. In 1900 the defendants purchased from a stranger a house adjoining the demised premises, pulled it down and erected on the site a new building of such a height that it caused one of the plaintiff's chimneys to smoke so as to affect

(*z*) *Manchester Railway Co.* v. *Anderson*, [1898] 2 Ch. 394.

(*a*) *Jenkins* v. *Jackson* (1888), 40 Ch.D. 71; *Hudson* v. *Cripps*, [1896] 1 Ch. 265.

(*b*) *Robson* v. *Palace Chambers Co.* (1897), 14 Times L.R. 56.

(*c*) *Tebb* v. *Cave*, [1900] 1 Ch. 642.

(*d*) *Davis* v. *Town Properties Investment Corporation*, [1903] 1 Ch. 797; *Tebb* v. *Cave*, [1900] 1 Ch. 642, discussed.

(*e*) *Davis* v. *Town Properties Investment Corporation*, [1903] 1 Ch. 797.

materially his enjoyment of one room. It was held that the defendants were not liable for a breach of the covenant for quiet enjoyment, inasmuch as at the date of the demise the lessor had no interest in the adjoining premises, and could not and did not for the benefit of the lessee put any fetter on their enjoyment, but only undertook to respect the rights of the lessee which were limited by the fact that the owner of the adjoining land might, if he were so minded, build on it so as to interfere with the draught of the lessee's chimneys.

Giving notice to sub-lessees.

Interference with the title or possession of the land by legal proceedings, or by giving notice to the lessee's sub-tenants not to pay their rent to him, if such notice be acted on, has been held to be a breach of the covenant (*f*).

Where, after rent has become due, the lessor has obtained possession of the demised premises from the lessee, and distrained for rent in arrear on the goods there found which prove to be insufficient to satisfy the rent, he is not liable under a covenant for quiet enjoyment for refusing to restore possession to the lessee (*g*).

Eviction.

But where the lessor has no power, either expressly reserved in the lease or by statute, to re-enter for non-payment of rent, he is liable under a covenant for quiet enjoyment for evicting his lessee (*h*).

Locking doors.

A lessor is liable on a covenant for quiet enjoyment in a lease of a flat or offices in a building with the right to use the passage ways thereto, if the caretaker employed by him locks the street door after office hours, so that free access thereto is prevented (*i*).

(*f*) *Edge* v. *Boileau* (1885), 16 Q.B.D. 117.

(*g*) *Doe d. Somers* v. *Bullen* (1849), 5 U.C.R. 369.

(*h*) *Purser* v. *Bradburn* (1875), 25 U.C.C.P. 108.

(*i*) *Maclennan* v. *Royal Insurance Co.* (1876), 37 U.C.R. 284; 39 U.C.R. 515.

Municipal corporation.

A municipal corporation leased the market fees of a wood market established in one of the streets of the city, covenanting against their own interference, or that of any one by their license. The corporation had previously passed a by-law, giving the right to deposit materials for building purposes on the highways of the city, and they subsequently demised certain premises adjoining the market to a person who obstructed a portion of the same with building materials. It was held that the corporation was not liable on their implied covenant for undisturbed collection of said fees (*j*).

Giving notice of sale.

Where a lease of premises used as a factory contained this provision: "Provided that in the event of the lessor disposing of the factory the lessees will vacate the premises, if necessary, on six months' notice," it was held that a parol agreement for the sale of the premises, though not enforceable under the Statute of Frauds, was a "disposition" of the same under said provision entitling the lessor to give notice to vacate; and further, that the lessor having, in good faith, represented that he had sold the property, with reasonable grounds for believing so, there was no fraudulent misrepresentation entitling the lessee to damages even if no sale within the meaning of the provision had acutally been made, nor was there any eviction or disturbance constituting a breach of the covenant for quiet enjoyment (*k*).

(d) *Damages.*

Damages.

Under an express agreement for quiet enjoyment in a lease under seal, the lessee may, if ousted by a superior title, recover by way of damages the value of his lease, on the footing of the title being good; and, if the true owner

(*j*) *Reynolds* v. *City of Toronto* (1866), 15 U.C.C.P. 276.
(*k*) *Lumbers* v. *Gold Medal Furniture Co.* (1900), 30 S.C.R. 55, reversing S.C. 26 Ont. App. 78.

grants a lease to the lessee on different terms, the damages may be calculated on the basis of the difference between the rents and the difference in value of the other terms, under the two leases (*l*).

Prior mortgage.

A lessee is entitled to damages for breach of the covenant for quiet enjoyment out of the proceeds of sale of the lands sold under a prior mortgage, in priority to the claims of mortgagees whose mortgages were made subsequent to the lease (*m*).

The damages in an action for breach of the covenant, may be assessed, in the case of a continuing breach, up till judgment (*n*).

Injunction.

The breach of a covenant for quiet enjoyment may be restrained by injunction, and, where the nature of the case requires it, by a mandatory injunction (*o*).

(*l*) *Lock* v. *Furze* (1866), L.R. 1 C.P. 441.
(*m*) *Anderson* v. *Stevenson* (1888), 15 Ont. 563.
(*n*) *Hole* v. *Chard Union*, [1894] 1 Ch. 293.
(*o*) *Allport* v. *Securities Coroporation* (1895), 64 L.J. Ch. 491.

CHAPTER XII.

RENT.

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SECTION III.—WHEN, WHERE AND HOW PAYABLE.
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SECTION I.

WHAT IS RENT.

What is rent.

Rent, as the name implies, is that which is rendered or returned, and, in a wide sense, it is used as signifying that which is given as a compensation for the use or possession of property of any kind, whether the relation of landlord and tenant exists or not. Thus, a payment made for the use or hire of a chattel, or as interest on money lent is sometimes called rent. So, fees and dues payable by licensees, who have no exclusive possession, but the mere

right of user in common with others, are often termed rents or rentals; payments charged on persons who occupy property which is drained into a common sewer, are called rents by statute (*a*).

Compensation recoverable by distress.

But the word "rent" means strictly that which is paid or payable under a tenancy, by a tenant to a landlord and recoverable by distress, either as compensation for the possession and use of the landlord's property, or as an acknowledgment by the tenant of his title.

The distinction is important, since, if there is no tenancy, payments, although they may be called rents, cannot be recovered by distress unless a distress is authorized by statute, or by the express agreement of the parties. Thus, where the owner of a factory agreed to give space in, but not the exclusive possession of, rooms for lace-machines, it was held there was no tenancy, and as a consequence the weekly payments to be made were not rents, and could not, in the absence of express stipulation, be distrained for (*b*).

Rent issues out of land.

Rent is said to arise or issue out of lands, tenements or hereditaments corporeal, to which the landlord may have recourse to distrain, and payments for the recovery of which there is no right of distress necessarily incident thereto, are not properly speaking rents. Rent cannot issue out of incorporeal hereditaments or personal chattels; where rent is payable in respect of a furnished house the whole rent is said to issue out of the realty (*c*).

Rent-charge.

A rent-charge is a periodical payment charged on land by deed or will with an express power to distrain for it in case of non-payment, the owner of the rent-charge having no reversion in the land.

(*a*) R.S.O. (1897), c. 223, s. 539.

(*b*) *Hancock* v. *Austin* (1863), 14 C.B.N.S. 634.

(*c*) *Farewell* v. *Dickenson* (1827), 6 B. & C. 251; *Brown* v. *Peto*, [1900] 1 Q.B. 346; 2 Q.B. 653.

Rent-seck.

Rent-seck, *redditus siccus*, or barren rent is a rent-charge without an express power to distrain, and is so called for that reason. It is provided by statute, however, that a distress may be made for a rent-seck as in case of rent reserved in a lease (*d*).

Under the *Landlord and Tenants' Act* (*e*), the word "rents" is to be construed as including rent-service, rent-charge and rent-seek, and all periodical payments or renderings in lieu of, or in the nature of rent.

A fee-farm rent is a rent-charge reserved in perpetuity on a grant in fee.

Quit-rent.

Rents of assize are the rents payable by freeholders of a manor, and are often called chief-rents, or quit-rents, as by payment thereof the tenant is quit or free of all other services (*f*).

Rack-rent is a rent of the full rentable value of the land demised.

Rent-service.

Rent reserved under a lease was originally called rent-service, because fealty, homage or other corporeal service was incident to it.

Nominal rent.

A rent may be in the nature of substantial compensation; or it may be merely nominal, as for example, a peppercorn, which is not usually intended to be paid, but it may nevertheless be demanded and distrained for.

Royalty.

Rent is usually paid or payable in money but it may be paid or payable in produce, or other chattels; or it may consist in corporeal services, as plowing or the like; or it may be a royalty on bricks or minerals made or mined out of the soil (*g*).

(*d*) 4 Geo. II. c. 28, s. 5; R.S.O. (1897), vol. III., c. 342, s. 1. As to the distinction between a rent seck, and a payment charged on land, see *McCaskill* v. *McCaskill* (1886), 12 Ont. 783.

(*e*) R.S.O. (1897), c. 170, s. 1; see also R.S.M. (1902), c. 100, s. 1; R.S.N.S. (1900), c. 150, s. 2.

(*f*) Gilbert: Rents, p. 38.

(*g*) *Reg.* v. *Westbrook* (1847), 10 Q.B. 178.

Dead-rent.

It is usual in mining leases to reserve two rents; a dead-rent, that is, a minimum rent to be paid whether the mines are worked or not, and a further rent in the nature of a royalty upon whatever is mined.

Rent an incorporeal hereditament.

Rent payable under a lease of land is an incorporeal hereditament, and where the right or title to it comes in question, a Division Court has no jurisdiction in an action to recover it(*h*).

SECTION II.

COVENANT FOR PAYMENT.

"Yielding and paying."

No particular form of words is necessary to be used in a lease to constitute a covenant to pay rent. Any words indicating an undertaking to pay will be sufficient. The words "yielding and paying" in the *reddendum* of a lease amount to a covenant to pay rent (*a*).

In Ontario, under the *Act respecting Short Forms of Leases* (*b*), the short form of the covenant to pay rent is as follows: "The said lessee covenants with the said lessor to pay rent." This form contained in a lease expressed to be made in pursuance of the Act, is construed as if it were in the following form:

Statutory covenant.

"And the said lessee doth hereby for himself, his heirs, executors, administrators and assigns, covenant with the said lessor that he, the said lessee, his executors, administrators and assigns will, during the said term, pay unto the said lessor the rent hereby reserved in manner hereinbefore mentioned, without any deduction whatsoever."

A lessee under a covenant to pay rent becomes liable to pay the rent reserved upon the execution of the lease,

(*h*) *Kennedy* v. *MacDonell* (1901), 1 Ont. L.R. 250; see also *Hopkins* v. *Hopkins* (1883), 3 Ont. 223.

(*a*) *Iggulden* v. *May* (1824), 9 Ves. 325; 8 R.R. 623.

(*b*) R.S.O. (1897), c. 125.

and continues to be liable until the estate vested in him thereby is destroyed (*c*).

Under an instrument of demise that conforms to legal requirements, a lessee is liable for rent although he does not enter upon or occupy the premises (*d*).

Verbal lease.

But under a verbal agreement for a present demise, although for a term less than three years, an intended lessee is not liable for the rent agreed by him to be paid if he does not enter upon the premises (*e*). Such an agreement has been held to be a contract respecting an interest in land, within the meaning of the fourth section of the Statute of Frauds which provides that no action shall be brought upon it (*f*).

Unsigned lease.

Where a lease purports to demise lands to three lessees and only two of them sign it, it has been held that the lessor, in an action on the covenant for payment of rent, cannot recover against the two lessees who signed the lease, although the three were in occupation of the premises (*g*).

Premises Unfit for habitation.

It is no defence to an action for rent, that the house demised became unfit for habitation in consequence of the roof admitting water, and by reason of defective drainage it became damp, offensive and unwholesome, although the lessor had notice of its condition, and the lessee quitted the premises. In such a case, it was held that the lessee was liable for rent accruing after he left the premises (*h*).

Where a lessee took a lease of land in front of the city of Toronto, with the use of the water in the bay adjacent, and the city corporation in the construction of the esplan-

(*c*) *Ward (Lord)* v. *Lumley* (1860), 5 H. & N. 87, 656.

(*d*) *Bellasis* v. *Burbrick* (1696), 1 Salk. 209.

(*e*) *Bank of Upper Canada* v. *Tarrant* (1860), 19 U.C.R. 423.

(*f*) *Moore* v. *Kay* (1880), 5 Ont. App. 261; *Edge* v. *Strafford* (1831), 1 Tyr. 295; 35 R.R. 746.

(*g*) *Piper* v. *Simpson* (1881), 6 Ont. App. 175.

(*h*) *Denison* v. *Nation* (1862), 21 U.C.R. 57.

ade cut off the access to the water, it was held that he was nevertheless bound to pay rent under his covenant (*i*).

A covenant by the tenant for payment of rent is independant of a covenant by the landlord to repair, and before the *Judicature Act*, could be enforced by the landlord, although there was a breach of his covenant to repair(*j*). Since that Act the breach of a covenant on the part of a landlord may be set up by way of counter-claim.

Premises abandoned.

When a tenant leaves the demised premises before the expiration of the term, paying rent up to the time of leaving and notifying the landlord that he does not intend to keep the premises any longer or pay any more rent, the landlord cannot, on the principle that there has been a repudiation of the contract, at once recover the whole rent for the unexpired portion of the term. He must either consent to the tenant's departure and treat the term as surrendered, or he must treat the term as subsisting and sue for future gales of rent as they fall due (*k*).

Where part of the crop is payable as rent, it is no defence to an action brought for non-delivery of the crop, that it was converted by one who was not entitled to it. An inchoate purchaser of land on which the crops are growing is not entitled thereto, as against the tenant(*l*).

Where a tenant agrees to pay a yearly rent per acre of cleared land, and to clear so many acres during the term, he is not liable for rent of the land to be cleared, in the absence of a stipulation plainly expressing that intention (*m*).

(*i*) *Lyman* v. *Snarr* (1862), 9 U.C.C.P. 104.

(*j*) *Wilkes* v. *Steele* (1856), 14 U.C.R. 570.

(*k*) *Connolly* v. *Coon* (1896), 23 Ont. App. 37; *Hochster* v. *De La Tour* (1853), 2 E. & B. 678, and *Frost* v. *Knight* (1872), L.R. 7 Ex. 111, considered. See *Fuches* v. *Hamilton Tribune Co.* (1885), 10 P.R. 409.

(*l*) *Richardson* v. *Trinder* (1861), 11 U.C.C.P. 130.

(*m*) *Jones* v.*Montgomery* (1871), 21 U.C.C.P. 157.

Where a tenant agreed to make certain improvements upon the demised premises, and was to get the first three years' rent for said buildings and improvements, providing they are completed in the first two years, it was held that the right to rent was suspended during the two years (*n*).

Covenant controls *reddendum.*

A covenant for payment controls and overrides a reservation of rent in the *reddendum.* Thus in a mining lease, where the lessees covenanted to take from the mine not less than 2,000 tons of ore the first year, and not less than 5,000 tons in every subsequent year thereafter, and to "pay quarterly the sum of $1 per ton for the quantity agreed to be taken during each year," it was held that the lessees were liable for the rent according to the covenant although less than the agreed quantity was mined and the reservation of the rent in the *reddendum* was for $1 per ton for every ton mined, and that they could not recover back previous payments of rent based on the quantity agreed to be mined as for a failure of consideration (*o*).

Additional rent.

Where there is a covenant on the part of the tenant not to do a specified act, for example, plowing up pasture land, and if he does that act to pay an additional rent, he will be permitted to do it on paying such additional rent (*p*).

But where the covenant is in absolute terms to refrain from doing such act, a stipulation for the payment of additional rent in case of breach, will not give him the right to break the covenant on paying such additional rent, even where the lease contains a proviso for re-entry on non-payment of rent "or of the additional rent where such rent becomes payable," for the effect of such a pro-

(*n*) *Irwin* v. *Hunter* (1869), 19 U.C.C.P. 391.

(*o*) *Wallbridge* v. *Gaujot* (1888), 14 Ont. App. 460; *Palmer* v. *Wallbridge* (1888), 15 S.C.R. 650.

(*p*) *Woodward* v. *Gyles* (1690), 2 Vern. 119; *Legh* v. *Lillie* (1860), 6 H. & N. 165.

viso is to give the lessor the option to take the increased rent or to re-enter (*q*).

Reduction of rent.

In like manner, where there is an absolute covenant to do a specified act, and a proviso for reduction of rent in case it is done, the lessee is not discharged from liability under such a covenant by payment of the rent in full (*r*).

Where additional rent is provided for under such circumstances, it is payable as liquidated damages, unless such rent is made payable upon the breach of any one of several covenants of an unequal degree of importance (*s*). And when such additional rent once becomes payable, it continues to be payable until the end of the term (*t*).

Increased rent.

Where the lessor allowed the lessees to remain in occupation for two months after the expiration of their term, and made no demand for an increased rent, and then gave notice that if they desired to remain on longer they must pay an increased rent, it was held that the lessor must be deemed to have agreed to allow the lessees to remain for the two months on the terms of paying the rent reserved by the lease, but thereafter only on paying the increased rent (*u*).

Abatement of rent.

Where there is an agreement for an abatement of rent in case of sale of part of the lands, the amount of the abatement should not be measured by the interest on the amount for which the lands were sold, but should be determined on a consideration of the comparative value to

(*q*) *Weston* v. *Metropolitan Asylum District* (1882), 8 Q.B.D. 387; 9 Q.B.D. 404.

(*r*) *Hanbury* v. *Cundy* (1887), 58 L.T. 155.

(*s*) *Willson* v. *Love*, [1896] 1 Q.B. 626.

(*t*) *Birch* v. *Stephenson* (1811), 3 Taunt. 469; *Bowers* v. *Nixon* (1848), 12 Q.B. 558.

(*u*) *Hilliard* v. *Gemmell* (1886), 10 Ont. 504.

the tenant of the part sold, having regard to the rent paid for the whole (*v*).

Interest on rent.

In an action for rent payable in pursuance of a covenant, the landlord is entitled to interest from the date of the writ, but it was held in an early case to be doubtful if he is entitled to interest on each instalment of rent as it falls due, without showing a previous demand or other warning to the tenant of an intention to demand interest in the event of non-payment (*w*).

In a recent case, where, under an agreement for a lease a time was fixed for the commencement of the term, and the lessee entered into possession and had the use of the premises, but the title was not accepted till some time afterwards, interest on arrears of rent which had accrued in the meantime was allowed (*x*).

Rent reserved under a tenancy may be recovered by action or by distress; but if a landlord proceeds to distrain he cannot bring an action before, though he may after, he has sold the tenant's goods, for the rent that remains unsatisfied (*y*).

Illegal purpose.

An action will not lie to recover rent under a lease if it is shewn that the premises were demised for an illegal purpose; although (probably) the landlord might succeed in an action to recover possession; as in that case he would not have to rely upon the illegal contract (*z*). Thus, it was held a good plea in covenant for rent, that the premises were let for the express purpose of being used in draw-

(*v*) *Bickle* v. *Beatty* (1859), 17 U.C.R. 465.

(*w*) *Crooks* v. *Dickson* (1866), 15 U.C.C.P. 523; 1 C.L.J. 211.

(*x*) *In re the Canadian Pacific Railway Co. and the City of Toronto* (1903), 5 Ont. L.R. 717.

(*y*) *Lehain* v. *Philpott* (1875), L.R. 10 Ex. 242; *Philpott* v. *Lehain* (1876), 35 L.T. 855; *Smith* v. *Haight* (1900), 4 Terr. L.R. 387; *Gray* v. *Curry* (1890), 22 N.S.R. 262.

(*z*) *Gas Light and Coke Co.* v. *Turner* (1839), 5 Bing. N.C. 666; 6 Bing. N.C. 324.

ing oil of tar, and boiling oil and tar, contrary to the provisions of the *Building Act* (*a*).

So, where commissioners appointed under a statute limiting their powers with respect to demises and to the collection and appropriation of rent when due, made a demise beyond the scope of these powers, under which the tenant was put into possession and enjoyed his term, and at the expiration of the term, they took a promissory note from the tenant for the rent, giving time for payment, it was held that they could not sustain an action upon such note, because the promise to pay the note arose upon an illegal consideration, viz., the illegal demise (*b*).

And where commissioners exercising a public trust under an Act of Parliament, made a lease at a rent payable every fortnight in advance, the Act requiring the rent to be made payable monthly, it was held that they could not be permitted to recover the rent under such a contract, because it was a contract substantially different from the one which the commissioners were expressly directed by the statute to make (*c*).

A lessee is not liable for rent under a lease of premises for use as an hotel which did not, to the knowledge of the parties, comply with the requirements of a municipal by-law in regard to the number of bed-rooms. In such a case, the lease is void *ab initio*, and the maxim, *In pari delicto potior est conditio defendentis*, applies (*d*).

It is not necessary that the illegal purpose appear on the face of the lease, as parol evidence may be given to show the intention of the parties (*e*).

(*a*) *Ibid.*
(*b*) *Ireland* v. *Guess* (1846), 3 U.C.R. 220.
(*c*) *Ireland* v. *Noble* (1846), 3 U.C.R. 235.
(*d*) *Hickey* v. *Sciutto*, (1903), 40 C.L.J. 125.
(*e*) *Gas Light and Coke Co.* v. *Turner* (1839), 6 Bing. N.C. 324.

It is immaterial whether the illegal purpose of the demise has been carried into effect or not (*f*). But it must be shown that the lessor was aware of the use to which the premises were to be put when he let them (*g*).

Immoral purpose.

So, rent cannot be recovered under a lease where the premises were let for an immoral purpose (*h*).

SECTION III.

WHEN, WHERE AND HOW PAYABLE.

When payable.

Rent is due and payable at the first moment of the day appointed for payment, and is in arrear on the first moment of the day following (*a*).

Each periodical payment of rent is termed a "gale," and a "gale-day" is any day on which payment is to be made.

The question when rent is payable is a question of fact, and it may properly be left to the jury to say whether the rent was to be paid quarterly, or yearly or in any other way (*b*).

If the rent be payable yearly, or by the year, and no time is mentioned for payment, it is not payable or recoverable until the end of a year from the commencement of the tenancy (*c*). Although it may have been actually paid for some time at other periods, or in advance.

When rent is made payable on two or more specific days in each year, it will become due on the first of such days that occur after the making of the demise, without

(*f*) *Gibbons* v. *Chambers* (1885), C. & E. 577.
(*g*) *Girardy* v. *Richardson* (1793), 1 Esp. 13.
(*h*) *Appleton* v. *Campbell* (1826), 2 C. & P. 347.
(*a*) *Dibble* v. *Bowater* (1853), 2 E. & B. 564.
(*b*) *Wilson* v. *Macnamara* (1854), 12 U.C.R. 446.
(*c*) *Coomber* v. *Howard* (1845), 1 C.B. 440.

regard to the order in which they are mentioned in the lease.

Under a lease dated the 27th of September, 1862, for ten years from the 1st of January, 1863, containing a *reddendum* clause as follows: "yielding and paying yearly during the said term the yearly rent of $720, the first payment to begin and be made on the 1st of January, 1863, next ensuing from the date of these presents," with a covenant by the lessee to pay said yearly rent, on the said day and time therein limited and appointed for payment thereof, it was held that the second year's rent was payable on the 1st of January, 1864 (*d*).

Under an indenture of lease, creating a term for five years, to be computed from the 15th of March, 1867, at the yearly rent of $280, payable on the 1st days of November and May during the term, excepting the last payment, which was to be made on the 15th of March preceding the 1st of May, it was held that the first instalment became due on the 1st of November, 1867 (*e*).

Under a lease of a farm for five years from the 31st of March, 1866, the lessor was to find the team and seed for the first year, and "to receive as rent for the first year, two-thirds of all the grain when cleaned, threshed, and ready for market, also one-third of the straw, turnips, and root crops, and half of the hay; for the remainder of the term to receive one-third of all the crops, with the exception of the hay, of which one-half," it was held that the words "when cleaned," etc., applied only to the first year, and that the second year's rent did not become due until the end of the second year (*f*).

(*d*) *Joslin* v. *Jefferson* (1865), 14 U.C.C.P. 260.
(*e*) *Brown* v. *McCarty* (1869), 18 U.C.C.P. 454.
(*f*) *Nowery* v. *Connolly* (1869), 29 U.C.R. 39.

Under a lease, dated the 21st of December, 1874, for five years, to commence from the 1st of April, 1875, the rent of $80 was to be payable annually on the 1st of June in each year, but subject to a proviso that if the lessee "shall yearly and every year during the said term, or earlier, if he shall think proper, chop, clear, and fence in a proper manner six acres of the said land, then the current year's rent shall be considered as paid and satisfied." The rent not being paid on the 1st of June, 1875, and the lessee then having three acres cleared, it was held that the rent reserved, payable on the 1st of June, 1875, was then due, and might be distrained for, and that the effect of the proviso was not to suspend the right to distrain during the currency of the year (*g*).

Under a lease dated the 15th of December, 1862, for five years, at an annual rent, half payable on the 1st of January, and half on 1st of February following, in each and every year during the term, it being agreed that the first payment of rent should not become due until the 1st of January, 1864, it was held that this agreement did not prevent any rent from falling due in 1863, but was limited to the first payment to be made on the 1st of January, 1863, or at most to the rent for the first year; and that two years' rent therefore was due on the 1st of February, 1864 (*h*).

Where premises were leased from the 1st of September, 1846, for six years, at a yearly rent, the first payment to be made on the 1st of March, 1848, and the succeeding yearly payments to be made on the 1st March, during the lease, it was held, that the rent for the sixth year fell due at the expiration of the last year's occupation, namely, on the 1st of September, 1852 (*i*).

(*g*) *Peacey* v. *Ovas* (1877), 26 U.C.C.P. 464.
(*h*) *Huskinson* v. *Lawrence* (1866), 26 U.C.R. 570.
(*i*) *Neal* v. *Scott* (1853), 10 U.C.R. 361, per Robinson, C.J.

A mere agreement between landlord and tenant after the lease has been made, whereby the time or mode of payment fixed by the lease has been altered, in indulgence to the tenant, is not, unless founded on a fresh consideration, binding on the landlord, even although it has been acted on by the parties (*j*).

A tenant may by parol bind himself to pay rent in advance (*k*).

Payment in advance.

Under a lease dated 1st of October, for five years from the date thereof at a rent payable on every first day of October during the said term, the first year's rent had been paid in advance, but it was held that the rent was not payable in advance in the subsequent years (*l*).

Payment in advance not good against assignee.

Payment of rent in advance where it is not so provided in the lease is a good payment as against the landlord himself, or his executors (*m*). Such a payment is not, however, a fulfilment of the covenant to pay rent, as against an assignee of the reversion; it is in effect an advance to the landlord on the implied agreement that when the rent falls due it will be treated as a discharge thereof. So, if payment of rent is made in advance to the landlord, and before the rent becomes due by the terms of the lease, he parts with the reversion, the tenant is liable to pay the rent again to the assignee of the reversion, if before it becomes due he receives notice from the assignee to pay it to him (*n*).

Where payable.

In the absence of an express agreement appointing a place for payment, rent is payable upon the land demised.

(*j*) *In re Smith and Hartogs* (1895), 73 L.T. 221.

(*k*) *Galbraith* v. *Fortune* (1860), 10 U.C.C.P. 109.

(*l*) *McCallum* v. *Synder* (1860), 10 U.C.C.P. 191; see also *Brown* v. *Blackwell* (1874), 35 U.C.R. 239.

(*m*) *Nash* v. *Gray* (1861), 2 F. & F. 391.

(*n*) *De Nicholls* v. *Saunders* (1870), L.R. 5 C.P. 589; see also *Cook* v. *Guerra* (1872), L.R. 7 C.P. 132.

If, however, there is a covenant in the lease for the payment of rent, it is the duty of the tenant to seek out the person entitled, wherever he may be, and pay him (*o*).

Tender.

In order to constitute a legal tender, the money must be either produced and shewn to the creditor, or its production expressly or impliedly dispensed with. Where, therefore, a tenant, after refusing to pay some charges and costs which the landlord claimed in addition to the rent, said to the landlord, "Here is the rent," which he told the landlord he had in a desk, but did not produce it, or shew it to the landlord who said nothing and left the premises, it was held that these facts did not amount to a tender, or a waiver of a tender (*p*).

In what currency.

Where the lease is made in Canada, and no place out of Canada is appointed for payment, the rent is payable in the current money of Canada, and a tender of the amount in the currency of the United States is invalid, although the head office of the lessors, and part of the demised premises, are situate in the United States (*q*).

Promissory note.

A promissory note, if given in satisfaction and discharge of the rent, operates as an absolute payment; but, if given merely on account of rent, it is not a payment, and does not suspend the right of action or distress for the rent during its currency (*r*).

A sub-lessee cannot insist that a promissory note given by his lessor to the head landlord, operates as a discharge of the rent as against such sub-lessee (*s*).

(*o*) *Haldane* v. *Johnson* (1853), 8 Ex. 689.

(*p*) *Matheson* v. *Kelly* (1874), 24 U.C.C.P. 598.

(*q*) *Niagara Falls International Bridge Co.* v. *Great Western Railway Co.* (1863), 22 U.C.R. 592.

(*r*) *Davis* v. *Gyde* (1835), 2 A. & E. 623; 41 R.R. 489; *Palmer* v. *Bramley*, [1895] 2 Q.B. 405.

(*s*) *McLeod* v. *Darch* (1857), 7 U.C.C.P. 35.

A cheque given for rent, on the other hand, is only a conditional payment, so that if it is dishonoured the landlord's remedies remain intact (*t*). Cheque.

SECTION IV.

TO AND BY WHOM PAYABLE.

Where a tenant has entered into an agreement or stipulation, whether under seal or not, for the payment of rent, he continues to be liable therefor even after he has assigned his interest in the term (*a*). Lessee.

Such a stipulation cannot be treated, as between lessor and lessee after the assignment, as one of mere suretyship for the assignee (*b*).

In the absence of an express stipulation by the lessee to pay rent, it would seem that he may get rid of his liability by assigning the term; that is to say, he is not liable after assignment upon a mere covenant implied by law from the relation of landlord and tenant, or from the use of the words "yielding and paying" in the *reddendum* (*c*). Lessee after assignment.

Whether the lessee continues liable or not, the assignee is liable for the rent during the time he occupies, by virtue of his privity of estate. An assignee may get rid of his liability by assigning over, whether he has covenanted to pay the rent or not (*d*). Assignee.

An assignee of a lease is liable for rent payable thereunder, although he was under a misapprehension as to the extent of the land demised, and supposed erroneously that

(*t*) Byles on Bills, 16th ed., p. 24.

(*a*) *Auriol* v. *Mills* (1790), 4 T.R. 94; *Boot* v. *Wilson* (1807), 8 East 311.

(*b*) *Baynton* v. *Morgan* (1888), 22 Q.B.D. 74.

(*c*) See *Baynton* v. *Morgan* (1887), 21 Q.B.D. 101, per A. L. Smith, J., at p. 105.

(*d*) See chapter XXIV.

he was getting a frontage on a certain street, since, by calling for the lease at the time of the assignment, he might have ascertained the true state of facts (*e*).

Sub-lessee.

A sub-lessee is not liable in an action by the head landlord for rent, although his goods on the premises may be distrained therefor (*f*).

It is a good defence to an action by a lessor for rent, that his interest in the premises has expired, or has become vested in another, at least for the proportion of rent accruing thereafter (*g*).

Assignment of reversion.

A lease by deed for the whole interest of the person granting it, or for a greater interest, operates in law as an assignment, and leaves no reversion in the lessor; and apart from statute the rent reserved under such an instrument cannot be recovered by distress, but it may be recovered by action (*h*). And where the lease is not made by deed, so that it cannot operate as an assignment, the rent reserved thereby may be recovered by action, where the intention of the parties was, by such instrument, to create the relationship of landlord and tenant between them (*i*).

In Ontario, a distress may apparently be made for rent reserved under such circumstances (*j*).

Where a landlord assigns his reversion to another, he is entitled to sue for the rent which became due before the assignment, but not after (*k*); and the assignee of the re-

(*e*) *Talbot* v. *Rossin* (1864), 23 U.C.R. 170.

(*f*) *Holford* v. *Hatch* (1779), 1 Doug. 183.

(*g*) *Cunninghame* v. *Duane* (1849), 9 U.C.R. 274.

(*h*) *Baker* v. *Gostling* (1834), 1 Bing. N.C. 19; 41 R.R. 533; *Wollaston* v. *Hakewill* (1841), 3 M. & Gr. 297.

(*i*) *Pollock* v. *Stacey* (1847), 9 Q.B. 1033.

(*j*) R.S.O. (1897), c. 170, s. 3; *Harpelle* v. *Carroll* (1896), 27 Ont. 240; see chapter XIII.

(*k*) *Harmer* v. *Bean* (1853), 3 C. & K. 307.

version is entitled to the rent which falls due after the assignment, but not before (*l*).

Notice of assignment.

But a tenant may continue to pay rent to the landlord until he receives notice from the assignee to pay rent to him, whereupon the assignee becomes entitled to all rent which falls due after the notice, as well as to rent in arrear which fell due after the assignment (*m*). And if a tenant continues to pay rent to his lessor after receiving notice from the assignee, he may be compelled to pay it over again, and in such a case he cannot recover from the lessor what he has so paid (*n*).

Assignee of rent.

So an assignee of the rent merely, not of the reversion, is entitled to be paid by the tenant after notice is given (*o*), even if the landlord notifies the tenant not to pay anything further to the assignee (*p*).

An assignment of rent to become due in the future is valid; but it must be done by an instrument under seal (*q*). An assignment, however, of rent already due is regarded as the assignment of a chose in action, and it may apparently be done by writing without a seal (*r*).

Where a lessor who had a life estate in certain lands, made a lease of them for ten years to a person who was entitled to the reversion in fee, and the rent reserved in the lease was to the lessor simply, and the covenant for the payment of rent was "with the lessor, her heirs and assigns," for payment to "the said lessor, her heirs and assigns," it was held in an action brought by the lessor's

(*l*) *Flight* v. *Bentley* (1835), 7 Sim. 149.
(*m*) *Moss* v. *Gallimore* (1779), 1 Doug. 279; 18 R.C. 403.
(*n*) *Higgs* v. *Scott* (1849), 7 C.B. 63.
(*o*) *Allen* v. *Bryan* (1826), 5 B. & C. 512.
(*p*) *Knill* v. *Prowse* (1884), 33 W.R. 163.
(*q*) *Dove* v. *Dove* (1868), 18 U.C.C.P. 424.
(*r*) *Galbraith* v. *Irving* (1885), 8 Ont. 751.

executor for instalments of rent which became payable after the lessor's death, that, as the interest of the lessor was a freehold interest, the executor could not recover, either as being entitled to the reversion of a chattel interest, or as being the person designated by the covenant; it was also held that there was no estoppel to prevent the lessee from shewing that the title of the lessor had come to an end, and that he himself became the owner upon her death (*s*).

Mortgagee.

The rents due by tenants of a mortgagor become payable to a mortgagee of the reversion, on notice by him to them to pay; and to a mortgagee, whose mortgage was created prior to the leases, upon the attornment of the tenants to him; and, as against him, in such cases, an attaching order, served on the tenants under a judgment against the landlord, has no validity. An attaching order binds only such debts as the debtor can honestly deal with, without affecting the interests of third parties (*t*). And where a mortgagee, under a mortgage created prior to the lease, served a notice on the tenant to pay rents to him, and the mortgagor endorsed his approval on the notice, it was held that these acts operated as an assignment of the rents to the mortgagee which would be valid as against judgment creditors of the mortgagor (*u*).

Judgment creditor.

Executor.

It has been held that an executor or administrator has no right as such to receive the rents of real estate. As to them he is merely an intermeddler, and will not be entitled to any commission thereon (*v*).

But in Ontario, under the *Devolution of Estates Act* (*w*), it would seem that an executor or administrator

(*s*) *Thatcher* v. *Bowman* (1889), 18 Ont. 265.
(*t*) *Parker* v. *McIlwain* (1896), 17 P.R. 84; see chapter XXIV.
(*u*) *Ibid.*
(*v*) *Dagg* v. *Dagg* (1878), 25 Gr. 542.
(*w*) R.S.O. (1897), c. 127, s. 4.

is entitled and is bound to collect rents, at least, until the lands vest in the heir or devisee (*x*).

A partner of the tenant, who is jointly interested in the lease and in the goods on the demised premises, is, for purposes of distress, deemed to be a tenant, and subject to the terms of the lease and liable for the rent (*y*). Partner.

SECTION V.

PROVISO FOR ACCELERATION OF PAYMENT.

It is usual to insert in leases a covenant or proviso in the following form or to the like effect:

"Provided also, and it is hereby expressly agreed and understood by and between the parties hereto, that if the term hereby granted, or any of the goods or chattels of the said lessee shall be at any time during said term seized or taken in execution or attachment by any creditor of the said lessee, or if the said lessee shall make any chattel mortgage or bill of sale of any of his crops or other goods and chattels, or any assignment for the benefit of creditors, or becoming bankrupt and insolvent, shall take the benefit of any Act that may be in force for bankrupt and insolvent debtors, or shall attempt to abandon said premises, or to sell and dispose of his farm stock and implements, so that there would not, in the event of such sale or disposal, be a sufficient distress on said premises for the then accuring rent, of which the said lessor shall be sole judge, then in every such case, the then current and next ensuing years' rent and the taxes for the then current year (to be reckoned upon the rate for the previous year, in case the rate shall not have been fixed for the then current year) Proviso for acceleration.

(*x*) See chapter XXV.

(*y*) *Young* v. *Smith* (1880), 29 U.C.C.P. 109.

shall immediately become due and payable, and the term hereby granted shall at the option of the said lessor immediately become forfeited, void and determined, and in every of the above cases such taxes or accrued portion thereof be recoverable by said lessor in the same manner as the rent hereby reserved. And also in case of removal by the lessee of his goods and chattels in whole or a substantial part thereof from off the said premises, the said lessor may follow and distrain the same for thirty days in the same manner as is provided for by law in cases of fraudulent or clandestine removal."

Option to avoid.

A proviso in a lease declaring in words however clear and strong that the term shall be forfeited and void on a breach of a covenant or condition, has been construed by the courts to mean that the term is voidable only, at the option of the lessor (*a*).

The statutory provision (*b*) allowing a distress to be made after the determination of a lease, applies only to cases where the lease has been determined in ordinary course by lapse of time, and not to cases where it has been determined by forfeiture on breach of a covenant or proviso (*c*).

Removal of goods.

A proviso in a lease, that if the tenant should commence to remove his goods from the demised premises the then current year's rent immediately became due and in arrear, is valid, and on the tenant proceeding to sell and dispose of all the goods on the demised premises, with the intention of finally quitting the place before the time when the

(*a*) *Davenport* v. *Reg.* (1877), 3 App. Cas. 115; *Doe* v. *Bancks* (1821), 4 B. & Ald. 401; 23 R.R. 318; *Palmer* v. *Mail Printing Co.* (1897), 28 Ont. 656.

(*b*) 8 Anne, c. 14, s. 6; R.S.O. (1897), vol. III., c. 342, s. 2.

(*c*) *Grimwood* v. *Moss* (1872), L.R. 7 C.P. 360; *Baker* v. *Atkinson* (1886), 11 Ont. 735; *Linton* v. *Imperial Hotel Co.* (1889), 16 Ont. App. 337.

rent became due and the lease terminated, a distress by the landlord is legal (*d*).

Assignment for benefit of creditors.

A covenant or proviso in a lease that "if the lessee shall make any assignment for the benefit of creditors, the said term shall become forfeited and void, and the full amount of the current yearly rent shall be at once due and payable," is valid, and a distress made for rent which became due by virtue of such a proviso, but which would not otherwise have become due until afterwards, will be upheld (*e*).

Under such a proviso, it has been held that a distress may be justified on the ground that the rent became due at the same instant as the lease terminated and not thereafter; but even if that construction could not be given to it, the distress would nevertheless be valid, although made for money reserved as rent falling due after the expiration of the term, by reason of the lessee's express personal covenant declaring the sum to be rent; and the covenant which was binding on the tenant was equally binding on his assignee (*f*).

Graham v. *Long*.

The decision in *Graham* v. *Long* (*f*), expressing this view was not followed in a later case (*g*), in which it was held that such a distress was illegal on the ground that the statute (*h*) allowing a distress to be made after the determination of a lease, applies only to cases where the tenancy has been determined by lapse of time and not by forfeiture; that the year's rent became due only by virtue of the for-

(*d*) *Young* v. *Smith* (1879), 29 U.C.C.P. 109, approved in *Linton* v. *Imperial Hotel Co.* (1889), 16 Ont. App. 337.

(*e*) *Graham* v. *Long* (1886), 10 Ont. 248; *Linton* v. *Imperial Hotel Co.* (1889), 16 Ont. App. 337.

(*f*) *Graham* v. *Long* (1886), 10 Ont. 248.

(*g*) *Baker* v. *Atkinson* (1886), 11 Ont. 735, reversed on another point in appeal, 14 Ont. App. 409.

(*h*) 8 Anne, c. 14, s. 6; R.S.O. (1897), vol. III., c. 342, s. 2.

feiture, and that the distress was an unequivocal act indicating an intention to forfeit, and the lessor's right to distrain was at an end.

Linton v. *Imperial Hotel Co.*

This decision, however, and the grounds on which it rested were disapproved in *Linton* v. *Imperial Hotel Co.* (*i*), in which the law on the point was finally settled. It was there held that that the lease did not become void on the making of the assignment, but only voidable at the option of the lessor; that his right to claim the accelerated rent depended, not upon the lessor's election to forfeit the term, but upon the fact of the lessee having made an assignment for the benefit of creditors; that the proviso in this respect was divisible, and that, as the lessor had not elected to forfeit the term, the distress itself not being an election to forfeit, he was entitled to distrain.

Fraud on creditors.

Under the *Insolvent Act of 1875*, a proviso that, in the event of insolvency, the next year's rent should become due and payable, was held to be void as a fraud against creditors (*j*).

Where rent was made payable monthly, and the lease provided that "if the lessee shall make any assignment for the benefit of creditors the then current quarter's rent shall immediately become due and payable," it was held that this proviso was ineffectual to accelerate the rent, as the term "current quarter" could have no application to rent payable monthly (*k*).

Proviso does not run with the land.

A condition in a lease that in case any writ of execution shall be issued against the goods of the lessee, the then current year's rent shall immediately become due and pay-

(*i*) *Linton* v. *Imperial Hotel Co.* (1889), 16 Ont. App. 337; *Wyld* v. *Clarkson* (1886), 12 Ont. 589, explained; *Baker* v. *Atkinson* (1886), 11 Ont. 735; 14 Ont. App. 409, and *Griffith* v. *Brown* (1871), 21 U.C.C.P., considered.

(*j*) *In re Hoskins* (1877), 1 Ont. App. 379.

(*k*) *Langley* v. *Meir* (1898), 25 Ont. App. 372.

able, and the term forfeited, is personal to the original lessor and lessee, and does not run with the land, and cannot be taken advantage of by the grantee of part of the reversion (*l*).

SECTION VI.

ASSIGNMENT BY TENANT FOR BENEFIT OF CREDITORS.

Restriction on arrears recoverable.

At common law, a landlord was entitled to recover by action or distress, without restriction, the whole amount of rent in arrear. As against the tenant his right of distress is limited by statute to the recovery of six years' arrears, and his right of action under an indenture of demise is limited to the recovery of twenty years' arrears (*a*).

Three months following assignment.

In Ontario, where a tenant makes an assignment for the general benefit of his creditors, the landlord's right of distress is restricted, as against creditors, to the arrears of rent due during the period of one year prior to the execution of the assignment, and for three months thereafter. This is provided by sub-section 1 of section 34 of the *Landlord and Tenants' Act* (*b*), which is as follows:

> **34.** (1) In case of an assignment for the general benefit of creditors, the preferential lien of the landlord for rent shall be restricted to the arrears of rent due during the period of one year last previous to, *and for three months following*, the execution of such assignment, and from thence so long as the assignee shall retain possession of the premises leased.

Insolvent Acts.

This section has given rise to conflicting decisions as to its meaning and effect and it is impossible to reconcile all of them. It is very nearly in the same words as section 121

(*l*) *Mitchell* v. *McCauley* (1893), 20 Ont. App. 272.

(*a*) See section XII. of this chapter.

(*b*) R.S.O. (1897), c. 170.

of the *Insolvent Act of 1865*, section 81 of the *Insolvent Act of 1869*, and section 74 of the *Insolvent Act of 1875*, as well as section 28 (4) of the *Landlord and Tenants' Act*, chapter 143 of the Revised Statutes of Ontario, 1887, the only difference that needs to be noticed is that the words "and for three months following" are not found in any of those sections. These words were first introduced by a statute amending section 28 of the Revised Statutes of Ontario, 1887 (*c*).

Preferential lien.

The words "preferential lien of the landlord for rent" are to receive the construction given them under the Insolvent Acts, and although the right of distress is not interfered with by the Ontario Act, as it was under those Acts, the landlord has a statutory lien which may be enforced by action, although a distress is not made (*d*).

Under section 81 of the Act of 1869, it was held that the landlord was not thereby made a preferred creditor in all cases, but merely that the goods on the demised premises should not pass into the hands of the assignee to the prejudice of the landlord's lien or right of distress, which, but for the Act, he would be entitled to enforce against them (*e*).

Under section 74 of the Act of 1875, it was held that "the preferential lien of the landlord for rent" means the right of the landlord to distrain goods on the premises, and that the landlord was entitled to be paid his rent in priority to other creditors when there were goods liable to distress, and which at the time of the assignment he had a right to

(*c*) 58 Vict. c. 26, s. 3.

(*d*) *Lazier* v. *Henderson* (1898), 29 Ont. 673; see *In re McCracken* (1879), 4 Ont. App. 486. It has been held in England under the *Bankruptcy Act* (46 & 47 Vict. c. 52), that the landlord in order to enforce his claim against the bankrupt's property, must make an actual distress. See *In re Suffield* (1888), 20 Q.B.D. 693.

(*e*) *In re Kennedy* (1875), 36 U.C.R. 471.

distrain, while he was restricted as to amount to the rent which accrued due within a year before that time (*f*).

The two cases just cited were followed in a subsequent case in which it was said that "preferential lien" meant the right of a landlord to be paid out of, and to the extent only of, the proceeds of the goods on the premises, which, but for the assignment, would have been liable to distress (*g*).

In Custodiâ legis.

Under section 125 of the Act of 1875, the landlord was, in effect, prohibited from making a distress upon the goods of the insolvent after they came into the hands of the assignee, as the goods were then held to be *in costodiâ legis* (*h*).

But under the Ontario Act, goods in the possession of an assignee for the general benefit of creditors, are not *in custodiâ legis*, so as to protect them from distress for rent (*i*). Thus, where a tenant made an assignment for the benefit of creditors, and the landlord, before the assignee removed the goods from the demised premises, distrained for arrears of rent which had become due before the assignment was made, it was held that the landlord's right to recover his rent by distress was not affected by the assignment (*j*).

Right of distress unaffected.

Distrainable goods on the premises.

Under the section of the Ontario Act which has been quoted, it has been held that a landlord has no right to be paid his rent by the assignee in priority to other creditors if there were no distrainable goods on the premises at the

(*f*) *In re Hoskins* (1877), 1 Ont. App. 379.

(*g*) *In re McCracken* (1879), 4 Ont. App. 486.

(*h*) *In re McCracken* (1879), 4 Ont. App. 486.

(*i*) *Eacrett* v. *Kent* (1888), 15 Ont. 9; *Linton* v. *Imperial Hotel Co.* (1889), 16 Ont. App. 337, in which the decision on this point in *Wyld* v. *Clarkson* (1886), 12 Ont. 589, and *In re McCracken* (1879), 4 Ont. App. 486, were explained and distinguished.

(*j*) *Eacrett* v. *Kent* (1888), 15 Ont. 9.

time of the assignment. If there were no distrainable goods, he was entitled to rank only as an ordinary creditor (*k*).

It was contended, and in one case decided that the preferential lien for rent extends, not only to a year's rent prior to the assignment, but also to three months' rent thereafter, whether the assignee retains possession or not (*l*).

Three months additional rent.

This view was disapproved in a later case in which it was held that the section does not confer any additional right or benefit on the landlord as for compensation for the loss of a tenant; but where the parties have stipulated for rent to become payable in advance, or to be accelerated upon an assignment being made, the effect of the section is to restrict the amount recoverable by the landlord as a preference. In other words it is a restrictive, not an enlarging, provision, and where by the lease not more than three months' rent is accelerated or payable in advance, the landlord is not entitled to more than the lease gives him (*m*), unless, of course, the assignee retains possession, in which case he is entitled to rent by the terms of the section for so long as his possession lasts.

Not recoverable if not due by the lease.

So, where rent is payable in advance, a proviso that in the event of an assignment by the lessee for the benefit of creditors the current quarter's rent shall become due, is superfluous, and is ineffectual to accelerate rent that falls due thereafter; in such a case, the rent being payable in advance, is already due by the terms of the lease apart from the proviso (*n*).

Three months clause.

It has been held that the words in the section, "arrears of rent due . . . for three months following the execu-

(*k*) *Magan* v. *Ferguson* (1898), 29 Ont. 235; *Langley* v. *Meir* (1898), 25 Ont. App. 372.

(*l*) *Clarke* v. *Reid* (1896), 27 Ont. 618.

(*m*) *Langley* v. *Meir* (1898), 25 Ont. App. 372

(*n*) *Langley* v. *Meir* (1898), 25 Ont. App. 372.

tion of the assignment" mean "arrears of rent becoming due during the three months following the execution of the assignment." Thus, where rent was payable quarterly in advance by the terms of a lease which contained a proviso that if the lessee should make an assignment for the benefit of creditors, the rent for the then current quarter, and the next succeeding quarter should immediately become due and payable, it was held that the landlord was entitled to be paid by the assignee, in priority to other creditors, the current quarter's rent, which was 13 days past due at the date of the assignment, and the succeeding quarter's rent which, in ordinary course, would have become due within three months after the date of the assignment (*o*).

Upon this interpretation of the section, the landlord may be entitled, as in the cases just cited, to be paid as a preference at the time of the assignment, nearly six months' rent which has not been earned by the premises. It would seem to follow, also, that where no rent fell due in ordinary course during the three months next after the execution of the assignment, as for example, where rent was payable yearly or half-yearly, the landlord would not be entitled, as against the assignee, to any benefit from the acceleration clause at all (*p*).

It is submitted that the "three months" clause of the section is capable of the following interpretation: "Where, by the terms of the lease, unearned or future rent is due, or becomes due, at the time of the assignment, either as payable in advance, or by virtue of an acceleration clause, the amount of such unearned rent recoverable as a preference shall not exceed three months' rent." This view is supported by the language of two of the three Judges of

(*o*) *Lazier* v. *Henderson* (1898), 29 Ont. 673, followed in *Tew* v. *Toronto Savings and Loan Co.* (1898), 30 Ont. 76.

(*p*) See *Lazier* v. *Henderson* (1898), 29 Ont. 673, at p. 677.

the Court of Appeal who decided the case of *Langley* v. *Meir* (*q*).

Langley v. *Meir.*

In that case, at page 377, Chief Justice Burton said: "It is, I think, a mistake to suppose that the Legislature, in an unwonted fit of generosity to the landlord, intended to confer any additional right or benefit on him in consequence of his being deprived of a good tenant suddenly. He was left to look after that himself, and very few leases in modern times are without an express agreement that in the event of insolvency, the rent shall be accelerated for a longer or shorter period, and the Legislature has now interfered by limiting the period to three months; if they had intended to confer a right they would have used different language. If the lease does not contain such an agreement there is nothing to restrict, for it depends entirely on the agreement of the parties, and on nothing else."

And Mr. Justice Maclennan, at page 386, said: "If by the terms of the lease, three months or more of the future rent was payable in advance, or was accelerated by the execution of the assignment, then the defendant [the landlord] would have had a preferential lien for future rent to the extent of three months but no more."

Summary.

The rules deduced from the foregoing cases governing the rights of a landlord under the section may then be stated as follows:

Applies to rent due by the terms of the lease.

1. The section contemplates and is confined to rent which is due or becomes due by the terms of the lease at the time the assignment is made. The section, being restrictive merely, confers no new right, and does not have the effect of accelerating rent which is not due by the terms of the lease.

Future rent.

2. The rent thus due may be rent which has been earned by the premises, or rent which has not been earned, or both.

(*q*) *Langley* v. *Meir* (1898), 25 Ont. App. 372.

As to earned rent, it seems clear that the landlord is entitled to a preferential lien for it to the extent of one year's rent. As to that part which is unearned or future rent, it is submitted, he is restricted by the section to a preferential lien for three months' rent, and no more.

Distrainable goods.

3. The landlord is entitled to a preferential lien, and to be paid in priority to other creditors, to the extent only of the distrainable goods on the premises at the time of the assignment.

Action or distress.

4. He may recover his debt by distress on the goods, or by action against the assignee although no distress has been made.

Where a trustee in bankruptcy, in order to avoid a distress, has given an undertaking for the payment of the rent, the landlord is entitled to be paid out of the estate before deducting any sum for the costs of administering the estate (*r*).

Lex loci contractus.

There is nothing in section 56 of the *Dominion Winding-up Act* which alters or interferes with the *lex loci contractus* in the case of a claim. Where a lease of property situate in the Province of Quebec, and entered into there, contained a provision making the same void, at the option of the lessor, on the insolvency of the lessee, and by the law of that Province (*Civil Code, art.* 1092), the rent not yet exigible by the terms of the lease, becomes so, a claim for the whole rent, taxes, etc., to the end of the term, was, on the insolvency of the lessee company, allowed to the lessors in liquidation proceedings under the Dominion Act (*s*).

Taxes.

Under a lease containing a proviso that if the lessee should make an assignment for the benefit of creditors, the taxes for the current year, to be reckoned on the rate of

(*r*) *In re Chapman* (1894), 10 Times L.R. 449.

(*s*) *In re Harte and Ontario Express and Transportation Co.* (1892), 22 Ont. 510.

the previous year, in case the rate for the then current year should not have been fixed, should immediately become due and payable as rent in arrear, and recoverable by distress or otherwise, it was held that the landlord was entitled to distrain, and had a preferential lien for such taxes as against the assignee (*t*).

Election of lessor to forfeit.

Where a lease contains a proviso that in the event of an assignment by the lessee for the benefit of creditors, the term shall become forfeited, the lessor may, in the absence of statutory provision, elect to forfeit the term and eject the assignee (*u*).

Election of assignee to ret. in premises.

In Ontario, however, it is provided by sub-section 2 of section 34 of the *Landlord and Tenants' Act* (*v*), that under an assignment made by a tenant for the general benefit of his creditors, or under an order for the winding up of an incorporated company being a lessee, the assignee or liquidator may elect to retain the premises for the unexpired term of the lease, upon the terms of the lease, and paying rent as provided thereby. The sub-section is as follows:

Notice of election.

34. (2) Notwithstanding any provision, stipulation or agreement in any lease or agreement contained, in any case of an assignment for the general benefit of creditors, or in case an order is made for the winding-up of an incorporated company, being lessees, the assignee or liquidator shall be at liberty within one month from the execution of such assignment, or the making such winding-up order, by notice in writing under his hand given to the lessor, to elect to retain the premises occupied by the assignor or company as aforesaid at the time of such assignment or winding-up, for the unexpired term of any lease under which the said premises were held, or for such portion of the said term as he shall see fit, upon the terms of such lease and paying the rent therefor provided by said lease.

(*t*) *Tew* v. *Toronto Savings and Loan Co.* (1898), 30 Ont. 76.

(*u*) *Magee* v. *Rankin* (1869), 29 U.C.R. 257.

(*v*) R.S.O. (1897), c. 170.

Where, under this sub-section, the assignee has given notice of an election to retain the premises for the unexpired term of the lease, the landlord cannot claim three months' rent in addition to the rent for the term, and if it has been paid by the assignee, under protest, it may be recovered back(*w*). Lessor not entitled to three months additional rent.

A claim for damages against an overholding tenant for double the yearly value of the land, under the statute 4 George II., chapter 28, section 1, is an unliquidated claim, and therefore is not provable against the tenant's estate in the hands of an assignee for creditors(*x*).

SECTION VII.

IN CASE OF AN EXECUTION AGAINST THE TENANT.

A landlord is entitled to be paid his rent, to the extent of one year's arrears, out of the goods on the demised premises, in priority to execution creditors of the tenant. This is provided by section 1 of the Statute 8 Anne, chapter 18, which, as re-enacted in Ontario, is as follows:

19. No goods or chattels whatsoever lying or being in or upon any messuage, lands, or tenements, leased for life or lives or term of years, at will, or otherwise, shall be liable to be taken by virtue of any execution issued out of the High Court of Justice, or a County Court, on any pretence whatsoever, unless that party at whose suit the execution is sued out shall, before the removal of such goods or chattels from off the said premises by virtue of such execution, pay to the landlord of the said premises, or his bailiff, all such sums of money as are due for rent of the premises at the time, of the taking of such goods or chattels by virtue of such execution: Provided the said arrears of rent do not amount to more than one 8 Anne, c. 18. One year's arrears.

(*w*) *Kennedy* v. *MacDonell* (1901), 1 Ont. L.R. 250; but see *Tew* v. *Routley* (1900), 31 Ont. 358.

(*x*) *Magann* v. *Ferguson* (1898), 29 Ont. 235; *Grant* v. *West* (1896), 23 Ont. App. 533.

year's rent, and in case the said arrears shall exceed one year's rent, then the party at whose suit such execution is sued out, paying the said landlord, or his bailiff, one year's rent, may proceed to execute his judgment as he might have done before the making of this Act, and the sheriff, or other officer, is hereby empowered and required to levy and pay to the execution creditor as well the money so paid for rent as the execution money (*a*).

In Manitoba, except as otherwise provided by "The County Courts Act," no person shall be at liberty to claim as against any writ of execution or writ or order of attachment issued out of any Court of this Province, or to distrain as against the tenant or any other person, for more than three months' arrears of rent where the same is payable quarterly or more frequently, nor for more than one year's arrears where the same is payable less frequently than quarterly (*b*).

In custodiâ legis.

Before the statute the landlord was without a remedy, as goods taken in execution were *in custodiâ legis*, and could not be seized for rent. The object of the statute is to provide a remedy, and it only applies where the right of distress cannot, by reason of the seizure under the execution, be exercised (*c*).

Existing tenancy.

The statute does not apply unless there is an existing tenancy between the landlord and the execution debtor. Its benefit cannot be claimed by a lessor, where the execution is against a sub-lessee, and not his immediate lessee (*d*). But it applies to a tenancy created by an attornment of a mortgagor to a mortgagee (*e*).

(*a*) 8 Anne, c. 18 (or c. 14 in Ruffhead's ed.), s. 1; R.S.O. (1897), vol. III., c. 342, s. 19; C.S.N.B. (1904), c. 153, ss. 20, 21.

(*b*) R.S.M. (1902), c. 49, s. 3.

(*c*) *In re Benn-Davis* (1885), 55 L.J.Q.B. 217.

(*d*) *Bennett's Case* (1727), 2 Str. 787.

(*e*) *Yates* v. *Ratledge* (1860), 5 H. & N. 249; *Hobbs* v. *Ontario Loan and Debenture Company* (1890), 18 S.C.R. 483, per Strong, J., at p. 493.

The tenancy, moreover, must be subsisting at the time of the seizure under the execution. Thus, if a landlord has brought ejectment against the tenant he cannot claim the benefit of the statute(*f*). And if the tenancy has expired, he will be disentitled under this section, although under another section he might distrain within six months thereafter(*g*).

Fixed rent.

To entitle a landlord to the benefit of the statute, the rent must be a fixed or certain rent, or one that becomes certain by calculation or on the happening of specified events(*h*).

Rent accruing after seizure.

A landlord can only claim for rent that was due at the time of the seizure, and not rent that accrued afterwards, although the sheriff be in possession(*i*). But if it is due by the terms of the lease, it is immaterial that it be payable in advance(*j*).

Abandonment of seizure.

If, however, the sheriff merely makes an inventory of the goods seized, leaving no one in possession, the goods are not *in custodiâ legis*, so as to prevent the landlord from claiming for rent due at the time the execution was subsequently attempted to be enforced(*k*). But the bailiff's absence from the place of seizure for a mere temporary purpose is not an abandonment of the seizure(*l*). Nor where the goods are left in the hands of a person who undertook to be responsible for them(*m*).

(*f*) *Hodgson* v. *Cascoigne* (1821), 5 B. & A. 88.

(*g*) *Cox* v. *Leigh* (1874), L.R. 9 Q.B. 333. See Chapter XIII.

(*h*) *Bateman* v. *Farnsworth* (1860), 29 L.J. Ex. 365.

(*i*) *Tomlinson* v. *Jarvis* (1853), 11 U.C.R. 60; *Vance* v. *Ruttan* (1854), 12 U.C.R. 632; *In re Benn-Davis* (1885), 55 L.J.Q.B. 217.

(*j*) *Harrison* v. *Barry* (1819), 7 Price 690; 21 R.R. 781.

(*k*) *Hart* v. *Reynolds* (1864), 13 U.C.C.P. 501.

(*l*) *Gordon* v. *Rumble* (1892), 19 Ont. App. 440.

(*m*) *Lossing* v. *Jennings* (1851), 9 U.C.R. 406; *Duffus* v. *Creighton* (1887), 14 S.C.R. 740.

But where a man was placed in charge of the goods, and he left voluntarily without any intention of returning, although in violation of his duty, it was held that the goods were not *in custodiâ legis*, and that the landlord was entitled to distrain(*n*).

Removal of goods.

The statute forbids removal of the goods without satisfying the rent; so that where the goods are seized and sold, but not removed from the premises, the statute has been held not to apply(*o*). It is contrary to the statute to remove any portion of the goods(*p*). If any of the goods are removed from the premises the statute applies and the sheriff is liable for the rent, although they have been subsequently returned(*q*).

Reasonable time.

The object of the statute is to provide a remedy to the landlord in lieu of distress, and if the removal does not take place within a reasonable time after sale, the statute does not apply, as the right of distress then revives(*r*).

Notice to sheriff.

Before the landlord can claim the benefit of the statute, he must give notice of his claim to the sheriff, or have it brought to his knowledge(*s*); and proof of his knowledge, although no notice is given, is sufficient(*t*). It is not necessary to give notice to the execution creditor(*u*). The notice will be in time, if it is given while the goods or the proceeds of their sale, are in the sheriff's hands, whether before or after their removal from the premises(*v*).

(*n*) *Cross* v. *Davidson* (1897), 17 C.L.T. 189; see also *Bagshaw* v. *Deacon*, [1898] 2 Q.B. 173.

(*o*) *White* v. *Binstead* (1853), 13 C.B. 304.

(*p*) *Colyer* v. *Speer* (1820), 2 B. & B. 67.

(*q*) *Lane* v. *Crockett* (1819), 7 Price 566.

(*r*) *In re Benn-Davis* (1885), 55 L.J.Q.B. 217; see chapter XIII.

(*s*) *Andrews* v. *Dixon* (1820), 3 B. & A. 645; 22 R.R. 518.

(*t*) *Risley* v. *Ryle* (1843), 11 M. & W. 16.

(*u*) *Risley* v. *Ryle* (1843), 11 M. & W. 16.

(*v*) *Arnitt* v. *Garnet* (1820), 3 B. & A. 440; 22 R.R. 453; *Yates* v. *Ratledge* (1860), 5 H. & N. 249.

Duty of sheriff.

The duty of the sheriff is to require the execution creditor to pay the rent, and to refuse to sell or remove any of the goods until it is paid, even if it is clear that the goods are sufficient to satisfy both the execution and the rent(*w*). The practice, however, has grown up for the sheriff to levy for both, and pay the rent out of the proceeds(*x*).

An action will lie against the sheriff at the suit of the landlord for the rent if he infringes the statute(*y*), but not against the execution creditor(*z*).

The measure of damages in such a case is the amount of rent due; or, if the value of the goods is less than the rent, the loss to the landlord by their removal, not the mere amount realized at a forced sale(*a*).

Goods of third persons.

The sheriff is liable to the landlord if he takes the goods of third persons under the writ against the tenant, even if he has accounted for the goods to their true owner(*b*).

Where goods are seized under execution on leasehold premises and are claimed by a third party, who establishes his title thereto, the statute does not entitle the landlord to be paid rent by the sheriff. Where, however, goods seized by the sheriff were claimed by a third party, and under an interpleader order were sold and the proceeds paid into Court pending the trial of an issue as to the ownership of the goods, and the trial of a second issue had been directed between the landlord and the execution creditor as to the landlord's right to the rent claimed, and the claimants in the first issue consented to the landlord's claim being satisfied even if they should be successful in the

(*w*) *Cocker* v. *Musgrove* (1846), 9 Q.B. 223; *Thomas* v. *Mirehouse* (1887), 19 Q.B.D. 563.

(*x*) See *In re Mackenzie*, [1900] 2 Q.B. 566.

(*y*) *Thomas* v. *Mirehouse* (1887), 19 Q.B.D. 563.

(*z*) *Risley* v. *Ryle* (1843), 11 M. & W. 16.

(*a*) *Thomas* v. *Mirehouse* (1887), 19 Q.B.D. 563.

(*b*) *Forster* v. *Cookson* (1841), 1 Q.B. 419.

issue, the landlord was held entitled to be paid out of the fund in Court the arrears of rent, not exceeding one year's rent, without awaiting the decision of the issue as to the ownership of the goods(*c*).

Where a tenant absconded leaving rent in arrear, whereupon the landlord distrained, but, before selling, the tenant sent to the landlord a power of attorney, authorizing him to dispose of the property; and by letter he directed the landlord to pay himself his claim for rent, as also his claim for expenses and trouble; and after payment thereof, and of an execution creditor's claim, to remit the balance to the tenant, and the landlord then abandoned his warrant, and disposed of the property under the power, it was held that the landlord by so proceeding had not waived his right to payment of the rent due, and that the execution creditor was entitled to be paid only out of the balance remaining after payment of such rent, as also of any rent due by any former tenant for which a distress could have been made, together with the landlord's expenses and charges for trouble in executing the trusts of the power(*d*).

Execution in Division Courts.

In Ontario, the statute applies only to goods taken under an execution issued out of the High Court of Justice, or a County Court, and does not apply to goods seized under the process of a Division Court. Where goods of a tenant are seized under a Division Court execution, and a claim is made by the landlord for rent, the procedure is regulated by the *Division Courts Act*(*e*).

Under this Act, a claim may be made by the landlord or his agent, and delivered to the bailiff making the seizure, or where the money has been paid into Court, to the clerk of the Court.

(*c*) *Robinson* v. *McIntosh* (1899), 4 Terr L.R. 102.

(*d*) *Tyrrell* v. *Rose* (1870), 17 Gr. 394.

(*e*) R.S.O. (1897), c. 60, s. 276, *et seq.*

In such a case the claim of the landlord for rent is restricted to the rent of four weeks, when the tenement has been let by the week, and to the rent accruing due in two terms or gales where the letting has been for any other period less than a year, and not exceeding in any case a year's rent. Restriction on arrears recoverable.

These provisions are made by section 278 of the *Division Courts Act*(*f*), which is as follows:

278. (1) So much of the Act passed in the 8th year of the reign of Queen Anne, intituled *An Act for the better security of Rents and to prevent Frauds committed by Tenants*, as related to the liability of goods taken by virtue of any execution, shall not be deemed to apply to goods taken in execution under the process of any Division Court, but the landlord of a tenement in which any goods are so taken may, by writing under his hand or under the hand of his agent, stating the terms of holding and the rent payable for the same, and delivered to the bailiff making the levy, claim any rent in arrear then due to him, not exceeding the rent of four weeks when the tenement has been let by the week, and not to exceed the rent accruing due in two terms of payment, where the tenement has been let for any other term less than a year, and not exceeding in any case the rent accruing due in one year. Division Court. Execution.

(2) Notice of the said claim may be given at any time before the return of the execution, notwithstanding that the goods may in the meantime have been removed from the premises upon which they were seized, and when the goods of a tenant are sold within ten days after the seizure the money realized shall remain in court until the expiration of the said term of ten days to answer the claim of the landlord, and in cases where the money has been paid into court, the notice may be directed to the Clerk with like effect as if given to the bailiff before the sale of the goods so seized. Notice may be given to bailiff or clerk.

It is further provided that if such a claim is made, the bailiff shall distrain for the rent claimed, as well as for the amount of the execution, but shall not sell the goods distrained until eight days thereafter(*g*). Bailiff to sell for both rent and debt.

If a replevin is made of the goods distrained, so much of the goods taken under the warrant of execution shall Replevin.

(*f*) R.S.O. (1897), c. 60.

(*g*) Section 279.

be sold as will satisfy the money and costs for which the warrant issued and the costs of the sale, and the surplus of the sale and the goods so distrained shall be returned as in other cases of distress for rent and replevin thereof(*h*).

No execution creditor under the Act shall have his debt satisfied out of the proceeds of the execution and distress, or of the execution only, where the tenant replevies, until the landlord who conforms to the provisions of this Act has been paid the rent in arrear for the periods before mentioned(*i*).

Manitoba.

In Manitoba, similar provisions have been made by the *County Courts Act*(*j*).

Notice in writing.

Under the Statute of Anne it is not necessary to give notice *in writing* to the sheriff(*k*); but under this Act the landlord must give written notice to the bailiff(*l*).

After the bailiff has seized, the landlord's right of distress is suspended, and he cannot legally distrain so long as the bailiff is in possession(*m*).

SECTION VIII.

DEDUCTIONS FROM RENT.

Right of set-off in an action.

In an action by a landlord to recover the rent, a tenant is entitled to set off any indebtedness due to him by the landlord which the latter has agreed by the lease to allow him, whether or not he is authorized by the agreement to

(*h*) Section 281.

(*i*) Section 282.

(*j*) R.S.M. (1902), c. 38, s. 296, *et seq.*

(*k*) *Brown* v. *Ruttan* (1849), 7 U.C.R. 97; *Sharpe* v. *Fortune* (1859), 9 U.C.C.P. 523; *Kingston* v. *Shaw* (1861), 20 U.C.R. 223.

(*l*) *In re McGregor* v. *Norton* (1889), 13 P.R. 223.

(*m*) *Craig* v. *Craig* (1878), 13 C.L.J. 326.

deduct them from the rent(*a*), and since the *Judicature Act*, he may counter-claim for any other indebtedness or for damages(*b*).

Right of set-off under a distress.

But where a distress is made for rent, a tenant cannot, as a general rule, insist on deducting from the rent, sums that are due him from his landlord, unless he is authorized to deduct them by an express agreement, or by statute. A landlord may, unless restricted by statute, distrain for the amount of rent in arrear, although he is indebted to the tenant in a larger amount, even where the lease provides that the tenant shall be allowed for moneys due by the landlord, as for example, moneys expended for repairs, but does not expressly state that he may deduct them from the rent(*c*).

Agreement of the parties.

Where, however, the landlord covenants to allow the tenant all reasonable improvements made by him, in the amount of his rent, the tenant is entitled to deduct the value of the improvements from the rent distrained for(*d*).

Fluctuating payment.

Where the landlord agrees to allow the tenant to deduct a fluctuating payment from a certain gale of rent, and the payment exceeds the rent, the tenant has no remedy against the landlord for the excess, and cannot deduct it from other gales of rent. Thus where the plaintiff leased a tavern to defendant for three years at a rent of $400 a year, payable quarterly, "the said lessor to allow the said lessee the amount he has to pay as license fees out of the first quarter's rent in each year," and the license fee, when the lease was executed, and for some years previously, was $85;

(*a*) *McAnnany* v. *Tickell* (1864), 23 U.C.R. 122; *Wheeler* v. *Sime* (1846), 3 U.C.R. 143.

(*b*) *Walton* v. *Henry* (1889), 18 Ont. 620.

(*c*) *Graham* v. *Tate* (1813), 1 M. & S. 609; *Dallman* v. *King* (1837), 4 Bing. N.C. 105.

(*d*) *Wilcoxson* v. *Palmer* (1840), T.T. 3 & 4 Vict.

but in the following year was raised to $200, it was held that the lessee could claim no allowance beyond the first quarter's rent, the lessor being bound to allow the fee only provided it did not exceed such rent(*e*).

Where a landlord agreed with his tenant that if he should not paint the buildings in the first year the tenant might do it in the second year, and charge it against the rent of the third year, and after the tenant had begun the painting in the third year, but before completion, the landlord distrained for a quarter's rent, it was held that the distress was warranted, although the painting which had been begun, but not completed, exceeded the quarter's rent distrained for(*f*).

Deduction on sale of part.

Where it was provided that the lessor might sell any part of the farm demised, making a reasonable deduction from the rent thereof to be determined by arbitration in case of dispute, and a railway company required a portion of the land, which the lessor conveyed to them, it was held that such a portion was sold within the meaning of the lease, and that the abatement from the rent should not be measured by the interest of the money paid by the company, but should be determined upon a consideration of the comparative value to the tenant of the land sold, having regard to the rent of the whole, and that, after the sale, the lessor could not distrain without first arranging or offering to arbitrate as to the deduction(*g*).

If the landlord refuses to allow proper deductions he is liable in an action by the tenant for repayment(*h*).

Right to deduct taxes.

A tenant is entitled, however, even in the absence of an express agreement, to deduct from the rent sums paid by

(*e*) *Writt* v. *Sharman* (1880), 41 U.C.R. 249.
(*f*) *Millmine* v. *Hart* (1847), 4 U.C.R. 525.
(*g*) *Bickle* v. *Beatty* (1859), 17 U.C.R. 465.
(*h*) *Graham* v. *Tate* (1813), 1 M. & S. 609.

him for taxes due by the landlord, and other payments such as annuities, or interest on a mortgage secured by a power of distress, where the tenant's goods might be distrained in case of non-payment(*i*). So, an under-tenant may deduct from rent due, payments which he has been compelled to make to the superior landlord, and for which his goods are liable to be distrained(*j*).

Voluntary payment.

A tenant who voluntarily pays full rent to his landlord without claiming deduction for taxes paid by him, cannot afterwards recover the amount from his landlord(*k*).

Assessment Act.

Under section 26 of the *Assessment Act*(*l*) a tenant in occupation of lands may deduct from his rent any taxes paid by him, if the same could be recovered from the owner or previous occupant, unless there is a special agreement to the contrary. But he is not entitled, under this section, to deduct from the rent, or to compel his landlord to pay taxes for which he and others were jointly assessed for a year prior to his existing tenancy(*m*).

Snow Fences Act.

In Ontario, under the *Act respecting Snow Fences*(*n*), a tenant is authorized to deduct from the rent payable to his landlord, the cost of taking down, altering, removing or constructing fences done in pursuance of that Act, unless there is an agreement to the contrary.

(*i*) *Whitmore* v. *Walker* (1848), 2 C. & K. 615; *Johnson* v. *Jones* (1839), 9 A. & E. 809; *Underhay* v. *Read* (1887), 20 Q.B.D. 209.

(*j*) *Carter* v. *Carter* (1829), 5 Bing. 406.

(*k*) *Denby* v. *Moore* (1817), 1 B. & Ald. 123; 18 R.R. 444; *Grantham* v. *Elliott* (1838), 6 O.S. 192; *Aldwell* v. *Hanath* (1857), 7 U.C.C.P. 9; *McAnnany* v. *Tickell* (1864), 23 U.C.R. 499; *Wade* v. *Thompson* (1873), 8 C.L.J. 22.

(*l*) R.S.O. (1897), c. 224; see chapter XV.

(*m*) *Meehan* v. *Pears* (1899), 30 Ont. 433, in which *Heyden* v. *Castle* (1888), 15 Ont. 257, was discussed.

(*n*) R.S.O. (1897), c. 240, s. 2.

Public Health Act.

Also, under the *Public Health Act*(*o*), he may deduct from the rent, in like manner costs and expenses which he is compelled to pay thereunder.

Ontario.

In Ontario, under the *Landlord and Tenant's Act*(*p*), where the tenancy has been created on or after October 1st, 1887, a tenant has the right of setting off against the rent, any debt due him by the landlord, and the landlord may only distrain for the balance of the rent after deducting the debt. This is provided by section 33 of that Act, which is as follows:

Tenant may set-off debt due by landlord.

33. (1) A tenant may set-off against the rent due a debt due to him by the landlord.

(2) The set-off may be by a notice in the form or to the effect following, and may be given before or after the seizure:

Take notice that I wish to set-off against rent due by me to you, the debt which you owe me on your promissory note for ——— dated ——— (or for eight months' wages at $20.00 per month, $160, *or, as the case may be.*)

(3) In case of such notice the landlord shall only be entitled to distrain for the balance of rent after deducting any debt justly due by him to the tenant.

Claim for damages.

A claim for damages for breach of a covenant to repair is not a debt within the meaning of the section, so as to constitute a set-off against the rent, and although it might be the subject of a counter-claim in an action for rent, it would not justify an injunction to prevent the landlord from distraining(*q*).

SECTION IX.

IN CASE OF EVICTION OF THE LESSEE.

Eviction.

It is a good defence to an action for rent, that the lessee has been wrongfully evicted by the lessor from the demised premises or some part thereof, before the rent claimed fell

(*o*) R.S.O. (1897), c. 248, s. 113.

(*p*) R.S.O. (1897), c. 170.

(*q*) *Walton* v. *Henry* (1889), 18 Ont. 620.

due(*a*). In such a case no part of the rent from the previous gale day up to time of eviction can be recovered by the landlord, and it has been held that the Act providing for the apportionment of rent(*b*), does not apply so as to entitle a landlord, who has wrongfully evicted his tenant, to a proportion of the rent(*c*).

It is an eviction in law, if the lessor, without the consent of the lessee and against his will, enters on the demised premises and turns him out and keeps him out of possession(*d*).

What amounts to eviction.

It is not necessary that there should be an actual expulsion from the whole or part of the premises to constitute an eviction. It is sufficient to show any act of the landlord of a continuing character, by which the tenant is deprived of the use and enjoyment of the demised premises, or any part thereof(*e*). Thus, it has been held that if the landlord re-lets the premises to another person on their becoming vacant during the term, without the tenant's consent, or accepting rent from a person who obtains possession, it is an eviction(*f*). So, if a landlord enters on part of the premises to erect a building, or pulls down, or alters buildings already erected, it will amount in law to an eviction(*g*). And where a landlord gave notice to sub-lessees to quit, whereby part of the lands were left

(*a*) *Boodle* v. *Cambell* (1844), 7 M. & Gr. 386; *Selby* v. *Browne* (1845), 7 Q.B. 620.

(*b*) R.S.O. (1897), c. 170, s. 4.

(*c*) *Clapham* v. *Draper* (1885), C. & E. 484; *Shuttleworth* v. *Shaw* (1849), 6 U.C.R. 539.

(*d*) *Baynton* v. *Morgan* (1888), 21 Q.B.D. 101; 22 Q.B.D. 74.

(*e*) *Upton* v. *Townend* (1855), 17 C.B. 30.

(*f*) *Hall* v. *Burgess* (1826), 5 B. & C. 332; *Pellatt* v. *Boosey* (1862), 31 L.J.C.P. 281.

(*g*) *Smith* v. *Raleigh* (1814), 3 Camp. 513; *Furnivall* v. *Grove* (1860), 8 C.B.N.S. 496; *Upton* v. *Townend* (1855), 17 C.B. 30.

unoccupied, it was held to be an eviction of the sub-lessor(*h*).

Re-letting.

Where a tenant from year to year goes out of possession at the end of a year, without having determined the tenancy by previous notice, and before the expiration of the next half year the landlord re-lets the premises, such re-letting amounts to an eviction of the previous tenant, and the landlord is not entitled to rent for the interval, unless he notifies the tenant that he intends to re-let on his account(*i*).

Where a landlord himself enters and uses any part of the premises while the tenant is in possession, he is thereby disentitled to claim rent(*j*).

An eviction of the tenant from part of the premises demised, operates as a suspension of the whole rent as long as the tenant is out of possession, and the landlord is not entitled to a proportionate part of the rent, or to compensation for any part of the premises of which the tenant retains possession(*k*). But the tenancy is not thereby determined, nor is the tenant discharged from performing his other covenants, nor in general is he justified in abandoning the residue of the premises(*l*).

It is an eviction if the lessee is deprived by the lessor of the use of a road which is appurtenant to the lands demised(*m*).

A landlord will not be disentitled to claim rent where premises have been abandoned by the tenant, if he enters,

(*h*) *Burn* v. *Phelps* (1815), 1 Stark. 94.

(*i*) *Hall* v. *Burgess* (1826), 5 B. & C. 332; *Walls* v. *Atcheson* (1826), 3 Bing. 462.

(*j*) *Smith* v. *Raleigh* (1814), 3 Camp. 513.

(*k*) *Morrison* v. *Chadwick* (1849), 7 C.B. 266; *Upton* v. *Townend* (1855), 17 C.B. 30; *Carey* v. *Bostwick* (1852), 10 U.C.R. 156.

(*l*) *Morrison* v. *Chadwick* (1849), 7 C.B. 266; *Newton* v. *Allin* (1841), 1 Q.B. 518; *Coleman* v. *Reddick* (1875), 25 U.C.C.P. 579.

(*m*) *Shuttleworth* v. *Shaw* (1849), 6 U.C.R. 517.

not for profitable occupation, but to put up an advertisement that they are to be let(*n*); or to put in a caretaker to prevent injury to the premises(*o*). So, a mere trespass by the landlord does not amount to an eviction(*p*).

Where the lessee had allowed the landlord's tenant, who was to succeed him, to enter into possession about ten days before the expiration of his term, it was held that this was not an eviction by the landlord(*q*).

Eviction by stranger.

Where a tenant is evicted by a stranger, he is not excused from payment of rent if the stranger was not entitled to evict him. Thus, where a mere inchoate purchaser takes, but is not entitled to take possession the tenant is liable to pay the rent(*r*).

In an action to recover a year's rent on a covenant in a lease for three years, where the lessee had harvested the crops which together with the barn and stable, were destroyed by fire before the expiration of the year, and the lessee was paid the insurance money, whereupon he left the farm, and the lessor entered, ploughed, and put in a crop, it was held that the acts of the lessor did not amount to an eviction, that there was not evidence to support a surrender in law, and that the lessor was entitled to recover(*s*).

Where the landlord, after leasing the premises, had rented the outside of the fence around the premises to a third person to post bills on, who, however, posted no bills, but only put up a notice forbidding others to post bills without his leave, which notice was pulled down, there was held to be no eviction(*t*).

(*n*) *Bird* v. *Defonvielle* (1846), 2 C. & K. 415; *Redpath* v. *Roberts* (1801), 3 Esp. 225.

(*o*) *Wheeler* v. *Stevenson* (1860), 6 H. & N. 155.

(*p*) *Newby* v. *Sharpe* (1878), 8 Ch. D. 39, at p. 51.

(*q*) *Corse* v. *Moon* (1889), 22 N.S.R. 191.

(*r*) *Richardson* v. *Trinder* (1861), 11 U.C.C.P. 130.

(*s*) *Nixon* v. *Maltby* (1882), 7 Ont. App. 371.

(*t*) *Oliver* v. *Mowat* (1873), 34 U.C.R. 472.

Where a lease of business premises provided that the lessor could enter upon the premises for the purpose of making certain repairs and alterations at any time within two months after the beginning of the term, but not after except with the consent of the lessee, and the lessor had entered within the two months, but had been in possession of part of the premises after the specified time, without the necessary consent, and the tenant claimed that he had been thereby deprived of the beneficial use of the property and had been evicted therefrom, it was held that the two months' limitation in the lease had reference to the entry by the lessor to commence the repairs, and not to his subsequent occupation of the premises, and the lessor, having entered upon the premises within the prescribed period, had a reasonable time to complete the work, and his subsequent occupation was not wrongful(*u*).

Eviction by title paramount.

Where a tenant has been evicted from the premises by the landlord or by any person having a paramount title, as for example, a mortgagee prior to the lease, no rent can be recovered by the landlord for the period after the eviction took place(*v*).

Thus, where the lessor's predecessor in title had mortgaged the premises prior to the lease, and the assignee of the mortgage brought ejectment against the tenant who thereupon gave up possession, it was held that this amounted to an eviction, and that the lessor could only recover the rent up to the date of the writ, which must be looked upon as the date of the eviction(*w*).

(*u*) *Ferguson* v. *Troop* (1890), 17 S.C.R. 527; see also *Dainty* v. *Vidal* (1888), 13 Ont. App. 47.

(*v*) *Tomlinson* v. *Day* (1821), 2 B. & B. 680; *Prentice* v. *Elliott* (1839), 5 M. & W. 606; *Newport* v. *Hardy* (1845), 2 D. & L. 921; *Barnes* v. *Bellamy* (1881), 44 U.C.R. 303.

(*w*) *Barnes* v. *Bellamy* (1881), 44 U.C.R. 303.

But where a lessee has been lawfully evicted by title paramount, he is liable for a proportion of the rent up to the time of eviction(*x*).

Constructive eviction.

A constructive eviction by title paramount is sufficient to disentitle a landlord to rent accruing thereafter, as for example, where a tenant is threatened with eviction by a mortgagee who has a title prior, and therefore paramount to the lease, and the tenant attorns to him(*y*).

A lessee claiming to have suffered an eviction, must show that the person evicting him did not derive title from the lessee himself(*z*).

Where the lessor had previously let part of the demised premises, and the prior lessee claimed possession thereof, and the subsequent lessee gave up possession voluntarily, this was held to amount to an eviction by title paramount, on account of which he was disentitled to distrain for rent thereafter(*a*).

Where a lessee of a mill was deprived by title paramount of a right or easement to use the water from a pond to drive the mill, this was held not to be an eviction(*b*).

SECTION X.

DESTRUCTION OF THE PREMISES BY FIRE.

Destruction by fire.

The destruction by fire of premises held under a lease is, in the absence of an express agreement, no defence against an action for rent, nor is the tenancy determined, although the premises are rendered useless, and the tenant

(*x*) *Tominson* v. *Day* (1821), 2 B. & B. 680.

(*y*) *Mayor of Poole* v. *Whitt* (1846), 15 M. & W. 571; *Carpenter* v. *Parker* (1857), 3 C.B.N.S. 234.

(*z*) *McNab* v. *McDonnell* (1845), 2 U.C.R. 169.

(*a*) *Carey* v. *Bostwick* (1852), 10 U.C.R. 156.

(*b*) *Coleman* v. *Reddick* (1875), 25 U.C.C.P. 579.

has in fact ceased to occupy them. Nor does the mere circumstance that the landlord has insured and received the insurance money create, as between himself and the tenant, any obligation to rebuild or to remit the rent(*a*).

Statutory proviso.

In Ontario, under the *Act respecting Short Forms of Leases*(*b*), the short form of proviso, that in case the premises are destroyed the rent shall cease, is as follows: "Provided, that in the event of fire, lightning or tempest, rent shall cease until the premises are rebuilt." This form in a lease expressed to me made in pursuance of the Act, is construed as if it were in the following form: "Provided, and it is hereby declared and agreed, that in case the premises hereby demised or any part thereof shall at any time during the term hereby agreed upon be burned down or damaged by fire, lightning or tempest so as to render the same unfit for the purposes of the said lessee, then and so often as the same shall happen, the rent hereby reserved, or a proportionate part thereof, according to the nature and extent of the injuries sustained shall abate, and all or any remedies for recovery of said rent, or such proportionate part thereof, shall be suspended until the said premises shall have been rebuilt, or made fit for the purposes of the said lessee."

Rent payable in advance.

Where rent is payable in advance under a lease which contains a provision that in case the premises are destroyed by fire, the rent is thenceforth to cease, and the premises are destroyed by fire between gale days, the landlord is entitled to rent up to the gale day next after the fire(*c*).

Where the rent was payable in advance, and a provision was made in the lease, in case of destruction by fire,

(*a*) *Baker* v. *Holtpzaffell* (1811), 4 Taunt. 45; 33 R.R. 556; *Lofft* v. *Dennis* (1859), 1 E. & E. 474; *Findlayson* v. *Elliott* (1874), 21 Gr. 325; *Taylor* v. *Hortop* (1872), 22 U.C.C.P. 542.

(*b*) R.S.O. (1897), c. 125.

(*c*) *Ryerse* v. *Lyons* (1863), 22 U.C.R. 12.

for a reduction of the annual rent, it was held that the lessee was not entitled to recover back or be allowed a proportion of the rent so paid in advance from the time of the fire to the following gale day(*d*).

But where it was provided that, in case of the total destruction of the premises by fire, the term should cease, and the proportion of rent up to that time should be adjusted between the parties, it was held that the lessor should repay a proportion of the rent paid in advance(*e*).

Determination of tenancy.

Where a lease of a mill and ten acres of land adjoining, for five years at a rent payable half-yearly in advance, contained covenants to pay rent (without any exception as to fire), and to keep in repair, accidents by fire excepted; and also the following clause: "Should the mill be rendered incapable by any fire or tempest, then the portion of rent for the unexpired portion of the term paid for in advance, to be refunded by the lessor to the lessee," but no provision in such event for determining the tenancy, it was held that the effect of the whole instrument was, that the destruction of the premises by fire, not merely gave a right to a return of a proportionate part of the current half-year's rent, but put an end to the whole term, and therefore that the lessor was not entitled to recover rent for the half year succeeding such destruction(*f*).

Corporation.

Although a lease made by an incorporated company may be void in consequence of the same having been executed without the corporate seal, still if the lessee enter and hold thereunder he will be liable for all rents reserved thereby during the time he so holds; and where an instrument was so executed by the agent of an incorporated bank,

(*d*) *Cornock* v. *Dodds* (1872), 32 U.C.R. 625.

(*e*) *Hortop* v. *Taylor* (1871), 21 U.C.C.P. 56.

(*f*) *Agar* v. *Stokes* (1881), 5 Ont. App. 180.

under which the lessees entered and occupied, but, before the expiration of the term demised, the buildings on the premises were destroyed by fire, and the lessees omitted to give notice of abandonment, it was held that they were liable for the rent during the residue of the term, which had since expired(*g*).

Where there is an agreement in a lease for a reduction of the rent in case of destruction of the premises by fire, and the amount is to be settled by arbitration, the lessee is not precluded from making the jury the medium by which the reduction is to be estimated, where neither party took steps to have it settled by arbitration(*h*).

SECTION XI.

APPORTIONMENT OF RENT.

1. *In respect of Time.*
2. *In respect of Estate.*

1. *In Respect of Time.*

No apportionment at common law.

At common law, rent was not apportionable in respect of time. Thus, for example, if a tenant for life, who had granted a lease, should die between gale days, no rent was payable by, or recoverable from the lessee for the interval between the last gale day and the date of such death.

By an Act passed in the reign of George II.(*a*), it was provided that in such cases the executors of the tenant for life might recover from the lessee a just proportion of the rent.

(*g*) *Findlayson* v. *Elliott* (1874), 21 Gr. 325.
(*h*) *McGill* v. *Proudfoot* (1847), 4 U.C.R. 33.
(*a*) 11 Geo. II., c. 19; R.S.B.C. (1897), c. 110.

By a later enactment(*b*) the right of apportionment was greatly extended, but was still far from comprising all cases, and it did not apply to demises made by parol(*c*).

Apportionment by statute.

It is now provided that rent is to be deemed as accruing from day to day, and is apportionable in respect of time, virtually, in all cases(*d*).

In Ontario, this is provided by section 4 of the *Landlord and Tenant's Act*(*e*), which is as follows:

Rent accrues from day to day.

4. All rents, annuities, dividends and other periodical payments, in the nature of the income (whether reserved or made payable under an instrument in writing or otherwise), shall like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly(*f*).

But, although rent may be apportioned up to a certain time, it is not payable by, or recoverable from the tenant at that time, but only when it becomes due under the terms of the lease. This is provided by section 5 of the Act, which is as follows:

Not recoverable till due.

5. The apportioned part of such rent, annuity, dividend or other payment shall be payable or recoverable in the case of a continuing rent, annuity or other such payment when the entire portion, of which such apportioned part forms part, becomes due and payable, and not before; and in the case of a rent, annuity or other such payment determined by re-entry, death or otherwise, when the next entire portion of the same would have been payable if the same had not so determined, and not before(*g*).

By section 6 provision is made for the recovery and

(*b*) 4 & 5 Will. IV (Imp.), c. 22; R.S.B.C. (1897), c. 110.

(*c*) *Mills* v. *Trumper* (1869), L.R. 4 Ch. 320.

(*d*) In England by the *Apportionment Act* (1870), 33 & 34 Vict., c. 35; in Ontario by the *Landlord and Tenants' Act*, R.S.O. (1897), c. 170; in Nova Scotia by the *Apportonment Act*, R.S.N.S. (1900), c. 150.

(*e*) R.S.O. (1897), c. 170.

(*f*) R.S.O. (1897), c. 170, s. 4; in Nova Scotia a similar provision is to be found in R.S.N.S. (1900), c. 150, s. 3.

(*g*) R.S.O. (1897), c. 170, s. 5; R.S.N.S. (1900), c. 150, s. 4.

payment of rents which are apportionable. The section is as follows:

Succession of interest in reversion.

6. (1) All persons, and their respective heirs, executors, administrators and assigns, and also the executors, administrators and assigns, respectively, of persons whose interests determine with their own deaths, shall have such or the same remedies for recovering such apportioned parts as aforesaid, when payable (allowing proportionate parts of all just allowances) as they respectively would have had for recovering such entire portions as aforesaid, if entitled thereto respectively.

(2) Provided that persons liable to pay rents reserved out of or charged on lands or other hereditaments of any tenure, and the same lands or other hereditaments shall not be resorted to for any such apportioned part forming part of an entire or continuing rent as aforesaid specifically, but the entire or continuing rent, including such apportioned part, shall be recovered and received by the heir or other person, who, if the rent had not been apportionable under this Act, or otherwise, would have been entitled to such entire or continuing rent, and such apportioned part shall be recoverable by action from such heir or other person by the executors or other persons entitled under this Act to the same(*i*).

This section is intended to apply where there is a succession of interest in the reversion(*j*).

It is provided, however, that the Act shall not apply to any case in which it is expressly stipulated that no apportionment shall take place(*k*).

Rent payable in advance.

The Act is only intended to apply to sums which are accruing, but have not accrued, due at the time when the apportionment is said to be required, and does not apply to any sum duly and properly paid before the happening of the incident, which is said to necessitate or require the apportionment, and does not apply to rent payable in advance(*l*).

(*i*) R.S.O. (1897), c. 170, s. 6; R.S.N.S. (1900), c. 150, s. 5.

(*j*) *Swansea Bank* v. *Thomas* (1879), 4 Ex. D. 94.

(*k*) R.S.O. (1897), c. 170, s. 8; R.S.N.S. (1900), c. 150, s. 6.

(*l*) *Ellis* v. *Rowbotham*, [1900] 1 Q.B. 740; 82 L.T. 191; 48 W.R. 423; 69 L.J.Q.B. 379.

It has been held that the Act applies to rent in all tenancies that come to an end in the middle of a period from whatever cause(*m*). At common law where the tenancy was determined between gale days the rent for the period from the last gale day up to the time of determination was altogether lost(*n*). Under the Act rent in such a case is now payable *pro ratâ* for the time of actual occupation by the tenant(*o*).

Third interest intervening.

No alteration of the law is contemplated by the Act, where the case remains strictly between landlord and tenant, but only where a third interest intervenes(*p*). The Act does not alter the relation of landlord and tenant so as to make rent fall due before the day specified in the lease(*q*); but it affects not only the right of the landlord to recover rent, but also the liability of a tenant to pay it(*r*). Thus, an assignee of the lessee who assigns over during a current quarter is liable for a proportionate part of the rent(*s*). In like manner, where mortgaged premises are demised, and the lessee, in consequence of a threat of eviction from the mortgagee, determined his tenancy with the mortgagor, it was held that the lessee was liable for a proportionate part of the rent(*t*).

Sale under mortgage.

Where demised property is sold by a prior mortgagee under power of sale, and the lease is thereby determined between two gale days, the rent is apportionable, and the tenant is liable to pay rent up to the day of such determin-

(*m*) *Elvidge* v. *Meldon* (1888), 24 L.R. Ir. 91.
(*n*) *Walls* v. *Atcheson* (1826), 3 Bing. 462.
(*o*) *Swansea Bank* v. *Thomas* (1879), 4 Ex. D. 94.
(*p*) *Massie* v. *Toronto Printing Co.* (1887), 12 P.R. 12.
(*q*) *In re United Club* (1889), 60 L.T. 665.
(*r*) *In re Wilson* (1893), 62 L.J.Q.B. at p. 632.
(*s*) *Hopkinson* v. *Lovering* (1883), 11 Q.B.D. 92.
(*t*) *Hartcup* v. *Bell* (1883), C. & E. 19.

ation. Thus, where the defendant was tenant of certain land, subject to two prior mortgages created by his landlord, and the plaintiff was a subsequent mortgagee, who had given notice of his mortgage, and had required the defendant to pay the rent to him, and afterwards the land was sold by the prior mortgagees to a person who on the same day re-sold it to defendant, and the purchaser from the mortgagees claimed to be entitled to the rent, it was held that as to the rent which had accrued up to the date of sale, the right of the plaintiff as mortgagee of the reversion was not affected by the sale; that the rent was apportionable; and that the plaintiff was entitled to recover(*u*).

Where a half-year's rent, due on a lease made by a tenant for life who died between gale days, was paid after his death to his executor, it was held to be apportionable in his hands between the parties entitled(*v*).

Rent is garnishable.

Inasmuch as rent is declared by the statute to accrue from day to day, it has been held that it is garnishable by a judgment creditor of the lessor before it falls due by the terms of the lease, and is apportionable, and that the creditor is entitled to an order for payment over when it becomes due(*w*).

But it has been held in England that the Act does not apply to make rent garnishable before it is due, so as to entitle the creditor to a proportionate part of the rent; the rent must have become due before an order will be made(*x*).

Right of distress suspended.

Where rent has been garnished by a creditor of the lessor, the latter's right to distrain is suspended as to that

(*u*) *Kinnear* v. *Aspden* (1892), 19 Ont. App. 468.

(*v*) *Dennis* v. *Hoover* (1896), 27 Ont. 377.

(*w*) *Massie* v. *Toronto Printing Co.* (1887), 12 P.R. 12.

(*x*) *Barnett* v. *Eastman* (1898), 67 L.J.Q.B. 517.

portion of the rent which has accrued up to the garnishment, if the lessee has been served before a distress has been made with an order attaching the rent, and a distress for such portion thereafter is wrongful(*y*).

In an action of covenant between the original parties to the deed, a wrongful eviction from part of the premises is a good defence to the action, and there can be no apportionment of the rent as in debt(*z*).

Wrongful eviction.

The Act does not apply to the case of a wrongful eviction of the lessee by the lessor, so as to entitle the lessor to a proportionate part of the rent up to the time of eviction(*a*).

2. *In Respect of Estate.*

Apportionment by agreement, or by a jury.

At common law, rent was always apportionable in respect of estate. Thus, where a lessor, after creating a lease, grants away part of his reversion, an apportionment will be made, as rent is incident to the reversion, and a proportionate part of it passes with the grant, even though no mention of it be made therein(*b*). But the grantor and grantee cannot, as between themselves, agree on the proportion, so as to bind the tenant without his consent; an apportionment in such a case, if not made by agreement between all parties, can only be made by the Court or a jury(*c*). Where a lease was made of premises at one entire rent, and the lessor died, having devised the premises among several persons, it was held that those persons

Separate actions may be brought for rent to be apportioned.

(*y*) *Patterson* v. *King* (1895), 27 Ont. 56, following *Mitchell* v. *Lee* (1867), L.R. 2 Q.B. 259.

(*z*) *Shuttleworth* v. *Shaw* (1849), 6 U.C.R. 539.

(*a*) *Clapham* v. *Draper* (1885), C. & E. 484.

(*b*) Gilbert on Rents, p. 173; *Reeve* v. *Thompson* (1887), 14 Ont. 499.

(*c*) *Bliss* v. *Collins* (1822), 5 B. & A. 876; 24 R.R. 601; *Mayor of Swansea* v. *Thomas* (1882), 10 Q.B.D. 48; *Reeve* v. *Thompson* (1887), 14 Ont. 499.

might bring separate actions against the lessee for such part of the rent as each would be entitled to, according to his respective share, without any other apportionment than that which a jury might make in each suit(*d*).

Freehold and leasehold lands.

Where the owner of freehold and leasehold lands demises them at one entire rent for both, an apportionment will be made on his death between his real and personal representatives. Thus, where a lease was made at one rent, of lands of which the lessor was seized in fee, and of other lands of which he had a power of leasing, and the lease was invalid as to the latter for the reason that it was not executed according to the terms of the power, it was held that an apportionment of the rent must be made(*e*).

Land and chattels.

An apportionment will also be made, where land and chattels are let at one entire rent, between persons who subsequently become entitled by severance. Thus, where an owner of a house, after mortgaging it, let it with the furniture at one rent, and notice was given by the mortgagee to the tenant to pay the rents to him, it was held that the rent was apportionable as to the house and as to the furniture(*f*).

Where part of premises in possession of prior lessee.

A demise that is not under seal of premises, part of which is in possession of a third person under a previous demise made by the same lessor, creates no legal term, and is wholly void as to that part, and the rent is not apportionable, and the lessor is not entitled to distrain for the whole rent or any part of it(*g*). But if such a demise is

(*d*) *Hare* v. *Proudfoot* (1838), 6 O.S. 617.

(*e*) *Doe* v. *Meyler* (1814), 2 M. & S. 276; 15 R.R. 244.

(*f*) *Salmon* v. *Matthews* (1841), 8 M. & W. 827.

(*g*) *Neale* v. *Mackenzie* (1837), 1 M. & W. 747; followed in *Kelly* v. *Irwin* (1867), 17 U.C.C.P. 351, which case, however, seems to have been wrongly decided because the instrument in question was under seal, and thus operated as a grant of the reversion. See *Holland* v. *Vanstone* (1867), 27 U.C.R. 15. See also *Crooks* v. *Dickson* (1866), 15 U.C.C.P. 23.

made by an instrument under seal, it operates as a grant of the reversion (with the rent incident thereto) as to the part thus held by such third person, and the lessor is entitled to distrain for the whole rent in arrear(*h*).

But rent is not apportionable even where the lease is under seal, if part of the demised premises is withheld from the lessee under a title adverse to the lessor(*i*).

Sale of part of lands.

Where it is agreed that a reasonable deduction from the rent shall be made in case part of the land demised is sold, the amount of the abatement should be measured, not by the interest on the purchase money, but by the value to the tenant of the land sold having regard to the rent payable for the whole of the land demised(*j*).

Eviction by title paramount.

An apportionment will also be made where the lessee has been lawfully evicted by title paramount from part of the demised premises(*k*). So, if a lessee assigns part of the demised premises or loses possession of part by surrender or forfeiture, the rent will be apportioned(*l*).

Covenant to pay rent divisible.

Where the lessee entered into a covenant to pay rent, and assigned the whole of his interest in the premises, and the lessor afterwards assigned part of his reversion, it was held in an action against the lessee that the covenant in question was divisible, and that the lessee was liable for a proportionate part of the rent pertaining to that part of the reversion which was still in the lessors(*m*).

In an action by the lessor against the original lessee who had assigned the lease, for arrears of rent of part of

(*h*) *Holland* v. *Vanstone* (1867), 27 U.C.R. 15; *Ecclesiastical Commissioners* v. *O'Connor* (1858), 9 Ir. C.L.R. 242.

(*i*) *Holgate* v. *Kay* (1844), 1 C. & K. 341.

(*j*) *Bickle* v. *Beatty* (1859), 17 U.C.R. 465.

(*k*) *Tomlinson* v. *Day* (1821), 2 B. & B. 680; 5 Moore 558; *Hartley* v. *Maddocks* (1899), 47 W.R. 573.

(*l*) *Baynton* v. *Morgan* (1888), 22 Q.B.D. 74.

(*m*) *Mayor of Swansea* v. *Thomas* (1882), 10 Q.B.D. 48.

the lands demised, it was held that the rent was apportionable, although the action was on the covenant resting in privity of contract and not in privity of estate(*n*).

In an action of covenant by the lessor against the assignee of the lessee, the rent is apportionable; and if the assignee has been lawfully evicted by title paramount from a part of the premises, the action will lie for the rent of the remainder(*o*).

Rent-seck.

Where the owner of a rent seck discharges part of the lands out of which it issues, the rent will be apportioned as to the remainder of the lands(*p*).

SECTION XII.

LIMITATION OF ACTIONS FOR RENT.

20 years on an indenture of demise.

An action for rent upon an indenture of demise must be brought within twenty years after the cause of action arose. This is provided by section 1 of the *Act respecting the Limitation of certain Actions*(*a*), which is as follows:

1. (1) The actions hereinafter mentioned shall be commenced within and not after the times respectively hereinafter mentioned, that is to say:

(a) Actions *for rent*, upon an *indenture of demise;*

(b) Actions upon a bond, or other specialty, except upon the covenants contained in any indenture of mortgage made on or after the 1st day of July, 1894;

(*n*) *Boulton* v. *Blake* (1886), 12 Ont. 532, following *Mayor of Swansea* v. *Thomas* (1882), 10 Q.B.D. 48, and *Barnes* v. *Bellamy* (1881), 44 U.C.R. 303.

(*o*) *Stevenson* v. *Lambard* (1802), 2 East 575; 6 R.R. 511; *Barnes* v. *Bellamy* (1881), 44 U.C.R. 303; *Boulton* v. *Blake* (1886), 12 Ont. 532; *Hartley* v. *Maddocks* (1899), 47 W.R. 573.

(*p*) *McCaskill* v. *McCaskill* (1886), 12 Ont. 783. As to apportionment of rent where a part of the demised lands are expropriated under statutory authority, see R.S.B.C. (1897), c. 112, s. 104.

(*a*) R.S.O. (1897), c. 72, s. 1; R.S.N.S. (1900), c. 167, s. 2; R.S.B.C. (1897), c. 123, s. 50; 3 & 4 Will. IV. (Imp.), c. 42, s. 3.

(c) Actions upon a recognizance,
within *twenty years* after the cause of such actions arose;

(d) Actions upon an award where the submission is not by specialty;

(e) Actions for an escape;

(f) Actions for money levied on execution,
within six years after the cause of such actions arose;

(g) Actions for penalties, damages, or sums of money given to the party aggrieved by any statute,
within two years after the cause of such actions arose;

(h) Actions upon any covenant contained in any indenture of mortgage, made on or after the 1st day of July, 1894,
within ten years after the cause of such actions arose.

(2) But nothing herein contained shall extend to any action given by any statute, when the time for bringing the action is by the statute specially limited.

6 years arrears recoverable by distress.

By section 17 of the *Real Property Limitation Act*(*b*), it is provided that no arrears of rent shall be recovered by action or distress but within six years after the same became due, or were acknowledged in writing. The section in full is as follows:

17. No arrears of rent or of interest in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy, or any damages in respect of such arrears of rent or interest, shall be recovered by any distress action or suit but within six years next after the same respectively shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto or his agent signed by the person by whom the same was payable, or his agent.

These two provisions, although apparently contradictory, have been held not to be so. The latter Act (section 17) has for its object to relieve the land from arrears of rent beyond six years, while the former relates to personal actions only. The meaning of the two sections taken together is that no more than six years arrears shall be re-

(*b*) R.S.O. (1897), c. 133, s. 17; 3 & 4 Will. IV. (Imp.), c. 27, s. 42; R.S.B.C. (1897), c. 123, s. 45; R.S.N.S. (1900), c. 167, s. 25; R.S.M. (1902), c. 100, s. 18.

covered, except in actions upon an indenture of demise, in which case the limitation shall be twenty years(*c*).

Crown, 60 years.

In Ontario, the right of the Crown to bring an action for rent is limited by statute to sixty years after the right first accrued(*d*).

It is provided by the *Real Property Limitation Act*(*e*), that no action shall be brought to recover any land or rent but within ten years after the time at which the right to bring such action first accrued. It has been held, however, that this provision has no application to rent reserved under a demise, but only to a rent existing as an inheritance distinct from the land(*f*).

By section 23 of *The Real Property Limitation Act*(*g*), it is provided that no action or other proceeding shall be brought to recover out of any land or rent, any sum of money secured by mortgage or lien or otherwise charged upon or payable out of such land or rent, but within ten years next after a present right to receive the same accrued. It has been held, however, that this section does not apply to arrears of rent reserved by a demise(*h*).

6 years on a lease not under seal.

An action to recover rent under a lease that is not made by deed, must be brought within six years after the cause of action arose(*i*).

(*c*) *Hunter* v. *Nockalds* (1849), 1 Mac. & G. 640.

(*d*) 2 Edward VII. (1902), c. 1, s. 17.

(*e*) R.S.O. (1897), c. 133, s. 4; 3 & 4 Will. IV. (Imp.), c. 27, s. 2; 37 & 38 Vict. (Imp.), c. 57, s. 1.

(*f*) *Grant* v. *Ellis* (1841), 9 M. & W. 113.

(*g*) R.S.O. (1897), c. 133; 3 & 4 Will. IV. (Imp.), c. 27, s. 40; 37 & 38 Vict. (Imp.), c. 57, s. 8.

(*h*) *Darley* v. *Tennant* (1885), 53 L.T. 257.

(*i*) 21 Jac. I., c. 16, s. 3.

CHAPTER XIII.

DISTRESS.

SECTION I.—NATURE OF DISTRESS.
SECTION II.—HOW THE RIGHT ARISES.
SECTION III.—WHEN A DISTRESS MAY BE MADE.
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SECTION I.

NATURE OF DISTRESS.

Nature of distress.

Distress is a remedy that is used to compel the redress of an injury, such as that done by the trespassing of cattle; to compel the performance of a duty, as for example, the services incident to the tenure of land; or to compel the payment of a debt or demand, such as rent.

As a remedy for the non-payment of rent, it consists in taking possession of personal chattels without legal process or judicial authority, and selling them to realize the amount due. The word is used in three senses, to denote the act of taking, the thing taken, and the remedy generally.

Judicial authority.

Originally, the right of a landlord to distrain seems to have depended, in some cases at least, on judicial authority, and could not legally be exercised without it. At a very early period, however, the right of a landlord to distrain without legal process came to be recognized by law, probably by analogy to the right of an occupant of land to distrain cattle *damage feasant*, which was the earliest form of distress, and did not require to be authorized judicially(*a*). As the non-payment of rent operated as a forfeiture of the land, distress came to be resorted to as an alternative remedy to that harsh and extreme measure.

Right of sale.

Originally the landlord had no right of sale; the chattels distrained were held by him merely as a pledge until the rent was paid. The distress operated as an inconvenience to the tenant, and so brought pressure to bear to compel payment; but if the tenant remained obstinate and still refused to pay, the landlord was practically without a remedy. It was not until the reign of William and Mary that an act was passed to authorize the sale of goods distrained for rent in arrear(*b*).

SECTION II.

HOW THE RIGHT ARISES.

1. *By Statute.*
2. *By Express agreement.*
3. *As incident to a Demise.*
   (a) *There must be a Tenancy.*
   (b) *There must be a Certain Rent.*
   (c) *There must be a Reversion in the distrainor.*

How the right arises.

The right of distress as a remedy to compel payment of a debt may arise in three ways: (1) by statute, (2) by

(*a*) Bullen on Distress, p. 3.
(*b*) 2 W. & M. Sess. 1, c. 5.

express agreement, (3) by implication of law, as in the case of a demise.

1. *By Statute.*

A rent-charge, as we have seen, is a periodical payment in the nature of rent reserved by a grant or a conveyance which leaves no reversion in the person entitled to the rent-charge, but expressly provides for the right of distress in case of non-payment. A rent-seek is a similar payment reserved without providing for distress. By statute.

The right of distress has been extended to rent-seek, rents of assize, and chief rents, by section 5 of the statute 4 George II., chapter 28(*a*), which, as re-enacted in Ontario, is as follows: Rent-seek.

> 1. Every person may have the like remedy by distress, and by impounding and selling the same in cases of rents seek, as in case of rent reserved upon lease, any law or usuage to the contrary notwithstanding.

2. *By Express Agreement.*

By an express agreement the right of distress may be created where the right does not otherwise exist. Thus, a landlord under an express provision may distrain for payments which, although reserved as rent, are not rent in the strict sense of the term(*b*). And even where there is no tenancy between the parties, a right of distress may be conferred by agreement, as for instance to recover interest on money lent(*c*), or both principal and interest(*d*), or the By agreement.

(*a*) 4 Geo. II. c. 28, s. 5; R.S.O. (1897), vol. III., c. 342, s. 1; R.S.B.C. (1897), c. 110, s. 15.

(*b*) *Pollitt* v. *Forrest* (1847), 11 Q.B. 949.

(*c*) *Chapman* v. *Beecham* (1842), 3 Q.B. 723.

(*d*) *Hobbs* v. *Ontario Loan and Debenture Co.* (1890), 18 S.C.R. 483, per Patterson, J., at p. 552.

price of goods sold(*e*), and as between the parties such a stipulation is valid.

Mortgage.

A common form of provision for distress is the statutory distress clause in a mortgage deed: "Provided that the mortgagee may distrain for arrears of interest." This form of words in a mortgage deed expressed to be made in pursuance of the *Act respecting Short Forms of Mortgages*(*f*), is construed as if it were in the following form:

Statutory distress clause.

"And it is further covenanted, declared and agreed by and between the parties to these presents, that if the mortgagor, his heirs, executors or administrators, shall make default in payment of any part of the said interest at any of the days and times hereinbefore limited for the payment thereof, it shall and may be lawful for the said mortgagee, his heirs, executors, administrators or assigns, to distrain therefor upon the said lands, tenements, hereditaments and premises, or any part thereof, and by distress warrant to recover *by way of rent reserved as in the case of a demise of the said lands*, tenements, hereditaments and premises, so much of such interest as shall from time to time be or remain in arrear and unpaid, together with all costs, charges and expenses attending such levy or distress, *as in like cases of distress for rent.*"

Personal license.

This clause, although it provides for the recovery of the interest *by way of rent reserved as in the case of a demise*, does not create the relation of landlord and tenant between the parties, but operates simply as a personal license(*g*), and the goods of a stranger cannot be distrained thereunder(*h*).

Tenancy between mortgagor and mortgagee.

But the relationship of landlord and tenant may be created between a mortgagee and a mortgagor by a proper

(*e*) *Iredale* v. *Kendall* (1878), 40 L.T. 362.
(*f*) R.S.O. (1897), c. 126, schedule B, clause 15.
(*g*) *Trust and Loan Co.* v. *Lawrason* (1882), 10 S.C.R. 679.
(*h*) *Gibbs* v. *Cruikshank* (1873), 28 L.T. 104.

stipulation to that effect in the mortgage deed involving, without express stipulation, the ordinary right of distress which the law attaches to that relationship(*i*). And in such a case, the mortgagee, if not restricted by statute, may distrain as for rent in arrear upon the goods of a stranger found on the mortgaged premises, and may insist, as against the sheriff and execution creditors of the mortgagor, upon the rights conferred on landlords by the statute 8 Anne, chapter 14(*j*).

Registration

In England, a right of distress which is created by agreement only, even where a tenancy has been created by an attornment clause in a mortgage, is invalid unless the agreement is registered under the Bills of Sale Acts 1878 and 1882(*k*). But this does not extend to the right of distress of a mortgagee who has made a demise after taking possession under his mortgage(*l*).

But it has been held that a right of distress under an attornment clause in a mortgage deed, is not within the Ontario *Bills of Sale Act*, and does not require to be registered in pursuance thereof(*m*).

3. *As Incident to a Demise.*

By implication of law.

In the case of a demise, or in other words, where the relation of landlord and tenant exists, the law implies a right of distress as necessarily incident thereto, providing the following conditions be fulfilled:

(*i*) *Ex parte Jackson, in re Bowes* (1880), 14 Ch. D. 726; *Kearsley* v. *Phillips* (1883), 11 Q.B.D. 621; *Linestead* v. *Hamilton Provident and Loan Society* (1896), 11 Man. L.R. 199.

(*j*) *Hobbs* v. *Ontario Loan and Debenture Co.* (1890), 18 S.C.R. 483; *McKay* v. *Grant* (1893), 30 C.L.J. 70; see chapter VII.

(*k*) *Pulbrook* v. *Ashby* (1887), 56 L.J.Q.B. 376; *Stevens* v. *Marston* (1890), 60 L.J.Q.B. 192; *Green* v. *Marsh*, [1892] 2 Q.B. 330.

(*l*) *In re Willis* (1888), 21 Q.B.D. 384.

(*m*) *Trust and Loan Co.* v. *Lawrason* (1881), 6 Ont. App. 286.

(a) There must be a tenancy strictly so called;

(b) There must be a rent reserved and it must be certain in amount;

(c) There must be a reversion in the distrainor at the time the distress is made.

(a) *There Must be a Tenancy.*

There must be a tenancy.

The tenancy need not be created by express agreement; it is sufficient if from the acts of the parties the law implies a tenancy. And an acknowledgment of a tenancy, as by attornment at a certain rent, or by payment of rent with reference to a periodic holding, will be sufficient to imply a tenancy, and to support the right of distress(*n*).

Agreement for a lease.

Before the passing of the *Judicature Act*, an agreement for a lease was not a demise, and did not constitute the relation of landlord and tenant, and hence a distress could not lawfully be made thereunder until an implied tenancy arose by the payment of rent(*o*). But the right of distress under an agreement for a lease may be created by an express stipulation that a tenancy shall exist until the lease has been granted(*p*).

A demise, however, may be constituted by an instrument in the form of an agreement to let if it clearly appears to have beeen the intention of the parties that it should operate as a present demise(*q*). So, if possession is taken under an agreement for a lease and rent is paid, a tenancy from year to year arises at common law, and a distress may be made for rent that afterwards becomes due(*r*).

(*n*) *Kearsley* v. *Phillips* (1883), 11 Q.B.D. 621; *Yeoman* v. *Ellison* (1867), L.R. 2 C.P. 681; see chapter III.

(*o*) *Dunk* v. *Hunter* (1822), 5 B. & A. 322; 24 R.R. 390.

(*p*) *Bicknell* v. *Hood* (1839), 5 M. & W. 104.

(*q*) *Warman* v. *Faithfull* (1834), 5 B. & Ad. 1042.

(*r*) See chapters III. and IV.

Judicature Act.

Since the passing of the *Judicature Act*, whereby both legal and equitable jurisdiction may be exercised by the same Court, a tenant holding under an agreement for a lease, of which specific performance would be decreed, stands in the same position as to liability as if the lease had been executed, and consequently a landlord has a right to distrain for rent payable thereunder(*s*).

Exclusive possession.

An instrument, although called a lease and containing the usual words of demise, which does not give the exclusive possession and control of the premises to the lessee, operates merely as a licence and not as a demise, and no right of distress, in the absence of express stipulation, exists thereunder(*t*). Thus, where the right to use standing room for machines in a factory was given in a lease at a weekly rent, the lessor supplying the power to run the machines, it was held that this was a mere privilege or easement, and that consequently the rent could not be recovered by distress(*u*). But it is otherwise if the demise is made of a defined portion of a room of which exclusive possession is given to the lessee(*v*).

Where the defendant who owned a farm agreed with the plaintiff to work it on shares, each of them supplying one-half of the seed and labour and to have half the profits, the plaintiff to pay $60 for implements, and $160 annually; but the plaintiff was not placed in possession of any distinct portion of the farm, the parties being equally in possession of the whole, it was held that there was no tenancy created between the parties, and that the $160 was not rent for which the defendant could distrain(*w*).

(*s*) *Walsh* v. *Lonsdale* (1882), 21 Ch. D. 9; see chapter VI.

(*t*) *Ward* v. *Day* (1864), 4 B. & S. 337; 5 B. & S. 359.

(*u*) *Hancock* v. *Austin* (1863), 14 C.B.N.S. 634.

(*v*) *Selby* v. *Greaves* (1868), L.R. 3 C.P. 594; *Marshall* v. *Schofield* (1882), 52 L.J.Q.B. 58.

(*w*) *Oberlin* v. *McGregor* (1876), 26 U.C.C.P. 460.

Possession of part.

A grant of a lease not under seal, of premises part of which are in the possession of a third person under a prior lease from the same lessor, creates no legal term, and the lessor cannot distrain under the second lease for any part of the rent(*x*). Such a demise, however, if granted by an instrument under seal, operates as a grant of the reversion expectant on the prior lease, and the lessor may distrain under the second lease for the whole rent in arrear(*y*).

Bona fide intention.

There must be a *bona fide* intention of the parties to create a tenancy, in order to give rise to the landlord's right of distress as against third parties, or as against creditors of the tenant. If the demise is merely a scheme to enable the landlord, under colour of a tenancy, to distrain the goods of third parties, or to satisfy a debt in priority to other creditors, it will not be deemed a valid tenancy as against them.

Fraudulent scheme.

Thus, where a creditor of a tenant took an assignment from him of the residue of his term to secure the indebtedness, and forthwith gave the tenant another lease for the term of three months at a rent equal to the amount of the indebtedness, the intention being manifestly not to create a tenancy except as a scheme to enable the creditor to seize the goods of third parties on the premises, it was held that the relation of landlord and tenant was not created by the lease(*z*).

Excessive rent.

It is material in determining the *bona fides* of the parties to a demise, to consider the amount of rent reserved; and where the annual rent reserved is clearly in excess of the annual value of the lands, or of a fair and reasonable rent, the inference will be drawn that there was not a *bona fide* intention to create a tenancy(*a*).

(*x*) *Neale* v. *Mackenzie* (1837), 1 M. & W. 747; see also *Kelly* v. *Irwin* (1867), 17 U.C.C.P. 351.

(*y*) *Holland* v. *Vanstone* (1867), 27 U.C.R. 15.

(*z*) *Thomas* v. *Cameron* (1885), 8 Ont. 441.

(*a*) *Ex parte Jackson* (1880), 14 Ch. D. 725.

In *Ex parte Jackson*(*b*) where a mortgagee had redemised the mortgaged lands to the mortgagor at an excessive rent, Baggallay, L.J., in delivering judgment said: "So far as any inference can be drawn from the practice of inserting attornment clauses, it appears to me that the benefit to be derived from the attornment clause was intended to be an equivalent for that which the mortgagee would derive from the rent, if the tenant had been a stranger. What would that equivalent be? Would it not be a right to the payment of a fair and reasonable rent, such as the ordinary tenant would be willing to give for the property under ordinary circumstances? That, as it seems to me, is the rent for which a properly prepared attornment clause should make provision, not necessarily the exact amount which a tenant would pay for the property, but such an amount as a willing tenant would probably pay as a *bona fide* rent. If the rent so reserved is clearly in excess of what would be a fair and reasonable rent, it appears to me that although you may call it rent, it is no longer a real rent, but a fictitious payment under the name of rent."

So, where a mortgage of real estate provided that the moneys secured thereby, amounting to $20,000, should be payable with interest in half-yearly instalments of $500 for five years, and the remainder, $15,000, at the end of five years, and contained an attornment clause reserving rent equal to the amounts so payable, it was held that the rent was so excessive as to show conclusively that the parties did not intend in good faith to create a tenancy, and no right of distress as against third parties arose(*c*).

Such a demise however will be supported, if the rent

(*b*) *Ibid.*

(*c*) *Hobbs* v. *Ontario Loan and Debenture Co.* (1890), 18 S.C.R. 483; see also *Imperial Loan and Investment Co.* v. *Clement* (1896), 11 Man. L.R. 428 and 445.

reserved, although a high rent, is one which a tenant might honestly agree to pay and a landlord might honestly expect to receive(*d*).

Corporeal hereditaments.

A tenancy strictly so called can be created only in respect of corporeal hereditaments; unless rent is payable under a demise of corporeal hereditaments, that is, lands and tenements out of which it is said to issue, it cannot, in the absence of an express agreement to that effect, be recovered by distress.

Corporeal and incorporeal.

Where a demise of corporeal and incorporeal hereditaments at a single rent for both was void as to the latter as not being under seal, a distress for the rent was held to be unlawful(*e*).

Land and chattels.

A distress, however, may be made for rent payable under a demise of both lands and chattels, as for example, of a farm with the stock thereon, or of a house with the furniture therein, as in such cases the rent is deemed to issue out of the land alone(*f*).

(b) *There Must be a Certain Rent.*

Sum distrained for must be rent.

The sum sought to be recovered by distress must be rent in the strict sense of the term, that is compensation given for the exclusive use and occupation of the premises under a tenancy. Thus, sums reserved as compensation for goodwill, although called rent and payable annually, and sums payable over and above the rent, for improvements made by the landlord, are sums in gross and not rents, and cannot be recovered by distress(*g*).

(*d*) *Ex parte Williams, in re Thompson* (1877), 7 Ch. D. 138; *In re Stockton Iron Furnace Co.* (1879), 10 Ch. D. 335.

(*e*) *Gardiner* v. *Williamson* (1831), 2 B. & Ad. 336.

(*f*) *Spencer's Case*, 5 Co. 16a; *Newman* v. *Anderton* (1806), 2 N.R. 224.

(*g*) *Smith* v. *Mapleback* (1786), 1 T.R. 441; 1 R.R. 247; *Hoby* v. *Roebuck* (1816), 7 Taunt. 157; 17 R.R. 477; *Donellan* v. *Read* (1832), 3 B. & Ad. 899; 37 R.R. 588.

Rent must be certain.

The rent reserved must be certain in amount; it may fluctuate, but so long as it is capable of being definitely ascertained by computation it may be recovered by distress(*h*).

Rent payable in kind.

The rent may be sufficiently certain although not payable in money. A distress for rent may lawfully be made under a lease providing that the lessee, in lieu of a money rent, is to deliver to the landlord a share of the crop grown on the lands(*i*). So, a distress may be made for rent for a sum certain payable in produce at the market price(*j*), or payable in leather(*k*). But it is doubtful if there is a right to distrain for the non-fulfilment of a contract respecting certain rails agreed to be delivered in lieu of rent(*l*).

Farming "on shares."

Where under a lease of a farm the lessor was to find the team and seed for the first year, and was "to receive as rent for the first year, two-thirds of all the grain when cleaned, threshed, and ready for market, also one-third of the straw, turnips, and root crops, and half the hay; and for the remainder of the term to receive one-third of all the crops, with the exeception of the hay, of which one-half," it was held that the rent was sufficiently certain to warrant a distress, and that the goods seized might be sold(*m*).

Additional rent.

But an increased or additional rent, which becomes payable if the tenant performs or fails to perform certain acts, even if it is penal in its nature, may be recovered by

(*h*) *Ex parte Voisey* (1882), 21 Ch. D. 442; *Walsh* v. *Lonsdale* (1882), 21 Ch. D. 9; *Daniel* v. *Gracie* (1844), 6 Q.B. 145.

(*i*) *Thompson* v. *Marsh* (1832), 2 O.S. 389; *Nowery* v. *Connolly* (1869), 29 U.C.R. 39; *Dick* v. *Winkler* (1898), 12 Man. L.R. 624.

(*j*) *Thompson* v. *Marsh* (1832), 2 O.S. 355.

(*k*) *Cumming* v. *Hill* (1838), 6 O.S. 303.

(*l*) *Robinson* v. *Shields* (1866), 15 U.C.C.P. 386.

(*m*) *Nowery* v. *Connolly* (1869), 29 U.C.R. 39.

Demand.

distress, although a previous demand of the rent, unlike other cases, is necessary(*n*).

Rent fixed by arbitration.

Where it was provided in a lease that the tenant was to make certain improvements, and at the expiration of the term the value of the improvements, as well as the amount of the rent, was to be fixed by arbitration, it was held that the landlord could not distrain as there was no fixed rent agreed upon(*o*).

Where it is provided in a lease that a reasonable deduction from the rent is to be made for land sold, to be determined by arbitration, a lessor cannot distrain after such sale, without first arranging or offering to arbitrate as to the amount to be deducted(*p*).

Nova Scotia.

In Nova Scotia, it is provided by statute that no distress for rent shall be made unless there is an actual demise at a specific rent(*q*).

Apportioned rent.

Where rent has by law to be apportioned, the apportioned part may be distrained for(*r*).

(c) *There Must be a Reversion in the Distrainor.*

Reversion necessary to support a distress.

The right to distrain for rent in arrear is properly an incident of the reversion, and unless authorized by statute, or express agreement, a distress can lawfully be made only when a reversion is vested in the person distraining(*s*).

It is necessary, also, that the reversion should be vested in the person distraining at the time the rent falls due, so

(*n*) *Roulston* v. *Clarke* (1795), 2 H. Bl. 563; *Mallam* v. *Arden* (1833), 10 Bing. 299; *Pollitt* v. *Forrest* (1847), 11 Q.B. 949.

(*o*) *Mitchell* v. *McDuffy* (1880), 31 U.C.C.P. 266, 649.

(*p*) *Bickle* v. *Beatty* (1859), 17 U.C.R. 465.

(*q*) R.S.N.S. (1900), c. 172, s. 1.

(*r*) *Neale* v. *Mackenzie* (1836), 1 M. & W. 747, at p. 758, per Lord Denman, C.J.

(*s*) *Staveley* v. *Allcock* (1851), 16 Q.B. 636; *Smith* v. *Torr* (1862), 3 F. & F. 505.

that upon the assignment of the reversion arrears of rent already due cannot be distrained for(*t*).

Where a tenant for years, after assigning his term, pays rent as surety for his assignee, the right of distress is not a security or remedy to which he becomes entitled as a surety(*u*).

A person possessed of a term of years who sub-leases the lands for a part of the term would still have a reversion, and he may distrain on his sub-lessee for rent which accrues while the reversion lasts(*v*). Sub-lease.

But if he assigns the whole of his term, or sub-lets for the whole term or longer, whereby he divests himself of any reversion in it, he cannot distrain unless the right be reserved by express agreement(*w*), although it is stipulated that the sub-lessee shall be his tenant during the term, and although rent has been paid or agreed to be paid to him(*x*). Thus, where a tenant for a term of five years sub-let to another for a term of seven years reserving a rent, it was held that the sub-lease operated as an assignment of the whole term of five years, and the sub-lessor, being divested of all reversion in the term, could not distrain for the rent, although the contract to pay rent was valid and might be enforced by action(*y*). Sub-lease for whole term.

But a tenant from year to year, who demises by indenture for a term of years, however long, has, by reason of the possibility of his estate continuing longer than the term Sub-lease by yearly tenant.

(*t*) *Brown* v. *Metropolitan Counties Society* (1859), 1 E. & E. 832.

(*u*) *In re Russell* (1885), 29 Ch. D. 254.

(*v*) *Burne* v. *Richardson* (1813), 4 Taunt. 720; 14 R.R. 647.

(*w*) *Pascoe* v. *Pascoe* (1837), 3 Bing. N.C. 898; 43 R.R. 847; *Parmenter* v. *Webber* (1818), 8 Taunt. 593; 20 R.R. 575; *Preece* v. *Corrie* (1828), 5 Bing. 24; 30 R.R. 536; *Jolly* v. *Arbuthnot* (1859), 3 DeG. & J. 224.

(*x*) *Parmenter* v. *Webber* (1818), 8 Taunt. 593; *Hazeldine* v. *Heaton* (1883), C. & E. 40.

(*y*) *Selby* v. *Robinson* (1866), 15 U.C.C.P. 390.

demised, a reversion sufficient to support a distress during the existence of the tenancy from year to year(*z*).

The grant of a lease to take effect on the expiration of a lease already in existence, does not amount to a parting with the reversion, so as to disentitle the lessor to distrain under the first lease(*a*).

Estoppel.

The existence of the legal reversion may be sufficiently established by estoppel(*b*).

Surrender.

In case a tenant who has sub-let surrenders his lease, and has thus divested himself of his reversion, he cannot distrain on his sub-tenant. But where such surrender is made for the purpose of obtaining a renewal of his own lease his right of distress (which at common law would be extinguished) is provided for by statute(*c*).

In Ontario, reversion not necessary.

In Ontario, however, it has been enacted that a reversion in the lessor shall not be necessary in order to create the relation of landlord and tenant, or to make applicable the incidents by law belonging to that relation. This is provided by section 3 of the *Landlord and Tenants' Act*(*d*), which is as follows:

> **3.** The relation of landlord and tenant did not since the 15th day of April, 1895, and shall not hereafter depend on tenure, and a reversion or remainder in the lessor shall not be necessary in order to create the relation of landlord and tenant, or to make applicable the incidents by law belonging to that relation; nor shall any agreement between the parties be necessary to give a landlord the right of distress.

This section was first enacted in a slightly different form in the year 1895, as follows: "The relation of land-

(*z*) *Oxley* v. *James* (1844), 13 M. & W. 209.

(*a*) *Smith* v. *Day* (1837), 2 M. & W. 684; 46 R.R. 747.

(*b*) *Morton* v. *Woods* (1869), L.R. 4 Q.B. 293; see chapter VIII.

(*c*) 4 Geo. II. c. 28, s. 6; R.S.O. (1897), vol. III., c. 342, s. 25; R.S.B.C. (1897), c. 110, s. 16.

(*d*) R.S.O. (1897), c. 170.

lord and tenant shall be deemed to be founded in the express or implied contract of the parties, and not upon tenure or service, and a reversion shall not be necessary to such relation which shall be deemed to subsist in all cases where there shall be an agreement to hold land from or under another in consideration of any rent"(*e*). In the following year(*f*) this section was repealed and the section first quoted was enacted.

Harpelle v. *Carroll.*

The effect of this section as first enacted was in part judicially declared in *Harpelle* v. *Carroll*(*g*). In this case it was contended, (1) that the section was retrospective, and (2) that its effect was to take away the common law right of distress of the landlord in all tenancies, unless there was a stipulation in the lease either expressly or impliedly creating that right. These two points were both decided in the negative(*h*); and although these were the only points which arose for decision under the section, the general effect of it was discussed. Sir William Meredith, C.J., in delivering judgment said(*i*):

Judgment.

"The section in question does not abolish the relation of landlord and tenant, and make the bargain by which one lets land to another a mere contract, but alters the manner of creating a long existing and well-known relation; it is hereafter not to be a matter depending on tenure or service, as it was under the feudal law, nor is a reversion to be necessary to the relation, as it has been since the statute *Quia Emptores*, but it is deemed to be founded on contract express or implied. It was always, I take it, neces-

Quia Emptores.

(*e*) Ont. Stat. 58 Vict. (1895), c. 26, s. 4.

(*f*) Ont. Stat. 59 Vict. (1896), c. 42, s. 3.

(*g*) *Harpelle* v. *Carroll* (1896), 27 Ont. 240.

(*h*) *Chute* v. *Busteed* (1865), 16 Ir. C.L.R. 222 (decided under a similar section since repealed, 23 & 24 Vict. (Imp.), c. 144, s. 3), was followed as to the first point.

(*i*) *Harpelle* v. *Carroll* (1896), 27 Ont. 240, at p. 249.

sary that in a certain sense the relation should be founded on contract, because there must have been an agreement, express or implied by the tenant to hold, and as to the return to be made to the landlord; but it was also necessary that he under whom the tenant agreed to hold, should be either lord of the feud or owner of the reversion in order that the relation of landlord and tenant should be complete; and all that the section does is to render unnecessary hereafter the latter requisite, and to create the relation whenever, as it provides, there shall be an agreement to hold land from or under another in consideration of any rent.

"It will also be observed that the section does not in terms, or I think by necessary implication, assume to interfere with cases where, as in this, the true relation of landlord and tenant exists. I mean by that where the lands are held in consideration of a rent of one who had the immediate reversion in them, or the rights incident to that relation; but, as I have endeavoured to point out, does away with the necessity of the person to whom the rent is reserved, having the immediate reversion in the lands in respect of which it is payable, in order to the creation of that relation.

Rent-seck.

"The right is, I think, not interfered with for another reason. Such an agreement as the statute mentions, if there were no reversion in the lessor, made the rent reserved, I take it, rent-seck; and, though there was at common law no right of distress for that species of rent, the right was given by 4 George II., chapter 28, section 5, which provides that there shall be the like remedy to recover rent-seck as exists in case of rent service reserved on a lease to a reversioner.

Section has enlarged right of distress.

"I am inclined to think that it will be found that the section, instead of curtailing, has enlarged the right of distress by extending it to all cases in which there is an

agreement of the nature mentioned in it; but, however that may be, I ought not, I think, without a much clearer expression of the will of the Legislature, to give to its enactment such a construction as would practically sweep away the whole body of the law (common and statute) affecting the relation of landlord and tenant, and the rights, interests and obligations arising out of that relation, without substituting for it anything but the bald provisions of this section."

It would seem, therefore, that in case a landlord parts with his reversion, as for example, where a lessee for years sub-lets for the whole of his term or longer, reserving rent, the relation of landlord and tenant may exist between him and his lessee, and the rent reserved may be recovered by distress(*j*).

Reversion extinguished by death.

Where a landlord is entitled to rent for the life of another person, he may distrain for rent which was due and owing at the death of such other person although the reversion is extinguished by such death. This is provided by section 4 of the statute 32 Henry VIII., chapter 37, which, as re-enacted in Ontario(*k*), is as follows:

> **4.** Where a person is entitled to any rent or land for the life of another he may sue for, distrain, and recover by action or distress, the rent due and owing at the time of the death of the person for whose life such rent or land did depend, as he might or could have done if such person, by whose death the estate in such rent or land determined, had continued in life.

So, a landlord entitled to an estate in the right of his wife, may distrain, after his wife's death, for rent which became due in her lifetime. This is provided by section 3

(*j*) The effect of the section has been discussed by Mr. E. Douglas Armour, K.C., in several able articles in the Canadian Law Times, vol. 15, pp. 217, 245; vol. 17, p. 253; see also Armour: Real Property, p. 135.

(*k*) R.S.O. (1897), Vol. III., c. 342, s. 4.

of the statute 32 Henry VIII., chapter 37, which, as re-enacted in Ontario(*l*), is as follows:

> **3.** If any man hath, or shall have, in the right of his wife, any estate in fee simple, fee tail, or for term of life of or in any rents, or fee ferms, and the same rents, or fee ferms, shall be due, behind and unpaid in the said wife's life, then the said husband, after the death of his said wife, his executors and administrators, shall have an action for the said arrearages against the tenant of the demesne that ought to have paid the same, his executors, or administrators and also the said husband, after the death of his said wife may distrain for the said arrearages, in like manner and form as he might have done if his said wife had been then living and make avowry upon his said matter as is aforesaid (*m*).

SECTION III.

WHEN A DISTRESS MAY BE MADE.

Between sunrise and sunset.

A distress for rent must be made in the daytime; that is to say, between sunrise and sunset. The rule that a distress for rent must be made in the day time, and not in the night, must be taken to mean, not merely that it must not be taken in the dark, but that it must be between sunrise and sunset; and although there may be circumstances under which it may be difficult to determine what will be the proper evidence of sunrise and sunset, yet, ordinarily, the time by the clock, coupled with the almanac, will be some evidence, and, if unanswered, sufficient; and if by such evidence it clearly appears that in any view the distress was before the sun had risen or after it had set, the distress will be illegal. Thus, where the distress was taken at near eight o'clock on an evening when, by the almanac, the sun set just after seven, and where it was taken between two and three o'clock in the morning of a day on which,

(*l*) R.S.O. (1897), vol. III., c. 342, s. 3.

(*m*) See R.S.O. (1897), c. 127, ss. 4 (3), 5, and c. 163, ss. 5, 6, 7.

by the almanac, the sun rose at shortly before half-past four, and there was no other evidence upon the point, nor any evidence as to whether in either case it was dark when the distress was taken, but the jury in both cases found that it was taken after sunset and before sunrise, it was held that the evidence was sufficient to sustain that finding, and that the distress were therefore illegal(*a*).

Where a landlord entered the tenant's house after sunset, and interfered to prevent the removal of goods, the tenant was held entitled to recover the full value of the goods distrained(*b*).

Rent must be in arrear.

A distress cannot be made until the rent is in arrear, and it is not in arrear until the day after it becomes due(*c*).

Distress before rent due.

As between the parties, a valid stipulation may be made in the lease, or subsequently if founded on a fresh consideration or under seal, conferring the right to distrain before the rent falls due by the terms of the lease, as where rent is made payable in advance if required. In such a case a demand for payment is necessary before distress(*d*).

Demand.

But where a landlord attempted to justify a seizure for rent under a warrant of distress by procuring a document, without consideration and not under seal, signed by the tenant, which purported to give him the right to seize the tenant's goods for rent before the rent fell due according to the lease, it was held that the document was a *nudum pactum*, and afforded no justification for the distress(*e*).

(*a*) *Tutton* v. *Darke* (1860), 29 L.J. Ex. 271; 5 H. & N. 647; *Nixon* v. *Freeman* (1860), 29 L.J. Ex. 271; 5 H. & N. 647; see also *Tinckler* v. *Prentice* (1812), 4 Taunt. 549; 13 R.R. 684.

(*b*) *Lamb* v. *Wall* (1859), 1 F. & F. 503; see *Attack* v. *Bramwell* (1863), 3 B. & S. 520; *England* v. *Cowley* (1873), L.R. 8 Ex. 126.

(*c*) *Dibble* v. *Bowater* (1853), 2 E. & B. 564.

(*d*) *Clarke* v. *Holford* (1848), 2 C. & K. 540; *Williams* v. *Holmes* (1853), 8 Ex. 861, at p. 863.

(*e*) *Brayfield* v. *Cardiff* (1893), 9 Man. L.R. 302.

Where the lease provides that the lessee shall fall-plow the land as part of the rent, a distress cannot be made until the period for fall plowing has expired(*f*).

Not on Sunday.

As a distress must be made between sunrise and sunset, it follows that the earliest moment a distress may lawfully be made, is at sunrise on the day after it becomes due. And if that day should fall on a Sunday, it has been held, under the *Sunday Observance Act, 1677*(*g*), which forbids the service or execution of any writ, process, warrant, judgment or decree on that day, that it cannot be made until the next day(*h*).

Not after tenancy expired.

At common law a distress could not lawfully be made after the termination of the tenancy(*i*). But by statute, a distress may be made under a lease for life, for years or at will, within six months after the end of the term, provided the tenant is still in possession and it is made during the continuance of the landlord's title. This is provided by sections 6 and 7 of the *Landlord and Tenant Act, 1709*(*j*), which are re-enacted in Ontario in section 2 of the *Act respecting Landlord and Tenant (2)*, as follows:

Exception.

Within 6 months after expiration of tenancy.

2. Any person having any rent in arrear, or due, upon any lease for life or lives or for years, or at will, ended or determined, may distrain for such arrears, after the determination of the said lease, in the same manner as he might have done if such lease had not been ended or determined: Provided that such distress be made within the space of six months after the determination of such lease, and during the continuance of such landlord's title or interest, and during the possession of the tenant from whom such arrears became due (*k*).

(*f*) *Mowat* v. *Clement* (1885), 3 Man. L.R. 585.

(*g*) 29 Car. II., c. 7, s. 6.

(*h*) *Werth* v. *London and Westminster Loan Co.* (1889), 5 Times L.R. 521.

(*i*) *Williams* v. *Stiven* (1846), 9 Q.B. 14.

(*j*) 8 Anne c. 18.

(*k*) 8 Anne, c. 18 (or c. 14 in Ruffhead's ed.), ss. 6, 7; R.S.O. (1897), vol. III., c. 342, s. 2; R.S.B.C. (1897), c. 110, ss. 12 and 13; R.S.N.S. (1900), c. 172, s. 13; C.S.N.B. (1904), c. 153, s. 11.

Where a distress was made more than six months after, but under a warrant given to the bailiff four weeks before, the expiration of, the tenancy, and the landlord was not aware of the illegal act of his bailiff in seizing at the time he did, but learned of the fact of seizure after it had been made and before the sale, which he allowed to go on without making any inquiry, and afterwards accepted the proceeds of the sale, it was held that the landlord either ratified the bailiff's illegal act with knowledge of the circumstances or meant to take upon himself without inquiry the risk of any irregularity the bailiff might have committed and to adopt all the bailiff's acts, and was held liable for the damages suffered by the tenant(*l*).

Mortgage.

This section applies to a tenancy created by attornment between mortgagor and mortgagee, and a distress which was made two years after the maturity of the mortgage, when by express provision the tenancy expired, was held to be illegal(*m*).

A distress made more than six months after the expiration of the tenancy is illegal, and a continuation of the tenancy will not necessarily be implied from the mere fact of the tenant remaining in possession(*n*).

Yearly tenancy.

A letting at an annual rent constitutes a yearly tenancy, which continues at the same rent for the second year, if the tenant remain in possession; and the landlord may distrain for the first year's rent at the end of the second year. The fact that the landlord may re-enter for non-payment of rent, does not determine the tenancy at the end

(*l*) *Dick* v. *Winkler* (1899), 12 Man. L.R. 624, following *Lewis* v. *Read* (1845), 13 M. & W. 834.

(*m*) *Klinck* v. *Ontario Industrial Loan and Investment Co.* (1888), 16 Ont. 562.

(*n*) *Soper* v. *Brown* (1836), 4 O.S. 103.

of the first year, so as to make it necessary to distrain six months afterwards(*o*).

Distress after 6 months.

A custom that a tenant may leave his away-going crop in the barns of the farm, for a certain time after the lease has expired and he has quitted the premises, is good, and the landlord may distrain the corn so left, for rent in arrear, after six months have expired from the determination of the term notwithstanding the statute(*p*).

A plea of distress for rent under a demise after the lease had expired, should state that the distress was made within six calendar months after the determination of the lease(*q*).

Determination by forfeiture.

The statute has been held to apply only where the tenancy has been determined in ordinary course by lapse of time, and not where it has been determined by forfeiture, or the like(*r*).

Where a lease was made "for the term of one year, to be computed form the 1st of October, 1863, and so on from year to year, unless notice should be given to the contrary, or equitable proceedings taken on the mortgage hereinafter mentioned," and after proceedings were taken on the mortgage the landlord distrained for rent, it was held that there was no subsisting tenancy at the time of the distress, as it was determined by the proceedings on the mortgage in pursuance of the proviso in the lease(*s*).

No right of distress after election to forfeit.

Where an act has been done by the tenant which incurs a forfeiture, the landlord, if he elects to forfeit the term

(*o*) *McClenaghan* v. *Barker* (1844), 1 U.C.R. 26; see R.S.O. (1897), c. 170, s. 20.

(*p*) *Beavan* v. *Delahay* (1788), 1 H. Bl. 5; 2 R.R. 728.

(*q*) *Strathey* v. *Crooks* (1838), 6 O.S. 587.

(*r*) *Grimwood* v. *Moss* (1872), L.R. 7 C.P. 360; *Baker* v. *Atkinson* (1886), 11 Ont. 735; *Linton* v. *Imperial Hotel Co.* (1889), 16 Ont. App. 337.

(*s*) *Higgins* v. *Langford* (1871), 21 U.C.C.P. 254.

by commencing proceedings, cannot distrain after such proceedings have been commenced(*t*). But putting in a distress is not an election to forfeit the term. Thus, where a distress was made for rent which became due by virtue of a proviso in the lease that "if the lessee shall make any assignment for the benefit of creditors, the said term shall become forfeited and void, and the full amount of the current yearly rent shall be at once due and payable, it was held that the proviso was divisible, and that the distress was not an election to forfeit the term(*u*).

Distress itself is not an election to forfeit.

It has been held that the statute does not apply to a tenancy at will that has been determined by the death of the tenant. Thus, where the relation of landlord and tenant was created by an attornment clause in a mortgage deed, providing that the mortgagor should be tenant at will to the mortgagee, the latter cannot distrain after the death of the mortgagor(*v*).

Tenancy at will.

The tenant must be in possession of the premises, otherwise a distress even within the six months will be unlawful. Thus, where a tenant has quitted the premises and another tenant has entered the landlord cannot distrain(*w*). And if the landlord has taken possession of the premises by the exercise of his right of re-entry, or by some proceeding equivalent thereto, he cannot afterwards distrain(*x*).

Tenant must be in possession.

The tenant will not be deemed to be in possession, so as to render a distress lawful, from the mere fact that he has left distrainable goods on the premises(*y*).

(*t*) *Bridges* v. *Smyth* (1829), 5 Bing. 410; 30 R.R. 681.

(*u*) *Linton* v. *Imperial Hotel Co.* (1889), 16 Ont. App. 337, overruling on this point *Baker* v. *Atkinson* (1886), 11 Ont. 735.

(*v*) *Scobie* v. *Collins*, [1895] 1 Q.B. 375.

(*w*) *Taylerson* v. *Peters* (1837), 7 A. & E. 110; 45 R.R. 689.

(*x*) *Murgatroyd* v. *Old Silkstone Co.* (1895), 65 L.J. Ch. 111.

(*y*) *Gray* v. *Stait* (1883), 11 Q.B.D. 668.

But a distress may be made if the tenant is in possession of part of the demised premises(*z*).

Where a tenant holds over after the tenancy has been determined by a notice to quit, the landlord cannot distrain for rent for the period of such overholding(*a*). But it is otherwise if a new tenancy has been created by express or implied agreement of the parties(*b*).

Not after surrender.

No rent becomes due after the surrender of a lease(*c*), and a distress for rent under a lease that has been surrendered is illegal(*d*). Where a tenant, with the knowledge and consent of his landlord, takes a lease from another person, to whom the landlord has transferred the reversion, this amounts to a surrender in law of the lease; the relation of landlord and tenant no longer exists; and consequently the right to distrain is gone(*e*).

But a lessor is entitled after the surrender to sue for rent which accrued before the surrender(*f*). The liability of a sub-lessee for rent, on a surrender of the head-lease, was formerly at an end, as the immediate reversion was thereby extinguished(*g*). But his liability is now preserved by statute(*h*).

Not after parting with the reversion

A landlord cannot distrain after his interest in the estate has expired(*i*). A tenant for years who has sub-let

(*z*) *Nuttall* v. *Stanton* (1825), 4 B. & C. 51; 28 R.R. 207.

(*a*) *Alford* v. *Vickery* (1842), Car. & M. 280.

(*b*) *Jenner* v. *Clegg* (1832), 1 Moo. & R. 213; 42 R.R. 778.

(*c*) *Southwell* v. *Scotter* (1880), 49 L.J.Q.B. 356.

(*d*) *Coffin* v. *Danard* (1865), 24 U.C.R. 267.

(*e*) *Lewis* v. *Brooke* (1850), 8 U.C.R. 576.

(*f*) *Atty.-General* v. *Cox* (1850), 3 H.L.C. 240; but see *Bradfield* v. *Hopkins* (1866), 16 U.C.C.P. 298.

(*g*) *Webb* v. *Russell* (1789), 3 T.R. 393.

(*h*) 8 & 9 Vict. (Imp.), c. 106, s. 9; R.S.O. (1897), c. 170, s. 10.

(*i*) *Hartley* v. *Jarvis* (1859), 7 U.C.R. 545; see *supra*, Section II.

cannot distrain for rent after his own term has expired, since the sub-lease comes to an end with the head-lease(*j*). So, where a tenant has been evicted by title paramount, and has entered into a new tenancy with the person who evicted him, the original lessor cannot distrain for rent which accrued after his title was defeated(*k*).

The statute provides that a distress, made after the expiration of the term, must be made during the continuance of the landlord's title or interest. It is necessary that a reversion should be vested in the distrainor, whether the distress is made before or after the termination of the tenancy. This subject has been discussed in section II. of this chapter.

When demand necessary.

Where an increased rent becomes payable by the terms of the lease, in case the tenant does or fails to do certain things, a demand of the rent is necessary before a lawful distress may be made(*l*). So, where a mortgage deed contains a stipulation that the mortgagor shall become tenant to the mortgagee upon making default in any of the payments, the mortgagee is not entitled to distrain until he shall have given notice to the mortgagor that he intends to treats him as a tenant(*m*).

SECTION IV.

WHERE A DISTRESS MAY BE MADE.

On the demised premises.

Subject to the exceptions hereinafter mentioned, a distress may lawfully be made only on the premises demised, and out of which the rent issues(*a*). This was first pro-

(*j*) *Burne* v. *Richardson* (1813), 4 Taunt. 720; 14 R.R. 647.
(*k*) *Hopcroft* v. *Keys* (1833), 9 Bing. 613; 35 R.R. 644.
(*l*) *Roulston* v. *Clarke* (1795), 2 H. Bl. 563; *Mallam* v. *Arden* (1833) 10 Bing. 299; *Pollitt* v. *Forrest* (1847), 11 Q.B. 949.
(*m*) *Clowes* v. *Hughes* (1870), L.R. 5 Ex. 160.
(*a*) *Capell* v. *Buzard* (1829), 6 Bing. 150; 32 R.R. 359.

vided by the statute of Marlebridge(*b*), whereby it was enacted that "it shall be lawful for no man from henceforth for any manner of cause to take distresses out of his fee, nor in the king's highway, nor in the common street, but only to the king and his officers having special authority to do the same."

The substance of this provision was re-enacted in Ontario by section 10, of chapter 342 of the Revised Statutes of Ontario, (1897), volume III., as follows:

> 10. Save as provided by section 7 and as hereinafter provided, chattels shall not be distrained for rent which are not at the time of the distress upon the premises in respect of which the rent distrained for is due.

A landlord cannot distrain goods off the demised premises even if he has himself removed them. Thus, where a landlord purchased from the tenant goods subject to a chattel mortgage, and removed them to his own house, it was held in an action by the mortgagee to recover the value of the goods removed, that the landlord could not set up a lien for rent, and that his right to distrain ceased on the removal of the goods(*c*).

On any part.

A distress may be made on any part of the land demised, as the rent is deemed to issue out of the whole and every part(*d*).

Where one rent is reserved in respect of lands in occupation of several tenants, a distress may be made on the lands of any one of them(*e*).

Where a tenant, under a stipulation in the lease, continues to hold part of the demised lands after the expira-

(*b*) 52 Hen. III., c. 15; R.S.O. (1897), vol. III., c. 342, s. 10.
(*c*) *Fraser* v. *McFattridge* (1879), 13 N.S.R. 28.
(*d*) *Woodcock* v. *Titterton* (1865), 12 W.R. 685.
(*e*) *Woodcock* v. *Titterton* (1865), 12 W.R. 685.

tion of the term, a distress may be made for the whole rent on that part(*f*).

Separate demises.

But where two distinct parcels are let under separate demises, although both are made by the same instrument, one distress cannot be made for the rent of both on either parcel; a separate distress must be made for each rent on the parcel from which it issues(*g*).

Common appurtenant.

It is provided by statute that a landlord may take and seize, as a distress for arrears of rent, any cattle or stock of his tenant feeding or depasturing upon any common appendant or appurtenant, or any ways belonging to all or any part of the premises demised(*h*). And it has been held that chattels of the tenant on that part of the highway next to and adjoining the lands demised may be distrained(*i*), as there is a legal presumption that the soil of the road *usque ad medium filum* belongs to the owner of the adjoining land(*j*).

On the highway.

Cattle may be taken on the highway as a distress, if driven off the land in view of the bailiff; and if the legality of a distress turn upon the place of seizure, as to whether it was a highway or not, that point should be left clearly to the jury(*k*).

Where a landlord on the day of the removal of goods forbade such removal until the rent was paid, and afterwards made a seizure on the highway for such rent, it was

(*f*) *Nuttall* v. *Staunton* (1825), 4 B. & C. 51; 28 R.R. 207; *Beavan* v. *Delahay* (1788), 1 H. Bl. 5; 2 R.R. 696; *Knight* v. *Bennett* (1826), 3 Bing. 361; 28 R.R. 640.

(*g*) *Rogers* v. *Birkmire* (1736), 2 Str. 1040; see also *Phillips* v. *Whitsed* (1860), 2 E. & E. 804, at p. 809.

(*h*) 11 Geo. II., c. 19, s. 8; R.S.O. (1897), vol. III., c. 342, s. 7; R.S.B.C. (1897), c. 110, s. 22.

(*i*) *Hodges* v. *Lawrence* (1854), 18 J.P. 347.

(*j*) *Berridge* v. *Ward* (1861), 10 C.B.N.S. 400.

(*k*) *Halsted* v. *McCormack* (1840), E.T. 3 Vict.; Bullen: Distress, p. 125.

held that a sufficient inception of distress had taken place to warrant such seizure(*l*).

Where the lessee's mare and yoke of oxen, the subject of the distress, had strayed off the demised premises to the lessor's land adjoining, and the bailiff went to the place where the mare and oxen were, off the demised premises, and drove them to the lessee's premises, it was held that there was evidence to go to the jury that the distress was made off the demised premises(*m*).

Vessel at wharf.

Where a wharf has been leased, "with all the privileges thereto belonging," a vessel attached to the wharf by the usual fastenings cannot be distrained for rent, not being on the premises demised(*n*).

Where a bailiff, having a warrant from the defendant to distrain, seized property off the premises, without defendant's knowledge, and there was no evidence of his having adopted the act, it was held that the defendant was not liable, and that plaintiff could not maintain replevin against him(*o*).

Off the premises by agreement.

The parties may agree to create a right of distress, valid as between themselves, upon other lands than those in respect of which the rent is due(*p*). Thus, where a lessee held two adjoining coal mines under two separate lessors, each lease giving power to the lessor to distrain in or about any adjoining or neighbouring collieries, a distress made under one lease upon the premises demised in the other was held to be valid; but under such a power the goods of strangers cannot be taken(*q*).

(*l*) *Pulver* v. *Yerez* (1859), 9 U.C.C.P. 270.

(*m*) *Peacey* v. *Ovas* (1876), 26 U.C.C.P. 464.

(*n*) *Sanderson* v. *Kingston Marine R.W. Co.* (1846), 3 U.C.R. 168.

(*o*) *Ferrier* v. *Cole* (1857), 15 U.C.R. 561.

(*p*) *Daniel* v. *Stepney* (1874), L.R. 9 Ex. 185.

(*q*) *In re Roundwood Colliery Co., Lee* v. *Roundwood Colliery Co.*, [1897] 1 Ch. 373.

Fraudulent removal.

An important exception to the general rule that goods can be distrained only on the demised premises, is where the tenant removes the goods in order to prevent the landlord from making a distress. In such a case the landlord may follow and distrain the goods wherever they may be found at any time within thirty days after such removal(*r*). This is provided by the first section of the statute 11 George II., chapter 19, which is re-enacted in Ontario as follows:

Goods may be seized within 30 days after removal.

11. (1) In case any tenant or lessee for life or lives, term of years, at will, sufferance, or otherwise, of any messuages, lands, tenements, or hereditaments, upon the demise, or holding whereof, any rent reserved, due, or made payable, shall fraudulently, or clandestinely, convey away, or carry off, or from, such premises, his goods or chattels, to prevent the landlord or lessor from distraining the same for arrears of rent so reserved, due, or made payable, the landlord or lessor or any person by him, for that purpose, lawfully impowered, may, within the space of thirty days next ensuing such conveying away, or carrying off such goods or chattels as aforesaid, take and seize such goods and chattels wherever the same shall be found, as a distress for the said arrears of rent, and the same sell, or otherwise dispose of, in such manner as if the said goods and chattels had actually been distrained by the lessor or landlord in and upon such premises for such arrears of rent; any law, custom, or usuage to the contrary, notwithstanding (*s*).

Except goods sold.

But an exception is made of goods so removed which have been sold for value and in good faith before seizure. This provision is enacted as follows:

11. (2) No landlord or lessor, or other person entitled to such arrears of rent, shall take, or seize, any such goods or chattels as a distress for the same which shall be sold *bona fide* and for a valuable consideration, before such seizure made, to any person not privy to such fraud as aforesaid; any thing herein contained to the contrary notwithstanding (*t*).

(*r*) In Nova Scotia the period is twenty-one days.

(*s*) 11 Geo. II., c. 19, s. 1; R.S.O. (1897), vol. III., c. 342, s. 11 (1); R.S.B.C. (1897), c. 110, s. 17; R.S.N.S. (1900), c. 172, s. 11; C.S.N.B. (1904), c. 153, s. 12.

(*t*) 11 Geo. II., c. 19, s. 2; R.S.O. (1897), vol. III., c. 342, s. 11 (2); R.S.B.C. (1897), c. 110, s. 18.

Forcible entry.

In order to make such distress the landlord is empowered to break open and enter in the day time any house, barn or stable where the goods are lodged, and under certain conditions where they are suspected to be lodged. This is provided by section 7 of the Act of George II. and by section 12 of the Ontario Act which is as follows:

12. Where any goods or chattels fraudulently or clandestinely conveyed, or carried away, by any tenant or lessee, his servant or agent, or other person aiding or assisting therein, shall be put, placed, or kept, in any house, barn, stable, outhouse, yard, clôse, or place, locked up, fastened, or otherwise secured, so as to prevent such goods or chattels from being taken and seized as a distress for arrears of rent, the landlord, or lessor, or his agent, may take and seize, as a distress for rent, such goods and chattels (first calling to his assistance the constable, or other peace-officer, of the place where the same shall be suspected to be concealed, who is hereby required to aid and assist therein: and in case of a dwelling house, oath being also first made before a justice of the peace of a reasonable ground to suspect that such goods or chattels are therein), and in the day time break open and enter into such house, barn, stable, out-house, yard, close and place, and take and seize such goods and chattels for the said arrears of rent, as he might have done if such goods and chattels had been put in any open field or place upon the premises from which the same have been so conveyed or carried away(*u*).

Assistance of constable.

Making oath.

Goods of strangers.

Only the goods of the tenant himself may be seized after removal, not those of strangers or lodgers who may remove their goods off the premises at any time before distress(*v*), and a stranger entitled to the goods of the tenant under a bill of sale may remove them before seizure(*w*). Goods claimed by a chattel mortgagee cannot be distrained after

Chattel mortgagee.

(*u*) 11 Geo. II., c. 19, s. 7; R.S.O. (1897), vol. III., c. 342, s. 12; R.S.N.S. (1900), c. 172, s. 12; R.S.B.C. (1897) c. 110, s. 21; C.S.N.B. (1904), c. 153, s. 13.

(*v*) *Fletcher* v. *Marillier* (1839), 9 A. & E. 457; *Foulger* v. *Taylor* (1860), 5 H. & N. 202 per Martin B. at p. 210; *Wood* v. *Nunn* (1828), 5 Bing. 10; *Thornton* v. *Adams* (1816), 5 M. & S. 38; *Postman* v. *Harrell* (1833), 6 C. & P. 225; *Martin* v. *Hutchinson* (1891), 21 Ont. 388.

(*w*) *Tomlinson* v. *Consolidated Credit Corporation* (1889), 24 Q.B.D. 135.

they have been removed from the premises, and a mortgagee or holder of a bill of sale is a third person within the meaning of the rule(*x*). So, a creditor of the tenant may, with his assent, take and remove goods in satisfaction of his debt, if done in good faith(*y*).

Fraudulent intent.

There must be a fraudulent intent on the part of the tenant of depriving the landlord of his remedy, and it is for the landlord to show it, and the question of fraud is for the jury(*z*), although the mere fact of removing the goods, without leaving a sufficient distres, is evidence of fraud.

It may not be fraudulent if the tenant in good faith disputes the landlord's right(*a*).

Sufficient distress remaining.

It has been held that a landlord cannot seize goods after removal, if a sufficient distress remains on the premises(*b*).

Rent must be due before removal.

It is necessary that the rent should be actually due at the time of the removal of the goods to entitle a landlord to follow and distrain them; if the goods are removed before the rent falls due the right does not arise(*c*), even if they were removed with the fraudulent intent of preventing a distress(*d*). And where, in such a case, the tenant made a pretended sale of the goods and, before the rent fell due, removed them into the possession of the pretended purchaser, the tenant is not precluded, in an action against the landlord for illegally distraining such goods, from setting up his own title, and showing that the goods were not really sold(*e*).

(*x*) *Pidgeon* v. *Milligan* (1871), 13 N.B.R. 459.

(*y*) *Bach* v. *Meats* (1816), 5 M. & S. 200.

(*z*) *Parry* v. *Duncan* (1831), 7 Bing. 243; *Inkop* v. *Morchurch* (1861), 2 F. & F. 501; *Opperman* v. *Smith* (1824), 4 D. & Ry. 33.

(*a*) *John* v. *Jenkins* (1832), 1 Cr. & M. 227.

(*b*) *Opperman* v. *Smith* (1824), 4 D. & Ry. 33; *Parry* v. *Duncan* (1831), 7 Bing. 243; although the point was decided otherwise in *Gillam* v. *Arkwright* (1850), 16 L.T.O.S. 88.

(*c*) *Rand* v. *Vaughan* (1835), 1 Bing. N.C. 767.

(*d*) *Whitelock* v. *Cook* (1900), 31 Ont. 463.

(*e*) *Ibid.*

Rent need not be in arrear.

But it is not necessary that the rent should be in arrear; where goods were removed on the day the rent fell due, it was held that they could be lawfully distrained(*f*). Thus, where by a demise rent was reserved due quarterly, the 25th of December being one of the quarterly days of payment, and the tenant on that day, and while the quarter's rent was unpaid, fraudulently removed his goods off the demised premises for the purpose of preventing a distress, it was held that the statute enabled the landlord to follow and distrain the goods within thirty days after their removal(*g*).

The right to distrain conferred by the statute only applies where the goods would have been subject to distress if not removed, and not to cases where, on other grounds, a distress would have been invalid(*h*),

SECTION V.

BY WHOM A DISTRESS MAY BE MADE.

1. *Joint Tenants.*
2. *Tenants in Common.*
3. *Assignees.*
4. *Mortgagors and Mortgagees.*
5. *Husband and Wife.*
6. *Receivers and Agents.*
7. *The Crown.*
8. *Infants.*
9. *Judgment Creditors.*
10. *Executors and Administrators.*

As a general rule the person entitled to the reversion, if also entitled to the rent, may distrain therefor(*a*).

(*f*) *Dibble* v. *Bowater* (1852), 2 E. & B. 564; 22 L.J.Q.B. 396.
(*g*) *Ibid.*
(*h*) *Gray* v. *Stait* (1883), 11 Q.B.D. 668.
(*a*) See *supra*, section II.

1. *Joint Tenants.*

Joint tenants may only distrain jointly, as they hold by one title; but a distress made by one on behalf of the others is good if none of the others objects(*b*). Joint Tenants.

Where any of the joint tenants sever, the right of the others to distrain for rent which accrued before the severance, is gone(*c*).

A demise by one joint tenant to another carries with it the right to distrain(*d*).

2. *Tenants in Common.*

Tenants in common, on the other hand, who may hold by different titles and have several estates, are each entitled to distrain, without the concurrence of the others, for his respective share of the rent(*e*). So, if a lessee from two tenants in common pays the whole of the rent to one of them after notice from the other not to do so, the latter may distrain for his share of the rent(*f*). Tenants in common.

3. *Assignees.*

At common law an assignee of the rent or of the reversion could not restrain unless the tenant attorned him. But it has been provided by statute that a grant, conveyance or assignment of rent or of the reversion is good and effectual without any attornment of the tenant, and the rent may be distrained for by the assignee(*g*); but no tenant Assignees.

(*b*) *Robinson* v. *Hofman* (1828), 4 Bing. 562; 29 R.R. 627.
(*c*) *Staveley* v. *Allcock* (1851), 16 Q.B. 636.
(*d*) *Cowper* v. *Fletcher* (1865), 6 B. & S. 464.
(*e*) *Whitley* v. *Roberts* (1825), McCl. & Y. 107; 29 R.R. 755.
(*f*) *Harrison* v. *Barnby* (1793), 5 T.R. 246; 2 R.R. 584.
(*g*) 4 & 5 Anne, c. 3, s. 9; R.S.O. (1897), vol. III., c. 342, s. 24.

will be prejudiced by payment of rent to the grantor before he receives notice of the assignment(*h*).

Attornment not necessary.

Where one of the lessors assigned certain rent to his co-lessor who gave the tenant notice, it was held that such an assignment conferred an estate, and that the assignee was entitled to distrain for the rent in question, whether the tenant attorned or not(*i*).

Rent-charge.

Where a landlord, after leasing certain premises, by deed, "assigned, transferred and set over" two instalments of the rent reserved, and appointed the assignee his attorney to sue for, collect or levy by landlord's warrant, if necessary, in his name, it was held that the instrument contained a grant of a rent-charge, as an incorporal hereditament, accompanied with a clause of distress, and therefore not a rent-seek, and that the assignee could distrain for the rent in his own name; but that, whether rent-charge or rent-seck, he had equally the power of distress by statute(*j*).

Before and after assignment.

An assignee of the reversion cannot distrain for rent which accrued before the assignment(*k*). And a landlord cannot distrain for rent after he has assigned the reversion(*l*); although he may sue for rent which became due before he assigned, and after it becomes due for a proportionate part of the rent up to the time of the assignment(*m*).

Acceleration.

Where rent is accelerated by a covenant or proviso in the lease, that in case a writ of execution shall be issued against the goods of the lessee, the then current year's rent

(*h*) *Ibid.*

(*i*) *Hope* v. *White* (1867), 17 U.C.C.P. 52.

(*j*) *Hope* v. *White* (1869), 19 U.C.C.P. 479, affirming same case 18 U.C.C.P. 430; 4 Geo. II., c. 28, s. 5; R.S.O. (1897), vol. III., c. 342, s. 1; R.S.B.C. (1897), c. 110, s. 15.

(*k*) *Sharp* v. *Key* (1841), 8 M. & W. 379; *Wittrock* v. *Hallinan* (1855), 13 U.C.R. 135.

(*l*) *Harmer* v. *Bean* (1853), 3 C. & K. 307; *Hartley* v. *Jarvis* (1849), 7 U.C.R. 545.

(*m*) *Swansea (Mayor of)* v. *Thomas* (1882), 10 Q.B.D. 48.

shall immediately become due and payable, such a proviso is personal to the original lessor and lessee, and an assignee of the reversion cannot distrain for the rent so due(*n*).

4. *Mortgagors and Mortgagees.*

Privity of estate.

At common law, where the owner of the reversion assigned it by way of mortgage he lost his right of distress, as his privity of estate with the tenant was thereby destroyed. Thus, where the lessor mortgaged the property after the rent became due, it was held that the mortgagor could not distrain, because he had parted with the reversion; nor could the mortgagee, because the rent was not due to him(*o*).

But it has been held that a mortgagor, if permitted to continue in the receipt of the rents and profits, may authorize a distress as agent of the mortgagee(*p*). And a mortgagor, or the assignee of the equity of redemption, may distrain after the mortgage has been paid off, even before the legal estate has been reconveyed(*q*).

Mortgagor may distrain.

A mortgagor has been empowered to distrain in certain cases by statute. This is provided in Ontario by section 58 of the *Judicature Act* as follows:

> **58.** (4) A mortgagor, entitled for the time being to the possession or receipt of the rents and profits of any land, as to which no notice of his intention to take possession, or to enter into the receipt of the rents and profits thereof, shall have been given by the mortgagee, may sue for such possession, or sue or distrain for the recovery of such rents or profits, or to prevent or recover damages in respect of any trespass or other wrong relative thereto, in his own name only, unless the cause of action arises upon a lease or other contract made by him jointly with any other person, and in that case he may sue or distrain jointly with such other person (*r*).

(*n*) *Mitchell* v. *McCauley* (1893), 20 Ont. App. 272.
(*o*) *Dauphinais* v. *Clark* (1885), 3 Man. L.R. 225.
(*p*) *Reece* v. *Strousberg* (1885), 54 L.T. 133.
(*q*) *Snell* v. *Finch* (1863), 13 C.B.N.S. 651.
(*r*) R.S.O. (1897), c. 51, s. 58, s.-s. 4; C.O., N.W.T., c. 21, s. 10, s.-s. 4.

Where the mortgagee of leasehold premises has appointed a receiver of the rents and profits, the mortgagor cannot distrain for arrears of rent without the authority of the receiver, and if he does so, the distress is illegal. Under such circumstances no valid distress can be made, except by the receiver, or some person, including the mortgagor, authorized by him(*s*).

Where a mortgagee received rent from a tenant who held of the mortgagor by lease subsequent to the mortgage, but afterwards directed the tenant to pay the rent to the mortgagor, which he did, it was held that the mortgagee could not distrain afterwards, as he had himself put an end to the implied tenancy created by his former receipt of rent(*t*).

Estoppel. Where a lease is made of lands already in mortgage, the lessor may distrain, as in that case, although he has no legal reversion, a tenancy arises by estoppel(*u*).

Mortgagee. A mortgagee of the reversion is entitled, on giving notice to the tenant, to distrain for all rent in arrear which became due after the making of the mortgage, and for all rent as it becomes due thereafter(*v*).

Attornment. The relation of landlord and tenant may be created by agreement between the mortgagor and mortgagee as already explained(*w*), and in such a case, the mortgagee may distrain in the same way as in other cases.

5. *Husband and Wife.*

Married woman. At common law, a married woman could not herself distrain, but her husband might do so during her life,

(*s*) *Woolston* v. *Ross*, [1900] 1 Ch. 788; 82 L.T. 21; 48 W.R. 556; 69 L.J. Ch. 363.

(*t*) *Lambert* v. *Marsh* (1845), 2 U.C.R. 39.

(*u*) See chapter VIII.

(*v*) *Moss* v. *Gallimore* (1779), 1 Doug. 279; 4 Anne, c. 16, s. 9; R.S.O. (1897), vol. III., c. 342, s. 24.

(*w*) Chapter VII.

whether her interest was freehold or leasehold. In the case of a leasehold interest it became vested in him absolutely on her death, but in the case of a freehold interest, he could not distrain after her death unless he himself was the lessor, or became tenant by the curtesy(*x*).

But under the *Married Women's Property Act*(*y*), by which married women may acquire, hold and dispose of their property as if unmarried, it would seem they would be entitled apart from their husbands to distrain for rent under leases made by them.

6. *Receivers and Agents.*

Receiver.

Receivers appointed by the Court may distrain without obtaining a special order for that purpose(*z*). But if there is any doubt as to who is entitled to the rent as owner of the legal estate, the receiver should apply for an order(*a*).

As a general rule, he should distrain in the name of the person in whom the right to distrain exists(*b*). But if the receiver has himself made the lease, or the tenant has attorned to him, he may distrain in his own name(*c*).

An order made giving a receiver liberty to distrain for arrears of rent, will be discharged if it appears that the tenancy had determined more than six months before the order to distrain was made. No notice need be given to a tenant of an application for an order giving a receiver leave to distrain(*d*).

(*x*) Bullen on Distress, p. 56; *Howe* v. *Scarrott* (1859), 4 H. & N. 723.

(*y*) R.S.O. (1897), c. 163. See chapter IX.

(*z*) *Bennett* v. *Robins* (1832), 5 C. & P. 379.

(*a*) *Pitt* v. *Snowden* (1752), 3 Atk. 750.

(*b*) *Justice* v. *James* (1899), 15 Times L.R. 181.

(*c*) *Hughes* v. *Hughes* (1790), 1 Ves. 161.

(*d*) *Paxton* v. *Dryden* (1875), 6 P.R. 127; see 8 Anne, c. 14, ss. 6 and 7; R.S.O. (1897), vol. III., c. 342, s. 2; and see *supra*, section III.

Agent.

An agent, or receiver appointed by the lessor, has no power to distrain without express authority in that behalf, even where the tenants have been notified to pay him the rent for his own benefit, and that his receipt is to be their discharge(*e*).

Where a person distrains as agent, he should do it in the name of the person entitled, and not in his own name. But a distress may lawfully be made by an agent for the benefit of his principal, in his own name, if subsequently ratified by the principal(*f*).

7. *The Crown.*

The Crown.

In Ontario, where rent payable to the Crown on a lease of public lands is in arrear, the Commissioner of Crown Lands, or an agent or officer appointed and authorized by the Commissioner of Crown Lands to act in such cases, may issue a warrant, directed to any person or persons by him named therein, in the nature of a distress warrant, as in ordinary cases of landlord and tenant; and the same proceedings may be had thereon for the collection of such arrears as in the last mentioned cases; or an action may be brought therefor in the name of the Commissioner of Crown Lands, but a demand of the rent shall not be necessary in any case(*g*).

8. *Infants.*

Infants.

An infant, who is entitled to the reversion, may make a warrant of distress and may distrain in his own name, as fully and effectually as if he were of full age(*h*).

(*e*) *Ward* v. *Shew* (1833), 9 Bing. 608; 35 R.R. 640.

(*f*) *Grant* v. *McMillan* (1860), 10 U.C.C.P. 536; see also *Trent* v. *Hunt* (1853), 9 Ex. 14.

(*g*) R.S.O. (1897), c. 28, s. 26.

(*h*) *Owen* v. *Taylor* (1878), 39 U.C.R. 358

9. *Judgment Creditors.*

Judgment creditors.

A judgment creditor who has been put into possession under an *elegit* or other execution is entitled to sue or distrain upon the tenants of the judgment debtor, without any attornment by them(*i*).

10. *Executors and Administrators.*

Executors.

At common law, the executors or administrators of a landlord could not distrain, either during the term or after it has come to an end, for rent which fell due during his life-time. But it has been provided by statute that "the executors or administrators of any lessor or landlord may distrain upon the lands demised for any term or at will, for the arrears of rent due to such lessor or landlord in his life-time, in like manner as such lessor or landlord might have done if living"(*j*).

Such arrears may be distrained for at any time within six months after the determination of the term or lease, and during the continuance of the possession of the tenant from whom the arrears became due; and the powers and provisions contained in the several statutes relating to distress for rent will be applicable to the distresses so made as aforesaid(*k*).

Administrators.

Executors may distrain before letters of probate have been obtained(*l*). But an administrator cannot distrain until after letters of administration have been granted, because these alone constitute his title(*m*).

(*i*) *Lloyd* v. *Davies* (1848), 2 Ex. 103.

(*j*) R.S.O. (1897), c. 129, s. 13; R.S.N.S. (1900), c. 172, s. 14; 3 & 4 Will. IV. (Imp.), c. 42, s. 37; C.S.N.B. (1904), c. 153, s. 18.

(*k*) R.S.O. (1897), c. 129, s. 14; R.S.N.S. (1900), c. 172, s. 14; 3 & 4 Will. IV. (Imp.), c. 42, s. 38.

(*l*) *Whitehead* v. *Taylor* (1839), 10 A. & E. 210.

(*m*) 1 Williams on Executors, p. 342.

Heir.

Rent falling due after the death of the landlord under a lease of freeholds may be distrained for, apart from statutory authority, only by the heir-at-law, or devisee, and under a sub-lease by the executors or administrators of the sub-lessor as these are respectively entitled to the reversion.

A devise in a will whereby a testator desired that his executors should sell and dispose of his land, and then nominated and appointed his executors, their executors and administrators, to seal, execute and deliver any deeds that might be necessary for making a title to the purchaser, was held to vest no estate in the executors, but gave them a mere power, and consequently that they could not distrain for rent accruing in their own time, before the land was sold(*n*).

Devolution of Estates Act.

In Ontario, however, under the *Devolution of Estates Act*(*o*), upon the death of a person, all his property, real and personal, notwithstanding any testamentary disposition, devolves upon and becomes vested in his legal personal representatives, who would be entitled to distrain for rent which became due both before and after the death of the testator or intestate, at least until the reversion became vested in the person beneficially entitled(*p*).

(*n*) *Nicholl* v. *Cotter* (1848), 5 U.C.R. 564.

(*o*) R.S.O. (1897), c. 127, s. 4.

(*p*) See R.S.O. (1897), c. 127, s. 13, *et seq.*

SECTION VI.

WHOSE AND WHAT GOODS MAY BE DISTRAINED.

A. Exemptions in Favour of the Tenant.

1. *Goods in Actual Use.*
2. *Perishable Goods.*
3. *Fixtures.*
4. *Tools and Implements of Trade.*
5. *Beasts that Gain the Land.*
6. *Loose Money.*
7. *Animals* Ferae Naturae.
8. *Goods of Ambassadors.*
9. *Goods Exempt from Seizure under Execution.*

B. Exemptions in Favour of Third Persons.

1. *Goods Delivered in the Way of Trade.*
2. *Straying Cattle.*
3. *Goods* in Custodiâ Legis.
4. *Goods of Boarders and Lodgers.*
5. *Other Statutory Exemptions.*

General rule.

The general rule is that all goods and chattels which are upon the demised premises at the time of the distress, whether they are the property of the tenant or of a stranger, may be distrained for rent in arrear, unless they are either absolutely or conditionally privileged or exempted from distress by some statute or other rule of law(*a*).

Subsequent tenant.

But the goods of a tenant are not liable to be distrained for rent due by a former tenant. Thus, where a landlord demised a house, and a third person occupied it

(*a*) *Mitchell* v. *Coffee* (1881), 5 Ont. App. 525.

with the tenant during his (the tenant's) lifetime, and after his death continued in possession as tenant with the assent of the landlord, it was held that the goods of the new tenant could not be distrained for rent which accrued in the lifetime of the former tenant(*b*).

The goods of a party let into possession by a house-agent of a lessee who had no authority to sub-let the premises, are not liable to distress by the superior landlord.

Authority to let.

Thus, where the plaintiffs were let into possession of certain demised premises by the agent of the assignees of a tenant who afterwards repudiated the agent's authority, and refused to recognize the plaintiffs as sub-tenants and the defendant, who was the superior landlord, in the meantime distrained the plaintiffs' goods for arrears of rent, it was held by the Supreme Court of Canada, reversing the judgment of the Ontario Court of Appeal(*c*), that persons let into possession by a house-agent appointed by assignees of a tenant, for the sole purpose of exhibiting the premises to prospective lessees, and without authority to let or grant possession of them, were not in occupation "under" the said assignees, and their goods were not liable to distress(*d*).

Tenant of stranger.

But where a tenant during the term absconds, and abandons the property, and a stranger finding the place vacant, puts a tenant of his own in possession, it was held that a distress made by the original landlord on the goods of the new tenant was legal(*e*).

A tenant's partner, who is jointly interested in the goods on the demised premises, is, for the purposes of dis-

(*b*) *Strathey* v. *Crooks* (1838), 6 O.S. 587.

(*c*) 23 Ont. App. 517.

(*d*) *Farewell* v. *Jameson* (1896), 26 S.C.R. 588.

(*e*) *Rudolph* v. *Bernard* (1847), 4 U.C.R. 238.

tress deemed to be a tenant and subject to the terms of the lease(*f*).

Under a power of a distress that is created by express contract only, and does not arise as incident to a tenancy, the goods of strangers cannot be lawfully distrained(*g*).

Where a landlord has distrained for arrears of rent goods upon the demised premises liable to such distress, belonging in part to the tenant and in part to a third person, such third person has no right to compel, or to ask the Court to compel, the landlord to sell the part belonging to the tenant before selling the part belonging to such third person(*h*).

A person serving with, or attached to a militia cavalry troop as quartermaster, is an officer thereof, and his horse is protected from distress by statute(*i*).

A. Exemptions in Favour of the Tenant.

1. *Goods in Actual Use.*

Goods in use.

Goods in actual use whether they are the property of the tenant or of a stranger, are, by the common law, exempt from distress, for the reason that otherwise there would be a danger of a breach of the peace. Thus, a horse being ridden, horses, waggon and harness under personal care, clothing being worn, goods being carried to be weighed, an axe in a man's hand cutting wood, and other implements actually being used are exempt(*j*).

(*f*) *Young* v. *Smith* (1879), 29 U.C.C.P. 109.

(*g*) *Gibbs* v. *Cruikshank* (1873), 28 L.T. 104.

(*h*) *Pegg* v. *Starr* (1892), 23 Ont. 83.

(*i*) *Davey* v. *Cartwright* (1870), 20 U.C.C.P. 1; 18 Vict c. 77, s. 31.

(*j*) Co. Lit. 47a; *Simpson* v. *Hartopp* (1744), 1 Smith L.C. 11th ed., 437; *Field* v. *Adames* (1840), 12 A. & E. 649.

So, where a pair of horses belonging to a stranger were driven on to the premises and tied, the party in whose charge they were, going into the house and while there were distrained, it was held they were not seizable for rent as being in actual use at the time of the distress(*k*).

The actual user of goods, of whatever kind, exempts them from seizure, either by distress or otherwise, and whether, in the case of distress, there be a sufficiency or not of other goods on the premises liable therefor(*l*).

2. *Perishable Goods.*

Perishable goods.

At common law, goods of a perishable nature, as for example, the carcase of a slaughtered animal, or sheaves or cocks of corn or grain, were exempt from distress for the reason that, a distress being merely a pledge, they could not be restored, if replevied, in the same plight or condition, but must necessarily be damaged by being removed.

By section 2 of the Statute 2 William and Mary, Session 1, chapter 5, it has been provided that certain perishable goods, otherwise exempt, may be seized and sold. This section, as re-enacted in Ontario, is as follows:

Corn, hay, etc.

6. Any person having rent arrear and due upon any demise lease, or contract, may seize and secure any sheaves or cocks of corn, or corn loose, or in the straw, or hay, lying or being in any barn or granary or upon any hovel, stack or rick or otherwise upon any part of the land, or ground, charged with such rent, and may lock up, or detain the same, in the place where the same shall be found, for or in the nature of a distress until the same shall be replevied; and, in default of the same being replevied, may sell the same after appraisment thereof to be made, so as nevertheless such corn, grain or hay, so distrained as aforesaid, be not removed by the person distraining, to the damage of the owner thereof, out of the place where

(*k*) *Couch* v. *Crawford* (1860), 10 U.C.C.P. 491.

(*l*) *Miller* v. *Miller* (1867), 17 U.C.C.P. 226.

the same shall be found and seized, but be kept there (as impounded) until the same shall be replevied, or sold in default of replevying the same (*m*).

3. *Fixtures.*

Fixtures. Fixtures are either chattels which were originally moveable, but which, having been attached to the land, have ceased to be moveable and have become part of the freehold, or things originally part of the freehold, such as growing crops, which may become moveable by severance. Anything imbedded in the soil, or attached to any permanent building or erection by cement, bolts, nails or other fastenings, so as not to be moveable without the exercise of force is in general, a fixture(*n*). So, whatever is substantially part of a house, mill or other building, so that it cannot be removed without injury, or without depriving the building of what was intended to be used with it, will be deemed a fixture(*o*).

Things which are affixed and actually form part of the freehold, are, by the rule of common law, exempt from distress for rent(*p*), although, at the time of the distress, they have been detached for a temporary purpose(*q*).

Machinery. But machinery affixed to the freehold, not to improve the inheritance, but merely for its more convenient use as a chattel, where the fastening is so slight that it can be removed without injury, is not exempt(*r*).

Growing crops, fruits, etc., after harvesting. Growing crops at common law could not be distrained for rent; but it has been provided by statute(*s*), that a

(*m*) 2 W. & M. Sess. 1, c. 5, s. 2; R.S.O. (1897), Vol. III. c. 342, s. 6; R.S.N.S. (1900), c. 172, s. 4; R.S.B.C. (1897), c. 110, s. 7.

(*n*) *Ex parte Moore* (1880), 14 Ch. D. 379.

(*o*) *Smith* v. *Maclure* (1884), 32 W.R. 459.

(*p*) *Simpson* v. *Hartopp* (1744), 1 Smith L.C., 11th ed. 437.

(*q*) *Garton* v. *Falkner* (1792), 4 T.R. 565; 2 R.R. 463.

(*r*) *Holland* v. *Hodgson* (1872), L.R. 7 C.P. 328.

(*s*) 11 Geo. II. c. 19, s. 8; R.S.O. (1897), Vol. III. c. 342, s. 7; R.S.N.S. (1900), c. 167 s. 5.

landlord may seize for rent all sorts of corn, grass, hops, roots, fruits, pulse or other product whatsoever, which shall be growing on any part of the demised premises, and harvest the same in barns or other proper place on the premises. If there are no barns or other proper place on the premises he may hire a proper place near by, and may sell them in the same manner as other chattels; but the appraisement must not be made until after such crops are harvested. These provisions were made by section 8 of the Statute 11 George II., chapter 19, which, as re-enacted in Ontario, is as follows:

> 7. Every lessor or landlord, or person empowered by him, may take and seize as a distress for arrears of rent, any cattle or stock of his tenant feeding or depasturing upon any common appendant, or appurtenant, or any ways belonging to all or any part of, the premises demised, or holden; and may take and seize all sorts of corn, and grass, hops, roots, fruits, pulse, or other product whatsoever, which shall be growing on any part of the estate demised, or holden, as a distress for arrears of rent; and the same cut, gather, make, cure, carry, lay up, when ripe, in the barns, or other proper place, on the premises so demised, or holden; and in case there shall be no barn, or proper place, on the premises so demised, or holden, then, in any other barn, or proper place which such lessor or landlord shall hire, or otherwise procure, for that purpose and as near as may be to the premises and in convenient time to appraise, sell, or otherwise dispose of the same, towards satisfaction for the rent for which such distress shall have been taken, and of the charges of such distress, appraisement, and sale, in the same manner as other goods and chattels may be seized, distrained, and disposed of; and the appraisement thereof shall be taken when cut, gathered, cured and made, and not before (*t*).

Notice.

It is further provided that notice of the place where the goods and chattels so distrained shall be lodged or deposited shall, within the space of one week after the lodging or depositing thereof in such place, be given to such lessee or tenant, or left at his last place of abode(*u*).

(*t*) 11 Geo. II. c. 19, s. 8; R.S.O. (1897), Vol. III. c. 342, s. 7; R.S.N.S. (1900)), c. 167, s. 5; R.S.B.C. (1897), c. 110, s. 22.

(*u*) *Ibid.*

It is also provided that upon payment or tender of the amount due and costs, at any time before the crops have been harvested, the distress shall cease, and the crops seized shall be delivered up to the tenant. This is enacted by section 9 of that statute which, as re-enacted in Ontario, is as follows:

Payment or tender.

8. (2) If after any distress for arrears of rent so taken of corn, grass, hops, roots, fruit, pulse, or other product, which shall be growing as aforesaid, and at any time before the same shall be ripe and cut, cured or gathered, the tenant or lessee, his executors, administrators, or assigns, shall pay, or cause to be paid, to the lessor or landlord for whom such distress shall be taken, the whole rent which shall be then in arrear, with the full costs and charges of making such distress, and which shall have been occasioned thereby, then, upon such payment, or lawful tender thereof actually made, whereby the end of such distress will be fully answered, the same, and every part thereof shall cease, and the corn, grass, hops, roots, fruits, pulse, or other product, so distrained shall be delivered up to the lessee or tenant or his executors, administrators, or assigns; anything hereinbefore contained to the contrary notwithstanding.

Nurseryman.

The section, however, has been held not to include trees and shrubs growing in a nurseryman's grounds, which are consequently exempt as fixtures under the common law rule(*v*).

In Ontario, it is provided by statute that growing or standing crops may be sold in the same manner as other goods and it shall not be necessary for the landlord to harvest them before sale. This is enacted by section 36 of the *Landlord and Tenants' Act*(*w*), which is as follows:

Sale before harvest.

36. When growing or standing crops which may be seized and sold under execution, are seized for rent, they may at the option of the landlord or upon the request of the tenant, be advertised and sold in the same manner as other goods, and it shall not be necessary for the landlord to reap, thresh, gather or otherwise market the same.

Chattel mortgagee.

It has been held that a chattel mortgagee of growing crops is entitled thereto, as against a prior mortgagee of

(*v*) *Clark* v. *Gaskarth* (1818), 8 Taunt 431; 20 R.R. 516.

(*w*) R.S.O. (1897), c. 170.

land who distrained such crops after the chattel mortgage had been given, for an instalment due before the crops were sown(*x*).

Hop poles left standing in the ground after the hops have been gathered, are fixtures and are not distrainable(*y*).

Where it is agreed by the lease that machinery, even if affixed to the freehold, shall be the property of the lessee and removable by him, such machinery will be deemed to be chattels, and after severance may be distrained upon for rent(*z*).

4. *Tools and Implements of Trade.*

Tools of trade.

When there is no other sufficient distress on the premises, tools and implements of a man's trade or profession, are exempt at common law from distress(*a*).

As hereafter explained tools and implements of trade are, in Ontario, absolutely privileged by statute.

The burden of showing that there was no other sufficient distress on the premises, is on the landlord(*b*).

But growing crops, which are not available until later, nor the goods of strangers which the landlord does not choose to take, are not to be reckoned in the goods as being a sufficient distress(*c*).

5. *Beasts that Gain the Land.*

Sheep.

By an early statute it was provided that, where there is other sufficient distress, beasts that gain the land, and

(*x*) *Laing* v. *Ontario Loan and Savings Co.* (1882), 46 U.C.R. 114.

(*y*) *Alway* v. *Anderson* (1848), 5 U.C.R. 34.

(*z*) *Davey* v. *Lewis* (1860), 18 U.C.R. 21; see also *Donkin* v. *Crombie* (1861), 11 U.C.C.P. 601. As to fixtures that are removable by the tenant after the end of the term, see chapter XXVII.

(*a*) *Fenton* v. *Logan* (1833), 9 Bing. 676; 35 R.R. 656.

(*b*) *Nargett* v. *Nias* (1859), 1 E. & E. 439.

(*c*) *Pigott* v. *Birtles* (1836), 1 M. & W. 441; 46 R.R. 349.

sheep are exempt from distress. This provision, as re-enacted in Ontario(*d*), is as follows:

> 9. Beasts that gain the land, and sheep, shall not be distrained for the King's debt, nor for the debt of any other man, nor for any other cause, if there be other chattels sufficient to satisfy the debt, or demand; but this provision is not to affect the right to impound beasts which a man findeth in his ground *damage feasant* (*e*).

Beasts of the plow. Beasts of the plow are included under this provision, but not heifers, young steers or colts that only improve the land by manuring it(*f*).

It has been held to be illegal to distrain sheep for rent when there are other goods upon the premises sufficient to satisfy the claim(*g*).

Beasts of the plow and implements of husbandry, which are exempt only if there is no other sufficient distress on the premises, may be absolutely privileged if they are in actual use at the time of the distress(*h*).

6. *Loose Money.*

Loose money. Loose money is by common law privileged from distress, because "it will not be known again," and hence could not be restored in the same condition(*i*). But the privilege does not extend to money enclosed in a sealed bag(*j*).

7. *Animals* Ferae Naturae.

Wild Animals. By the rule of common law animals in a state of nature are exempt from distress on the ground that the tenant

(*d*) R.S.O. (1897), Vol. III., c. 342, s. 9.

(*e*) Stat. of Exchequer, of uncertain date, sometimes styled 51 Hen. III. St. 4; Imp. Rev. St. (1870), p. 126.

(*f*) *Keen* v. *Priest* (1859), 4 H. & N. 236.

(*g*) *Hope* v. *White* (1872), 22 U.C.C.P. 5.

(*h*) *Miller* v. *Miller* (1867), 17 U.C.C.P. 226.

(*i*) Bac. Ab. Distress (B.)

(*j*) 1 Ro. Ab. 667.

has no legal property in them. But animals that have been tamed, such as deer kept in an enclosure for profit, are not exempt(*k*).

8. *Goods of Ambassadors.*

Ambassadors.

It is provided by statute that goods and chattels of ambassadors, or other public ministers of any foreign prince or state, and those of their servants, are exempt from distress(*l*).

9. *Goods Exempt from Seizure under Execution.*

Execution.

In Ontario, the right of distress of a landlord is further restricted by statute. A landlord may, in general, seize all the goods of the tenant without any exemptions other than those hereinbefore set forth. But in Ontario, the goods and chattels, which are exempt from seizure under an execution, are not liable to seizure by a landlord for rent; but in case of a monthly tenancy, the exemption applies only to two months' arrears and a tenant cannot claim the benefit of it, unless he gives up possession of the premises, or makes an offer to the landlord, or his agent or bailiff, to do so. If the landlord desires to seize the exempted goods in case possession is not given up, he must notify the tenant, and if possession is given the tenancy thereby determines.

These provisions are made by sections 30 and 32 of the *Landlord and Tenants' Act*(*m*), which are as follows:

30. (1) The goods and chattels exempt from seizure under execution shall not be liable to seizure by distress by a landlord for rent in respect of a tenancy created after the first day of October, 1887, except as hereinafter provided.

(2) In the case of a monthly tenancy the said exemption shall only apply to two months' arrears of rent.

(*k*) See *Morgan* v. *Lord Abergavenny* (1849), 8 C.B. 768.

(*l*) 7 Anne c. 12, s. 3.

(*m*) R.S.O. (1897), c. 170.

(3) The person claiming such exemption shall select and point out the goods and chattels as to which he claims exemption.

Possession.

32. (1) A tenant who is in default for non-payment of rent and claims the benefit of the exemption from distress to which he is entitled under this Act, must give up possession of the premises forthwith, or be ready and offer to do so.

(2) The offer may be made to the landlord or to his agent; and the person authorized to seize and sell the goods and chattels, or having the custody thereof for the landlord, shall be considered an agent of the landlord for the purpose of the offer and surrender to the landlord for the possession.

Notice.

(3) Where a landlord desires to seize the exempt goods, he shall, after default has been made in payment of rent, and before or at the time of seizure serve the tenant with a notice which shall inform the tenant what amount is claimed for rent in arrear and that in default of payment if he gives up possession of the premises to the landlord after service of the notice he will be entitled to claim exemption for such of his goods and chattels as are exempt from seizure under execution, but that if he neither pays the rent, nor gives up possession, his goods and chattels will be liable to seizure and will be sold to pay the rent in arrear and costs.

(4) The notice may be in the following form or to the like effect:

Take notice that I claim $——— for rent due to me in respect of the premises which you hold as my tenant, namely (*here briefly describe them*); and unless the said rent is paid, I demand from you immediate possession of the said premises; and I am ready to leave in your possession such of your goods and chattels as in that case only you are entitled to claim exemption for.

Take notice further, that if you neither pay the said rent nor give me up possession of the said premises within three days after the service of this notice, I am by law entitled to seize and sell and I intend to seize and sell all your goods and chattels, or such part thereof as may be necessary for the payment of the said rent and costs.

This notice is given under the Act of the Legislature of Ontario, respecting the Law of Landlord and Tenant.

dated this———day of———A.D. 19—.

Signed A. B. (landlord.)

To C. D. (tenant.)

(5) The surrender of possession in pursuance of the notice by the landlord shall be a determination of the tenancy.

Service.

(6) Service of papers under this Act shall be made either personally or by leaving the same with some grown person being in and

apparently residing on the premises occupied by the person to be served.

(7) If the tenant cannot be found and his place of abode is either not known, or admission thereto cannot be obtained, the posting up of the paper on some conspicuous part of the premises, shall be deemed good service.

(8) No proceedings under this section shall be deemed defective or rendered invalid by any objection of form.

The chattels exempt from seizure under execution are set out in section 2 of the *Execution Act*(*n*), which is as follows:

Goods exempt from seizure under execution.

2. The following chattels shall be exempt from seizure under any writ in respect of which this Province has legislative authority, issued out of any Court whatever in this Province, namely:

1. The bed, bedding, and bedsteads (including a cradle) in ordinary use by the debtor and his family.

2. The necessary and ordinary wearing apparel of the debtor and his family.

Household furniture.

3. One cooking stove with pipes and furnishings, one other heating stove with pipes, one crane and its appendages, one pair of andirons, one set of cooking utensils, one pair of tongs, and shovel, one coal scuttle, one lamp, one table, six chairs, one washstand with furnishings, six towels, one looking glass, one hair brush, one comb, one bureau, one clothes press, one clock, one carpet, one cupboard, twelve knives, twelve forks, twelve plates, twelve teacups, twelve saucers, one sugar basin, one milk jug, one tea pot, twelve spoons, two pails, one wash tub, one scrubbing brush, one blacking brush, one wash board, three smoothing irons, all spinning wheels and weaving looms in domestic use, one sewing machine and attachments in domestic use, three volumes of books, one axe, one saw, one gun, six traps, and such fishing nets and seines as are in common use, the articles in this sub-division enumerated not exceeding in value the sum of $150.

Provisions.

4. All necessary fuel, meat, fish, flour, and vegetables, actually provided for family use, not more than sufficient for the ordinary consumption of the debtor and his family for thirty days, and not exceeding in value the sum of $40.

Animals.

5. One cow, six sheep, four hogs, and twelve hens, in all not exceeding the value of $75, and food therefor for thirty days, and one dog.

Tools.

6. Tools and implements of or chattels ordinarily used in the debtor's occupation, to the value of $100; but if a specific article

(*n*) R.S.O. (1897), c. 77, as amended by 62 Viet. (1899), c. 7, s. 1.

claimed as exempt, be of a value greater than $100, and there are not other goods sufficient to satisfy the execution, such article may be sold by the sheriff who shall pay $100 to the debtor out of the net proceeds, but no sale of such article shall take place unless the amount bid therefor shall exceed the said sum of $100 and the cost of sale in addition thereto(o).

7. Bees reared and kept in hives to the extent of fifteen hives.

It is usual to insert in leases a stipulation that the lessee waives his rights to statutory exemptions in the following form or to the like effect:

Agreement to waive exemptions.

"And the said lessee hereby waives all his rights to exemptions from seizure by distress given to him, or which in the event of a distress for rent by the said lessor he might or could, but for this provision, claim or be entitled to under any statute now or which during this demise shall or may be in force relating to exemptions from distress, and the said lessee hereby agrees that the rights and remedies of the said lessor for the recovery of the rents hereby reserved shall, notwithstanding anything to the contrary in any such statute contained, be as full and extensive as if this Indenture and the tenancy hereby created had been made and created prior to the first day of October, A.D. 1877, and all such goods and chattels of the said lessee as are by the Revised Statutes of Ontario, 1897, chapter 170, or any other statute which during this demise may come into force, declared to be exempt from seizure by distress by a landlord for rent shall remain and continue to be liable to seizure and sale under distress for the rents hereby reserved in all respects the same as if the said Revised Statutes of Ontario, Chapter 170, or such other statutes (if any) had never been passed, and it is upon this express understanding and agreement that these presents are entered into, and in any action brought by the said lessee in respect of a distress upon goods by any

(o) 62 Vict. (2) (1899), c. 7, s. 1.

statute of Ontario now or hereafter during this demise in force declared to be exempt from seizure this covenant may be pleaded in estoppel against the said lessee."

A sewing machine which is in the possession of a tenant under a hire-purchase agreement, and which is used by the wife of the tenant for the purpose of supporting his family, is exempt from distress, apart from a specific exemption of it, as it is a tool or implement of the trade of such tenant within the meaning of the section(*p*).

It has been held that "bedding" includes "bedstead"(*q*).

Monthly tenancy.

The effect of the words "in case of a monthly tenancy the said exemptions shall only apply to two months' arrears of rent," is to give protection to the tenant to the amount of two months' rent which may be paid to him either before or after the sale of the goods(*r*).

B. Exemptions in Favour of Third Person.

1. *Goods Delivered in the Way of Trade.*

Goods delivered in the way of trade.

Goods delivered to a person exercising a public trade, to be carried, wrought, worked up or managed in the way of his trade or employment, are exempt from liability to distress(*s*).

Thus, a horse sent to a blacksmith to be shod, materials sent to a weaver to be manufactured, cloth sent to a tailor to be made up, a carriage sent to the maker's to be repaired, are exempt from distress for rent(*t*).

(*p*) *Masters* v. *Fraser* (1903), 85 L.T. 611.

(*q*) *Davis* v. *Harris*, [1900] 1 Q.B. 729.

(*r*) *McGaw* v. *Trebilcock* (1900), 37 C.L.J. 703; but see *Harris* v. *Canada Permanent Co.* (1897), 34 C.L.J. 89, and *Shannon* v. *O'Brien* (1897, 34 C.L.J. 421

(*s*) *Simpson* v. *Hartopp* (1744), 1 Smith L.C., 11th ed. p. 437.

(*t*) Co. Lit. 47a; *Hurry* v. *Rickman* (1831), 1 Moo. & R. 126; *Gibson* v. *Ireson* (1842), 3 Q.B. 39; *Miles* v. *Furber* (1873), L.R. 8 Q.B. 77; 1 Smith L.C., 11th ed. p. 437.

Public trade.

A public trade is one in which the trader invites the public to intrust him with their goods, or one carried on generally for the benefit of any persons who choose to avail themselves of it(*u*). The trade in question must be one that is carried on in good faith on the premises, and must consist mainly of dealing with other people's goods. Thus, it has been held that pictures left with a restaurant keeper for sale on commission are not privileged(*v*).

Artist.

It has been held, however, that an artist to whom a picture has been sent to be altered is not within the rule(*w*).

Goods delivered to a person to be dealt with by him in the way of his trade, and for which he is in business, as for example, goods entrusted to a carrier, a pawnbroker, a wharfinger, a storage agent, a commission agent, a broker or an auctioneer are privileged(*x*).

But the mere custody of goods by an auctioneer who is called in by the tenant to sell them does not make them privileged(*y*). And goods entrusted to a general agent, who is acting in a special capacity in regard to them under agreement, have been held not to be privileged(*z*).

Consignee.

Goods consigned for sale at prices not below those fixed by the consignor, under an arrangement whereby the consignee was allowed for his services, not a commission, but all he received above those prices, are not exempt from a distress for rent due by the consignee(*a*).

(*u*) *Tapling* v. *Weston* (1883), C. & E. 99.

(*v*) *Edwards* v. *Fox* (1896), 60 J.P. 404.

(*w*) *Von Knoop* v. *Moss* (1891), 7 Times L.R. 500.

(*x*) *Swire* v. *Leach* (1865), 18 C.B.N.S. 479; *Thompson* v. *Mashiter* (1823), 1 Bing. 283; 25 R.R. 624; *Miles* v. *Furber* (1873), L.R. 8 Q.B. 77; *Findon* v. *McLaren* (1845), 6 Q.B. 891.

(*y*) *Lyons* v. *Elliott* (1876), 1 Q.B.D. 210.

(*z*) *Tapling* v. *Weston* (1883), C. & E. 99.

(*a*) *Hurd* v. *Davis* (1864), 23 U.C.R. 123.

Conveyance.

The privilege extends to the conveyance by which goods are carried to and from a trader; but if the goods themselves are not privileged, the instrument of conveyance found on the premises will not be privileged(*b*).

Delivery.

It is necessary for the privilege to attach that the goods should have been "delivered" in the way of trade. Thus, a ship in process of construction for another person by a builder is not privileged from distress for rent owing by such builder, although the property in the ship may have vested in the person for whom it was being built, as there had been no delivery to the builder(*c*).

But vessels sent to a shipyard to be repaired, and materials supplied by their owner for that purpose, cannot be distrained for rent due to the lessor of the shipyard(*d*).

Saw-logs.

The exemption from distress of goods intrusted to persons carrying on certain public trades, to exercise their trades upon them, is a privilege grounded upon public policy for the benefit of trade. So where saw-logs were taken to a saw mill by the plantiff, to be converted into lumber in the due course of business of the mill, and were distrained there for rent by the defendant, it was held that the business of sawing lumber for hire is a trade in which is exempted from distress for rent the property of a stranger brought in to be converted into lumber(*e*).

The exemption, however, does not apply where the person who brings the goods on to the premises and the tenant are co-owners of the goods(*f*).

(*b*) *Muspratt* v. *Gregory* (1836), 3 M. & W. 677; 46 R.R. 435; *Joule* v. *Jackson* (1841), 7 M. & W. 450.

(*c*) *Clarke* v. *Millwall Dock Co.* (1886), 17 Q.B.D. 494.

(*d*) *Gildersleeve* v. *Ault* (1858), 16 U.C.R. 401.

(*e*) *Paterson* v. *Thompson* (1882), 46 U.C.R. 7; 9 Ont. App. 326.

(*f*) *Paterson* v. *Thompson* (1883), 9 Ont. App. 326.

Where goods were sent to the premises of a tenant to be repaired, under an arrangement whereby he was to acquire an interest in them after making the repairs, it was held that he acquired no beneficial interest until the repairs were made, and the goods were exempt from distress for his rent(*g*).

A machine left at an hotel by an occasional customer or patron, merely for safe-keeping, is not exempt from distress(*h*).

2. *Straying Cattle.*

Straying cattle.

Cattle belonging to a stranger which have strayed on to the tenant's lands, by reason of the default of the tenant or the landlord in not repairing fences, are, at common law, privileged from distress; but the privilege lasts only for a day and a night. They cannot be taken, however, until notice has been given to their owner(*i*).

Notice.

If the cattle have strayed through the owner's default, or are on the land of the tenant with their owner's consent, they are not privileged(*j*).

3. *Goods* in Custodiâ Legis.

Custody of the law.

Goods already in the custody of the law are exempt from distress for rent at common law, for the reason that otherwise there would be obvious inconvenience and conflict. Thus, cattle which have been distrained *damage feasant*, and goods seized by a sheriff under a writ of execution, are privileged from distress(*k*). And, although

(*g*) *May* v. *Severs* (1874), 24 U.C.C.P. 396.

(*h*) *Mitchell* v. *Coffee* (1881), 5 Ont. App. 525.

(*i*) *Kempe* v. *Crews* (1696), 1 Ld. Ray. 167.

(*j*) *Jones* v. *Powell* (1826), 5 B. & C. 647.

(*k*) *Grant* v. *Grant* (1885), 10 P.R. 40; *Beatty* v. *Rumble* (1890), 21 Ont. 184.

Sheriff.

a sheriff removes goods seized under an execution without paying a year's rent to the landlord contrary to the statute(*l*), they are nevertheless privileged(*m*).

Landlord.

So, goods taken under a distress for rent are *in custodiâ legis* and cannot be seized by a tax collector for arrears of taxes(*n*).

There is nothing in the Assessment Act(*nn*) to warrant a municipal tax collector seizing for arrears of taxes, goods which, being under distraint by a landlord, are *in custodiâ legis*. And where subsequent rent became due during the joint possession of the landlord and the collector, the landlord was held to have priority in respect to another distress made by him for such subsequent rent(*o*).

Receiver.

Goods in the hands of a receiver are not *in custodiâ legis* so as to protect them from distress(*p*).

Assignee for creditors.

Goods in the possession of an assignee for the general benefit of creditors, are not *in custodiâ legis*, so as to protect them from distress for rent(*q*).

Thus, where a tenant of certain freehold premises executed an assignment for the benefit of his creditors, and afterwards, but before possession of the tenant's property had been taken by the assignee, or such property removed from the demised premises, the landlord distrained for arrears of rent past due before the making of the assignment, it was held that the landlord's right of distress was

(*l*) 8 Anne, c. 14, s. 1.

(*m*) *Wharton* v. *Naylor* (1848), 12 Q.B. 673.

(*n*) *Jones* v. *Burnstein*, [1899] 1 Q.B. 470.

(*nn*) R.S.O. (1897), c. 224.

(*o*) *City of Kingston* v. *Rogers* (1899), 31 Ont. 119.

(*p*) *In re Sutton* (1863), 32 L.J. ch. 437.

(*q*) *Eacrett* v. *Kent* (1888), 15 Ont. 9; *Linton* v. *Imperial Hotel Co.* (1889), 16 Ont. App. 337, in which the decisions on this point in *Wyld* v. *Clarkson* (1886), 12 Ont. 589, and *In re McCracken* (1879), 4 Ont. App. 486 were explained and distinguished.

not affected by the assignment, and that goods so assigned were not to be therefore deemed *in custodiâ legis*(*r*).

Under the Insolvent Act of 1875, however, a landlord was forbidden to distrain goods in the hands of an official assignee, as they were held to be in the custody of the law(*s*). Insolvent Act.

But in order that goods shall be deemed to be in the custody of the law an actual seizure must have been made and completed. Complete seizure.

Where a landlord went to the house of the tenant and declared that he seized everything for rent, but touched nothing, and made no inventory, and a few days afterwards told the tenant's wife that the goods had been seized for rent, and to let no one take anything away, which she promised to do, it was held that what took place did not amount to a distress, and a subsequent distress as against a chattel mortgagee who had removed the goods was illegal(*t*).

Where a sheriff seized goods under execution, but left them in the possession of the execution debtor upon receiving a receipt for the same, with an undertaking to deliver them to the sheriff when requested, it was held that the sheriff had not such a possession of the goods as precluded the landlord from distraining(*u*). Undertaking to deliver.

Where a bailiff seized certain goods under a landlord's distress warrant for rent in arrear, but did not remain in possession, or take any further steps to execute the warrant except that the tenant was constituted the landlord's agent to keep possession of the goods for him under the warrant, it was held that the goods were not *in custodiâ*

(*r*) *Eacrett* v. *Kent* (1888), 15 Ont. 9.
(*s*) *In re McCracken* (1879), 4 Ont. App. 486.
(*t*) *Whimsell* v. *Giffard* (1883), 3 Ont. 1.
(*u*) *McIntyre* v. *Stata* (1854), 4 U.C.C.P. 248.

legis, so as to prevent a chattel mortgagee from removing them(*v*).

Where the goods of a tenant, which had been mortgaged by him, were distrained for rent, and impounded, and were left on the premises in his charge for over three weeks by agreement between him and the bailiff, when on being advertised for sale under the distress, they were seized and taken away by the mortgagee, it was held that as to the mortgagee, the goods were no longer *in custodiâ legis*, and that in taking them he had not committed a breach of the pound(*w*).

Bond to deliver.

Where the goods seized are left by the landlord's bailiff upon the demised premises, in the possession of the tenant, the taking of a bond from the tenant to the bailiff to produce and keep and deliver the chattels and crops and not to remove or allow them to be removed from the premises and to hold them for the bailiff, is not evidence of an abandonment of the seizure, but the contrary. Pending the distress, the goods taken are in the custody of the law, and not liable to seizure under a chattel mortgage, so long as no fraud is on foot and no intention or contrivance exists to prejudice the mortgagee(*x*).

Where a bailiff had gone to the store of the tenants who told him to proceed and they would replevy, and they requested him to seize some barrels of spirits, which he did, and afterwards advertised them for sale in the usual manner, and although he did not touch the casks, or leave any one in possession, or take security for their produc-

(*v*) *Roe* v. *Roper* (1873), 23 U.C.C.P. 76.

(*w*) *Langtry* v. *Clark* (1896), 27 Ont. 280. This case was not followed in *Anderson* v. *Henry* (1898), 29 Ont. 719; see next cited case.

(*x*) *Anderson* v. *Henry* (1898), 29 Ont. 719; *McIntyre* v. *State* (1854), 4 U.C.C.P. 248; *Roe* v. *Roper* (1873), 23 U.C.C.P. 76, and *Whimsell* v. *Giffard* (1883), 3 Ont. 1, distinguished; *Langtry* v. *Clark* (1896), 27 Ont. 280, distinguished, and not followed.

tion at the time of sale, relying, as he said, on the assurance of the tenants, and knowing that they intended to replevy, it was held to be a sufficient seizure(*y*).

So where a bailiff, under a distress warrant, entered and made an inventory of "the several goods and chattels distrained by me, viz., in front shop, quantity of millinery, etc., together with sundry articles on the premises," and the tenant then gave to the bailiff the following receipt: "I acknowledge to have received from G., bailiff, all the goods and chattels in house No. 113, etc., seized for rent, etc., to be delivered to him, the said bailiff, when demanded," it was held to be sufficient to constitute a distress executed(*z*).

Purchaser.

The privilege extends to goods which have been purchased from a sheriff under an execution, and allowed to remain on the premises(*a*).

Removal.

Although goods seized by the sheriff cannot be distrained in his custody, still they must be removed within a reasonable time after sale, in order to protect the purchaser against a distress for rent; and if not removed within a reasonable time either after the sale or after notice to remove them, they are liable to distress for rent(*b*).

Tax collector.

Goods seized by a collector for taxes are in the custody of the law; but after sale, unless removed within a reasonable time, they are liable to be distrained, for rent(*c*).

Growing crops.

But where the goods seized, as for example, growing crops, are in such a state as to be incapable of removal

(*y*) *Finn* v. *Morrison* (1855), 13 U.C.R. 568.

(*z*) *Black* v. *Coleman* (1880), 29 U.C.C.P. 507.

(*a*) *In re Benn-Davis* (1885), 55 L.J.Q.B. 217

(*b*) *Hughes* v. *Towers* (1866), 16 U.C.C.P. 287; *In re Benn-Davis* (1885), 55 L.J.Q.B. 217.

(*c*) *Langtry* v. *Bacon* (1859), 17 U.C.R. 559.

without injury or loss, the time will be extended so as to protect them in the hands of a purchaser, from being distrained for subsequent rent(*d*).

Purchaser liable for rent.

In Ontario, it is provided by statute that the purchaser of a growing crop shall be liable for a proportionate part of the rent of the lands upon which such crops are growing, and until the same shall be removed. This is enacted by section 37 of the *Landlord and Tenants' Act*(*e*), which is as follows:

> **37.** Any person purchasing a growing crop at such sale, shall be liable for the rent of the lands upon which the same is growing at the time of the sale, and until such crop shall be removed, unless the same has been paid or has been collected by the landlord, or has been otherwise satisfied, and the rent shall, as nearly as may be, be the same as that which the tenant whose goods were sold was to pay, having regard to the quantity of land and to the time during which the purchaser shall occupy it (*f*).

Puchaser of patented article.

The purchaser of a patented article seized and sold under a distress for rent acquires no right of user as against the patentee. Thus, where a patented article, held by a tenant under an agreement with the patentee by which his right to use the article is restricted, has been taken in distress and sold to a purchaser with notice of the restriction, no right to use the article is acquired by the purchaser. The patentee's right is entirely distinct from the right of property in the chattel. It is a right of action to prevent any dealing with that chattel in contravention of the letters patent, and such right is not part of, or capable of seizure with, the chattel, but is outside and antagonistic to the possessory title to the chattel(*g*).

(*d*) *Peacock* v. *Purvis* (1820), 2 B. & B. 362; 23 R.R. 465; *Wright* v. *Dewes* (1834), 1 A. & E. 641; 40 R.R. 384.

(*e*) R.S.O. (1897) c. 170. A similar provision is made by 14 & 15 Vict. (Imp.), c. 25, s. 2.

(*f*) See also C.S.N.B. (1904), c. 153, s. 17.

(*g*) *British Mutoscope and Biograph Co.*, [1901] 1 Ch. 671; see also *Incandescent Gas Light Co.* v. *Brogden*, 16 Rep. Pat. Cas. 179.

But the privilege extending to goods seized by a sheriff ceases where the sheriff has abandoned possession(*h*).

Where goods were distrained for rent in arrear but no appraisement was made and no one left in possession and no attempt was made to sell for twelve days, it was held that these facts were sufficient evidence of an abandonment of the distress(*i*).

Collusive sale.

So, where the sale under an execution has been merely collusive, and the goods remain on the premises, they will not be exempt(*j*).

4. *Goods of Boarders and Lodgers.*

Boarders and lodgers.

In Ontario, the goods of persons who board or lodge with a tenant are not liable to be distrained for rent due by him, if they comply with certain conditions, and pay or tender to the landlord the amount due by them to the tenant. This provision is made by sections 39, 40, 41 and 42 of the Landlord and Tenants' Act(*k*), which are as follows:

Declaration of ownership.

39. If a superior landlord shall levy or authorize to be levied a distress on any furniture, goods or chattels of any boarders or lodgers for arrears of rent due to the superior landlord by his immediate tenant, the boarder or lodger may serve the superior landlord, or the bailiff or other person employed by him to levy the distress, with a declaration in writing, made by the boarder or lodger, setting forth that the immediate tenant has no right of property or beneficial interest in the furniture, goods or chattels so distrained or threatened to be distrained upon, and that such furniture, goods or chattels are the property or in the lawful possession of such boarder or lodger; and also setting forth whether any and what amount by way of rent, board or otherwise is due from the boarder or lodger to the said immediate tenant; and the boarder or lodger

(*h*) *Blades* v. *Arundale* (1813), 1 M. & S. 711; 14 R.R. 555.

(*i*) *Naylor* v. *Bell* (1882), 2 R. & G. 444; 2 C.L.T. 263.

(*j*) *Smith* v. *Russell* (1811), 3 Taunt. 400; 12 R.R. 674.

(*k*) R.S.O. (1897), c. 170, taken from the Imperial Act, 34 & 35 Vict., c. 79.

may pay to the said superior landlord, or to the bailiff or other person employed by him as aforesaid, the amount, if any, so due as last aforesaid or so much thereof as shall be sufficient to discharge the claim of the superior landlord; and to such declaration shall be annexed a correct inventory, subscribed by the boarder or lodger, of the furniture, goods and chattels referred to in the declaration.

Action.

40. If a superior landlord, or a bailiff or other person employed by him, after being served with the before mentioned declaration and inventory, and after the boarder or lodger shall have paid or tendered to the superior landlord, bailiff or other person the amount, if any, which by the last preceding section the boarder or lodger is authorized to pay, shall levy or proceed with a distress on the furniture, goods or chattels of the boarder or lodger, the superior landlord, bailiff or other person shall be deemed guilty of an illegal distress, and the boarder or lodger may replevy such furniture, goods or chattels, in any court of competent jurisdiction, and the superior landlord shall also be liable to an action at the suit of the boarder or lodger, in which action the truth of the declaration and inventory may likewise be inquired into.

Payment.

41. Any payment made by a boarder or lodger pursuant to section 39 of this Act shall be deemed a valid payment on account of the amount due from him to the immediate tenant mentioned in the said section.

42. The declaration hereinbefore referred to shall be made under and in accordance with *The Canada Evidence Act*, 1893.

In Nova Scotia, New Brunswick, and British Columbia, similar provisions have been made(*l*).

If a tenant at will, or a tenant by sufferance lets a part of the premises so held by him, the person to whom it is let may become a lodger within the meaning of the above Act, and on complying with its requirements his goods will be exempt from a distress at the instance of the superior landlord(*m*).

4. *Other Statutory Exemptions.*

Goods of strangers exempt.

In Ontario, a landlord is not entitled to distrain the goods and chattels of any person except those of the ten-

(*l*) R.S.N.S. (1900), c. 172, s. 15; C.S.N.B. (1904), c. 153, s. 15; R.S.B.C. (1897), c. 110, ss. 3, 4 & 5.

(*m*) *Bensing* v. *Ramsey* (1898), 62 J.P. 613.

ant or person liable to pay the rent, although they are found on the demised premises.

But this restriction does not apply:

(a) In favour of a person claiming title to the goods under an execution against the tenant;

(b) Nor in favour of a person whose title is derived by purchase, gift or transfer from the tenant;

(c) Nor in favour of a chattel mortgagee of the tenant;

(d) Nor to the interest of the tenant in any goods on the premises in his possession which he has agreed to purchase;

(e) Nor to goods borrowed in exchange with a view to defeat the distress;

(f) Nor to goods claimed by the wife, husband, daughter, son, daughter-in-law, son-in-law or other relative of the tenant living on the premises as members of his family;

(g) Nor to goods claimed by any person whose title is derived by gift, or transfer from any such relative;

(h) Nor to goods in a shop managed by an agent for the owner when such agent is the tenant;

(i) Nor to the goods of a sub-tenant.

These provisions are made by section 31 of the *Landlord and Tenant's Act*(*n*), which is as follows:

Ontario.

31.—(1) A landlord shall not distrain for rent on the goods and chattels the property of any person except the tenant or person who is liable for the rent, although the same are found on the premises; but this restriction shall not apply in favour of a person claiming title under or by virtue of an execution against the tenant, or in favour of any person whose title is derived by purchase, gift, transfer, or assignment from the tenant, whether absolute or in trust, or by way of mortgage or otherwise nor to the interest of the tenant in any goods on the premises in the possession of the tenant under a contract for purchase, or by which he may or is to become

(*n*) R.S.O. (1897), c. 170.

the owner thereof upon performance of any condition, nor where goods have been exchanged between two tenants or persons by the one borrowing or hiring from the other for the purpose of defeating the claim or the right of distress by the landlord, nor shall the restriction apply where the property is claimed by the wife, husband, daughter, son, daughter-in-law, or son-in-law of the tenant, or by any other relative of his, in case such other relative lives on the premises as a member of the tenant's family, or by any person whose title is derived by purchase, gift, transfer or assignment from any relative to whom such restriction does not apply.

(2) Nothing in this section contained shall exempt from seizure by distress goods or merchandise in a store or shop, managed or controlled by an agent or clerk for the owner of such goods or merchandise, when such clerk or agent is also the tenant, and in default, and the rent is due in respect of the store or shop and premises rented therewith and thereto belonging, when such goods would have been liable to seizure but for this Act.

(3) Subject to sections 39 and 40 of this Act the word "tenant" in this section shall extend to and include the sub-tenant and the assigns of the tenant and any person in actual occupation of the premises under or with the assent of the tenant during the currency of the lease, or while the rent is due or in arrears whether he has or has not attorned to or become the tenant of the landlord.

Manitoba.

In Manitoba, a similar provision is made by section 5 of the *Distress Act*(*o*).

North-west Territories.

In the North-West Territories, a like enactment is made in section 4 of the *Distress for Rent Act*(*p*).

Where a tenant is in possession of goods under a contract by which he is to become the owner when he has paid for them in full, only the interest of the tenant in such goods can be sold under a distress(*q*).

British Columbia.

In British Columbia the right of a landlord to distrain for rent owing to him by his tenant on goods in possession of the tenant, which said goods have been sold to the tenant under a duly filed agreement for hire, contract or

(*o*) R.S.M. (1902), c. 49.

(*p*) C.O., N.W.T., c. 34, s. 4.

(*q*) *Carroll* v. *Beard* (1896), 27 Ont. 349; R.S.O. (1897) c. 170, s. 31.

conditional sale, is limited to three months' rent, and payment by the hirer or owner of such goods of three months' rent, or so much thereof as shall be sufficient to satisfy the landlord's claim, amounts to a discharge of the claim of the landlord against them(*r*).

Nova Scotia.

In Nova Scotia, goods brought upon or into any building used as a market for the purpose of sale, by any person or persons, such goods not being the property of the tenant, or property in which the tenant is interested, are exempt from distress for rent(*s*).

It was held in an early Canadian case that a stranger, whose goods have been seized on the premises of a tenant and distrained for rent, cannot, any more than the tenant himself, question the landlord's right to demise(*t*).

Stranger may dispute landlord's title.

But it has been held recently in England, that in an action for illegal distress brought by an owner of goods which were on the demised premises by permission of the tenant and distrained for rent, such owner was not estopped from disputing the landlord's title(*u*).

By virtue of section 15 of the *Act respecting Mortgages of Real Estate*(*v*), the right of a mortgagee to distrain for interest due on a mortgage is limited to the goods of the mortgagor only, and as to such goods, to those only that are not exempt from seizure under an execution(*w*). The section is as follows:

Mortgagee.

15. The right of a mortgagee to distrain for interest in arrear upon a mortgage, shall be limited to the goods and chattels of the mortgagor, and as to such goods and chattels, to such only as are

(*r*) R.S.B.C. (1897) c. 110, s. 2.

(*s*) R.S.N.S. (1900), c. 172, s. 7; see *Bent* v. *McDougall* (1882), 2 R. & G. 468; 2 C.L.T. 262.

(*t*) *Smith* v. *Aubrey* (1849), 7 U.C.R. 90.

(*u*) *Tadman* v. *Henman*, [1893] 2 Q.B. 168.

(*v*) R.S.O. (1897), c. 121.

(*w*) See R.S.O. (1897), c. 77, s. 2.

not exempt from seizure under execution. This section shall not apply to mortgages existing on the 25th day of March, 1886.

This section has been held to apply to the case of a mortgagee who, by express stipulation in his mortgage deed, stands in the relation of landlord to his mortgagor(*x*).

In Manitoba, however, section 2 of the *Distress Act*(*y*), which is identical in terms with the section of the Ontario Act just quoted, has been held only to restrict the right of a mortgagee for arrears of interest under the ordinary distress clause, but not the right to distrain for arrears of rent, as such, where the relation of landlord and tenant has been validly created by an attornment clause in the mortgage deed, and consequently a mortgagee in such a case had all the rights of a landlord and might, at that time, distrain the goods of third parties(*z*).

Rent as such.

Where, however, a mortgage deed contains the ordinary provision that the mortgagee may distrain for arrears of interest, and also an attornment clause by which the mortgagor becomes a tenant of the mortgagee, and the mortgagee distrains for arrears of interest, but not for rent as such, on the crops of a lessee of the mortgagor, the section applies, and the distress is consequently illegal(*a*).

Statutory distress clause.

The right given by the statutory distress clause in a mortgage deed, being merely a personal license, the mortgagee cannot distrain any goods other than those of the mortgagor(*b*).

(*x*) *Edmonds* v. *Hamilton Provident and Loan Society* (1891), 18 Ont. App. 347.

(*y*) R.S.M. (1902), c. 49.

(*z*) *Linstead* v. *Hamilton Provident and Loan Society* (1896), 11 Man. L.R. 199.

(*a*) *Miller* v. *Imperial Loan and Investment Co.* (1896), 11 Man. L.R. 247; 16 C.L.J. 298.

(*b*) *Trust and Loan Co.* v. *Lawrason* (1882), 10 S.C.R. 679; *Edmonds* v. *Hamilton Provident and Loan Society* (1891), 18 Ont. App. 347, per Osler, J., at p. 358.

SECTION VII.

FOR WHAT AMOUNT A DISTRESS MAY BE MADE.

At common law, the amount of rent recoverable by distress extended to the whole amount of rent in arrear, both as against the tenant himself, and as against his creditors.

Six years' arrears.

By the *Real Property Limitation Act*(*a*), it has been provided that no arrears of rent shall be recovered by distress but within six years next after the same has become due, or has been acknowledged in writing. Section 17 of the Ontario Act is as follows:

> **17.** No arrears of rent, or of interest in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy, or any damages in respect of such arrears of rent or interest, shall be recovered by any distress, or action, but within six years next after the same respectively has become due, or next after any acknowledgment of the same in writing has been given to the person by whom the same was payable, or his agent.

Action.

The amount of arrears of rent recoverable by action has already been discussed(*b*).

Execution.

Where goods have been seized under an execution against the tenant the landlord is not entitled to distrain as the goods are then *in custodiâ legis*(*c*); and his right to be paid is limited to one year's arrears at the most, and in some cases to less than that amount. This has already been considered(*d*).

Assignment for benefit of creditors.

In Ontario, in case an assignment is made by the tenant for the general benefit of creditors the amount for which the landlord is entitled to distrain is restricted by statute to "the arrears of rent due during the period of one year

(*a*) 3 & 4 Will. IV., (Imp.) c. 27, s.42; R.S.O. (1897), c. 133, s. 17; R.S.B.C. (1897), c. 123, s. 45.

(*b*) chapter XII.

(*c*) See *supra*, section VI.

(*d*) See chapter XII.

last previous to, and for three months following the execution of such assignment"(*e*). The meaning and effect of this enactment has been already discussed(*f*).

The assignee is liable to pay the rent out of the proceeds of the distrainable goods on the premises at the date of the assignment, although no distress has been made, and the landlord may maintain an action against him therefor as the statute in effect gives him a statutory lien(*g*).

Crown. In Ontario, the right of the Crown to make a distress for rent is limited by statute to within sixty years after the right first accrued(*h*).

SECTION VIII.

HOW A DISTRESS MAY BE MADE.

1. *Appointment of a Bailiff.*
2. *Entry on the Premises.*
3. *Seizure.*
4. *Impounding.*
5. *Notice of Distress.*
6. *Appraisement.*
7. *Sale.*

1. *Appointment of a Bailiff.*

The right of distress may be exercised by the landlord in person, or by an agent or bailiff in his behalf, who is usually authorized in writing by a warrant of distress, although it is not necessary that his authority should be in writing.

(*e*) R.S.O. (1897), c. 170, s. 34.

(*f*) See chapter XII.

(*g*) *Laizer* v. *Henderson* (1898), 29 Ont. 673; *Langley* v. *Meir* (1898), 25 Ont. App. 372.

(*h*) 2 Edward VII. (1902), c. 1, s. 17.

A distress made without authority may be valid if afterwards ratified, and such ratification will relate back to the time the distress is made(*a*); and a distress, made by a bailiff whose authority has been determined by the death of the landlord, may be afterwards ratified by the executor, even before probate has been issued(*b*).

Written warrant not necessary.

A bailiff distraining for rent need not have a written warrant of distress, for if the warrant be insufficient, but landlord adopt the distress, the bailiff may justify under him(*c*). But where a party assumes to act as principal in making a distress for rent, he cannot afterwards justify as bailiff, on the subsequent confirmation of the party entitled to the rent(*d*).

Effect of warrant.

As between the bailiff and the landlord, the effect of a distress warrant is to indemnify the bailiff in case the landlord had no right to distrain(*e*). A bailiff may recover against the landlord who employs him, damages and costs of defending an action brought against him where the right of distress was disputed(*f*).

But a distress warrant will not operate to indemnify a bailiff against the consequences of illegal acts committed by him or his servants in the course of the distress(*g*), or of his own default or misconduct(*h*), unless the landlord has led him to believe that he was acting under an indemnity from him(*i*).

When bailiff liable.

On the other hand, a bailiff is liable to his landlord for damages which he has to pay in consequence of the bailiff's

(*a*) *Whitehead* v. *Taylor* (1839), 10 A. & E. 210.
(*b*) *Ibid.*
(*c*) *Halstead* v. *McCormack* (1840), E.T. 3 Vict.
(*d*) *Lambert* v. *Marsh* (1845), 2 U.C.R. 39.
(*e*) *Draper* v. *Thompson* (1829), 4 C. & P. 84.
(*f*) *Cox* v. *Bailey* (1843), 6 M. & Gr. 193.
(*g*) *Draper* v. *Thompson* (1829), 4 C. & P. 84.
(*h*) *Ibbett* v. *De la Salle* (1860), 6 H. & N. 233.
(*i*) *Toplis* v. *Grane* (1839), 5 Bing. N.C. 636.

misconduct(*j*), and for the value of the goods distrained, if they have been lost owing to his default or failure to use reasonable care(*k*).

2. *Entry on the Premises.*

Entry on the premises must be made for the purpose of making a distress between sunrise and sunset(*l*), and in a lawful manner, as otherwise the distress will be illegal(*m*).

Forcible entry.

An entry by a bailiff under distress warrant for rent must be through the ordinary and natural means of ingress to the place where the distress is about to be made; and where a bailiff, acting under a distress warrant delivered to him by the landlord, entered an adjoining house, and got through a trap door in that house into the loft and then removing the trap door in the tenant's house, descended into the kitchen and distrained, it was held that the distress was illegal, and that the landlord was liable for the bailiff's act(*n*).

Outer door.

It is unlawful, in general, to gain an entrance to distrain by breaking open an outer door of a dwelling-house, barn, stable, warehouse or other building(*o*).

Where a bailiff, in order to levy, took down a key from a nail in the hall and unlocked the door of the tenant's apartment, it was held that the door was an outer door, and the entry a breaking in, and that the distress was void,

(*j*) *Megson* v. *Mapleton* (1883), 49 L.T. 744.

(*k*) *White* v. *Heywood* (1888), 5 Times L.R. 115.

(*l*) See *supra*, section III.

(*m*) *Attack* v. *Bramwell* (1863), 3 B. & S. 520.

(*n*) *Anglehart* v. *Rathier* (1877), 27 U.C.C.P. 97.

(*o*) *Long* v. *Clarke*, [1894] 1 Q.B. 119; *Brown* v. *Glenn* (1851), 16 Q.B. 254; as to what is an outer door see *American Trust Corporation* v. *Hendry* (1861), 62 L.J.Q.B. 388.

and that the sale following passed no title to the purchasers of the goods(*p*).

But if the usual mode of entering premises is by lifting a latch, turning a key in the door, or drawing back a bolt, this may be done, for a license to enter is implied if a door, although closed, is left unfastened(*q*). Usual mode of entry.

It is also unlawful to enter by opening a closed window, although it is unfastened(*r*); but an entrance may be made through an open window, or sky-light, even if it has to be opened further in order to get in(*s*). Window.

It is not unlawful to enter by getting over a fence from adjoining premises, or to commit an act which in a stranger would be a trespass, so long as the enclosure is not broken into(*t*). Enclosure.

But if the bailiff has once lawfully gained an entrance and has been forcibly expelled, or has been refused re-admission after a temporary absence, he may use force in making an entry(*u*). Force after entry.

Also, where goods have been fraudulently removed by the tenant for the purpose of defeating a distress, it is provided by statute that the landlord or his bailiff may, in the day time, break open and enter any house, barn, stable, out-house, yard, close or place where they are kept. In such a case, however, it is necessary to call the assistance of a constable or other peace officer of the place, who is required to aid and assist therein, and in case of a dwell- Fraudulent removal.

(*p*) *Miller* v. *Curry* (1892), 25 N.S.R. 502.

(*q*) *Ryan* v. *Shilcock* (1851), 7 Ex. 72; *Nash* v. *Lucas* (1867), L.R. 2 Q.B. 590.

(*r*) *Nash* v. *Lucas* (1867), L.R. 2 Q.B. 590.

(*s*) *Nixon* v. *Freeman* (1860), 5 H. & N. 652; *Long* v. *Clarke*, [1894] 1 Q.B. 119; *Miller* v. *Tebb* (1893), 9 Times L.R. 515.

(*t*) *Eldridge* v. *Stacey* (1863), 15 C.B.N.S. 458.

(*u*) *Eagleton* v. *Guttridge* (1843), 11 M. & W. 465; *Bannister* v. *Hyde* (1860), 2 E. & E. 627.

ing house, an oath must be made before a justice of the peace that there is reasonable ground to suspect that such goods are concealed therein(*v*).

Where a distress is so made by virtue of the statute, all the provisions must be strictly complied with, and it is necessary in every case that it be done in the presence of a constable or other peace officer(*w*).

Inner door.

When a lawful entry has been made, the bailiff may break open an inner door in order to take the goods, although this is not always necessary as a seizure of some of the goods in the name of all is a good seizure of all(*x*).

Where a sub-tenant has an apartment with an outer door, it is illegal to break into that apartment to make a distress(*y*).

A chattel mortgagee of the tenant's goods cannot complain of an unlawful entry of a landlord to distrain, where the tenant himself makes no complaint(*z*).

3. *Seizure.*

An actual seizure of goods is not necessary to constitute a distress; any act or word showing a present intention to assume control of the goods is sufficient(*a*).

Constructive seizure.

In order to constitute a valid seizure as between landlord and tenant, that is, to render the tenant liable, in case he removes the goods, or to render the landlord liable in case of an unlawful seizure, it is not necessary that an actual seizure be made. In such a case a constructive

(*v*) 11 Geo. II., c. 19, s. 7; R.S.O. (1897), vol. III., c. 342, s. 12; R.S.N.S. (1900), c. 172, s. 12; see *supra*, section IV.

(*w*) *Rich* v. *Woolley* (1831), 17 Bing. 651; 33 R.R. 596.

(*x*) *Dod* v. *Monger* (1705), 6 Mod. 215.

(*y*) *McArthur* v. *Walkley* (1841), M.T. 4 Vict.

(*z*) *Nattrass* v. *Phair* (1876), 37 U.C.R. 153.

(*a*) *De Grouchy* v. *Sivert* (1890), 30 N.B.R. 104.

seizure is sufficient. Thus, where a bailiff entered, and demanded rent and the costs of levy and received payment under protest, it was held to be a seizure, although he did not touch any of the goods, or make an inventory(*b*). And so, where the bailiff entered on the premises, and said he had come to distrain, and afterwards gave notice to the tenant that he had distrained, although he touched nothing and left no one in possession, it was held to be a seizure(*c*).

Complete seizure.

But the seizure must be complete; thus, where a bailiff entered and began making an inventory, but finding he had made a mistake, left without doing anything further, it was held that no seizure had been made(*d*).

As between the landlord and third persons, no action will lie for removal of goods by third persons, unless an actual seizure has been made(*e*).

But it has been held that a seizure is complete if the bailiff touches an article and forbids its removal until the rent is paid(*f*). And where a landlord's solicitor wrote to the man in possession of goods under a bill of sale, claiming them for rent, followed by efforts on the part of the landlord to prevent their removal, is a sufficient seizure to make their removal unlawful(*g*).

A seizure of some goods as a distress in the name of all the goods on the premises will operate as a valid seizure of all(*h*).

It has been held that a valid seizure may be made with-

(*b*) *Hutchins* v. *Scott* (1837), 2 M. & W. 809; 46 R.R. 770.

(*c*) *Swann* v. *Lord Falmouth* (1828), 8 B. & C. 456; 32 R.R. 441.

(*d*) *Spice* v. *Webb* (1838), 2 Jur. 943.

(*e*) *Pool* v. *Crawcour* (1884), 1 Times L.R. 165.

(*f*) *Wood* v. *Nunn* (1828), 5 Bing. 10.

(*g*) *Cramer* v. *Mott* (1870), L.R. 5 Q.B. 357; *Werth* v. *London and Westminster Loan Co.* (1889), 5 Times L.R. 320.

(*h*) *Dod* v. *Monger* (1705), 6 Mod. 215.

Notice.

out leaving a man in possession, if the articles seized are clearly indicated, and notice given to the tenant of the seizure(*i*).

But if the landlord removes goods which were not seized, or included in the inventory, the tenant may maintain an action of trover for them(*j*).

Seizure of exempted goods.

If goods are distrained that are exempt from distress, the seizure will be illegal and the landlord liable to an action(*k*). But if fixtures are seized but not removed or sold, the landlord will not be liable(*l*).

Excessive seizure.

It is unlawful to seize goods that greatly exceed in saleable value the amount due for arrears of rent and costs.

It is provided by an early statute that "distresses whether for a debt due to the King, or to any other person, shall be reasonable, and not too great"(*m*).

But it is sufficient, if the landlord exercises reasonable care and discretion to avoid an excessive distress, and he is not bound to calculate nicely the value of the goods seized(*n*).

Where the rent due was $401, and the value of the goods distrained $469, it was held that the difference was insufficient to support an action for excessive distress(*o*).

But it has been held that the distress is excessive, if goods worth £260 are distrained for a rent of £120(*p*).

Evidence of value.

The amount which the goods are sold for at a sale by

(*i*) *Swann* v. *Lord Falmouth* (1828), 8 B. & C. 456; 32 R.R. 441.

(*j*) *Bishop* v. *Bryant* (1834), 6 C. & P. 484.

(*k*) See *supra*, section VI.

(*l*) *Beck* v. *Denbigh* (1860), 29 L.J.C.P. 273.

(*m*) 52 Hen. III., (St. of Marlbridge), c. 4 part; Statute of uncertain date; (Imp. Rev. St. (1870), p. 126); R.S.O. (1897), vol. III., c. 342, s. 5.

(*n*) *Willoughby* v. *Backhouse* (1824), 2 B. & C. 283; *Roden* v. *Eyton* (1848), 6 C. & B. 427.

(*o*) *Huskinson* v. *Lawrence* (1866), 26 U.C.R. 570.

(*p*) *Chandler* v. *Doulton* (1865), 3 H. & C. 553.

auction, is *primâ facie* evidence of their value(*q*). But the amount realized at the sale, or the amount fixed by two sworn appraisers, is not conclusive evidence of the value, and an action may be brought, although the goods did not sell for sufficient to satisfy the rent(*r*).

Single chattel.

An action for excessive distress will not lie, if only a single chattel is found on the premises to satisfy the rent, although it greatly exceeds in value the amount due(*s*).

Second seizure.

While, however, avoiding an excessive distress, it is important that sufficient goods should be taken to satisfy the arrears, as a second distress for the same rent is unlawful, if the landlord might have taken sufficient at first(*t*).

Where a landlord distrained for rent due to him and abandoned the distress without realizing, and subsequently upon a second distress for the same rent, sold the goods, it was held in an action for illegal distress, that as he had shown no sufficient ground for the abandonment of the first distress without realizing, the second was illegal(*u*).

Benefit of tenant.

A landlord may lawfully distrain a second time for the same rent, when the first distress is withdrawn by an arrangement for the benefit of the tenant, which arrangement is at an end at the time of the second distress; and when the withdrawal has been effected through the fraud of the tenant, the landlord can again distrain(*v*).

A second distress may be made, if the landlord abandons the first, at the request of the tenant(*w*). So, if a

(*q*) *Rapley* v. *Taylor* (1883), C. & E. 150.

(*r*) *Smith* v. *Ashforth* (1860), 29 L.J. Ex. 259; *Cook* v. *Corbett* (1876), 24 W.R. 181.

(*s*) *Avenell* v. *Croker* (1828), Moo. & M. 172.

(*t*) *Bagge* v. *Mawby* (1853), 8 Ex. 641; *Lear* v. *Caldicott* (1843), 4 Q.B. 123.

(*u*) *Lyness* v. *Sifton* (1864), 13 U.C.C.P. 19.

(*v*) *Harpelle* v. *Carroll* (1896), 27 Ont. 240.

(*w*) *Owens* v. *Wynne* (1855), 4 E. & B. 584.

distress is withdrawn under an arrangement made for payment of rent by the tenant, which is not carried out (*x*).

But where a distress was abandoned at the request of the tenant's assignee in insolvency, and the landlord agreed to look to the estate to be paid, a second distress for the same rent was held invalid as against a chattel mortgagee, as the abandonment was not made at the tenant's request(*y*).

Where, by the lease the amount of rent is to be fixed by arbitration, a distress for rent before it is so fixed is wrongful, and the landlord is a trespasser, and is liable in damages to the actual value of the goods(*z*).

4. *Impounding.*

Impounding.

At common law, it was necessary that goods seized for rent should be removed and impounded off the demised premises.

But it has been provided by statute that any person lawfully taking any distress for rent, may impound the same in such place, or on such part of the demised premises chargeable with the rent, as shall be most fit and convenient therefor. It is made lawful, also, to appraise, sell and dispose of the goods on the premises.

It is further provided that it shall be lawful for any person to go to and from the premises, in order to view, appraise or buy the goods, and for the purchaser to remove the same.

These provisions are made by section 10 of the statute 11 George II., chapter 19, which, as re-enacted in Ontario, is as follows:

(*x*) *Thwaites* v. *Wilding* (1883), 12 Q.B.D. 4.
(*y*) *May* v. *Severs* (1874), 24 U.C.C.P. 396.
(*z*) *Mitchell* v. *McDuffy* (1880), 31 U.C.C.P. 266, 649.

14.—(3) Any person lawfully taking any distress for any kind of rent may impound or otherwise secure the distress so made, of what nature or kind soever it may be, in such place, or on such part of the premises chargeable with the rent, as shall be most fit and convenient for the impounding and securing such distress, and may appraise, sell, and dispose of the same upon the premises, in like manner, and under like directions and restraints to all intents and purposes, as any person taking a distress for rent may now do off the premises, and it shall be lawful for any person whomsoever to come and go to, and from, such place, or part of the said premises, where any distress for rent shall be impounded and secured as aforesaid, in order to view, appraise and buy, and also in order to carry off or remove the same on account of the purchaser thereof, and if any pound-breach, or rescue, shall be made of any goods and chattels, or stock, distrained for rent, and impounded or otherwise secured by virtue of this Act, the person aggrieved thereby shall have the like remedy as in cases of pound-breach, or rescue (*a*).

On the premises.

Where the pound is constituted by a man being left in possession upon the premises of the goods distrained on, they are *in custodiâ legis*, and it is not necessary that a man should always remain in possession of them(*b*).

Formerly, cattle distrained and kept in an open pound, had to be fed and watered by the owner at his risk.

But it is provided by statute that every pound-keeper, and every person who impounds or confines, or causes to be impounded or confined, any animal in any common pound or in any open or close pound, or in any enclosed place, shall daily furnish the animal with good and sufficient food, water, and shelter, during the whole time that such animal continues impounded and confined(*c*).

Care of animals impounded.

If goods are removed from the premises, it is provided by statute that no cattle distrained shall be driven out of the hundred, where such distress was taken, except to a

Cattle not to be driven out of municipality.

(*a*) 11 Geo. II., c. 19, s. 10; R.S.O. (1897), vol. III., c. 342, s. 14 (3); R.S.B.C. (1897), c. 110, s. 24; R.S.N.S. (1900), c. 172, s. 2; C.S.N.B. (1904), c. 153 s. 10.

(*b*) *Jones* v. *Bernstein*, [1900] 1 Q.B. 100.

(*c*) R.S.O. (1897), c. 272, s. 15; see also 12 & 13 Vict. (Imp.) c. 92, s. 5.

pound overt within the shire not above three miles distant from the place where the distress is taken. This provision, as re-enacted in Ontario, is as follows:

14.—(1) Beasts or cattle distrained shall not be chased or driven out of the local municipality (as defined by *The Municipal Act*) in which they are distrained, except it be to a pound overt within the same county not above three miles distant from the place where the distress is taken (*d*).

Goods not to be impounded in several places.

It is further provided that goods shall not be impounded in several places. This provision, as re-enacted in Ontario, is as follows:

14.—(2) No cattle, or other goods, distrained or taken by way of distress for any manner of cause at one time, shall be impounded in several places, whereby the owner of such distress shall be constrained to sue several replevins for the delivery of the said distress so taken at one time; upon pain that every person offending shall forfeit to the party aggrieved $20, and treble damages (*e*).

Where the plaintiff, having remained in possession and paid rent after the expiry of his term, the defendants levied a distress upon plaintiff's goods on the premises, situate six miles from Toronto, for two months' arrears of rent, and removed the goods to Toronto to impound and sell, it was held that the relationship of landlord and tenant existed at the time of the distress, and that the removal to Toronto, unless unnecessary and unreasonable, or malicious, was not a good ground of action(*f*).

Where grain is seized, loose or in the straw, or hay, it must be impounded on the premises(*g*).

Growing crops.

And where growing crops are seized and harvested by the landlord, they must be impounded in barns or other

(*d*) 3 Ed. 1 (St. of Westminster Prim.), c. 16, and 1 P. & M. c. 12, s. 1, part; R.S.O. (1897), vol III., c. 342, s. 14 (1).

(*e*) 1 P. & M. c. 12, s. 1, part; R.S.O. (1897), vol. III., c. 342, s. 14 (2).

(*f*) *MacGregor* v. *Defoe* (1887), 14 Ont. 87.

(*g*) 2 W. & M. Sess. 1, c. 5, s. 2; R.S.O. (1897), vol III., c. 342, s. 6.

proper place on the premises, and if there be no such proper place for storing them on the premises, they may be removed and stored in a hired barn as near as may be to the premises(*h*).

Sufficient impounding.

A distress is sufficiently impounded, if the bailiff makes an inventory of the goods and gives notice to the tenant of the distress, although, with the tenant's assent, no goods are removed or locked up(*i*).

If the tenant does not assent, the furniture seized in a house should be placed in one room, or removed from the premises, as the bailiff is not allowed to take the whole house without the tenant's permission in which to impound the goods(*j*).

Where a landlord turned the tenant's wife out of possession, and kept the premises on which he impounded the goods, he was held liable in an action of trespass(*k*).

Where the landlord left a note with the tenant, stating that he had seized a number of cattle, and on the next morning sent him a notice of distress and that he had impounded the cattle on the premises, it was held to be a complete impounding(*l*).

Goods must not be used.

The person distraining is not entitled to use the goods seized, and is liable to the owner if he does so(*m*), except where such use is necessary; thus milch cows may be milked(*n*).

In Nova Scotia, it was held that the impounding of a

(*h*) 11 George II., c. 19, s. 8; R.S.O. (1897), vol. III., c. 342, s. 7; see *supra*, section VI.

(*i*) *Johnson* v. *Upham* (1859), 2 E. & E. 250; *Tennant* v. *Field* (1857), 8 E. & B. 336.

(*j*) *Woods* v. *Durrant* (1846), 16 M. & W. at p. 158.

(*k*) *Etherton* v. *Popplewell* (1800), 1 East 139.

(*l*) *Thomas* v. *Harries* (1840), 1 M. & Gr. 695.

(*m*) *Smith* v. *Wright* (1861), 6 H. & N. 821.

(*n*) Bullen on Distress, p. 180.

piano, which the tenant had on hire, by leaving it with the tenant's wife, was valid, and that the landlord was not liable to the owner on account of the continued use of the piano by the tenant's wife and her family, as that was referable to the original hiring(*o*).

Where goods have been impounded, they are deemed to be in the custody of the law. This question has already been discussed(*p*).

5. *Notice of Distress.*

Notice of distress.

At common law, it was not necessary that the landlord should give a notice of the distress.

By section 1 of the statute 2 William and Mary, session 1, chapter 5(*q*), it has been provided that a notice of distress must be given, if a sale is intended, with the cause of such taking, and left at the dwelling house, or other notorious place on the premises.

Service.

The notice will be sufficient if served personally on the tenant although the statute does not so provide(*r*).

Written notice.

The notice must be in writing(*s*), and should inform the tenant exactly what goods are seized(*t*); although a notice specifying certain articles, "and any other goods and effects on the premises," has been held sufficient where such goods and effects have been in fact seized(*u*).

But where a notice specifies certain articles, "and all other goods, chattels and effects on the premises that may be required to satisfy" the landlord's claim, is invalid(*v*).

(*o*) *Dimock* v. *Miller* (1897), 30 N.S.R. 74.

(*p*) See section VI.

(*q*) 2 Ed. VII. (Ont.), c. 1, s. 22; R.S.O. (1897), vol. III., c. 342, s. 16; R.S.N.S. (1900), c. 172, s. 2; R.S.B.C. (1897), c. 110, s. 6; C.S.N.B. (1904), c. 153, s. 9.

(*r*) *Walter* v. *Rumball* (1696), 1 Ld. Ray. 53.

(*s*) *Wilson* v. *Nightingale* (1846), 8 Q.B. 1034.

(*t*) *Kerby* v. *Harding* (1851), 6 Ex. 234.

(*u*) *Wakeman* v. *Lindsay* (1850), 14 Q.B. 625.

(*v*) *Kerby* v. *Harding* (1851), 6 Ex. 234.

The failure to give notice renders the sale irregular, but does not make the distress illegal(*w*).

What it should contain.

It is not necessary, although usual and proper, to specify the amount of rent claimed to be due, as the tenant is presumed to know what is in arrear, and is bound to tender the proper sum(*x*).

In Manitoba, it is provided by statute that every person who makes and levies any distress shall give a copy of demand and of all costs and charges of the distress, signed by him, to the person on whose goods and chattels the distress is levied(*y*).

Growing crops.

Where growing crops are seized and harvested, notice of the place where they are stored must be given to the tenant, or left at his last place of abode, within the space of one week after they have been so stored(*z*).

Waiver.

Where, after the distress was made, the tenant, on being informed by the bailiff that he had eight days in which to redeem, said he did not require an inventory of the goods to be given him, it was held that this did not constitute a waiver of the notice of distress(*a*).

6. *Appraisement.*

Appraisement.

The section next hereafter quoted provides that the goods seized shall be appraised by two appraisers, who shall first be sworn before a justice of the peace, or any other peace officer or person authorized to administer an

(*w*) *Trent* v. *Hunt* (1853), 9 Ex. 14; but see *Vaughan* v. *Building and Loan Association* (1889), 6 Man. L.R. 289, and 46 & 47 Vict. (Man.), c. 45, s. 6.

(*x*) *Tancred* v. *Leyland* (1851), 16 Q.B. 669; overruling *Taylor* v. *Henniker* (1840), 12 A. & E. 488.

(*y*) R.S.M. (1902), c. 49, s. 6.

(*z*) 11 Geo. II., c. 19, s. 9; R.S.O. (1897), vol. III., c. 342, s. 8 (1); R.S.B.C. (1897), c. 110, s. 23; R.S.N.S. (1900), c. 167, s. 6.

(*a*) *Shultz* v. *Reddick* (1882), 43 U.C.R. 155.

oath, to appraise the same truly, a memorandum of which oath is to be endorsed on the inventory.

Where growing crops are distrained, the appraisement is not to be made until after they have been cut and harvested(*b*).

A failure to make an appraisement will render the sale irregular(*c*). But if the tenant consents, it may me dispensed with(*d*).

The appraisers must be competent and disinterested persons(*e*). The landlord or his bailiff cannot act as appraisers, nor any person who has acted as an agent of the landlord in making the distress, otherwise the sale will be irregular(*f*).

7. *Sale.*

Sale.

At common law, as already explained, a landlord was not entitled to sell goods distrained for rent, but only to keep them as a pledge until the rent was paid.

By section 1 of the Statute 2 William and Mary, Session 1, chapter 5, it has been provided that the landlord may lawfully sell the goods after the expiration of five days from the seizure and giving notice of the distress, if not replevied in the meantime. This section, as re-enacted in Ontario, is as follows:

After five days.

16. Where any goods or chattels shall be distrained for any rent reserved and due upon any demise, lease, or contract whatsoever, and the tenant, or owner of the goods so distrained shall not, within five days next after such distress taken and notice thereof (with the cause of such taking) left at the dwelling house, or other most notorious place on the premises charged with the rent distrained for,

(*b*) 11 Geo. II., c. 19, s. 8; R.S.O. (1897), vol. III., c. 342, s. 7.

(*c*) *Messing* v. *Kemble* (1809), 2 Camp. 115; *Stoddart* v. *Arderly* (1838), 6 O.S. 305.

(*d*) *Bishop* v. *Bryant* (1834), 6 C. & P. 484.

(*e*) *Roden* v. *Eyton* (1848), 6 C.B. 427.

(*f*) *Rocke* v. *Hills* (1887), 3 Times L.R. 298.

replevy the same, with sufficient security to be given to the sheriff according to law, then in case, after such distress and notice as aforesaid, and expiration of the said five days, the person distraining shall cause the goods and chattels so distrained to be appraised by two appraisers, who shall first be sworn before a justice of the peace, or any other officer or person authorized to administer an oath, to appraise the same truly, according to the best of their understandings (a memorandum of which oath is to be indorsed on the inventory), and, after such appraisement, the person so distraining may lawfully sell the goods and chattels so distrained for the best price which can be got for the same towards satisfaction of the rent for which the said goods and chattels shall be destrained, and of the charges of such distress, appraisement, and sale, and shall hold the overplus (if any) for the owner's use, and pay the same over to him on demand (*g*).

It has been held that the statute is permissive and not compulsory, and that no action will lie for not selling (*h*); but in the case of the seizure of growing crops and corn or grain in sheaves, or hay, it has been held, under the statutes permitting them to be seized, that a sale is compulsory (*i*).

Clear days.

The "five days" mentioned in the section means five clear days (*j*). The sale will be rendered irregular, if it takes place before the expiration of the five days, but the distress itself will not be illegal (*k*).

Notice.

Under the statute, goods distrained cannot be sold until the expiration of five days after a written notice of distress, with the cause of the taking, shall have been given. So where the only notice was one given on the 8th Febru-

(*g*) 2 W. & M. Sess. 1, c. 5, s. 1; 2 Ed. VII., c. 1, s. 22; R.S.O. (1897), vol. III., c. 342, s. 16; R.S.N.S. (1900), c. 172, s. 2; R.S.B.C. (1897), c. 110, s. 6; C.S.N.B. (1904), c. 153, s. 9.

(*h*) *Hudd* v. *Ravenor* (1821), 2 B. & B. 662.

(*i*) *Pigott* v. *Birtles* (1836), 1 M. & W. at p. 448; see R.S.O. (1897), vol. III., c. 342, ss. 6 & 7; 2 W. & M. Sess. 1, c. 5, s. 2; 11 Geo. II., c. 19, s. 8.

(*j*) *Robinson* v. *Waddington* (1849), 13 Q.B. 753; *Sharpe* v. *Fowle* (1884), 12 Q.B.D. 385.

(*k*) *Lucas* v. *Tarleton* (1858), 3 H. & N. 116.

ary, and the sale took place on the 12th, it was held that the sale was invalid(*l*).

The distrainor has a reasonable time after the expiration of five days to sell and remove the goods and if he sells after such reasonable time he will be deemed a trespasser(*m*).

In the case of distress for rent, there must be five clear days between the day of distress and the sale, at the expiration of which the landlord is at liberty to sell; but he has a reasonable time after the five days so to do, and what is a reasonable time is a question for the jury. So, where the judge directed the jury that the landlord was bound to proceed to sell on the sixth day, it was held that the direction was improper, and that the right direction would have been, after having told the jury the time when the goods could first have been sold, for them to find whether under all the facts the landlord had remained a reasonable time in possession after the five days before selling(*n*).

Delay in selling.

Where goods have been distrained for rent the tenant is entitled to maintain trespass for a wrongful continuance in possession beyond the time the landlord was reasonably authorized to keep the same(*o*).

Trespass lies for a seizure and sale of goods where they have been left on the premises after a distress longer than five days, no person being in charge of them, and a second seizure was made, the seizure and sale for which the action was brought being subsequent to the five days after the first seizure; but in such case the full value of the goods cannot be recovered, but only special damages(*p*).

(*l*) *Shultz* v. *Reddick* (1881), 43 U.C.R. 155.

(*m*) *Pitt* v. *Shew* (1821), 4 B. & A. 208; *Winterbourne* v. *Morgan* (1809), 11 East 395; 10 R.R. 532.

(*n*) *Lynch* v. *Bickle* (1867), 17 U.C.C.P. 549.

(*o*) *Lynch* v. *Bickle* (1867), 17 U.C.C.P. 549.

(*p*) *Thompson* v. *Marsh* (1834), 2 O.S. 355.

A receiver, who distrains for rent and withdraws on receiving notice of a prior encumbrancer's claim to the rent, is not liable for trespass, although he kept possession three days after receiving such notice(*q*).

Delay in the sale of goods distrained for rent does not prejudice the distress, if there is no fraud or collusion between the landlord and tenant to defeat the rights of third parties(*r*).

Postponement.

The sale may be postponed at the request, or with the consent of the tenant(*s*).

Illegal sale.

The property in the goods remains in the tenant or other owner, until they are sold, when it vests in the purchaser, and the tenant cannot then replevy, although the sale has been irregular(*t*). But if the distress is illegal, the purchaser acquires no title against the tenant, or against the owner in case the goods sold belong to a third person(*u*).

The section requires that the best price obtainable should be got for the goods, and the landlord will be liable if, through his default, the best price is not obtained. Thus, if he sells produce subject to a condition that it be consumed on the premises, even where there is a covenant in the lease to that effect binding on the tenant, he will be liable if a higher price could have been got without such condition(*v*).

Purchase of goods by landlord.

The landlord cannot purchase the goods himself(*w*); and if he purchase goods of a third person on the premises,

(*q*) *Simpson* v. *Hutchison* (1859), 7 Gr. 308.
(*r*) *Anderson* v. *Henry* (1898), 29 Ont. 719.
(*s*) *Hills* v. *Street* (1828), 5 Bing. 37.
(*t*) *Lyon* v. *Weldon* (1824), 2 Bing. 334.
(*u*) *Harding* v. *Hall* (1866), 14 L.T. 410.
(*v*) *Hawkins* v. *Walrond* (1876), 1 C.P.D. 280.
(*w*) *King* v. *England* (1864), 4 B. & S. 782.

sold by his bailiff for rent, he cannot acquire title as against the owner(*x*); nor can he set up a lien for rent thereon after the sale, as the distress is then at an end, and the goods in no way in the custody of the law(*y*).

Where goods sold to the landlord, even with the tenant's consent are left on the premises in the tenant's possession, they may be seized under an execution against the tenant(*z*).

Where a landlord distrained upon his tenant, and at the sale, with the latter's consent, purchased a portion of the property sold, which he left upon the tenant's premises for a couple of days, when it was removed, partly by his own servant and partly by the delivery of the tenant to him, it was held that, although as a general principle no one can sustain the double character of seller or buyer, yet where, as in this case, the tenant consented to the purchase by the landlord, the sale can be supported; and therefore, that the property sold passed to the landlord, and that he could hold it against an execution issued subsequently to the sale, provided there was an immediate delivery, followed by an actual and continued change of possession(*a*).

The purchaser of property sold for rent must remove the same off the premises within a reasonable time after the sale. Where the property was sold on the 15th of February, and the purchaser entered to remove it off the premises on the 26th of March following, he was held liable as a trespasser(*b*).

(*x*) *Williams* v. *Grey* (1873), 23 U.C.C.P. 561; *Howell* v. *Listowell Rink Co.* (1887), 13 Ont. 476.

(*y*) *Williams* v. *Grey* (1873), 23 U.C.C.P. 561.

(*z*) *Burnham* v. *Waddell* (1878), 3 Ont. App. 288.

(*a*) *Woods* v. *Rankin* (1868), 18 U.C.C.P. 44.

(*b*) *Alway* v. *Anderson* (1848), 5 U.C.R. 34; see section VI.

SECTION IX.

HOW THE RIGHT IS SUSPENDED.

Some of the modes in which a right of distress may be lost have been discussed incidentally in preceding sections. Payment or tender.

Payment of the rent due, or a tender of the proper amount, before a distress is made, operates as an extinguishment of the right of distress, and to make a distress thereafter illegal. To divest a landlord of his right to distrain, a strict legal tender must be shown(*a*).

In order to constitute a valid tender it must be made of the proper amount, to the proper person, and without any condition.

A tender made to the landlord or to his agent having authority to receive the rent, is valid, and a bailiff acting under a distress warrant is presumed to have authority to receive the rent(*b*), although he has received instructions not to receive it(*c*).

But a tender made to a servant of the bailiff, or to the man left in possession, is not good, unless he had in fact authority to receive it(*d*).

A tender may be good although it is made under protest(*e*).

When a valid tender has been made before distress of the amount due for rent, or after distress, of the amount due and costs, it is illegal to proceed with the distress or detain the goods(*f*).

(*a*) *Matheson* v. *Kelly* (1874), 24 U.C.C.P. 598.

(*b*) *Bennett* v. *Bayes* (1860), 5 H. & N. 391.

(*c*) *Hatch* v. *Hale* (1850), 15 Q.B. 10.

(*d*) *Boulton* v. *Reynolds* (1859), 2 E. & E. 369.

(*e*) *Greenwood* v. *Sutcliffe*, [1892] 1 Ch. 1.

(*f*) *Vertue* v. *Beasley* (1831), 1 Moo. & R. 21; *Loring* v. *Warburton* (1858), E.B. & E. 507.

Before seizure.

A tender of the amount due for rent without costs is valid, if made after a warrant has been delivered to the bailiff, but before seizure(*g*).

Where a tender has been made to the bailiff, the landlord is responsible for subsequent proceedings if the bailiff refuses to accept it(*h*).

A tender made to the landlord by a boarder or lodger, of the amount due by him to the tenant, before the time when they could lawfully be sold, renders a subsequent sale of his goods illegal(*i*).

Demanding receipt.

To demand a receipt is not imposing a condition; but it is otherwise if a receipt in full is demanded(*j*).

Promissory note.

Where a landlord accepts a note in payment of rent, his right to distrain in suspending during its currency(*k*). The mere taking of a note for rent will not take away the right to distrain, but it is otherwise where, in consideration of receiving it, the landlord expressly agrees to wait until it has been dishonoured(*l*).

The acceptance by the landlord of a bill or note on account of rent will not suspend his right of distress(*m*). But it affords evidence of an agreement to suspend his right of distress during its currency(*n*).

Negotiations.

Where a tenant enters into a contract for the purchase of the reversion, the right to distrain is suspended pending completion, and the landlord may be restrained by injunction from exercising it(*o*).

(*g*) *Bennett* v. *Bayes* (1860), 5 H. & N. 391; *Holland* v. *Bird* (1833), 10 Bing. 15.

(*h*) *Howell* v. *Listowell Rink and Park Co.* (1887), 13 Ont. 476.

(*i*) *Sharpe* v. *Fowle* (1884), 12 Q.B.D. 385.

(*j*) *Finch* v. *Miller* (1848), 5 C.B. 428.

(*k*) *Colpitts* v. *McColough* (1900), 32 N.S.R. 502.

(*l*) *Simpson* v. *Howitt* (1878), 39 U.C.R. 610.

(*m*) *Davis* v. *Gyde* (1835), 2 A. & E. 623; 41 R.R. 489.

(*n*) *Palmer* v. *Bramley*, [1895] 2 Q.B. 405.

(*o*) *Ellis* v. *Wright* (1897), 76 L.T. 522.

If there is a dispute between landlord and tenant as to the amount of rent due, and a verbal agreement is entered into that no distress shall be made until the amount shall have been settled by arbitration, the landlord is liable in trespass if he distrains in violation of the agreement(*p*).

Agreement not to distrain.

So, where a landlord gives a written undertaking not to distrain for rent that may become due, on goods supplied to his tenant on the hire-purchase system, the landlord is estopped from distraining, and a subsequent distress in violation of his agreement is illegal(*q*).

Garnishment.

Where rent is garnished, a landlord's right to distrain is suspended as to that portion of the rent which has accrued up to the garnishment, by the service on the tenant, before such distress, of an order attaching the rent, and distress for such portion is wrongful(*r*).

It has been held that the recovery of a judgment for the rent renders a subsequent distress illegal, by reason of a merger of that right in the judgment(*s*).

Set-off.

Apart from statutory provisions, the right of a tenant to set off a debt or sum against the rent, does not take away the landlord's right to distrain for the rent in full(*t*).

In Ontario, it is provided by statute that a tenant may set-off against the rent, any debt due to him by the landlord, and in such a case, the latter is entitled to distrain only for the balance of rent after deducting such debt(*u*).

But it has been held that a claim of damages for breach of a covenant is not a debt within section 33 of the *Land-*

(*p*) *Preston* v. *Appleby* (1890), 30 N.B.R. 94.

(*q*) *Wallace* v. *Fraser* (1878), 2 S.C.R. 522.

(*r*) *Patterson* v. *King* (1896), 27 Ont. 56.

(*s*) *Potter* v. *Bradley* (1894), 10 Times L.R. 445.

(*t*) *Willson* v. *Davenport* (1833), 5 C. & P. 531; *Pratt* v. *Keith* (1864), 33 L.J. Ch. 528.

(*u*) R.S.O. (1897), c. 170, s. 33; see chapter XII.

lord and Tenants' Act(*v*), so as to constitute a set-off against the rent, and although it might be the subject of a counter-claim, it would not justify an injunction against a distress for rent(*w*).

Where a tenant has been compelled to pay taxes, or ground-rent, or interest which as between himself and his landlord should be paid by the latter, such payments operate as part payment of the rent(*x*).

SECTION X.

WRONGFUL DISTRESS.

1. *Illegal Distress.*
2. *Irregular Distress.*
3. *Excessive Distress.*

Wrongful distresses are of three kinds: illegal, irregular and excessive, according to the principles regulating the liability of the landlord, and the damages recoverable by the tenant.

An illegal distress is committed:

Illegal. (1). Where there is no right to distrain at all, (a) either because one or more of the conditions precedent to the right arising have not been fulfilled, or (b) because there is no rent due, or (c) because the right having arisen has been suspended or lost; or

(2). Because, there being a right to distrain, a wrongful act has been committed at the beginning of the distress, in the time, place or manner of entry, or in the seizure of exempted goods.

(*v*) R.S.O. (1897), c. 170.

(*w*) *Walton* v. *Henry* (1889), 18 Ont. 620.

(*x*) See chapter XII.

An irregular distress is committed where, a right to distrain existing, a wrongful act has been committed at some intermediate stage of the proceedings, either in the failure to do something required, or in doing something forbidden by law, as for example, a failure to give notice of distress, or to make an appraisement, or selling the goods prematurely. Irregular.

An excessive distress is committed where the distrainor has seized more goods than are reasonably necessary to satisfy the claim. Excessive.

Some instances of wrongful distress have already been noticed in previous sections.

1. *Illegal Distress.*

When goods are seized and sold when no rent is in arrear, the owner of the goods may recover from the person distraining, double of the value of the goods sold and full costs of suit. This is provided by section 5 of the Statute 2 William and Mary, Session 1, chapter 5, which, as re-enacted in Ontario, is as follows: No rent due.

> **18.**—(2) In case any distress and sale shall be made for rent pretended to be in arrear and due when, in truth, no rent is arrear or due to the person distraining, or to him in whose name or right such distress shall be taken, the owner of such goods or chattels distrained and sold, his executors, or administrators, may, by action to be brought against the person so distraining, recover double of the value of the goods or chattels so distrained and sold, together with full costs of suit (*a*). Double value.

The section is absolute, and a successful plaintiff is entitled to its benefit, and less damages than double value cannot be given(*b*).

But where a plaintiff claims double value for distraining when no rent was due, he must make such claim at the It must be claimed.

(*a*) 2 W. & M. Sess. 1, c. 5, s. 5; R.S.O. (1897), vol. III., c. 342, s. 18 (2); R.S.N.S. (1900) c. 172, s. 9; R.S.B.C. (1897), c. 110.

(*b*) *Masters* v. *Ferris* (1845), 1 C.B. 715.

trial, and ask to have the jury directed upon it(*c*). In an action for distraining when no rent was due, where the case was left to the jury, as an ordinary case, without being expressly left to them to find double damages, and without their being apprised of the provisions of the statute, the Court refused to increase the verdict to double the value of the goods distrained(*d*).

Actual damages.

Where the defendant leased certain land to the plaintiff for a term, during which the latter was to make improvements, and at the expiration of the term the value of such improvements, as well as the amount of the rent, was to be fixed by arbitration, and the defendant having distrained for rent claimed to be due, it was held that, there being no fixed rent agreed upon, there was no right of distress, and the defendant was therefore merely a trespasser and liable in damages to the actual value of the goods, but not to double their value, as it was not a case within this section, which refers to the wilful abuse of the power of distress(*e*).

Where a tenant, to relieve his goods from an illegal distress, pays the amount of the distress and recovers his goods, it would seem that in an action of trespass for the wrongful seizure, he is not entitled to recover as damages more than the value of the goods(*f*).

Pleading.

In an action for wrongful distress for rent before it was due, where there was no allegation in the statement of claim that the action was brought upon this section of the statute, nor that the goods distrained were "sold," but merely an allegation that the defendant "sold and carried away the same and converted and disposed there-

(*c*) *Bell* v. *Irish* (1882), 45 U.C.R. 167.
(*d*) *Shipman* v. *Graydon* (1855), 5 U.C.C.P. 465.
(*e*) *Mitchell* v. *McDuffy* (1881), 31 U.C.C.P. 266, 649.
(*f*) *Matheson* v. *Kelly* (1874), 24 U.C.C.P. 598.

of to his own use," and no claim was made for double the value of the goods distrained and sold, within the terms of the statute, it was held that the action was the ordinary action for conversion, and that the value, and not double the value, of the goods distrained was recoverable(*g*).

Rent must be reserved.

The statute does not apply to a distress made for rent claimed to be due, where no rent was reserved in the lease. Thus, in an action for illegal distress, where the plaintiff occupied the premises in question under an agreement with the defendant, by the terms of which no rent was payable by the plaintiff to the defendant, and the distress being therefore illegal, the plaintiff claimed double the value of the goods as damages under the statute, it was held that the 5th section of the statute, by reference to the 2nd section(*h*), does not extend to a holding of land where there is no rent reserved, and that the plaintiff was not entitled to double value(*i*).

A landlord is liable under the statute to double damages for distraining when no rent is due, although he has acted upon an erroneous construction of a doubtful lease(*j*).

The action for double value for illegal distress for rent, is not confined to the landlord only, but extends to those who distrain on his behalf, or in his name or right(*k*).

Some rent due.

In Manitoba, it has been held that an action of trespass or trover will not lie upon a distress where there is some rent due; the action should be upon the case for excessive damages, or for not accounting for the surplus

(*g*) *Williams* v. *Thomas* (1894), 25 Ont. 536.
(*h*) R.S.O. (1897), vol. III., c. 342, s. 6.
(*i*) *McCaskill* v. *Rodd* (1887), 14 Ont. 282.
(*j*) *Brown* v. *Blackwell* (1874), 35 U.C.R. 239.
(*k*) *Hope* v. *White* (1867), 17 U.C.C.P. 52.

moneys realized, or for not returning the balance of goods unsold(*l*).

A landlord when sued in trespass for an illegal distress, is precluded by the distress from claiming the goods as his own under a prior bill of sale(*m*). But where a person distrained, as landlord, on goods which as a matter of fact, had, by subsequent agreement between himself and the tenant, but before the distress, become his absolutely, it was held that he might justify the taking on this latter ground(*n*).

In an action for taking a distress when no rent was due, the declaration need not set forth any tenancy between the parties; it is sufficient if it appear that the seizure was made under colour of a distress(*o*).

Set-off.

The service by the tenant, after seizure but before sale, of a notice of set-off pursuant to section 33 of the *Landlord and Tenants' Act* (*p*), of an amount in excess of the rent, to which the tenant is entitled, does not make the distress illegal, and the landlord is not liable for "double value" for selling, as the statute of William and Mary requires both seizure and sale to be unlawful(*q*).

Illegal sale passes no property.

In case of an illegal distress, the owner of the goods is entitled to maintain an action of trover against the purchaser of the goods at the sale, as no property passes where the sale is illegal(*r*).

Costs.

It has been held that the costs recoverable under the

(*l*) *Pettit* v. *Kerr* (1888), 5 Man. L.R. 359.
(*m*) *Gibbs* v. *Crawford* (1850), 8 U.C.R. 155.
(*n*) *Bell* v. *Irish* (1882), 45 U.C.R. 167.
(*o*) *Stoddart* v. *Arderly* (1838), 6 O.S. 305.
(*p*) R.S.O. (1897), c. 170; see chapter XII.
(*q*) *Brillinger* v. *Ambler* (1897), 28 Ont. 368.
(*r*) *Harding* v. *Hall* (1866), 14 L.T. 410.

words of the statute, are not more than the usual costs of suit as between party and party(*s*).

An action may be maintained not only by the tenant, but by third parties in case the goods of third parties have been unlawfully seized(*t*). And it may be brought not only against the bailiff, but against his employer, if he has authorized the wrongful act, or adopted or ratified it(*u*).

Bailiff only liable.

The landlord, however, will not be liable, if the wrongful act committed by the bailiff was beyond the scope of his authority, as where the warrant authorizes a distress on goods and the bailiff distrains fixtures(*v*); or where the warrant authorizes a distress of goods on the premises, and the bailiff takes goods off the premises(*w*).

But the landlord has been held liable where the bailiff seizes exempted goods, under a warrant to seize the goods(*x*).

It has also been held that a landlord is not liable where the bailiff enters the premises in an unlawful manner(*y*).

Where the defendant justifies a trespass under a warrant of distress no inquiry can be made into his motives, and the plaintiff having prevented the defendant from distraining, was not at liberty to shew that the defendant had no intention of executing the warrant when he entered, although nothing was done inconsistent with such an intention(*z*).

(*v*) *Freeman* v. *Rosher* (1849), 13 Q.B. 780.

(*s*) *Avery* v. *Wood*, [1891] 3 Ch. 115.

(*t*) *Kerby* v. *Harding* (1851), 6 Ex. 234.

(*u*) *Haseler* v. *Lemoyne* (1858), 5 C.B.N.S. 530.

(*w*) *Lewis* v. *Read* (1845), 13 M. & W. 834.

(*x*) *Hurry* v. *Rickman* (1831), 1 Moo. & R. 126; *Gauntlett* v. *King* (1857), 3 C.B.N.S. 59.

(*y*) *Green* v. *Wroe* (1877), W.N. p. 130.

(*z*) *Scott* v. *Vance* (1851), 9 U.C.R. 613; *Lucas* v. *Nockells* (1827), 4 Bing. 740, distinguished.

In an action for wrongful distress, it was held that the receipt by the tenant from the bailiff of the surplus of the proceeds of the sale was no condonation of the wrong complained of, the payment having been neither made nor accepted in satisfaction or compromise of the injury suffered(*a*).

"Not guilty."

In such an action it is necessary to state correctly to whom the rent is due. The plea of "not guilty" puts in issue the tenancy and the ownership of the goods(*b*).

Where a landlord distrained upon and sold the goods of his tenant without objection on the part of the tenant, and the landlord then bought the goods back from the purchaser and left them in possession of the tenant who subsequently refused to give them up to the landlord, it was held that, on a complaint for illegal detention of the goods, the defendant was not estopped from raising the defence that some of the goods were not distrainable(*c*).

Replevin.

Where goods have been illegally distrained the tenant or other person interested in them may replevy them. This is provided in Ontario, by section 2 of the *Act respecting Actions of Replevin*(*d*), which is as follows:

2. Where goods, chattels, deeds, bonds, debentures, promissory notes, bills of exchange, books of account, papers, writings, valuable securities or other personal property or effects have been wrongfully distrained under circumstances in which by the law of England, on the 5th day of December, 1859, replevin might have been made, the person complaining of such distress as unlawful may bring an action of replevin, or where such goods, chattels, property or effects have been otherwise wrongfully taken or detained, the owner or other person capable of maintaining an action for damages therefor may bring an action of replevin for the recovery of the goods, chattels, property or effects, and for the recovery of the damages sustained by reason of the unlawful caption and detention, or of the unlawful

(*a*) *Robinson* v. *Shields* (1865), 15 U.C.C.P. 386.

(*b*) *Robinson* v. *Shields* (1865), 15 U.C.C.P. 386.

(*c*) *Dockery* v. *Evans* (1896), 21 V.L.R. 496.

(*d*) R.S.O. (1897), c. 66.

detention, in like manner as actions are brought and maintained by persons complaining of unlawful distresses.

A recovery in an action of replevin is a bar to an action for wrongful distress, because the tenant has in that case elected to treat the distress as illegal(*e*).

The remedy of replevin is applicable only to a case where the distress is illegal, as it is founded on the fact of an original wrongful taking, and its object is not to obtain compensation, but to have the goods themselves restored(*f*).

An action of replevin will lie for a distress under a demise in which no rent was fixed, or where no rent was due at the time of the distress(*g*). The action will lie to recover goods that have been taken, but not fixtures(*h*).

But replevin will not lie if some rent was due, as the distress for more than is due is only irregular but not illegal(*i*).

Illegal lease.

Replevin will lie to recover goods distrained for rent in arrear under an illegal lease. The maxim, *in pari delicto est conditio possidentis*, is applicable only when the possession results from the acts of the parties, and not when it results from some incident attached to a legal instrument(*j*).

Rescue.

A tenant or other owner of goods distrained illegally, may lawfully rescue them at any time before they have been impounded, if it can be done without occasioning a breach of the peace(*jj*). After the goods are impounded,

(*e*) *Phillips* v. *Berryman* (1783), 3 Doug. 286.

(*f*) *Mennie* v. *Blake* (1856), 6 E. & B. 842.

(*g*) *Regnart* v. *Porter* (1831), 7 Bing. 451; 33 R.R. 537; *Davis* v. *Gyde* (1835), 2 A. & E. 623; 41 R.R. 489; *Downs* v. *Cooper* (1841), 2 Q.B. 256.

(*h*) *Gibbs* v. *Cruickshank* (1873), L.R. 8 C.P. 454.

(*i*) *White* v. *Greenish* (1861), 11 C.B.N.S. 209.

(*j*) *Gallagher* v. *McQueen* (1902), 35 N.B.R. 198.

(*jj*) *Keen* v. *Priest* (1859), 4 H. & N., at p. 240.

they are in the custody of the law, and cannot lawfully be rescued(*k*).

2. *Irregular Distress.*

Irregular distress.

Where an irregularity has been committed after a distress has lawfully been made, the party aggrieved is entitled to recover any special damage sustained thereby. This is provided by section 20 of the Statute 11 George II., chapter 19, which, as re-enacted in Ontario, is as follows:

Damages.

17.—(1) Where any distress shall be made for any kind of rent justly due, and any irregularity, or unlawful act, shall afterwards be done by the party distraining, or by his agent, or if there has been an omission to make the appraisement under oath, the distress itself shall not be therefore deemed to be unlawful, nor the party making it be deemed a trespasser *ab initio*, but the party aggrieved by such unlawful act, or irregularity may recover by action full satisfaction for the special damage sustained thereby.

(2) A tenant or lessee shall not recover in any action for any such unlawful act, or irregularity as aforesaid, if tender of amends hath been made before action (*l*).

Formerly, a wrongful act in levying a distress rendered the person making it a trespasser *ab initio*.

Where, in a distress for rent, no notice thereof in writing was given to the lessee; nor a legal appraisement made before sale; and the actual value of the goods sold was much greater than the amount due for rent, it was held that the distress was irregular and excessive(*m*).

Distress off the premises.

Where part of the tenant's goods are distrained for rent off the premises, he is entitled to recover their value either in trespass or trover(*n*).

(*k*) See section XI.

(*l*) 11 Geo. II., c. 19, s. 20; R.S.O. (1897), vol. III., c. 342, s. 17; R.S.N.S. (1900), c. 172, s. 10; R.S.B.C. (1897), c. 110, ss. 33 & 34; C.S.N.B. (1904), c. 153, s. 16.

(*m*) *Howell* v. *Listowell Rink and Park Co.* (1887), 13 Ont. 476.

(*n*) *Huskinson* v. *Lawrence* (1866), 26 U.C.R. 570.

A wrong-doer taking goods out of the possession of another cannot set up *jus tertii*, but the person out of whose possession the goods are taken may shew it, and in such case the wrong-doer may take advantage of it. A plaintiff, having shewn a chattel mortgage subsisting upon a portion of the goods distrained, will not be allowed to recover the value of such portion without protecting the defendant against another action at the suit of the mortgagee; and the plaintiff is not entitled to recover from the defendant the amount received by him from the sale of the plaintiff's goods in addition to the value thereof(*o*).

Where the landlord distrained for rent due, and entering the tenant's house, assumed the management of it as if the term were at an end, insisted on the tenant's wife leaving a room down stairs which she occupied as a bedroom and taking another above, and remained there nine days against the tenant's will, it was held that a verdict of $375 damages was not excessive(*p*).

Tender.

Where a tender was made of the amount due, after seizure but before sale, it was held that the plaintiff could recover the full value of the goods(*q*).

Nominal damages.

In an action for irregular distress, the plaintiff is entitled to succeed on shewing that there was no such appraisement as the law directs, even though but for nominal damages(*r*).

A landlord is liable if he sells goods distrained without an appraisement or valuation; and the measure of damages is the actual value of what is sold less the amount of rent that is due(*s*).

(*o*) *Williams* v. *Thomas* (1894), 25 Ont. 536; *Hoare* v. *Lee* (1847), 5 C.B. 754, followed.

(*p*) *Chase* v. *Scripture* (1856), 14 U.C.R. 598.

(*q*) *Howell* v. *Listowell Rink and Park Co.* (1887), 13 Ont. 476.

(*r*) *Maguire* v. *Post* (1837), 5 O.S. 1.

(*s*) *Pegg* v. *Independent Order of Foresters* (1901), 1 Ont. L.R. 97.

In an action for irregular distress the plaintiff is entitled to recover under the statute the special damage which he may have sustained by reason of the irregularity complained of, and the measure of damages is the actual value of the goods, that is, their full value to him, less the amount of rent in arrear(*t*).

Where no actual damage can be shown to have resulted from the irregularity, the plaintiff will fail in the action altogether(*u*).

Distress for more than is due.

An action for distraining for more rent than is due, cannot be maintained without a tender of the sum which is really due(*v*); and only the excess may be recovered back(*w*).

3. *Excessive Distress.*

Excessive distress.

Where the person distraining takes more goods than are reasonably sufficient to satisfy the amount due for rent and costs, he is liable in damages to the owner. This has been provided by an early statute which, as re-enacted in Ontario, is as follows:

Damages.

18. A distrainer who takes an excessive distress, or takes a distress wrongfully, or wrongfully drives a distress out of the local municipality (as defined by *The Municipal Act*) in which the same was taken, shall be liable in damages to the owner of the chattels distrained (*x*).

In an action for excessive distress it is not necessary to allege malice(*y*).

(*t*) *Rocke* v. *Hills* (1887), 3 Times L.R. 298; *Knight* v. *Egerton* (1852), 7 Ex. 407; *Shultz* v. *Reddick* (1880), 43 U.C.R. 155, in which *Lucas* v. *Tarleton* (1858), 3 H. & N. 116, was distinguished.

(*u*) *Rodgers* v. *Parker* (1856), 18 C.B. 112; *Lucas* v. *Tarleton* (1858), 3 H. & N. 116.

(*v*) *Owen* v. *Taylor* (1878), 39 U.C.R. 358.

(*w*) *Netting* v. *Hubley* (1892), 26 N.S.R. 497.

(*x*) 52 Hen. III. (St. of Marlbridge), c. 4, in part; and 3 Ed. I. (St. of Westminster Prim.), c. 16; R.S.O. (1897), vol. III., c. 342, s. 18.

(*y*) *Huskinson* v. *Lawrence* (1865), 25 U.C.R. 58.

The tenant is entitled to recover damages for an excessive distress, although he is not prevented from carrying on his business, nor deprived of the use of the goods distrained(*z*); and although no special damage be proved(*a*).

Where a landlord makes an excessive distress and the goods when so distrained are destroyed by fire, the tenant is nevertheless entitled to damages for such excessive distress to the value of the excess, and such damages are not too remote(*b*). Goods destroyed by fire.

SECTION XI.

INTERFERENCE WITH DISTRESS.

1. *Fraudulent Removal.*
2. *Pound Breach and Rescue.*
3. *Resisting Bailiff.*

1. *Fraudulent Removal.*

Where goods have been fraudulently removed from the demised premises, after the rent falls due, to prevent a landlord from making a distress, he may follow and seize the goods, as already explained, and he may, in addition, proceed against the persons who have removed them. Fraudulent removal.

In case of fraudulent removal or concealment of goods, the landlord is entitled to recover double their value from the tenant, or any person knowingly aiding or assisting in such removal or concealment. This is provided by section 3 of the Statute 11 George II, chapter 19, which, as re-enacted in Ontario, is as follows:

(*z*) *Baylis* v. *Usher* (1830), 4 Moo. & P. 790; 7 Bing. 153.
(*a*) *Black* v. *Coleman* (1879), 29 U.C.C.P. 507.
(*b*) *Earnscliffe* v. *Lethbridge* (1900), 37 C.L.J. 123.

Double value.

13.—(1) If a tenant or lessee shall fraudulently remove and convey away his goods or chattels as aforesaid, or if any person shall wilfully and knowingly aid or assist any such tenant or lessee in such fraudulent conveying away, or carrying off, of any part of his goods or chattels or in concealing the same, every person so offending shall forfeit and pay to the landlord or lessor, from whose estate such goods and chattels were fraudulently carried off as aforesaid, double the value of the goods by him carried off or concealed as aforesaid to be recovered by action in any court of competent jurisdiction (*a*).

Imprisonment.

And if the goods do not exceed in value $200, on a complaint made before a justice of the peace, the offender may be ordered to pay to the landlord double the value of the goods, and in default, to be imprisoned for six months, unless the money so ordered to be paid shall be sooner satisfied. This is provided by section 4 of that Act which, as re-enacted in Ontario, is as follows:

13. (2) Where the goods and chattels so fraudulently carried off, or concealed, shall not exceed the value of $200, the landlord from whose estate such goods or chattels were removed, or his agent, may exhibit a complaint in writing against such offender before two or more justices of the peace of the same county, residing near the place whence such goods and chattels were removed, or near the place where the same were found, not being interested in the lands or tenements whence such goods were removed who may summon the offender, examine the fact, and all proper witnesses upon oath, and in a summary way determine whether such offender be guilty of the offence with which he is charged, and inquire in like manner of the value of the goods and chattels by him fraudulently carried off, or concealed, as aforesaid; and upon full proof of the offence, by order under their hands and seals, the said justices of the peace may and shall adjudge the offender to pay double the value of the said goods and chattels to the landlord at such time as the said justices shall appoint, and in case the offender, having notice of such order, shall refuse or neglect to do so, may and shall by warrant under their hands and seals, levy the same by distress and sale of the goods and chattels of the offender; and for want of such distress may commit the offender to the common gaol, there to be kept to hard labour, without bail or mainprize, for the space of six months, unless

(*a*) 11 Geo. II., c. 19, s. 3; R.S.O. (1897), vol. III., c. 342, s. 13 (1); R.S.B.C. (1897), c. 110, s. 19.

the money so ordered to be paid as aforesaid shall be sooner satisfied(*b*).

(3) Any person aggrieved by such order may appeal to the General Sessions in accordance with the provisions of *The Ontario Summary Convictions Act*(*c*). Appeal.

(4) Where the party appealing shall enter into a recognizance with one or two sufficient surety or sureties in double the sum so ordered to be paid, with condition to appear at such General Sessions and to abide the order there to be made, the order of the said justices shall not be executed against him in the meantime(*d*).

The section only applies where the goods removed are the property of the tenant(*e*). A tenant is not liable to prosecution under the Act, for the fraudulent and clandestine removal of goods from the demised premises, unless such goods are his own property, nor can goods which are not the tenant's property be distrained off the premises(*f*). Goods must be property of tenant.

2. *Pound Breach and Rescue.*

Where goods which have been distrained for rent and impounded, are taken from the place where they have been impounded, and where goods distrained have been rescued, the landlord is entitled to recover treble damages and costs of suit against the offender. This is provided by section 3 of the statute 2 William and Mary, session 1, chapter 5, which, as re-enacted in Ontario, is as follows: Treble damages.

15. Upon any pound breach, or rescue, of goods or chattels distrained for rent, the person grieved thereby shall, by action for the wrong thereby sustained, recover treble damages and costs of suit against the offender in any such rescue, or pound breach, or against

(*b*) 11 Geo. II. c. 19, s. 4; R.S.O. (1897), Vol. III. c. 342, s. 13 (2); R.S.B.C. (1897), c, 110, s. 20.

(*c*) 11 Geo. II. c. 19, s. 5,; R.S.O. (1897), Vol. III. c. 342, s. 13 (3).

(*d*) 11 Geo. II., c. 19, s. 6; R.S.O. (1897), Vol. III. c. 342 s. 13 (4).

(*e*) *Tomlinson* v. *Consolidated Credit Corporation* (1889), 24 Q.B.D. 135.

(*f*) *Martin* v. *Hutchinson* (1891), 21 Ont. 388.

the owner of the goods distrained, in case the same be afterwards found to have come to his use or possession(*g*).

In Nova Scotia, the person grieved is entitled to recover damages simply, not treble damages(*h*).

In an action under this section the plaintiff must establish both that he was the landlord and that rent was in arrear(*i*).

A reference to arbitration disentitles a plaintiff from recovering treble damages and costs in cases where he would otherwise be entitled to them under this section. The word "recover," used in the statute, means "recover by the verdict of a jury"(*j*).

In an action for treble damages for pound breach under this section, a landlord need not prove any special damage(*k*).

Larceny.

Where goods have been impounded, and are therefore in the custody of the law, it has been held that a person found taking them away is guilty of larceny, and may be apprehended without a warrant and taken before a justice of the peace(*l*).

Discovery.

The action under this section is a penal action, and in accordance with the usual rule in such cases the plaintiff is not entitled to examine for discovery(*m*), nor to an affidavit on production of documents by the defendant(*n*).

Rescue.

Rescue is the forcible taking away of goods before they

(*g*) 2 W. & M. Sess. 1, c. 5, s. 3; R.S.O. (1897), Vol. III., c. 342, s. 15; R.S.N.S. (1900), c. 167, s. 8; R.S.B.C. (1897), c. 110; C.S.N.B. (1904), c. 153, s. 14.

(*h*) R.S.N.S. (1900), c. 167, s. 8.

(*i*) *Berry* v. *Huckstable* (1850), 14 Jur. 718.

(*j*) *Clark* v. *Irwin* (1862), 8 C.L.J., O.S. 21.

(*k*) *Kemp* v. *Christmas* (1898), 79 L.T. 233.

(*l*) *Beatty* v. *Rumble* (1890), 21 Ont. 184; but see *Gordon* v. *Rumble* (1892), 19 Ont. App. 440.

(*m*) *Hobbs* v. *Hudson* (1890), 25 Q.B.D. 232.

(*n*) *Jones* v. *Jones* (1889), 22 Q.B.D. 425.

have been impounded, but after the distrainor has obtained possession of them.

The right of recaption upon a rescue only extends to cases where it can be effected upon fresh pursuit and without a breach of the peace(*o*).

3. *Resisting Bailiff.*

By section 144 of the *Criminal Code, 1892*, it is provided as follows:

Penalty.

144. (1). Every one is guilty of an indictable offence, and liable to ten years' imprisonment, who resists or wilfully obstructs any public officer in the execution of his duty, or any person acting in aid of such officer.

(2). Every one is guilty of an offence, and liable on indictment to two years' imprisonment, and on summary conviction before two justices of the peace, to six months' imprisonment with hard labour, or to a fine of one hundred dollars, who resists or wilfully obstructs—

(a) any peace officer in the execution of his duty, or any person acting in aid of any such officer;

(b) any person in the lawful execution of any process against any lands or goods, or in making any lawful distress or seizure(*p*).

Vendor re-taking goods.

A vendor taking possession of goods from the purchaser thereof, under an agreement which gives the vendor the right to take such goods upon default being made in paying for them, is not a person making a "lawful distress or seizure" within the meaning of this section, and the purchaser is not liable for resisting such a taking(*q*). But a bailiff making a distress for rent is protected by this provision.

In the case just cited, Mr. Justice Osler, in declaring the meaning of the last clause of the section, said:

"The case turns upon the proper meaning of the words in the last clause of the section, 'lawful distress or seizure.'

(*o*) *Rich* v. *Woolley* (1831), 7 Bing. 651; 33 R.R. 596.

(*p*) 55 & 56 Vict. (Dom.), c. 29.

(*q*) *Rex* v. *Shand* (1904), 7 Ont., L.R. 190; 40 C.L.J. 243.

It is needless to say that the written authority to the agent of the owner of the goods to resume possession is not process against goods. Nor is it a distress warrant issued by any common law or statutory authority. . . . All the antecedent provisions of the section deal with cases of interference with or obstruction of legal authority, whether exercised by public officers, peace officers under process against lands or goods, or by those engaged in executing a lawful distress, such as distress for rent. A 'lawful seizure' in connection with such provisions, must be something *ejusdem generis*, a seizure made in due course of or by the authority of law. The word itself denotes a taking of that character, and is not apt to describe the recaption or resumption of possession of goods by the mere act of the owner. . . . If the owner can acquire possession peacefully he may do so. If he attempts to take it forcibly and in a riotous manner, as was done in the case before us, he becomes himself a breaker of the law. . . . If resistance is offered or possession refused, he should have recourse to his action, and the statute would then have its full force in making unlawful any resistance to seizure made in due course of law. That is what is meant by a lawful seizure. It was never intended to enlarge or extend the civil rights or powers of individuals, or to convert a breach of contract or resistance to private force into a criminal offence."

Rent in arrear.

In a prosecution for resisting or obstructing a bailiff making a distress, under section 144 of the *Criminal Code, 1892*, all the ingredients which go to make up the offence must be established, one of which is the legality of the distress, and hence it must be shown that there was rent in arrear(*r*).

Where a bailiff, at the request of the owner, delivered

(*r*) *Rex* v. *Harron* (1903), 40 C.L.J. 27.

goods which he had seized into the hands of a third party, and took an undertaking from him to give up the goods on demand, it was held that the bailiff, in attempting to retake the goods, was not acting in the execution of a "process" within the meaning of the section, but was acting merely on the undertaking(*s*).

SECTION XII.

COSTS OF DISTRESS.

Costs.

In Ontario, it is provided by section 1 of the *Costs of Distress Act* (*a*), that where the rent does not exceed $80, no person making a distress for rent shall take or receive from any person, or out of the proceeds of the chattels distrained and sold, any other costs in respect of the distress than such as are set forth in schedule A to that Act. Section 1 and schedule A are as follows:

Ontario.

1. No person making a distress for rent or for a penalty where the sum demanded and due in respect of the rent or penalty does not exceed $80, and no person employed in making the distress or doing any act in the course of the distress, or for carrying the same into effect shall take or receive, from any person, or out of the produce of the chattels distrained and sold, any other costs in respect of the distress, then such as are set forth in Schedule A hereunto annexed.

SCHEDULE A.

Costs on distress for small rents and penalties.

1. Levying distress under $80..... $1.00
2. Man keeping possession, per diem..... 0.75
3. Appraisement, whether by one appraiser or more—two cents in the dollar on the value of the goods:
4. If printed advertisement, not to exceed in all..... 1.00
5. Catalogues, sale and commission, and delivery of goods—five cents in the dollar on the net produce of the sale.

(*s*) *Reg.* v. *Carley* (1898), 18 C.L.T. 26.

(*a*) R.S.O. (1897), c. 75.

Where the rent exceeds $80 it is further provided by section 2 as follows:

> **2.** When the sum to be levied by distress for rent or for any penalty exceeds the sum of $80, no further charges shall be made for, or in respect of, costs or expenses by any person making the distress, or employed in doing any act in the course of such distress than such as are set forth in Schedule A of this Act except the following that is to say:—
>
> (a) The actual expenses or outlay incurred in removing the goods distrained or part thereof when such removal is necessary.
>
> (b) Advertisement when necessarily published in a newspaper, $2, but not exceeding $5.
>
> (c) If any printed advertisement otherwise than in a newspaper $1, but not to exceed $3.
>
> (d) The sum of $1 per day for man keeping possession in lieu of 75 cents per day as allowed in said Schedule A.
>
> (e) Where the amount due shall be satisfied in whole or in part, after seizure and before sale the bailiff or person seizing shall be entitled to charge and receive but three per cent. on the amount realized in lieu of five per cent., and no more.

Where exempted goods are seized it is further provided by section 3 as follows:

> **3.** No costs shall be levied for or in respect of the seizure upon exempted goods when they may not be lawfully sold, and when sold no greater sum in all than $2, and actual and necessary payments for possession money, shall be levied or retained for or in respect of costs and expenses of sale of such exempted goods.

It is also provided that no person shall make any charge for anything mentioned in the schedule unless such thing has been actually done(*b*).

Penalty. If a person offends against any of the provisions of these sections the party aggrieved may apply to a Justice of the Peace for the county, city or town where the offence was committed for the redress of the grievance, whereupon the Justice shall summon the person complained of to appear before him at a reasonable time to be fixed in the summons, and the Justice shall examine into and hear the

(*b*) Section 5.

complaint and defence; and if it appears that the person complained of has so offended, the Justice shall order and adjudge treble the amount of the money unlawfully taken and full costs to be paid by the offender to the party aggrieved(*c*). Treble the amount.

In an order made by a Justice under section 6, it is sufficient to state the unlawful charges to have been taken "under a distress for rent," and it is unnecessary to state that such rent was under $80 in order to show jurisdiction(*d*).

The Justice, at the request of either party, may summon and examine witnesses and may administer an oath to them touching the complaint or distress(*e*).

The Justice is not empowered to make any order or judgment against the person for whose benefit the distress, seizure or sale has been made, unless such person personally levied the distress or personally made the seizure, or sale(*f*).

No person aggrieved by a seizure or sale of goods under a distress for rent or a penalty, or by any proceeding had in the course thereof, or by any costs or charges levied upon him in respect of the same, shall be barred from any action or remedy which he might have had before the passing of the Act, except so far as any complaint preferred under the Act has been determined by the order and judgment of the Justice before whom it has been heard and determined, and in case the matter of the complaint is made the subject of an action, the order and judgment may be given in evidence under the defence of "not guilty"(*g*). Action.

(*c*) Section 6.

(*d*) *Regina* v. *Stewart* (1865), 25 U.C.R. 327.

(*e*) Section 9.

(*f*) Section 12.

(*g*) Section 13.

Statement to be given.

Every person who makes and levies a distress shall give a statement in writing of the demand and all the costs and charges of the distress, signed by him to the person on whose goods and chattels the distress is levied, although the amount of the rent or penalty demanded exceeds the sum of $80(h).

Taxation.

The person whose goods are distrained, or the person authorizing the distress, or any other person interested may, upon giving two days' notice in writing, have the costs of the bailiff or other person making the distress, and the disbursements charged taxed by the clerk of the Division Court within whose division the distress has been made(i).

The bailiff or person so making the distress must furnish the clerk with a copy of his costs, charges and disbursements for taxation at the time mentioned in the notice, or at such other time as the clerk may direct, and in default of his so doing he will not be entitled to any costs, charges or disbursements whatever(j).

The clerk upon such taxation is required, amongst other things, to consider the reasonableness of any charges for removal, keeping possession, and for advertising, or any sums alleged to have been paid therefor, and he may examine either party on oath touching the same. The person requiring the taxation shall pay the clerk a fee of twenty-five cents therefor(k).

Revision.

Where that portion of the bill or charges in dispute amounts to the sum of $10, either party, may, on giving two days' notice, have the taxation revised by the clerk of the County Court who shall be paid a fee of fifty cents for

(h) Section 15.
(i) Section 16.
(j) Section 17.
(k) Section 18.

such revision by the person appealing, and such fee may, in the discretion of the clerk, be deducted from or added to the bill as finally taxed by him(*l*).

In any proceedings taken before a Justice under section 6 of the Act the taxation shall not be received as conclusive evidence(*m*).

British Columbia.

In British Columbia, similar provisions have been made by the *Distraint Procedure Act*(*n*). The schedule of costs fixed by that Act is as follows:

SCHEDULE A.

Levying distresses under one hundred dollars	$1.50
Levying distresses over one hundred dollars and under three hundred dollars	1.75
Levying distresses over three hundred dollars	2.00
Man keeping possession, per diem	2.00

Appraisement, whether by one appraiser or more—two cents in the dollar on the value of the goods:

Catalogues, sale and commission, and delivery of goods—on the net produces of the sale, if under one hundred dollars, ten cents in the dollar: if over one hundred and under three hundred dollars, eight cents: and if over three hundred dollars six cents.

Manitoba.

In Manitoba, provisions similar to the foregoing have been made by the *Act respecting Distress and Extra-Judicial Seizures*(*o*). The following is the schedule of fees allowed thereby:

SCHEDULE A.

TARIFF OF FEES.

1. Levying distress, one dollar ($1.00).
2. Man in possession, per day, one dollar and fifty cents ($1.50).
3. Appraisement, whether by one appraiser or more, two cents on the dollar on the value of the goods up to one thousand dollars, and one cent on the dollar for each additional one thousand dollars or portion thereof.

(*l*) Section 19.

(*m*) Section 20.

(*n*) R.S.B.C. (1897), c. 61.

(*o*) R.S.M. (1902), c. 49.

4. All reasonable and necessary disbursements for advertising.

5. Catalogue, sale, commission and delivery of goods, five per cent. on the net proceeds of the goods up to one thousand dollars, and two and one-half per cent. thereafter.

6. Mileage in going to seize, fifteen cents per mile one way.

7. All necessary and reasonable disbursements for removing and storing goods and removing and keeping live stock, and all other disbursements which, in the opinion of the Judge before whom any question as to the amount of the fees to be allowed under this Act may come for decision, are reasonable and necessary.

Nova Scotia.

In Nova Scotia, similar provisions have been made by the *Act respecting Costs and Fees*(*p*). The tariff of fees on a distress for rent is as follows:

FEES ON DISTRESS FOR RENT.

Warrant to bailiff	.50
Appraisement	.20
Notice and each necessary copy	.10
Appraisers, each	.25

On a sale or payment without sale, the same fees as to a sheriff

No custody money to be allowed.

Northwest Territories.

In the Northwest Territories, provision has been made in like cases by the *Ordinance respecting Distress for Rent and Extra-judicial Seizure*(*q*).

New Brunswick.

In New Brunswick, the costs of distress are regulated by section 23 of the *Landlord and Tenant Act*(*r*).

(*p*) R.S.N.S. (1900), c. 174.

(*q*) C.O., N.W.T., c. 34.

(*r*) C.S.N.B. (1904), c. 153.

CHAPTER XIV.

USE AND OCCUPATION.

Presumption of agreement.

Where premises are occupied by a person with the permission of the owner, a presumption arises that a reasonable compensation for their use has been agreed on between them(*a*).

An agreement, express or implied, must be established between the parties(*b*). But the plaintiff proving a legal title to the premises, and a mere naked possession by the defendant, is *primâ facie* entitled to a verdict; he need not prove an express attornment or contract between himself and defendant(*c*). An agreement will be implied where nothing appears except that the plaintiff is entitled to land which the defendant occupied(*d*).

Overholding tenant.

Thus, where a lessee holds over after the expiration of his term, he is liable in an action for use and occupation for the period so held over(*e*); the mere abstention by the landlord from his right to eject is a sufficient permission to enable him to maintain the action(*f*).

Where a tenancy has been determined by notice to quit or otherwise, and the tenant holds over, and no new tenancy is created by express or implied agreement between the parties, compensation for the period so held over cannot be recovered by distress(*g*).

(*a*) *Gibson* v. *Kirk* (1841), 1 Q.B. 850; *Bayley* v. *Bradley* (1848), 5 C.B. 396; *Leigh* v. *Dickeson* (1884), 15 Q.B.D. 60.

(*b*) *Crawford* v. *Seney* (1888), 17 Ont. 74.

(*c*) *Price* v. *Lloyd* (1846), 3 U.C.R. 120.

(*d*) *Churchward* v. *Ford* (1857), 2 H. & N. 446.

(*e*) *Seymour* v. *Graham* (1864), 23 U.C.R. 272; *McFarlane* v. *Buchanan* (1862), 12 U.C.C.P. 591.

(*f*) *Leigh* v. *Dickeson* (1884), 15 Q.B.D. 60.

(*g*) *Alford* v. *Vickery* (1842), C. & M. 280.

Assignment of reversion.

The action will also lie at the suit of a person who, having parted with his whole interest in the land, has no reversion in respect of which he could distrain(*h*).

An action will lie against a lessee who has assigned for the benefit of creditors, if he has continued to occupy the premises, although no formal re-assignment has been made to him(*i*).

It is no defence to an action for use and occupation that the plaintiff is himself the lessee of the premises under a lease which he has forfeited by breach of covenant in sub-letting to defendant, there being no averment that the plaintiff's lessor had taken any advantage of the forfeiture(*j*).

An action for use and occupation will lie against a person who, by express or implied agreement, has been substituted as tenant in place of the original lessee(*k*).

Presumption may be rebutted.

The presumption of an agreement to pay arising from occupation, may be rebutted by proof that the occupation was to be without compensation(*l*).

An intending purchaser who has been let into possession, and the purchase is not completed for want of title in the vendor, is not liable for use and occupation pending the negotiations, in the absence of an express agreement to pay rent(*m*); but if he continues in possession after the negotiations are off, he is liable(*n*). And an intended lessee, who has been let into possession under an agreement for a lease which the lessor fails to grant, is not

(*h*) *Pollock* v. *Stacy* (1847), 9 Q.B. 1033.

(*i*) *Blackburn* v. *Lawson* (1877), 2 Ont. App. 215.

(*j*) *Henderson* v. *Torrance* (1845), 2 U.C.R. 402.

(*k*) *Darch* v. *McLeod* (1858), 16 U.C.R. 614.

(*l*) *Howard* v. *Shaw* (1841), 8 M. & W. 118; *Crouch* v. *Tregonning* (1872), L.R. 7 Ex. 88.

(*m*) *Winterbottom* v. *Ingham* (1845), 7 Q.B. 611; *Temple* v. *McDonald* (1866), 6 N.S.R. (2 Old.) 155.

(*n*) *Howard* v. *Shaw* (1841), 8 M. & W. 118.

liable(*o*), except for the period of occupation after it has become clear that the lease cannot be granted(*p*).

Beneficial occupation.

But a tenant let into possession with a view to a lease being made, but no agreement has been concluded, is liable for the period during which he occupies, if the occupation has been beneficial(*q*).

Where lands are sold under power of sale in a mortgage, the mortgagor in possession is not liable to a purchaser for use and occupation between the date of the sale and the acceptance of the deed, where in the meantime the purchaser repudiated the purchase(*r*).

The owner of lands under lease who conveys them to a creditor in part payment of a debt, stipulating for a reconveyance in three years, is not liable for use and occupation to the creditor, although he has received rent during that period from the lessee(*s*).

In the absence of an express agreement to pay, an action will not lie against a steamboat owner for use and occupation of a wharf used in landing passengers(*t*).

Municipal Corporation.

Where a person sued a municipal council for the use and occupation of a room in his hotel as a court-room, and proved that the sheriff of the county had engaged the room, and that the chairman of the municipal council had signed an order for the payment of his charges, it was held that no agreement was proved and the action could not be maintained(*u*).

(*o*) *Rumball* v. *Wright* (1824), 1 C. & P. 589.

(*p*) *Fawkner* v. *Booth* (1893), 10 Times L.R. 83.

(*q*) *Coggan* v. *Warwicker* (1852), 3 C. & K. 40.

(*r*) *Osborne* v. *Jones* (1857), 15 U.C.R. 296.

(*s*) *Matthie* v. *Rose* (1851), 9 U.C.R. 602.

(*t*) *Glendinning* v. *Turner* (1885), 9 Ont. 34.

(*u*) *Dark* v. *Municipal Council of Huron and Bruce* (1857), 7 U.C.C.P. 378.

Tenant in common.

A tenant in common in actual occupation of the joint estate, is not chargeable with rent. It would be otherwise if he had been in actual receipt of rent from third parties(*v*).

Where one of two tenants in common makes a lease, the other is not entitled to distrain for any part of the rent, as there was no demise from him, and his only remedy is an action for use and occupation(*w*).

Where it is quite evident that the defendant did not occupy under the plaintiff, or with his permission, either express or implied, but under a third person, the plaintiff will be nonsuited(*x*). So, the action will not lie against a person who holds under a title adverse to the plaintiff, or against a mere trespasser(*y*).

Mistake of title.

No occupation rent should be charged against one who has been in occupation of land under mistake of title, in respect of the increased value thereof arising from improvements which are not allowed him(*z*).

Actual entry.

In order that the action may be maintained, it is necessary that there should be an actual entry by the defendant, or his tenant or agent, for purposes of occupation, under an agreement with the plaintiff. Proof of a written agreement to take the premises from a future time, was held to be insufficient to render a defendant liable for use and occupation, without proof of entry(*a*).

(*v*) *Rice* v. *George* (1873), 20 Gr. 221; *LeCain* v. *Hosterman* (1877), 11 N.S.R. (2 R. & C.) 229.

(*w*) *Lowther* v. *Johnson* (1898), 34 C.L.J. 430; *Harrison* v. *Barnby* (1793), 5 T.R. 246; 2 R.R. 584, distinguished.

(*x*) *McDonald* v. *Brennan* (1848), 5 U.C.R. 599; *Newport* v. *Hardy* (1841), 2 D. & L. 921.

(*y*) *Tew* v. *Jones* (1844), 13 M. & W. 12; *Phillips* v. *Homfray* (1883), 24 Ch. D. 439, at p. 461.

(*z*) *McGregor* v. *McGregor* (1884), 5 Ont. 617.

(*a*) *Woolley* v. *Watling* (1836), 7 C. & P. 610.

A person who does not occupy and has no power to take a lease cannot be charged an occupation rent(*b*).

But entry by one of two or more tenants is sufficient as against all(*c*).

Executors. Executors may be liable although they have not occupied, if their testator was in occupation(*d*).

Mere temporary occupation is not sufficient to render the occupant liable for use and occupation. Thus, where an assignee of the tenant for the benefit of his creditors entered for the purpose of conducting a sale of the tenant's goods, it was held that the assignee was not liable(*e*). But acts of ownership, such as sending in a person to clean and paper rooms, have been held sufficient(*f*).

It is not necessary that the occupation should continue until the tenancy has been determined. The tenant may be liable for use and occupation, even after he has ceased to occupy, if there was a definite tenancy, as for example, a tenancy from year to year which has not been determined(*g*); and the liability continues until the tenancy has been properly determined(*h*).

Occupation of sub-lessee. A lessee's liability is not at an end when the lease has expired, even if he ceases to occupy; thus, if the premises are in the possession of a sub-lessee, the lessor may refuse to accept the possession, and hold the original lessee liable, as the lessor is entitled to receive the absolute possession at the end of the term(*i*).

(*b*) *Edinburgh Life Assurance Co.* v. *Allen* (1876), 23 Gr. 230.
(*c*) *Glen* v. *Dungey* (1849), 4 Ex. 61.
(*d*) *Atkins* v. *Humphrey* (1846), 2 C.B. 654.
(*e*) *How* v. *Kennett* (1835), 3 A. & E. 659.
(*f*) *Smith* v. *Twoart* (1841), 2 M. & Gr. 841.
(*g*) *Hughes* v. *Brooke* (1881), 43 U.C.R. 609.
(*h*) *Bessell* v. *Landsberg* (1845), 7 Q.B. 638.
(*i*) *Harding* v. *Crethorn* (1793), 1 Esp. 57; *Cristy* v. *Tancred* (1840), 7 M. & W. 127; *Henderson* v. *Squire* (1869), L.R. 4 Q.B. 170; *Ibbs* v. *Richardson* (1839), 9 A. & E. 849; followed in *Lindsay* v. *Robertson* (1899), 30 Ont. 229.

A tenancy from year to year is not determined by the death of the lessor, and his devisee may maintain an action for use and occupation thereunder, although the lessee had ceased to occupy the premises, if he might have occupied, had he so pleased(*j*).

Accrues from day to day.

In the absence of an agreement to hold for a definite time, the compensation to be paid ceases when the occupation ceases, and where no express time is mentioned for its payment, it is deemed to accrue from day to day(*k*). Such compensation may be recovered in an action for use and occupation, where there has been no express agreement as to the amount of rent to be paid. And the action may be brought in cases where a rent has been agreed on, if the lessor is precluded from claiming the whole rent but is entitled to a part of it. Thus, where the lessee has been lawfully evicted by title paramount he may be sued for a proportion of the rent up to the time of eviction(*l*).

Executors may sue for use and occupation of their testator's land during his life-time(*m*), but not where the agreement was for payment in produce, and not in money(*n*).

Where the defendant held land from, and paid rent to, a person who never claimed to own the land but who acted as manager for the owner who had disappeared, it was held that the executors of such person could recover for use and occupation, although the money, when received, would be held in trust for the owner(*o*).

Mortgagee.

A mortgagee whose mortgage was made after the lease may maintain the action against a tenant after notice to

(*j*) *Hughes* v. *Brooke* (1881), 43 U.C.R. 609.
(*k*) *Gibson* v. *Kirk* (1841), 1 Q.B. 850.
(*l*) *Tomlinson* v. *Day* (1821), 2 B. & B. 680.
(*m*) *Seymour* v. *Graham* (1864), 23 U.C.R. 272.
(*n*) *Wallis* v. *Harold* (1864), 23 U.C.R. 279.
(*o*) *Baldwin* v. *Foster* (1862), 21 U.C.R. 152.

him to pay(*p*), but not a mortgagee whose mortgage was made before the lease unless a new tenancy has been created between them(*q*).

Company.

Where an incorporated company, who had occupied certain premises under an oral agreement and paid rent for a year, continued in possession after the year, and then went out, paying rent for the time they were actually in possession, it was held that, as there was no lease under seal, the company were not liable as tenants from year to year, but only for use and ocupation while actually in possession(*r*).

Although a lease made by an incorporated company may be void in consequence of its being executed without the corporate seal, still if the lessee enters and holds under it, he will be liable for use and occupation during the time he so holds(*s*).

Right of action suspended.

The right of action for rent is suspended where a distress has been made and the goods distrained remain unsold in the landlord's hands(*t*).

If rent is agreed to be paid at a stated time, an action will not lie for use and occupation before that time has elapsed(*u*).

Where no rent is payable until some condition has been performed by the lessor, as for example, to put the premises in repair, which he has failed to do, the tenant is liable, if the occupation has been beneficial, for what it is

(*p*) *Burrowes* v. *Gradin* (1843), 1 D. & L. 213.

(*q*) *Downe (Lord)* v. *Thompson* (1847), 9 Q.B. 1037.

(*r*) *Garland Manufacturing Co.* v. *Northumberland Paper and Electric Co.* (1899), 31 Ont. 40, following *Finlay* v. *Bristol and Exeter Railway Co.* (1852), 7 Ex. 409.

(*s*) *Finlayson* v. *Elliott* (1874), 21 Gr. 325.

(*t*) *Lehain* v. *Philpot* (1875), L.R. 10 Ex. 242; 44 L.J. Ex. 225; *Smith* v. *Haight* (1900), 4 Terr. L.R. 387; *Gray* v. *Curry* (1889), 22 N.S.R. 262.

(*u*) *Collett* v. *Curling* (1847), 10 Q.B. 785.

reasonably worth(*v*). But a tenant is not liable for use and occupation, where he has occupied under an agreement for a lease by which no rent was to be paid until the fulfilment of certain conditions which were never fulfilled(*w*).

Damages.

Where rent has been agreed to be paid, such rent will be the measure of damages, although the lease is void under the Statute of Frauds, as that statute will not prevent recovery for use and occupation(*x*).

Where no agreement has been made as to compensation, or where, an agreement having been made, other circumstances have to be considered, the measure of damages is the reasonable value of the occupation which has been enjoyed(*y*). The value of the occupation should not be estimated by calculating the interest on the value of the land(*z*).

Estoppel.

A person who occupies the land of another with his permission, and is thus liable for use and occupation, is estopped from denying the title of the person who let him into possession(*a*).

A lessor who has recovered in an action of ejectment, is not estopped from recovering in a subsequent action for use and occupation after the expiry of the term, although he made a claim in the first action for use and occupation but gave no evidence in support of it(*b*).

(*v*) *Smith* v. *Eldridge* (1854), 15 C.B. 236; *Dawes* v. *Dowling* (1874), 31 L.T. 65.

(*w*) *Toronto Hospital Trustees* v. *Heward* (1858), 8 U.C.C.P. 84.

(*x*) *Smallwood* v. *Sheppards*, [1895] 2 Q.B. 627.

(*y*) *Mayor of Thetford* v. *Tyler* (1845), 8 Q.B. 95.

(*z*) *Fraser* v. *Kaye* (1892), 25 N.S.R. 102; *Bickle* v. *Beatty* (1859), 17 U.C.R. 465.

(*a*) *Burrows* v. *Gates* (1858), 8 U.C.C.P. 121.

(*b*) *Elliott* v. *Elliott* (1890), 20 Ont. 134.

A judgment in replevin for the wrongful taking of goods under a distress for rent, is no bar to an action for use and occupation(*c*).

At common law, an action for use and occupation was liable to be defeated in case it was proved that there was a demise(*d*).

By section 14 of the statute 11 George II., chapter 19(*e*), it was provided that an action brought for use and occupation should not be defeated by proof of a parol demise, or any agreement not being by deed, reserving a certain rent, but that such demise might be used as evidence of the *quantum* of damages to be recovered. This section was re-enacted in British Columbia by section 25 of the *Landlord and Tenant Act*(*f*), as follows: 11 Geo. II., c. 19.

> **25.** It shall be lawful for the landlord, where the agreement is not by deed, to recover by action in any court of competent jurisdiction a reasonable satisfaction for the lands, tenements, hereditaments held, used or occupied by the defendant for such use and occupation thereof; and if at the trial of such action it shall appear that any rent has been reserved by a parol demise, or any agreement (not being by deed) such rent may be the measure of the damages to be recovered by the plaintiff.

This section of the statute has been repealed in Ontario by the *Statute Law Revision Act, 1902*(*g*). Repealed in Ontario.

If there was a demise by deed, the action for rent should be brought thereon and not under the statute(*h*), and an action for use and occupation will not lie(*i*).

(*c*) *Crooks* v. *Bowes* (1863), 22 U.C.R. 219.

(*d*) *Churchward* v. *Ford* (1857), 2 H. & N. 446.

(*e*) R.S.B.C. (1897), c. 110, s. 25; R.S.N.S. (1900), c. 172, s. 17; C.S.N.B. (1904), c. 153, s. 24.

(*f*) R.S.B.C. (1897), c. 110.

(*g*) 2 Edward VII., c. 1, s. 2, schedule.

(*h*) *Dungey* v. *Angove* (1794), 2 Ves. 304, at p. 307; 2 R.R. 217.

(*i*) *McFarlane* v. *Buchanan* (1862), 12 U.C.C.P. 591.

Agreement for a lease.

Where there is only an agreement for a lease, and not a lease, between the parties, it has been held that an action for use and occupation, and not for debt on the demise, was the proper form of action(*j*). But the action could be brought under the statute, upon an agreement by deed, if it did not amount to an actual demise(*k*).

Apportionment.

If a tenancy was determined between gale days no compensation was recoverable under the Act of George II.(*l*). But it is now recoverable by virtue of the Act providing for the apportionment of rent(*m*).

(*j*) *McLean* v. *Young* (1850), 1 U.C.C.P. 22; see also *Thompson* v. *Bennett* (1867), 17 U.C.C.P. 380.

(*k*) *Pitman* v. *Woodbury* (1848), 3 Ex. 4.

(*l*) *Grimman* v. *Legge* (1828), 8 B. & C. 324; 32 R.R. 398.

(*m*) See chapter XII.

CHAPTER XV.

TAXES.

Landlord liable.

As a general rule, in the absence of any express stipulation in the lease as to the payment of taxs, the landlord, as between the parties to the lease, is liable to pay them(*a*).

Municipal corporation.

It is otherwise, however, where the lessor is a municipal corporation. Property of a municipal corporation, when occupied by a tenant other than a servant or officer for the purpose of the corporation, is subject to taxation, and such tax is a tenant's tax payable by him, in the absence of an express agreement to the contrary(*b*).

Also, where a tenant holds under a lease renewable in perpetuity, he may be regarded as the "owner" within the meaning of the *Assessment Act*, and as such, is liable to taxation without recourse to the owner in fee(*c*).

Where a municipality entered into a written agreement with a railway company to grant a lease for successive terms of fifty years each, during all time to come, at a specified rent, but no mention was made of taxes, it was held that the fixing of the rent payable to the city did not interfere with the right of the latter in its governmental capacity of exercising its sovereign power to lay taxes upon the property when under lease. Taxes and rent are distinct things, and collectable by the corporation in different capacities, and the imposition of the yearly taxes is

(*a*) *Dove* v. *Dove* (1868), 18 U.C.C.P. 424.

(*b*) *In re Canadian Pacific Railway Co. and the City of Toronto* (1902), 4 Ont. L.R. 134; *Scragg* v. *City of London* (1868), 28 U.C.R. 457.

(*c*) *In re Canadian Pacific Railway Co. and the City of Toronto* (1902), 4 Ont. L.R. 134.

not a derogation from or inconsistent with the contract(*d*).

Tenant liable in first instance.

Whether or not a tenant has agreed with his landlord to pay the taxes on the demised premises, the tenant is liable to pay them, in the first instance, to the municipality levying the same, if he has been assessed for the premises; and the taxes may be recovered from him by the municipality either by distress or by action(*e*).

Under section 20 of the *Assessment Act* of Ontario(*f*), land is to be assessed against both the owner and occupant.

By section 134 of that Act it is provided that the collector shall call on the person taxed, and demand payment of the taxes, or leave a notice specifying the amount.

When payable.

Under section 135 of the *Assessment Act*, as amended by a later Act(*g*), in case a person neglects to pay his taxes for fourteen days after such demand, or after notice served, the collector may levy the same with costs by distress, as follows:

Goods liable for taxes.

1. Upon the goods and chattels, wherever found, within the county in which the local municipality lies, belonging to or in possession of the person who is actually assessed for the premises, and whose name appears upon the collector's roll for the year as liable therefor;

2. Upon the interest of the person assessed in any goods on the premises, including his interest in any goods to the possession of which he is entitled under a contract for purchase, or a contract by which he may, or is to become the owner thereof upon performance of any condition;

3. Upon the goods and chattels of the owner of the premises, found thereon, whether such owner is assessed in respect of the premises or not;

(*d*) *In re Canadian Pacific Railway Co. and the City of Toronto* (1902), 4 Ont. L.R. 134.

(*e*) R.S.O. (1897), c. 224, ss. 20, 135, and 142.

(*f*) R.S.O. (1897), c. 224.

(*g*) Ont. Stat. 62 Vict. (1899), c. 27, s. 10.

4. Upon any goods and chattels on the premises, where title to the same is claimed in any of the ways following:

(a) By virtue of an execution against the owner or person assessed; or

(b) By purchase, gift, transfer or assignment from the owner or person assessed, whether absolutely or in trust, or by way of mortgage, or otherwise; or

(c) By the wife, husband, daughter, son, daughter-in-law or son-in-law of the owner or person assessed, or by any relative of his, in case such relative lives on the premises as a member of the family; or

(d) Where the goods liable for the taxes, have been exchanged between two persons by the one borrowing or hiring from the other for the purpose of defeating the claim of, or the right of distress for the non-payment of taxes;

And, subject to the provisions of the preceding clause numbered 4, where the owner or person assessed is not in possession, the goods and chattels on the premises, not belonging to the owner or person assessed, shall not be subject to seizure; and the possession by the tenant of said goods and chattels on the premises shall be sufficient *primâ facie* evidence that they belong to him.

In any part of the county.

It is provided, however, that in cities and towns, and in any other local municipality having power to sell lands for the non-payment of taxes, no distress for the taxes upon each parcel of vacant property shall be made on the goods or chattels of the owner in any part of the county, other than upon such property, and this provision is retroactive so as to apply to the returns for arrears of taxes for the years 1896 and 1897(*h*).

(*h*) Ont. Stat. 62 Vict. (1899), c. 27, s. 10.

It is provided, nevertheless, that no goods which are in the possession of the person liable to pay such taxes for the purpose only of storing or warehousing the same, or of selling the same upon commission or as agent, shall be levied upon or sold for such taxes.

Assignee for creditors.

And it is further provided that goods in the hands of an assignee for the benefit of creditors, or in the hands of a liquidator under a winding up order, shall be liable only for the taxes of the assignor or of the company which is being wound up, and for the taxes upon the premises in which the said goods were at the time of the assignment or winding up order, and thereafter while the assignee or liquidator occupies the premises, or while the goods remain thereon(*i*).

Goods exempt.

In Ontario, the goods and chattels exempt by law from seizure under execution are not liable to seizure by distress for taxes, unless they are the property of the person who is actually assessed for the premises, and whose name also appears upon the collector's roll for the year as liable therefor(*j*).

The person claiming such exemption must select and point out the goods and chattels as to which he claims exemption(*k*).

Distress before due.

If at any time after demand has been made, or notice served by the collector as aforesaid, and before the expiry of the time for payment of the taxes, the collector has good reason to believe that any person in whose hands goods and chattels are subject to distress under the preceding provisions, is about to remove such goods and chattels out of the municipality before such time has expired, and makes affidavit to that effect before the mayor or reeve

(*i*) R.S.O. (1897), c. 224, s. 135.

(*j*) R.S.O. (1897), c. 224, s. 135, sub-sec. (2).

(*k*) R.S.O. (1897), c. 224, s. 135, sub-sec. 3.

of the municipality, or before any Justice of the Peace, such mayor, reeve or Justice shall issue a warrant to the collector authorizing him to levy for the taxes and costs, although the time for payment thereof may not have expired, and such collector may levy accordingly(*l*).

A lessee of premises should not be assessed as occupier when he no longer occupies them, although his term still continues; but where he has been assessed, and has omitted to appeal, he is liable to pay the sum assessed against him, and he is not entitled to replevy his goods which have been seized to satisfy them(*m*).

Goods of a tenant that are under distress for rent are *in custodiâ legis,* and cannot be seized by a tax collector for arrears of taxes(*n*). Custody of the law.

In Ontario, it is provided by statute that rents or other income derived from real estate, except interest on mortgages, shall be exempt from taxation(*o*).

The extent of the liability of a lessee who has entered into a covenant for the payment of taxes depends on the words used.

In Ontario, the form of covenant for the payment of taxes provided in the *Act respecting Short Forms of Leases*(*p*), is as follows: "and to pay taxes, except for local improvements." These words in a lease expressed to be made in pursuance of the Act are to be construed and to have the same effect as the following:

"And also will pay all taxes, rates, duties, and assessments whatsoever, whether municipal, parliamentary or otherwise, now charged or hereafter to be charged upon the Covenant for payment.

(*l*) R.S.O. (1897), c. 224, s. 135 (4).
(*m*) *McCarrall* v. *Watkins* (1860), 19 U.C.R. 248.
(*n*) *Jones* v. *Burnstein*, [1899] 1 Q.B. 470.
(*o*) R.S.O. (1897), c. 224, s. 7, sub-sec. 27.
(*p*) R.S.O. (1897), c. 125.

said demised premises, or upon the said lessor on account thereof, except municipal taxes for local improvements or works assessed upon the property benefited thereby."

The construction of a covenant for the payment of taxes by a lessee has been in some respects declared by statute.

Local improvements.

Thus, it is provided in Ontario, that in a lease for a term less than seven years, a covenant by the lessee for the payment of taxes shall not, unless otherwise agreed, be deemed to include taxes for local improvements, but it is otherwise in a lease for more than seven years when the land only belongs to the lessor. This is enacted by section 17 of the *Landlord and Tenants' Act*(*q*), as amended by a later Act(*r*), which is as follows:

> **17.** In the case of leases made on or after the 1st day of September, 1897, unless it is therein otherwise specifically provided, a covenant by a lessee for payment of taxes shall not be deemed to include an obligation to pay taxes assessed for local improvements. But a lease for a term not less than seven years when the land only belongs to the lessor, and made under *The Act respecting Short Forms of Leases* containing the covenant on the part of the lessee to pay taxes, and omitting the words "except for local improvements," shall be deemed a covenant by the lessee for payment of taxes assessed for local improvements within the meaning of this section.

Before this section was passed, it was held that under a covenant to pay "all taxes, rates, duties, and assessments whatsoever, . . . now charged or hereafter to be charged upon the said demised premises," the lessee was liable for local improvement taxes and for the additions made under the *Assessment Act* year by year to the amount of the taxes in arrear or additions made by the municipality(*s*).

(*q*) R.S.O. (1897), c. 170.

(*r*) Ont. Stat. (1901), 1 Ed. VII., c. 12, s. 27.

(*s*) *Boulton* v. *Blake* (1886), 12 Ont. 532.

Special rate.

An ordinary lease under the Short Forms Act, containing the words "and to pay taxes," covers a special rate created by a corporation by-law as well as all other taxes(*t*).

Drainage taxes.

So, a covenant to pay all taxes does not include drainage taxes unless they are expressly mentioned. But in the case of a lessee exercising an option to purchase contained in the lease, the drainage taxes paid by the owner, for drainage work done after the date of the lease, are to be added to the purchase price and paid by the lessee. This is provided by section 87 of the *Municipal Drainage Act*(*u*), which is as follows:

> **87.** Any agreement on the part of any tenant to pay the rates or taxes in respect of the demised lands, shall not include the charges and assessments for any drainage work unless such agreement in express terms so provides; but in cases of contract to purchase, or of leases giving the lessee an option to purchase, the said charges and assessments for drainage work, in connection with which proceedings were commenced under this Act, after the date of the contract or lease, and which have been already paid by the owner, shall be added to the price, and shall be paid by the purchaser or the lessee, in case he exercises his option to purchase; but the amount still unpaid on the cost of the work or repair, and charged against the lands shall be borne by the purchaser unless otherwise provided by the conveyance or agreement.

Costs of abating nuisance.

A lease for years contained a covenant by the lessee to "pay and discharge all taxes, rates, including sewer main drainage assessments and impositions whatsoever which now are or which may, at any time or times hereafter during the continuance of the said term hereby granted, be taxed, rated, assessed, charged or imposed upon, or in respect of, the said premises or any part thereof, on the landlord, tenant or occupier of the same premises, by authority of Parliament or otherwise howsoever (landlord's pro-

(*t*) *In re Michie and City of Toronto* (1861), 11 U.C.C.P. 379.
(*u*) R.S.O. (1897), c. 226.

perty tax and tithe only excepted)." There was no repairing covenant in the lease. Notice was given to the lessor by the sanitary authority of the district under the Public Health (London) Act, 1891, to abate a nuisance caused by a foul and offensive privy on the premises, by removing the privy and constructing a water-closet in accordance with the by-laws of the London County Council. The lessor thereupon did the work required by the notice, and subsequently sued the lessee to recover the expense incurred by him in so doing. It was held that this expense was covered by the words "impositions charged or imposed upon or in respect of the said premises on the landlord, tenant or occupier of the same" in the covenant, and therefore that the action was maintainable(*v*).

Where, by a covenant in a lease, the lessee covenanted that he would during the term pay and bear all present and future rates, taxes, duties, assessments, and outgoings charged upon the demised premises, or the owner or occupier in respect thereof, it was held that the covenant did not apply to expenses of private street works which, under the Private Street Works Act, 1892, had become a charge upon the premises on the completion of the works before the date of the commencement of the term granted by the lease, though not payable until after that date(*w*).

Outgoings.

The plaintiff let a house to the defendant for a term of three years, the tenant agreeing to pay all "outgoings payable in respect of the premises." During the tenancy the plaintiff in obedience to an order from the sanitary authority, reconstructed the drainage system of the house. It was held that the shortness of the term was no reason for putting a more limited construction upon the expres-

(*v*) *Foulger* v. *Arding*, [1902] 1 K.B. 700.

(*w*) *Surtees* v. *Woodhouse*, [1903] 1 K.B. 396, following *Stock* v. *Meakin*, [1900] 1 Ch. 683.

sion "outgoings" than that which would have been put upon it in a lease for a longer period, and that the defendant was liable under his agreement to recoup the plaintiff the expense of the drainage work(*x*).

Sanitary drains.

A landlord let a house to a tenant for three years at the "clear yearly rent" of £54, to be paid "free and clear of and from all deductions whatsoever," property tax excepted. The tenant covenanted to pay the rent and to pay and discharge "all rates, taxes, assessments, and impositions whatsoever," whether "parliamentary, parochial, or otherwise," that might become due or assessed in respect of the premises during the tenancy, property tax excepted, and to keep the premises in as good repair as at the commencement of the tenancy, fair wear and tear excepted. The landlord covenanted to keep the main walls and roof in repair during the tenancy. It was held that the duty and expense of complying with a notice from the sanitary authority to reconstruct the drains constituted an "imposition," within the agreement which fell on the tenant notwithstanding the absence of such words as "imposed on the landlord or tenant," and notwithstanding the shortness of the tenancy(*y*).

Lessee not assessed.

Where a tenant agrees to pay taxes on the land demised to him, the omission of the assessor to enter his name on the assessment roll, or the failure of the landlord to appeal to the Court of Revision to have the omission rectified, does not relieve the tenant from his obligation(*z*).

Deduction from rent.

A covenant by a tenant to pay all assessments, etc., extends to an assessment imposed by an Act of Parliament, with a clause empowering the tenant to deduct it from his

(*x*) *Stockdale* v. *Ascherberg*, [1903] 1 K.B. 873.

(*y*) *In re Warriner*, *Brayshaw* v. *Ninnis*, [1903] 2 Ch. 367; *Foulger* v. *Arding*, [1902] 1 K.B. 700, 710, and *Stockdale* v. *Ascherberg*, [1903] 1 K.B. 873, considered and applied.

(*z*) *Janes* v. *O'Keefe* (1896), 26 Ont. 489; 23 Ont. App. 129.

rent. Thus, where commissioners appointed under an Act were authorized to pave and flag footways, and the costs thereof, were to be paid by the tenants or occupiers of the houses next adjoining; in default whereof, they were to be recovered by distress, and the Act empowered the tenant to deduct the costs so paid by him out of his rent, it was held that this charge was within the terms of a covenant in a lease subsequently made, whereby the tenant covenanted to pay all taxes, rates, duties, levies, assessments, and payments whatever, which were, or during the term might be rated, levied, assessed, or imposed on the premises(*a*).

Taxes for year in which lease is made.

It has been held that a lessee is not liable, under a covenant for payment of taxes, to pay the taxes assessed against the lessor for the year in which the lease is made. Thus, in a lease of a farm for a year from the 27th September, 1872, where the lessee covenanted to pay during the term "all taxes, rates, . . . assessments . . whatsoever, whether parliamentary, municipal or otherwise, which now are or which, during the continuance of the said term, . . . shall at any time be rated, charged, assessed, or imposed in respect of the said premises," with a proviso for re-entry for breach of the covenant, it was held that the lessee was not liable for the taxes for 1872, which had been assessed against the lessor; for the words, "all rates, etc., which now are," referred to the kind or character of the taxes assessable against the land, and the words, "or which shall at any time," etc., to any other kind of taxes which might thereafter be imposed(*b*).

Lessee buying at tax sale.

But where one of two lessees who had covenanted to pay all taxes during a term of four years from the 1st of October, 1880, purchased the demised lands at a sale there-

(*a*) *Payne* v. *Burridge* (1844), 12 M. & W. 727.
(*b*) *Macnaughton* v. *Wigg* (1874), 35 U.C.R. 111.

of for taxes due for the years 1880 and 1882, it was held that such lessee could not hold the title so acquired against the lessors and a subsequent mortgagee, as the lessees were both bound under their covenant to pay the taxes for which the land was sold(*c*).

A lessee covenanted in a lease made pursuant to the *Act respecting Short Forms of Leases*, to pay all taxes "to be charged upon the said demised premises or upon the said lessor on account thereof." The premises consisted of a building, with a lane in the rear described as being "north of the premises hereby demised," over which the lease provided that the lessee might at any time erect a building or extension, provided the same was always nine feet above the ground, and in accordance with which the lane was built over. The lease also provided that if the lessors elected not to renew, they were to pay a fair valuation for the building which should at any time be erected "on the lands and premises hereby demised and over the said lane." It was held that the words "demised premises" in the covenant referred only to the building lot itself, and not to the interest in the lane which passed by the lease(*d*).

When payable.

Under a covenant to pay taxes a lessee has not got the whole term to pay them in, but is liable to pay them when they become due, and they become due when demanded by the collector(*e*).

Forfeiture.

A breach of a covenant for the payment of taxes will not work a forfeiture, if the taxes are paid before action, or even after action and before a statement of claim is filed(*f*).

(*c*) *Heyden* v. *Castle* (1888), 15 Ont. 257.
(*d*) *Janes* v. *O'Keefe* (1896), 26 Ont. 489; 23 Ont. App. 129.
(*e*) *Taylor* v. *Jermyn* (1865), 25 U.C.R. 86.
(*f*) *Buckley* v. *Beigle* (1885), 8 Ont. 85.

Assigns liable if mentioned.

A covenant for the payment of taxes where "assigns" are named in the covenant has been held to be a covenant that runs with the land(*g*). It has been held in Nova Scotia that a covenant for the payment of taxes, assigns not being named, is purely personal, and does not run with the land(*h*).

Tenant for life.

A tenant for life of property, part of which is productive and part unproductive, is bound to keep down taxes on the whole(*i*).

"Usual" covenant.

Primâ facie, a covenant by a tenant to pay taxes is a "usual" covenant, and it lies upon the tenant objecting to it to shew by competent evidence that it is not so in his case, or in this country(*j*).

Evidence.

Upon a reference to settle the form of lease, under a contract by a municipal corporation to demise land owned by it to a railway company for a long term of years with perpetual right of renewal, evidence of surrounding circumstances and the practice and usage of conveyancers is admissible to enable the referee to decide whether the lease should contain a covenant by the lessee to pay municipal taxes. Upon such a reference the referee is entitled to rule as to the evidence to be admitted, and he should not be ordered to admit, subject to objection, all evidence which may be tendered(*k*).

Deduction from rent.

When the landlord is liable for the taxes, the tenant may deduct any taxes paid by him from the rent due to the

(*g*) *Wix* v. *Rustow*, [1899] 1 Q.B. 474.

(*h*) *McDuff* v. *McDougall* (1889), 21 N.S.R. 250.

(*i*) *Biscoe* v. *Van Bearle* (1858), 6 Gr. 438; *Gray* v. *Hatch* (1871), 18 Gr. 72; *In re Denison, Waldie* v. *Denison* (1893), 24 Ont. 197.

(*j*) *In re Canadian Pacific Railway Co. and City of Toronto* (1902), 4 Ont. L.R. 134.

(*k*) *In re Canadian Pacific Railway Co. and the City of Toronto* (1900), 27 Ont. App. 54.

landlord(*l*). In Ontario, this is provided by section 26 of the *Assessment Act* (*m*), which is as follows:

26. Any occupant may deduct from his rent any taxes paid by him, if the same could also have been recovered from the owner, or previous occupant, unless there is a special agreement between the occupant and the owner to the contrary.

It has been held that this section authorizes a tenant to deduct taxes paid by him from his rent, only when he can be compelled to pay them; and if for any reason the collector has no right to collect them, as for example, where no valid demand has been made, the tenant has no right to deduct them(*n*).

Night watchmen.

In Ontario, it is provided by statute that the special rate levied by by-law, in cities, towns and villages, for the expenses of the employment of night watchmen, shall, as between the landlord and tenant of any premises comprised within the limits defined by the by-law, be borne by the tenant, for the period of time of his occupation, unless there is an express agreement to the contrary(*o*).

Snow fences.

It is provided by statute that when a tenant is required to pay the costs of taking down, altering or removing fences, under the *Act respecting Snow Fences*(*p*), he may deduct the same from the rent payable by him, unless he has agreed with his landlord to pay them. Section 2 of the Act is as follows:

2. In case the owner or occupant refuses or neglects to take down, alter, or remove the fence, and to construct such other fence as required by the council, the council may, after the expiration of two months from the time the compensation to be paid by the council has been agreed upon or settled by arbitration, proceed to take down, alter, or remove the old fence and construct the other

(*l*) See chapter XII.

(*m*) R.S.O. (1897), c. 224.

(*n*) *Carson* v. *Veitch* (1885), 9 Ont. 706; see *Chamberlain* v. *Turner* (1881), 31 U.C.C.P. 490.

(*o*) R.S.O. (1897), c. 223, s. 548, sub-sec. 2 (d).

(*p*) R.S.O. (1897), c. 240.

description of fence which has been approved of by the council, and the amount of all costs and charges, thereby incurred by the council over and above the amount of compensation agreed upon or settled by arbitration, may immediately be recovered from such owner or occupier, by action in any Division Court having jurisdiction in the locality, and the amount of the judgment in favor of the municipality obtained in such Court, shall, if not sooner paid, be, by the clerk of the municipality, placed upon the next collector's roll as taxes against the lands upon or along the boundaries of which the fence is situate, and after being placed upon the collector's roll, shall be collected and treated in all respects as other taxes imposed by by-laws of the municipality; when a tenant or occupant, other than the owner, is required to pay the aforesaid sum, or any part thereof, the tenant or occupant may deduct the same, and any costs paid by him, from the rent payable by him, or may otherwise recover the same, unless the tenant or occupant has agreed with the landlord to pay the same.

Nuisances.

Under the *Public Health Act*(*q*), the expenses of the abatement of nuisances recoverable from a tenant, may be deducted from the rent payable by him, in the absence of an agreement that he shall pay them. This is provided by section 113 of that Act, which is as follows:

113. (1) Any costs or expenses recoverable from an owner of premises under this Act, or under any provision of law in respect of the abatement of nuisances, may be recovered from the occupier for the time being of such premises; and the owner shall allow such occupier to deduct any moneys which he pays under this enactment out of the rent from time to time becoming due in respect of said premises, as if the same had actually been paid to such owner as part of said rent. But no such occupier shall be required to pay any further sum than the amount of rent for the time being due from him, or which, after demand of such costs or expenses from such occupier, and after notice not to pay his landlord any rent without first deducting the amount of such costs and expenses, becomes payable by such occupier, unless he refuses truly to disclose the amount of his rent, and the name and address of the person to whom rent is payable; and the burden of proof that the sum demanded from such occupier is greater than the rent due by him at the time of such notice, or which has since accrued, shall be on such occupier.

(*q*) R.S.O. (1897), c. 248.

(2) Nothing in this section contained shall affect any contract between any owner or occupier of any house, building or other property whereby it is, or may be, agreed that the occupier shall pay or discharge all rates and dues and sums of money payable in respect of such house, building or other property, or affect any contract whatever between landlord and tenant.

Term in perpetuity.

The statute permitting a tenant to deduct taxes from his rent has no application to a lessee from a municipal corporation, as it applies only to taxes which can be legally recovered from the owner; and it does not apply to the case of a term held in perpetuity(*r*).

Under this section a tenant is not at liberty to deduct from the rent and to compel his landlord to pay taxes for which the tenant and others were jointly assessed for a year prior to his existing tendency(*s*).

When deduction should be claimed.

Where a tenant, after paying the property tax upon land occupied by him, pays full rent to his landlord without producing the collector's receipt or claiming deduction, he is not entitled to recover from his landlord the amount so unnecessarily paid. Thus, where an occupier of lands having, during the course of twelve years, paid to the collector of taxes the landlord's property tax, and the full rent as it became due to the landlord, without claiming any deduction on account of the tax so paid, it was held that the occupier could not recover back from the landlord any part of the property tax so paid(*t*).

Where a lessee occupied the premises for four years, paying taxes for three years without objection, but when sued for rent which subsequently accrued, he claimed to

(*r*) *In re Canadian Pacific Railway Co. and the City of Toronto* (1902), 4 Ont. L.R. 134.

(*s*) *Meehan* v. *Pears* (1899), 30 Ont. 433; *Heyden* v. *Castle* (1888), 15 Ont. 257, discussed.

(*t*) *Denby* v. *Moore* (1817), 1 B. & Ald. 123; 18 R.R. 444; see also *McAnnany* v. *Tickell* (1864), 23 U.C.R. 499; *Aldwell* v. *Hanath* (1857), 7 U.C.C.P. 9.

set-off such taxes on the ground that as the agreement made no provision for them, and could not be added to by oral evidence, they must fall upon the landlord, it was held that having made the payment voluntarily in pursuance of his own agreement, even if it were without consideration, he could not recover back or set-off such payment(*u*). Where a tenant occupied a house for some six years, during which period he paid his landlord's taxes, it was held that he could not deduct the taxes paid by him, out of the last quarter's rent, although there was no agreement as to payment of taxes between him and the landlord(*v*).

It has been held that a tenant who covenants to pay rent without any deduction cannot claim a deduction for taxes paid by him(*w*).

Damages.

If a tenant's goods are distrained for taxes payable by the landlord, the tenant may recover as damages from the latter, the amount he was required to pay to remove the distress, but not consequential damages(*x*).

Statute of Limitations.

The payment of taxes by a tenant is not payment of rent within the meaning of the *Real Property Limitation Act*(*y*); and if no rent is paid, the mere payment of taxes will not prevent the statute from running against the landlord(*z*).

(*u*) *McAnnany* v. *Tickell* (1864), 23 U.C.R. 499.
(*v*) *Wade* v. *Thompson* (1862), 8 C.L.J., O.S. 22.
(*w*) *Grantham* v. *Elliot* (1838), 6 O.S. 192.
(*x*) *Smith* v. *Franklin* (1892), 12 C.L.T. 414.
(*y*) R.S.O. (1897), c. 133.
(*z*) *Finch* v. *Gilray* (1889), 16 Ont. App. 484.

CHAPTER XVI.

INSURANCE.

Insurable interest.

A tenant of glebe lands, under a lease containing a covenant for further renewal, who continues in possession after death of the lessor, and after the induction of his successor, against the latter's will, has no insurable interest, the successor not being bound by the covenant(*a*).

Indemnity.

A policy of fire insurance is a contract of indemnity(*b*). And where a lessee, in pursuance of a covenant in his lease, rebuilds and restores premises which have been damaged by fire, the lessor cannot, as against his own insurers, claim or retain the amount of a policy of insurance effected by himself on the damaged premises(*c*).

Tenant for life.

Where a tenant for life of a certain house, insured it against fire, and the house having been burned, the insurers paid her the amount of the policy, and on her death, the remainder-man laid claim to the insurance, it was held that the tenant for life not having been under any legal obligation to insure, nor to restore in case of fire, yet had an insurable interest, and having insured out of her own moneys for her own benefit, the resulting fund belonging to her estate(*d*).

A lessee of premises who acquires the reversion during the term, and takes out a policy of fire insurance on the buildings in addition to the policy previously effected by the lessor, with the knowledge and consent of the insurers,

(*a*) *Shaw* v. *Phoenix Insurance Co.* (1870), 20 U.C.C.P. 170.

(*b*) *West of England Fire Insurance Co.* v. *Isaacs*, [1896] 2 Q.B. 377.

(*c*) *Darrell* v. *Tibbitts* (1880), 5 Q.B.D. 560.

(*d*) *In re Estate Susan Curry* (1900), 33 N.S.R. 392.

is entitled in case of loss by fire to the proceeds of the first policy as against an attaching creditor of the lessor(*e*).

A lessor, who insures the premises on his own account, is not bound, in the absence of an express stipulation, to lay out the moneys he receives under the policy in rebuilding(*f*).

Covenant to repair.

Under a covenant to repair, a lessee is bound to rebuild premises destroyed by fire, unless his liability is expressly limited in that behalf, even if the lessor has insured the premises and received the insurance moneys(*g*).

Covenant to restore.

Where the lessee of goods covenanted to restore them to the lessor "at the expiration of the term in as good order as they then were, reasonable wear and tear excepted," and the goods during the term were destroyed by fire, without the lessee's default, it was held that the exception, "reasonable wear and tear excepted" referred to the order and condition of the goods so as to exclude bad repair, breakage, etc., not arising from reasonable wear and tear, but did not amount to a guarantee of the continued existence of the goods(*h*).

Breach of covenant.

Where there is a covenant on the part of the lessee to insure the demised premises in the name of the lessor, or in the joint names of the lessee and lessor, an insurance effected in the name of the lessee alone is a breach of the covenant(*i*). But an insurance affected in the name of the lessor is not a breach of a covenant by the lessee to insure in their joint names(*j*).

(*e*) *Langelier* v. *Charlebois* (1903), 34 S.C.R. 1.

(*f*) *Leeds* v. *Cheetham* (1827), 1 Sim. 146; 27 R.R. 181; *Edwards* v. *West* (1878), 7 Ch. D. 858.

(*g*) *Leeds* v. *Cheetham* (1827), 1 Sim. 146; 27 R.R. 181. The ordinary statutory covenant to repair contains an exception as to damage by fire, lightning and tempest; see chapter XVIII.

(*h*) *Chamberlen* v. *Trenouth* (1873), 23 U.C.C.P. 497.

(*i*) *Penniall* v. *Harborne* (1848), 11 Q.B. 368.

(*j*) *Havens* v. *Middleton* (1853), 10 Hare 641.

Where there is a continuing covenant, such as a covenant to insure, an act which implies a waiver of breaches of the covenant does not operate as a license to commit subsequent breaches(*k*). Thus, where a lessee of buildings covenanted in the lease "to insure and continue insured" such buildings in the joint names of himself and the lessor, and the lessee insured in his own name singly, but shewed the policy to the lessor, who approved of it, and afterwards assigned the reversion, it was held, in an action by the assignee for a forfeiture, that the covenant to insure in the joint names was a continuing covenant, and was not waived by the conduct of the lessor, except as to past breaches(*l*). Waiver of breach.

A covenant to insure and keep insured the buildings on the demised premises, is a covenant that runs with the land(*m*). So, a covenant by the lessee to insure in the name of the lessor, the insurance moneys to be expended in the erection of new buildings, runs with the land, and an action will lie on it against the assignee of the lessee(*n*). Covenant runs with the land.

The court has power to relieve a tenant against a forfeiture for breach of a covenant to insure. This is provided in Ontario by section 30 of the *Judicature Act*(*o*), which is as follows: Relief against forfeiture.

> **30.** The High Court shall have power to relieve against a forfeiture for breach of a covenant or condition in any lease to insure against loss or damage by fire, where no loss or damage by fire has happened, and the breach has, in the opinion of the Court, been committed through accident or mistake, or otherwise without fraud or gross negligence, and there is an insurance on foot at the time

(*k*) *Doe d. Muston* v. *Gladwin* (1845), 6 Q.B. 953.
(*l*) *Ibid.*
(*m*) *Vernon* v. *Smith* (1821), 5 B. & A. 1; 24 R.R. 257.
(*n*) *Douglass* v. *Murphy* (1858), 16 U.C.R. 113.
(*o*) R.S.O. (1897), c. 51.

of the application to the Court, in conformity with the covenant to insure, upon such terms as to the Court may seem fit.

Prior to the passing of the statute(*oo*) on which this section is founded, courts of equity refused to grant relief on a forfeiteure for breach of a covenant to insure(*p*).

(*oo*) 29 Vict. c. 28, s. 5.

(*p*) *Green* v. *Bridges* (1830), 4 Sim. 96.

CHAPTER XVII.

WASTE.

Waste, in law, is anything done or permitted by a tenant in the nature of a permanent injury to the inheritance, not occasioned by the act of God or a public enemy. It is a spoil or destruction in houses, gardens, trees, or other corporeal hereditaments, to the dishersion of him that hath the remainder or reversion in fee simple or fee tail(*a*). Waste.

Waste is either *voluntary*, or *permissive;* voluntary waste is occasioned by an act of commission, as for example pulling down buildings, or cutting down timber trees; Permissive waste results from something left undone or omitted, such as allowing buildings or fences to decay or fall for want of necessary repairs. Voluntary and permissive.

Voluntary waste was further distinguished by courts of law and courts of equity. If an estate were granted to a tenant for life without impeachment of waste, courts of equity would interfere to restrain wanton destruction, or malicious waste, which would have been excused at law, by reason of the words "without impeachment of waste," and hence this description of waste came to be known as Equitable waste. Equitable waste.

By section 58(2) of the *Judicature Act*, it has been provided that "an estate for life without impeachment of waste shall not confer or be deemed to have conferred upon the tenant for life any legal right to commit waste of the description known as equitable waste, unless an intention to confer such right shall expressly appear by the instrument creating such estate"(*b*). So that now, both Without impeachment of waste.

(*a*) 2 Blackstone, p. 281.
(*b*) R.S.O. (1897), c. 51, s. 58 (2).

at law and in equity, the words "without impeachment of waste," contained in an instrument creating a life estate, do not enable a life tenant to commit equitable waste.

Meliorating waste.

Meliorating waste consists of acts which may be injurious to the inheritance by increasing the burden upon it or impairing the evidence of title, but which really increase the value of the property, and are not punishable or restrainable unless substantial damage is proved(*c*).

A tenant is liable for voluntary waste, even in the absence of an express covenant against waste generally, or against the commission of specific acts of waste, and threatened or apprehended waste may be restrained by injunction(*d*).

It is provided by statute that "a tenant by the curtesy, a dowress, a tenant for life, or for years, and the guardian of the estate of an infant, shall be impeachable for waste, and liable in damages to the person injured"(*e*).

Waste to keep down annuity.

A testator seized in fee of land, subject to a mortgage to secure an annuity for his wife, devised the land for life, remainder over in fee. After his death the life tenant continued to pay the annuity to the widow, and sold the timber on the land, claiming the right to do so on account of her payments on the annuity; and the purchaser having begun to cut the timber, an action was commenced by the remainder-man to restrain waste. It was held that the periodical payments of the annuity must be treated partly as interest which the tenant for life had to pay, and partly as principal for which she would have a charge on the

(*c*) *Doherty* v. *Allman* (1878), 3 App. Cas. 709; but see *West Ham Central Charity Board* v. *East London Waterworks Co.*, [1900] 1 Ch. 624, at p. 639.

(*d*) R.S.O. (1897), c. 51, s. 58 (9); *Gray* v. *McLennan* (1885), 3 Man. L.R. 337.

(*e*) 6 Edw. I., c. 5 (Statute of Gloucester); R.S.O. (1897), vol. III., c. 330, s. 21.

inheritance, in the proportion which the value of life estate bore to the value of the reversion(*f*).

Tenant in common.

It is further provided that "tenants in common, and joint tenants, shall be liable to their co-tenants for waste, or, in the event of a partition, the part wasted may be assigned to the tenant committing such waste, at the value thereof to be estimated as if no such waste had been committed"(*g*).

Lessee.

It is also provided that "lessees making or suffering waste on the demised premises without license of the lessors, shall be liable for the full damage so occasioned"(*h*).

A tenant for a term of years is liable for both permissive and voluntary waste, even in the absence of a covenant to repair(*i*). It has been held in Ontario, that in the absence of an express covenant to repair a lessee is not liable for permissive waste, and an accidental fire, by which the leased premises are burnt, is permissive not voluntary waste(*j*).

Tenant for life.

A tenant for life is liable for permissive waste, if he is expressly bound to keep premises in repair(*k*), but not otherwise(*l*).

Tenant at will.

A tenant at will, or a tenant from year to year is not

(*f*) *Whitesell* v. *Reece* (1903), 5 Ont. L.R. 352; *Yates* v. *Yates* (1860), 28 Beav. 637, followed.

(*g*) 13 Edw. I., c. 22 (Statute of Westminster the Second); R.S.O. (1897), vol. III., c. 330, s. 22.

(*h*) 52 Henry III., c. 23 (Statute of Marlebridge); R.S.O. (1897), vol. III., c. 330, s. 23; c. 342, s. 22.

(*i*) *Yellowly* v. *Gower* (1855), 11 Ex. 274, at p. 294; *Davies* v. *Davies* (1888), 38 Ch. D. 499.

(*j*) *Wolfe* v. *McGuire* (1897), 28 Ont. 45.

(*k*) *Woodhouse* v. *Walker* (1880), 5 Q.B.D. 404.

(*l*) *In re Cartwright* (1889), 41 Ch. D. 532.

liable for permissive waste, unless bound by a covenant to repair(*m*), but both are liable for voluntary waste(*n*).

A lessee is liable for waste committed, whether done or authorized by him or not, as it is presumed that he had power to prevent it(*o*); and although it is possible for him to restore the premises to their former condition before the expiration of the lease(*p*).

Test of waste.

The test whether a particular act amounts to waste is whether that act is one which alters the nature of the thing demised(*q*). Acts done which substantially diminish the value of the estate, or which increase the burden upon it, or which impair the evidence of title, are acts of waste(*r*).

Buildings.

Pulling down a house or other building or any part of it, even if it be afterwards rebuilt(*s*), or altering its internal structure, is waste(*t*).

But accidental damage to or destruction of buildings, without default on the part of the lessee, does not amount to waste(*u*).

Removing soil.

It is waste if soil be dug up and removed from the surface(*v*). Digging for gravel, clay, brick-earth, quarry-

(*m*) *Harnett* v. *Maitland* (1847), 16 M. & W. 257; *Torriano* v. *Young* (1833), 6 C. & P. 8; *Blackmore* v. *White*, [1899] 1 Q.B. 293.

(*n*) *Burchell* v. *Hornsby* (1808), 1 Camp. 360.

(*o*) *West Ham Central Charity Board* v. *East London Waterworks Co.*, [1900] 1 Ch. 624; 2 Inst. 145.

(*p*) *Queen's College* v. *Hallett* (1811), 14 East 489; 13 R.R. 293.

(*q*) *West Ham Central Charity Board* v. *East London Waterworks Co.*, [1900] 1 Ch. 624; 82 L.T. 85; 48 W.R. 284; 69 L.J. Ch. 257.

(*r*) *Doe* v. *Burlington* (1833), 5 B. & Ad. 507; 39 R.R. 552.

(*s*) *Smyth* v. *Carter* (1851), 18 Beav. 78.

(*t*) *Young* v. *Spencer* (1829), 10 B. & C. 145.

(*u*) *Manchester Bonded Co.* v. *Carr* (1880), 5 C.P.D. 507; *Saner* v. *Bilton* (1878), 7 Ch. D. 815.

(*v*) *Whitham* v. *Kershaw* (1886), 16 Q.B.D. 613.

ing stone or mining coal or other mineral, from pits or mines unopened at the date of the lease, is waste, except where the materials taken are necessary for the repair of the buildings(*w*).

Raising the surface of the land by the deposit of rubbish or other material is waste, if it diminishes the value, or produces a substantial alteration in the nature, of the property demised(*x*). Raising surface.

To cut down fruit trees, timber trees, ornamental trees or shade trees is waste, but it is not waste to cut down trees that are dead, nor to cut bushes or underwood(*y*), nor to cut timber trees for necessary repairs(*z*). A lessee is entitled to carry away trees, other than timber trees, which have been blown down by the wind(*a*). Trees.

Where it was agreed that the lessee should render up all improvements but the lease did not bind him to make any, it was held that the lease did not confer a right to cut the timber standing on the demised premises, notwithstanding the same were wild and in a state of nature(*b*).

What would be considered waste in England is not always deemed to be waste in this country(*c*).

In this country, a tenant for life may cut down timber in the proper course of good husbandry, if it does not diminish the value of the reversion, in order to bring the proper proportion of the land under cultivation. The ex- Cutting down timber.

(*w*) Co. Litt. 53 b.

(*x*) *West Ham Central Charity Board* v. *East London Waterworks Co.*, [1900] 1 Ch. 624.

(*y*) Co. Litt. 53 a.

(*z*) Co. Litt. 53 b.

(*a*) *Channon* v. *Patch* (1826), 5 B. & C. 897.

(*b*) *Goulin* v. *Caldwell* (1867), 13 Gr. 493; see also *Drake* v. *Wigle* (1872), 22 U.C.C.P. 341.

(*c*) *Drake* v. *Wigle* (1874), 24 U.C.C.P. 405.

tent to which timber may be cut for such purpose is a question of fact for the jury(*d*). In such a case, if the lessee is entitled to cut timber, he is entitled to sell it(*e*).

A tenant, who, for the purpose of rendering the land more fit for cultivation, collects the stones therefrom, has the property in the stones, and the landlord has no interest in them and is liable for their value if he disposes of them(*f*).

In addition to covenants against permissive waste, such as covenants to repair and to keep up fences(*g*), it is usual to insert in leases covenants against specific acts of voluntary waste. The statutory covenant against cutting down timber is as follows:

Covenant against.

"And also will not at any time during the said term hew, fell, cut down or destroy, or cause or knowingly permit or suffer to be hewed, felled, cut down or destroyed, without the consent in writing of the lessor, any timber or timber trees, except for necessary repairs, or firewood, or for the purpose of clearance as herein set forth."

Tapping sugar trees.

The tapping of sugar trees for sugar making is a breach of a covenant not to cut down timber, where it has the effect of shortening their life or injuring them for timber purposes(*h*). It is a question for the jury whether the tapping of trees for sugar making has the effect of destroying them, or of shortening their life, or injuring them for timber purposes(*i*).

Alterations.

Where the lease of a shop occupied by a jeweller and watchmaker contained a covenant by the lessee that he

(*d*) *Saunders* v. *Breakie* (1884), 5 Ont. 603; following *Drake* v. *Wigle* (1874), 24 U.C.C.P. 405.

(*e*) *Lewis* v. *Godson* (1888), 15 Ont. 252, disapproving of a *dictum* to the contrary in *Saunders* v. *Breakie* (1884), 5 Ont. 603.

(*f*) *Lewis* v. *Godson* (1888), 15 Ont. 252.

(*g*) See chapter XVIII.

(*h*) *Campbell* v. *Shields* (1879), 44 U.C.R. 449.

(*i*) *Ibid.*

would not make or suffer to be made any alteration to the demised premises without the previous written consent of the lessor, it was held that some limitation must be placed on the words of the covenant; and that the erection of a large clock, affixed without the consent of the lessor, to the exterior of the wall of the house by means of bolts driven into it, was not a breach of the covenant, and consequently that a mandatory injunction to compel the removal of the clock ought not to be granted. The word "alteration" in the covenant is limited to alterations which would affect the form or structure of the building. The exceptions from such a covenant include not only things absolutely essential to the carrying on of the business, but also things fixed to the premises for the purpose of carrying on the business in a reasonable, ordinary and proper way(*j*).

A lessee is not guilty of committing waste, as against his lessor, if the acts done are expressly sanctioned by the terms of the lease(*k*).

Cumulative remedies.

An action for waste will lie, although there is an express covenant to repair, as the remedies are cumulative; but a breach of a covenant to repair, not amounting to waste, is not sufficient to sustain an action of waste. To maintain such an action, the plaintiff must have a vested interest in the reversion at the time the waste was committed(*l*).

A landlord may maintain trespass against his tenant for the value of the timber trees cut down and carried away by him, although the landlord is not in actual possession(*m*).

(*j*) *Bickmore* v. *Dimmer*, [1903] 1 Ch. 158.
(*k*) *Meux* v. *Cobley*, [1892] 2 Ch. 253.
(*l*) *Crawford* v. *Bugg* (1886), 12 Ont. 8.
(*m*) *Chestnut* v. *Day* (1838), 6 O.S. 637.

CHAPTER XVIII.

REPAIRS.

Liability of lessor.

As between the parties to the lease for a term of years or from year to year, there is no obligation on the part of the landlord to do repairs during the term(*a*). In the absence of any stipulation on the part of the lessor to repair, a lessee of a house must take it as it stands, and cannot compel the lessor to put it into a condition fit for habitation(*b*).

Weekly tenancy.

But in the case of weekly tenancies, it would seem, there is an implied covenant on the part of the landlord to keep the premises in repair(*c*), and he is liable for damages occasioned by his failure(*d*).

In the event of the premises being destroyed by fire during the term the landlord is not bound to rebuild them(*e*), even though he has received the insurance therefor(*f*).

Furnished house.

Under a demise of a furnished house it has been held that there is an implied condition that it shall be reasonably fit for immediate habitation(*g*).

Negligence.

A landlord who occupies part of the premises is not liable to a tenant for injury caused by the escape of water from a

(*a*) *Gott* v. *Gandy* (1853), 2 E. & B. p. 847; *Arden* v. *Pullen* (1842), 10 M. & W. 321.

(*b*) *Chappell* v. *Gregory* (1864), 34 Beav. 250.

(*c*) *Broggi* v. *Robins* (1898), 14 Times L.R. 439.

(*d*) *Walker* v. *Hobbs* (1889), 23 Q.B.D. 458.

(*e*) *Bayne* v. *Walker* (1815), 3 Dow. 233.

(*f*) *Leeds* v. *Cheetham* (1827), 1 Sim. 146; *Lofft* v. *Dennis* (1859), 1 E. & E. 474.

(*g*) *Smith* v. *Marrable* (1843), 11 M. & W. 5.

water-pipe, unless it is occasioned by his negligence(*h*). Nor is he bound to keep the demised part in such repair as to render it habitable(*i*).

Where there is no express covenant to repair, a tenant is bound to keep the house wind and water-tight, and to make fair tenantable repairs, such as putting in windows and doors that have been broken by him(*j*). But he is not compelled to replace doors, windows, or stairs that are worn out, or to put on a new roof, or to renew main timbers, or to do any substantial repairs(*k*). Liability of lessee.

An express covenant to repair excludes and controls an implied covenant to use the premises in a tenantable manner(*l*).

The form of the statutory, covenant to repair provided by the *Act respecting Short Forms of Leases*(*m*), is as follows:

"And also will, during the said term, well and sufficiently repair, maintain, amend and keep the said demised premises with the appurtenances in good and substantial repair, and all fixtures and things thereto belonging, or which at any time during the said term shall be erected and made by the lessor, when, where and so often as need shall be, reasonable wear and tear and damage by fire, lightning and tempest only excepted." Covenant to repair.

The following is the statutory covenant to keep up fences:

(*h*) *Carstairs* v. *Taylor* (1871), L.R. 6 Ex. 217; *Ross* v. *Fedden* (1872), L.R. 7 Q.B. 661; *Blake* v. *Woolf*, [1898] 2 Q.B. 426.

(*i*) *Colebeck* v. *Girdlers' Co.* (1876), 1 Q.B.D. 234.

(*j*) *Auworth* v. *Johnson* (1832), 5 C. & P. 239; *Leach* v. *Thomas* (1835), 7 C. & P. 327.

(*k*) *Ibid.*

(*l*) *Standen* v. *Christmas* (1847), 10 Q.B. 135; *Crawford* v. *Bugg* (1886), 12 Ont. 8.

(*m*) R.S.O. (1897), c. 125.

To keep up fences.

"And also will, from time to time, during the said term, keep up fences and walls of or belonging to the said premises, and make anew any parts thereof that may require to be new-made in a good and husband-like manner and at proper seasons of the year."

The statutory covenant that the lessee will repair according to notice, and that the lessor may enter and view state of repair, is as follows:

To enter and view state of repair.

"And it is hereby agreed that it shall be lawful for the lessor and his agents, at all reasonable times during the said term, to enter the said demised premiss to examine the condition thereof; and further, that all want of reparation that upon such views shall be found, and for the amendment of which notice in writing shall be left at the premises, the said lessee, his executors, administrators and assigns will, within three calendar months next after such notice, well and sufficiently repair and make good accordingly, reasonable wear and tear and damage by fire, lightning and tempest only excepted."

Notice.

The form of the statutory covenant on the part of the lessee, that he will leave the premises in good repair, is as follows:

To leave premises in repair.

"And further the lessee will, at the expiration, or other sooner determination of the said term, peaceably surrender and yield up unto the said lessor the said premises hereby demised, with the appurtenances, together with all buildings, erections and fixtures erected or made by the lessor thereon, in good and substantial repair and condition, reasonable wear and tear and damage by fire, lightning and tempest only excepted."

Informal covenant.

No particular form of words is necessary to constitute a covenant to repair. Thus, where a lease contained a clause that it should be "competent" for the lessee to make certain specified repairs, and the lease was declared to be

on the express understanding that such repairs should be made within one year from the date of the said lease, it was held that, notwithstanding the word "competent," the lessee in effect covenanted to do the work specified(*n*).

Where there was a covenant on the part of the lessee to do certain specified repairs, the premises "being previously put in repair and kept in repair" by the lessor, it was held that this constituted an absolute and independent covenant on the part of the lessor to repair(*o*).

Covenant by lessor.

If a lessor has covenanted to repair, notice to him of the want of repair is necessary before any liability arises(*p*).

There is an implied license for the lessor to enter upon the premises for the purpose of doing repairs in pursuance of his covenant, although there is a covenant on the part of the lessor for quiet enjoyment(*q*). But if there is no covenant on the part of the lessor to repair, he is not entitled to enter for the purpose of doing repairs(*r*)

Breach of warranty by lessor.

An action may be maintained by a lessee against a lessor for a breach of a verbal warranty made by the latter that the drains were in good order at the time the lease was made. Thus, in *De Lassalle* v. *Guildford*, the plaintiff and the defendant negotiated for the lease of a house by the latter to the former. The terms were arranged, but the plaintiff refused to hand over the counterpart that he had signed unless he received an assurance that the drains were in order. The defendant verbally represented that the drains were in good order, and the counterpart was thereupon handed to him. The lease contained no refer-

(*n*) *McDonald* v. *Cochrane* (1856), 6 U.C.C.P. 134.
(*o*) *Cannock* v. *Jones* (1849), 3 Ex. 233.
(*p*) *Makin* v. *Watkinson* (1870), L.R. 6 Ex. 25.
(*q*) *Saner* v. *Bilton* (1878), 7 Ch. D. 815.
(*r*) *Barker* v. *Barker* (1829), 3 C. & P. 557.

ence to drains. The drains were not in good order, and an action was brought to recover damages for breach of warrantry, in which it was held that the representation made by the defendant as to the drains being in good order was a warrantry which was collateral to the lease, and for breach of which an action was maintainable(*s*).

Absolute covenant to repair.

The lessor, in a lease of a yard and wharf covenanted to put the wharf into good and sufficient repair on or before a given day, and a memorandum was afterwards drawn up by the lessor and signed by him and the lessee as follows: "Work to be completed to put wharf in good repair, two stringers, and one stringer to be put into place; all that part of wharf not planked to be planked with new plank, and all the broken plank or holes to be repaired with sound plank." The lessee signed this memorandum before examining the wharf, and on the lessor's representation that it was all right. These repairs were executed, but about a month afterwards the wharf fell in, apparently by reason of the defective state of the caps on which the stringers rested. It was held that the memorandum did not control or modify the covenant, and that the lessee was entitled to recover for the damage sustained by the wharf not having been put into good repair(*t*).

Lessee's liability dependent.

A covenant by the lessee to keep premises in repair "from and after" their repair by the lessor, or "the same being first put in repair" by him, is a dependent covenant, and the whole premises must be put in repair before the lessee can be called on to repair any part of them(*u*).

Independent covenants.

Where the lease contains a covenant to repair and a covenant to repair on notice, or within a specified time

(*s*) *De Lassalle* v. *Guildford*, [1901] 2 K.B. 215.

(*t*) *Snarr* v. *Beard* (1871), 21 U.C.C.P. 473.

(*u*) *Neale* v. *Ratcliffe* (1850), 15 Q.B. 916; *Coward* v. *Gregory* (1866), L.R. 2 C.P. 153.

after notice, these covenants are construed as independent, and where in such a case a notice has been given to repair, the former covenant may be enforced even before the expiration of the notice(*v*).

Where a notice is given to repair, and the lessee makes an offer to sell his interest in the premises to the lessor, the notice is suspended until the negotiations come to an end(*w*).

Divisible covenants.

The obligation of a lessee under a covenant to erect certain buildings on the land demised within a given time, and also to keep them in repair during the term, is divisible, and the obligation to repair is a continuing one, and is broken, although the buildings are never completed(*x*).

Continuing covenants.

A covenant to repair or to keep in repair is a continuing covenant, and a breach of it is a continuing breach, and the recovery of judgment in one action is no bar to a subsequent action on the same covenant(*y*).

A covenant to *put* premises in repair and a covenant to *leave* them in repair are not continuing covenants, and damages must be assessed for breaches of them once for all(*z*).

On a covenant to leave premises in repair, no action will lie until the end of the term(*a*).

Covenant implied.

Where a lessee continues in possession as a yearly tenant, after the expiration of a lease containing a covenant by him to repair, a similar obligation will be implied in the yearly tenancy(*b*).

(*v*) *Doe* v. *Meux* (1825), 4 B. & C. 606; 28 R.R. 426.

(*w*) *Hughes* v. *Metropolitan Railway Co.* (1877), 2 App. Cas. 439.

(*x*) *Jacob* v. *Down*, [1900] 2 Ch. 156.

(*y*) *Coward* v. *Gregory* (1866), L.R. 2 C.P. 153.

(*z*) *Cole* v. *Buckle* (1868), 18 U.C.C.P. 286; *Coward* v. *Gregory* (1866), L.R. 2 C.P. 153.

(*a*) Platt on Covenants, p. 289.

(*b*) *Hett* v. *Janzen* (1892), 22 Ont. 414.

The lessee is not liable on a covenant to repair in a lease given for an illegal purpose(*c*).

Compliance. The extent of the repairs which is necessary and sufficient to constitute a substantial compliance with a covenant to repair, depends on the condition of premises at the time of the demise, or at the time when the covenant to repair comes into force(*d*).

If premises consist of an old house, a lessee is only bound to keep it up as an old house, and not to give it greater value at the end of the term than it had at the beginning(*e*). A lessee is not bound under a covenant to repair to renew buildings that are in a dilapidated condition. If a tenant takes a house which is of such a kind that by its own inherent nature it will in course of time fall into a particular condition of disrepair, the effects of that result are not within the tenant's covenant to repair(*f*).

Fixtures. Under the statutory covenant to repair, the tenant is bound to keep in repair, not only the demised premises, but also all fixtures and buildings erected or placed thereon during the term which he had a right to erect or place there(*g*).

A covenant to repair and keep in repair, and "the said premises so repaired, with all things which, at any time during the term, should be fixed or fastened to, or set up, in, or upon the premises, at the expiration of the term peaceably to yield up, with all and singular the fixtures thereto belonging, in as good condition as the same were

(*c*) *Hickey* v. *Sciutto* (1903), 40 C.L.J. 125.

(*d*) *Proudfoot* v. *Hart* (1890), 25 Q.B.D. 42.

(*e*) *Gutteridge* v. *Munyard* (1834), 1 Moo. & R. 334.

(*f*) *Wright* v. *Lawson* (1903), W.N. 108, following *Lister* v. *Lane*, [1893] 2 Q. B. 212.

(*g*) *Holderness* v. *Lang* (1886), 11 Ont. 1.

at the execution of the lease," extends to a building resting on blocks of wood, not let into the ground, also to a building resting on stumps, and, and also to a building laid on a scantling and old posts not let into the ground, all placed on the demised premises during the term(*h*).

Under the statutory covenant to repair, the tenant is bound to keep in repair not only the demised premises but also impliedly all irremovable fixtures and things erected or made during the term which he had a right to erect or make(*i*).

Destruction of premises by fire.

If a lessee has entered into an unqualified covenant to repair and keep in repair, and the demised premises are afterwards destroyed by fire, he is liable to rebuild them at his own cost, although the landlord had insured them and received the insurance money(*j*).

Negligence of lessee.

By a notarial lease the lessees covenanted to deliver to the lessor certain premises in the city of Montreal at the expiration of their lease "in as good order as the same were at the commencement thereof, reasonable wear and tear and accidents by fire excepted." During the term the premises were destroyed by fire. In an action brought by the lessor to recover the cost of reconstructing the premises and restoring them to good order and condition, less the amount received from insurance, it was held that the lessees were not responsible for the loss, as the destruction of the premises was an accident by fire within the terms of the exception contained in the lease, although it may have been caused by their negligence(*k*).

Under a covenant to "return the mill to the lessor at

(*h*) *Allardice* v. *Disten* (1861), 11 U.C.C.P. 278.

(*i*) *Holderness* v. *Lang* (1886), 11 Ont. 1; *Argles* v. *McMath* (1895), 26 Ont. 224; 23 Ont. App. 44.

(*j*) *Leeds* v. *Cheetham* (1827), 1 Sim. 146; 27 R.R. 181; *Lofft* v. *Dennis* (1859), 1 E. & E. 474.

(*k*) *Evans* v. *Skelton* (1889), 16 S.C.R. 637.

the close of the season in as good order as could be expected considering wear and tear of machinery," and the mill was destroyed by fire during the term owing to the lessee's negligence, the lessee was held liable for the loss(*l*).

Re-building.

By a lease of property in a town, the lessor agreed to erect the outside of a frame building, and bound himself in case of its being destroyed by fire, to rebuild to the same extent, or in default the rent reserved to cease. Afterwards the house was burnt down, and in the interval the municipal council had by by-law prohibited the erection of frame buildings in that locality. The lessee refused to pay rent until the lessor rebuilt, and the lessor then filed a bill to cancel the lease, as it had become impossible for him to carry out his agreement. The court refused this relief; but on a submission in the answer, directed a reference to the master to fix a proper rent to be paid, upon the lessor rebuilding with brick, with costs to be paid by the plaintiff(*m*).

Under a covenant by the lessee to build a barn on the demised premises, the lessor in absence of express stipulation is not entitled to select the site where it is to be built(*n*).

Reasonable wear and tear.

It has been held that damages done to a wharf by the action of ice forced against it by a high wind, is not within the clause of "reasonable wear and tear, and damage by fire and tempest excepted"(*o*). In such a case, the non-repair of the wharf is a continuing breach of the covenant

(*l*) *Klock* v. *Lindsay*, *Lindsay* v. *Klock* (1898), 28 S.C.R. 453; following *Murphy* v. *Labbé* (1897), 27 S.C.R. 126.

(*m*) *Williams* v. *Tyas* (1855), 4 Gr. 533.

(*n*) *Campbell* v. *Simmons* (1869), 15 Gr. 506.

(*o*) *Thistle* v. *Union Forwarding Co.* (1880), 29 U.C.C.P. 76.

to repair and to repair after notice, of which an assignee may take advantage(*p*).

In this country, the removal of a fence on a farm from one place to another, is not *per se*, as a matter of law, a breach of a covenant to repair and keep fences in repair; and whether it is so or not would be a question of fact under the circumstances of each case. Where the lessor accepted rent after such a removal, with knowledge of it, this was held to be a waiver of the forfeiture, if any, and that he could not afterwards claim to re-enter for the continuance of the fence in its altered position as a breach of the covenant(*q*).

Making an opening in a brick wall for the purpose of a doorway is a breach, but not a continuing breach, of the covenant to repair(*r*).

Rent payable though premises unfit for habitation.

It is no defence to an action for rent that the house became unfit for habitation in consequence of the roof admitting water, and for want of sufficient drainage, whereby the said house became wet, damp, unwholesome, noisome, and offensive, of which the lessor had notice, although the lessee quitted the premises before the commencement of the time for which rent was demanded(*s*).

Eviction.

The fact that a tenant has been evicted from part of the demised premises does not relieve him from liability upon his covenant to repair, even if he has been evicted by the landlord(*t*), and although the tenant has in consequence given up possession of the remainder of the premises(*u*).

(*p*) *Thistle* v. *Union Forwarding Co.* (1880), 29 U.C.C.P. 76.
(*q*) *Leighton* v. *Medley* (1882), 1 Ont. 207.
(*r*) *Holderness* v. *Lang* (1886), 11 Ont. 1.
(*s*) *Denison* v. *Nation* (1862), 21 U.C.R. 57.
(*t*) *Newton* v. *Allin* (1841), 1 Q.B. 518.
(*u*) *Morrison* v. *Chadwick* (1849), 7 C.B. 266.

It is no defence to an action for rent that the lessor permitted the premises to be out of repair, contrary to his covenant in the lease(*v*).

When repairs must be made.

Under a covenant to repair and yield up in good repair, a lessee is not entitled to delay repairing until the end of the term; but such repairs are to be made as are necessary to prevent the buildings from going to destruction, and the moment such necessity exists and the lessee fails to repair, the covenant is broken(*w*).

Reduction of rent.

In a lease for eight years the lessee covenanted that he would at his own charge place the premises in good order, and build a new stable, and would repair and keep repaired the fences and gates then erected, or that might be erected during the term. On account of these improvements and additions, it was agreed that no rent should be paid for the first nine months. It was held that the lessee was not obliged to perform his covenant within the first nine months; and it seems to be doubtful whether he should have the whole term to do the work, or must do it within a reasonable time(*x*).

Lessor's covenant to build.

Where a tenant had under several leases been in occupation of a farm for about twenty-five years, and in consequence of the dwelling having become unfit for occupation, he notified the lessor of his intention to give up the premises at the end of his term, whereupon it was agreed that the lessor should put up a new house, the lessee agreeing to accept a new lease for six years, and pay an increase in his rent of $150 a year, and to perform some work in connection with the building in the summer of the first year of the term, and a written lease was executed containing a covenant by the lessor to build a new house "dur-

(*v*) *Wilkes* v. *Steel* (1856), 14 U.C.R. 570.

(*w*) *Perry* v. *Bank of Upper Canada* (1866), 16 U.C.C.P. 404.

(*x*) *Castle* v. *Rohan* (1851), 9 U.C.R. 400.

ing the said term," and the lessor insisted that he had the whole term within which to put up the house, it was held that the circumstances attending the execution of the lease, as also the corroboration afforded by the lease itself, warranted the Court in permitting parol evidence to shew that the first year of the term was the year in which the house was to be erected; also, that even if the lease was meant to be silent as to the year for building, a reasonable time would be intended, and that the covenant of the lessee being to perform certain work on the building during the first summer of the term, and the increase rent being payable for the whole term then created, the first year must be considered reasonable(*y*).

Fences.

In a lease containing the usual covenant by the lessee to repair fences, the lessor agreed "to build the line fence between the demised premises and an adjoining farm should the same be required during the currency of the lease." There was no line fence between the farms, but that there was a fence upon the adjoining farm about twenty-four yards from the boundary line. The lessee contended that this fence was out of repair in consequence of which damage had been done to his crops by cattle, and that the stipulation as to the line fence being "required during the currency of the lease," was fulfilled by the fence being out of repair. It was held that no liability could accrue under the lessor's covenant until something occurred to disturb the state of things existing at the time the lease was made, and that the covenant was designed to meet such contingency as the refusal of the adjoining owner to allow entry on his land to repair the fence, or his requiring the line fence to be built(*z*).

Where the lessor after the making of a lease contain-

(*y*) *Bulmer* v. *Brumwell* (1888), 13 Ont. App. 411.

(*z*) *Houston* v. *McLaren* (1888), 14 Ont. App. 103.

ing a covenant to repair, directs the lessee to take down and remove a fence he cannot set up the covenant to repair as to that act(*a*).

Covenant runs with the land.

A covenant to repair runs with the land, and is binding on the assignees, although they are not expressly mentioned(*b*).

A covenant on the part of the lessor to repair runs with the land and a lessee may maintain an action for a breach thereof against the assignee of the reversion, but not against a mere assignee of the rent. Thus, where the plaintiff sued the defendants who were assignees of the rent for the term which plaintiff was to enjoy, on a covenant by his lessor to repair, as being a covenant running with the land, it was held that they were not liable, for they had no reversion, and the covenant would not run with the rent(*c*).

Lessee liable after assignment.

The liability of a lessee under an express covenant to repair, as under an express covenant to pay rent, is unaffected by an assignment of the term(*d*).

Liability of assignee.

An assignee of the term is liable on his assignor's covenant to repair, as on other express covenants, only for breaches happening while he is assignee, and by assigning over, even to a pauper, he may get rid of his future liability(*e*).

The liability of an assignee of the lease under a covenant to repair ceases upon an assignment by him for breaches occurring thereafter(*f*), but not of his liability

(*a*) *Wixon* v. *Pickard* (1865), 25 U.C.R. 307.

(*b*) *Perry* v. *Bank of Upper Canada* (1866), 16 U.C.C.P. 404.

(*c*) *McDougall* v. *Ridout* (1851), 9 U.C.R. 239.

(*d*) *Brett* v. *Cumberland* (1618), Cro. Jac. 521; notes to *Spencer's Case*, 1 Smith L.C., 11th ed., p. 73.

(*e*) *Taylor* v. *Shum* (1797), 1 B. & P. 21; 4 R.R. 759; *Spencer's Case*, 1 Smith L.C., 11th ed., p. 73.

(*f*) *Crawford* v. *Bugg* (1886), 12 Ont. 8.

for breaches already committed during his interest; and in respect of such breaches, there is an implied contract on the part of each successive assignee to indemnify the original lessee(*g*). There is, however, no such liability on the part of a sub-lessee of an assignee(*h*).

A covenant to repair and paint made by the lessee with the lessor and a stranger jointly was held to run with the land and to bind an assignee of the lessee(*i*).

Breach of covenant.

A landlord is not entitled, on a breach of a covenant to repair, to enter and do the repairs himself at the tenant's expense unless expressly authorized so to do, and his only remedy, apart from his right of re-entry, is an action for damages, as specific performance will not be decreed(*j*).

Apart from statute, no notice or demand is necessary before action upon a forfeiture, where there is a power of re-entry in the lease upon breach of a covenant to repair(*k*).

Notice necessary.

It is provided by statute that a right of re-entry or forfeiture for a breach of any covenant in a lease, (with certain exceptions which, however, do not include a covenant to repair) shall not be enforceable by action or otherwise until the lessor shall have served a notice specifying the particular breach complained of, and requiring the lessee to remedy it, and to make compensation in money and until the lessee fails within a reasonable time to remedy the breach and to make compensation(*l*).

Order for inspection.

Consolidated Rule 571, though not so limited in express terms, must be construed so as to be confined to cases in

(*g*) *Moule* v. *Garrett* (1872), L.R. 5 Ex. 132; 7 Ex. 101.

(*h*) *Bonner* v. *Tottenham Building Society*, [1899] 1 Q.B. 161.

(*i*) *Wakefield* v. *Brown* (1846), 9 Q.B. 209.

(*j*) *Hill* v. *Barclay* (1810), 16 Ves. 402; 18 Ves. 56; 11 R.R. 147.

(*k*) *Connell* v. *Power* (1864), 13 U.C.C.P. 91.

(*l*) R.S.O. (1897), c. 170, s. 13; see chapter XXVI., section vii.

which the property of which inspection is sought is in the possession, custody, or control of the party against whom the order is desired, and an order should not be made in an action for damages for breaches of the covenant to repair and to leave the premises in good repair contained in a lease, against the mortgagees of the lease who had not been in the actual occupation of the premises(*m*).

Measure of damages.

The proper measure of damages for a breach of a covenant to repair is the amount by which the beneficial occupation of the premises during the term is lessened. Whether the cost of repairing would also be a correct method of estimating the damages must depend upon the circumstances of each case. But it would seem that if the cost of repairing would be so large as to be out of proportion to the tenant's interest in the premises, the lessor would not be justified in repairing and treating the cost of such repairs as his damages(*n*).

The measure of damages for breach of a covenant contained in the lease on the part of the lessor, to dig ditches and make improvements, is the difference between the rentable value of the demised premises with the lessor's covenant performed, that is, with the improvements made, and the value without such improvements(*o*).

In an action on a lease (having many years to run) for rent and non-repair of the premises, the reversioner is not restricted to nominal damages by reason of the length of the lease, but the measure of damages is the amount by which the reversion was injured by the want of repair(*p*).

Liability for injury to strangers.

A landlord who is under no obligation to repair is not liable to the tenant or to strangers using the premises, for injuries caused by the want of repair(*q*).

(*m*) *Hills* v. *Union Loan and Savings Co.* (1899), 19 P.R. 1.
(*n*) *Cole* v. *Buckle* (1868), 18 U.C.C.P. 286.
(*o*) *McEwen* v. *Dillon* (1886), 12 Ont. 411.
(*p*) *Atkinson* v. *Beard* (1861), 11 U.C.C.P. 245.
(*q*) *Lane* v. *Cox*, [1897] 1 Q.B. 415; *Copp* v. *Aldridge* (1895), 11 Times L.R. 411.

It was formerly held that the landlord was liable with the tenant where no duty to repair was imposed on the tenant, and the defect existed at the time of the demise(*r*). But in order to make the landlord liable it is necessary to show that he was aware of the defect(*s*).

Covenant to repair.

Liability for injury to strangers caused by a defective state of repair is *primâ facie* on the tenant(*t*). But it is shifted to the landlord where he is bound by the terms of the lease to repair(*u*). And as between the landlord and, strangers having business with the tenant, the landlord is liable, if he has covenanted to repair, for any injury caused by the defective condition of the premises(*v*).

Injury to lessee's family.

Where a lessee covenanted with the lessor to keep the premises in repair, and his daughter, living with him at the time of the accident, was injured by the fall of a verandah attached to the building, it was held that she had no right of action for damages on account of the accident against the lessor, nor could she be considered as standing in the position of a stranger(*w*).

Where a lessee continues in possession as a yearly tenant after the expiry of a lease containing a covenant by him to repair, a similar obligation will be implied; and the landlord, if ignorant of a defect arising from the non-repair during the currency of the lease, and continuing during the subsequent tenancy, is not liable to a stranger

(*r*) *Todd* v. *Flight* (1860), 9 C.B.N.S. 377; *Robbins* v. *James* (1863), 15 C.B.N.S. 221.

(*s*) *Gwinnell* v. *Eamer* (1875), L.R. 10 C.P. 658.

(*t*) *Pretty* v. *Bickmore* (1873), L.R. 8 C.P. 401.

(*u*) *Mills* v. *Temple-West* (1885), 1 Times L.R. 503.

(*v*) *Miller* v. *Hancock*, [1893] 2 Q.B. 177.

(*w*) *Mehr* v. *McNab* (1893), 24 Ont. 653.

for an injury caused by such neglect, happening during such subsequent tenancy(*x*).

Municipal corporation.

In an action against a city municipality in which the plaintiff recovered damages for injuries sustained by her slipping on ice which had formed on the sidewalk by water brought by the down pipe from the roof of an adjacent building, which was allowed to flow over the sidewalk and freeze, there being no mode of conveying it to the gutter, the owner of the building and the tenant thereof were, at the instance of the municipality, made parties defendants under section 531 of the Municipal Act. The pipe in its condition at the time of the accident had existed from the commencement of the tenancy. A by-law of the municipality required the occupant of a building if occupied, or, if unoccupied, the owner, to remove ice from the front of the building abutting on a street within a limited time. It was held that the owner was, but the tenant was not, liable over to the municipality for damages recovered(*y*).

Owner liable over.

Injury to tenant.

An express covenant on the part of the landlord to repair the demised premises, does not render him liable for an injury to the tenant arising from want of repair, although the tenant has notified him of the disrepair. In such a case the tenant should himself repair, at the expense of the landlord(*z*).

Negligence of servant.

A landlord is liable to his tenant for injuries occasioned by the negligence of the landlord's servant in the management of an elevator which was maintained for the use of the tenant injured and other tenants of the building(*a*).

Premises in dangerous condition.

Where the owner of premises known by him to be dangerous demises them in that condition without pro-

(*x*) *Hett* v. *Janzen* (1883), 2 Ont. 414.

(*y*) *Organ* v. *City of Toronto* (1893), 24 Ont. 318.

(*z*) *Brown* v. *Trustees of Toronto General Hospital* (1893), 23 Ont. 599.

(*a*) *Stephens* v. *Chaussé* (1888), 15 S.C.R. 379.

viding for their repair, he is liable for an injury which is the natural consequence of that dangerous condition. But where he lets the premises to a responsible tenant who enters into covenants to repair which include the source of danger, the liability is shifted to the tenant(*b*).

Todd v. *Flight*.

In *Todd* v. *Flight*(*c*), the defendant, who was the owner of a building and a stack of chimneys, near to the building of the plaintiff, demised them when the chimneys were known by him to be ruinous and in danger of falling upon the building of the plaintiff, and kept and maintained them in such ruinous state until they afterwards fell upon the plaintiff's building, which they did during the occupation of the tenant under such demise, from no default of such tenant, but by the laws of nature. It was held that an action for the injury the plaintiff had sustained from the fall of the chimneys would lie against the defendant, though he was not the occupier at the time of the fall.

Pretty v. *Bickmore*.

In *Pretty* v. *Bickmore*(*d*), the defendant let premises to a tenant under a lease by which the latter covenanted to keep them in repair. Attached to the house was a coal-cellar under the footway, with an aperture covered by an iron plate which was at the time of the demise out of repair and dangerous. A passer-by in consequence fell into the aperture and was injured; it was held that the obligation to repair being by the lease cast upon the tenant, the landlord was not liable for this accident.

A steamship company, who are in possession as lessees of a wharf, are liable to a stranger for damages for an

(*b*) *Todd* v. *Flight* (1860), 9 C.B.N.S. 377; 9 W.R. 145; 3 L.T. 325; *Pretty* v. *Bickmore* (1873), L.R. 8 C.P. 401; 21 W.R. 733; 28 L.T. 704.

(*c*) *Todd* v. *Flight* (1860), 9 C.B.N.S. 377.

(*d*) *Pretty* v. *Bickmore* (1873), L.R. 8 C.P. 401.

injury caused by the negligent maintenance of the wharf(*e*).

Injury to licensee.

One of the plaintiffs purchased from an exhibition association, upon the terms mentioned in the agreement set out in the report, the privilege of selling refreshments under a certain building during the holding of the exhibition in grounds leased by the association from the corporation of a city for two months in the year for the purpose of holding an exhibition, the city by the lease covenanting to repair. During the period of her occupation, and while walking across a platform which was constructed between the building and the sidewalk to give access to people requiring refreshments, the female plaintiff put her foot into a hole in the platform which was out of repair and was injured. It was held that under the agreement mentioned, she was not a lessee of the premises but a mere licensee, who was lawfully there upon the invitation of the association, and that the association owed a duty to the persons whom they induced to go there to keep the place in proper repair; that there was no liability on the corporation of the city as they were not the occupiers of the grounds, and did not invite the plaintiff to go where she was hurt, and there was no highway to be kept in repair by them, but that the association, who had by their negligence caused the accident, were liable(*f*).

Injury to tenants' goods.

A landlord is not liable for damages to the goods of a ground floor tenant caused by rain water coming through defective parts of an upper story, such defects being in existence at the time of the demise. A tenant on taking a

(*e*) *York* v. *Canada Atlantic Steamship Co.* (1892), 24 N.S.R. 436; 22 S.C.R. 167.

(*f*) *Marshall* v. *Industrial Exhibition Association* (1900), 1 Ont. L.R. 319.

lease of part of a building should examine the whole premises and contract for the removal of defects, otherwise he will have no remedy afterwards against the landlord for damages caused by such defects(*g*).

(*g*) *Rogers* v. *Sorell* (1903), 14 Man. L.R. 450; *Miller* v. *Hancock*, [1893] 2 Q.B. 177, distinguished.

CHAPTER XIX.

CULTIVATION AND USER.

Implied obligation.

The mere relation of landlord and tenant implies, and forms a good consideration for, a promise on the part of the tenant to manage the farm in a course of good husbandry; and the prevalent course of husbandry upon similar land in the neighbourhood is evidence of what good husbandry is(*a*).

Cutting timber on wild land.

In an action by a reversioner against a tenant, for injury to the reversion caused by cutting down and carrying away trees and underwood, it was held to be no defence that the tenant held under a demise for nineteen years, and that at the time of the demise, the land was chiefly wild and in a state of nature, and could not be used for farming purposes, for which it was demised, and the tenant cut down and removed the trees upon a portion of the wild land, cleared and made it fit for cultivation, fenced and cultivated it, making it productive and useful, and thereby improved the land in value, and did not injure the reversion(*b*).

A lease of rectory land by the rector contained a covenant not to clear more than a certain portion of the land demised; that the clearing should be for agricultural purposes, in contiguous fields, not exceeding ten acres each, such fields to be enclosed in good lawful fences, "and shall be sufficiently chopped, underbrushed, logged, and burned, according to the due course of farming and good husbandry." It appeared that the lessee's cutting was not

(*a*) *Powley* v. *Walker* (1793), 5 T.R. 373; 2 R.R. 619; *Leyh* v. *Hewitt* (1803), 4 East 154; 7 R.R. 545.

(*b*) *Drake* v. *Wigle* (1872), 22 U.C.C.P. 341.

meant to be limited to what "might be necessary in working regular clearings on the land," and the lessee, with the lessor's consent cut and sold the timber off 180 acres; but the lessee having for two years done nothing towards clearing this portion of the demised land it was held that the delay was open to the objection of being contrary to "the due course of farming and good husbandry," and that the lessee was liable to damages in respect thereof(*c*).

Farm leases.

It is usual to insert in leases of agricultural lands covenants on the part of the lessee, in the following form, or to the like effect:

Covenant as to cultivation.

"And the said lessee doth hereby further covenant and agree, with the said lessor in manner following, that is to say: that the said lessee will during the said term cultivate, till, manure and employ such parts of the said premises as are now or shall hereafter be brought under cultivation in a good husbandman-like and proper manner, and will in like manner crop the same by a regular rotation of crops so as not to impoverish, depreciate or injure the soil, and at the end of said term will leave the said land so manured as aforesaid; and will during the continuance of said term keep down all noxious weeds and grasses, and (so far as the same is practicable having regard to the present condition of the premises) will pull up or otherwise destroy all docks, red root, wild mustard, wild oats, wild tares, twich grass, Canadian thistles and noxious weeds of all kinds which shall grow upon the said premises, or on the side of the roads or highways immediately adjacent thereto, and will not sow, or permit to be sown, any grain containing any foul seeds, and will not suffer or permit any such foul or noxious weeds or grasses to go to seed on the said premises; and will mow the grass along the fences and in the fence corners on said premises;

Rotation of crops.

Noxious weeds.

Manure.

(*c*) *Lundy* v. *Tench* (1870), 16 Gr. 597.

"And will spend, use and employ upon said premises, in a proper, husbandman-like manner all the straw and manure which shall grow, arise, renew or be made thereupon, and will not remove or permit to be removed from said premises any straw of any kind, manure, wood or stone, and will carefully stack or house the straw in the last year of said term, and will each and every year of said term turn all the manure thereon into a pile, that it may thoroughly heat and rot so as to kill and destroy any foul seeds which may be therein, and will thereafter, and not before, spread the same on the land;

"And will not remove, alter or change the style or position of any buildings or fences on said premises without the consent of the said lessor in writing thereto;

"And will continuously throughout said term keep and maintain on said premises not less than ——— head of cattle, exclusive of horses, sheep and pigs;

Fallow. "And will in each and every year of said term make naked summerfallow of, or put in some hoe crop at least ——— acres of said premises, and will plough, hoe and otherwise cultivate the same in a thorough farmer-like manner, so as to kill and destroy all noxious weeds and grasses which may grow thereon;

Grass. "And will in each and every year of said term seed down with good timothy and clover seed, in a proper manner, at least ——— acres of said premises, and will at the expiration of said term leave at least ——— acres thereof in grass;

Protection of trees. "And will carefully protect and preserve all orchard, fruit, shade and ornamental trees on said premises from waste, injury or destruction, and will carefully prune and care for all such trees as often as they may require it, and will not suffer or permit any horses, cattle or sheep to have access to the orchard on said premises; and will not

allow the manure to be placed, or to lie against the buildings on said premises; and will allow any incoming tenant or purchaser to plough the said lands after harvest in the last year of said term, and to have stabling for one team, and bedroom for one man, and reasonable privileges and rights of way to do said ploughing;

"And will keep the mouths of all underdrains on said premises open and free from obstruction, and in good running order at all times during said term, and will not suffer or permit such drains, or the water-courses in any open ditches on said premises to become obstructed, but will constantly keep the same free and clear, for the escape of the water flowing therein. Drains.

"Provided and it is hereby agreed that if at any time during said term the said lessee shall neglect to pull up or otherwise destroy or prevent from going to seed on said premises any wild mustard or other noxious weeds growing thereon, and which are reasonably within the power and duty of said lessee so to pull out or otherwise destroy, or prevent from going to seed, the said lessor may, by notice in writing, require the said lessee within 48 hours after the service of such notice, to pull out or otherwise destroy, or prevent the same from going to seed, and on default of the said lessee in so doing, the said lessor may enter upon the said premises with laborers and workmen and do the work by said notice required to be done by said lessee, and all costs, charges and expenses of or incidental thereto shall be added to the rents hereby reserved and shall be recoverable in like manner as rent reserved, but this provision shall not in any way impair or abridge the right of re-entry by said lessor on non-performance of covenants." Failure to destroy noxious weeds.

Where a lessee covenanted that during the term he "will cultivate, till, manure, and employ such part of the demised premises as is now or shall hereafter be brought

under cultivation, in a good, husbandlike, and proper manner, and shall not nor will during the said term cut any standing timber upon the said lands except for rails or buildings on the said demised premises, and also shall and will sufficiently repair and keep repaired the erections and buildings, fences and gates, erected or to be erected upon the said premises; the said lessor finding or allowing on the premises all rough timber for the same, or allowing the said lessee to cut and fell so many timber trees upon the said premises as shall be requisite," it was held that the lessee was at liberty under the lease to bring further parts of the demised premises into cultivation without the landlord's assent, and to fence the same without his assent, if it was a reasonable and proper thing to do in the course of good and judicious husbandry, and there was nothing to indicate that the landlord was to control the use of the timber so that he might limit it to the buildings, fences and erections existing at the date of the lease(*d*).

Good husbandry.

Removal of straw.

Under a covenant not to remove from the farm during the last year of the term, any of the hay or straw which shall grow thereon, a lessee is not entitled in the last year of the term to remove hay or straw at whatever time during the term it may have grown(*e*).

A lessee who covenants to use upon the demised premises all the straw and dung which should be made thereupon is liable for manure removed from the premises which was there at the expiry of the term, but not for manure made thereafter, while he was overholding(*f*).

Under a lease of a dairy farm with a number of cows containing the following clause:—"All the hay, straw and

(*d*) *Cook* v. *Edwards* (1885), 10 Ont. 341.

(*e*) *Gale* v. *Bates* (1864), 3 H. & C. 84.

(*f*) *Elliott* v. *Elliott* (1890), 20 Ont. 134; *Hindle* v. *Pollitt* (1840), 6 M. & W. 529.

corn stalks raised on the . . . farm to be fed to the same cows on the . . . farm," it was held that while the property in hay produced on the farm might be legally in the tenant, yet his contract was so to use it that it should be fed to the cattle and consumed on the premises, and that he could not have the beneficial use of it or take it off the farm, and an execution creditor of his had no higher right than he had(*g*).

Sale of straw under execution.

It is provided by the *Sale of Farming Stock Act, 1816*(*h*), that no sheriff shall, by virtue of any process of any court of law, remove, or sell for the purpose of being removed, any hay, straw, or other produce from a farm, contrary to a covenant against such removal; but a sheriff may sell such produce to a person agreeing to expend it on the land(*i*); and an assignee or purchaser is not entitled to use it in any other manner than that in which the tenant might have used it(*j*). But this provision does not apply to a sale by a landlord under a distress for rent(*k*).

A covenant in a lease that the lessee will "take proper care of the fruit trees," *primâ facie* applies only to the trees planted and growing on the premises at the time the lease is executed, and does not apply to trees planted by the lessor under an oral agreement subsequent to the execution of the lease. If before the lease was executed it had been expressly agreed that the trees to be afterwards planted by the lessor should be included in the covenant, and upon that understanding they were planted, the covenant might be held to apply to them(*l*).

(*g*) *Snetzinger* v. *Leitch* (1900), 32 Ont. 440.
(*h*) 56 Geo. III., c. 50, s. 1.
(*i*) Sec. 3.
(*j*) Sec. 11.
(*k*) *Hawkins* v. *Walrond* (1876), 1 C.P.D. 280.
(*l*) *Crozier* v. *Tabb* (1876), 26 U.C.C.P. 369.

Injunction.

A covenant to work land in a husbandlike manner, or to keep on the farm a specified amount of stock, will not be enforced by a mandatory injunction(*m*). But an injunction will be granted to restrain the removal of manure or produce in violation of a covenant(*n*).

Immoral use of premises.

No action can be maintained against a lessee for rent or for damages for breach of a covenant, under a lease of premises used for immoral or illegal purposes, if the lessor was aware that the premises were to be so used(*o*).

A lessee is in general entitled to use premises for any lawful purpose other than that originally contemplated by the parties, provided no specific covenant is broken(*p*).

Trade.

A covenant not to carry on any trade or business is applicable only to a business conducted by buying or selling, and is not broken by keeping a private lunatic asylum(*q*). But teaching music, or keeping a school on the premises, is a breach of a covenant not to carry on any art, trade, or business(*r*).

Selling liquors.

A covenant not to carry on the trade of an innkeeper, victualler, or retailer of wine, spirits or beer, is broken by the sale of these liquors in the building, although only to persons who pay for admission to an adjoining theatre(*s*).

A covenant not to use premises as a public house or beer-shop, is not broken by its use as a private hotel, where wines and spirits are supplied only to visitors(*t*).

(*m*) *Musgrove* v. *Horner* (1875), 31 L.T. 632.

(*n*) *Crosse* v *Duckers* (1873), 27 L.T. 816.

(*o*) *Girardy* v. *Richardson* (1793), 1 Esp. 13; *Gibbons* v. *Chambers* (1885), C. & E. 577.

(*p*) *Grand Canal Co.* v. *McNamee* (1891), 29 L.R. Ir. 131.

(*q*) *Doe* v. *Bird* (1834), 2. A. & E. 161.

(*r*) *Tritton* v. *Bankart* (1887), 56 L.T. 306; *Doe* v. *Keeling* (1813), 1 M. & S. 95; *Wauton* v. *Coppard*, [1899] 1 Ch. 92.

(*s*) *Buckle* v. *Fredericks* (1890), 44 Ch. D. 244.

(*t*) *Duke of Devonshire* v. *Simmons* (1894), 11 Times L.R. 52.

Private dwelling.

A covenant that no building to be erected on the lands demised shall be used for any purpose of trade, or in any other way than as a private residence, is broken by its use as a boarding house(*u*).

Where a lease contained a covenant that the lessee was not to use the premises for any purpose but that of a private dwelling and "gents' furnishing store," it was held that the carrying on by the lessee of auction sales of his stock, on the premises, was a breach of the covenant restrainable by injunction(*v*).

Trade affecting insurance.

Where a lessee for a term of years stipulated that he would not carry on any business that would affect the insurance, and made an under-lease omitting any such stipulation, the under-lessee having commenced the business of rectifying high wines, was restrained(*w*).

Reasonable use.

The defendant leased to the plaintiff a small knoll or island, standing in a shallow lake, which in the dry season became a muddy marsh. The land surrounding the knoll or island belonged to the defendant, and the lease provided that the plaintiff should have the right of way across it, nothing being said as to the mode of exercising the right. The plaintiff built a trestle bridge from the knoll or island to the main land, and this bridge the plaintiff pulled down. It was held that the plaintiff's mode of user was reasonable and that the defendant was not justified in interfering with the bridge(*x*).

Where the lessee covenanted to clear and fence five acres each year, and to split and put into fences 500 rails each year to fence said land cleared by him, it was held that as this number of rails would not nearly fence five

(*u*) *Hobson* v. *Tulloch*, [1898] 1 Ch. 424.

(*v*) *Cockburn* v. *Quinn* (1890), 20 Ont. 519.

(*w*) *Arnold* v. *White* (1856), 5 Gr. 371.

(*x*) *Butchart* v. *Doyle* (1897), 24 Ont. App. 615.

acres, the covenant was satisfied by clearing five acres each year, and fencing with a fence of some kind, having—in this case a brush fence—in it 500 rails(*y*).

Boring for oil.

In the absence of an express stipulation in a lease giving the right to the lessee to bore for oil, it has been held that, *primâ facie*, he has no such right(*z*).

Nuisance.

It is usual to insert in leases a covenant that the lessee will not carry on any business that shall be deemed a nuisance on the premises.

The landlord and tenant are both liable for damages arising from a nuisance created by the landlord in the house, and continued to be used by the tenant while occupying it(*a*). If a nuisance exist at the time of letting, both tenant and owner are liable. If it arise after the tenancy is created, the tenant only is responsible(*b*).

A landlord is liable for a nuisance on the demised premises if it was existing at the time of the demise(*c*), or if it was created by the tenant under the authority of the landlord or derived from the terms of the demise(*d*).

But if the nuisance was created by the tenant himself after the making of the lease, the landlord having no right to interfere, the tenant, and not the landlord, is liable(*e*).

(*y*) *McLaren* v. *Kerr* (1878), 39 U.C.R. 507.
(*z*) *Lancey* v. *Johnston* (1881), 29 Gr. 67.
(*a*) *McCallum* v. *Hutchison* (1857), 7 U.C.C.P. 508.
(*b*) *Regina* v. *Osler* (1872), 32 U.C.R. 324.
(*c*) *Gandy* v. *Jubber* (1864), 6 B. & S. 78.
(*d*) *Harris* v. *James* (1876), 45 L.J.Q.B. 545.
(*e*) *Rich* v. *Basterfield* (1847), 4 C.B. 783.

CHAPTER XX.

OPTION TO PURCHASE.

A provision in a lease whereby the lessor grants to the lessee an option to purchase the demised premises within a limited time, is not a *nudum pactum*, but is binding on the lessor, although no separate consideration is given for such option. In such a case, the lease and the option to purchase are not independent contracts, but different parts of one contract(*a*).

A lease giving an option to purchase does not operate to create the relation of mortgagor and mortgagee between the parties, so as to give the lessor the right to compel the lessee to purchase, even if it was so understood by them(*b*).

Independent contract.

The right of a lessee to exercise an option to purchase is not dependent on the performance by him of other stipulations in the lease, unless expressly made dependent thereon(*c*); and it may be enforced, even if the lessee has done something amounting to forfeiture(*d*).

Time the essence.

But where there is a contract between the owner of lands and another person, whether lessee or not, that, if such other person shall do a certain specified act, he shall be at liberty to buy the property, time is of the essence of the contract, and until the performance of the act which has been so stipulated for, the relation of vendor and purchaser does not exist between the parties. Thus, where

(*a*) *Moir* v. *Palmatier* (1900), 13 Man. L.R. 34; *Youill* v. *White* (1902), 5 Terr. L.R. 275.

(*b*) *Cullen* v. *Price* (1833), 1 O.S. 302; see also *Doyle* v. *Dulhanty* (1891), 23 N.S.R. 78.

(*c*) *Rafferty v. Schofield*, [1897] 1 Ch. 937.

(*d*) *Green* v. *Low* (1856), 22 Beav. 625; but see *Hunt* v. *Spencer* (1867), 13 Gr. 225.

in a lease of certain lands, the lessors agreed that if the lessee duly paid certain rents and taxes, and should not cut, or sell, or suffer, or permit to be cut, or sold any timber or other trees growing on the lands, except for the purposes of clearing and for the use of the premises, he should be at liberty to purchase the same at a certain named price, and default having been made as well in regard to the payment of rent and taxes as to the cutting of timber, it was held that the right to insist upon a sale was forfeited, notwithstanding the lessee's offer to make good the rent and taxes, and pay the amount of purchase money agreed upon(*e*).

Notice.

When it is agreed that an option to purchase may be exercised on giving a specified notice, the requirements of the stipulation as to notice must be strictly complied with. Thus, where a lease, granted by three trustees, gave an option to the lessee to purchase at any time during the term, on giving written notice to the lessors, it was held that a notice given to only one of them was insufficient(*f*). And where notice is required to be given within a certain time, no contract will arise unless it is given strictly according to the agreement(*g*). Moreover, where notice has been given by a lessee in accordance with the agreement, his right to specific performance may be defeated by delay in carrying out the contract to purchase(*h*).

When notice may be given.

Under a lease creating a term from the 1st of April, 1852, and giving the lessee the option of purchasing, on declaring his intention so to do within two years from the commencement of the term, it was held that he was not too late in declaring such intention on the 1st of April, 1854,

(*e*) *Ball* v. *Canada Co.* (1877), 24 Gr. 281.
(*f*) *Sutcliffe* v. *Wardle* (1890), 63 L.T. 329.
(*g*) *Riddell* v. *Dumford* (1893), W.N. 30.
(*h*) *Rafferty* v. *Schofield*, [1897] 1 Ch. 937.

as the first day of the term should be excluded in the calculation(*i*). And an option to purchase within a fixed time may be exercised, although the term has come to an end before that time, under another provision in the lease(*j*).

But the right to notice may be waived, and such waiver may be implied from the circumstances of the case(*k*).

Payment of purchase money.

Payment of the purchase money is not a condition precedent to the existence of the contract to purchase, where it is simply agreed that the lessee shall have the option to purchase at a specified sum, and on payment thereof, shall be entitled to a conveyance(*l*). But if it is agreed that if the lessee should desire to purchase and should give notice, and pay the purchase money, payment is a condition precedent, and if not made, no binding contract arises, even if notice be given(*m*).

Payment of rent.

Where an option to purchase is given after the lease has been made, and it is agreed that no rent is to be paid after the exercise of the option, an instalment of rent, which became due before the option was exercised, was held not to be recoverable(*n*).

Where a lessee, under an option to purchase given after the lease, paid £50 to the lessor, which was to be on account of the purchase money, if the lessee elected within one year to purchase, otherwise to be applied on the rent accruing in the future, and the lessee not having elected to purchase, and the premises having been afterwards destroyed by fire, it was held that the lessor was entitled to retain the £50 for rent during the remainder of the term, notwithstanding

(*i*) *Sutherland* v. *Buchanan* (1862), 9 Gr. 135.

(*j*) *Edwards* v. *West* (1878), 7 Ch. D. 858.

(*k*) *Friary, Holroyd and Henley's Breweries* v. *Singleton*, [1899] 2 Ch. 261.

(*l*) *Mills* v. *Haywood* (1877), 6 Ch. D. 196.

(*m*) *Weston* v. *Collins* (1865), 34 L.J. Ch. 353.

(*n*) *Forge* v. *Reynolds* (1868), 18 U.C.C.P. 110.

a proviso in the lease that in such a case the rent should cease(*o*).

Right of purchaser to insurance moneys.

Where a lessee decides to exercise his option to purchase after the premises have been destroyed by fire, he is not entitled to the insurance money as part of his purchase, if the lessor covenanted to insure, and at the time the lessee decides to buy, the insurance money has been paid to the lessor(*p*).

But where the lessee had effected an insurance under a covenant to insure, and the lessor, without the lessee's knowledge, had also insured and received the insurance moneys, and the lessee in consequence received only a proportion of his insurance moneys, it was held that the lessee, upon exercising his option to purchase, was entitled to the benefit of the insurance moneys received by the lessor(*q*).

Assigns.

An option to purchase contained in a lease is binding on, and may be enforced against the representatives of a deceased lessor, although not so expressed(*r*). But where an option is given to the lessee or his assigns to purchase the fee-simple of the premises let, an equitable assignee cannot exercise it(*s*).

An option to purchase given to a "lessee, his executors, administrators and assigns" can be exercised by him, or them, only if still entitled to the term(*t*).

Before the *Devolution of Estates Act*(*u*), a right to purchase under a provision in a lease descended to the heir-at-law, and not to the personal representative of the lessee(*v*).

(*o*) *Pulver* v. *Williams* (1853), 3 U.C.C.P. 56.
(*p*) *Edwards* v. *West* (1878), 7 Ch. D. 858.
(*q*) *Reynard* v. *Arnold* (1875), L.R. 10 Ch. 386.
(*r*) *Youill* v. *White* (1902, 5 Terr. L.R. 275.
(*s*) *Friary, Holroyd and Henley's Breweries* v. *Singleton*, [1899] 2 Ch. 261.
(*t*) *In re Adams* (1884), 27 Ch. D. 394.
(*u*) R.S.O. (1897), c. 127.
(*v*) *Henrihan* v. *Gallagher* (1862), 9 Gr. 488; 2 E. & A. 338, over-ruling *Sampson* v. *McArthur* (1861), 8 Gr. 72. See chapter XXV.

CHAPTER XXI.

COMPENSATION FOR IMPROVEMENTS.

Improvements made by mistake.

When a landlord stands by and knowingly allows his tenant, who is under a mistake as to his legal rights, to expend money or do some act in respect of the property on the faith of that mistake, and he, the landlord, knows of that mistaken belief, he cannot afterwards set up his legal rights as against the tenant(*a*).

Covenant to pay.

Where a lessee covenanted to build on the demised premises during the term, "provided always, and it is the true intent and meaning of these presents, and the parties thereunto, that at the expiration of the demise, the buildings erected shall be paid for at the valuation of two indifferent persons," it was held that these words constituted a covenant by the lessor to pay for the buildings erected(*b*).

Trustees.

Trustees having a beneficial life interest in lands with power of sale, have power to grant a lease for twenty-one years with provision for compensation for improvements or renewal(*c*).

Assigns.

A covenant by a lessor (not mentioning assigns) to pay for buildings to be erected on the lands demised, does not run with the land, and neither the lessee nor his assigns have any claim against the land, or against the devisees of the lessor, in respect of the value of buildings so erected(*d*).

But under a lease containing an agreement that, "at

(*a*) *Civil Service Musical Instrument Association* v. *Whiteman* (1899), 68 L.J. Ch. 484; 80 L.T. 685.

(*b*) *McFattridge* v. *Talbert* (1845), 2 U.C.R. 156.

(*c*) *Brooke* v. *Brown* (1889), 19 Ont. 124.

(*d*) *McClary* v. *Jackson* (1887), 13 Ont. 310.

the expiration of the lease, the lessor, his heirs or assigns, will pay the said lessee one-half of the then value of any permanent improvements he may place upon the said lands," it was held that the liability to pay for the improvements ran with the land, and attached as an equitable lien thereon as against a purchaser, and that on the expiration of the term, the latter could only recover possession of the said land subject to such lien(*e*).

Fixtures.

A covenant in a lease to pay for "buildings and erections" on the demised premises, covers and includes fixtures, and machinery(*f*).

Under a covenant by the lessor that he will pay for improvements, and that if such payment be not made, he will grant a renewal of the lease, the option lies with the lessor to do either, and not with the lessee to require payment(*g*).

Buildings and erections.

Where the lessee of a water lot, who had made crib-work thereon and filled it in with earth to the level of adjoining dry lands, and thereby made the property available for the construction of sheds and warehouses, claimed compensation for the work so done, under a proviso in the lease by the lessor to pay for "buildings and erections" upon the leased premises at the end of the term, it was held that the crib-work and earth-filling were not "buildings and erections" within the meaning of the proviso(*h*).

Destruction by fire.

Where a lessor covenanted with his lessee that at the expiration of the term he would pay for buildings on the land demised, it was held that the covenant was neither

(*e*) *Berrie* v. *Woods* (1886), 12 Ont. 693; but see *Ambrose* v. *Fraser* (1887), 14 Ont. 551.

(*f*) *In re Brantford Electric and Power Co. and Draper* (1897), 28 Ont. 40; 24 Ont. App. 301.

(*g*) *Ward* v. *Hall* (1899), 34 N.B.R. 600.

(*h*) *Adamson* v. *Rogers* (1896), 26 S.C.R. 159, affirming S.C. 22 Ont. App. 415.

wholly spent in the event of destruction by fire of the building then in existence, nor necessarily limited to the then value of the existing building, but that the increased value of subsequently erected buildings could be claimed, at the expiration of the term, against the landlord(*i*).

Invalid lease.

Where the guardian of an infant tenant for life, without the sanction of the court, executed a lease for years, during the existence of which the infant died, and the court made an order for the lessee to deliver up possession, the lessee was permitted, on payment into court of the amount of rent in arrear, to remove the buildings and erections put by him on the property (doing no damage to the realty), but the court refused to allow him out of such rents, for any improvements made by him upon the premises(*j*).

Giving up possession on notice.

Where it was provided in the lease that if the lessor sold the farm, the lessee should give up possession upon receiving a specified notice, and that he should have the privilege of harvesting and threshing the crops of the summer fallow, or that the work done on said fallow should be paid for at a reasonable valuation, it was held that the lessee was to have the privilege of harvesting any crops which might have been put in on the summer fallow, unless the lessor elected to pay for them at a valuation; that he never parted with the property in the crop; and that he was therefore entitled to recover in trover against the purchaser(*k*).

Under a covenant that the lessee will at "the costs and charges of the said lessee, well and sufficiently repair and keep repaired the fences, and gates, erected or to be erected

(*i*) *In re Haisley* (1882), 44 U.C.R. 345.

(*j*) *Townsley* v. *Neil* (1863), 10 Gr. 72. As to compensation for improvements where a lease is set aside on grounds of improvidence, see *Shanagan* v. *Shanagan* (1884), 7 Ont. 209.

(*k*) *Harrison* v. *Pinkney* (1881), 6 Ont. App. 225.

upon the said premises, and the said lessor finding or allowing one-half of the expenses of repairing the house. . . . The lessee to repair fences, the amount to be valued and to be paid by the lessor at the end of the first year of the term," it was held that the lessor was bound to pay half the repairs of the house and all the repairs of the gates and fences(*l*).

Crown lands.

A lessee of Crown lands for which no patent has been issued to the lessor, cannot be ejected by the lessor except upon the terms that the lessee shall be paid for his improvements(*m*).

Interest on value of improvements.

By a lease made on the 1st of November, 1879, land was demised for a term of twenty-one years, and it was agreed that all the buildings on the land at the end of the term should be valued by valuators or arbitrators, and that the reference should be made and entered on, and the award made, within six months next preceding the 1st of November, 1900; and it was further agreed that within six months from that day the value of the buildings found by the arbitrators should be paid by the lessors, with interest at the rate of seven per cent. per annum from that day, and that until paid it should be a charge on the land. By deed dated the 23rd of October, 1900, the parties agreed that the time for making the award should be extended to the 1st of December, 1900, and until such further day as the valuators or arbitrators might extend the same. The time was duly extended until the 30th of November, 1901, on which day an award was made fixing the value of the buildings. Possession of the lands and buildings was given up by the lessees to the lessors on the 31st of October, 1900. It was held that, supposing the extension of time and delay to have been agreed for the convenience of both parties

(*l*) *Miller* v. *Kingsley* (1865), 14 U.C.C.P. 188.
(*m*) *Boulton* v. *Shea* (1893), 22 S.C.R. 742.

and without the fault of either, the lessees were entitled to interest on the value of the buildings from the 31st of October, 1900, to the 30th of November, 1901, for the first six months at seven per cent., and for the remainder of the time at the legal rate of five per cent(*n*).

Tender of value.

Where there is no mode provided in the lease for ascertaining the value of improvements which are to be paid for by the lessor, the latter should have a fair and reasonable valuation made, and tender the amount thereof to the lessee(*o*).

A lessee is a "proprietor" within the meaning of the *Railway Act* and is entitled to compensation(*p*).

Measure of compensation.

The measure of compensation to be paid to a lessee, where the demised lands are expropriated under statutory authority, is the value of the time of expropriation of his leasehold interest therein; and where the lease contains a stipulation for payment of a specified sum for improvements, if the lease should be determined on a given notice, the lessee will be entitled to that sum and the cost of removal to other premises, but not to compensation for increased profits which he might have made if he had not been disturbed in his possession(*q*).

(*n*) *Toronto General Trusts Corporation* v. *White* (1903), 5 Ont. L.R. 21.

(*o*) *Nudell* v. *Williams* (1866), 15 U.C.C.P. 348.

(*p*) *Brown* v. *Grand Trunk Railway Co.* (1865), 24 U.C.R. 350.

(*q*) *Gibbon* v. *The Queen* (1900), 6 Ex. C.R. 430; see also *Fitch* v. *McRae* (1881), 29 Gr. 139. As to compensation to a lessee in respect of lands expropriated under statutory authority in British Columbia, see R.S.B.C. (1897), c. 112, ss. 105, 106 and 107.

CHAPTER XXII.

RENEWAL.

Tacit renewal.

Where there is no covenant for renewal and the lessee who has held for a term at a certain rent continues to occupy, after the expiration of his term, with the assent of the lessor, it is presumed, in the absence of an agreement to the contrary, that he holds at the former rent(*a*).

Presumption of terms.

Where a lease is granted for a certain term "with the option of renewal," or it is agreed to grant a renewal simply, it is presumed that the new tenancy is to be of the same duration, and subject to the same terms as the former lease(*b*). A renewal lease is a continuation of the old lease, and if rent for buildings erected by the tenant is not provided for under the first lease, neither should it be under the extension, in the absence of express provision(*c*).

Acceleration clause.

A company were assignees of a lease in writing containing a provision for the acceleration of six months' rent in case the tenant became insolvent, but before the expiry of the lease an arrangement was made between the company and the landlord for a reduction of the rent after the expiry of the lease, nothing being said as to the other terms it was held that the arrangement made imported the terms of the old lease, so far as applicable, including the acceleration clause(*d*).

Statute of Frauds.

An agreement to extend the term for three years from

(*a*) *Hilliard* v. *Gemmell* (1886), 10 Ont. 504.

(*b*) *Lewis* v. *Stephenson* (1898), 67 L.J.Q.B. 296; *Dawson* v. *Graham* (1880), 41 U.C.R. 532.

(*c*) *In re Allen and Nasmith* (1899), 31 Ont. 335; 27 Ont. App. 536.

(*d*) *In re Canada Coal Co., Dalton's Claim* (1896), 27 Ont. 151.

a future time is within the Statute of Frauds, and is invalid if not in writing(*e*).

An agreement to "release" in a lease may be construed to mean an agreement to grant a renewal of the lease(*f*).

Executor. Under the *Devolution of Estates Act*(*g*), the executor of a deceased lessor can make a valid renewal of a lease pursuant to the covenant of the testator to renew(*h*).

Trustees. Trustees having a beneficial life interest in lands with power of sale are entitled to grant a lease for twenty-one years with provision for renewal(*i*).

Where the covenant for renewal of a sub-lease is conditional on the lessor obtaining a renewal of the head-lease, the lessor is under no obligation to obtain such renewal(*j*); but where a renewal of the head-lease is taken in the name of a trustee for the sub-lessor's wife, the sub-lessor is bound to renew the sub-lease, if it be shown that the renewal of the head-lease is a merely colourable transaction, and that the trustee is in reality a trustee for the sub-lessor(*k*).

Sub-lessor. If, however, the sub-lessor has covenanted to use his utmost endeavours to procure a renewal of his own lease, he is bound to do so, and to pay any reasonable sum that may be required for that purpose, or even a largely increased rent(*l*).

Leases under powers. A covenant for renewal in a lease made under a power of granting leases in possession at the best rent, will not

(*e*) *Kaatz* v. *White* (1869), 19 U.C.C.P. 36.

(*f*) *Dawson* v. *Graham* (1880), 41 U.C.R. 532.

(*g*) R.S.O. (1897), c. 127.

(*h*) *In re Canadian Pacific Railway Co. and National Club* (1893), 24 Ont. 205.

(*i*) *Brooke* v. *Brown* (1889), 19 Ont. 124.

(*j*) *Muller* v. *Trafford*, [1901] 1 Ch. 54; 49 W.R. 132.

(*k*) *Lumley* v. *Timms* (1873), 28 L.T. 608.

(*l*) *Simpson* v. *Clayton* (1838), 4 Bing. N.C. 785; 44 R.R. 841; *Evans* v. *Walshe* (1805), 2 Sch. & L. 519.

be enforced if, at the time, the rent is not the best rent, or if the proposed new lease contains stipulations not then authorized by the power(*m*), or is for a term exceeding the limit permitted by statute(*n*), or if the lease containing the covenant is void under some statute(*o*).

Municipal corporation.

But it has been held that an action for damages may be maintained against a municipal corporation on their covenant for renewal of a lease which had been made without having power to do so lawfully, and which they had no power to renew(*p*).

Renewal in perpetuity.

A covenant for renewal for ever is not within the rule against perpetuities, and will be enforced(*q*).

A covenant to renew on the same terms as are contained in the lease will not be construed so as to include the covenant for renewal itself, and so make it perpetual(*r*).

The right of perpetual renewal is not to be inferred from any expressions in the lease which are fairly capable of being otherwise interpreted, and the burden of strict proof rests on the party claiming such right(*s*). But it may be expressly stipulated that the covenants in the new lease shall include a covenant for renewal(*t*).

Where a lease for lives contained the words "renewable forever" in the *habendum*, and a covenant by the lessee to

(*m*) *Gas Light Co.* v. *Towse* (1887), 35 Ch. D. 519.

(*n*) *Moore* v. *Clench* (1875), 1 Ch. D. 447.

(*o*) *Bunting* v. *Sargent* (1879), 13 Ch. D. 330.

(*p*) *Wade* v. *Town of Brantford* (1860), 19 U.C.R. 207; *Van Brocklin* v. *Town of Brantford* (1861), 20 U.C.R. 347.

(*q*) *London & Southwestern Railway Co.* v. *Gomm* (1882), 20 Ch. D. 562, at p. 579, per Jessel, M.R.

(*r*) *Hyde* v. *Skinner* (1723), 2 P.Wms. 196; *Lewis* v. *Stephenson* (1898), 67 L.J.Q.B. 296; *Iggulden* v. *May* (1804), 9 Ves. 325; 7 East 237; 2 N.R. 449; *Sears* v. *City of St. John* (1891), 18 S.C.R. 702; 28 N.B.R. 1.

(*s*) *Swimburne* v. *Milburn* (1884), 9 App. Cas. 844.

(*t*) *Nicholson* v. *Smith* (1882), 22 Ch. D. 640, at p. 644.

pay a fine for inserting a new life in place of any that should fall, it was held that the lease conferred a right to renewal in perpetuity notwithstanding there was no covenant by the lessor so to renew(*u*).

Dependent covenant.

Where the covenant for renewal is made subject to the due performance of covenants by the lessee, strict performance is a condition precedent to his right of renewal. Thus, he will be disentitled if the lessor, at the time application is made, has a right of action for breaches of covenants, even of a trifling character(*v*).

Application for renewal.

When the covenant for renewal provides that application for renewal shall be made by the lessee at or within a specified time, it must be so made, otherwise he will forfeit his right thereto(*w*). But the court will relieve against a forfeiture, if it arises through no want of diligence in the lessee, and where the lessor's conduct has been such as to render it inequitable that the forfeiture should be enforced(*x*).

Fines.

Exact compliance with the lease as to the payments of fines on renewal is essential, and by failure in this respect on the part of the lessee or those claiming under him, the right to renew both legal and equitable is lost(*y*).

Reasonable time before expiration.

Where the lease is silent as to the time when application shall be made, it must be made within a reasonable time before its expiration(*z*). Thus, where the defendant held under a lease for five years containing a covenant by the

(*u*) *Pernette* v. *Clinch* (1890), 26 N.S.R. 410; affirmed 24 S.C.R. 385.

(*v*) *Finch* v. *Underwood* (1876), 2 Ch.D. 310; *Bastin* v. *Bidwell* (1881), 18 Ch. D. 238.

(*w*) *Baynham* v. *Guy's Hospital* (1796), 3 Ves. 295; 3 R.R. 96; *Rubery* v. *Jervoise* (1786), 1 T.R. 229; 1 R.R. 191; *Leys* v. *Baldwin* (1851), 2 U.C.C.P. 488.

(*x*) *Hunter* v. *Hopetoun (Lord)* (1865), 13 L.T. 130.

(*y*) *Pernette* v. *Clinch* (1890), 26 N.S.R. 410; 24 S.C.R. 385.

(*z*) *Lewis* v. *Stephenson* (1898), 67 L.J.Q.B. 296.

lessor to grant him a renewal for five years at a rent named, if requested, and the first term having expired, and no request made, it was held that the lessor might eject without any demand(*a*).

Delay.

It has been held, however, that notwithstanding a delay of nearly two years after the expiration of the lease, the lessee was not precluded from enforcing a covenant for renewal, although prior to the expiration of the lease he had written to the lessor to say he had no desire to renew(*b*).

Farley v. *Sanson.*

In *Farley* v. *Sanson*(*c*), the renewal clause in a lease provided that at the expiration of the term, the lessors might at their election either take the lessees' improvements at a valuation to be fixed by arbitrators prior to such election being made, or grant a new lease for a further term. No time limit was fixed within which the arbitration should take place, and either party might require the other to appoint an arbitrator within seven days, and on default might appoint a sole arbitrator. The lease terminated on November 1st, 1900, and on April 30th, 1900, the lessees wrote saying they had no desire to renew and would be glad to give up possession. The lessors, however, did nothing to relieve the lessees of possession; but, on the contrary, in June, and July, 1901, they endeavoured unsuccessfully to have the assessment roll altered by preserving the tenants' names thereon as still tenants. On February 15th, 1902, they gave notice to arbitrate requiring the lessees to appoint an arbitrator. It was held that the lessees were not precluded by delay from enforcing renewal of the lease.

Exercise of option.

Upon the expiry of a parol lease for a term certain, with an option in the lessees to renew for a fixed period, the facts that the keys of the demised premises were not

(*a*) *Dawson* v. *St. Clair* (1856), 14 U.C.R. 97.
(*b*) *Farley* v. *Sanson* (1903), 5 Ont. L.R. 105.
(*c*) (1903), 5 Ont. L.R. 105.

delivered by the lessees to the lessor for two or three days after the expiry of the term, and that a sub-tenant of the lessees continued thereafter in possession of a portion of the premises, are not sufficient to constitute an exercise by the lessees of their option to renew. Such possession of the sub-tenant is, however, sufficient to make the lessees liable for use and occupation, as to which the rent payable under the lease which has expired may be some evidence of the value of the premises, although no particular contract is to be inferred from the mere fact of holding over(*d*).

Desire to to renew.

Under a covenant in a lease that the lessors would, at the expiration of the term thereby granted, grant another lease, "provided the said lessee . . . should desire to take a further lease of said premises," no notice or demand by the lessee is necessary. The existence in fact of a desire for the further lease is all that is essential, and that desire may be indicated by conduct and circumstances(*e*).

Notice.

Under a covenant in a lease that if, at the expiration of the term, the lessee should be desirous of taking a renewal lease, and should have given to the lessors thirty days' notice in writing of his desire, the lessors would renew or pay for improvements, the lessors have the right to elect, and the lessee must accept a renewal unless, before the expiration of the term, the lessors elect not to renew(*f*).

Covenant to pay for improvements or renew.

Where a lessor has covenanted to pay for improvements at a valuation, and if not paid for within a certain time to grant a renewal of the term, the lessee is entitled to a renewal on default made in payment, although no valuation has been made; the lessor in order to free himself

(*d*) *Lindsay* v. *Robertson* (1898), 30 Ont. 229.

(*e*) *Brewer* v. *Conger* (1900), 27 Ont. App. 10.

(*f*) *Ward* v. *City of Toronto* (1899), 26 Ont. App. 225; 29 Ont. 729.

from liability to grant a renewal should, in the absence of any provision as to the mode of valuation, make a fair and reasonable valuation and tender the amount thereof to the lessee(*g*).

Lessor's right of election.

But where the lessor covenanted to grant a renewal, or pay the value of the lessee's buildings to be fixed by arbitration, within a certain time after the award, it was held that the failure to pay within the time did not deprive him of his right of election, nor enable the lessee to insist on a renewal(*h*). Where the lessor covenants for a renewal of the term, or in default for payment for improvements, the option rests with the lessor either to renew or pay for the improvements, and the lessee is not entitled to specific performance of the contract to renew(*i*).

Specific performance

A lease for a term of years provided that when the term expired, any buildings or improvements erected by the lessees should be valued, and it should be optional with the lessors either to pay for the same or to continue the lease for a further term of like duration. After the term expired the lessees remained in possession some years, when a new indenture was executed which recited the provisions of the original lease, and after a declaration that the lessors had agreed to continue and extend the same for a further term of fourteen years from the end of the term granted thereby, at the same rent, and under the like covenants, conditions, and agreements as were expressed and contained in the said recited indenture of lease, and that the lessees had agreed to accept the same, it proceeded to grant the further term. This last mentioned indenture contained no independent covenant for renewal. After the second term expired the lessees continued in possession and paid rent for one year, when they notified the lessors of their inten-

(*g*) *Nudell* v. *Williams* (1866), 15 U.C.C.P. 348.
(*h*) *Roaf* v. *Garden* (1873), 23 U.C.C.P. 59.
(*i*) *Hutchinson* v. *Boulton* (1853), 3 Gr. 391.

tion to abandon the premises. The lessors refused to accept the surrender, and, after demand of further rent, and tender for execution of an indenture granting a further term, they brought suit for specific performance of the agreement implied in the original lease for renewal of the second term at their option; it was held that the lessors were not entitled to a decree for specific performance(*j*).

Lessor's option to pay for improvements or to renew.

A lease contained a covenant to the effect that the lessee might make improvements upon the demised premises, and that at the expiration of the lease or any renewal thereof the same should be valued and paid for by the lessor and then concluded as follows: "And upon such payment upon such valuation not being duly made the party of the first part, his heirs or assigns, shall, if so required, give or renew a lease including the covenants of the present lease to the parties of the second part for a further period of five years, with the like agreement of valuation and payment for improvements as in this lease expressed and at the same yearly rent." On the expiration of the term a dispute having arisen between the lessor and lessee as to the effect of the covenant—the former claiming that it was optional with him either to renew the lease or pay for the improvements after valuation, the latter that he was entitled to have the improvements valued and paid for by the lessor—a special case was stated in equity for the opinion of the court. Each party was ready and willing to perform the covenant as interpreted by him. It was held, (1) That the covenant was single, and therefore that the lessor was discharged upon his showing that he was ready and willing to renew the lease; (2) That even if there were two separate and independent covenants, one to pay the appraised value of the improvements and the other to renew, only one was to

(*j*) *Sears* v. *City of St. John* (1898), 18 S.C.R. 702; 28 N.B.R. 1.

be performed, and the option lay with the lessor, he being the first person called upon to act(*k*).

Increased rent.

Where a lease provides for a renewal at an increased rent to be determined by arbitration, the arbitrators are bound to award an increased rent, but they may award a mere nominal increase if they think proper, to be based on the rent reserved for the whole term, and not on any particular years(*l*).

Thus, where a renewable lease provided that renewals should be at such "increased" rent as should be determined by arbitrators "payable in like manner and under and subject to the like covenants, provisions, and agreements as are contained in these presents," and the lease further provided for the payment of the yearly rent as follows: "For the first ten years of the said term $80 per annum; for the remaining eleven years $100 per annum"; it was held that the proper method of increasing the rent on renewal was by adding to the rent of $80 per annum for the first ten years, and to the rent of $100 per annum for the remaining eleven years of the renewal term; also, that the condition as to the rent for the new term being an increased rent, might be satisfied by making a merely nominal addition, there being no increase in the rental value of the premises(*m*).

Right to renew at former rent.

Where, in a lease for twenty-one years, it was stipulated that, at the expiration of the term, the lessee might retain possession, on condition that within three months a new rent should be ascertained by arbitration; and further that if "at the expiration of the next or any subsequent term of twenty-one years, no new ground rent should be

(*k*) *Ward* v. *Hall* (1899), 34 N.B.R. 600.

(*l*) *In re Geddes and Garde* (1900), 32 Ont. 262; *In re Geddes and Cochrane* (1902), 3 Ont. L.R. 75.

(*m*) *In re Geddes and Garde* (1900), 32 Ont. 262.

ascertained as aforesaid," then the lessee should continue in possession, upon payment of the rent last ascertained to be payable, it was held, no new rent having been ascertained within the time, that the lessee was entitled to a renewal for a further term at the old rent, although he had taken part in an arbitration in which an increased rent had been fixed(*n*).

Rent fixed by arbitration.

Where there is a covenant for renewal at a rent to be fixed by arbitration, the amount of rent for the renewal term should be based by the arbitrators on the value of the land at the time of the renewal, and not upon the value of the land and of buildings erected by the lessee during the term(*o*).

Costs of renewal.

Where it was provided in a lease that if the lessee should desire a renewal for a further term and should give a defined notice, containing the name of an arbitrator, the lessors, "at the expense of the lessee," should execute a new lease at such increased yearly rent as might be determined by the award of the three arbitrators, or a majority of them, it was held that the costs of the lease were provided for both by law and by the above clause, and must be borne by the lessee; but that the costs of the arbitration were not provided for by the clause, and each party must bear his own costs of the reference, one-half of the arbitrator's fees, for which the action was brought, and one-half of the plaintiff's costs of the action(*p*).

Costs of arbitration.

It has been held, however, in a recent case that the costs of renewal, under a covenant to renew "at the costs of the lessee," are not only the ordinary conveyancing

(*n*) *McDonell* v. *Boulton* (1859), 17 U.C.R. 14.

(*o*) *In re Allen and Nasmith* (1900), 27 Ont. App. 536, following *Van Brocklin* v. *Brantford* (1861), 20 U.C.R. 347.

(*p*) *Smith* v. *Fleming* (1888), 12 P.R. 520, 657, following *Marsack* v. *Webber* (1861), 6 H. & N. 1; and *In re Autothreptic Steam Boiler Co.* (1887), 21 Q.B.D. 182.

costs, such as the costs of drawing, settling, and completing the new lease, but include also the costs of a reference under the lease to determine the amount of rent to be paid in the new term(*q*).

Court may order renewal in pursuance of covenant.

In case of the absence from the country of a person who might, in pursuance of a covenant in that behalf, be compelled to execute a renewal of a lease, an order may be made by the court appointing some person to execute a new lease in the name of the person who ought to have renewed the same. This provision is made by section 18 of the Imperial Act 11 George IV. and 1 William IV., chapter 65, which, as re-enacted in Ontario(*r*), is as follows:

> **26.** Where any person who, in pursuance of any covenant or agreement in writing, might, if within Ontario and amenable to the process of the High Court of Justice, be compelled to execute any lease by way of renewal, shall not be within Ontario, or not amenable of the process of the said Court, it shall be lawful for the said High Court of Justice by an order to be made upon the petition or motion of any person entitled to such renewal (whether such person be, or be not, under any disability), to direct such person as the said Court shall think proper to appoint for that purpose to accept a surrender of the subsisting lease, and make and execute a new lease in the name of the person who ought to have renewed the same; and such deed executed by the person to be appointed as aforesaid, shall be as valid as if the person in whose name the same shall be made had executed the same, and had been alive, and not under any disability, and had himself executed the same; but in every such case it shall be in the discretion of the said Court, if under the circumstances it shall seem requisite, to direct an action to be brought to establish the right of the party seeking the renewal, and not to make the order for such new lease unless by the judgment to be made in such cause, or until after such judgment shall have been made.

Fines.

It is further provided that no renewed lease shall be executed by virtue of this section in pursuance of any

(*q*) *Lord Mostyn* v. *Fitzsimmons*, [1903] 1 K.B. 349; [1904] App. Cas. 46.

(*r*) R.S.O. (1897), vol. III., c. 342, s. 26.

covenant or agreement, unless the fine (if any), or the sum or sums of money (if any), which ought to be paid on such renewal, and the things (if any) which ought to be performed in pursuance of such covenant or agreement by the lessee or tenant, be first paid, and performed, and that counterparts of every renewed lease to be executed by virtue of the Act shall be duly executed by the lessee(*s*).

Expenses.

All fines, premiums, and sums of money, which shall be had, received, or paid, for, or on account of, the renewal of any lease, by any person out of Ontario, or not amenable as aforesaid, after a deduction of all necessary incidental charges and expenses, shall be paid, to such person, or in such manner, or into the High Court of Justice to such account, and be applied, and disposed of, as the said Court shall direct(*t*).

The High Court of Justice may order the costs and expenses of, and relating to, the petitions, orders, directions, conveyances, and transfers, to be made in pursuance of section 26, of any of them, to be paid and raised out of, or from the lands, or the rents, in respect of which the same respectively shall be made, in such manner as the said Court shall think proper(*u*).

Insurable interest.

A tenant who continues in possession of the premises after the expiration of his term under an invalid covenant for renewal, has no insurable interest in the buildings(*v*).

Registration.

A lease of land for four years, with a covenant to renew for four years more, was held not to require registration under the Act requiring registration of leases exceeding seven years, actual possession having gone with the

(*s*) 11 Geo. IV. & 1 Will. IV., c. 65, s. 20; R.S.O. (1897), vol. III., c. 342, s. 27.

(*t*) Sec. 21 of the Imperial Act; section 28 of the Ontario Act.

(*u*) Sec. 35 of the Imperial Act; section 29 of the Ontario Act.

(*v*) *Shaw* v. *Phoenix Ins. Co.* (1870), 20 U.C.C.P. 170.

lease; and such a lease, though not registered was held to be valid, and renewable as between the lessee and the subsequent mortgagees of the lessor(*w*).

Assignee.

An assignee of a lease, or of a part of the demised lands is entitled *pro tanto* to the benefit of a covenant for renewal and right of pre-emption(*x*).

Constructive trustee.

There is no authority for the general proposition that if a person only partly interested in an old lease obtains from the lessor a renewal, he must be held a constructive trustee of the new lease, whatever may be the nature of his interest or the circumstances under which he obtained the new lease. A person renewing is only held to be a constructive trustee of the new lease, if in respect of the old lease, he occupied some special position by virtue of which he owed a duty towards the other persons interested; as, for example, in the case of a renewal by a tenant for life of settled leaseholds, or by a partner of a partnership lease, or by a mortgagee of a mortgaged lease. In all such cases the new lease is treated as engrafted on or a forming part of the original lease(*xx*).

Right of son of deceased lessee to renew for his own benefit.

A lessor granted a lease for seven years of a house in which the lessee carried on a profitable business. On the expiration of the term, the lessor refused to renew, but allowed the lessee to remain as tenant from year to year at an increased rent. During that tenancy the lessee died intestate, leaving a widow and three children, one being an infant. The widow took out administration to her husband's estate, and she and the two adult children, one of whom was a son, continued to carry on the business under the existing yearly tenancy. The widow and son each applied to the lessor for a new

(*w*) *Latch* v. *Bright* (1870), 16 Gr. 633.

(*x*) *McVean* v. *Woodell* (1834), 2 O.S. 33.

(*xx*) See next cited case.

lease for the benefit of the estate, which he refused to grant, but, having determined the yearly tenancy by notice, he granted to the son "personally" a new lease for three years at a still further increased rent. In an action which had in the meantime been instituted by the three children, including the infant, against the administratrix for administration of the intestate's estate, the administratrix applied to have the new lease treated as having been taken by the son for the benefit of the estate, and for an account of the rents and profits received by him, it was held that the right or hope of renewal had been determined by the lessor himself before the son intervened, so that the new lease could not be treated as an accretion to the estate of the deceased, and also that the son had in no way abused his position, nor stood in any fiduciary relation towards, nor owed any duty to the other persons interested in the estate, and that he was therefore entitled to retain the lease for his own benefit(*y*).

(*y*) *In re Biss, Biss* v. *Biss*, [1903] 2 Ch. 40; *Ex parte Grace* (1799), 1 B. & P. 376, distinguished.

CHAPTER XXIII.

COVENANT NOT TO ASSIGN OR SUB-LET.

Assign and sub-let.

The words "assign" and "assignment" are used where the lessee parts with his whole remaining interest in the term, and ceases to be a tenant, and the words "sub-let" and "sub-lease," or "under-let" and "under-lease" are used where the lessee, while still remaining a tenant, transfers the demised lands, or a portion thereof, for only part of the period of his lease(*a*).

In the absence of an express stipulation to the contrary, a lessee is entitled to assign or sub-let the whole or any part of the demised premises, for the whole or any part of the term.

Not a "usual" covenant.

A covenant not to assign or sub-let without leave, although it is a statutory covenant, is not a "usual" covenant in the technical sense in which that word is used with respect to an agreement for a lease; that is to say, under an agreement for a lease with "usual" covenants, the intended lessor is not entitled to have inserted in the lease that is executed in pursuance of the agreement, a covenant not to assign or sub-let without leave(*b*).

A covenant, however, against assigning or sub-letting or both, without the consent in writing of the lessor, is often inserted in leases by the express agreement of the parties.

The short form of the covenant not to assign or sub-let without leave provided by the *Act respecting Short*

(*a*) See *Beardman* v. *Wilson* (1868), L.R. 4 C.P. 57; *Baker* v. *Gostling* (1834), 1 Bing. N.C. 19; 41 R.R. 533; *Derby (Lord)* v. *Taylor* (1801), 1 East 502; 6 R.R. 337.

(*b*) See chapter VI.

Forms of Leases(*c*), is as follows: "And will not assign or sub-let without leave." This form of words contained in a lease expressed to be made in pursuance of the Act will be construed as if it were in the following form:

Form of covenant.

"And also that the lessee, his executors, administrators and assigns shall not, nor will during the said term, assign, transfer or set over, or otherwise by any act or deed procure the said premises or any of them to be assigned, transferred, set over or sub-let unto any person or persons whomsoever without the consent in writing of the lessor, his heirs or assigns, first had and obtained."

Assigns.

Apart from statute, it has been held that a covenant not to assign or sub-let without leave is a covenant that runs with the land if assigns are expressly mentioned(*d*), but not, if assigns are not expressly mentioned in the covenant(*e*).

The long form of covenant not to assign or sub-let without leave, as formerly provided by statute(*f*)., did not expressly extend to assigns. This form was as follows:

Former statutory covenant.

"And also that the lessee shall not nor will during the said term assign, transfer, or set over, or otherwise by any act or deed, procure the said premises or any of them to be assigned, transferred, set over, or sub-let unto any person or persons whomsoever, without the consent in writing of the lessor, his heirs, or assigns, first had and obtained"(*g*).

The form of words by which statutory covenants are introduced is as follows: "And the said lessee doth hereby

(*c*) R.S.O. (1897), c. 125.

(*d*) *Williams* v. *Earle* (1868), L.R. 3 Q.B. 739; see also *Crawford* v. *Bugg* (1886), 12 Ont. 8.

(*e*) *Lee* v. *Lorsh* (1876), 37 U.C.R. 262; *Crawford* v. *Bugg* (1886), 12 Ont. 8; *West* v. *Dobb* (1870), L.R. 4 Q.B. 634; L.R. 5 Q.B. 460.

(*f*) See R.S.O. (1887), c. 106.

(*g*) R.S.O. (1887), c. 106, schedule B.

for himself, his heirs, executors, administrators, and assigns, covenant with the said lessor, his executors, administrators and assigns."

Did not extend to assigns.

Where the former statutory covenant not to assign or sub-let without leave was prefaced by the words: "And the said lessee for himself, his heirs, and executors, administrators, and assigns, hereby covenants with the said lessor, his heirs, executors, administrators and assigns, in manner and form following, that is to say;" it was held that the covenant did not include assignees, as they could not be held to be named; and that the prefatory words to the covenant would have no contrary effect; and therefore that an assignment of the term by an assignee without leave was no breach thereof(*h*).

Runs with the land.

In Ontario, and in British Columbia, it is provided by statute that a covenant not to assign or sub-let without leave, is a covenant that runs with the land and is binding on the heirs, executors, administrators, and assigns of the lessee whether they are mentioned in the lease or not, and that the statutory proviso for re-entry applies to the breach of such a covenant, although it is a negative covenant. This is provided in Ontario by section 3 of the *Act respecting Short Forms of Leases*, which is as follows:

Proviso for re-entry.

3. Unless the contrary is expressly stated in the lease, all covenants not to assign or sublet without leave, entered into by a lessee in any lease under this Act, shall run with the land demised, and shall bind the heirs, executors, administrators, and assigns of the lessee whether mentioned in the lease or not, unless it is by the terms of the lease otherwise expressly provided, and the proviso for re-entry contained in Schedule B to this Act shall, when inserted in a lease, apply to a breach of either an affirmative, or negative covenant(*i*).

(*h*) *Crawford* v. *Bugg* (1886), 12 Ont. 8.

(*i*) R.S.O. (1897), c. 125, s. 3; 49 Vict. c. 21, s. 1; in British Columbia, see R.S.B.C. (1897), c. 117, s. 8.

Affirmative and negative covenants.

Apart from this enactment, it has been held that a proviso for re-entry according to the form provided in the *Act respecting Short Forms of Leases*(*ii*), applies to the breach of a negative, as well as of an affirmative covenant, and under such a proviso there is a right of re-entry for a breach of a covenant not to assign or sub-let without leave(*j*).

Re-assignment to lessee.

The words "any person or persons," in the long form of the covenant not to assign or sub-let without leave, include the original lessee, and where an assignment by him has been made with consent, a re-assignment to him without a fresh consent is a breach of the covenant(*l*).

Meaning of assigns.

A covenant not to assign is valid and binding, even where the lease is made to the lessee, his executors, administrators, *and assigns*. In such a case, the word "assigns" is construed to mean such assigns as the lessee may lawfully have, either by his own act with the consent of the lessor, or by operation of law(*m*).

To constitute a breach of a covenant not to assign there must be an actual assignment; a mere declaration of intention to assign is not sufficient(*n*).

Evidence of breach.

But it has been held that the making of an agreement for the assignment of a lease, the settlement of the terms

(*ii*) R.S.O. (1897), c. 125.

(*j*) *Toronto General Hospital* v. *Denham* (1880), 31 U.C.C.P. 207; followed in *McMahon* v. *Coyle* (1903), 5 Ont. L.R. 618. In *Lee* v. *Lorsch* (1876), 37 U.C.R. 262, it was held that a proviso for re-entry on non-performance of covenants applied only to the non-performance of positive, not negative, covenants, and consequently did not apply to a breach of a covenant not to assign or sublet without leave. See chapters XIV. and XXVI.

(*l*) *Munro* v. *Waller* (1897), 28 Ont. 29; referring to *Varley* v. *Coppard* (1872), L.R. 7 C.P. 505, and *The Corporation of Bristol* v. *Westcott* (1879), 12 Ch. D. 461, and disapproving of *McCormick* v. *Stowell* (1885), 138 Mass. 431.

(*m*) *Weatherell* v. *Geering* (1806), 12 Ves. 504; 8 R.R. 369.

(*n*) *Corporation of Bristol* v. *Westcott* (1879), 12 Ch. D. 461; *Gourlay* v. *Duke of Somerset* (1812), 1 V. & B. 68.

thereof, and the taking of possession by the assignee, constitute sufficient evidence of the breach of such a covenant; the fact of the document shewing the transfer not having been made until after action brought is immaterial(*o*).

Sub-lease is not an assignment.

The question whether or not a covenant not to assign has been broken, depends on the precise words in which it is expressed. Thus, a covenant not to assign will not be broken by a sub-lease of part of the term, unless the covenant expressly extends to sub-letting, or forbids an assignment for the whole or any part of the term(*p*).

If the covenant forbids assigning *and* sub-letting, or letting for all or any part of the term, either assigning or sub-letting would be a breach; but where a covenant is simply not to demise, or let, or sub-let without the lessor's consent, an assignment of the whole term does not amount to a breach(*q*).

"Any part."

By an indenture of lease the defendant demised to the plaintiff the exclusive right of fishing in a certain portion of a river, "together with full liberty of egress, and regress for the said lessee and his authorized friends at all times during the term thereby granted to fish with rods and lines in a proper and sportsmanlike manner . . . and the fish which they shall then and there take and retain to his and their own use." The lessee covenanted that he would not during the term "underlet, assign, transfer, or set over, or otherwise by any act or deed procure, the said premises to be assigned, transferred or set over unto any person or persons whatsoever," without the consent in writing of the lessor, his heirs or assigns. It was held

(*o*) *McMahon* v. *Coyle* (1903), 5 Ont. L.R. 618.

(*p*) *Church* v. *Brown* (1808), 15 Ves. 258, at p. 265, per Lord Eldon; 10 R.R. 74; *Doe* v. *Worsley* (1807), 1 Camp. 20.

(*q*) *In re Doyle*, [1899] 1 Ir. R. 113.

that, inasmuch as the covenant did not expressly apply to "any part" of the premises as well as to the whole, the lessee was not precluded from granting a license to another person (limited to two rods) to fish in the river during the residue of the term granted by the lease(*r*).

Where a party enters upon the demised premises, not as a tenant, but as a purchaser from the lessee of his property thereon, this will not amount to a breach of a covenant not to sub-let(*s*).

A temporary letting, for a particular purpose, of a small part of the demised premises is not a breach of a covenant not to assign or sub-let(*t*).

Assignment for benefit of creditors.

Generally speaking, in the absence of statutory provision, a voluntary assignment by the lessee of all his property for the benefit of his creditors, operates as a breach of the covenant not to assign(*u*). But it has been held that a breach of the covenant not to assign has not been committed, where the lessee has been adjudicated a bankrupt on his own petition(*v*).

Insolvent Act.

A voluntary assignment under the Insolvent Act was held to be a breach of the covenant not to assign. Thus, where lessees, under a lease containing a covenant in the statutory form not to assign without leave, made a voluntary assignment in insolvency on the 17th of May, 1869, and the assignee sold the stock-in-trade of the insolvents, who were dry goods merchants, and the purchaser took possession of the premises from him on the 27th of May, the assignee also occupying a room there for the manage-

(*r*) *Grove* v. *Portal*, [1902] 1 Ch. 727; *dictum* of Lord Eldon, in *Church* v. *Brown* (1808), 15 Ves. 258; 10 R.R. 74, followed.

(*s*) *Horsey Estate* v. *Steiger*, [1899] 2 Q.B. 79.

(*t*) *Mashiter* v. *Smith* (1887), 3 Times L.R. 673.

(*u*) *Holland* v. *Cole* (1862), 1 H. & C. 67; *Dobson* v. *Sootheran* (1888), 15 Ont. 15.

(*v*) *In re Riggs, ex parte Lovell*, [1901] 2 K.B. 16.

ment of the estate, it was held that there had been a breach of the covenant, and that a forfeiture had been incurred, for the term passed to the assignee under the Insolvent Act, and if his election to accept it were necessary, it was shewn by his conduct(*w*).

Ontario.

In Ontario, an assignment for the general benefit of creditors made by a lessee does not operate as a breach of a covenant not to assign. In such a case the assignee may elect to retain the demised premises for the unexpired period, or a portion thereof, upon the terms of the lease, notwithstanding such covenant. This is provided by subsection 2 of section 34 of the *Landlord and Tenant's Act*(*x*), which is as follows:

Assignee may elect to retain premises.

34. (2) Notwithstanding any provision, stipulation or agreement in any lease or agreement contained, in any case of an assignment for the general benefit of creditors, or in case an order is made for the winding-up of an incorporated company, being lessees, the assignee or liquidator shall be at liberty, within one month from the execution of such assignment, or the making of such winding-up order, by notice in writing under his hand given to the lessor, to elect to retain the premises occupied by the assignor or company as aforesaid at the time of such assignment or winding-up, for the unexpired term of any lease under which the said premises were held, or for such portion of the said term as he shall see fit, upon the terms of such lease and paying the rent therefor provided by said lease.

Before this section was passed(*y*), it was held that an assignment for the general benefit of creditors operated as a breach of the covenant not to assign without leave(*z*).

Effect of statute.

The effect of this section is to place the assignee, who has elected by notice in writing under his hand to retain the premises occupied by the assignor at the time of the assignment for the unexpired term of the lease under

(*w*) *Magee* v. *Rankin* (1869), 29 U.C.R. 257.

(*x*) R.S.O. (1897), c. 170.

(*y*) 58 Vict. (1895), c. 26, s. 3.

(*z*) *Dobson* v. *Southeran* (1888), 15 Ont. 15.

which said premises were held, in the same position as respects the lease, as the assignor would have been in, had the assignment not been made; the landlord in such cases being entitled to the full amount of the rent reserved by the lease, but to nothing more; and where accelerated rent due for the unexpired term of a lease containing the usual forfeiture clause on an assignment for the benefit of creditors being made by the lessor, had been paid by his assignee for creditors, who had elected to retain the premises to the end of the term, the assignee was held entitled to recover back a sum for rent of the premises for a portion of the same period, which he had paid on demand of the landlord, under protest, to avoid distress(*a*).

Involuntary assignment.

A covenant not to assign or sub-let does not extend to an involuntary assignment, that is, to a transfer effected by operation of law, as by the death of the lessee, or by a sale of his interest in the term under an execution against him(*b*). Nor to a compulsory assignment to a railway company(*c*). A bequest by will of the lessee's interest is not a breach of the covenant(*d*).

But a breach will be incurred if a lessee gives a warrant of attorney for the purpose of having the lease taken in execution(*e*).

Possession when required.

A sub-lease by the lessee, who was leaving the country for a time, to a person who was to give up posession *when required,* was held not to incur a forfeiture under a proviso for re-entry in the following form: "Proviso for re-entry

(*a*) *Kennedy* v. *Macdonell* (1901), 1 Ont. L.R. 250.

(*b*) *Seers* v. *Hind* (1791), 1 Ves. 294; *Roe* v. *Harrison* (1788), 2 T.R. 425; 1 R.R. 513; *Doe* v. *Bevan* (1815), 3 M. & S. 353; see also *Elphinstone* v. *Monkland Iron Co.* (1886), 11 App. Cas. 332.

(*c*) *Slipper* v. *Tottenham and Hampstead Junction Railway Co.* (1867), 4 Eq. 112.

(*d*) *Doe* v. *Bevan* (1815), 3 M. & S. 353.

(*e*) *Doe* v. *Carter* (1799), 8 T.R. 57, 300; 4 R.R. 586.

if the lessee do or shall at any time or times during the continuance of the said term, let, set, or assign over these presents or the term, estate or premises hereby granted, or otherwise part with his interest therein or thereto to any person or persons whatsoever, without the lessor's consent in writing"(*f*).

Mortgage.

A mortgage made by the lessee of his interest in the term is a breach of the covenant, but not a mortgage of fixtures which are by agreement in the lease to remain the property of the tenant(*g*).

Lodgings.

A covenant not to assign or sub-let is broken by letting lodgings or furnished apartments, if exclusive possession thereof is given(*h*).

A covenant contained in an agreement for farming "on shares" to deliver possession of land to which the covenanter has homestead rights only, is not an assignment or transfer within the meaning of *Dominion Lands Act*(*i*).

Assignment to partner.

It has been held that where the lessees are partners, an assignment by one to the other is a breach of the covenant(*j*); but this decision was questioned in a later case, in which it was held that no breach was committed where one partner continued in possession after a dissolution(*k*).

Company.

A declaration of trust in favour of, or an assignment to, a joint stock company taking over the lessee's business, operates as a breach of the covenant(*l*); but a sale by the

(*f*) *Leys* v. *Fiskin* (1854), 12 U.C.R. 604.

(*g*) *Moss* v. *James* (1878), 38 L.T. 595.

(*h*) *Greenslade* v. *Tapscott* (1834), 1 C.M. & R. 55.

(*i*) *Spence* v. *Arnold* (1901), 5 Terr. L.R. 176; R.S.C. (1886), c. 54, s. 42, as amended by 60 & 61 Vict. (1897), c. 29, s. 5.

(*j*) *Varley* v. *Coppard* (1872), L.R. 7 C.P. 505.

(*k*) *Corporation of Bristol* v. *Westcott* (1879), 12 Ch. D. 461.

(*l*) *Richards* v. *Crawshay* (1892), 8 Times L.R. 446; *Gentle* v. *Faulkner* (1899), 68 L.J.Q.B. 848.

lessee of his business to a company will not have that effect, if the lessee retains possession, although the company makes use of the premises in carrying on the business(*m*).

Buildings.

Where land was leased on the 30th of October, 1866, for twenty-one years, by a lease under the Short Forms Act, containing covenants to pay rent, and not to assign or sub-let without leave, and by a deed of the same date, the lessor sold and conveyed the buildings on the land to the lessee, who then mortgaged the premises, and afterwards assigned his interest, it was held that the lessors were entitled to recover for the breach of the covenant not to assign, but that under the circumstances their recovery must be limited to the land alone, and not to the buildings thereon, and that therefore they could not enter into the buildings or remove the assignee therefrom(*n*).

Consent of lessor.

The lessee is bound to ask the consent of the lessor to save a forfeiture, even if it could not be reasonably withheld(*o*). And where a sub-lease contains a covenant not to assign or sub-let without leave, and is made subject to all the covenants in the original lease which contains a like covenant, the sub-lessee must obtain the consent of both the original lessor and the sub-lessor before assigning(*p*).

Infant or lunatic.

Where the person whose leave or consent is necessary to validate an assignment under a covenant not to assign or sub-let without leave is an infant or lunatic, his guardian or committee may, with the approbation of the Judge of the Surrogate Court of the County wherein the land lies, consent to an assignment or transfer. This is provided

(*m*) *Peebles* v. *Crosthwaite* (1897), 13 Times L.R. 198.

(*n*) *Toronto Hospital Trustees* v. *Denham* (1880), 31 U.C.C.P. 203.

(*o*) *Barrow* v. *Isaacs*, [1891] 1 Q.B. 417; *Eastern Telegraph Co.* v. *Dent* [1899] 1 Q.B. 835.

(*p*) *Haywood* v. *Silber* (1885), 30 Ch. D. 404.

by section 12 of the *Landlord and Tenants' Act*(*q*), which is as follows:

Guardian or committee may consent.

12. Where any person being under the age of twenty-one years, or a lunatic, or a person of unsound mind, shall be seised of the reversion of land subject to a lease, and such lease shall contain a covenant not to assign or sub-let without leave, the guardian of such infant or the committee of such lunatic, or person of unsound mind may, with the approbation of the Judge of the Surrogate Court of the county in which the said land is situate, consent to any assignment or transfer of such lease-hold interest, in the same manner and with the like effect as if the consent were given by a lessor under no disability(*r*).

Written consent.

Where the consent of the lessor is required by the covenant to be in writing a verbal consent is insufficient(*s*); and in an action of ejectment against the assignee of the lessee, for breach of a covenant not to assign without leave in writing, the fact of the lessor's oral assent to the assignment before the assignee entered into possession is no defence(*t*).

Consent not to be unreasonably withheld.

Where the covenant not to assign without the consent of the lessor is qualified by a proviso that such consent shall not be unreasonably withheld, it operates to empower a lessee to assign without consent, if it be unreasonably refused(*u*).

Assignment without consent.

Where a lease contains a covenant by the lessee not to assign without the license in writing of the lessor, "such license not to be unreasonably withheld," although the lessor, in refusing a license to assign, is not bound to give any reason for his refusal, yet if, in granting a license he

(*q*) R.S.O. (1897), c. 170.

(*r*) See also C.S.N.B. (1904), c. 153, s. 5.

(*s*) *Richardson* v. *Evans* (1818), 3 Madd. 218.

(*t*) *Carter* v. *Hibblethwaite* (1855), 5 U.C.C.P. 475.

(*u*) *Treloar* v. *Bigge* (1874), L.R. 4 Ex. 151; *Hyde* v. *Warden* (1877), 3 Ex. D. 72; *Sear* v. *House Property Society* (1880), 16 Ch. D. 387.

attaches to it a condition which, in the opinion of the Court, is unreasonable, the Court will, in an action brought by the lessee for the purpose, make a declaratory order that the lessor is not entitled to impose the unreasonable condition, and that the lessee is entitled to assign without any further consent of the lessor(*v*).

Specific performance

And in such a case an agreement to assign a lease will be enforced by specific performance, if the lessor's consent under such a covenant could not be reasonably withheld(*w*). But such an agreement would not be enforced by specific performance in breach of an absolute covenant not to assign without leave(*x*).

It is unreasonable for a lessor to withhold consent merely on the ground that he wishes to occupy the premises himself(*y*).

Forfeiture.

Where a lease contains a covenant (with a condition of re-entry on breach) "not to assign or sub-let without the consent of the landlord first had and obtained," and an agreement by the landlord that his consent should "not be arbitrarily withheld in the case of a respectable and responsible person," and a tenant does sub-let without applying for the landlord's consent, he cannot be relieved against forfeiture by shewing that the sub-lessee is a respectable and responsible person, and that the omission to apply for the landlord's consent was by inadvertence(*z*).

Waiver.

Formerly a consent to assign, once given, operated as a general waiver of a covenant not to assign, so as not to restrict subsequent assignments(*a*).

(*v*) *Young* v. *Ashley Gardens Properties, Limited*, [1903] 2 Ch. 112.

(*w*) *White* v. *Hay* (1895), 72 L.T. 281.

(*x*) See chapter VI.

(*y*) *Bates* v.*Donaldson*, [1896] 2 Q.B. 241.

(*z*) *Barrow* v. *Isaacs*, [1891] 1 Q.B. 417; 60 L.J.Q.B. 179; 64 L.T. 686; 39 W.R. 338.

(*a*) *Dumpor's Case* (1603), 1 Smith L.C., 11th ed., p. 32.

Extent of license.

It is now provided by statute that a consent or license given to a lessee to do any act which, without such license or consent, would create a forfeiture, shall extend only to the permission actually given(*b*).

License to assign part.

Where the lessor, under a lease containing a proviso for re-entry on assigning or sub-letting without leave, gives a license to assign part of the demise premises, he may re-enter upon the remainder for breach of covenant not to assign or sub-let, notwithstanding that the proviso for re-entry makes it lawful only to re-enter on the whole or a part in the name of the whole. Sections 14 and 15 of the *Landlord and Tenants' Act*(*c*), are to be read together, the former referring generally to all cases, and making licenses to alien applicable *pro hâc vice* only, the latter referring to specific cases of licensing the alienation of a part, and reserving the right of re-entry as to the remainder. Hence, where a lessor gave a license to alien part of the demised premises, it was held, that the license applied only to the alienation then effected, and that upon subsequent alienation without leave, he might re-enter(*d*).

Where a lessee sub-let under such a lease which contained also a covenant for renewal, and the sub-lease contained a covenant to renew for the term to be granted on the renewal of the superior lease, less one month, to which the lessor assented, and the lessee afterwards without leave assigned his reversion expectant on the sub-lease, it was held that the lessors might re-enter as against the sub-tenant, notwithstanding their assent, for it must be deemed

(*b*) 22 & 23 Vict. (Imp.), c. 35, ss. 1 and 2; R.S.O. (1897), c. 170, ss. 14, 15 and 16.

(*c*) R.S.O. (1897), c. 170.

(*d*) *Baldwin* v. *Wanzer, Baldwin* v. *Canadian Pacific Railway Co.* (1892), 22 Ont. 612; see also *Bacon* v. *Campbell* (1879), 40 U.C.R. 517.

to have been an assent to the renewal of the sub-lease, provided that the superior lease was renewed(*e*)

Assignment of rents with leave.

A lessee under such a lease created a number of sub-tenancies on part of the land, with leave. He then assigned all the rents to an assignee, and the head lessors assented to the assignment, and covenanted with the assignee that so long as the rents reserved were paid, and the covenants observed, they would not claim any forfeiture, as to the lands affected by the assignment, and that the rights of the assignee should not be prejudiced by any act of the original lessee, or any person claiming under him, or by any breach or non-observance by the lessee, or any person claiming under him, of the covenants or provisions contained in the original lease, such consent not, however, to operate as a waiver of the covenant against assigning and sub-letting. The original lessee afterwards assigned his reversion in the whole of the demised premises without leave, and for this the lessors brought an action to recover the demised premises, after the interest of the assignee of the rents had expired by lapse of time. It was held that, in the absence of notice of the assignment without leave, pending the existence of the interest created by the assignment of the rents, they were not precluded from maintaining the action(*f*).

Subsequent assignment of reversion without leave.

Registration of assignment.

Where the lessors, after an assignment by the lessee without leave, of part of a lot, was registered, took a surrender of part of the same lot demised by another lease and registered it, it was held that the registration of the assignment without leave was not notice of it to them, as they were not bound by the nature of the surrender to ex-

(*e*) *Baldwin* v. *Wanzer* (1892), 22 Ont. 612.

(*f*) *Ibid.*

amine the register as to that part of the lot affected by the assignment without leave(*g*).

Severance of reversion.

A tenant in fee simple conveyed land to the use of himself for life, and after death, to such uses as he might by will appoint. He, with his grantees to uses, then made a lease of the land, containing a covenant not to assign or sub-let without leave, and a proviso for re-entry for breach of the covenant, and by will appointed the reversion to his seven children. After his death an assignment was made by the lessee without leave, and subsequently one of the devisees conveyed his undivided one-seventh interest to trustees, to sell, lease, or mortgage. An action was brought to recover the lands for breach of the covenant against assigning, and it was held that by the conveyance of the undivided one-seventh share, the reversion was severed and the condition destroyed, and therefore no recovery could be had for breach of the covenant occurring either before or after the severance(*h*).

Condition destroyed.

Knowledge or acquiescence of lessor.

The fact that the lessor does not object to the assignee's taking possession, or knows that the assignee is making expenditures on the premises will not alone operate as a waiver of a covenant not to assign(*i*); and if the lessor is not aware of the assignment he may insist on a forfeiture as soon as it comes to his knowledge(*j*).

Receipt of rent.

But where the lessor acquiesces in the assignee's possession and receives rent from him with knowledge of the circumstances, it will be presumed that he has consented to the assignment(*k*).

(*g*) *Ibid.*

(*h*) *Baldwin* v. *Wanzer, Baldwin* v. *Canadian Pacific Railway Co.* (1892), 22 Ont. 612.

(*i*) *Elphinstone* v. *Monkland Iron Co.* (1886), 11 App. Cas. 332; *Wilmott* v. *Barber* (1880), 15 Ch. D. 96.

(*j*) *Silcock* v. *Farmer* (1882), 46 L.T. 404.

(*k*) *Gibson* v. *Doeg* (1857), 2 H. & N. 615.

And where the possession of demised premises by an assignee and his sub-tenant has been open and notorious for several years, it will be presumed that the lessor has given a license to assign and sub-let(*l*).

Forfeiture.

A forfeiture will not be incurred by the breach of a covenant not to assign or sub-let without leave unless there is a proviso in the lease for re-entry on a breach thereof, and the lessor cannot recover possession from the assignee although he may maintain an action for damages against the lessee for breach thereof(*m*).

Notice.

The law requiring notice to be given by a lessor to a lessee before enforcing by action or otherwise breaches of covenants does not extend to a covenant not to assign or sub-let(*n*).

Damages.

In estimating the damages in an action for breach of a covenant not to assign, account must be taken of the inferior pecuniary ability of the assignee to perform the covenants in the lease(*o*).

Inferior liability.

Upon breach of a covenant in a lease not to assign without leave, the lessors are entitled to recover as damages such sum of money as will put them in the same position as if the covenant had not been broken, and they had retained the liability of the defendant instead of an inferior liability; but in estimating the value of the defendant's liability, allowance must be made for the vicissitudes of business, and the uncertainty of life and health(*p*).

Where, a few days prior to the accruing due of a quarter's rent payable in advance, the lessee assigned without

(*l*) *Crawford* v. *Bugg* (1886), 12 Ont. 8.

(*m*) *McIntosh* v. *Samo* (1874), 24 U.C.C.P. 625.

(*n*) R.S.O. (1897), c. 170, s. 13, s.-s. 6; *Connell* v. *Power* (1864), 13 U.C.C.P. 91; see chapter XXVI., section VII.

(*o*) *Williams* v. *Earle* (1868), L.R. 3 Q.B. 739.

(*p*) *Munro* v. *Waller* (1897), 28 Ont. 574; following *Williams* v. *Earle* (1868), L.R. 3 Q.B. 739.

the lessor's leave, in breach of a covenant contained in the lease, the lessor was held entitled to recover, as damages for such breach, the rent so payable in advance without any deduction for rents realized during the said quarter under a new lease created by the lessor, who, finding the property vacant, had taken possession(*q*).

Loss by fire.

Where a lessee in breach of a covenant sub-let premises for the purpose of a turpentine distillery, and they were in consequence destroyed by fire, it was held that the loss was recoverable as damages(*r*).

Where by the terms of a lease it is stipulated and conditioned that the lessee should not assign or underlet, the lessor may maintain ejectment for breach of the condition(*s*). And a breach or an intended breach of a covenant not to assign or sub-let without leave will be restrained by injunction(*t*).

Injunction.

Liability of assignee.

The assignee of a lease is subject to all the covenants and conditions contained therein, although he takes in breach of a covenant against assigning(*u*).

An assignee of a term is properly assessable in respect of the demised premises, although the assignment, which is made orally and without the knowledge of the lessor, is in violation of a covenant not to assign without leave(*v*).

(*q*) *Patching* v. *Smith* (1897), 28 Ont. 201.

(*r*) *Lepla* v. *Rogers*, [1893] 1 Q.B. 31.

(*s*) *Doe d. Henniker* v. *Watt* (1828), 8 B. & C. 308; 32 R.R. 393.

(*t*) *Bridewell Hospital* v. *Fawkner* (1892), 8 Times L.R. 637.

(*u*) *Silcock* v. *Farmer* (1882), 46 L.T. 404.

(*v*) *Regina ex rel. Northwood* v. *Askin* (1861), 7 C.L.J., O.S. 130.

PART III.

CHANGE OF PARTIES TO THE RELATIONSHIP.

CHAPTER XXIV.

BY ACTS OF THE PARTIES.

SECTION I.—ASSIGNMENT OF THE TERM.
SECTION II.—ASSIGNMENT OF THE REVERSION.

SECTION I.

ASSIGNMENT OF THE TERM.

1. *Requisites of a Valid Assignment.*
2. *Covenants that Run with the Land.*
3. *Collateral Covenants.*
4. *Equitable Doctrine of Notice.*
5. *Liability of Assignee to Lessor.*
6. *Liability of Sub-lessee.*
7. *Liability of Lessee after Assignment.*
8. *Liability of Assignee to Lessee.*

An assignment of the term is a transfer by the lessee of his interest in the premises for the whole remaining period of his lease. A sub-lease, on the other hand, is a transfer by the lessee of his interest for a part only of the remaining period of his lease, leaving a reversion in the sub-lessor, if it be only for the last day of the term.

Assignment.

By an assignment of the term a change is effected in the parties to the relationship; a privity of estate is thereby created between the landlord and the assignee and the assignee, subject to what will be said hereafter, acquires the rights and assumes the liabilities of the original tenant and becomes a tenant in his stead.

Sub-lease.

By a sub-lease, on the other hand, no change is effected in the parties to the original relationship, but a new relation of landlord and tenant is created between the sub-lessor and his sub-lessee. The sub-lessor still remains a tenant to the head lessor, and becomes a landlord to his sub-lessee. By a sub-lease privity of estate is not created between the head lessor and the sub-lessee, and the sub-lessee acquires only the rights conferred and assumes the liabilities imposed by the sub-lease, and subject to what is said hereafter, the sub-lessee is not liable to the terms, covenants, or conditions contained in the head lease.

A demise by deed for a term of years, extending to the whole of the term vested in the lessor or for a longer period operates as an assignment of the term(*a*). Thus, in an action by the assignee of the reversion of a lease, on a covenant to repair, against the representatives of an assignee of the lease, who had made a sub-lease ending at the same date as the original term, it was held that the sub-lease amounted to an assignment, and that the plaintiff was not entitled to recover(*b*).

So, where a lessee of land for five years demised the land for seven years, it was held that the demise in question operated as an assignment of the original term, and conferred upon the original lessor, in respect of the privity of estate thus created, a right of action against the assignee

(*a*) *Beardman* v. *Wilson* (1868), L.R 4 C.P. 57.

(*b*) *Ibid.*

of the term for the arrears of rent due under the original lease(*c*).

Right to assign or sub-let.

A lessee and each successive assignee and sub-lessee, in the absence of express stipulation in the lease, assignment or sub-lease to the contrary, has a right to assign or sub-let the whole or any part of the premises demised, assigned or sub-let.

The effect of covenants by the lessee not to assign or sub-let has already been considered(*d*).

1. *Requisites of a Valid Assignment.*

Statute of Frauds.

It is provided by section 3 of the *Statute of Frauds* that no assignment of a lease shall be made except it be by deed or note in writing signed by the party so assigning or his agent(*e*). Section 3 of the *Statute of Frauds* as re-enacted in Ontario by section 4 of the Ontario Statute of Frauds, is as follows:—

> 4. And moreover, *no lease*, estates or interests, either of freehold, *or terms of years*, or any uncertain interest, of, in, to, or out of, any messuages, lands, tenements, or hereditaments, *shall be assigned*, granted, or surrendered, *unless it be by deed, or note in writing*, signed by the party so assigning, granting, or surrendering, the same, or his agent thereunto lawfully authorized by writing, or by act and operation of law.

Assignment must be in writing.

A sub-lease for a term not exceeding three years, like a lease for such a term, may be made by parol(*f*). But an assignment of a lease, although such lease itself might be created by parol, must, under this section be in writing(*g*).

Where in an action for an accounting by one partner against another, in respect of mining areas, the defendant

(*c*) *Selby* v. *Robinson* (1866), 15 U.C.C.P. 370.

(*d*) Chapter XXIII.

(*e*) 29 Car. II., c. 3, s. 3; R.S.O. (1897), vol. III., c. 338, s. 4; R.S.N.S. (1900), c. 141, s. 4; R.S.B.C. (1897), c. 85, s. 4.

(*f*) See chapter V.

(*g*) *Betting* v. *Martin* (1809), 1 Camp. 317.

offered evidence of an oral transfer to him by plaintiff of his interest, it was held that he was precluded from doing this by the Statute of Frauds(*h*).

By deed.

By a later statute it is provided that an assignment of a chattel interest in land shall be void at law unless made by deed. This is provided by Section 7 of the *Act respecting the Law and Transfer of Property*(*i*), corresponding to section 3 of the Imperial Act(*j*), which is as follows:

> 7. A partition and an exchange of land and a lease required by law to be in writing, and *an assignment of a chattel interest in land*, and a surrender in writing of land not being an interest which might by law have been created without writing, *shall be void at law unless made by deed.*

An assignment, however, that is not made by deed is not wholly without legal effect, since if the assignee enters into possession and pays rent, a tenancy will be created on the principles already referred to(*k*).

Agreement to assign.

An agreement to assign a lease, like an agreement for a lease, is one relating to an interest in land within the meaning of the 4th section of the *Statute of Frauds*, and must be in writing. Such an agreement is governed by principles similar to those respecting an agreement for a lease which have been already set forth(*l*).

Where a person who had an agreement for a lease, assigned all his interest therein and authorized his assignee to demand and receive a lease thereunder, it was held that such person was not precluded from procuring a lease in his own name, and thus defeating his own assignment(*m*).

(*h*) *Sim* v. *Sim* (1890), 22 N.S.R. 185.

(*i*) R.S.O. (1897), c. 119.

(*j*) 8 & 9 Vict. (Imp.), c. 106.

(*k*) See chapters III. and VI.

(*l*) Chapter VI.

(*m*) *Parkinson* v. *Glendinning* (1855), 13 U.C.R. 150.

Possession.

In order to create the relationship of landlord and tenant between the lessor and assignee, it is not necessary that the assignee should take possession, so that a mortgagee of a lease, under an assignment by mortgage deed, is liable on the covenants, although he does not take possession(*n*).

Actual assignment.

But in order to create such relation there must be an actual assignment; a mere agreement to assign, or an equitable assignment, will not operate to vest the term in the assignee, or to create a privity of estate between him and the lessor, which is necessary in order to render the assignee liable on the covenants, even if he has entered into possession and paid rent(*o*).

Equitable Mortgage.

Thus, where a lessee made an equitable mortgage of his lease by deposit of title deeds only, and the mortgagee entered into and retained possession and paid rent to the lessor for a period exceeding that perscribed by the Statute of Limitations to extinguish the title of the lessee, it was held that a person claiming under a legal assignment from the mortgagee, who had entered and paid rent, was not liable on the covenants contained in the lease, as the effect of the statute was only to extinguish the title of the lessee, and not to transfer the lease to the mortgagee(*p*).

General assignment.

A general assignment of all a person's property or personal estate will operate as an assignment of a term of years, and vest it in the assignee, as for example, an assignment for the benefit of creditors(*q*)., even although

(*n*) *Williams* v. *Bosanquet* (1819), 1 B. & B. 238; 21 R.R. 585, over-ruling *Eaton* v. *Jaques* (1780), 2 Doug. 455; *Haig* v. *Homan* (1830), 4 Bli. N.S. 380.

(*o*) *Cox* v. *Bishop* (1857), 8 D.M. & G. 815; *Friary Breweries* v. *Singleton*, [1899] 1 Ch. 86; 2 Ch. 261; *Moores* v. *Choat* (1839), 8 Sim. 508; 42 R.R. 236; *Robinson* v. *Rosher* (1841), 1 Y. & C. 7.

(*p*) *Tichborne* v. *Weir* (1892), 67 L.T. 735.

(*q*) *White* v. *Hunt* (1870), L.R. 6 Ex. 32; *Ringer* v. *Cann* (1838), 3 M. & W. 343; *Debenham* v. *Digby* (1873), 28 L.T. 170; *McGill* v. *Young* (1852), 10 U.C.R. 301.

the assignee does nothing to accept the lease(*r*). In Ontario an assignee for the benefit of creditors, or a liquidator of an incorporated company, may elect, within one month after the making of the assignment or winding-up order, by notice in writing to the lessor, to retain the premises for the unexpired term of the lease, or such portion thereof as he may see fit, and this notwithstanding any provision to the contrary in the lease(*s*).

But an assignment of personal chattels, and "all other the personal estate," will not operate to convey a term of years belonging to the assignor, as the generality of that expression is controlled by the previous specific description confining it to things *ejusdem generis*(*t*).

Mortgage by assignment.

A mortgage of leasehold lands may be created either by an assignment of the term, or by a sub-lease. A mortgagee by way of assignment of the term is liable to pay rent reserved by the lease, and to perform the covenants contained therein, in the same way as any other assignee; while a mortgagee by way of sub-lease is only liable as a sub-lessee(*u*).

Mortgage by sub-lease.

Where it is intended that a mortgage of leasehold lands should operate by way of sub-lease, and not by way of assignment, it may be done by reserving a reversion in the mortgagor, as by granting the residue of the term less one day, which should be stated to be the last day of the term; the reservation of a day generally, without stating it to be the last day of the term, is insufficient to give it the character of a sub-lease(*v*).

(*r*) *White* v. *Hunt* (1870), L.R. 6 Ex. 32.

(*s*) R.S.O. (1897), c. 170, s. 34, s.-s. 2.

(*t*) *Harrison* v. *Blackburn* (1864), 17 C.B.N.S. 678.

(*u*) For forms of mortgages of leasehold lands by way of assignment and by way of sub-lease, see Part V.

(*v*) *Jamieson* v. *London and Canadian Loan and Agency Co.* (1897), 27 S.C.R. 435.

In an assignment of lease by way of mortgage the *habendum* if repugnant to the premises will be rejected, and where it is recited in the premises that the lease granted or assigned by mortgage is one for a term of twenty-one years, the *habendum*, which limits it to the unexpired term less one day, is void(*w*).

Jamieson v. London and Canadian.

In *Jamieson* v. *London and Canadian Loan and Agency Co.*(*x*), a lease of real estate for twenty-one years, with a covenant for a renewal for a like term or terms, was mortgaged by the lessee. The mortgage after reciting the terms of the lease proceeded to convey to the mortgagees the indenture and the benefit of all covenants and agrements therein, the leased property by description and "all and singular the engines and boilers which now are or shall at any time hereafter be brought and placed upon or affixed to the said premises, all of which said engines and boilers are hereby declared to be and from part of the said leasehold premises hereby granted and mortgaged or intended so to be and form part of the term hereby granted and mortgaged;" the *habendum* of the mortgage was, "to have and to hold unto the said mortgagees, their successors and assigns, for the residue yet to come and unexpired of the term of years created by the said lease, less one day thereof, and all renewals. It was held by the Ontario Court of Appeal, that the premises did not grant any estate or interest, and the *habendum* was not void as repugnant; that the one day excepted might be taken as the last day of the term; and that the mortgagees were not assignees of the term and liable for the rent. But it was held by the Supreme Court, reversing the judgment of the Court of Appeal, that the premises of the mortgage contained an

(*w*) *Jamieson* v. *London and Canadian Loan and Agency Co.* (1897), 27 S.C.R. 435.

(*x*) *Jamieson* v. *London and Canadian Loan and Agecny Co.* (1897), 23 Ont. App. 602; 27 S.C.R. 435.

express assignment of the whole term, and the *habendum*, if intended to reserve a portion to the mortgagor, was repugnant to the premises, and therefore void; that the words "leasehold premises" were quite sufficient to carry the whole term, the word "premises" not meaning lands or property, but referring to the recital, which described the lease as one for a term of twenty-one years. It was further held that the *habendum* did not reserve a reversion to the mortgagor; that the reversion of a day generally, without stating it to be the last day of the term, is insufficient to give the instrument the character of a sub-lease.

Last day of the term.

In an assignment of mortgage of leaseholds, the words "convey and transfer all the benefit of the said mortgage" were held to be insufficient to convey the legal estate in the mortgaged property(*y*).

Implied covenants.

In Ontario, in a conveyance by way of mortgage of leasehold property, whether by assignment or by sub-lease, certain covenants are implied by statute. This is provided by section 5 of the *Act respecting Mortgages of Real Estate*(*z*), which is as follows:

> **5.** There shall, in the several cases in this section mentioned, be deemed to be included, and there shall in those several cases by virtue of this Act be implied, covenants to the effect in this section stated, by the person or by each person who conveys, as far as regards the subject-matter or share of subject-matter expressed to be conveyed by him, with the person, if one, to whom the conveyance is made, or with the persons jointly, if more than one, to whom the conveyance is made as joint tenants, or with each of the persons, if more than one, to whom the conveyance is made as tenants in common, that is to say:—
>
> (a) In a conveyance by way of mortgage, the following covenants by the person who conveys and is expressed to convey as beneficial owner, namely:
>
> For payment of the mortgage money and interest and observance in other respects of the proviso in the mortgage;

(*y*) *In re Beachey, Heaton* v. *Beachey*, [1904] 1 Ch. 67.

(*z*) R.S.O. (1897), c. 121 s. 5; see also s. 1.

Good title;

Right to convey;

That, on default, the mortgagee shall have quiet possession of the land;

Free from all incumbrances;

That the mortgagor will execute such further assurances of the said lands as may be requisite; and

That the mortgagor has done no act to incumber the land mortgaged;

According to the tenor and effect of the several and respective forms of covenants for the said purposes set forth in Schedule B to *The Act respecting Short Forms of Mortgages.*

(b) In a conveyance by way of mortgage of leasehold property, the following further covenant by the person who conveys, and is expressed to convey, as beneficial owner, namely:

That the lease or grant creating the term or estate for which the land is held is, at the time of conveyance, a good, valid and effectual lease or grant of the land conveyed, and is in full force, unforfeited, and unsurrendered, and in nowise become void, or voidable, and that all the rents reserved by, and all the covenants, conditions and agreements contained in, the lease, or grant, and on the part of the lessee or grantee and the persons deriving title under him to be paid, observed, and performed, have been paid, observed and performed, up to the time of conveyance;

And also, that the person so conveying, or the persons deriving title under him, will at all times, as long as any money remains on the security of the conveyance, pay, observe and perform, or cause to be paid, observed and performed, all the rents reserved by, and all the covenants, conditions and agreements, contained in the lease or grant, and on the part of the lessee or grantee, and the persons deriving title under him, to be paid, observed and performed, and will keep the person to whom the conveyance is made, and those deriving title under him, indemnified against all accidents, proceedings, costs, charges, damages, claims and demands, if any, to be incurred or sustained by him or them, by reason of the non-payment of such rent, or the non-observance or non-performance of such covenants, conditions and agreements, or any of them.

In a conveyance of leasehold property for valuable consideration, other than a mortgage, whether by assignment or sub-lease, covenants for the right to convey, for quiet enjoyment, for freedom from incumbrances, and for further assurance, are implied by statute, and the follow-

ing further covenant, by the person who conveys, and is expressed to convey, as beneficial owner, namely:

Valid lease.

"That, notwithstanding anything by the person who so conveys, made, done, executed, or omitted, or knowingly suffered, the lease or grant creating the term or estate for which the land is conveyed is, at the time of conveyance, a good, valid, and effectual lease or grant of the property conveyed, and is in full force, unforfeited, unsurrendered, and in nowise become void or voidable, and notwithstanding anything as aforesaid all the rents reserved by and all the covenants, conditions and agreements contained in the lease or grant, and on the part of the lessee or grantee, and the person deriving title under him to be paid, observed, and performed, have been paid, observed, and performed, up to the time of conveyance"(*a*).

2. *Covenants that Run with the Land.*

In order to determine the rights and liabilities of successive parties to a tenancy, a distinction must be drawn between covenants that affect the land demised and are called "covenants that run with the land," and covenants that are merely personal to the covenantor and do not affect the land, and which may be called "collateral" covenants.

Covenants that run with the land.

A covenant is said to run with the land, when either the liability to perform it, or the right to take advantage of it, passes to the assignee of the tenant; and a covenant is said to run with the reversion, when a like right or liability passes to the assignee of the landlord. In both cases the covenant is commonly described as a covenant that runs with the land, as a covenant that runs with the reversion runs also with the land. Conditions are in this respect

(*a*) R.S.O. (1897), c. 119, s. 17; see also s. 1, s.-s. 6.

on the same footing as covenants, and may or may not run with the land(*b*).

Covenants running with the land include all those that touch or affect the demised land, and the burden and benefit thereof pass to the assignee, although not mentioned, if they relate to something that is in being at the time of the demise(*c*).

Where the covenants relate to something not in being at the time of the demise, the burden and benefit thereof passes to the assignee, if the covenants expressly extend to assigns(*d*).

But where the covenant is to do some act affecting the land, although relating to something not in being at the time of the demise, it is binding on the assigns, although they are not named, if the act is conditional on something else being first done, as for example, to repair buildings if erected during the term(*e*)

The effect of an assignment by the lessee, that is to say, a transfer by him of his whole interest in the term, is to substitute the assignee for the lessee, and to create the relation of landlord and tenant between the lessor and the assignee. The latter, by reason of the privity of estate between them, becomes liable to the lessor for rent and for breaches of the covenants contained in the lease that run with the land, as fully and completely, while he remains tenant, as the original lessee. The assignee, on the other hand, is entitled to sue the lessor for breaches committed by him after the assignment, of covenants that run with the land.

Assigns.

It is material, also, to consider whether covenants in a lease expressly extend to the assigns of the lessor and lessee

(*b*) *Horsey* v. *Steiger* [1899] 2 Q.B. 79.
(*c*) *Spencer's Case*, 1 Smith L.C., 11th ed., p. 55.
(*d*) *Doughty* v. *Bowman* (1848), 11 Q.B. 444.
(*e*) *Minshull* v. *Oakes* (1858), 2 H. & N. 793.

or not, that is to say, whether the lessee or lessor covenants not only on behalf of himself, but on behalf of his assigns as well.

Some covenants will be binding on the assigns, although they are not mentioned, and some covenants will not be binding on them, although they are mentioned, while others will only be binding on them if mentioned.

Covenant.

In Ontario, the short form of words provided, by the *Act respecting Short Forms of Leases*(*f*), to introduce the covenants on the part of the lessee is as follows: "The said (*lessee*) covenants with the said (*lessor*)," which, in leases expressed to be made in pursuance of the Act, is to be read as if it were in the following form: "And the said lessee doth hereby for himself, his heirs, executors, administrators,, and assigns, covenant with the said lessor, that he the said lessee, his executors, administrators, and assigns will, etc."

Under a lease expressed to be made in pursuance of the Act, in which a covenant to rebuild a house, in case it was destroyed by fire during the term, was introduced, by the words "And the said party of the second part covenants with the said party of the first part," in place of the words provided by the Act, it was held that the covenant derived no aid from the Act, and was to be read as made by the lessee for himself alone, and not for his assigns(*g*).

Law and equity.

A further distinction was drawn between covenants binding in law on the assignees, and those regarded only in courts of equity as binding on the assignees. Since the passing of the *Judicature Act*, all courts are now required to take notice of, and give effect to, equitable claims and defences.

At law, it was necessary that there should be privity of

(*f*) R.S.O. (1897), c. 125, Schedule B.

(*g*) *Emmett* v. *Quinn* (1882), 7 Ont. App. 306.

estate, that is, of the legal estate between the covenanting parties; a covenant by or with an equitable owner would not run with the land(*h*).

But in equity such a covenant is deemed to run with the land and to be binding on the assignee(*i*).

The following covenants on the part of the lessee have been held to run with the land, and to bind his assigns.

To pay rent.

A covenant to pay rent(*j*);

To pay taxes.

A covenant to pay taxes where assigns are named(*k*). In Nova Scotia, it has been held that a covenant to pay taxes was purely personal and did not run with the land(*l*).

To repair.

A covenant to repair the buildings on the demised premises, or to put them or leave them in repair(*m*). A covenant to repair and paint runs with the land, and is binding on the assignee, although made by the lessee with the reversioner and a stranger(*n*).

Where a lease contained the following proviso: "Provided always that nothing herein contained shall be deemed, or taken or construed to be deemed, or taken, in any way, to compel the said G., his executors, administrators, or assigns, to give up the buildings at the expiration thereof, which are all wooden and liable to decay, in as sound and good a state as they are now; but such buildings are not to be wilfully or negligently wasted or destroyed; necessary repairs, however, for the preservation of the said buildings, to be done and performed by the said G. at his

(*h*) *Webb* v. *Russell* (1789), 3 T.R. 393; 1 R.R. 725.

(*i*) *Rogers* v. *Hosegood*, [1900] 2 Ch. 388.

(*j*) *Parker* v. *Webb* (1703), 3 Salk. 5.

(*k*) *Wix* v. *Ruston*, [1899] 1 Q.B. 474.

(*l*) *McDuff* v. *McDougall* (1889), 21 N.S.R. 250.

(*m*) *Williams* v. *Earle* (1868), L.R. 3 Q.B. 739; *Martyn* v. *Clue* (1852), 18 Q.B. 661.

(*n*) *Wakefield* v. *Brown* (1846), 9 Q.B. 209.

own proper cost and charge:" it was held that the words recited constituted a covenant, and that such covenant ran with the land and bound the assignees of the lease, though assigns were not expressly mentioned in the instrument(*o*);

To build.

A covenant to build on the demised lands(*p*). In Ontario, it has been held that a covenant on the part of a lessee to build a house on the demised lands, and to rebuild in case of fire, where assigns were not expressly mentioned, must be read as being made by the lessee for himself alone, and not for his assigns, as it was not one of the statutory covenants; and that it did not run with the land, and was not binding on the assignee, as it was in respect of something not *in esse* at the time of making the lease(*q*);

To insure.

A covenant to insure and keep insured the buildings on the demised premises(*r*). A covenant by the lessee to insure in the name of the lessor, the insurance money to be expended in the erection of new buildings, was held to be a covenant running with the land, and that an action would lie on it against the assignee of the lessee(*s*);

Not to carry on trade.

A covenant not to carry on a particular trade on the premises(*t*). Where a lessor demised for a term of years, with a stipulation that the lessee would not carry on any business that would affect the insurance, and the lessee made an under-lease, omitting any such stipulation, and the under-lessee commenced the business of rectifying high wines, the court, upon a bill filed by the lessor against the lessee and the sub-lessee, restrained the parties from continuing to rectify high wines, or carry on any other busi-

(*o*) *Perry* v. *Bank of Upper Canada* (1867), 16 U.C.C.P. 404.

(*p*) *City of London* v. *Nash* (1747), 3 Atk. 512.

(*q*) *Emmett* v. *Quinn* (1882), 7 Ont. App. 306; *Minshull* v. *Oakes* (1858), 2 H. & N. 793, discussed.

(*r*) *Vernon* v. *Smith* (1821), 5 B. & A. 1; 24 R.R. 257.

(*s*) *Douglass* v. *Murphy* (1858), 16 U.C.R. 113.

(*t*) *Mayor of Congleton* v. *Pattison* (1808), 10 East 130.

ness that would interfere in any way with the insurance(*u*);

Not to assign.

Apart from statute, a covenant not to assign or sub-let without leave where assigns are named(*v*), runs with the land, but if assigns are not expressly mentioned in the covenant, it does not run with the land(*w*). In Ontario, a covenant not to assign or sub-let without leave runs with the land and is binding on assigns whether they are mentioned or not. This is provided by section 3 of the Act respecting Short Forms of Leases(*x*), which is as follows:

3. Unless the contrary is expressly stated in the lease, all covenants not to assign or sub-let without leave entered into by a lessee in any lease under this Act shall run with the land demised, and shall bind the heirs executors, administrators, and assigns of the lessee, whether mentioned in the lease or not, unless it is by the terms of the lease otherwise expressly provided, and the proviso for re-entry contained in Schedule B to this Act shall, when inserted in a lease, apply to a breach of either an affirmative or a negative covenant(*y*).

Right of way.

A covenant to allow the lessor and his licensees free passage over the demised premises(*z*);

Residence.

A covenant to reside on the demised premises(*a*);

A covenant so to conduct an hotel as not to endanger the withdrawal of a license(*b*);

A covenant not to sell liquors other than those supplied by the lessor(*c*).

(*u*) *Arnold* v. *White* (1856), 5 Gr. 371.

(*v*) *Williams* v. *Earle* (1868), L.R. 3 Q.B. 739; *McEacharn* v. *Calton*, [1902] App. Cas. 104.

(*w*) *Lee* v. *Lorsh* (1876), 37 U.C.R. 262; *Crawford* v. *Bugg* (1886), 12 Ont. 8; *West* v. *Dobbs* (1870), L.R. 4 Q.B. 634; L.R. 5 Q.B. 460.

(*x*) R.S.O. (1897), c. 125.

(*y*) In British Columbia, see R.S.B.C. (1897), c. 117, s. 8.

(*z*) *Dynevor (Lord)* v. *Tennant* (1888), 13 App. Cas. 279.

(*a*) *Tatem* v. *Chaplin* (1793), 2 H. Bl. 133.

(*b*) *Fleetwood* v. *Hull* (1889), 23 Q.B.D. 35.

(*c*) *Clegg* v. *Hands* (1890), 44 Ch. D. 503.

3. *Collateral Covenants.*

Collateral covenants.

Apart from the equitable doctrine of notice, a merely personal or collateral covenant does not run with the land, and does not confer rights, or impose liabilities upon the assignee, although the covenant expressly extends to assigns. A covenant or condition which affects merely the person, and which does not affect the nature, quality, or value of the thing demised, or the mode of using or enjoying it, does not run with the land(*d*).

Deed.

It has been held that a covenant in a lease does not run with the land, unless it is under seal(*e*).

But where rent has ben paid by the assignee a new tenancy may be inferred upon the terms of the lease, and since the *Judicature Act*, it would seem that an assignee of a lease not under seal can take advantage of a stipulation therein as the assignee of a chose in action(*f*).

A covenant extending to assigns to do some act relating to the land may be so framed as to be in effect a merely personal covenant, the burden or benefit of which will not pass to the assignee(*g*).

The following covenants on the part of the lessee have been held not to run with the land:

Increased rent.

A covenant to pay an increased rent in respect of improvements made by the lessor(*h*);

A covenant in a lease of a silk mill to employ only a certain class of persons therein(*i*);

(*d*) *Horsey* v. *Steiger*, [1899] 2 Q.B. 79.

(*e*) *Elliott* v. *Johnson* (1866), L.R. 2 Q.B. 120.

(*f*) *Manchester Brewing Co.* v. *Coombs* (1900), 82 L.T. 347; R.S.O. (1897), c. 51, s. 58, s.-s. 5.

(*g*) *Eccles* v. *Mills*, [1898] App. Cas. 360.

(*h*) *Raymond* v. *Fitch* (1835), 2 C.M. & R. 588; 41 R.R. 797.

(*i*) *Mayor of Congleton* v. *Pattison* (1808), 10 East 130.

A covenant to pay taxes on premises of the lessor other than the demised premises(*j*).

Under a demise of a brewery with a number of casks, it was held that a covenant to return the casks or pay a fixed price therefor, was not binding on an assignee who never received possession of them(*k*).

Forfeiture.

A condition in a lease that in case any writ of execution shall be issued against the goods of the lessee, the then current year's rent shall immediately become due and payable and the term forfeited, is personal to the original lessor and lessee, and does not run with the land(l).

To pay for buildings.

A covenant by a lessor, not mentioning assigns, to pay for buildings to be erected on the lands demised, does not run with the land, and the lessee or his assigns, although they may have a claim against the lessor's executors, have no claim against the lands, nor against the devisees of the lessor in respect of the value of the buildings so erected(*m*).

A covenant by the lessor not to build or keep any house for the sale of beer within half a mile of the demised premises has been held not to run with the land(*n*).

An assignment by the personal representative, instead of the heir, of a lessee, does not carry with it a right of purchasing the fee, under a stipulation contained in the lease in that behalf(*o*).

4. *Equitable Doctrine of Notice.*

Notice.

An assignee may, however, be bound by a collateral covenant by virtue of the equitable doctrine of notice, which is as follows: If an equity be attached to property

(*j*) *Gower* v. *Postmaster-General* (1887), 57 L.T. 527.
(*k*) *McDuff* v. *McDougall* (1889), 21 N.S.R. 250.
(*l*) *Mitchell* v. *McCauley* (1893), 20 Ont. App. 272.
(*m*) *McClary* v. *Jackson* (1887), 13 Ont. 310.
(*n*) *Thomas* v. *Hayward* (1869), L.R. 4 Ex. 311.
(*o*) *Henrihan* v. *Gallagher* (1862), 2 E. & A. 338.

by the owner, an assignee who takes with notice of that equity stands in the same position as the person who assigned to him. This rule applies to the case of a sub-lessee, as well as to an assignee of the term, and to a person who merely occupies the land with the consent of the lessee(*p*).

Restrictive covenants.

The rule, however, extends only to negative or restrictive covenants, which the assignee will be restrained from violating, and does not apply to covenants requiring something to be done(*q*)

Constructive notice.

The assignee is bound if he has constructive notice merely, although not actual notice. Thus, where a reasonable investigation of the title of the assignor would disclose a covenant, the assignor is bound if he fails to make such investigation(*r*).

So constructive notice of the covenants in a head lease would be imputed to the assignee of a sub-lease, where it appears in the sub-lease that the sub-lessor holds under a lease(*s*).

5. *Liability of Assignee to Lessor.*

Liability.

During the continuance of interest of each successive assignee there is a duty on the part of each to pay the rent and perform the covenants(*t*). The assignee is liable to the lessor on the covenants of a lease by reason of his privity of estate and his liability endures while he is ten-

(*p*) *John Brothers Co.* v. *Holmes*, [1900] 1 Ch. 188; *Mander* v. *Falcke*, [1891] 2 Ch. 554.

(*q*) *Hall* v. *Ewin* (1887), 37 Ch. D. 74; *Clegg* v. *Hands* (1890), 44 Ch. D. 503; *Ansterberry* v. *Corporation of Oldham* (1885), 29 Ch. D. 750; *London and Southwestern Railway Co.* v. *Gomm* (1882), 20 Ch. D. 562.

(*r*) *Patman* v. *Harland* (1881), 17 Ch. D. 353.

(*s*) *Tritton* v. *Bankhart* (1887), 56 L.T. 306; see also *Ebbets* v. *Conquest*, [1895] 2 Ch. 377.

(*t*) *Moule* v. *Garrett* (1870), L.R. 5 Ex. 132.

ant, but not after he has assigned over his interest in the lease.

Rent. As to rent, he is liable only for instalments that have become due during his tenancy, and for the proportion of the rent not yet due up to the time when he has assigned over his interest(*u*).

Covenants. And he is not liable for breaches of covenant to repair committed after he has assigned(*v*); nor has he a right to sue the lessor for breach of a covenant before the term was assigned to him(*w*).

The assignee of a lease is liable for a breach of a covenant running with the land, incurred in his own time, though the action is not commenced until after he has assigned the premises(*x*).

An assignee is liable for rent although he was under a misapprehension as to the extent of the lands demised, as by calling for the lease at the time of the assignment he might have learned the facts at first(*y*).

Mortgagee. A mortgagee of a lease by way of assignment is liable on the covenant for payment of rent, although he has never entered(*z*). And he is liable on the covenants in the lease, after sale under the mortgage, if there has been no conveyance to the purchaser(*a*).

An assignee, however, of the equity of redemption from the lessee of a mortgaged term will not be liable on the

(*u*) *Swansea Bank* v. *Thomas* (1879), 4 Ex. D. 94.

(*v*) *Beardman* v. *Wilson* (1868), L.R. 4 C.P. 57.

(*w*) *Morris* v. *Kennedy*, [1896] 2 Ir. R. 247.

(*x*) *Harley* v. *King* (1835), 2 C.M. & R. 18.

(*y*) *Talbot* v. *Rossin* (1864), 23 U.C.R. 170.

(*z*) *Cameron* v. *Todd* (1863), 22 U.C.R. 390; *Todd* v. *Cameron* (1863), 2 E. & A. 434.

(*a*) *McGrath* v. *Todd* (1866), 26 U.C.R. 87.

(*b*) *Mayor of Carlisle* v. *Blamire* (1807), 8 East 487; 9 R.R. 491.

covenants, at least during the currency of the mortgage(*b*).

Where a lease was granted by the plaintiff, and the defendant, before the expiration of the term, without the plaintiff's knowledge, struck out the lessee's name and put his own opposite to the seal, and entered and paid rent, it was held that the plaintiff could not maintain an action of covenant against the defendant on such lease(*c*).

Assignee of part.

The assignee of part of the demised premises is subject to the covenants of the lease affecting such part which run with the land, and although he is not liable in an action for the rent of the whole, his goods are liable to be distrained for the whole rent(*d*).

An asignee of an undivided moiety of the term comprised in the lease is chargeable with half the rent, and may be sued alone for breaches of the covenants(*e*).

It would seem to be doubtful whether an assignment by which the term is severed, that is, where the lessee transfers part of the demised premises for the whole of the period of the lease, operates to create a privity of estate between the assignee and the lessor in respect of the whole land(*f*).

Apportionable covenants.

But under such an assignment, the assignee is liable for rent and upon such covenants of the lease as can be apportioned as a covenant to repair(*g*); and the assignee has corresponding rights against the lessor(*h*).

Successive assignees.

Where there are successive assignments of the lease, the ultimate assignee, who has covenanted "to observe and perform the lessee's covenants therein contained and from the performance thereof to keep indemnified" his assignor,

(*c*) *Lapp* v. *May* (1856), 14 U.C.R. 47.

(*d*) *Curtis* v. *Spitty* (1835), 1 Bing. N.C. 756, at p. 760.

(*e*) *Merceron* v. *Dowson* (1826), 5 B. & C. 479.

(*f*) *Curtis* v. *Spitty* (1835), 1 Bing. N.C. 756.

(*g*) *Gamon* v. *Vernon* (1678), 2 Lev. 231.

(*h*) *Simpson* v. *Clayton* (1838), 4 Bing. N.C. 758; 44 R.R. 841.

is liable for breaches which have occurred before the assignment to him(*i*).

Assignment over.

An assignee may get rid of his liability by re-assigning, although he assigns to a "man of straw" for that express purpose, and even if, by the terms of the lease, he is bound not to assign without the lessor's consent(*j*).

The assignee of a lease is only liable to the original lessor by reason of privity of estate; and if he assigns over to another, he is not liable to the lessor for any breach occurring after the assignment. And if, after a refusal by the lessor to accept the assignee's offer to surrender the premises, the latter may assign to a person who cannot be made responsible, as for example, to a pauper emigrant: But the assignee of a lease cannot by assigning to another get rid of a liability for breach incurred during the continuance of his own estate(*k*).

There is no fraud in the assignee of a term assigning his interest to whom he pleases, with a view to get rid of a lease, although such person neither takes actual possession, nor receives the lease(*l*).

Thus, where a lessee assigned for the benefit of creditors, and the assignee took possession and paid rent for several months, and after the lessor refused to take the premises off his hands assigned the lease to a pauper, it was held that such assignment was not fraudulent, and that the assignee was not liable for subsequent rent(*m*).

Discharge of mortgage.

A mortgagee of a lease be way of assignment is entitled

(*i*) *Gooch* v. *Clutterbuck*, [1899] 2 Q.B. 148.

(*j*) *Paul* v. *Nurse* (1828), 8 B. & C. 486; 32 R.R. 456; *Taylor* v. *Shum* (1797), 1 B. & P. 21; 4 R.R. 759; *McGill* v. *Young* (1852), 10 U.C.R. 301.

(*k*) *Taylor* v. *Shum* (1797), 1 B. & P. 21; 4 R.R. 759.

(*l*) *Ibid.*

(*m*) *McGill* v. *Young* (1852), 10 U.C.R. 301.

to execute a statutory discharge of the mortgage, and thus put an end to his liability(*n*).

6. *Liability of Sub-lessee.*

Sub-lessee.

An action cannot be maintained by the lessor against a sub-lessee, as distinguished from an assignee for rent(*o*); although the sub-lessee's goods will be liable to be distrained for the whole rent as being on the demised premises(*p*).

Not liable on covenant for rent.

A plea to an action of covenant for rent against the assignee of a lease, that all the estate of the lessee did not come to and vest in the defendant, is a good defence(*q*).

In an action of debt for rent on a lease, the declaration stated that the right and interest of the lessee in the demised premises, came by assignment to and was vested in the defendant, and it appeared that the defendant was at most only under-lessee for a part of the term, it was held that the plaintiff could not recover(*r*).

Where a lessee assigns part of the demised premises, and sub-lets another part, covenanting in each case to pay the whole rent and indemnify against non-payment, and the assignee pays the whole rent under a threat of distress from the lessor, such assignee cannot recover a proportion of the rent from the sub-lessee(*s*).

A mortgagee of a sub-lease by way of assignment is not liable to indemnify the original lessee for rent paid by him to the lessor to save a forfeiture, even although the

(*n*) *Jamieson* v. *London and Canadian Loan and Agency Co. (No. 2)* (1900), 26 Ont. App. 116; 30 S.C.R. 14.

(*o*) *Holford* v. *Hatch* (1779), 1 Doug. 183.

(*p*) See chapter XIII.

(*q*) *Annis* v. *Corbett* (1844), 1 U.C.R. 303.

(*r*) *Lawler* v. *Sutherland* (1851), 9 U.C.R. 205.

(*s*) *Johnson* v. *Wild* (1890), 44 Ch. D. 146.

mortgagee is in possession, and has covenanted with the sub-lessee to pay the rent reserved by the sub-lease(*t*).

Receiver of sub-lessee.

Since a mortgagee of leaseholds by sub-demise in the usual form is, through absence of privity of estate, not himself liable to the head-lessor for rent or other outgoings, whether he is in possession or not, it follows that a receiver appointed by the Court in an action by the mortgagee against the mortgagor to enforce the security is also under no such liability, his appointment being in right of the mortgagees. Hence the head-lessor cannot require the receiver to pay, out of moneys coming to his hands while in the use or occupation of the mortgaged premises as receiver, any rent or other outgoings in respect of such use or occupation. And there is no equity entitling the head-lessor to claim payment from the receiver by reason of the latter having been put into use or occupation as an officer of the Court, even though he has, by the direction of the Court, sold off the mortgagor's goods on the premises and so deprived the head-lessor of his landlord's remedy by distress. Thus, in a debenture-holder's action against the trustees of the trust deed who were mortgagees from the company by sub-demise of premises of which the company were lessees, the Court disallowed a claim by the head-lessor against the receiver appointed by the Court to payment, out of the proceeds of the company's goods sold by the receiver while in occupation of the premises, of rent in respect of the occupation, and of damages for a breach of the company's covenant in the head-lease to repair(*u*).

7. *Liability of Lessee after Assignment.*

Lessee's liability continues.

The liability of the lessee to be sued on his covenants is not determined by his assigning over the term, and the

(*t*) *Bonner* v. *Tottenham Building Society*, [1899] 1 Q.B. 161.
(*u*) *Hand* v. *Blow*, [1901] 2 Ch. 721.

lessor's acceptance of his assignee, but he and his representatives continue to be liable both to the lessor and his assignees; and his liability on a covenant to pay rent is not extinguished by the surrender of part of the demised premises by the assignee(*v*).

The original lessee is liable on the covenants entered into by him by reason of his privity of contract with the lessor.

Express covenant.

The original lessee after assignment continues to be liable for the rent if he has entered into an express covenant with his lessor to pay it(*w*). Such a covenant is not, as between the lessor and lessee, one merely of suretyship(*x*).

An assignment of the term by a lessee, and the acceptance by lessor of the assignee, will prevent the lessor from bringing an action of debt for the rent, but he can still maintain an action on an express covenant(*y*).

In an action on the covenant for rent, the fact of the lessor's acceptance of the assignees as his tenants, and his receipt of prior rent from them as relieving the lessee from any further liability is no defence to an action on an express covenant(*z*).

8. *Liability of Assignee to Lessee.*

Liability to indemnify.

An assignee is liable to indemnify the lessee for breaches of covenants which occur during the assignee's tenancy, but not for breaches which occurred before the assignment to him, or after an assignment by him(*a*).

(*v*) *Baynton* v. *Morgan* (1888), 21 Q.B.D. 101; 22 Q.B.D. 74; *Spencer's Case*, 1 Smith L.C., 11th ed., p. 73.

(*w*) *Auriol* v. *Mills* (1790), 4 T.R. 94; 2 R.R. 341; *Boot* v. *Wilson* (1807), 8 East 311.

(*x*) *Baynton* v. *Morgan* (1888), 22 Q.B.D. 74.

(*y*) *Montgomery* v. *Spence* (1864), 23 U.C.R. 39.

(*z*) *Stinson* v. *Magill* (1850), 8 U.C.R. 271.

(*a*) *Wolveridge* v. *Steward* (1833), 1 Cr. & M. 644; 38 R.R. 701; *Smith* v. *Peat* (1853), 9 Ex. 161.

But where an assignee covenanted to pay the rent reserved in the lease, and to perform the lessee's covenants therein, and to keep him indemified from payment and performance thereof respectively, it was held he was bound in respect of breaches occurring at any time whether before or after the assignment(*b*).

A lessee who assigns his interest, and, the assignee of the assignee neglecting to pay rent and to keep the premises in repair, is sued by the lessor, and compelled to pay the rent, damages and costs, is entitled to recover from such assignee for the rent, damages and costs he has been obliged to pay to lessor(*c*).

Where a lease, containing a covenant against asignment without the consent of the lessors, is so assigned, the assignment containing a covenant by the assignee to pay the rents and indemnify the assignor, and the assignee goes into possession of the demised premises, he is liable, although the consent of the lessors may not have been procured, to repay to the assignor rent accruing due after the assignment which the latter has been obliged to pay(*d*).

Lien.

But payment of rent by the lessee does not entitle him to a lien on the term in the hands of the assignee, so as to prevent a subsequent assignment(*e*).

(*b*) *Gooch* v. *Clutterbuck*, [1899] 2 Q.B. 148.

(*c*) *Ashford* v. *Hack* (1849), 6 U.C.R. 541; *Spence* v. *Hector* (1865), 24 U.C.R. 277; *Burnett* v. *Lynch* (1826), 5 B. & C. 589; 29 R.R. 343.

(*d*) *Brown* v. *Lennox* (1893), 22 Ont. App. 442.

(*e*) *In re Russell* (1885), 29 Ch. D. 254.

SECTION II.

ASSIGNMENT OF THE REVERSION.

1. *Covenants that Run with the Reversion.*
2. *Collateral Covenants.*
3. *Equitable Doctrine of Notice.*
4. *Mortgagor and Mortgagee.*
5. *Severance of the Reversion.*
6. *Assignment of the Rent.*

At common law, a covenant touching or concerning the thing demised was deemed to run with the land, so that the burden and the benefit thereof passed to the assignee of the term as against and in favour of the original lessor; but such a covneant was not deemed to run with the reversion, and conferred no rights and imposed no liabilities on the assignee of the lessor(*a*).

32 Henry VIII., c. 34.

This anomaly was remedied by a statute passed in the reign of Henry VIII.(*b*). The first section of that statute gave to assignees of the reversion, and their heirs, executors, and assigns, the same rights and remedies for non-payment of rent, and non-performance of covenants against the lessees, their executors, administrators, and assigns, as the original lessor had. This section as re-enacted in Ontario is as follows:

Rights of assignees of the reversion against lessees.

12. All persons being grantees or assignees of the King, or of any other person than the King, and the heirs, executors, successors, and assigns of every of them, shall have and enjoy like advantage, against the lessees, their executors, administrators, and assigns, by entry for non-payment of the rent, or for doing of waste, or other forfeiture, and also shall have and enjoy all and every such like and

(*a*) *Spence's Case*, 1 Smith L.C., 11th ed., p. 55.

(*b*) 32 Henry VIII., c. 34, ss. 1 and 2; R.S.O. (1897), vol. III., c. 330, ss. 12 and 13.

the same advantage, benefit, and remedies, by action only, for not performing of other conditions, covenants, or agreements, contained and expressed in the indentures of their said leases, demises or grants against all and every of the said lessees, and fermors, and grantees, their executors, administrators, and assigns, as the said lessors or grantors themselves, or their heirs or successors, might have had and enjoyed at any time or times(*c*).

The second section of the statute conferred on lessees, their executors, administrators, and assigns, the same rights and remedies for non-performance of covenants in their leases against the assignees of the reversion as they might have had or enjoyed against their lessors. This section as re-enacted in Ontario is as follows:

Rights of lessees against assignees of the reversion.

13. All fermors, lessees and grantees of lands, tenements, rents, portions, or any other hereditaments, for term of years, life or lives, their executors, administrators, and assigns, shall and may have like action, advantage, and remedy, against all and every person who shall have any gift or grant of the King, or of any other person, of the reversion of the same lands, tenements and other hereditaments so let, or any parcel thereof for any condition, covenant, or agreement, contained or expressed in the indentures of their leases, as the same lessees, or any of them, might and should have had against their said lessors, and grantors, their heirs, or successors(*d*).

Collateral covenants.

It will be noted that these sections extend in terms to the covenants in the lease, and are not restricted to covenants that touch or concern the land, but it has been held that collateral covenants are not within the statute(*e*), and covenants that run with the reversion are on the same footing in this respect, as those that run with the land. As before stated, a covenant that runs with the land runs also with the reversion, and such a covenant is usually called a covenant that runs with the land whether it is

(*c*) R.S.O. (1897), vol. III., c. 330, s. 12.

(*d*) R.S.O. (1897), vol. III., c. 330, s. 13.

(*e*) *Spencer's Case*, 1 Smith L.C., 11th ed., p. 55; *Webb* v. *Russell* (1789), 3 T.R. 402; 1 R.R. 725.

sought to be enforced by or against the assignees of the lessor or of the lessee.

Assignee of part.

It has ben held that the sections of the statute of Henry VIII. just quoted, include and extend to an assignee of part of the reversion(*f*); and to an assignee of part of the term(*g*); and to a devisee and a remainder-man, although they may not be the assignees of the person making the lease(*h*).

At common law, upon an assignment being made of the reversion, the relation of landlord and tenant did not arise between the assignee of the reversion and a lessee of the assignor, unless such lessee attorned to him. But it has been provided by statue(*i*), that a grant or conveyance of the reversion shall be good and effectual to all intents and purposes without any attornment of the tenant; but no tenant shall be prejudiced by the payment of rent to the grantor before notice shall be given to him of such grant by the grantee. Section 24 of the Ontario Act by which this is provided is as follows:

Attornment not necessary.

24. (1) All grants or conveyances of any rents, or of the reversion, or remainder of any messuages or lands, shall be good and effectual to all intents and purposes without any attornment of the tenant of the land out of which such rent shall be issuing, or of the particular tenant upon whose particular estate any such reversion, or remainder, shall and may be expectant, or depending, as if his attornment had been had and made(*j*).

(2) No tenant shall be prejudiced, or damaged, by payment of any rent to any grantor, or conusor, or by breach of any condition for non-payment of rent before notice shall be given to him of such grant by the conusee, or grantee(*k*).

(*f*) *Wright* v. *Burroughes* (1846), 3 C.B. 685; *Twynham* v. *Pickard* (1818), 2 B. & Ald. 105; *Simpson* v. *Clayton* (1838), 4 Bing. N.C. 758; 44 R.R. 841.

(*g*) *Palmer* v. *Edwards* (1783), 1 Doug. 187.

(*h*) *Isherwood* v. *Oldknow* (1815), 3 M. & S. 382; 16 R.R. 305.

(*i*) R.S.O. (1897), vol. III., c. 342, s. 24; R.S.B.C. (1897), c. 110, s. 35; 4 Anne, c. 16, ss. 9 and 10.

(*j*) 4 & 5 Anne, c. 3 (or c. 16, Ruffhead's ed.), s. 9.

(*k*) 4 & 5 Anne, c. 3 (or c. 16, in Ruffhead's ed.), s. 10.

Rent.

An assignee of the reversion is entitled to the rent which accrues after the assignment, and to the benefit of the covenants that run with the reversion and with the land. He is also subject to the burden of covenants that run with the reversion and with the land.

Distress.

The right of distress is incident to the reversion, and a landlord after parting with the reversion, cannot, apart from statute, distrain even for rent which accrued before assignment(*l*).

In Ontario, however, it would seem that a landlord, although having no reversion, may distrain for rent(*m*).

The assignor of the reversion has no claim to rent which accrued after the assignment(*n*); but he is entitled to, and may sue, after assignment, for the rent which accrued while he was owner, and a proportionate part of the rent up to the time of assignment(*o*). And the assignee of the reversion has no claim to rent which accrued before assignment, but only to a proportion from the date of the assignment, although payable afterwards(*p*).

Yearly tenancy.

Where land is held by a tenant from year to year, and the estate of the landlord passes by conveyance to another, the tenant is entitled to continue the same tenancy under the new owner, and, upon notice of the conveyance, is liable to pay to the new owner as his landlord any rent accrued since the date of the conveyance, and which he has not before the notice paid over to the original landlord. But if the new landlord obtains judgment in an action to

(*l*) See chapter XIII.; *Hartley* v. *Jarvis* (1849), 7 U.C.R. 545.

(*m*) R.S.O. (1897), c. 170, s. 3; *Harpelle* v. *Carroll* (1896), 27 Ont. 240; see chapter XIII.

(*n*) *Harmer* v. *Bean* (1853), 3 C. & K. 307.

(*o*) *Swansea (Mayor of)* v. *Thomas* (1882), 10 Q.B.D. 48; see chapter XII.

(*p*) *Sharp* v. *Key* (1841), 8 M. & W. 379; *Wittrock* v. *Hallinan* (1855), 13 U.C.R. 135; see chapter XII.

recover possession, he is assumed to have elected to treat the tenant as a trespasser as from the day mentioned in the writ, and cannot sue him for use and occupation subsequent to that day(*q*).

An action for use and occupation may be maintained by a grantee of an annuity after a recovery in ejectment against a tenant, who was in possession under a demise from year to year, for all rent in his hands at the time of notice by the grantee and down to the day of the demise in the ejectment; but not afterwards(*r*).

Covenants. With regard to other covenants, the assignor is not entitled to sue for breaches which occur after the assignment, and the assignee is not entitled to sue for breaches committed before he acquired the reversion. Thus, where a tenant, who had covenanted to leave premises in repair at the end of the term, held over, and during such holding over the reversion was assigned, it was held that the assignee was not entitled to recover for breaches of the covenant which occurred during the term(*s*).

Repairs. But where a lease contains a covenant to repair after notice, non-compliance with a notice to repair, given by an assignee of the reversion, entitles him to sue, although the premises were in disrepair before the assignment(*t*).

Where a lease operates by way of estoppel it has been held that an assignee of the reversion is entitled to the benefit of the covenants(*u*).

1. *Covenants that Run with the Reversion.*

The burden and the benefit of following covenants on the part of the lessor have been held to run with the re-

(*q*) *Birch* v. *Wright* (1786), 1 T.R. 378; 1 R.R. 223.
(*r*) *Ibid.*
(*s*) *Johnson* v. *St. Peter, Hereford* (1836), 4 A. & E. 520.
(*t*) *Mascal's Case* (1587), 1 Leon. 62.
(*u*) *Norris* v. *Craig* (1895), 64 L.J.Q.B. 432.

version, and to be binding on and to extend to the assignees:

Quiet enjoyment.

A covenant for title and quiet enjoyment(*v*);

Renewal.

A covenant for a renewal of the lease(*w*). But it has been held that a covenant in a sub-lease, to grant an extension of the term if one were obtained from the head landlord, did not run with the land(*x*).

Extension of term.

D.A., who was sub-lessee of certain premises, demised the same to F. for the residue of the term then vested in him less the last days thereof, and covenanted for himself, his executors, administrators and assigns, that in case he should obtain from the freeholder, his heirs, or assigns, any extension of the term for which he then held the premises, then he, his executors, administrators or assigns, would grant to F. a new lease for such extended term as would include the unexpired residue of the original term granted to F., and the further term, less the last days thereof, which might be granted to D.A. by the freeholder, his heirs or assigns. D.A. died, and his reversion became vested in the defendant, who surrendered his term to the freeholder and obtained from him a new lease for an extended term, subject to existing underleases. F. having died, the plaintiff acquired from his executors his interest in the permises, and then claimed specific performance of D.A.'s covenant with F. It was held, (1) on the construction of the covenant, that it was personal to D.A. alone, and did not bind his representatives, (2) that the covenant was not strictly a covenant for renewal and did not on that account run with the land, but, assuming that it did run with the land, the doctrine of perpetuity had no application, and (3) that the covenant ran with the reversion which was vested in the covenantor at the time when he

(*v*) *Campbell* v. *Lewis* (1820), 3 B. & A. 392; 21 R.R. 520; *Manchester Railway Co.* v. *Anderson*, [1898] 2 Ch. 394.

(*w*) *Simpson* v. *Clayton* (1838), 4 Bing. N.C. 758; 44 R.R. 841.

(*x*) *Muller* v. *Trafford*, [1901] 1 Ch. 54.

entered into the covenant, and, consequently, that the statute 32 Henry VIII., chapter 34, section 2, did not apply. On these grounds the action was dismissed(*y*).

Deduction.

To allow a deduction to be made from the rent on certain conditions to be fulfilled(*z*);

To pay for improvements.

To pay at the end of the term for improvements to be made on the premises by the lessee where the assigns are named(*a*).

Where a lessor demised certain lands by deed of lease, containing an agreement that, "at the expiration of the lease, the lessor, his heirs or assigns will pay the said lessee, one half of the then value of any permanent improvements he may place upon the said lands," it was held that the liability to pay for the said improvements ran with the land, and attached as an equitable lien thereon as against the assignee of the reversion, such lien attaching on the title which the lessor had at the time the conveyance was made to the assignee, and that on the expiration of the term, the latter could only recover possession of the said land subject to such lien(*b*).

Married woman.

It has been held that a married woman, though married before May 4th, 1859, was not bound by a covenant of her husband, entered into by him for himself, his heirs and assigns, as lessor of certain lands, to pay at the expiration of the lease for a certain malthouse, which the lessee was to have liberty to erect on the demised premises, though the reversion had been assigned to her husband and another as trustees for her, in such a way that she had the entire

(*y*) *Muller* v. *Trafford* (1901), 1 Ch. 54; following *Brereton* v. *Tuohey* (1858), 8 Ir. Ch. Rep. 249, and *Covey* v. *Pascoe* (1899), 1 I.R. 125; see R.S.O. (1897), vol. III., c. 330 s. 13.

(*z*) *White* v. *Southend Hotel Co.*, [1897] 1 Ch. 767.

(*a*) *Gorton* v. *Gregory* (1862), 3 B. & S. 90; see also *Mansel* v. *Norton* (1883), 22 Ch. D. 769.

(*b*) *Berrie* v. *Woods* (1886), 12 Ont. 693.

beneficial interest, and though the covenant ran with the land. It was also held that a claim on behalf of the said trustees for rent in arrear and for damages for non-repair was not matter of set-off against damages recovered against the husband for breach of his covenant to purchase the malthouse, though he was one of the trustees, they not being matters arising in the same right(*c*).

Assigns.

A covenant by a lessor, assigns not being mentioned, to pay for buildings to be erected on the demised premises, does not run with the land(*d*);

Option to purchase.

A covenant to give an option to purchase the demised lands at the end of the term where assigns are mentioned(*e*).

To insure.

A covenant to insure by the lessor is binding on his assignee(*f*).

To remove buildings.

A lessee, after he had taken possession under his lease, agreed orally with the lessor to erect at his own expense a rough-cast addition to a brick tenement then on the premises, with the privilege of selling or removing such addition. The lessee accordingly built such addition, and afterwards transferred his interest to the defendant. The lessor subsequently sold and conveyed the fee to the plaintiff subject to this lease, and the defendant being about to sell and remove such addition, the plaintiff took proceedings to restrain him from so doing, claiming the same as part of the freehold. It was held that the plaintiff was not only bound by the terms of the lease, but took subject to any other rights or equities existing between the original lessor and lessee, including such oral agreement to permit the removal of the addition(*g*).

(*c*) *Ambrose* v. *Fraser* (1886), 12 Ont. 459.
(*d*) *McClary* v. *Jackson* (1887), 13 Ont. 310.
(*e*) *In re Adams* (1884), 27 Ch. D. 394.
(*f*) *McGill* v. *Proudfoot* (1847), 4 U.C.R. 33.
(*g*) *Close* v. *Belmont* (1875), 22 Gr. 317.

To pay for crops.

Where a tenant covenanted to leave some acres sewn, to be paid for by the landlord at a valuation upon the termination of the term, and the purchaser of the reversion from the landlord offered to sell the crops at the valuation, treating them as his own, it was held that by his acts he had assumed the landlord's liability, and was responsible under the lease(*h*).

To purchase all beer.

A covenant by the lessee in an agreement for a lease of an hotel to purchase all beer from the lessors and "their successors in business," not mentioning assigns, is not merely personal to the lessors, and the assignees of the reversion and of the business are entitled to the benefit of it(*i*).

Manchester Brewing Co. v. *Coombs.*

In *Manchester Brewing Co.* v. *Coombs*(*j*), the lessee, in 1892 executed under seal an agreement to take an hotel as yearly tenant, and thereby covenanted to purchase all his beer of the lessors "and their successors in business." The covenant did not mention "assigns." The lessors did not execute the agreement, and there was nothing on the face of it to shew that they were brewers. They were, in fact, brewers, and the lessee occupied the hotel under the agreement as their tenant and purchased beer of them. In 1899, the lessors sold and conveyed their brewery, tied houses (including the hotel), and business to the assignees who were brewers, and who incorporated the lessors' business with their own, and after the sale, the lessors ceased to carry on business. Notice of the change of ownership was given by the assignees to the lessee, and for a time he purchased beer of them. In an action by the assignees to restrain the lessee from committing a breach of the covenant, it was held that the covenant was not personal to

(*h*) *Murton* v. *Scott* (1857), 7 U.C.C.P. 481.

(*i*) *Manchester Brewing Co.* v. *Coombs*, [1901] 2 Ch. 608.

(*j*) *Manchester Brewing Co.* v. *Coombs*, [1901] 2 Ch. 608.

the lessors, but ran with the land, and that the assignees, as successors in business of the lessors, and owners of the reversion in fee of the hotel, were entitled to the benefit of it. It was held, also, that the assignees being clearly entitled against the lessee to specific performance of the agreement under which he was in possession of the hotel, could sue him on the covenant in the same manner as they could have done, if the lessors had actually executed the original agreement(*k*). The benefit of the covenant was a chose in action, assignable in equity before the Judicature Act, and by virtue of that Act the covenant could, after absolute asignment thereof in writing and due notice given, be sued upon by the assignee(*l*).

Chose in action.

2. *Collateral Covenants.*

Collateral covenants.

The following covenants on the part of the lessor have been held to be merely personal, and not to run with the reversion:

A covenant in a lease of a public house not to open a similar house within a certain distance thereof(*m*);

A covenant to give the lessee the option of purchasing property of the lessor other than the demised premises(*n*);

A covenant to pay the lessee on giving up possession at a certain time, a higher rate than customary for hay and straw(*o*);

Condition.

A covenant or condition in a lease that in case a writ of execution shall be issued against the goods of the lessee, the then current year's rent shall immediately become due and payable and the term forfeited, is personal to the

(*k*) *Clegg* v. *Hands* (1890), 44 Ch. D. 503, and *Walsh* v. *Lonsdale* (1882), 21 Ch. D. 9, followed.

(*l*) *Manchester Brewing Co.* v. *Coombs*, [1901] 2 Ch. 608.

(*m*) *Thomas* v. *Hayward* (1869), L.R. 4 Ex. 311.

(*n*) *Collison* v. *Lettsom* (1815), 6 Taunt. 224; 16 R.R. 605.

(*o*) *Phillips* v. *Miller* (1875), L.R. 10 C.P. 420.

original lessor and lessee, and does not run with the land and cannot be taken advantage of by the assignee of part of the reversion(*p*).

Covenant not under seal.

It has been held that covenants in leases not under seal are not within the statute, and do not run with the reversion(*q*); and the assignee of the reversion, at common law, in order to take advantage of a lessee's covenant, or more properly a stipulation not under seal, would have to sue in the name of the original lessor.

Judicature Act.

But it would seem that the *Judicature Act* has made a change in the law in this respect(*r*). It has been held under this Act, that the benefit of a stipulation in an agreement for a lease, was a chose in action, upon which the assignee could sue in his own name, and that the assignee of the reversion(if entitled to specific performance of an agreement by the occupier to take a lease, can sue on such stipulation as if a lease had been executed(*s*). And, as before explained, in case of a parol tenancy where there has been an acceptance of rent, or other act affirming the tenancy, the court or jury may infer that the parties agreed to continue, after the assignment, upon the terms of the original letting, and by a conventional law, a parol stipulation is thus made equivalent to a covenant or agreement under seal(*t*).

3. *Equitable Doctrine of Notice.*

Notice.

The equitable doctrine of notice, previously explained(*tt*), applies to collateral covenants in case of the

(*p*) *Mitchell* v. *McCauley* (1893), 20 Ont. App. 272.

(*q*) *Standen* v. *Christmas* (1847), 10 Q.B. 135; *Brydges* v. *Lewis* (1842), 3 Q.B. 603.

(*r*) R.S.O. (1897), c. 51, s. 58, s.-s. 5.

(*s*) *Manchester Brewing Co.* v. *Coombs*, [1901] 2 Ch. 608; see also *Walsh* v. *Lonsdale* (1882), 21 Ch. D. 9.

(*t*) *Cornish* v. *Stubbs* (1870), L.R. 5 C.P. 334, per Willes, J.; *Smith* v. *Eggington* (1874), L.R. 9 C.P. 145; *Manchester Brewing Co.* v. *Coombs*, [1901] 2 Ch. 608.

(*tt*) See last section.

assignment of the reversion, as in the case of an assignment of the term, and when they are of a negative or restrictive nature may be enforced by or against the assignee of the reversion(*u*).

Assigns.

The lessee of a person bound by a restrictive covenant can be sued, whether "assigns" are mentioned in the covenant or not. Thus, in a lease by H. to the plaintiff company, the lessor covenanted that he, his heirs, executors, administrators, and assigns, would not carry on, or permit to be carried on by others, in certain named shops the business of a tailor; H. subsequently demised one of the shops to B. for a tailoring business. In an action by the plaintiff company against H. and B. for an injunction to restrain H. from permitting, and B. from carrying on, this business, it was held on the construction of the covenant, that the mention of assigns, without mentioning lessees, afforded no ground, standing alone, for holding that the covenant was not binding upon B.; that though "lessees" were not mentioned *eo nomine*, the words of the covenant were sufficient to bind B. not to carry on the particular business referred to, and that an injunction ought to be granted(*v*).

Possession is constructive notice.

Where the reversion is assigned or sold, the possession of the tenant operates as constructive notice to the assignee or purchaser, of the actual interest, including any equities, which the tenant may have in the lands, and even of rights which he may have acquired after the making of the lease under which he holds possession(*w*). Thus, as against an

(*u*) *Clegg* v. *Hands* (1890), 44 Ch. D. 503.

(*v*) *Holloway Brothers, Limited* v. *Hill*, [1902] 2 Ch. 612; *Bryant* v. *Hancock*, [1898] 1 Q.B. 716, distinguished; *Kemp* v. *Bird* (1877), 5 Ch. D. 549, 974, and *Fitz* v. *Iles*, [1893] 1 Ch. 77, discussed.

(*w*) *Taylor* v. *Stibbert* (1794), 2 Ves. 437; *Daniels* v. *Davison* (1809), 16 Ves. 249; *Greenwood* v. *Bairstow* (1836), 5 L.J. Ch. 179; *Allen* v. *Anthony* (1816), 1 Mer. 282; 15 R.R. 113.

assignee of the reversion, who purchases without actual notice, a lessee in possession can enforce a right of renewal(*x*).

The occupation of land by a tenant affects a purchaser of the land with constructive notice of all that tenant's rights, but not with notice of his lessor's title or rights. Actual acknowledge by the purchaser that the rents of the land are paid by the tenants to some person whose receipt of them is inconsistent with the title of the vendor, is constructive notice of that person's rights, but mere knowledge that the rents are paid to an estate agent affects the purchaser with no notice at all(*y*).

4. *Mortgagor and Mortgagee.*

Mortgagee of reversion.

A lease of lands which are afterwards mortgaged is valid as against the mortgagee, and the lessee is entitled to retain possession under its terms, although the mortgage moneys may be due and in arrear(*z*), since the mortgagor can give to the mortgagee no better title than he himself has.

Rent.

But the mortgagee, upon giving notice to the lessee of his mortgage, and requesting the rent to be paid to him, is thereupon entitled to all rent then in arrear which became due after the making of the mortgage, and to all rent as it becomes due thereafter during the currency of the mortgage(*a*).

The mortgagee is entitled to the rent by virtue of the

(*x*) *Lewis* v. *Stephenson* (1898), 67 L.J.Q.B. 296.

(*y*) *Hunt* v. *Luck*, [1902] 1 Ch. 428; *Barnhart* v. *Greenshields* (1853), 9 Moo. P.C. 18, followed; a dictum of Jessell, M.R., to the contrary in *Mumford* v. *Stohwasser* (1874), L.R. 18 Eq. 556, at p. 562, disapproved.

(*z*) *Rogers* v. *Humphreys* (1835), 4 A. & E. 299; 43 R.R. 340.

(*a*) *Moss* v. *Gallimore* (1779), 1 Doug. 279; *Pope* v. *Biggs* (1829), 9 B. & C. 245; 4 Anne (1705), c. 16, s. 9; R.S.O. (1897), vol. III., c. 342, s. 24.

mortgage which conveys the reversion without any attornment of the tenant, but the tenant may pay the rent to the mortgagor until he has received notice from the mortgagee(*b*).

A mortgagee of the reversion is entitled to sue for rent which accrued during its currency, even after the mortgage has been discharged(*c*).

If a tenant, after receiving notice, voluntarily pays rent to the mortgagor under a lease made before the mortgage, and is afterwards compelled to pay it to the mortgagee, he cannot compel the mortgagor to repay him(*d*).

Mortgagee prior to lease.

There is a difference to be specially noted in the relations of mortgagee and tenant, in the case of a lease made before the mortgage, and in the case of a lease made after it. In the former case, the mortgagee, taking subject to the lease, as assignee of the reversion, is bound to respect the tenant's rights thereunder, but may, on notice to the tenant after default, as before stated, become entitled to the rent, and assume the position of landlord without the tenant's consent. In the latter case the mortgagee, being assignee, not of the reversion, but of the whole estate of the mortgagor, may treat the tenant as a trespasser, and eject him without notice(*e*).

Cannot sue or distrain for rent.

But he cannot distrain or sue for the rent, or for use and occupation of the land(*f*), unless a new tenancy has been created as between him and the tenant by attornment or otherwise(*g*).

(*b*) 4 Anne (1705), c. 16, s. 9; R.S.O. (1897), vol. III., c. 342, s. 24.

(*c*) *Cameron* v. *Todd* (1863), 22 U.C.R. 390.

(*d*) *Higgs* v. *Scott* (1849), 7 C.B. 63.

(*e*) *Gibbs* v. *Cruikshank* (1873), L.R. 8 C.P. 454.

(*f*) *Rogers* v. *Humphreys* (1835), 4 A. & E. 299; 43 R.R. 340; *Evans* v. *Elliott* (1836), 9 A. & E. 342; 48 R.R. 520; *Lichfield* v. *Ready* (1850), 5 Ex. 939.

(*g*) *Brown* v. *Storey* (1840), 1 M. & Gr. 117.

A notice given by the mortgagee to the tenant to pay rent, which, in the case of a lease given before the mortgage, entitles him to the rent, and operates to create the relation of landlord and tenant between them(*h*), does not have that effect in the case of a lease made after the mortgage unless the tenant assents. If the tenant refuses to pay, no tenancy will be created, and the mortgagee's only remedy is eviction(*i*).

Attornment.

By section 23 of the *Act respecting Landlord and Tenant*(2)(*j*), it is provided that an attornment of a tenant to a stranger claiming title to the estate of his landlord shall be absolutely null and void; but an exception is made of an attornment made to a mortgagee after the mortgage has become forfeited(*k*); and a tenant is justified in paying rents to the mortgagee if he receives a notice demanding them(*l*), and such payment will operate as a discharge of the rent.

New Brunswick.

In New Brunswick, it is provided by statute that a mortgagee may by notice in writing, make the tenant, under a demise by the mortgagor subsequent to the mortgage, his tenant and thereby adopt the same(*m*).

Mortgagor.

A lessor who, after making the lease, mortgaged the demised lands, was, before the passing of the *Judicature Act* (*n*), and, it would seem, still is, in some respects, in a peculiar position. Having assigned his reversion to the mortgagee, a lessor was held incapable of maintaining an action of ejectment in his own name against his lessee for a for-

(*h*) 4 Anne (1705), c. 16, ss. 9 and 10; R.S.O. (1897), vol. III., c. 342, s. 24; *Moss* v. *Gallimore* (1779), 1 Doug. 279.

(*i*) *Towerson* v. *Jackson*, [1891] 2 Q.B. 484.

(*j*) R.S.O. (1897), vol. III., c. 342; 11 George II., c. 19, s. 11.

(*k*) See chapter VII.

(*l*) *Pope* v. *Biggs* (1829), 9 B. & C. 245.

(*m*) C.S.N.B. (1904), c. 153, s. 26.

(*n*) R.S.O. (1897), c. 51.

feiture(*o*); and if the mortgagee was in default, he could not sue for an injury done to the reversion(*p*).

By sub-section 4 of section 58 of the *Judicature Act*, it is provided as follows:— Judicature Act.

> **58.** (4) A mortgagor entitled for the time being to the possession or receipt of the rents and profits of any land as to which no notice of his intention to take possession or to re-enter into receipt of the rents and profits thereof shall have been given by the mortgagee, may sue for such possession or sue or distrain for the recovery of such rents or profits, or to prevent or recover damages in respect of any trespass or other wrong relative thereto, in his own name only, unless the cause of action arises upon a lease or other contract made by him jointly with any other person, and in that case he may sue or distrain jointly with such other person.

Under this section it was held in an action to recover damages that the mortgagees were not necessary parties(*q*). On the other hand, it was held that this section does not empower a mortgagor to re-enter in his own name only, on a proviso for re-entry for breach of covenant(*r*). Parties.

It has been held that an assignee of the reversion who has given a mortgage back to his grantor, cannot, after default, maintain an action to recover possession from a tenant of the grantor on the expiration of his term, as the grantor under his mortgage is entitled to possession(*s*).

A lessee of lands has the right to redeem a mortgage made thereon prior to his lease(*t*). Lessee may redeem.

Where a lease of land, subject to two mortgages, contained a covenant by the lessor and the second mortgagee with the lessee, that the lessee might, if he desired to do so,

(*o*) *Doe d. Marriott* v. *Edwards* (1834), 5 B. & Ad. 1065.

(*p*) *Ford* v. *Jones* (1862), 12 U.C.C.P. 358.

(*q*) *Platt* v. *Grand Trunk Railway Co.* (1886), 12 Ont. 119.

(*r*) *Matthews* v. *Usher*, [1900] 2 Q.B. 535.

(*s*) *Doe d. Marr* v. *Watson* (1847), 4 U.C.R. 398.

(*t*) *Tarn* v. *Turner* (1888), 39 Ch. D. 456; 59 L.T. 743; see *Martin* v. *Miles* (1884), 5 Ont. 404.

redeem the first mortgage, and that in that case the sum paid for redemption should be a first charge on the land, it was held that the second mortgagee's right to redeem the first mortgage, after its acquisition by the lessee, was not taken away(*u*).

5. *Severance of the Reversion.*

Severance of reversion.

Where the lessor assigns less than his whole interest in the premises, he is said to sever the reversion; thus, he may sever by assigning the whole of the lands for a less interest than he himself possesses, as for a term of years, or he may sever by assigning part of the lands for the whole of the period of his interest.

In both cases covenants that are apportionable run with the reversion.

Conditions now apportionable.

At common law, there was a distinction between the two classes of cases. Thus, the assignee of the whole of the lands could take advantage of the breach of conditions, but the assignee of part of the lands could not, as it was held that conditions could not be apportioned by the act of the party(*v*).

But it has been provided by statute(*w*) that where the reversion is severed, and the rent legally apportioned, the assignee of each part of the reversion shall have the benefit of all conditions or powers of re-entry for non-payment of rent, as if they were reserved to him as incident to his part of the reversion in respect of the apportioned rent. Section 9 of the Ontario Act, which is taken from the Imperial Act, is as follows:—

> **9.** Where the reversion upon a lease is severed and the rent or other reservation is legally apportioned, the assignee of each part

(*u*) *Brewer* v. *Conger* (1900), 27 Ont. App. 10.

(*v*) *Wright* v. *Burroughes* (1846), 3 C.B. 685; Co. Lit. 215a.

(*w*) 22 & 23 Vict. (Imp.), c. 35, s. 3; R.S.O. (1897), c. 170, s. 9.

of the reversion shall, in respect of the apportioned rent or other reservation allotted or belonging to him, have and be entitled to the benefit of all conditions or powers of re-entry for non-payment of the original rent or other reservation, in like manner as if such conditions or powers had been reserved to him as incident to his part of the reversion in respect of the opportioned rent or other reservation allotted or belonging to him(*x*).

Tenants in common.

Where a reversion has passed by assignment to different persons as tenants in common, each of them may, independently of the others, maintain an action on a covenant running with the land or with the reversion(*y*).

Where the owner let premises at one entire rent, and died, having devised the premises among several persons, it was held that those persons might bring separate actions against the tenant for such part of the rent as each would be entitled to according to his respective share, without any other apportionment than that which a jury might make in each suit(*z*).

6. *Assignment of Rent.*

Assignment of rent.

A landlord may assign rent, and since 4 George II, chapter 28, section 5, rent charge or rent seek may be distrained for, and by one who has not the reversion, as, for instance, the assignee of the landlord(*a*).

Where a lessor assigned the rent for the term which the tenant was to enjoy, it was held that the assignees were not liable to the tenant on a covenant by the lessor to repair, as they had no reversion, and such a covenant would not run with the rent(*b*).

Garnishment.

An attaching order binds only such debts as the debtor can honestly deal with, without affecting the interests of

(*x*) R.S.O. (1897), c. 170, s. 9; C.S.N.B. (1904), c. 153, s. 1.

(*y*) *Roberts* v. *Holland*, [1893] 1 Q.B. 665.

(*z*) *Hare* v. *Proudfoot* (1838), 6 O.S. 617; as to apportionment of rent, see Chapter XII.

(*a*) *White* v. *Hope* (1867), 17 U.C.C.P. 52; 19 U.C.C.P. 479.

(*b*) *McDougall* v. *Ridout* (1851), 9 U.C.R. 239.

third parties; and where mortgagees, whose mortgage was made before the lease, had served notice upon tenants of the mortgagor in occupation of the mortgaged premises, to pay rent to them, and such tenants had attorned to them, a judgment creditor of the mortgagor is not entitled to attach the rents accruing thereafter, and the mortgagees are entitled to have attaching orders, obtained *ex parte*, discharged(*c*).

Notice.

In such a case, the service of a notice upon the tenants is not in itself sufficient to create the relation of landlord and tenant between them and the mortgagees unless the tenants attorn; but where the mortgagor endorsed on such a notice to his tenants the words "I approve of the above," it was held to operate as an assignment of the rents to the mortgagees(*d*).

Deed.

It has been held that an assignment in writing, but not under seal, of all rent to become due under a lease, was held to be void as there could be no assignment of rent except by deed(*e*).

In a later case, however, it was held to be doubtful whether an assignment in writing, but not under seal, as security for a debt, should be treated as an assignment of the reversion, and so void as not being by deed, or as an assignment of a chose in action, that is, of moneys payable under the covenants of the lease, and so valid(*f*).

(*c*) *Parker* v. *McIlwain* (1896), 17 P.R. 84.
(*d*) *Ibid.*
(*e*) *Dove* v. *Dove* (1868), 18 U.C.C.P. 424.
(*f*) *Galbraith* v. *Irving* (1885), 8 Ont. 751.

CHAPTER XXV.

CHANGE OF PARTIES BY OPERATION OF LAW

SECTION I.—BY THE DEATH OF THE LESSEE.
SECTION II.—BY THE DEATH OF THE LESSOR.
SECTION III.—BY A WRIT OF EXECUTION.

SECTION I.

BY THE DEATH OF THE LESSEE.

Upon the death of a lessee, his leasehold interests become vested in his personal representatives(*a*), except a tenancy at will, which, like a tenancy for the life of the lessee, determines on his death; but a tenancy from year to year descends like a term of years, to the executors or administrators(*b*).

Executors.

In the case of executors, such interests become vested from the date of the lessee's death, even where there is a specific bequest of them, as a bequest cannot take effect until it has received the assent of the executors(*c*). But when the assent has once been given it cannot be revoked(*d*).

As soon as the executors have assented, the legatee, if he accepts the bequest, becomes invested with the rights and liabilities of an assignee of the term(*e*).

(*a*) *Ackland* v. *Pring* (1841), 2 M. & Gr. 937.
(*b*) *Doe* v. *Porter* (1789), 3 T.R. 13; 1 R.R. 626; *Doe* v. *Wood* (1845), 14 M. & W. 682.
(*c*) *Thorne* v. *Thorne*, [1893] 3 Ch. 196.
(*d*) *Doe* v. *Guy* (1802), 3 East. 120; 6 R.R. 563.
(*e*) *In re Culverhouse*, [1896] 2 Ch. 251; *Hawkins* v. *Hawkins* (1880), 13 Ch. D. 470.

One of several executors may, without the concurrence of the others assign the whole of the testator's interest in leasehold property(*f*).

Administrator.

In the case of an intestacy, a term of years becomes vested in the administrator only from the time of the grant of letters of administration, as from these alone he derives his authority(*g*).

An administrator cannot, before obtaining letters of administration, bind the estate by making any disposition of leaseholds, as the letters of administration do not relate back to the date of the death(*h*).

And a person to whom administration is granted may repudiate an agreement previously made by him to surrender a term of years vested in the intestate(*i*).

Personal estate.

Under the *Wills Act* of Ontario(*j*), personal estate includes leasehold estates and other chattels real and devolves upon the executor or administrator. This is provided by section 9 of that Act, which is as follows:—

> **9.** (3) "Personal Estate" shall extend to leasehold estates and other chattels real, and also to moneys, share of government and other funds, securities for money (not being real estates) debts, choses in action, rights, credits, goods, and all other property whatsoever which by law devolves upon the executor or administrator, and to any share or interest therein.

The benefit of a covenant in a lease on the part of the lessor passes to the executor or administrator, who is entitled to sue for its breach. Thus, an executor of the lessee is entitled to damages against the lessor, or his representatives, for a breach of the covenant for quiet enjoyment(*k*).

(*f*) *Hawkins* v. *Williams* (1862), 10 W.R. 692.
(*g*) 1 Williams on Executors, p. 342.
(*h*) *Morgan* v. *Thomas* (1853), 8 Ex. 302.
(*i*) *Doe d. Hornby* v. *Glenn* (1834), 1 A. & E. 49; 40 R.R. 251.
(*j*) R.S.O. (1897), c. 128, s. 9.
(*k*) *Derisley* v. *Custance* (1790) 4 T.R. 75.

An action for a breach of a covenant may be brought by the executor whether it be one that runs with the land or not(*l*).

Breaches of covenants.

At common law, executors and administrators are liable upon all covenants of the testator or intestate for breaches committed during his life. It is, however, no part of the contract between lessor and lessee that in case of the latter's death, his assets shall be impounded as a fund to which recourse may be had for future rent, or future breaches of covenants(*m*).

Joint tenants.

Where a lease is made to joint tenants, and one of them dies, the term vests by survivorship in the others, and the executors of a deceased tenant are not liable on the covenants, except under an express stipulation to that effect, in which case they may be liable, although the whole benefit of the lease passes to the survivors(*n*).

A term of years vests in the executor or administrator without entry by him(*o*), and he cannot waive it, although it be worthless, as he must accept or renounce the executorship as a whole(*p*).

Executors personally liable after entry.

An executor or administrator of a deceased lessee is liable in his representative capacity for rent which fell due in the lifetime of the testator or intestate; and if the executor or administrator has entered into possession of the demised premises, he is liable personally for the rent which accrues thereafter(*q*), and such personal liability continues although the executor has agreed to assign the lease, and the lessor has accepted rent from the equitable assignee(*r*).

(*l*) *Raymond* v. *Fitch* (1835), 2 C. M. & R. 588; 41 R.R. 797.
(*m*) *King* v. *Malcott* (1852), 9 Hare 692.
(*n*) *Burns* v. *Bryan* (1887), 12 App. Cas. 184.
(*o*) *Wollaston* v. *Hakewill* (1841), 3 M. & Gr. 297.
(*p*) *Rubery* v. *Stevens* (1832), 3 B. & Ad. 241; 38 R.R. 242.
(*q*) *Wollaston* v. *Hakewill* (1841), 3 M. & Gr. 297.
(*r*) *Rowand* v. *Equity Trustees, Executors and Agency Co.* (1896), 22 V.L.R. 1; 17 A.L.T. 300; 2 A.L.R. 194.

But the fact that he has paid rent after the death of the testator, is not sufficient to make him personally liable for subsequent rent, if he has not entered(*s*).

Where rent exceeds profits.

Where the rent exceeds the profits of the land, the executor is personally liable only for the profits, and he is chargeable as executor for the rent in excess of the profits only so far as he has assets(*t*).

Before entry and taking possession (either actual or constructive, as by the receipt of rent) the executor of a lessee cannot be made personally liable, under the covenants, as assignee of the term, but if he does enter, he may be made liable as assignee; and he may then by proper pleading limit his liability for rent to the actual value which the premises might have yielded(*u*).

Actual value.

Where an executor has taken possession under a lease to his testator, and has thus become personally liable, his liability is limited to the actual value of the property, not exceeding the rent, from the time of taking possession, and such actual value is determined by what he has actually received, and what by reasonable diligence he might have received from the property(*v*).

Pleading.

In such a case the executor may plead that the term did not vest in him except as executor, and that he has not, since the death of the lessee, received nor could have received by reasonable diligence any profit whatever (except such sum as he has received), and that he had not at the commencement of the action, nor has since, had any assets to be administered(*w*).

(*s*) *Rendall* v. *Andreae* (1892), 61 L.J. Q.B. 630.

(*t*) *Collins* v. *Crouch* (1849), 13 Q.B. 542; *Hornidge* v. *Wilson* (1840), 11 A.E. 645; 52 R.R. 460.

(*u*) *Rendell* v. *Andreae* (1892), 61 L.J. Q.B. 630.

(*v*) *In re Bowes* (1887), 37 Ch. D. 128.

(*w*) *Hopwood* v. *Whaley* (1848), 6 C.B. 744; *Billinghurst* v. *Speerman* (1696), 1 Salk. 297; *Reid* v. *Lord Tenterden* (1833), 4 Tyr. 111.

If the rent does not exceed the profits of the land, the rent must be paid out of the profits before they can be legally applied to anything else(*x*).

Covenants.

But the defence that the premises yield no profit, and that the executor has fully administered the assets, while available in an action for rent, is not available in an action for non-repair or for breaches of other covenants that run with the lands(*y*).

Assigning over.

An executor or administrator of a deceased person who was assignee of a term may discharge himself from liability by assigning over, even to a pauper(*z*), and it is his duty, as trustee for others, to assign after first offering to surrender, if the rent exceeds the value of the lands(*a*).

The executor of a person who was the lessee continues to be liable on the covenants at common law notwithstanding assignment(*b*). If he has not taken possession, he may plead that he has fully administered the assets and so discharge himself from liability(*c*).

By section 27 of the *Law of Property Amendment Act*, 1859(*d*), an executor or administrator has been enabled to rid himself of personal liability under any lease or agreement for a lease, by assigning over. This section, as enacted in Ontario by section 36 of the *Trustee Act*(*e*), is as follows:—

Executors liable for rent.

36. Where an executor or administrator, liable as such to the rents, covenants or agreements contained in any lease or agreement

(*x*) *Buckley* v. *Pick* (1711), 1 Salk. 316.

(*y*) *Tremeere* v. *Morison* (1834), 1 Bing. N.C. 89; 41 R.R. 566; *Sleap* v. *Newman* (1862), 12 C.B.N.S. 116.

(*z*) *Taylor* v. *Shum* (1797), 1 B. & P. 21; 4 R.R. 759.

(*a*) *Rowley* v. *Adams* (1839), 4 Myl. & Cr. 534.

(*b*) *Wilson* v. *Wigg* (1808), 10 East 313.

(*c*) *Ibid.*

(*d*) 22 & 23 Vict., (Imp.) c. 35.

(*e*) R.S.O. (1897), c. 129.

for a lease granted or assigned to the testator or intestate whose estate is being administered has satisfied all such liabilities under the said lease or agreement for a lease, as have accrued due and been claimed up to the time of the assignment hereinafter mentioned, and has set apart a sufficient fund to answer any claim that may be made in respect of any fixed and ascertained sum covenanted or agreed by the lease to be laid out on the property demised or agreed to be demised, although the period for laying out the same may not have arrived, and has assigned the lease, or agreement for the lease, to a purchaser thereof, he shall be at liberty to distribute the residuary personal estate of the deceased to and among the parties entitled thereto respectively, without appropriating any part, or any further part (as the case may be) of the personal estate of the deceased, to meet any future liability under the said lease, or agreement for a lease; and the executor or administrator so distributing the residuary estate shall not, after having assigned the said lease or agreement for a lease, and having, where necessary, set apart such sufficient fund as aforesaid, be personally liable in respect of any subsequent claim under the said lease, or agreement for a lease; but nothing herein contained shall prejudice the right of the lessor, or those claiming under him, to follow the assets of the deceased into the hands of the person or persons to or amongst whom the said assets may have been distributed.

Distribution after assignment.

It is further provided by statute as follows(*f*) :—

Executors liable for rent-charge.

37. In like manner, where an executor or administrator, liable as such to the rent, covenants or agreements contained in any conveyance on chief rent or rent-charge (whether any such rent be by limitation of use grant or reservation) or agreement for such conveyance, granted to or assigned to or made and entered into with the testator or intestate whose estate is being administered, has satisfied all such liabilities under the said conveyance, or agreement for conveyance, as may have been accrued due and been claimed up to the time of the conveyance hereinafter mentioned, and has set apart a sufficient fund to answer any future claim that may be made in respect of any fixed and ascertained sum covenanted or agreed by the grantee to be laid out on the property conveyed, or agreed to be conveyed, although the period for laying out the same may not have arrived, and has conveyed such property, or assigned the said agreement for such conveyance as aforesaid, to a purchaser thereof, he shall be at liberty to distribute the residuary personal estate of the deceased to and amongst the parties entitled thereto

Distribution after conveyance.

(*f*) 22 & 23 Vict. (Imp.), c. 35, s. 28; R.S.O. (1897), c. 129, s. 37.

respectively, without appropriating any part or any further part (as the case may be) of the personal estate of the deceased to meet any future liability under the said conveyance, or agreement for conveyance; and the executor or administrator so distributing the residuary estate shall not, after having made or executed such conveyance, or assignment, and having where necessary, set apart such sufficient fund as aforesaid, be personally liable in respect of any subsequent claim under the said conveyance, or agreement for conveyance; but nothing herein contained shall prejudice the right of the grantor, or those claiming under him, to follow the assets of the deceased into the hands of the person or persons to or among whom the said assets may have been distributed.

The effect of this provision is that if an executor sells and assigns his testator's leasehold estates to a purchaser, he may, without any order of the Court, distribute the assets, without making provision for any future breach of covenant, and he will not be further liable(*g*).

Devisees.

But if the executor assigns them to the devisees, he loses the protection of the Act, as devisees are not purchasers(*h*).

Where executors bring all the facts before the Court and distribute the assets under its direction, they are protected against any future claims, and the only remedy of the lessor for future rent or breaches of covenant is against the legatees(*i*).

SECTION II.

BY THE DEATH OF THE LESSOR.

Reversion.

Upon the death of a lessor his reversion in the demised premises passes, if leasehold, to his executor or administrator; if freehold, it becomes vested, as a general rule, in his heir or devisee.

Where the owner of a farm rented it "on shares," and died before the crop was reaped, it was held that the share

(*g*) *Dodson* v. *Sammell* (1861), 1 Dr. & Sm. 575.

(*h*) *Smith* v. *Smith* (1861), 1 Dr. & Sm. 384.

(*i*) *Bennett* v. *Lytton* (1860), 2 J. & H. 155.

of the crop to which he would have been entitled passed to the devisee of the land, and not to the executors(*j*).

In Ontario, it is provided by statute that the real and personal property vested in any person dying on or after the 1st day of July, 1886, shall, on his death, notwithstanding any testamentary disposition, devolve upon and become vested in his legal personal representatives. This is provided by the *Devolution of Estates Act*(*k*), section 4(1) of which is as follows:—

Devolution of Estates Act.

4. (1) All such property as aforesaid which is vested in any person or is comprised in any such disposition as aforesaid made by him, shall on his death, notwithstanding any testamentary disposition, devolve upon and become vested in his legal personal representatives from time to time, and subject to the payment of his debts; and so far as the said property is not disposed of by deed, will, contract or other effectual disposition, the same shall be distributed as personal property not so disposed of is hereafter to be distributed.

It is further provided by section 13 of that Act, that the real estate of persons dying on or after the 4th day of May, 1891, not disposed of or conveyed by executors or administrators within twelve months after the death of the testator or intestate, shall be deemed to be vested in the devisees or heirs beneficially entitled thereto, unless a caution be registered, in pursuance of that section. Sub-section 1 of section 13 is as follows:—

Caution.

13. (1) Real estate of persons dying on or after the 4th day of May, 1891, not disposed of or conveyed by executors or administrators within twelve months after the death of the testator or intestate shall, subject to *The Land Titles Act*, in the case of land registered under that Act, at the expiration of the said period, whether probate of the will of the testator or letters of administration to the estate of the intestate has been taken or not, be deemed thenceforward to be vested in the devisees or heirs beneficially entitled thereto, as such devisees or heirs (or their assigns as the case may be) without any conveyance by the execu-

(*j*) *Tubbs* v. *Morgan* (1854), 12 U.C.R. 151.
(*k*) R.S.O. (1897), c. 127, ss. 3 and 4.

tors or administrators, unless such executors or administrators, if any, have caused to be registered, in the registry office, or land titles office where the land is under *The Land Titles Act*, of the territory in which such real estate is situate, a caution under their hands, that it is or may be necessary for them to sell such real estate, or part thereof, under their powers and in fulfillment of their duties in that behalf; and in case of such caution being so registered, this section shall not apply to the real estate referred to therein for twelve months from the time of such registration, or from the time of the registration of the last of such cautions if more than one are registered.

This section has been held to apply to a case where letters of probate or administration have not been granted for more than a year after the death of the testator or intestate, and an effectual caution may be registered within a year after such grant(*l*).

In Manitoba, a similar provision is contained in the *Devolution of Estates Act* of that Province(*m*), which applies to the estates of persons dying after the 1st day of July, 1885.

Liability of personal estate.

Where a father leased a farm to his son for five years at a yearly rental, and stipulated in the lease that he would build a house on the farm during the first year of the term, and died after the expiration of the first year without having built the house, and in his will devised the farm to his son, it was held that the father having died after breach of the undertaking, the son was not entitled to have the house built at the expense of the father's personal estate, but at most was entitled to damages for non-performance of the agreement to build(*n*).

Leasehold estate.

By section 28 of the *Wills Act* of Ontario(*o*), a devise

(*l*) *In re Martin* (1895), 26 Ont. 465; *In re Baird* (1893), 13 C.L.T. 277, considered.

(*m*) R.S.M. (1902), c. 48, s. 21.

(*n*) *In re Murray* (1902), 4 Ont. L.R. 418; *Cooper* v. *Jarman* (1868), L.R. 3 Eq. 98, and *In re Day*, [1898] 1 Ch. 510, distinguished.

(*o*) R.S.O. (1897), c. 128.

of the land of the testator, or of the land of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner, and any other general devise which would describe a leasehold estate, if the testator had no freehold estate which could be described by it, shall be construed to include his leasehold estates, or any of them to which such description will extend (as the case may be), as well as freehold estates, unless a contrary intention appears by the will.

Real estate.

"Real estate" includes messuages, lands, rents, and hereditaments, whether freehold or any other tenure, and whether corporeal or personal, and to any undivided share thereof, and to any estate, right or interest (other than a chattel interest) therein(*p*).

Rent.

Apart from the *Devolution of Estates Act*, the personal representative, and not the heir or devisee, of a deceased lessor, is entitled to the arrears of rent which fell due during his lifetime, and to a proportionate part of the rent up to the time of his death(*q*).

Breach of covenant.

And the executor or administrator, and not the heir or devisee, is also entitled to bring an action in respect of the breach of a covenant committed during the lessor's lifetime, as for example, a breach of a covenant to repair(*r*).

The executor or administrator is also liable upon all covenants of the testator or intestate which have been broken during his life.

Where a covenant which runs with the land has been broken after the death of the lessor, the burden and the benefit thereof passes to the person then legally entitled to the reversion(*s*).

(*p*) R.S.O. (1897), c. 128, s. 9.

(*q*) See Chapter XII.

(*r*) *Dollen* v. *Batt* (1858), 4 C.B.N.S. 760; *Ricketts* v. *Weaver* (1844), 12 M. & W. 718.

(*s*) *Derisley* v. *Custance* (1790), 4 T.R. 75.

A dowress whose dower has been assigned is entitled to possession of the land assigned to her, in priority to persons claiming under leases created by her husband, without her assent during the coverture(*t*). Under section 4 of the Devolution of Estates Act(*u*), the executor is the only person who can legally assign dower(*v*). Dowress.

SECTION III.

BY A WRIT OF EXECUTION.

A change of parties to a tenancy may be effected by means of a writ of execution against the property of the lessee or lessor or against the asignee of either of them.

In Ontario it is provided by the *Execution Act*(*w*), that any estate or interest in lands may be sold under execution in the same way as lands are liable to be sold. Subsection 1 of section 33 of that Act is as follows:—

33. (1) Any estate, right, title, or interest in lands which, under section 8 of *The Act respecting the Transfer of Real Property*, may be conveyed or assigned by any person or over which he has any disposing power which he may, without the assent of any other person, exercise for his own benefit, shall be liable to seizure and sale under execution against such person, in like manner and on like conditions as lands are by law liable to seizure and sale under execution, and the sheriff selling the same may convey and assign the same to the purchaser in the same manner and with the same effect as the person might himself have done. Execution Act.

A rent charge issuing out of and chargeable upon a freehold estate and granted to a person for life cannot be seized under an execution against goods(*x*).

(*t*) *Allan* v. *Rever* (1902), 4 Ont. L.R. 309, following *Houghton* v. *Leigh* (1808), 1 Taunt. 402.

(*u*) R.S.O. (1897), c. 127.

(*v*) *Ibid.*

(*w*) R.S.O. (1897), c. 77.

(*x*) *Smith* v. *Turnbull* (1848), 5 U.C.R. 586.

A term of years may be seized and sold under an execution against goods(*y*); but not under a writ against lands(*z*).

In British Columbia, it is provided by the *Execution Act*(*a*), that "lands" shall include leasehold interests, and that a term of years shall not be seized or sold under an execution against goods.

A lease of lands made after the delivery of an execution against lands to the sheriff, will only convey an interst subject to such execution(*b*).

Equity of redemption.

It has been held that an equity of redemption in a term of years cannot be sold under an execution(*c*).

But it is now provided by statute, in Ontario, that an equity of redemption in leasehold lands may be sold under an execution against goods. This is enacted by sub-section 1 of section 17 of the *Execution Act*(*d*), which is as follows:—

> 17. (1) Under an execution against goods, the sheriff or other officer to whom the same is directed may seize and sell the interest or equity of redemption in any goods or chattels, including leasehold interests in any lands, of the party against whom the writ has issued, and such sale shall convey whatever interest the mortgagor had in the goods and chattels at the time of the seizure.

In Ontario, the distinction between a sale under a writ against goods, and one against lands, has lost most of its importance since it has been provided by statute that every writ of execution, except those issued out of a Division Court, is to be issued against both the goods and lands of the execution debtor(*e*).

(*y*) *Sparrow* v. *Champagne* (1855), 5 U.C.C.P. 394.
(*z*) *Doe d. Court* v. *Tupper* (1837), 5 O.S. 640.
(*a*) R.S.B.C. (1897), c. 72, ss. 2 and 11.
(*b*) *Sloan* v. *Whalen* (1866), 15 U.C.C.P. 319.
(*c*) *Doe d. Webster* v. *Fitzgerald* (1839), E.T. 2 Vict.; *Chisholm* v. *Sheldon* (1850), 1 Gr. 108; 2 Gr. 178; 3 Gr. 655.
(*d*) R.S.O. (1897), c. 77.
(*e*) R.S.O. (1897), c. 77, s. 8.

Where it is provided in a lease that all hay and straw is to be fed on the farm, such hay and straw is not liable to seizure and sale under an execution against the tenant(*f*).

When a sheriff, acting in good faith for all concerned, agreed to pay for having grain threshed for the purpose of its better sale, the expenses of such threshing should be allowed him(*g*).

In Ontario, it is provided by statute that a person purchasing a growing crop at a sale under an execution shall be liable for the rent of the lands upon which the same is growing at the time of the sale, and until the crop shall be removed, unless the same has been paid or has been collected by the landlord, or has been otherwise satisfied, and the rent shall, as nearly as may be, be the same as that which the tenant whose goods were sold was to pay, having regard to the quantity of the land, and to the time during which the purchaser shall occupy it(*h*).

(*f*) *Snetzinger* v. *Leitch* (1900), 32 Ont. 440 .
(*g*) *Galbraith* v. *Fortune* (1860), 10 U.C.C.P. 109.
(*h*) R.S.O. (1897), c. 170, s. 37.

PART IV.

DETERMINATION OF THE RELATIONSHIP.

CHAPTER XXVI.

MODES OF DETERMINATION.

SECTION I.—DETERMINATION GENERALLY.
SECTION II.—EFFLUXION OF TIME.
SECTION III.—CESSER OF LESSOR'S INTEREST.
SECTION IV.—DEATH.
SECTION V.—DEMAND OF POSSESSION.
SECTION VI.—NOTICE TO QUIT.
SECTION VII.—FORFEITURE.
SECTION VIII.—SURRENDER.
SECTION IX.—MERGER.
SECTION X.—DISCLAIMER.

SECTION I.

DETERMINATION GENERALLY.

Some tenancies come to an end without any act of the parties, as by the lapse of time agreed on for the tenancy to continue; or by death, as in the case of a tenant for life; or by the extinguishment of the lessor's interest in the premises; or by the happening of an event upon which it is agreed it shall determine.

Other tenancies may continue until some definite act is done to determine them. Thus, tenancies by sufferance, or at will, or periodic tenancies, as a tenancy from year to year or from month to month may continue indefinitely, and do not come to an end by mere lapse of time (except under the statute of limitations by virtue of which the tenant, if no rent is paid, may become the owner); and are only determined by some act of the parties.

Tenancy by sufferance.

A tenancy by sufferance is an anomalous or fictitious tenancy since it can only be said to exist by occupation after a real tenancy has been lawfully determined. Still, it would seem that such a tenancy continues until actual dispossession, or in other words, a tenant by sufferance cannot be treated as a trespasser until he has given up possession or has been ejected. A tenant by sufferance is not entitled to a demand of possession or notice to quit before proceedings may be taken to recover possession(*a*).

The regular mode of determining a tenancy at will is by a demand of possession, and a periodic tenancy by a notice to quit.

Other tenancies, although they might come to an end by mere lapse of time, or the happening of an event, may be determined earlier, as by forfeiture by reason of a breach of a condition or covenant contained in the lease, or by surrender of the term by the lessee, or by merger of the term in a greater estate, or by disclaimer by the tenant.

Dissolution of partnership.

Where a lease is made by one of the partners of a firm to himself and his co-partners for the use of the firm the tenancy is determined by a dissolution and the partner-owner may recover possession without notice to quit to his co-partners(*b*).

(*a*) *Doe* v. *Turner* (1840), 7 M. & W. at p. 235; *Doe* v. *Lawder* (1816), 1 Stark 308.

(*b*) *Doe* v. *Bluck* (1838), 8 C. & P. 464.

In Manitoba, it is provided by the *Real Property Act*(*c*), that the district registrar, upon proof to his satisfaction of lawful re-entry and recovery of possession by a lessor, shall note the same by entry in the registrar and upon the lease, and in such case the estate of the lessee in such land shall thereupon determine, but without releasing the lessee from his liability in respect of the breach of any covenant in such lease expressed or implied.

SECTION II.

BY EFFLUXION OF TIME.

In the case of a lease for a term certain, or until the happening of an event, the tenancy comes to an end by lapse of the time agreed on or by the happening of the event, without notice to quit or demand of possession(*a*).

Time.

A term of years continues until the end of the anniversary day from which it is granted. Thus, a term in a lease for twenty-one years from the 25th of March, 1809, did not determine until the last moment of the 25th day of March, 1830(*b*).

In the absence of express stipulation providing for determination, a tenancy for a term of years cannot in general be determined, earlier by either party against the will of the other. Thus, where the landlord has agreed in the lease to do the repairs, there is no implied condition that the tenant may determine the tenancy if the repairs are not done(*c*).

(*c*) R.S.M. (1902), c. 148, s. 96.

(*a*) *Cobb* v. *Stokes* (1807), 8 East 358; *Right* v. *Darby* (1786), 1 T.R. 159, at p. 162.

(*b*) *Acland* v. *Lutley* (1839), 9 A. & E. 879.

(*c*) *Surplice* v. *Farnsworth* (1844), 7 M. & Gr. 576.

SECTION III.

CESSER OF LESSOR'S INTEREST.

A lease for a term of years made by a person having a limited interest, is determined as soon as that interest is determined, unless the lease is made in pursuance of a special power, or of some enabling statute(*a*). Thus, where a tenant in tail makes a lease for lives and dies without issue, the lease is absolutely determined by his death, so that no acceptance of rent by the person entitled in remainder or reversion can make it good. The acceptance by the remainderman of a yearly nominal rent is not a confirmation of the lease, especially where the lessee disclaims holding as his tenant(*b*).

Tenant in tail.

So, where a person made a lease of lands which he held in right of his wife, and died during the term, it was held that the term expired on the death of the lessor, and that the assignee of the reversion could eject the lessee without notice to quit or demand of possession(*c*).

In like manner, a lease made by a tenant for life, which he is not empowered to make by any instrument or Act of Parliament, determines on the death of the tenant for life, and is incapable of confirmation by the remainderman(*d*).

Tenant for life.

But if the remainderman accept rent from the lessee after the death of the tenant for life, a presumption may arise of a new tenancy from year to year, and in such case, the lessee would be entitled to notice to quit(*e*).

(*a*) See Chapter IX.

(*b*) *Doe d. Graham* v. *Newton* (1846) 3 U.C.R. 249.

(*c*) *Burns* v. *McAdam* (1865), 24 U.C.R. 449.

(*d*) *Doe d. Martin* v. *Watts* (1797), 7 T.R. 83; 4 R.R. 387; *Smith* v. *Widlake* (1877), 3 C.P.D. 10.

(*e*) *Doe d. Martin* v. *Watts* (1797), 7 T.R. 83; 4 R.R. 387.

Tenant for years.

A sub-lease made by a tenant for a term of years comes to an end when the head lease has been determined(*f*).

A demand of possession is not necessary where the estate of the lessee terminates by the death of his grantor(*g*).

The subject of leases made by tenants for life and others having limited interest in the demised premises has already been considered(*e*).

SECTION IV.

BY DEATH.

Tenancy at will.

The death of either landlord or tenant will operate as a determination of a tenancy at will(*a*).

Tenancy for life.

A tenancy for life either for the life of the tenant or for the life of another comes to an end, it is unnecessary to say, on the death of the tenant or of the *cestui que vie*, as the case may be.

Tenancy *pur autre vie.*

In the case of a tenancy *pur autre vie*, where the person for whose life an estate is granted remains beyond the seas, or elsewhere absents himself for the space of seven years together, and there is no sufficient proof of his being alive, such person will be deemed to be dead, and the person entitled in reversion or remainder may recover possession. This is provided by the first section of the statute 18 and 19 Charles II., chapter 11, which is re-enacted in Ontario as follows:

Presumption of death.

14. If any person for whose life an estate is granted shall remain out of Ontario, or elsewhere absent himself in this Province, for the space of seven years together, and no sufficient and evident

(*f*) *Gilmour* v. *Magee* (1889), 17 Ont. 620; 17 Ont. App. 27; 18 S.C.R. 579.

(*g*) *Nolan* v. *Fox* (1866), 15 U.C.C.P. 565.

(*e*) Chapter IX.

(*a*) *James* v. *Dean* (1805), 11 Ves., at p. 391; *Scobie* v. *Collins*, [1895] 1 Q.B. 375.

proof be made of the life of such person in any action commenced for recovery of such estate by the lessor or reversioner, in every such case, the person upon whose life such estate depended shall be accounted as naturally dead, and in every action brought for the recovery of the said estate by the lessor or reversioner, his heirs, or assigns, judgment shall be given accordingly(*b*).

But in case such person shall afterwards return, or be proved to be alive, the tenant may re-enter and enjoy the lands in his former estate, and bring an action for damages and recover the full profits of the land with interest. This is provided by section 4 of the statute of Charles II. which, in the Ontario Act, is as follows:

15. If any person shall be evicted out of any lands or tenements by virtue of section 14 and afterwards if such person, upon whose life such estate depends, shall return to Ontario, or shall, on proof in any action to be brought for recovery of the same, be made appear to be living, or to have been living at the time of the eviction, then, and from thenceforth, the tenant or lessee who was ousted of the same, his executors, administrators or assigns, may re-enter, repossess, have, hold, and enjoy, the said lands or tenenments in his former estate, for and during the life, or so long term as the said person, upon whose life the said estate depends, shall be living, and also shall, upon action to be brought by him against the lessor, reversioner, or tenant in possession, or other persons respectively, who, since the time of the said eviction, received the profits of the said lands or tenements, recover for damages the full profits of the said lands or tenements respectively, with lawful interest for, and from, the time that he was ousted of the said lands or tenements, and kept or held out of the same by the said lessor, reversioner, tenant in possession, or other person, who, after the said eviction received the profits of the said lands or tenements, or any of them respectively, as well in the case when the said person, upon whose life such estate did depend, is or shall be dead at the time of bringing of the said action, as if the said person were then living(*c*).

Production of *cestui que vie*.

It is further provided by statute, that a tenant for the life of another may be required every year by the Court, at

(*b*) R.S.O. (1897), Vol. III., c. 330, s. 14; 18 & 19 Car. II., c. 11, s. 1.

(*c*) 18 & 19 Car. II., c. 11, s. 4; R.S.O. (1897), Vol. III., c. 330, s. 15.

the instance of the reversioner or remainderman, to produce the *cestui que vie*, and upon refusal, the *cestui que vie* shall be deemed to be dead, and the tenancy at an end(*d*). Sections 16 and 17 of the Ontario Act, by which this is provided, are as follows:

16. The High Court of Justice may, on the application of any person who has any claim or demand in, or to, any remainder, reversion, or exceptancy, in or to, any estate after the death of any person within age, married woman, or any other person whomsoever, upon affidavit made by the person so claiming such estate of his title, and that he hath cause to believe that such minor, married woman, or other person, is dead, and that his, or her death is concealed by the guardian, trustee, husband or any other person (which application may be made once a year if the person aggrieved shall think fit), order that such guardian, trustee, husband, or other person concealing, or suspected to conceal, such person, do, at such time and place as the said Court shall direct, on personal or other due service of such order produce and shew to such person and persons (not exceeding two) as shall in such order be named by the party prosecuting such order such minor, married woman, or other person aforesaid. And if such guardian, trustee, husband, or such other person as aforesaid, shall refuse or neglect to produce or shew such infant, married woman, or such other person on whose life any such estate doth depend, according to the directions of the said order, then the said Court is hereby authorized and required to order such guardian, trustee, husband, or other person, to produce such minor, married woman, or other person concealed, in the said Court, or otherwise before commissioners to be appointed by the said Court, at such time and place as the Court shall direct, two of which commissioners shall be nominated by the party prosecuting such order, at his costs and charges; and in case such guardian, trustee, husband, or other person, shall refuse or neglect to produce such infant, married woman, or other person so concealed, in the said Court, or before such commissioners, whereof return shall be made by such commissioners, and filed in the Central Office in either, or any of the said cases, the said minor, married woman, or such other person so concealed shall be taken to be dead, and it shall be lawful for any person claiming any right, title, or interest, in remainder or reversion, or otherwise after the death of such infant, married woman, or such other person, so concealed as aforesaid, to

(*d*) 6 Anne, c. 72, (or c. 18 in Ruffhead's Ed.) ss. 1 and 2; R.S.O. (1897), Vol. III., c. 330, ss. 16 and 17.

enter upon such lands, tenements and hereditaments, as if such infant, married woman, or other person so concealed, were actually dead.

17. And if it shall appear to the said Court by affidavit that such minor, married woman, or other person, is, or lately was, at some certain place out of Ontario in the said affidavit to be mentioned, it shall and may be lawful for the party prosecuting such order as aforesaid, at his costs and charges, to send over one or both the said persons appointed by the said order to view such minor, married woman, or other person, and in case such guardian, trustee, husband, or other person, concealing, or suspected to conceal, such person as aforesaid, shall refuse or neglect to produce, or procure to be produced, to such person or persons a personal view of such infant, married woman, or other person, then such person or persons are hereby required to make a true return of such refusal or neglect to the said Court, which shall be filed in the Central Office, and thereupon such minor, married woman, or other person shall be taken to be dead, and it shall be lawful for any person claiming any right, title, or interest in remainder, reversion, or otherwise after the death of such infant, married woman, or other person, to enter upon such lands, tenements and hereditaments, as if such infant, married woman, or other person, were actually dead.

In case it should appear, after a tenancy *pur autre vie* has been thus terminated, that the *cestui que vie* is still alive, the tenant may re-enter and recover damages(*e*). Section 18 of the Ontario Act, by which this is provided, is as follows:

18. Provided always, if it shall afterwards appear upon proof in any action to be brought that such infant, married woman, or other person was alive at the time of such order made, then it shall be lawful for such infant, married woman, guardian, or trustee, or other person, having any estate or interest determinable upon such life, to re-enter upon the said lands, tenements, or hereditaments, and to maintain an action against those who, since the said order, received the profits of such lands, tenements, or hereditaments, or their executors, or administrators and therein recover full damages for the profits of the same received from the time that such infant, married woman, or other person, having any estate or interest determinable upon such life, was ousted of the possession of such lands, tenements, or hereditaments.

(*e*) 6 Anne, c. 72, (or c. 18, in Ruffhead's Ed.) s. 3; R.S.O. (1897), Vol. III., c. 330, s. 18.

The tenant may, however, shew that he has used his utmost endeavours to procure the appearance of such *cestui que vie*, and that he is still alive, in which case he may continue in possession(*f*). Section 19 of the Ontario Act, by which this is provided, is as follows:

19. Provided always, if any such guardian, trustee, husband, or other person, holding or having any estate or interest determinable upon the life of any other person, shall by affidavit or otherwise to the satisfaction of the said Court, make appear that he has used his utmost endeavours to procure such infant, married woman, or other person, on whose life such estate or interest doth depend, to appear in the said Court, or elsewhere according to the order of the said Court in that behalf made, and that he cannot procure or compel such infant, married woman, or other person, so to appear, and that such infant, married woman, or other person is or was living at the time of such return made and filed as aforesaid, then it shall be lawful for such person to continue in the possession of such estate, and receive, the rents and profits thereof, for and during the infancy of such infant, and the life of such married woman, or other person, on whose life such estate or interest doth depend, as fully as he might have done if this, and the three preceding sections of this Act had not been made.

Overholding tenant a trespasser.

In case a tenant *pur autre vie* holds over after the death of the *cestui que vie*, he will, unlike a tenant by sufferance, be deemed a trespasser, and his possession wrongful, and the person entitled to possession may recover as damages the full value of the profits of the lands(*g*). Section 20 of the Ontario Act, by which this is provided, is as follows:

20. Every person who as guardian or trustee for any infant, and every husband seized in right of his wife only, and every other person having any estate determinable upon any life who, after the determination of such particular estate, or interest, without the express consent of him who is next and immediately entitled upon and after the determination of such particular estate or interest, shall hold over and continue in possession of any lands, tenements, or hereditaments shall be deemed a trespasser, and every person who

(*f*) 6 Anne c. 72 (or c. 18, in Ruffhead's Ed.), s. 4; R.S.O. (1897), Vol. III., c. 330, s. 19.

(*g*) 6 Anne c. 72 (or c. 18, in Ruffhead's Ed.) s. 5; R.S.O. (1897), Vol. III., c. 330, s. 20.

is, or shall be, entitled to any such lands, tenements, and hereditaments upon and after the determination of such particular estate or interest, may recover in damages against every such person so holding over as aforesaid, the full value of the profits received during such wrongful possession as aforesaid.

SECTION V.

BY DEMAND OF POSSESSION.

Tenancy at will.

A tenancy at will may be determined by the landlord by a demand of possession, or by any act that is equivalent to a demand of possession(*a*), or by any act which implies his intention to put an end to it. Thus, by making a lease to another to commence at once, or by conveying the lands, the tenancy is determined, if the tenant at will have notice of it(*b*).

A minister of a dissenting congregation, placed in the possession of a chapel and dwelling-house by trustees in whom the legal estate is vested, in trust to permit and suffer the chapel to be used for the purpose of religious worship, is a mere tenant at will to those trustees; and his tenancy is determined instanter by a demand of possession. He is not entitled *de jure*, before the determination of his tenancy, to have a reasonable time allowed him for the removal of his furniture. But it would seem that he will not be a trespasser, if he enter afterwards to remove his goods, and continue a reasonable time for that purpose(*c*).

Where the lessor of the plaintiff conveyed in fee to defendant and took back a lease for life at a nominal rent, and defendant continued in possession for several years

(*a*) *Doe* v. *Jones* (1830), 10 B. & C. 718; *Pollen* v. *Brewer* (1859), 7 C.B.N.S. 371.

(*b*) *Doe* v. *Thomas* (1851), 6 Ex. 854; *Hogan* v. *Hand* (1861), 14 Moo. P.C. 310.

(*c*) *Doe d. Nicholl* v. *McKaeg* (1830), 10 B. & C. 721.

with the lessor's knowledge, but without his express consent, it was held that he was entitled to a demand of possession before the tenancy could be ended(*d*).

Where the defendant goes into possession of land as tenant at will under a third party, but upon the invitation and with the concurrence of lessor of plaintiff, he is entitled to a demand of possession before he can be ejected(*e*).

A party who has entered into possession of land under an agreement to purchase, and has refused to accept a deed of the land tendered to him, on the ground that he does not consider the deed a proper one, has not by such refusal so changed the character of his position as a tenant at will as to put himself in the position of a terspasser, and cannot be ejected without demand of possession(*f*).

A tenant at will cannot sue his landlord for ousting him from possession(*g*).

Notice to quit.

A notice to quit, instead of a demand of possession, given to a tenant at will, does not operate as a recognition of a tenancy from year to year, and such notice may be good as a demand of possession(*h*).

Where a lessee by the terms of the lease has a right to renewal, if requested before the end of the term, and he does not make the request, he is not entitled to a demand of possession at the end of the term, as he is a mere tenant by sufferance(*i*).

A demand of possession given to a tenant by the reversioner enures to the benefit of his successor in title(*j*).

(*d*) *Doe d. Mann* v. *Keith* (1836), 4 O.S. 86.
(*e*) *McKinnon* v. *McDonald* (1845), 2 N.S.R. 7.
(*f*) *Lewer* v. *McCulloch* (1875), 10 N.S.R. 315.
(*g*) *Henderson* v. *Harper*, (1844), 1 U.C.R. 481.
(*h*) *Doe* v. *Inglis* (1810), 3 Taunt. 54.
(*i*) *Dawson* v. *St. Clair* (1856), 14 U.C.R. 97.
(*j*) *Henderson* v. *White* (1873) 23 U.C.C.P. 78.

A landlord cannot recover in ejectment against his tenant at will, unless he has demanded possession(*k*).

Tenant at will.

A tenant at will may put an end to the tenancy by giving notice and going out of possession, or by assigning or sub-letting if the landlord has notice of it(*l*).

Rent.

It has been held that if a tenancy at will, where a rent is reserved payable quarterly, is determined by the landlord during a quarter, he is not entitled to any rent since the last gale day, and if determined by the tenant he must pay rent to the next gale day(*m*). It is probable the rent in such cases would now be apportioned(*n*).

SECTION VI.

NOTICE TO QUIT.

1. *Yearly Tenancies.*
2. *Weekly, Monthly, and Quarterly Tenancies.*

The mode of determining a tenancy by notice to quit is applicable to periodic tenancies, and to those tenancies for a term certain, where there is an express stipulation for putting an end to them at an earlier period by notice. Of periodic tenancies the most common are those from year to year, from quarter to quarter, from month to month, and from week to week.

Reasonable notice.

In the absence of express stipulation, and apart from statutory provision, it is necessary to give a reasonable notice to quit to determine a periodic tenancy(*a*).

(*k*) *Goodtitle* v. *Herbert* (1792), 4 T.R. 680.

(*l*) *Pinhorn* v. *Souster* (1853), 8 Ex. 763; *Woodworth* v. *Thomas* (1892), 25 N.S.R. 42.

(*m*) *Leighton* v. *Theed* (1702), 2 Salk. 413.

(*n*) 33 & 34 Vict. (Imp.), c. 35; R.S.O. (1897), c. 170, s. 4; see Chapter XII.

(*a*) *Doe* v. *Watts* (1797), 7 T.R., at p. 85, per Lord Kenyon.

1. *Yearly Tenancies.*

Yearly tenancy.

In the case of a tenancy from year to year, it is settled, at common law, that half a year's notice expiring at the end of some year of the tenancy is necessary and sufficient to determine it(*b*).

A tenancy from year to year may be determined at the end of the first year or of any subsequent year, unless, by the terms of the lease, it can be inferred that the parties contemplated a tenancy for two years at least(*c*). A lease for one year certain, and so on from year to year, cannot be determined by notice to quit before the end of the second year(*d*).

An agreement to let certain premises "for the term of one year certain from the date thereof, and so on from year to year, unless or until the tenancy thereby created should be determined by either party giving to the other twenty-eight days' notice in writing, such notice to expire at any period of the year without any reference to the time of entry, the date of the agreement, or the commencement of the tenancy," does not enable the tenancy to be determined by notice during the first year(*e*).

A lease for one or more years certain, with a provision to determine by notice thereafter, cannot be determined except by notice taking effect after the expiry of the certain term(*f*).

Nova Scotia.

In Nova Scotia, it is provided by statute that notice to

(*b*) *Right* v. *Darby* (1786), 1 T.R. 163; *Birch* v. *Wright* (1786), 1. T.R. 379; *Maddon* v. *White* (1787), 2 T.R. 159.

(*c*) *Doe* v. *Smaridge* (1845), 7 Q.B. 957.

(*d*) *Doe* v. *Green* (1839), 9 A. & E. 658; see also *Denn* v. *Cartwright* (1803), 4 East 29; *Doe* v. *Geekie* (1844), 5 Q.B. 841; *Cannon Brewery Co.* v. *Nash* (1898), 77 L.T. 648.

(*e*) *Cannon Brewery Co.* v. *Nash* (1898), 77 L.T. 648.

(*f*) *Gardner* v. *Ingram* (1889), 61 L.T. 729, in which a contrary opinion expressed in *Thompson* v. *Maberly* (1811), 2 Camp. 573 was questioned.

quit any house or tenement, where the same is let from year to year, shall be given to or by the tenant thereof, at least three months before the expiration of any such year, and such notice shall be sufficient, although the day on which the tenancy terminates is not named therein(*g*).

New Brunswick.

In New Brunswick, three months' notice is sufficient to determine a yearly or a half-yearly tenancy(*h*).

The notice to quit must end with the period at which the tenancy commenced, that is, on the last day of some year of the tenancy; but a notice which ends on the anniversary of the day of commencement is sufficient(*i*).

Broken period.

Where a tenant holds over after a term for a broken period, for example, three years and five months from the 1st of May, and becomes a yearly tenant, the notice to quit should in general expire with the 1st of May, and not the 1st of October when the term ended and the yearly tenancy commenced(*j*).

But where an assignee, or sub-lessee of the original tenant held over in such a case, it was decided that the notice to quit should expire with some year from the commencement of the yearly tenancy, and not with some year from the commencement of the original term(*k*).

Beginning of term.

The tenancy *primâ facie*, and in the absence of express agreement, commences on the actual day of demise or entry(*l*).

But where a tenant has paid or agreed to pay rent quarterly or half yearly, the tenancy will be deemed to have

(*g*) R.S.N.S. (1900), c. 172, s. 16.

(*h*) C.S.N.B. (1904), c. 153, s. 27.

(*i*) *Sidebotham* v. *Holland*, [1895] 1 Q.B. 378.

(*j*) *Doe* v. *Dobell* (1841), 1 Q.B. 806; *Berrey* v. *Lindley* (1841), 3 M. & Gr. 498.

(*k*) *Doe* v. *Lines* (1848), 11 Q.B. 402; *Kelly* v. *Patterson* (1874), L.R. 9 C.P. 681.

(*l*) *Doe* v. *Matthews* (1851), 11 C.B. 675; *Sandill* v. *Franklin* (1875), L.R. 10 C.P. 377.

commenced at the beginning of the first whole quarter or half year for which rent is paid or agreed to be paid, though the tenant in fact came in on some earlier or later day(*m*). Such inference cannot be drawn, however, where there is an express agreement as to the date of commencement(*n*).

Service.

A notice to quit is sufficiently served upon a tenant, if it can be shewn that it came to his hands before the six months previous to the expiration of his year of holding, though the notice had been served only by having been put under the door of the tenant's house(*o*).

Joint tenant.

A notice to quit by one of two or more joint tenants who have made a joint demise, determines the tenancy as to all(*p*).

Service of a notice to quit on one of two joint tenants is effectual to determine the tenancy as to both(*q*).

Where a notice to quit was served, and on the same day, but after the notice was served, a writ of attachment in insolvency issued against the lessee, it was held, notwithstanding the rule that a judicial act relates back to the earliest moment of the day on which it was done, that the notice so given was effectual, and it was not necessary to serve the assignee(*r*).

Where in a yearly tenancy from Ladyday to Ladyday, a notice was dated and served on 24th of March, 1898, requiring the tenant to leave on the 24th of June, 1898, or at the end of the current year's tenancy, it was held that although such notice was bad as regards 24th of June, it

(*m*) *Doe* v. *Grafton* (1852), 18 Q.B. 496.
(*n*) *Sidebotham* v. *Holland*, [1895] 1 Q.B. 378.
(*o*) *Alford* v. *Vickery* (1842), C. & M. 280.
(*p*) *Doe d. Aslin* v. *Summersett* (1830), 1 B. & Ad. 135.
(*q*) *Barrett* v. *Merchants Bank* (1879), 26 Gr. 409.
(*r*) *Barrett* v. *Merchants Bank* (1879), 26 Gr. 409.

could be taken to mean a year's notice to quit on the 25th of March, 1899(*s*).

Retaining possession after notice.

Where a tenant had given notice of his intention to quit on May 1st, which notice was accepted by the landlord, and that day falling on Sunday, he proceeded to move out on the 2nd, but had not finished when a new tenant arrived, and retained the key for a few days, when it was returned to the landlord, it was held that the overholding, if any, did not amount to a renewal of the tenancy, or to a waiver of the notice to quit on the part of the tenant, in the absence of a mutual agreement to that effect; and that the only period for which he could be held liable to pay rent was that during which he had retained the key, upon proof by the landlord that he had thereby been prevented from recovering possession, and in that case the action should be for use and occupation(*t*).

Effect of notice.

Where the owner served the occupant with a notice to give up possession on the 30th of September then next, in failure whereof "I shall require you to pay me rent of £1 per month for the same, for every month wherein you may continue in possession of the same, until I recover possession of the same by legal proceedings or otherwise," it was held that the notice was not an acknowledgment of a yearly tenancy, so as to entitle defendant to six months' notice(*u*).

It has been held that a demand of possession given by the owner of lands enures for the benefit of his successor in title(*v*).

A notice to quit or a demand of possession is not necessary to be given to a person who, although let into posses-

(*s*) *Wride* v. *Dyer*, [1900] 1 Q.B. 23.
(*t*) *Nisbet* v. *Hall* (1893), 28 N.S.R. 80.
(*u*) *Cleland* v. *Kelly* (1855), 13 U.C.R. 442.
(*v*) *Henderson* v. *White* (1873), 23 U.C.C.P. 78.

sion by one assuming to have authority, has never been recognized by the owner(*w*).

Where a lessee from the Crown sub-let, and after his term expired, purchased the fee from the Crown, it was held that the sub-leseee who was still in possession was not entitled to a notice to quit or a demand of possession before action(*x*).

Where a tenant overholds for a considerable time, and refuses to pay rent, he may be ejected without a notice to quit or a demand of possession(*y*).

Farming on shares.

A person taking a farm on shares is a lessee, and entitled to six months' notice to quit(*z*)

Where a tenancy from year to year exists, and during its continuance the parties agree for a lease for a certain term, with a power to the tenant to purchase, which is never executed, the tenant stands in his original situation after the agreement fails, and cannot be ejected without a regular notice to quit(*a*).

Mortgagee.

Where, in ejectment by a mortgagee, the tenant claimed possession under a lease from the mortgagor made after the mortgage, and refused to attorn to the mortgagee (who demanded possession), it was held that he was not entitled to notice to quit(*b*).

Statute of Frauds.

Where the defendant had gone into possession of land under a demise for four years, which was void under the Statute of Frauds, and before the expiration of the first year, the lessor of the plaintiff told him that he should want the land in the spring, and defendant agreed to give it up

(*w*) *Henderson* v. *White* (1873), 23 U.C.C.P. 78.
(*x*) *Doe d. Wismer* v. *Hearnes* (1849), 6 U.C.R. 193.
(*y*) *Doe d. Burritt* v. *Dunham* (1847), 4 U.C.R. 99.
(*z*) *Doe d. Bnnuill* v. *Lin* (1837), E.T., 7 Wm. IV.
(*a*) *Doe d. Crookshank* (1842), M.T., 5 Viet.
(*b*) *Doe d. Samson* v. *Parer* (1836), 4 O.S. 36.

then, it was held that there was no necessity for proving a formal notice to quit(*c*).

Judicature Act.

Since the Judicature Act, a tenant who enters and continues in possession under an oral lease of real property for more than three years, which is void under the Statute of Frauds, is bound to give up possession at the end of the term without notice to quit; and in case he sub-lets the sub-tenancy determines at the same time(*d*).

Sub-tenant.

A sub-tenant, who continues in possession after the original tenancy has expired, is a tenant by sufferance, and is not entitled to a notice to quit; and the fact that the lessor distrains for rent due from the original lessee, and gives the sub-tenant notice to quit after the head-lease has expired, does not work an estoppel against the lessor, or operate to give the sub-tenant any higher rights than as tenant by sufferance(*e*).

Term certain.

Where a lease is for a year certain, or is otherwise terminable at a certain period, no notice to quit is necessary to put an end to the tenancy at the expiration of the period. But if, at the expiration of the period, the tenancy is renewed by tacit consent, it becomes a tenancy from year to year, and a notice to quit is necessary. By the common law six months is the time of notice both for houses and land(*f*).

Invalid notice.

A tenancy from year to year is not determined by the parol acceptance of an invalid notice to quit(*g*).

Johnstone v. *Huddlestone*

In *Johnstone* v. *Huddlestone*(*g*), a tenant held under a demise from the 26th day of March for one year then next

(*c*) *Doe d. Lynde* v. *Merritt* (1845), 2 U.C.R. 410.

(*d*) *Magee* v. *Gilmour* (1889, 17 Ont. 620; 17 Ont. App. 27; 18 S.C.R. 579.

(*e*) *Gilmour* v. *Magee* (1889), 17 Ont. 620; 17 Ont. App. 27; 18 S.C.R. 579.

(*f*) *Right d. Flower* v. *Darby* (1786), 1 T.R. 159; 1 R.R. 169.

(*g*) *Johnstone* v. *Huddlestone* (1825), 4 B. & C. 922; 28 R.R. 565.

ensuing, and so from year to year, for so long as the landlord and tenant should respectively please, and the tenant after having held more than one year, gave a parol notice to the landlord less than six months before the 25th day of March, that he would quit on that day, and the landlord accepted and assented to the notice. It was held on demurrer in replevin, that the tenancy was not thereby determined, there not having been either a sufficient notice to quit, or a surrender in writing or by operation of law, within the meaning of the Statute of Frauds; and that the tenant having held over after the expiration of the time mentioned in the notice to quit, the landlord was not entitled to distrain for double rent under the statute of 11 George II., chapter 19, section 18, inasmuch as that statute applied to those cases only where the tenant had the power of determining his tenancy by a notice, and where he actually gave a valid notice sufficient to determine it.

A notice to quit given for a date for which the party thinks himself, but is not, entitled to give notice, is inoperative, and cannot be treated by the other party as determining the tenancy at that date(*h*). Thus, a tenant from year to year, believing that his tenancy determined at midsummer, gave a written notice to quit at that period, which the landlord accepted, and made no objection to. The tenant having afterwards discovered that his tenancy expired at Christmas, gave his landlord another notice accordingly, and on possession being demanded at midsummer, refused to quit the premises. An ejectment having been brought, it was held that the tenancy was not determined by notice, inasmuch as it was not good as a notice to quit, and could not operate as a surrender by note in writing within the Statute of Frauds, the first being to take effect *in futuro*(*i*).

(*h*) *Doe d. Murrell* v. *Milward* (1838), 3 M. & W. 328.
(*i*) *Ibid.*

It has been held that where a tenant held over and paid rent, and thus became a tenant from year to year, but having accepted a demand of possession from the lessor and offered to give up possession, he could not retract his offer and insist on a notice to quit(*j*).

Waiver of notice.

A valid notice to quit cannot be waived by the party giving it, so as to restore the tenancy determined by it, except by acts or conduct of both parties which amount to the creation of a new tenancy; and conversely, when an insufficient notice to quit has been given, the mere acquiescence in it of the party receiving it cannot have the effect of putting an end to the tenancy(*k*).

Payment of rent after action.

There is no distinction in principle between the effect of payment of rent, as such, after action brought, upon the determination of the tenancy by notice to quit and by forfeiture; the payment or acceptance of rent after action brought, has no effect either as a bar to the action or as a waiver of the notice to quit(*l*).

New tenancy.

The effect of a proper notice to quit is to determine the tenancy, and although a notice once given may be withdrawn, such withdrawal does not revive the tenancy, but if the parties agree a new tenancy may be created on the old terms(*m*).

Thus, where a notice to quit was given in pursuance of a proviso that, if the lessor should sell during the term, the lessee should give up possession on six months' notice, it was

(*j*) *Cartwright* v. *McPherson* (1861), 20 U.C.R. 251. This decision was dissented from in the next cited case.

(*k*) *In re Magee and Smith* (1895), 10 Man. L.R. 1, following *Doe d. Murrell* v. *Milward* (1838), 3 M. & W. 328, and *Bessell* v. *Landsberg* (1845), 7 Q.B. 638; *Cartwright* v. *McPherson* (1861), 20 U.C.R. 251, dissented from.

(*l*) *Laxton* v. *Rosenberg* (1886), 11 Ont. 199.

(*m*) *Tayleur* v. *Wildin* (1868), L.R. 3 Ex. 303; *Manning* v. *Dever* (1874), 35 U.C.R. 294.

held that acceptance of rent by the purchaser after the expiration of the notice, set up a new tenancy from year to year, and that the lessee could not be ejected without a fresh notice; it was considered doubtful if the lessee could claim under the original lease on the ground that the notice to quit had been waived by the acceptance of rent; the lessee having claimed under the original lease only was allowed to amend(*n*).

Express agreement as to notice.

The rule that half a year's notice is necessary and sufficient to end a tenancy from year to year, does not apply where there is an express agreement as to what notice shall be given(*o*).

The parties to a tenancy may agree upon the length of notice to be given to determine it, and it has been held that there is no objection in law to the creation of a tenancy determinable on a week's notice with an allowance of a reasonable time after the expiration of the notice for the tenant to remove his goods(*p*).

Reasonable notice.

Where there is an express stipulation giving power to determine a lease for a term of years at an earlier period than the term stated, a reasonable notice must be given if the lease is silent as to the length of notice(*q*). And in such a case the option to exercise the power of ending the term will be with the lessee alone, unless it is expressly reserved to the lessor, or to either party(*r*). But a power to determine the lease "if the parties so think fit," cannot be exercised unless both parties concur(*s*).

(*n*) *Manning* v. *Dever* (1874) 35 U.C.R. 294.

(*o*) *King* v. *Eversfield*, [1897] 2 Q.B. 475.

(*p*) *Cornish* v. *Stubbs* (1870), L.R. 5 C.P. 334.

(*q*) *Goodright* v. *Richardson* (1789), 3 T.R. 462.

(*r*) *Goodright* v. *Mark* (1815), 4 M. & S. 30; *Lucas* v. *Ridcout* (1868), L.R. 3 H.L.C. 153; *Dann* v. *Spurrier* (1803), 3 B. & P. 399; 7 R.R. 797.

(*s*) *Fowell* v. *Tranter* (1864), 3 H. & C. 458.

Strict construction.

Where a notice to determine a lease is given under a proviso of the instrument creating the lease, the notice must be strictly in the terms authorized by the proviso(*t*).

Thus, where a lease for twenty-one years from Michaelmas, 1823, contained a covenant that, if the tenant should desire to determine the demise at the end of the first fourteen years, and should leave or give six calendar months' notice immediately preceding the expiration of the first fourteen years, the lease should determine, and the tenant, six months before the June preceding the expiration of the first fourteen years, gave notice that he should quit on the 24th of June, 1837, agreeably to the covenants of the lease, it was held that this notice did not satisfy the covenant(*u*).

Where a notice was agreed to be given "within three months prior to the 9th of March, 1861," it was held that these words should be construed literally, and did not mean "*at least* three months prior to the 9th of March," and a notice given on the 9th of December, 1860, was held to be a sufficient notice(*v*).

By whom notice may be given.

Where a lease contains a proviso that the notice to determine must be given by or on behalf of the person in whom the term is vested, a first assignee of the term who has purchased an equitable charge created by a subsequent assignee thereon, cannot give such notice, he not being the person in whom the term is vested(*x*).

Where the plaintiff leased to the defendant for one year, with the privilege of holding for an indefinite time, on condition that three months' notice in writing should be given prior to leaving the premises, and prior to the termination

(*t*) *Cadby* v. *Martinez* (1840), 11 A. & E. 720; *Right* v. *Cuthell* (1804), 5 East 491.

(*u*) *Ibid.*

(*v*) *Shipman* v. *Grant* (1862), 12 U.C.C.P. 395.

(*x*) *Seaward* v. *Drew* (1898), 67 L.J.Q.B. 322; 78 L.T. 19.

of a full year, by either party so inclined, it was held that defendant was bound to give three months' notice of his intention to quit at the end of the first year(*y*).

A notice to determine a tenancy, where there is a stipulation in the lease for determining it in case of sale, given by the lessor after he has sold the property is ineffectual; whether he has sold only the reversion, or the land discharged of the lease(*z*).

It would seem that under a proviso for the lessee to give up possession on a specified notice in case the lessor should sell during the term, the notice may be given after the sale by the purchaser(*a*).

Untrue notice.

If the lease contains a provision for determining the tenancy on notice by the lessor of the happening of an event, and notice is given untruly stating the event to have happened, the lessor is liable for the loss sustained by the lessee in acting on it. Thus, by a covenant in a lease of a farm from defendant to plaintiff, it was provided that upon receiving six months' notice from the lessor that he had sold the farm, and upon receiving compensation for all labor up to the date of the notice, from which he had derived no return, the lessee would deliver up possession at the end of six months, the compensation being duly paid. The defendant served the plaintiff with a notice that he had sold the farm, in consequence of which the plaintiff desisted from putting in crops and other work for which he had made preparation, and rented another farm. Upon ascertaining that the notice was untrue, the plaintiff refused to give up possession, and sued the defendant for false representation, and it was held that the plaintiff was entitled to recover the damages sustained by him in consequence of the notice(*b*).

(*y*) *Counter* v. *Morton* (1851), 9 U.C.R. 253.
(*z*) *Pepper* v. *Butler* (1876), 37 U.C.R. 253.
(*a*) *Manning* v. *Dever* (1874), 35 U.C.R. 294.
(*b*) *Cowling* v. *Dickson* (1881), 5 Ont. App. 549; 45 U.C.R. 94.

Where a lease of premises used as a factory contained this provision:—"Provided that in the event of the lessor disposing of the factory, the lessee will vacate the premises, if necessary, on six months' notice," it was held that a parol agreement for the sale of the premises, though not enforceable under the Statute of Frauds, was a "disposition" of the same under said provision entitling the lessor to give the notice to vacate; and that the lessor having, in good faith, represented that he had sold the property, with reasonable grounds for believing so, there was no fraudulent misrepresentation entitling the lessee to damages, even if no sale within the meaning of the provision had actually been made, nor was there any eviction or disturbance constituting a breach of the covenant for quiet enjoyment(*c*).

Where a lease limited in the *habendum* for a year contained a stipulation that either party might terminate the lease at the end of the year on giving three months' notice prior thereto, it was held that the stipulation was repugnant to the *habendum*, and that the lease came to an end without notice(*d*).

Where a lease for five years from the 15th of April contained a proviso that if the lessor should require the premises before the end of the term, he should pay a specified sum to the lessee for possession, and the lessor notified the lessee on the 6th of September that he would require the premises on the 10th October following, and tendered the amount which the lessee refused, it was held that the lessor was entitled to maintain ejectment(*e*).

Reservation of rights.

A lease for fourteen years provided that the lessees should have power to determine the lease at the end of the

(*c*) *Lumbers* v. *Gold Medal Furniture Mfg. Co.* (1900), 30 S.C.R. 55, reversing S.C. 26 Ont. App. 78; 29 Ont. 75.

(*d*) *Weller* v. *Carnew* (1898), 29 Ont. 400.

(*e*) *Eckhardt* v. *Raby* (1861), 20 U.C.R. 458.

first seven years upon giving six months' notice in writing, and that "in such case this present indenture and every clause, matter, and thing herein contained shall, upon the expiration of the said notice, cease and determine and be void, anything hereinbefore contained to the contrary notwithstanding;" the proviso, however, did not contain the usual reservation of the lessor's rights in respect of existing breaches of the lessee's covenants. It was held that, upon the determination of the lease, by the lessees under the above power, the lessor was entitled to sue them for existing breaches of their covenants notwithstanding that his right to do so was not expressly reserved(*f*).

Where an official person occupies a house merely in virtue of his office, when he ceases to hold the office his right to the possession of the house expires and he is not entitled to notice to quit(*g*).

Incorporeal hereditament.

The common law doctrine of six months' notice being required to terminate a tenancy from year to year of a corporeal hereditament, does not apply to the case of an incorporeal hereditament, such as a right to shoot over lands(*h*). A reasonable notice only, in such a case, is sufficient. A verbal notice to determine a lease from year to year of shooting rights, at an annual rent, given early in March for the 25th of the same month, being the end of the current year, was held to be reasonable and sufficient(*i*).

Reasonable notice.

An agreement to permit a person to erect a hoarding, and to use the wall of a house for bill-posting purposes, at a rental of £10 per annum, payable quarterly on the usual quarter days, is, in law, a license and not a tenancy, and a

(*f*) *Blore* v. *Giulini*, [1903] 1 K.B. 356.
(*g*) *Bigelow* v. *Norton* (1846), 3 N.S.R., (2 Thom.) 283.
(*h*) *Lowe* v. *Adams*, [1901] 2 Ch. 598.
(*i*) *Lowe* v. *Adams*, [1901] 2 Ch. 598.

three months' notice to quit, expiring at the end of the year of the term, is a reasonable and valid notice(*j*).

2. *Weekly, Monthly, and Quarterly Tenancies.*

Monthly tenancy.

In case of a monthly tenancy, a month's notice has been held to be a reasonable and sufficient notice(*k*).

Weekly tenancy.

To determine a weekly tenancy it seems doubtful at common law whether a week's notice is necessary and sufficient, or whether a reasonable notice only must be given. A weekly tenancy does not come to an end every week without notice, and it has been held that some notice is necessary(*l*). Some judges have expressed the opinion that a week's notice is necessary and sufficient in law, while others have held that only a reasonable notice is requisite(*m*).

In Ontario, New Brunswick, Nova Scotia, and Manitoba, it is provided by statute that a month's notice is necessary to determine a monthly tenancy, and a week's notice to determine a weekly tenancy(*n*). This is provided in Ontario, by section 18 of the *Landlord and Tenant's Act*(*o*), which is as follows:

Ontario.

18. In the case of tenancies from week to week and from month to month, a week's notice to quit and a month's notice to quit, respectively, ending with the week or the month, as the case may be, shall be deemed sufficient notice to determine, respectively, a weekly or monthly tenancy(*p*).

(*j*) *Wilson* v. *Tavener*, [1901] 1 Ch. 578.

(*k*) *Doe* v. *Hazell* (1794), 1 Esp. 94; 5 R.R. 722; *Beamish* v. *Cox* (1885), 16 L.R. Ir. 270, 458.

(*l*) *Bowen* v. *Anderson*, [1894] 1 Q.B. 164, disapproving *Sandford* v. *Clarke* (1888), 21 Q.B.D. 398, in which it was held that no notice was necessary.

(*m*) *Jones* v. *Mills* (1861), 10 C.B.N.S. 788; *Harvey* v. *Copeland* (1892), 30 L.R. Ir. 412.

(*n*) R.S.O. (1897), c. 170, s. 18; R.S.N.S. (1900), c. 172, s. 16; R.S.M. (1902), c. 93, s. 4; C.S.N.B. (1904), c. 153 s. 27.

(*o*) R.S.O. (1897), c. 170.

(*p*) In Manitoba, the provision is identical with this section.

Nova Scotia.

In Nova Scotia, it is regulated by section 16 of the *Tenancies and Distress for Rent Act*(*q*), which is as follows:

16. (1) Notice to quit any house or tenement shall be given to or by the tenant thereof,

(a) If the house or tenement is let from year to year, at least three months before the expiration of any such year;

(b) If from month to month, at least one month before the expiration of any such month;

(c) If from week to week, at least one week before the expiration of any such week.

(2) Such notice shall be sufficient, although the day on which the tenancy terminates is not named therein .

New Brunswick.

In New Brunswick, it is enacted: "Where any lands shall be let requiring a notice to quit, the notice shall be as follows: For the year or half year, three months; for the quarter or month, one month; and for the week, one week"(*r*).

When a monthly tenancy expires on the last day of the calender month, a notice to quit must be served not later than that day in order to put an end to the lease at the end of the next calender month. A notice to quit which requires a monthly tenant to vacate "by" the 30th of April, even if served on the 31st March, would not be sufficient, as it does not allow the tenant the whole of the last day of his term. In such a case the word "by" means "not later than" or "as early as"(*s*).

Where a monthly tenant agreed to give up possession in case of sale on a month's notice, it was held that a notice given by the lessor after the sale with the authority of the purchaser, was sufficient(*t*).

A notice given by a monthly tenant that he would quit

(*q*) R.S.N.S. (1900), c. 172.

(*r*) C.S.N.B. (1904), c. 153, s. 27.

(*s*) *In re Magee and Smith* (1895), 10 Man. L.R. 1.

(*t*) *Matthews* v. *Lloyd* (1875), 36 U.C.R. 381.

in April next, the tenancy actually terminating on the 8th of the month, and served three months before the actual termination, was held to be sufficient(*u*).

If premises are let at a weekly, monthly, or quarterly rent, the tenancy is *primâ facie* a weekly, monthly, or quarterly tenancy respectively(*v*). But the fact that a yearly rent is payable quarterly does not make the tenancy a quarterly tenancy(*w*).

In the case of a quarterly tenancy, it has been held that a quarter's notice is sufficient to determine the tenancy(*x*).

Notice at any time.

Where there is no express stipulation creating a yearly tenancy, if the parties have contracted that the tenants may be dispossessed by a notice given at any time, effect should be given to such intention. So where a public-house was let at a rent payable every three months on 1st of May, 1st of August, 1st of November, and 1st of February, in each year, "subject to three months' notice on either side at any time to terminate this agreement, "it was held that a three months' notice might be given at any time to determine the agreement(*y*).

(*u*) *Brown* v. *Boole* (1835), 1 Thom. (1st ed.), 108; (2nd ed.) 137.

(*v*) *Wilkinson* v. *Hall* (1837), 3 Bing. N.C. 508; 43 R.R. 728.

(*w*) *King* v. *Eversfield*, [1897] 2 Q.B. 475.

(*x*) *Towne* v. *Campbell* (1847), 3 C.B. 921.

(*y*) *Soames* v. *Nicholson*, [1902] 1 K.B. 157.

SECTION VII.

FORFEITURE.

1. *Forfeiture Generally.*
2. *Forfeiture for non-payment of Rent.*
3. *Notice required before Enforcing Forfeiture.*
4. *License.*
5. *Waiver.*
6. *Relief.*

1. *Forfeiture Generally.*

A forfeiture may be incurred, and the tenancy thereby determined, by a breach of a condition on which it is expressly made to depend, or of a covenant that is made conditional by the terms of the lease, and in certain cases by the non-payment of rent.

Covenant and condition.

On a breach of a condition on which the tenancy is made to depend, a landlord is entitled to avoid the lease and re-enter, but on a breach of a covenant contained in the lease, he is not entitled to claim a forfeiture, unless it is expressly provided, that the lease is to determine on such a breach (*a*). Hence it is material to distinguish between a stipulation that is merely a covenant, and one that amounts to a condition.

A stipulation in a lease to do or not to do a specified act will in general be construed as a covenant, unless the word "condition" in some form be used, as for example, "it is stipulated and conditionned" (*b*), or "these presents are upon the express condition" (*c*), or unless it clearly ap-

(*a*) *Doe d. Dixon* v. *Roe* (1849), 7 C.B. 134.
(*b*) *Doe* v. *Watt* (1828), 8 B. & C. 308; 32 R.R. 393.
(*c*) See *Brookes* v. *Drysdale* (1877), 3 C.P.D. 52.

pears that its non-fulfillment was intended to avoid the lease.

Where there was no express proviso for re-entry, but the lease was stated to be made "subject to the following stipulations," followed by a number of clauses, one of which was that the lessee should not assign the lease without the consent in writing of the lessor, it was held that the words quoted had not the effect of making the succeeding clauses conditions, so as to cause a forfeiture and right of entry for their breach; and therefore that ejectment would not lie for assigning the lease without the consent of the lessor(*d*).

It is usual, therefore, to insert in leases an express stipulation or proviso that the landlord may re-enter in case the covenants are not performed and that the lease shall become forfeited and void.

In Ontario, the form given in the *Act respecting Short Forms of Leases* (*e*), is as follows: "Proviso for re-entry by the said (lessor) on non-payment of rent or non-performance of covenants." Where a lease under seal is expressed to be made in pursuance of the Act, and contains a proviso for re-entry in this form, it will be taken to have the same effect, and be construed as if it were in the following form:

Proviso for re-entry.

"Provided always, and it is hereby expressly agreed, that if and whenever the rent hereby reserved, or any part thereof, shall be unpaid for fifteen days after any of the days on which the same ought to have been paid, although no formal demand shall have been made thereof, or in case of the breach or non-performance of any of the covenants or agreements herein contained on the part of the lessee, his executors, administrators or assigns, then and in either of such cases it shall be lawful for the lessor

(*d*) *McIntosh* v. *Samo* (1874), 24 U.C.C.P. 625.

(*e*) R.S.O. (1897), c. 125.

at any time hereafter, into and upon the said demised premises or any part thereof, in the name of the whole to re-enter, and the same to have again, repossess and enjoy as of his or their former estate; anything hereinafter contained to the contrary notwithstanding''(*f*).

There can be no reservation of a right of re-entry to a stranger to the legal estate(*g*).

Affirmative and negative covenants.

Where a lease of a house contained a covenant by the tenant to pay the rent, rates, and taxes, and also a covenant not to use the premises for certain purposes without the consent of the lessor, and it contained a proviso that ''if the lessee shall commit any breach of the covenant hereinbefore contained and on his part to be performed'' the lessor might re-enter, it was held that, as the lease contained both affirmative and negative covenants, a proviso for re-entry in the above form must be understood as applying only to breaches of the former(*h*).

A proviso for re-entry in the following form, ''Proviso for re-entering by the said lessor on non-performance of covenants, or seizure or forfeiture of the term for any of the causes aforesaid,'' has been held to apply only to the non-performance of positive, not negative, covenants, and hence there was no right to re-enter for breach of a covenant not to assign(*i*).

A proviso for re-entry according to the form provided in the *Act respecting Short Forms of Leases*(*j*), applies to the breach of a negative as well as to an affirmative

(*f*) R.S.O. (1897), c. 125, s. 1.

(*g*) *Hyndman* v. *Williams* (1858), 8 U.C.C.P. 293.

(*h*) *Harman* v. *Ainslie*, [1903] 2 K.B. 241.

(*i*) *Lee* v. *Lorsch* (1876), 37 U.C.R. 262.

(*j*) R.S.O. (1897), c. 125.

covenant, as, for example, a covenant not to assign or sublet without leave(*k*).

Under a lease of a "refreshment-room and apartments connected therewith," part of a railway station, containing a covenant that "no spirits of any kind should be sold or allowed to be sold in the refreshment-room," and that if he "should fail, refuse, or neglect to carry out the terms of the lease, then the lessee should, if required by the lessor quit, leave, and absolutely vacate the premises, and the lease should terminate," it was held that the sale of spirits in the bar-room part of the premises was a contravention of the lease; and that the proviso for the termination of the same extended to negative covenants; that the lease was therefore forfeited, and a right of entry accrued to the lessor; and that it was a case coming within the *Overholding Tenant's Act*(*l*).

A general proviso for re-entry on non-payment of rent or non-performance of covenants is not controlled or affected by a special proviso for determining the lease on a given notice(*m*).

Election to forfeit.

Where a lease contains a provision that the lease shall become void if the lessee does or omits to do something contrary to the objects of the tenancy, the effect of such act or omission is not of itself to avoid the lease, but to give the lessor the option of avoiding it; and the lease does not become void until the lessor has exercised the option(*n*).

Thus, where a lease contained the following clause: "In case the said premises . . . become and remain vacant

(*k*) *McMahon* v. *Coyle* (1903), 5 Ont. L.R. 618; *Toronto General Hospital* v. *Denham* (1880), 31 U.C.C.P. 207; R.S.O. (1897), c. 125, s. 3.

(*l*) *Longhi* v. *Sanson* (1882), 46 U.C.R. 446.

(*m*) *Hely* v. *Canada Co.* (1873), 23 U.C.C.P. 20 .

(*n*) *Doe d. Bryan* v. *Bancks* (1821), 4 B. & Ald. 401; 23 R.R. 318; *Palmer* v. *Mail Printing Co.* (1897), 28 Ont. 656.

and unoccupied for the period of ten days . . . without the written consent of the lessors, this lease shall cease and be void and the term thereby created expire and be at an end . . . and the lessor may re-enter and take possession of the premises" as in the case of a holding over, and the lessee entered and occupied for about two years, when he moved out and left the premises vacant for over ten days, and claimed that the lease was at an end, it was held that the agreement embodied in the lease was a subsequent condition, a breach of which could only avoid the lease at the instance of the lessors, and that the vacancy created by the lessee did not put an end to the term(*o*).

The issue and service of the writ to recover possession of the premises operates as a final election by the lessor to forfeit the term, and to have that effect it is not necessary that the actual ground of forfeiture should be stated(*p*).

The fact that a lessor granted a lease to a sub-lessee, and defended an action brought by the lessee against the sub-lessee, is sufficient to shew a desire to forfeit the original lease, and to constitute a proceeding to enforce it, so as to protect the sub-lessee in attorning to the lessor(*q*).

Application of proviso.

A proviso in a lease for re-entry, if the lessees being a company should enter into liquidation either compulsory or voluntary, applies to the case of a solvent company going into voluntary liquidation for the purpose of reconstruction or amalgamation only(*r*).

A mortgage of the term given by a tenant by way of sub-demise is a breach of the covenant not to assign or sublet without leave(*s*).

(*o*) *Palmer* v. *Mail Printing Co.* (1897), 28 Ont. 656.

(*p*) *Serjeant* v. *Nash*, [1903] 2 K.B. 304; *Grimwood* v. *Moss* (1872), L.R. 7 C.P. 360, approved.

(*q*) *Hely* v. *Canada Co.* (1873), 23 U.C.C.P. 597.

(*r*) *Fryer* v. *Ewart*, [1902] App. Cas. 187; *Horsey* v. *Steiger*, [1899] 2 Q.B. 79, approved.

(*s*) *Serjeant* v. *Nash*, [1903] 2 K.B. 304.

Where it was provided by a lease that in case the term should at any time be seized or taken in execution or attachment by any creditor of the lessee, or if the lessee, becoming bankrupt or insolvent, should take the benefit of any Act that might be in force for bankrupt or insolvent debtors, the term should immediately become forfeited and void, and proceedings having been taken in compulsory liquidation under the *Insolvent Act* of 1869, it was held that the lease was forfeited, and that the clause was not limited to an attachment issued under the *Absconding Debtors' Act*(*t*).

A covenant by a lessee restraining himself and his assigns from making use of his land in a particular way, is discharged as to land taken by a railway company or other undertakers of public works under the compulsory powers of their Act of Parliament(*u*).

Penalty.

A landlord is entitled to recover possession on breach of any of the conditions, notwithstanding that there is also a covenant in the lease to perform them, and a penalty attached to the breach; and apart from statute, no notice to quit or demand of possession is necessary(*v*).

Re-entry.

A lessor, on breach of a covenant for which he is entitled to re-enter, may enter and take possession if he can without a breach of the peace, and is not bound to bring an action of ejectment(*w*).

Where a lease is liable to be forfeited for non-payment of rent and the lessee leaves the premises, the grant of a

(*t*) *Kerr* v. *Hastings* (1875), 25 U.C.C.P. 429.

(*u*) *Baily* v. *DeCrespigny* (1869), L.R. 4 Q.B. 180; 17 W.R. 494.

(*v*) *Sheldon* v. *Sheldon* (1863), 22 U.C.R. 621; *Connell* v. *Power* (1864), 13 U.C.C.P. 91.

(*w*) *Taylor* v. *Jermyn* (1865), 25 U.C.R. 86.

lease to a new lessee who enters and occupies the premises, is a sufficient re-entry to avoid the first lease(*x*).

Where a landlord obtained the key of the demised premises from one of the lessees, and distrained such property as he found, which proved insufficient to pay the rent due, and refused to give up possession it was held in an action brought by the lessees that the lease being void by reason of the non-payment of the rent, and the distress, being equivalent to a demand, the landlord was not liable to be treated as a trespasser for continuing in possession, and that the plaintiff could not recover(*y*).

Where a landlord on breach of a covenant to pay taxes has peaceably entered, and resumed possession of the demised premises, the lessee is not entitled to recover for eviction(*z*).

A special covenant to surrender possession after default in payment of rent for a specified time, does not alter or affect the lessor's right to re-enter and take possession immediately on default, in pursuance of a general proviso in that behalf(*a*).

Where a lessor proceeds to re-enter on a breach of a covenant or condition on the part of the lessee, the taking of a new lease by a sub-lessee from the head-lessor in order to save himself from eviction, is a bar to the lessee's right to recover possession from his sub-lessee on a breach of a covenant contained in their lease(*b*). And in such a case it is not necessary that such sub-lessee should be put out of possession and re-enter under the new demise(*c*).

(*x*) *O'Hara* v. *McCormick* (1870), 30 U.C.R. 567.
(*y*) *Doe d. Somers* v. *Bullen* (1848), 5 U.C.R. 369.
(*z*) *Taylor* v. *Jermyn* (1865), 25 U.C.R. 86.
(*a*) *Hely* v. *Canada Co.* (1873), 23 U.C.C.P. 20.
(*b*) *Hely* v. *Canada Co.* (1873), 23 U.C.C.P. 20.
(*c*) *Ibid.*

Effect of re-entry.

The effect of re-entry by the lessor upon a forfeiture is to revest in him the same estate which he had at the time he granted the lease, so that he may avoid all incumbrances and sub-leases made by the lessee. A sub-lessee or other person claiming under the lessee loses his estate as well as the lessee himself(*d*).

But re-entry by the lessor does not put an end to the lessee's liability for a breach of a covenant incurred before such re-entry, although it is provided by the terms of the lease that upon a forfeiture the estate is to revest in the lessor as if the lease had never been made(*e*).

Where it was provided in an agreement that if the lessee made default in completing a building within a specified time, all the materials and buildings on the premises should be forfeited to the lessor, and that he might re-enter without making compensation, it was held that the lessor, having re-entered upon default, was not restricted to that remedy, but that he was also entitled to bring an action for damages to be measured by the actual loss sustained for breach of the agreement(*f*).

2. *Forfeiture for Non-payment of Rent.*

Apart from statute, the landlord has no right of entry for non-payment of rent, except under the terms of an express condition made upon the demise(*g*).

At common law, to entitle a lessor to determine a lease for non-payment of rent, a formal demand of the rent,

(*d*) *Smith* v. *Great Western Railway Co.* (1877), 3 App. Cas. 165.

(*e*) *Hartshorne* v. *Watson* (1838), 4 Bing. N.C. 178; 44 R.R. 693.

(*f*) *Marshall* v. *Mackintosh* (1898), 78 L.T. 750.

(*g*) *Doe d. Dixon* v. *Roe* (1849), 7 C.B. 134.

apart from statute and in the absence of express stipulation, is necessary(*h*).

Formal demand.

In making a formal demand, it is necessary that the demand should be made, (1) by the landlord or his duly authorized agent; (2) on the day the rent fell due, at such convenient hour before sunset, as would give time to count the money before sunset, the demand being continued by the person remaining until, or returning at that time; (3) on the demised premises, and at the most notorious place there, as for example, the front door of a dwelling house; (4) the demand is to be of the precise sum due.

A demand made at half-past ten o'clock and not continued till sunset was held to be insufficient(*i*).

If more than one instalment were due, a demand was to be made only of the last, or it would be ineffectual(*j*).

Where the proviso gives a right of re-entry on non-payment of rent for a specified time after it becomes due, a demand could only be made after that time had elapsed(*k*).

It became usual to provide expressly in the lease for a right of re-entry on non-payment of rent without the necessity of making a formal demand. The statutory form of the proviso for re-entry is set forth in the last sub-section.

Where the lessee covenanted to pay the yearly rent, with a condition for re-entry "if the tenant should do or omit anything in breach or non-performance of any of his covenants"; it was held that the non-payment of the rent would not make the demise void *ipso facto*, but only void upon proper proceedings being taken for that purpose(*l*).

Implied proviso for re-entry.

It is provided by statute in Ontario that in every demise

(*h*) *Faugher* v. *Burley* (1876), 37 U.C.R. 498.

(*i*) *Acocks* c. *Phillips* (1860, 5 H. & N. 183.

(*j*) *Doe* v. *Paul* (1829), 3 C. & P. 613.

(*k*) *Phillips* v. *Bridge* (1873), L.R. 9 C.P. 48.

(*l*) *Doe d. King's College* v. *Kennedy* (1848), 5 U.C.R. 577.

made after the 25th day of March, 1886, a proviso for re-entry is implied, if the rent reserved shall remain unpaid for fifteen days after any of the days on which it ought to have been paid. This is enacted by section 11 of the *Landlord and Tenant's Act*(*m*), which is as follows:—

11. In every demise made or entered into after the 25th day of March, 1886, whether by parol or in writing, unless it shall be otherwise agreed, there shall be deemed to be included an agreement that if the rent reserved, or any part thereof, shall remain unpaid for fifteen days after any of the days on which the same ought to have been paid, although no formal demand thereof shall have been made, it shall be lawful for the landlord, at any time thereafter into and upon the demised premises, or any part thereof in the name of the whole, to re-enter and the same to have again, repossess and enjoy as of his former estate(*n*).

Demand to be made 15 days before entry.

In Ontario it is provided by statute that where a landlord has by law a right to enter for non-payment of rent, a demand of the rent shall be made, unless the premises are vacant, at least fifteen days before entry; but it is not necessary that the demand should be made on the day when the rent is due; or that it should be made with the strictness required by the common law. A demand will be sufficient, although more or less than amount really due is asked for; and it is not necessary that it should be made on the premises, or that it should be made on the tenant. It may be made on the tenant personally anywhere, or on his wife, or on some other grown-up member of his family on the premises. These provisions are made by section 35 of the *Landlord and Tenant's Act*(*o*), which is as follows:—

35. Where a landlord has by law a right to enter for non-payment of rent, it shall not be necessary to demand the rent on the day when due, or with the strictness required at common law, and a demand of rent shall suffice notwithstanding more or less than the amount really due is demanded, and notwithstanding

(*m*) R.S.O. (1897), c. 170.

(*n*) See also C.S.N.B. (1904), c. 153, s. 3.

(*o*) R.S.O. (1897), c. 170.

other requisites of the common law are not complied with: Provided that, unless the premises are vacant, the demand be made fifteen days at least before entry: such demand to be made on the tenant personally anywhere or on his wife or some other grown up member of his family on the premises(*p*).

It is provided by statute in certain cases that a demand of the rent is unnecessary before enforcing a forfeiture for its non-payment. A landlord who has by law a right to re-enter for non-payment of rent may, whenever a half year's rent is in arrear, without any formal demand or re-entry, serve a writ for the recovery of possession. In Ontario, this is provided by section 20 of the *Landlord and Tenant's Act*(*q*), which is as follows:—

Half-year's rent in arrear.

20. In all cases between landlord and tenant, as often as it happens that one-half year's rent is in arrear, and the landlord or lessor to whom the same is due has the right by law to re-enter for non-payment thereof, such landlord or lessor may, without any formal demand or re-entry, serve a writ for the recovery of the demised premises; or in case the same cannot be legally served, or no tenant is in actual possession of the premises, then the landlord or the lessor may affix a copy thereof upon the door of any demised messuage, or in case the action is not for the recovery of any messuage, then upon some notorious place on the lands, tenements or hereditaments comprised in the writ; and such affixing shall be good service thereof, and shall stand instead of a demand and re-entry(*r*).

It is further provided by section 21 as follows:—

No sufficient distress.

21. In case of judgment against the defendant for non-appearance, it it is shewn by affidavit to the Court, or is proved upon the trial in case the defendant appears, that half a year's rent was due before the writ was served, and that no sufficient distress was to be found on the demised premises countervailing the arrears then due, and that the lessor had power to re-enter, the lessor shall recover judgment and have execution in the same manner as if the rent in arrear had been demanded, and re-entry made.

(*p*) See also C.S.N.B. (1904), c. 153, s. 4.

(*q*) R.S.O. (1897), c. 170.

(*r*) In Manitoba see R.S.M. (1902), c. 93, s. 23 *et seq.*

These sections are taken from the English Common Law Procedure Act, 1852(*s*).

It has been held that the operation of the statute is not prevented, although there is a proviso in the lease requiring a demand to be made, and if the requirements of the statute are satisfied, no demand is necessary(*t*).

The action must be between landlord and tenant; but under the word "tenant" is included a sub-lessee, and an assignee either absolutely or by way of mortgage(*u*).

It is also necessary that one half-year's rent should be in arrear at the time the writ is served(*v*).

But if under a distress enough has been realized to reduce the amount to less than half a year's rent, the statute does not apply, and the right of re-entry under this section is gone(*w*).

Where, however, there is a proviso for re-entry when one quarter's rent shall be in arrear for twenty-one days, and no sufficient distress can be had for the same, the right of re-entry under the proviso is not lost, although a distress has been made for three quarter's rent in arrear, which realized less than two quarter's rent, leaving more than one quarter's rent still in arrear(*x*).

It is also necessary to enable a lessor to take advantage of this section that there be no sufficient distress found on the premises countervailing the arrears due; that is to say, if there is no distress, or not sufficient to reduce the amount due to less than one half-year's rent, although there is suf-

(*s*) 15 & 16 Vict. (Imp.), c. 76, s. 210, re-enacting 4 Geo. II., c. 28, s. 2.

(*t*) *Doe* v. *Alexander* (1814), 2 M. & S. 525; 15 R.R. 338.

(*u*) *Doe* v. *Roe* (1811), 3 Taunt. 402; *Hare* v. *Elms*, [1893] 1 Q.B. 604.

(*v*) *Thomas* v. *Lulham*, [1895] 2 Q.B. 400.

(*w*) *Cotesworth* v. *Spokes* (1861), 10 C.B.N.S. 103.

(*x*) *Shepherd* v. *Berger*, [1891] 1 Q.B. 597.

ficient to pay half a year's rent, the lessor may serve his writ(*y*).

Search for goods.

A search must be made for distrainable goods on all the premises included in the demise, and account must be taken of growing crops(*z*).

But where outer doors are kept locked, so that a distress cannot be made, a distress is excused(*a*).

Where the lease expressly provides that it shall be void on non-payment of rent, whether demanded or not, there is no necessity to shew a want of distress(*b*).

In an action of ejectment for a forfeiture for non-payment of rent, the plaintiff must prove, if proceeding under this section, that there was no sufficient distress upon the premises, and if at common law, that the rent was demanded in proper time by a person duly authorized(*c*).

Under a proviso in a lease for re-entry if any part of the rent shall remain in arrear for fifteen days, although no formal demand be made, a landlord is entitled to recover possession, although there is sufficient distress on the premises(*d*).

It is further necessary that the lessor should have by law a right to re-enter for non-payment of rent, either under an express proviso in the lease, or under a proviso implied by law.

In Ontario, as already stated, there is an implied proviso for re-entry, unless otherwise agreed, on non-payment of rent for fifteen days(*e*).

(*y*) *Cross* v. *Jordan* (1853), 8 Ex. 149.
(*z*) *Ex parte Arnison* (1868), L.R. 3 Ex. 56.
(*a*) *Doe* v. *Dyson* (1827), Moo. & M. 77; 31 R.R. 715.
(*b*) *McDonald* v. *Peck* (1859), 17 U.C.R. 270.
(*c*) *Doe d. Cubitt* v. *McLeod* (1841), M.T. 4 Vict.
(*d*) *Campbell* v. *Baxter* (1866), 15 U.C.C.P. 42.
(*e*) R.S.O. (1897), c. 170, s. 11.

The right of re-entry must have accrued at the time the writ was served(*f*).

Option to purchase.

Where it is provided in the lease that it shall be void in case the rent shall be and remain in arrear for a specified time, the lessee is not entitled to exercise an option to purchase contained in the lease, if the rent was in arrear for the time specified(*g*).

Emblements.

Where a lease has been determined by a notice in pursuance of a proviso to that effect, there can be no forfeiture for non-payment of rent which accrued, or would have accrued after such termination, so as to deprive the lessee of his right to the emblements(*h*).

3. *Notice Required Before Enforcing Forfeiture.*

Notice complaining of breach.

In Ontario, it is provided by statute that a right of re-entry or forfeiture under a proviso for a breach of any covenant or condition in a lease, with certain exceptions hereinafter mentioned, shall not be enforceable by action or otherwise, until the lessor serves a notice specifying the particular breach complained of, and requiring the lessee to remedy it, and to make compensation in money, and until the lessee fails within a reasonable time thereafter to remedy the breach and to make compensation. This is provided by sub-section 1 of section 13 of the *Landlord and Tenant's Act*(*i*), which is as follows:—

> **13.** (1) A right of re-entry or forfeiture under any proviso or stipulation in a lease, for a breach of any covenant or condition in the lease, shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice specifying the particular breach complained of, and if the breach is capable of remedy, requiring the lessee to remedy the breach, and, in any case, requiring the lessee to make compensation in money for the

(*f*) *Doe* v. *Roe* (1849), 7 C.B. 134.
(*g*) *McLellan* v. *Rogers* (1854), 12 U.C.R. 571.
(*h*) *Campbell* v. *Baxter* (1866), 15 U.C.C.P. 42.
(*i*) R.S.O. (1897), c. 170.

breach, and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor for the breach.

This sub-section is taken from sub-section 1 of section 14 of the English Conveyancing Act, 1881(*j*).

Service.

Under this section it has been held in England that notice must be served on the lessee himself, and that a notice served on the lessee's trustee, although in possession, was insufficient(*k*). But it has been held that a notice addressed to the original lessee and all others whom it may concern, and served on the occupiers, is good service on the assignee of the lessee(*l*).

Compensation.

Although the section provides that the notice must in any case require the lessee to make compensation, it has been held that where the breach is capable of remedy it is not necessary that compensation should be demanded in the notice(*m*).

Sufficiency of notice.

The notice complaining of the breach of covenant must be sufficiently specific to enable the tenant to know with reasonable certainty what he is required to do, so that he shall have an opportunity of remedying the breach before an action is brought(*n*). The notice ought "to give the tenant precise information of what is alleged against him and what is demanded of him"(*o*).

Where a lessee had broken a covenant to build, and a covenant to repair, and a breach of the former had been waived, it was held that a notice referring only to the build-

(*j*) 44 & 45 Vict. (Imp.), c. 41.
(*k*) *Gentle* v. *Faulkner*, [1900] 2 Q.B. 267.
(*l*) *Cronin* v. *Rogers* (1884), C. & E. 348.
(*m*) *Lock* v. *Pearce*, [1893] 2 Ch. 271.
(*n*) *Fletcher* v. *Nokes*, [1897] 1 Ch. 271.
(*o*) *Horsey* v. *Steiger*, [1899] 2 Q.B. 79.

ing covenant was ineffectual as to the covenant to repair(*p*).

A notice given under a lease of several houses which merely stated that the tenant had "broken the covenant for repairing the inside and outside of the houses," without giving any details, or pointing out in which of the houses default was made, was held to be insufficient(*q*).

So, a notice in which it was stated that the tenant had not "kept the said premises well and sufficiently repaired, and the party and other walls thereof," was held insufficient, as it did not indicate the particular breaches complained of(*r*).

But a notice giving in detail a list of repairs to be done wherever required, leaving it to the tenant to decide where the repairs should be made, was held to be good(*s*).

A notice of forfeiture of a lease under this section, given in the words, "You have broken the covenants as to cutting timber, etc.," without more particularly specifying the breach and claiming compensation, is sufficient(*t*).

It has been held that a notice which is insufficient as to one breach, but sufficiently specifies another, is altogether ineffectual(*u*).

But where the notice contains a complaint of two breaches, one of which is not in fact justifiable, it does not invalidate the notice as to the other(*v*).

Where a notice complaining of a breach which was incapable of remedy, was followed by the issue of a writ two

(*p*) *Jacob* v. *Down*, [1900] 2 Ch. 156.
(*q*) *Fletcher* v. *Nokes*, [1897] 1 Ch. 271.
(*r*) *In re Serle*, [1898] 1 Ch. 652.
(*s*) *Matthews* v. *Usher*, [1900] 2 Q.B. 535; 68 L.J.Q.B. 856.
(*t*) *McMullen* v. *Vannatto* (1893), 24 Ont. 625.
(*u*) *In re Serle*, [1898] 1 Ch. 652.
(*v*) *Pannell* v. *City of London Brewery Co.*, [1900] 1 Ch. 496.

days later, it was held that the time given to make compensation was too short(*w*).

"Lease" and "lessee."

For the purposes of the section, a lease is declared to include an original or derivative under-lease, also a grant at a fee farm rent, or securing a rent by condition; and a lessee includes an original or derivative under-lessee, and the heirs, executors, administrators and assigns of a lessee, also a grantee under such a grant as aforesaid, his heirs and assigns; and a lessor includes an original or derivative under-lessor, and the heirs executors, administrators and assigns of a lessor, also a grantor as aforesaid, and his heirs and assigns(*x*).

This section applies, although the proviso or stipulation under which the right of re-entry or forfeiture accrues is inserted in the lease, in pursuance of the directions of any Act of Parliament or of the Legislature of the Province(*y*).

For the purposes of this section, a lease limited to continue as long only as the lessee abstains from committing a breach of covenant, shall be and take effect as a lease to continue for any longer term for which it could subsist, but determinable by a proviso for re-entry on such a breach(*z*).

Covenants not within the statute.

It is provided by sub-section 6 of section 13 that these provisions shall not extend to a covenant against assigning, underletting, or parting with the possession of the premises; or to a condition for forfeiture on the bankruptcy of the lessee; or to a condition for forfeiture on the taking in execution of the lessee's interest; or to a mining lease. Sub-section 6 is a follows:—

(*w*) *Horsey* v. *Steiger*, [1899] 2 Q.B. 79.

(*x*) Sub-section 3.

(*y*) Sub-section 4.

(*z*) Sub-section 5.

13. (6) This section shall not extend—

(a) To a covenant or condition, against the assigning, underletting, parting with the possession, or disposing of the land leased; or to a condition for forfeiture on the bankruptcy of the lessee, or on the taking in execution of the lessee's interest; or

(b) To a mining lease—

A "mining lease" is a lease for mining purposes, that is, the searching for, working, getting, making merchantable, carrying away, or disposing of mines and minerals, or purposes connected therewith, and includes a grant or license for mining purposes.

No notice or demand is necessary, apart from statute, before action on a forfeiture for breach of a covenant not to assign or sub-let, where a power of re-entry for a breach thereof is reserved in the lease(*a*).

The effect of the statute is not to alter the contract of the parties, or to take away the right of re-entry, but merely to postpone it, until the lessor has taken the steps prescribed(*b*).

It is further provided that this section shall not affect the law relating to re-entry or forfeiture or relief in cases of non-payment of rent(*c*).

This section is declared to apply to leases made either before or after the enactment thereof, and shall have effect notwithstanding any stipulation to the contrary(*d*).

Repair.

Where, under a covenant to repair upon notice, a notice is given to repair within a certain time, the notice operates as a suspension of any right within that time to enforce a forfeiture for breach of the general covenant to repair. But the covenant to repair upon notice, and the covenant to repair generally, are separate covenants; and a notice to re-

(*a*) *Connell* v. *Power* (1864), 13 U.C.C.P. 91.

(*b*) *Creswell* v. *Davidson* (1887), 56 L.T. 811.

(*c*) Sub-section 7.

(*d*) Sub-section 8.

pair "according to the covenants" does not imply that the full time under the former covenant is to be allowed(*e*).

Thus, where a lease contained covenants to keep the premises in repair, and to repair within three months after notice, and a clause of re-entry for breach of any covenant; and the premises being out of repair, the landlord gave a notice to repair within three months, it was held that this was a waiver of the forfeiture incurred by breach of the general covenant to keep the premises in repair, and that the landlord could not bring ejectment until after the expiration of the three months(*f*).

But where an indenture of lease, with a clause for re-entry, contained a general covenant on the part of the lessee to keep the premises demised in repair, and a further covenant that he would within three months after notice being given to him by the landlord, repair all defects specified in the notice, and the premises demised being out of repair, the landlord gave the lessee notice to repair, "in accordance with the covenants" of the lease, and before the expiration of three months ejectment was brought, it was held that the notice was not a waiver of the forfeiture incurred by the breach of the general covenant to repair, and that the action was maintainable(*g*).

Where, in an action brought for possession after due notice, complaining of non-repair, had been given, a claim for rent, down to a time after the expiration of the notice, had been included (which would thus operate as a waiver of the forfeiture to that time), it was held, nevertheless that, as the non-repair continued from that time to the time

(*e*) *Doe d. Morecraft* v. *Meux* (1825), 4 B. & C. 606; 28 R.R. 426.

(*f*) *Ibid.*

(*g*) *Few* v. *Perkins* (1867), L.R. 2 Ex. 92; 36 L.J. Ex. 54; 16 L.T. 62.

of issuing the writ, the lessor was entitled to possession without giving a fresh notice(*h*).

Reasonable notice.

The section does not require that any time shall be set by the notice within which the breach shall be remedied, and it has been held, under a lease containing a general covenant to repair, and a covenant to repair within three months after notice, that one month's notice to repair may be sufficient to satisfy the statute under the general covenant(*i*).

In action to enforce a forfeiture for non-repair, the lessor must show that the premises were out of repair, not merely at the date of the notice, but also at the date of the writ(*j*).

Under the words "reasonable compensation in money to the satisfaction of the lessor," the costs of viewing the premises, and ascertaining the extent of non-repair, cannot be demanded, nor the solicitor's costs of preparing the notice(*k*).

4. *License.*

In Ontario, it is provided by statute that a license to do any act which without a license would operate as a forfeiture, shall, unless otherwise expressed, extend only to the permission actually given, or the act specifically authorized to be done, and shall not operate as a license generally. This is provided by section 14 of the *Landlord and Tenant's Act*(*l*), which is as follows:—

Operation of license.

14. Where a license to do any act which, without such license, would create a forfeiture, or give a right to re-enter, under a condition or power reserved in a lease heretofore granted, or to be

(*h*) *Penton* v. *Barnett*, [1898] 1 Q.B. 276.

(*i*) *In re Serle*, [1898] 1 Ch. 652.

(*j*) *Skinner's Co.* v. *Knight*, [1898] 2 Q.B. 542.

(*k*) *Ibid.*

(*l*) R.S.O. (1897), c. 170.

hereafter granted, has been, at any time since the 18th day of September, 1865, given to a lessee or his assigns, every such license shall, unless otherwise expressed, extend only to the permission actually given, or to any specific breach of any proviso or covenant made or to be made, or to the actual assignment, under-lease or other matter thereby specifically authorized to be done, but not so as to prevent a proceeding for any subsequent breach (unless otherwise specified in such license): and all rights under covenants and powers of forfeiture and re-entry in the lease contained shall remain in full force and virtue, and shall be available as against any subsequent breach of covenant or condition, assignment, under-lease or other matter not specifically authorized or made dispunishable by such license, in the same manner as if no such license had been given; and the condition or right of re-entry shall be and remain in all respects as if such license had not been given, except in respect of the particular matter authorized to be done (*m*).

License to one of several lessees.

It is further provided that where a license has been given to one of several lessees, to assign or underlet his share or interest, or to do any other act which may not be done without a license, such license shall not operate to extinguish the right of re-entry for a breach of a covenant by the other lessees.

License to assign part.

It is also provided that a license given to a lessee to assign, or underlet, or to do any act in respect of part of the demised premises, shall not operate to destroy the right of re-entry for a breach of a covenant in respect of the remainder of the premises. These provisions are made by section 15 of the Act, which is as follows:—

15. Where in a lease heretofore granted or to be hereinafter granted, there is a power or condition of re-entry on assigning or underletting or doing any other specified act without license, and at any time since the 18th day of September, 1865, a license has been or is given to one of several lessees or co-owners to assign or underlet his share or interest, or to do any other act prohibited to be done without license, or has been or is given to a lessee or owner, or any one of several lessees or owners, to assign or underlet part only of the property, or to do any other such act as aforesaid in respect of part only of such property, such license shall not operate

(*m*) See also C.S.N.B. (1904), c. 153, s. 6; 22 & 23 Vict. (Imp.), c. 35, ss. 1 and 2.

to destroy or extinguish the right of re-entry in case of any breach of the covenant or condition by the co-lessee or co-lessees or owner or owners of the other shares or interests in the property, or by the lessee or owner of the rent of the property (as the case may be) over or in respect of such shares or interests or remaining property but such right of re-entry shall remain in full force over or in respect of the shares or interests or property not the subject of such license (*n*).

Formerly, a license to assign, once given, operated as a general waiver of a covenant not to assign, so as not to restrict subsequent assignments(*o*).

5. *Waiver.*

Where a forfeiture has been incurred, it is in the option of the landlord whether he will take advantage of it or not, even where, under a proviso, the lease is declared to be wholly void. In such a case the lease does not become void on breach of the covenant or condition, but only voidable, and the landlord may enforce the forfeiture or he may waive it, either expressly or by implication from his acts.

Any act by which he recognizes the tenancy as still subsisting after the breach which gives rise to the forfeiture comes to his knowledge, amounts to a waiver, or is evidence from which an intention to waive the forfeiture may be inferred(*p*).

Notice.

But actual knowledge of the breach is necessary before any act can amount to a waiver, and constructive notice, or means of knowledge is insufficient(*q*).

Acquiescence.

If, however, the lessor does nothing, and is merely aware that a breach of a covenant has been committed, he is not thereby disentitled to claim a forfeiture, as mere knowledge,

(*n*) R.S.O. (1897), c. 170; C.S.N.B. (1904), c. 153, s. 7.

(*o*) *Dumpor's Case* (1603), 1 Smith L.C., 11th ed., p. 32.

(*p*) *Roe* v. *Harrison* (1788), 2 T.R. 425; 1 R.R. 513; *Evans* v. *Wyatt* (1880), 43 L.T. 176.

(*q*) *Ewart* v. *Fryer* (1900), 17 Times L.R. 145; 82 L.T. 415.

without any positive assent, is not sufficient to constitute a waiver(*r*). Mere knowledge or acquiescence in an act constituting a forfeiture, does not amount to a waiver; there must be some positive act of waiver, such as a receipt of rent(*s*). It would seem to be no waiver of the breach of a covenant not to dig beyond a prescribed depth, that the landlord, though aware of such breach, and threatening to take proceedings in consequence, did not take any steps at the time, but allowed the tenant to remain in possession until his subsequent insolvency(*t*).

Acts of waiver.

If a person entitled to the reversion, knowing that a forfeiture has been incurred by breach of the covenant or condition, does any act whereby he acknowledges the continuance of the tenancy at a later period, he thereby waives the forfeiture(*u*). A right of re-entry, for breach of covenant in a lease, is waived by the lessor bringing an action for rent accrued due subsequent to the breach(*v*).

A forfeiture is waived where the landlord expressly declares to the tenant that he will not enforce it(*w*). So, if he agrees to grant a new lease to the tenant on the expiration of the old one(*x*); or if he notifies the tenant to do repairs under the lease(*y*).

Acceptance of rent.

So, where the landlord accepts rent from the lessee which became due after the forfeiture was incurred, it amounts to a waiver(*z*), although the landlord protests that

(*r*) *Doe* v. *Allen* (1810), 3 Taunt. 78; 12 R.R. 597.
(*s*) *McLaren* v. *Kerr* (1878), 39 U.C.R. 507.
(*t*) *Kerr* v. *Hastings* (1875), 25 U.C.C.P. 429.
(*u*) *Dendy* v. *Nicholl* (1858), 27 L.J.C.P. 220; 4 C.B.N.S. 376.
(*v*) *Ibid.*
(*w*) *Ward* v. *Day* (1864), 5 B. & S. 359.
(*x*) *Ibid.*
(*y*) *Griffin* v. *Tomkins* (1880), 42 L.T. 359.
(*z*) *Doe* v. *Rees* (1838), 4 Bing. N.C. 384; *Keith* v. *National Telephone Co.*, [1894] 2 Ch. 147; *Roe* v. *Southard* (1861), 10 U.C.C.P. 488.

such acceptance is without prejudice to his right to insist on the forfeiture(*a*).

So, where the landlord makes an unqualified demand on the tenant for rent due after the forfeiture(*b*), or sues him for such rent(*c*), it amounts to a waiver. Demand.

In like manner, a distress for rent after the forfeiture is incurred, whether such rent became due before or after the forfeiture, operates as a waiver(*d*). Distress.

But acceptance after forfeiture of rent which became due before the forfeiture, is not sufficient to constitute a waiver(*e*).

Where the landlord credits moneys received on a note given by the tenant for previous arrears of rent, it was held to be no waiver of a forfeiture arising in respect of rent accruing after the note was given(*f*).

In an action to recover possession on the ground of forfeiture for breach of covenants, and to recover arrears of rent, acceptance by the landlord of the sum paid into court by the defendant in satisfaction of the rent, is not a waiver of a breach of covenant which took place after the rent became due(*g*).

A reference to arbitration after default operates in the meanwhile as a suspension of the right of re-entry(*h*).

A lease to a joint stock company provided that in case the lessee should assign for the benefit of creditors, six Estoppel.

(*a*) *Davenport* v. *The Queen* (1877), 3 App. Cas. 115; *Croft* v. *Lumley* (1858), 6 H.L.C. 672.

(*b*) *Doe* v. *Birch* (1836), 1 M. & W. 402; 46 R.R. 326.

(*c*) *Dendy* v. *Nicholl* (1858), 4 C.B.N.S. 376.

(*d*) *Cotesworth* v. *Spokes* (1861), 10 C.B.N.S. 103.

(*e*) *Price* v. *Worwood* (1859), 4 H. & N. 512; *Dobson* v. *Southeran* (1888), 15 Ont. 15.

(*f*) *McDonald* v. *Peck* (1859), 17 U.C.R. 270.

(*g*) *Toogood* v. *Mills* (1896), 23 V.L.R. 106.

(*h*) *Black* v. *Allan* (1867), 17 U.C.C.P. 240.

months' rent should immediately become due and the lease should be forfeited and void. The two lessors were principal shareholders in the company, and while the lease was in force one of them, at a meeting of the directors, moved, and the other seconded, that a by-law be passed authorizing the company to make an assignment, which was afterwards done, the lessors executing the assignment as creditors assenting thereto. It was held that the lessors and the company were distinct legal persons and the individual interests of the lessors were not affected by their action as shareholders or directors of the company, and the lessors were not estopped from taking advantage of the forfeiture clause(*i*).

Continuing breaches.

Where, however, the act or omission which constitutes the breach of a covenant and occasions the forfeiture, is of a continuing nature, these acts of the landlord operate as a waiver only to a limited extent. Thus, acceptance of rent in the case of a continuing breach is a waiver down to the time such rent is received, but not afterwards(*j*).

So, a distress is a waiver of a continuing breach down to the time the distress is made(*k*).

It has been held that covenants to repair, to insure, to cultivate or use the premises in a particular manner, are continuing covenants, and the omission to observe them is a continuing breach(*l*).

Breaches of a covenant in a farm lease to keep the fences in repair, and to keep eighteen acres in meadow dur-

(*i*) *Soper* v. *Littlejohn* (1901), 31 S.C.R. 572, following *Salomon* v. *Salomon*, [1897] App. Cas. 22.

(*j*) *Doe* v. *Gladwin* (1845), 6 Q.B. 953.

(*k*) *Thomas* v. *Lulham*, [1895] 2 Q.B. 400.

(*l*) *Doe* v. *Jones* (1850), 5 Ex. 498; *Coward* v. *Gregory* (1866), L.R. 2 C.P. 153; *Coatsworth* v. *Johnson* (1886), 54 L.T. 520; *Doe* v. *Woodbridge* (1829), 9 B. & C. 376.

ing the term, are continuing breaches, and the right to re-enter for them is not waived by acceptance of rent(*m*).

A covenant which requires the complete performance of a definite act within a specified time, is not a continuing covenant(*n*). Thus, a covenant to build within a specified time is not such a covenant(*o*).

Where the lessee covenanted to build a house within four years and failed to perform it, it was held that the receipt of rent by the lessor after that time was a waiver of the forfeiture(*p*).

But a forfeiture on a breach of a covenant, the necessary effect of which, although a continuing breach, is to put it out of the lessee's power to remedy it, may be completely waived. Thus, where a landlord accepts or distrains for rent, after and with knowledge of a breach of a covenant against sub-letting, it operates as a complete waiver during the whole term of such sub-letting, but not afterwards(*q*).

Repair.

A demand of rent falling due after a notice to repair has expired, does not operate as a waiver, if there be subsequent non-repair(*r*).

Acceptance of rent which becomes due pending a notice to repair, is no waiver of a forfeiture on the expiry of the notice. And an agreement to allow further time for the repairs is not a waiver of, but only suspends the right of entry(*s*).

After election to forfeit.

Where, however, the landlord elects to claim the forfeiture, and brings an action of ejectment, nothing that he may

(*m*) *Ainley* v. *Balsden* (1857), 14 U.C.R. 535.

(*n*) *Morris* v. *Kennedy*, [1896] 2 I.R. 247.

(*o*) *Jacob* v. *Down*, [1900] 2 Ch. 156.

(*p*) *Roe* v. *Southard* (1861), 10 U.C.C.P. 488.

(*q*) *Walrond* v. *Hawkins* (1875), L.R. 10 C.P. 342; *Lawrie* v. *Lees* (1881), 14 Ch. D. 249; 7 App. Cas. 19.

(*r*) *Penton* v. *Barnett*, [1898] 1 Q.B. 276.

(*s*) *Doe* v. *Brindley* (1832), 4 B. & Ad. 84.

then do will be construed as a waiver of the forfeiture. Thus, neither acceptance of rent, nor his distraining for it, will operate as a waiver. An election to forfeit once made by bringing action, is irrevocable(*t*).

Where the right to re-enter has arisen on the bankruptcy of the lessee, the annulment of the bankruptcy after the issue of the writ in ejectment will not defeat the forfeiture(*u*).

Pleading.

But if a claim is made in the writ for an injunction to restrain the breach giving rise to the forfeiture, in addition to the claim for possession, or if the lessor in his pleading treats the tenancy as subsisting, it has been held to operate as a waiver(*v*).

New tenancy.

The action of ejectment shows an irrevocable intention on the part of the landlord to avoid the lease. Acceptance of rent, after the issue of the writ, will not operate as a waiver, nor set up the former tenancy, but it may be regarded as evidence of a new tenancy on the same terms from year to year(*w*).

Thus, where a landlord, after an action of ejectment was commenced for the forfeiture of the lease, distrained for and received rent subsequently accruing due, it was held that such course did not, *per se*, set up the former tenancy, which ended on the election to forfeit manifested by the issue of the writ, but might be evidence for the jury of a new tenancy on the same terms from year to year(*x*).

Operation of waiver.

In Ontario it is provided by statute that a waiver of the benefit of a covenant or condition in a lease shall not be deemed to extend to any instance or breach thereof, other

(*t*) *Doe* v. *Meux* (1824), 1 C. & P. 346; *Jones* v. *Carter* (1846), 15 M. & W. 718; *Grimwood* v. *Moss* (1872), L.R. 7 C.P. 360.

(*u*) *Smith* v. *Gronow*, [1891] 2 Q.B. 394.

(*v*) *Evans* v. *Davis* (1878), 10 Ch. D. 747.

(*w*) *Evans* v. *Wyatt* (1880), 43 L.T. 176.

(*x*) *McMullen* v. *Vannatto* (1893), 24 Ont. 625.

than that to which it specially relates, unless a contrary intention appears. This is enacted by section 16 of the *Landlord and Tenant's Act*(*y*), which is as follows:—

> **16.** Where an actual waiver of the benefit of a covenant or condition in a lease, on the part of a lessor, or his heirs, executors, administrators or assigns, is proved to have taken place after the 18th day of September, 1865, in any one particular instance, such actual waiver shall not be assumed or deemed to extend to any instance or any breach of covenant or condition other than that to which such waiver specially relates, nor to be a general waiver of the benefit of any such covenant or condition, unless an intention to that effect appears (*z*).

A waiver of a forfeiture made by the beneficial owner of unpatented land under lease, is binding on the purchaser who afterwards obtains a patent with notice of the lease(*a*).

It has been held that where the action is against defendant as plaintiff's tenant for a forfeiture, the receiving of rent after the writ of possession has issued, is a waiver of the execution(*b*).

There can be no waiver after entry for a forfeiture(*c*).

5. *Relief.*

In Ontario, the general jurisdiction of the High Court to relieve against forfeiture is conferred by sub-section 3 of section 57 of the *Judicature Act*(*d*), which is as follows:—

> **57.** (3) Subject to appeal as in other cases, the High Court shall have power to relieve against all penalties and forfeitures, and in granting such relief, to impose such terms as to costs, expenses, damages, compensation, and all other matters as the Court thinks fit.

(*y*) R.S.O. (1897), c. 170.
(*z*) See also C.S.N.B. (1904), c. 153, s. 8.
(*a*) *Flower* v. *Duncan* (1867), 13 Gr. 242.
(*b*) *Bleecker* v. *Campbell* (1857), 4 C.L.J., O.S. 136.
(*c*) *Thompson* v. *Baskerville* (1879), 40 U.C.R. 614.
(*d*) R.S.O. (1897), c. 51.

Grounds of relief.

Courts of Equity have refused to grant relief in case of forfeiture for a breach of a covenant, other than for the payment of a sum of money, except upon the grounds of fraud, accident, surprise or mistake(*e*).

It has been held, for example, that the Court has no jurisdiction to grant relief in respect of a breach of a covenant not to assign or sub-let without leave(*f*).

The power of the high Court to relieve against a forfeiture for breach of a covenant to insure, is regulated by sections 30, 31 and 32 of the *Judicature Act*(*g*), which are as follows:—

Covenant to insure.

30. The High Court shall have power to relieve against a forfeiture for breach of a covenant or condition in any lease to insure against loss or damage by fire, where no loss or damage by fire has happened, and the breach has, in the opinion of the Court, been committed through accident or mistake, or otherwise without fraud or gross negligence, and there is an insurance on foot at the time of the application to the Court in conformity with the covenant to insure, upon such terms as to the Court may seem fit.

31. The Court, where relief is granted, shall direct a record of such relief having been granted to be made by indorsement on the lease or otherwise.

32. The two preceding sections shall be applicable in the case of leases for a term of years absolute, or determinable on a life, or lives, or otherwise, and also, in the case of a lease for the life of the lessee, or the life, or lives of any other person or persons.

Before this section was passed the Court would not relieve against a forfeiture for a breach of a covenant to insure(*h*).

Apart from statute, relief from forfeiture on non-payment of rent may be granted by courts of equity in a pro-

(*e*) *Gregory* v. *Wilson* (1852), 9 Hare 683; *Hill* v. *Barclay* (1811), 18 Ves. 56; 11 R.R. 147.

(*f*) *Hill* v. *Barclay* (1811), 18 Ves. 56; *Barrow* v. *Isaacs*, [1891] 1 Q.B. 417.

(*g*) R.S.O. (1897), c. 51.

(*h*) *Green* v. *Bridges* (1830), 4 Sim. 96.

per case, as the proviso for re-entry is considered by those courts simply as a security for the payment of rent(*i*).

Judicature Act.

In actions to re-enter for breach of a covenant in a lease, the Court will, since the Judicature Act, dispose of questions in their equitable, rather than their legal aspect, in all cases where, under the former practice, the Court of Chancery would have relieved against the forfeiture. Thus, where the plaintiff claimed to recover possession of certain lands leased by her to the defendant, on the ground of breach of the covenant for the payment of taxes, which breach the defendant afterwards remedied before the statement of claim was filed, it was held that the action could not succeed, as it was a case in which equity would relieve, the breach being no more than the omission of a mere money payment(*j*).

Application for relief.

It is provided by statute that the lessee may, in any action brought by the lessor to enforce a forfeiture for non-payment of rent, or in an action brought by himself, apply to the Court to be relieved from such forfeiture; and such relief may be granted on such terms as the Court thinks fit. This is enacted by sub-section 2 of section 13 of the *Landlord and Tenant's Act*(*k*), which is as follows:—

> **13.** (2) Where a lessor is proceeding by action or otherwise to enforce such a right of re-entry or forfeiture, the lessee may, in the lessor's action, if any, or in any action brought by himself, apply to the Court for relief; and the Court may grant or refuse relief, as the Court, having regard to the proceedings and conduct of the parties under the foregoing provisions of this section and to all the other circumstances, thinks fit; and in case of relief may grant it on such terms, if any, as to costs, expenses damages, compensation, penalty, or otherwise, including the granting of an injunction to restrain any like breach in the future, as the Court in the circumstances of each case.

(*i*) *Howard* v. *Fanshawe*, [1895] 2 Ch. 581.

(*j*) *Buckley* v. *Beigle* (1885), 8 Ont. 85.

(*k*) R.S.O. (1897), c. 170.

Stay of proceedings.

Where the tenant applies to the court for relief under this sub-section, in an action to enforce a forfeiture, the Court may in its discretion order a stay of proceedings on payment of costs as between solicitor and client, including costs incurred prior to the action, although these latter costs cannot be demanded before action under sub-section 1(*l*).

Sub-lessee not entitled.

It has been held that an under-lessee, whether of the whole or part of the premises, is not within the section, and is not entitled to relief as between him and the superior landlord, as the Act was not intended to create a privity of estate where none existed before(*m*).

An application for relief will not be granted in favour of an under-lessee in the absence of the lessee, who must be made a party to the proceedings(*n*).

In England, an amendment has been made to the Act extending the provisions for relief to an under-lessee(*o*).

Agreement for a lease.

It has been held that an agreement for a lease, of which specific performance would be decreed, is within the section(*p*), but not an agreement of which specific performance would not be decreed(*q*).

Relief may be given to a tenant in an action of ejectment brought against him, although he has not claimed it in his pleadings(*r*).

The lessee's right to relief from a forfeiture has been held to be a chose in action, which vests on his bankruptcy

(*l*) *Bridge* v. *Quick* (1892), 61 L.J.Q.B. 375.

(*m*) *Nind* v. *Nineteenth Century Building Society*, [1894] 2 Q.B. 226; *Burt* v. *Gray*, [1891] 2 Q.B. 98.

(*n*) *Hare* v. *Elms*, [1893] 1 Q.B. 604.

(*o*) 55 & 56 Vict. (Imp.), c. 13, s. 4.

(*p*) *Strong* v. *Stringer* (1889), 61 L.T. 470.

(*q*) *Coatsworth* v. *Johnson* (1886), 55 L.J.Q.B. 220; *Swain* v. *Ayres* (1888), 21 Q.B.D. 289; see chapter VI.

(*r*) *Mitchison* v. *Thomson* (1883), C. & E. 72.

in his trustee, and such trustee is entitled to sell and assign it to a purchaser(*s*).

Where a covenant accompanied by a right of re-entry on breach, is so expressed that its meaning is doubtful, and the tenant in good faith has done what he supposed to be a performance of it, a forfeiture will not be enforced; the difficulty in construing the covenant is a special circumstance entitling the defendant to relief(*t*).

The lessee's claim to relief will be entertained, not only where the proviso gives a right of re-entry, but even where it is stipulated that the lease shall be voided(*u*).

Where term has expired.

The Court will not make a declaration relieving against forfeiture of a lease for non-payment of rent, when the trial of the action for that relief takes place after the term has expired by effluxion of time, even though the lease gives an option of purchase to be exercised during the term, which the lessee had attempted to exercise after the forfeiture. A lessee is not entitled as of right to relief against forfeiture for non-payment of rent. That relief may be refused on collateral equitable grounds(*v*).

Answer to claim for relief.

To an action for relief against a re-entry made by a landlord for non-payment of rent, the defendant pleaded that she had been induced to grant the lease by reason of misrepresentations made by the plaintiff to the effect that he would improve and beautify the demised premises, which would enhance the value of other lands of the defendant, but that the plaintiff had not done as he represented he would, and that the defendant had been thereby damnified; it was held that the evidence tendered by the defendant to

(*s*) *Howard* v. *Fanshawe*, [1895] 2 Ch. 581.
(*t*) *McLaren* v. *Kerr* (1878), 39 U.C.R. 507.
(*u*) *Bowser* v. *Colby* (1841), 1 Hare 109.
(*v*) *Coventry* v. *McLean* (1894), 21 Ont. App. 176.

establish the truth of this defense was admissible in answer to the claim of the plaintiff for relief(*w*).

Judicial discretion.

The origin of the action for specific performance, and of the action for relief against re-entry for non-payment of rent, is in the equitable jurisdiction of the Court; the compelling performance in the one, and the granting relief in the other, is in the judicial discretion of the Court; and in each, the Court has regard to the conduct of the party seeking to compel such performance, or to obtain such relief(*x*).

Relief cannot be claimed by the lessee after the lessor has re-entered(*y*), unless the re-entry has taken place after proceedings have been commenced for relief(*z*).

Relief will not be given for a breach of a covenant not to assign or sub-let(*a*).

It is further provided by statute(*b*) that if the lessee in an action of ejectment for non-payment of rent, suffers judgment and execution without paying the rent and costs, and without proceeding for equitable relief within six months after execution executed, he and all those claiming under the lease will be barred from any relief, except by way of appeal from the judgment. In Ontario this is provided by section 22 of the Act, which is as follows:—

Bar of action for relief.

22. In case the lessee or his assignee, or other person claiming or deriving title under the lease, permits and suffers judgment to be had on such trial and execution to be executed thereon, without paying the rent and arrears together with full costs, and without proceeding for equitable relief within six months after execution

(*w*) *Coventry* v. *McLean* (1892), 22 Ont. 1.

(*x*) *Ibid.*

(*y*) *Quilter* v. *Mapleson* (1882), 9 Q.B.D. 672; *Rogers* v. *Rice*, [1892] 2 Ch. 170.

(*z*) *Lock* v. *Pearce*, [1893] 2 Ch. 271.

(*a*) *Barrow* v. *Isaacs*, [1891] 1 Q.B. 417.

(*b*) R.S.O. (1897), c. 170, s. 22; 15 & 16 Viet. (Imp.), c. 76, s. 210.

executed, then and in every such case the lessee and his assignee and all other persons claiming and deriving under the lease, shall be barred and foreclosed from all relief or remedy other than by proceedings by way of appeal from the judgment, and the landlord or lessor shall from thenceforth hold the demised premises discharged from the lease (*c*).

Where rent under a lease made pursuant to the Short Forms Act becoming in arrear the landlord served the statutory notice of forfeiture, and brought an action against the tenants, both for the recovery of the demised premises, and of the arrears of rent, and before the action came to trial, the defendants paid the arrears and costs, it was held that the bringing of the action was an election on the part of the landlord to forfeit the lease which could not be retracted by him; to enable him to get rid of the forfeiture there must have been a request on the part of the tenants, either express or implied, to be relieved from the forfeiture; and the mere payment, after the forfeiture, of rent which accrued due before, would not amount to such a request. The effect of such a payment depends upon the intention of the party paying; and the payment of the rent and costs in this case could not operate, by force of the statute (*d*), to permit the landlord to retract his forfeiture, without regard to the intention of the tenants, and without any request on their part to be relieved from the forfeiture. The statute is applicable simply to an action for the recovery of the demised premises; had the action been brought for that alone, an implication might have arisen from the payment of rent and costs that the tenant intended to seek to be relieved from the forfeiture; but not so where the action was also brought for the rent in arrear, more especially as the demised premises were vacant land, the tenants not being in actual possession. It was further held that the landlord

Effect of payment of arrears.

Request for relief.

(*c*) In Manitoba, see R.S.M. (1902), c. 93, s. 25.

(*d*) R.S.O. (1897), c. 170, ss. 20-25.

could not get rid of the forfeiture unless both tenants concurred in seeking relief from it(*e*).

If the landlord in the action of ejectment be not allowed his costs by the Court, the tenant is not bound to pay them in order to take advantage of this section(*f*).

The section, it will be observed, only excludes the right to relief after six months, and does not entitle the tenant to relief as a matter of right within that time.

If, in the meanwhile, the position of the parties is changed, an application for relief, if not promptly made, will not be granted. Thus, if the lessor has made arrangements to let the premises to other persons, the lessee may be disentitled(*g*).

But if there be no change in the relations of the parties, the discretion of the Court will, in general, be exercised to grant relief(*h*).

It is provided by section 23 of the *Landlord and Tenant's Act* as follows:

Mortgagee.

23. Nothing hereinbefore contained shall bar the right of any mortgagee of such lease or any part thereof who is not in possession, if the mortgagee, within six months after such judgment obtained and execution executed, pays all rent in arrear, and all costs and damages sustained by the lessor or person entitled to the remainder or reversion, and performs all covenants and agreements which on the part and behalf of the first lessee are to be, or ought to be performed (*i*).

It is provided by statute(*j*) that if the tenant at any time before the trial of an action of ejectment brought to

(*e*) *Denison* v. *Maitland* (1892), 22 Ont. 166.

(*f*) *Croft* v. *London and County Banking Co.* (1885), 14 Q.B.D. 347.

(*g*) *Stanhope* v. *Haworth* (1886), 3 Times L.R. 34.

(*h*) *Newbolt* v. *Bingham* (1895), 72 L.T. 852.

(*i*) In Manitoba, see R.S.M. (1902), c. 93, s. 26.

(*j*) R.S.O. (1897), c. 170, s. 25; 15 & 16 Vict. (Imp.), c. 76, s. 212.

enforce a forfeiture for non-payment of rent, pays or tenders the arrears of rent and costs, proceedings will be stayed, and the lessee, if he obtains relief, may hold the premises under his lease without any new lease. These provisions are made in Ontario by section 25 of the *Landlord and Tenant's Act*(*k*), which is as follows:—

Stay of proceedings.

25. If the tenant or his assignee at any time before the trial of the action pays or tenders to the lessor or landlord, or to his solicitor in the casue, or pays into the Court all the rent and arrears together with the costs, all further proceedings in the action shall cease; and if the lessee or his assigns, upon such proceeding as aforesaid, obtains equitable relief he and they shall have, hold and enjoy the demised lands according to the lease thereof made without any new lease (*l*).

It is further provided by section 24 as follows:—

Payment into Court.

24. In case the lessee, his assignee or other person claiming any right, title or interest of, in or to the lease, proceeds for equitable relief within the time aforesaid, such person shall not be entitled to a stay of the proceedings unless within forty days next after an application for a stay of the proceedings he brings into Court and lodges with the proper officer such sum of money as the lessor or landlord swears to be due and in arrear over and above all just allowances, and also the costs taxed in the said action, there to remain until the hearing of the application for equitable relief, or to be paid out to the lessor or landlord on good security, subject to the judgment or order of the Court; and in case such proceedings for equitable relief are taken within the time aforesaid, and after execution has been executed, the lessor or landlord shall be accountable only for so much as he really and *bonâ fide* without fraud, deceit or wilful neglect, has made of the demised premises from the time of his entering into the actual possession thereof, and if what he has so made is less than the rent reserved on the lease, then the lessee or assignee, before being restored to his possession, shall pay the lessor or landlord what the money so by him made fell short of the reserved rent for the time the lessor or landlord held the lands (*m*).

(*k*) R.S.O. (1897), c. 170.

(*l*) In Manitoba, see R.S.M. (1902), c. 93, s. 28.

(*m*) R.S.O. (1897), c. 170, s. 24; R.S.M. (1902), c. 93, s. 27.

SECTION VIII.

SURRENDER.

1. *Surrender and its Effect.*
2. *Express Surrender.*
3. *Surrender by Operation of Law.*

1. *Surrender and its Effect.*

Surrender and release.

A surrender is the act of yielding up an estate for life or for years to him who has the immediate estate in reversion or remainder. A surrender must be distinguished from a release: by a release, a greater estate descends upon a less; by a surrender, a less estate falls into a greater. A surrender in fact, or an express surrender, is one made by conveyance; a surrender in law is one implied or resulting by operation of law from the conduct of the parties.

Effect of surrender.

The effect of a surrender of a term is to extinguish the interest created by the lease, but it does not put an end to the liability for breaches of covenants that have been previously committed; nor does it operate to destroy the rights of third parties who have acquired interests under the lease before the surrender(*a*).

Sub-lessee.

Thus, where a tenant sub-lets part of the demised premises, and then surrenders his lease to his landlord, the sub-lessee cannot be dispossessed, except by determining his lease in the usual way(*b*), although the latter may have had due notice of the surrender(*c*), or the lease was at the time of surrender liable to forfeiture(*d*).

(*a*) *Williams* v. *Taperell* (1892), 8 Times L.R. 241.

(*b*) *Pleasant* v. *Benson* (1811), 14 East 234; 12 R.R. 507.

(*c*) *Mellor* v. *Watkins* (1874), L.R. 9 Q.B. 400.

(*d*) *Smith* v. *Great Western Railway Co.* (1877), 3 App. Cas. 165; *Spicer* v. *Martin* (1888), 14 App. Cas. 12.

Purchaser.

In like manner the rights of a purchaser or mortgagee of fixtures from the tenant are not affected by a surrender of the lease, although he has not complied with a covenant to remove them within a certain time(*e*).

But it has been held that the purchaser of growing crops under a bill of sale takes, upon a surrender, subject to the liability of such property to a distress for rent, which would have accrued had there been no surrender(*f*).

Liability of sub-lessee.

The liability of a sub-lessee for rent, and upon his covenants, was formerly at an end upon a surrender of the head lease, on the principle that the immediate reversion was extinguished(*g*).

But such liability is now preserved by section 10 of the *Landlord and Tenant's Act*(*h*), which is as follows:—

> **10.** Where the reversion expectant on a lease of land merges or is surrendered, the estate, which for the time being confers, as against the tenant under the same lease, the next vested right to the same land, shall, to the extent of and for preserving such incidents to and obligations on the same reversion as but for the surrender or merger thereof would have subsisted, be deemed the reversion expectant on the same lease (*i*).

And where a lease, under which interests by way of sub-lease have been created, is surrendered in order to be renewed, it is further provided that the rights and liabilities of the parties to the sub-lease shall continue, as if the original lease had been kept on foot(*j*).

(*e*) *Saint* v. *Pilley* (1875), L.R. 10 Ex. 137.

(*f*) *Clements* v. *Matthews* (1883), 11 Q.B.D. 808.

(*g*) *Webb* v. *Russell* (1789), 3 T.R. 393; 1 R.R. 725.

(*h*) R.S.O. (1897), c. 170, taken from 8 & 9 Vict. (Imp.), c. 106, s. 9; see *In re Britton* (1889), 61 L.T. 52.

(*i*) In New Brunswick, see C.S.N.B. (1904), c. 153, s. 2.

(*j*) 4 Geo. II., c. 28, s. 6; R.S.O. (1897), vol. III., c. 342, s. 25; see chapter XXII.

This is provided by section 25 of the *Act respecting Landlord and Tenant*(2)(*k*), which is as follows:—

25. In case any lease shall be duly surrendered in order to be renewed, and a new lease made and executed by the chief landlord, the same new lease shall, without a surrender of all or any of the under-leases, be as good and valid to all intents and purposes as if all the under-leases derived thereout had been likewise surrendered at or before the time of taking of such new lease; and every person in whom any estate for life, or lives, or for years, shall from time to time be vested by virtue of such new lease shall be entitled to the rents, covenants, and duties, and have like remedy for recovery thereof, and the under-lessees shall hold and enjoy the messuages, lands and tenements in the respective under-leases comprised as if the original leases out of which the respective under-leases are derived, had been still kept on foot and continued, and the chief landlord shall have, and be entitled to, such and the same remedy by distress, or entry, in and upon the messuages, lands, tenements and hereditaments, comprised in any such under-lease, for the rents and duties reserved by such new lease, so far as the same exceed not the rents and duties reserved in the lease out of which such under-lease was derived, as they would have had in case such former lease had been still continued, or as they would in case the respective under-leases had been renewed under such new principal lease, any law, custom, or usuage to the contrary hereof notwithstanding.

Rent.

No rent becomes due after the surrender of a lease(*l*), and when a lease has been surrendered, a distress for rent thereunder is illegal(*m*). But the lessor is entitled to sue after the surrender for rent which accrued before it took place(*n*).

In one case it was questioned whether a surrender, besides necessarily discharging all rents not yet due, may not also be pleaded equitably by way of accord and satisfaction of rents overdue(*o*).

(*k*) R.S.O. (1897), vol. III., c. 342; 4 Geo. II., c. 28, s. 6; R.S.B.C. (1897), c. 110, s. 16.

(*l*) *Southwell* v. *Scotter* (1880), 49 L.J.Q.B. 356.

(*m*) *Coffin* v. *Danard* (1865), 24 U.C.R. 267.

(*n*) *Atty.-General* v. *Cox* (1850), 3 H.L.C. 240.

(*o*) *Bradfield* v. *Hopkins* (1866), 16 U.C.C.P. 298.

2. *Express Surrender.*

In writing.

The surrender of a term must, under the Statute of Frauds, be in writing, signed by the party surrendering, or by operation of law(*p*).

It is enacted by the third section of the Statute of Frauds that an express surrender of a lease must be made by deed, or by a note in writing, signed by the party so surrendering or his agent lawfully authorized by writing(*q*).

This section as re-enacted in Ontario(*r*), is as follows:—

> 4. And moreover *no leases* estates or interests, either of freehold or terms of years, or any uncertain interest, of, in, to, or out of, any messuages, lands, tenements or hereditaments *shall be* assigned, granted or *surrendered*, unless it be by *deed*, or *note in writing*, signed by the party so assigning, granting or surrendering the same, or his agent thereunto lawfully authorized by writing, or by act and operation of law.

It is further provided by statute(*s*) that a surrender in writing of an estate must be made by deed, except in the case of an estate which can by law be created without writing, that is, a lease for a term not exceeding three years.

By deed.

In Ontario this provided by section 7 of the *Act respecting the Law and Transfer of Property*(*t*), which is as follows:—

> 7. A partition and an exchange of land, and a lease required by law to be in writing of land, and an assignment of a chattel interest in land, and *a surrender in writing* of land, not being an interest which might by law have been created without writing, shall be void at law, unless made by deed.

(*p*) *Doe d. Burr* v. *Denison* (1850), 8 U.C.R. 185.

(*q*) 29 Car. II., c. 29, s. 3.

(*r*) R.S.O. (1897), vol. III., c. 338, s. 4.

(*s*) 8 & 9 Vict. (Imp.), c. 106, s. 3.

(*t*) R.S.O. (1897), c. 119; this is taken from the Imperial Act just cited.

A surrender may be made or accepted only by a person who is capable of making or taking a lease(*u*).

Assignee. An assignee may surrender the term assigned in the same way as a lessee(*v*). But an assignee can only surrender if he is for the time being entitled to the term(*w*).

Possession. A lessee cannot make an express surrender unless he is in possession. Hence, a lessee cannot surrender before entry, but if he has entered, and so severed the possession from the reversion, his assignee can surrender, although he has not entered, as the possession is transferred to him by the assignment(*x*).

A surrender is ineffectual if the lessee reserves to himself any part of his interest(*y*).

A surrender must be made to the owner of the immediate reversion, although he is only a lessee for a shorter term than the lease to be surrendered(*z*).

Sub-lessee. A sub-lease cannot surrender to the original lessor, as there is no privity of estate between them; but he may join with the lessee in surrendering, or he may surrender to the lessor after the lessee has surrendered(*a*).

Agreement to surrender An agreement to surrender, like an agreement for a lease, will be valid, although not made by deed, if it is capable of specific performance(*b*).

An agreement by the tenant to purchase the demised lands does not operate as a surrender, if it be not carried out, as for example, if a good title cannot be made out(*c*).

(*u*) Shep. Touch. 303; see chapter IX.
(*v*) *Baynton* v. *Morgan* (1888), 22 Q.B.D. 74.
(*w*) *Seaward* v. *Drew* (1898), 67 L.J.Q.B. 322.
(*x*) Bac. Abr. Leases, s. 2.
(*y*) *Burton* v. *Barclay* (1831), 7 Bing. 745.
(*z*) *Southwell* v. *Scotter* (1880), 49 L.J.Q.B. 356.
(*a*) Bac. Ab. Leases, s. 2.
(*b*) *Ex parte Vitale* (1882), 47 L.T. 480; see *Walsh* v. *Lonsdale* (1882), 21 Ch. D. 9; chapter VI.
(*c*) *Tarte* v. *Darby* (1846), 15 M. & W. 601.

An express surrender may be made of part of the demised premises(*d*).

Cancellation of lease.

A cancellation of the lease by mutual consent is not of itself sufficient to constitute an express surrender, and affords no presumption of a note in writing within the statute(*e*).

Grant of new lease that is void.

The mere cancelling of a lease is not a surrender; nor is a surrender effected by the fact that the lessor, in consideration of the surrender of the old lease, has purported to grant a new lease which is void as being *ultra vires*(*f*). The cancelling in fact of a lease is not a surrender of the term thereby granted within the Statute of Frauds, which requires such surrender to be by deed or note in writing, or by act or operation of law. Nor is a recital in a second lease, that it was granted in part consideration of the surrender of a prior lease of the same premises, a surrender by deed or note in writing of such prior lease, it not purporting in the terms of it to be of itself a surrender or yielding up of the interest; though in some instances the acceptance of a second lease for part of the same term before demised may be a surrender of such prior term by operation of law; and this even though the second lease be voidable, if it be not merely void. But where a tenant for life with a special power of leasing, reserving the best rent in consideration (as recited) of the surrender of a prior term of ninety-nine years (of which above fifty were expired), and certain charges to be incurred by the tenants for repairs and improvements, etc., granted to him a new lease of the premises for ninety-nine years by virtue of the power reserved to her or any other power vested in, or in anywise belonging to her, which new lease was

(*d*) *Holme* v. *Brunskill* (1877), 3 Q.B.D. 495.

(*e*) *Doe* v. *Thomas* (1829), 9 B. & C. 288; 32 R.R. 680.

(*f*) *Roe d. Earl of Berkeley* v. *The Archbishop of York* (1805), 6 East 86; 8 R.R. 413.

void by the power for want of reserving the best rent, it was held that the second lease, which was intended and expressly declared to be granted by virtue of and under the power, and being apparently not intended by the parties to be carved out of the estate for life of the lessor, being void under the power, should not operate in law as a surrender of the prior term, as passing an interest out of the life estate of the grantor, contrary to the manifest intent of the parties; and, consequently that the prior term, though the indenture of lease were in fact cancelled and delivered up when the new lease was granted, might be set up by the tenant of the premises in bar to an ejectment by the remainder-man after the death of tenant for life, however such second lease might have operated by way of estoppel as against the lessor during her life(*g*).

The giving up and cancelling the lease by the tenant, though not of itself a surrender of the term, is yet a strong circumstance to be considered(*h*).

Reference to arbitration.

The lessor and lessee "agreed to separate and cancel all arrangements heretofore made, and leave all controversies between them to two arbitrators and should they not agree, to choose an umpire, whose decision should be final." The four signed the bond, but it had only two seals, which all four touched. The two arbitrators not agreeing appointed an umpire, who awarded that defendant should release and give up to plaintiff "the term of years, as agreed to in the submission, and also deliver up the stock of farming utensils in proper order, and without further delay, and that the lease then held by both parties of said farm be immediately cancelled." It was held that the bond was not in itself a surrender of the term; that even if so intended by the parties, the term would not be surrendered, for the bond

(*g*) *Ibid.*

(*h*) *Doe d. Burr* v. *Denison* (1850), 8 U.C.R. 185.

could not be held to be such a deed as is required by the statute; that the award would not amount to a deed of surrender by the defendant; and therefore that the plaintiff could not eject the defendant(*i*).

Ratification.

Where a tenant of a farm absconded, and his wife surrendered the lease and took a new lease of the dwelling house on the farm, and the tenant afterwards returned, and resided with his wife and paid rent for the dwelling house, although he notified the landlord that he refused to recognize the surrender, it was held that, assuming that the wife had no authority to make a surrender, payment of rent by the husband under the new tenancy operated as a ratification of it(*j*).

Where a parol agreement has been made to surrender at a future date, and the landlord has in the meantime altered his position on the faith of it, as by selling the lands to a third party with the right of possession, it has been held, on the principle of estoppel, that the tenant cannot dispute his agreement, which consequently operates as a surrender(*k*).

But where a tenant entered into an agreement to surrender his term for a particular purpose which was not carried out, it has been held that such agreement did not operate as a surrender(*l*).

Where a lease is expressly surrendered in consideration of a new lease being granted, which new lease is voidable and is afterwards avoided, the old lease is not thereby revived(*m*).

Pleading.

The mere allegation in a plea "of surrender of a term of years to the defendant by the plaintiff," obliges the de-

(*i*) *O'Dougherty* v. *Fretwell* (1853), 11 U.C.R. 65.
(*j*) *Ramsay* v. *Stafford* (1878), 28 U.C.C.P. 229.
(*k*) *Fenner* v. *Blake*, [1900] 1 Q.B. 426.
(*l*) *Coupland* v. *Maynard* (1810), 12 East 134.
(*m*) *Doe* v. *Bridges* (1831), 1 B. & Ad. 847; 35 R.R. 483.

fendant to prove an express surrender; a surrender by operation of law must be so pleaded(*n*).

In order to put an end to a sealed contract for a tenancy, and to discharge one of two tenants from his obligation to pay past or future rent thereunder, there must be something more than an agreement between the tenants, though made in the presence of the landlord, that one of them is to pay the amounts overdue and accruing; there must be a consideration and an agreement to discharge(*o*).

In the Northwest Territories, it is provided by section 75 of the *Territories Real Property Act*(*p*), as follows:

North-West Territories.

75. Whenever any lease or demise which is required to be registered by this Act is intended to be surrendered, and the surrender thereof is effected otherwise than through the operation of a surrender of law, there shall be indorsed upon such lease or counterpart thereof the word "surrendered" with the date of such surrender, and such indorsement shall be signed by the lessee, and the lessor as evidence of the acceptance thereof, and shall be attested by a witness; and the registrar shall thereupon enter in the register a memorial recording the date of such surrender, and shall likewise indorse upon the lease a memorandum recording the fact of such entry having been so made in the register; and upon such entry having been so made, the estate or interest of the lessee in such land shall vest in the lessor or in the person in whom, having regard to intervening circumstances, if any, the said land would have vested if no such lease had ever been executed; and production of such lease or counterpart bearing such indorsed memorandum shall be sufficient evidence that such lease has been so surrendered: Provided, that no lease subject to mortgage or encumbrance shall be surrendered without the consent of the mortgagee or encumbrancee.

In an action of covenant by a landlord against a tenant, it is a bad plea to plead a surrender by a third party (whose legal estate is not shewn to have been derived from the plaintiff) to the Queen, and that therefore the land at

(*n*) *McNeil* v. *Train* (1848), 5 U.C.R. 91.

(*o*) *Donaldson* v. *Wherry* (1898), 29 Ont. 552.

(*p*) R.S.C. (1886), c. 51.

the expiration of the lease did not belong to the plaintiff(*q*).

Where the owner of land with a saw mill thereon leased the mill, with a right to cut timber during the term, and the lessee assigned the lease, and the assignee afterwards surrendered it to the proprietor of the freehold, it was held that the right to cut timber was only commensurate with the lease itself, and the lease having been surrendered, the right of cutting timber was at an end, except for the use of the mill(*r*).

3. *Surrender by Operation of Law.*

A surrender of a lease by operation of law is effected, (1) where the tenant accepts from the landlord a new lease or interest; or (2) where possession is delivered up to and accepted by the landlord.

The doctrine of surrender by act and operation of law applies as well to a term created by deed as to one created by parol(*s*).

Acceptance of new lease.

The acceptance by the tenant of a new lease of the same premises operates in law, on the principle of estoppel, as a surrender of the old lease(*t*).

But where, after a lease was made, the tenant entered into an agreement to purchase the lands which fell through, it was held that there had been no surrender of the term, and that the landlord might distrain for rent under the lease(*u*).

In order to affect a surrender, the new lease must be

(*q*) *Russell* v. *Graham* (1849), 6 U.C.R. 497.
(*r*) *Stegman* v. *Fraser* (1858), 6 Gr. 628.
(*s*) *Gault* v. *Shepard* (1888), 14 Ont. App. 203.
(*t*) *Lyon* v. *Reed* (1844), 13 M. & W. 285.
(*u*) *Grant* v. *Lynch* (1856), 14 U.C.R. 148.

capable of passing an interest according to the contract of the parties(*v*).

The increase or reduction of rent does not operate as a surrender of the term, or to create a new tenancy(*w*).

The relinquishment of part of the demised premises, and the acceptance by the landlord of a diminished rent, is evidence, but not conclusive evidence, of the creation of a new tenancy, and consequently of a surrender by operation of law of the old one(*x*).

Estoppel. Where a lessor with the assent of the lessee granted a lease of part of the premises to a third person, it was held that the lessee was estopped from saying that the lessor had no right to grant such lease and that what took place amounted to a surrender of the part so leased(*y*).

But where a parol agreement was made by the landlord for valuable consideration not to disturb the possession of a yearly tenant for a specified time, it was held that such agreement was not enforceable by reason of the Statute of Frauds, and as there was no new demise, there was no surrender of the existing tenancy(*z*).

A tenant in fee may surrender his estate back to the Crown by operation of law, as by accepting a new grant for the same land, or he may surrender by matter of record; but a surrender not of record, or a surrender by record founded on an invalid title, is insufficient(*a*).

Mortgagee. As between landlord and tenant, a demise under seal operates as a surrender of a prior lease not under seal; but a mortgagee whose mortgage was made after the first, but

(*v*) *Doe* v. *Poole* (1848), 11 Q.B. 713.

(*w*) *Pronquey* v. *Gurney* (1876), 37 U.C.R. 347.

(*x*) *Jones* v. *Bridgman* (1878), 39 L.T. 500; *Holme* v. *Brunskill* (1877), 3 Q.B.D. 495.

(*y*) *Crocker* v. *Sowden* (1872), 33 U.C.R. 397.

(*z*) *Sidebotham* v. *Holland*, [1895] 1 Q.B. 378.

(*a*) *Doe d. McDonell* v. *McDougall* (1835), 3 O.S. 177.

before the second lease, cannot take advantage of such a surrender, not being a party to it. In such a case the mortgagee takes subject to the rights of the tenant under the first lease(*b*).

Where a landlord and tenant agree to a parol variation of the terms of an existing tenancy, as by conferring upon the tenant the right to leave the premises at a date earlier than he would otherwise have done, a surrender of the existing tenancy takes place by operation of law upon the acceptance by the tenant of the new tenancy so created. If the landlord, relying on the new agreement, sells the premises with the right of possession on the date on which the tenant agreed to give them up, the tenant is estopped from saying that his tenancy is not then terminated(*c*).

New lease must be valid.

Where a term has been surrendered by operation of law, by the granting to the lessee of a new lease by the landlord, the lessee is entitled to retain the old lease. Such a surrender differs from an actual surrender by deed, in that it is subject to an implied condition that the new lease is valid, and if this is not so, the old lease remains in force(*d*).

If the tenant delivers up possession to the landlord, and the latter accepts possession from the tenant, it operates as a surrender of the lease(*e*).

In like manner, a surrender may be effected by the grant of a lease to a new tenant with the consent of the former tenant and his giving up possession(*f*).

Delivery and acceptance of possession.

A surrender founded on an express agreement must be in writing to satisfy the Statute of Frauds; but the accept-

(*b*) *Caverhill* v. *Orvis* (1862), 12 U.C.C.P. 392.

(*c*) *Fenner* v. *Blake*, [1900] 1 Q.B. 426; 82 L.T. 149; 48 W.R. 392.

(*d*) *Knight* v. *Williams*, [1901] 1 Ch. 256.

(*e*) *Easton* v. *Penny* (1892), 67 L.T. 290.

(*f*) *Davison* v. *Gent* (1857), 1 H. & N. 744; *Wallis* v. *Hands*, [1893] 2 Ch. 75.

ance of possession takes the case out of the statute, and is analogous to part performance in the case of a parol agreement for a lease(*g*).

A surrender of a lease by operation of law will be effected by an agreement followed by unequivocal acts of giving up possession by the tenant and taking possession by the landlord, or by a new tenant with the concurrence of both(*h*).

Thus, where a tenant held premises under a memorandum of agreement, for three years, and left the premises in the first year, and on application being then made by the landlord for rent due, the tenant by letter, authorized him to let the premises to any one else, and the landlord let them to another tenant for three years, and gave him possession, it was held in an action of debt on the original agreement, that these facts constituted a surrender by operation of law(*i*).

A surrender of a lease is effected, if possession be delivered up to and accepted by the landlord, whether in pursuance of an agreement to surrender or not. Mere relinquishment of possession by the tenant, however, is not sufficient, if the landlord do not accept possession, even if there has been a parol agreement to determine the tenancy(*j*).

What acts sufficient evidence of acceptance.

A surrender in law may be effected by unequivocal acts of the parties alone. Thus, where a landlord sold part of the demised lands with the assent of the tenant, and the purchaser entered and erected buildings and employed the tenant to plow the lands so sold, it was held that these acts operated as a surrender in law(*k*).

(*g*) See chapter VI.

(*h*) *Nickells* v. *Atherstone* (1847), 10 Q.B. 944.

(*i*) *Ibid.*

(*j*) *Mollett* v. *Brayne* (1809), 2 Camp. 103; 11 R.R. 676.

(*k*) *Horton* v. *Macconnichy* (1859), 9 U.C.C.P. 186.

The question whether possession has been accepted is one of fact, and acts of ownership exercised by the landlord after the tenant has quitted the premises, are evidence from which it may be inferred(*l*).

Acts relied on as shewing the acceptance by the landlord of the surrender of a lease and as effecting a surrender by operation of law must be such as are not consistent with the continuance of the term; and using the key left by the tenants at the landlord's office, putting up a notice that the premises are "to let," making some trifling repairs, and cleaning the premises, are ambiguous acts, which are not sufficient for this purpose(*m*).

Repairs.

It has been held that merely entering to do repairs, to put in a caretaker, or other occupation of the premises, not for purposes of profit, is not sufficient evidence of acceptance(*n*).

Re-letting.

If the landlord re-lets the premises, and a new tenant enters into possession, it will amount to an acceptance of possession, unless he notifies the tenant that he has re-let on his account(*o*).

But attempts to get a new tenant, as by putting up an advertisement in the window, will not of itself amount to an acceptance(*p*).

Acceptance of key.

The acceptance by the landlord of the key of the premises is not conclusive evidence of his acceptance of possession, unless it is done with the intention that the tenancy should be determined(*q*); and if a surrender sub-

(*l*) *Reeve* v. *Bird* (1834), 1 C.M. & R. 31.

(*m*) *Ontario Industrial Loan and Investment Co.* v. *O'Dea* (1895), 22 Ont. App. 349.

(*n*) *Bessell* v. *Landsberg* (1845), 7 Q.B. 638; *Oastler* v. *Henderson* (1877), 2 Q.B.D. 575.

(*o*) *Doe* v. *Johnston* (1825), McCl. & Y. 141; *Walls* v. *Atcheson* (1826), 3 Bing. 462; 28 R.R. 657.

(*p*) *Smith* v. *Blackmore* (1885), 1 Times L.R. 267.

(*q*) *Whitehead* v. *Clifford* (1814), 5 Taunt. 518; 15 R.R. 579.

sequently takes place, as by re-letting the premises, the surrender will not relate back to the time of delivering the key(*r*).

Abandonment of possession by the tenant does not amount to a surrender unless the landlord accepts it(*s*). If the tenant has left the country and abandoned the premises, acceptance of the key will not effect a surrender, as no other course is open to the landlord(*t*).

It has been held that neither the giving up the key of demised premises nor the abandoning possession amounts in itself to a surrender in law; but where the owner takes possession of abandoned premises and uses them as his own absolute property, it amounts to a complete surrender in law, or is evidence of it, just as would the sale of the premises by the owner, or his grant of a lease thereof to a third person(*u*).

A tenant from year to year, at a rent payable quarterly under the terms of a written agreement, having ceased to occupy the premises held by him in the middle of a quarter, tendered the key to his landlord: this the landlord refused to accept; but the tenant having left it behind him, the landlord in the course of the ensuing quarter made use of it to obtain access to the premises and he also placed up a board on the premises stating that they were to let. In the following quarter he painted out the defendant's name, which was over the door of the premises and cleaned and repaired them. It was held in an action brought by the landlord to recover the rent for the last two quarters, that he was not entitled to maintain such an action, for that there had been a surrender to the premises by operation of

(*r*) *Oastler* v. *Henderson* (1877), 2 Q.B.D. 575.
(*s*) *Elmsworth* v. *Brice* (1860), 18 U.C.R. 441.
(*t*) *In re Panther Lead Co.*, [1895] 1 Ch. 978.
(*u*) *Carpenter* v. *Hall* (1866), 16 U.C.C.P. 90.

law, by agreement between the parties, followed by a taking possession on the part of the landlord(*v*).

Where a lessee gave up a copy of the lease to the lessor who said he was willing to take the premises off his hands, and stood by without objection while a new lessee was erecting buildings on the property, it was held that there had been a surrender by operation of law, although the lessor agreed to give the original lessee a lease of another property which was never carried out(*w*).

Invalid notice to quit.

An invalid notice to quit given by a tenant cannot operate as a surrender, although it be accepted by the landlord(*x*). But if such a notice be acted upon, and the tenant relinquishes possession and the landlord accepts possession, it will operate as a valid surrender by operation of law(*y*).

Where a tenant gave a note in payment of arrears of rent, and let a third person into possession of the premises, who made certain payments to the landlord on account of rent, taking receipts as for premises leased to the original tenant, it was held that there had been no surrender of the term by operation of law(*z*).

A conveyance in fee from a lessor to his lessee during the term, though made to defraud creditors, is as between the lessor and lessee a surrender of the term, and entitles the purchaser at sheriff's sale of the lessor's estate in the land to immediate possession(*a*).

Where a tenant, with the knowledge and consent of his landlord takes a lease from another person, to whom the

(*v*) *Phene* v. *Popplewell* (1862), 12 C.B.N.S. 334.
(*w*) *Acheson* v. *McMurray* (1880), 41 U.C.R. 484.
(*x*) *Doe* v. *Milward* (1838), 3 M. & W. 328.
(*y*) *Ibid.*
(*z*) *McLeod* v. *Darch* (1857), 7 U.C.C.P. 35.
(*a*) *Doe d. McPherson* v. *Hunter* (1847), 4 U.C.R. 449.

landlord has transferred the reversion, this amounts to a surrender in law, and the right to distrain is gone(*b*).

A demise by the lessor to a third person who enters into possession under it operates as a surrender of a prior lease so as to prevent the lessor from distraining under it(*c*).

Dissolution of partnership.

A dissolution of partnership between two lessees does not operate as a surrender of the lease, so as to preclude the lessor from enforcing payment of rent against both of them, although a new partnership has been formed, and the lessor has accepted rent from the new firm(*d*).

In Ontario, it is provided by statute that if a tenant, who claims exemption from distress, gives up possession to the landlord in pursuance of his notice demanding possession, it shall be a determination of the tenancy(*e*).

British Columbia.

In British Columbia, where a tenant made an assignment for the benefit of creditors, and the third day thereafter, the landlord asked for and received the keys and took possession of the premises, it was held that the landlord was not entitled to a preference for rent accruing after the assignment, as there had been a surrender by operation of law(*f*).

In British Columbia, it is provided by sections 79 and 80 of the *Torrens Registry Act*(*g*), as follows:

Assignment for benefit of creditors.

79. Upon any assignment being made by any lessee for the benefit of his creditors, the land registrar, unless the land be subject to a mortgage or incumbrance under the provisions of this Act, shall upon the application in writing of the lessor accompanied by a statement in writing signed by the assignee or trustee under such

(*b*) *Lewis* v. *Brooks* (1850), 8 U.C.R. 576.

(*c*) *Strathy* v. *Crooks* (1838), 6 O.S. 587.

(*d*) *Gault* v. *Shepard* (1888), 14 Ont. App. 203; but see *Regina, ex rel. Adamson* v. *Boyd* (1870), 4 P.R. 204.

(*e*) R.S.O. (1897), c. 170, s. 32, s.-s. 5.

(*f*) *Gold* v. *Ross* (1903), 10 B.C.R. 80; *Phene* v. *Popplewell* (1862), 12 C.B.N.S. 334, applied.

(*g*) Stat. of B.C. (1899), c. 62.

assignment, certifying his refusal to accept such lease, or shall upon the order of the Court on the application of the lessor, enter in the register a note of such refusal or order, and such entry shall operate as a surrender of such lease.

Mortgagee.

80. Upon any assignment for the benefit of his creditors being made by any lessee of any land registered, where the land is subject to mortgage or incumbrance, the land registrar shall upon the application in writing of the mortgagee or incumbrancee, accompanied by a statement in writing signed by the assignee or trustee of such lessee, certifying his refusal to accept such lease enter in the register book a note of such application and refusal, and such entry shall vest the interest of the lessee in such lease in such mortgagee or incumbrancee, and if such mortgagee or incumbrancee shall neglect or decline to make such application as aforesaid, the land registrar upon application by the lessor, and proof of such neglect or refusal and of the matters aforesaid, shall enter in the register book notice of such neglect or refusal of such assignee to accept such lease, and such entry shall operate as a surrender of such lease.

SECTION IX.

MERGER.

Merger and surrender.

As between landlord and tenant a merger takes place when the tenant acquires the immediate reversion; it is, so to speak, the converse of surrender whereby the landlord acquires the term

In order that merger shall take place it is necessary that the two estates should come to one and the same person, in one and the same right. Thus, where a tenant for years makes the reversioner his executor and dies, or where he has a term of years, and acquires the reversion in his right of administrator to another person, no merger takes place(*a*).

It is necessary, also, that there be no intermediate estate, otherwise a merger will not take place(*b*). Thus, where a

(*a*) *Chambers* v. *Kingham* (1878), 10 Ch. D. 743.

(*b*) 2 Black. Com. 177.

lessee sub-let for his whole term except a few days, and then conveyed to his lessor all his interest for the term granted by the sub-lease, it was held that no merger had taken place(*c*).

Two estates.

In order for a merger to take place there must be a union of two estates, and not merely an estate and an interest. Thus, there would be no merger in the case of a lease to commence *in futuro,* as the lessee would not have an estate but only an interest in the term(*d*).

The owner of land on the 1st of October, 1852, granted it to one S., to hold "to the said S., and the heirs of his body for twenty-one years, or for the term of his natural life from the 1st of April, 1853, fully to be complete and ended," but not to underlet to any person except to the family of the said S., for any period during the said term. A yearly rent was reserved, which S. covenanted to pay, and it was provided that on the failure to perform the covenants, the lease and the term thereby granted should cease and be void. It was held that by the lease S. took a life estate in which the term merged(*e*).

A tenant for a term of years, who purchases the reversion in fee, may prevent a merger by taking a conveyance to a trustee for himself(*f*).

It has been provided by sub-section 3 of section 58 of the *Judicature Act*(*g*), as follows:

58. (3) There shall not be any merger by operation of law only of any estate, the beneficial interest in which would not prior to The Ontario Judicature Act have been deemed merged or extinguished in equity.

(*c*) *Burton* v. *Barclay* (1831), 7 Bing. 745.

(*d*) See chapter IV.

(*e*) *Dalye* v. *Robertson* (1860), 19 U.C.R. 411.

(*f*) *Belaney* v. *Belaney* (1867), L.R. 2 Ch. 138.

(*g*) R.S.O. (1897), c. 51.

The effect of this provision is that where there would not be a merger both at law and in equity, a merger will not take place(*h*).

In determining whether there would be a merger in equity the intention of the parties must be first looked at(*i*), and if that be not expressed, then the benefit of the person in whom the estates become united, must be considered. Thus, where a tenant for life in remainder of settled property takes a beneficial lease of a portion thereof, and subsequently becomes tenant for life in possession, there will be no merger(*j*). Intention.

The law formerly was, as in the case of a surrender, that where a lessee, who had sub-let, assigned his reversion to a person who afterwards acquired the fee, in which the reversion on the sub-lease became merged, the sub-lessee's liability on his covenants ceased, by reason of the destruction of the immediate reversion(*k*). Liability of sub-lessee.

The law, however, in this respect has been changed by section 10 of the *Landlord and Tenant's Act*(*l*), which is as follows:

> 10. Where the reversion expectant on a lease of land merges or is surrendered the estate, which for the time being confers, as against the tenant under the same lease, the next vested right to the same land, shall, to the extent of and for preserving such incidents to and obligations on the same reversion as but for the surrender or merger thereof would have subsisted be deemed the reversion expectant on the same lease.

Although a lease may be merged at law, restrictive covenants by the lessee contained in it may nevertheless, as Restrictive covenants.

(*h*) *Snow* v. *Boycott*, [1892] 3 Ch. 110.

(*i*) *Thellusson* v. *Liddard*, [1900] 2 Ch. 635.

(*j*) *Ingle* v. *Vaughan-Jenkins*, [1900] 2 Ch. 368.

(*k*) *Webb* v. *Russell* (1789), 3 T.R. 393.

(*l*) R.S.O. (1897), c. 170, taken from 8 & 9 Vict. (Imp.), c. 106, s. 9. In New Brunswick, see C.S.N.B. (1904), c. 153, s. 2; see also *Craig* v. *Greer*, [1899] 1 I.R. 258; *Laur* v. *White* (1868), 18 U.C.C.P. 99; *Cameron* v. *Todd* (1863), 22 U.C.R. 390.

against him, be kept alive, where they have been entered into with his knowledge for the benefit of an adjoining owner(*m*).

It is provided by section 8 of the *Act respecting Mortgages of Real Estate*(*n*), as follows:

> **8.** Any mortgagee of freehold or leasehold property, or any assignee of such mortgagee, may take and receive from the mortgagor or his assignee a release of the equity of redemption in such property, or may purchase the same under any judgment or decree or execution without thereby merging the mortgage debt as against any subsequent mortgagee or person having a charge on the same property.

SECTION X.

DISCLAIMER.

A disclaimer is committed by a tenant if he does any act which amounts to a direct repudiation of the relationship of landlord and tenant. Thus, if the tenant claim title in himself, or makes an attornment to a third person it is a disclaimer(*a*).

A mere refusal to pay rent, or a refusal to pay "until I know who is the right owner," has been held to be a disclaimer(*b*).

Waiver.

The effect of a disclaimer is to put an end to the tenancy if the landlord so elects. Hence, subsequent conduct on his part which amounts to a recognition of the continuance of the tenancy, as for example, a distress for rent, operates as a waiver, and prevents him from taking advantage of the disclaimer(*c*).

(*m*) *Birmingham Joint Stock Co.* v. *Lea* (1877), 36 L.T. 843; see also *Dynevor (Lord)* v. *Tennant* (1888), 13 App. Cas. 279.

(*n*) R.S.O. (1897), c. 121.

(*a*) *Doe* v. *Evans* (1841), 9 M. & W. 48.

(*b*) *Jones* v. *Mills* (1861), 10 C.B.N.S. 788.

(*c*) *Doe* v. *Williams* (1835), 7 C. & P. 322.

A disclaimer by a yearly tenant in order to take effect need not be in writing(*d*), but a disclaimer by a tenant for a term of years is ineffectual unless made in writing(*e*). In writing.

A tenant from year to year, who denies the right of the person entitled as successor to the landlord, may be treated as a trespasser; and no notice to quit from the person so entitled is necessary(*f*). Thus, where a lessee who held under a tenant for life, received, on her death, a letter from the successor in title claiming as heir, and demanding rent, and the lessee claimed that he held the premises as lessee from the tenant for life; that he had never considered her successor as his landlord; that he should be ready to pay the rent to any one who should be proved to be entitled to it, but that without disputing the claimant's pedigree, he must decline taking upon himself to decide upon his claim, without more satisfactory proof, in a legal manner, it was held that this was a disclaimer of the owner's title, which put an end to the tenancy(*g*).

A disclaimer by a tenant of his landlord's title, at once puts an end to an existing tenancy, and ejectment may be at once maintained without a notice to quit(*h*). Notice to quit.

Where the defendant, who went into possession under the lessor of the plaintiff, afterwards refused to acknowledge his right, it was held that he was entitled neither to notice to quit nor to a demand of possession(*i*).

Where a tenant leased from the plaintiff part of the property, and being in possession gave it up for $60 to the

(*d*) *Doe* v. *Long* (1841), 9 C. & P. 773.

(*e*) *Doe* v. *Wells* (1839), 10 A. & E. 427.

(*f*) *Doe d. Calvert* v. *Frowd* (1828), 4 Bing. 557; 29 R.R. 624.

(*g*) *Ibid.*; see also *Magee* v. *Gilmour* (1889), 17 Ont. 620; *Cartwright* v. *McPherson* (1861), 20 U.C.R. 251.

(*h*) *Doe d. Claus* v. *Stewart* (1844), 1 U.C.R. 512; *Doe d. Nugent* v. *Hessell* (1845), 2 U.C.R. 194.

(*i*) *Doe d. Bouter* v. *Frazer* (1836), 4 O.S. 80.

defendant, who claimed that it was her own, it was held that this was clearly a fraud upon the plaintiff as landlord, by which the lease was forfeited, and that the defendant could not set up the tenant's right under it(*j*).

The assertion of title by a tenant before, coupled with a refusal to pay rent after, action brought, is sufficient evidence of a disclaimer to obviate the necessity of proof of a notice to quit, especially where the tenant attempts to rely on such title at the trial(*k*).

A term is not forfeited by the tenant taking a title from a stranger, but only by his acknowledging by record that the fee is other than in his landlord(*l*).

Where a tenant takes a lease from a stranger, and undertakes to pay him rent, his original landlord need not serve him with a notice to quit, or demand possession, before ejectment(*m*).

Where possession is demanded from defendant in ejectment, and he, instead of claiming to be a tenant, asserts his rights to the fee, he has no claim to a notice to quit as a tenant(*n*).

A tenant endeavouring to defend his possession by a title adverse to the lessor of the plaintiff, is not entitled to a notice to quit(*o*).

(*j*) *Kyle* v. *Stocks* (1870), 31 U.C.R. 47.
(*k*) *Doe d. Cuthbertson* v. *Sager* (1838), 6 O.S. 134.
(*l*) *Doe d. Daniels* v. *Weese* (1848), 5 U.C.R. 589.
(*m*) *Doe d. Daniels* v. *Weese* (1848), 5 U.C.R. 589.
(*n*) *Doe d. McKenzie* v. *Fairman* (1850), 7 U.C.R. 411.
(*o*) *Doe d. Graham* v. *Edmondson* (1844), 1 U.C.R. 265.

CHAPTER XXVII.

RIGHTS OF THE TENANT.

SECTION I.—FIXTURES.
SECTION II.—EMBLEMENTS.

SECTION I.

FIXTURES.

Fixtures are either chattels which were originally movable, but which, having been attached to the land, have ceased to be movable and have become part of the freehold; or things originally part of the freehold, such as trees, and growing crops, which may become movable by severance. Anything imbedded in the soil, or attached to any permanent building or erection by cement, bolts, nails, or other fastenings, so as not to be movable without the exercise of force is, in general, a fixture(*a*). Fixtures.

When an article is attached to the land merely by its own weight it is, in general, deemed to be a chattel; but such an article may be deemed to be an irremovable fixture, if it appears from the degree and object of the annexation, that such was the intention of the parties(*b*). The question is not, whether it is easily removable, but whether it is essentially a part of the building or freehold from which it is proposed to remove it(*c*).

It is further necessary to determine whether the article has been affixed for a permanent, or merely a temporary purpose. Thus, things which are affixed to a building for

(*a*) *Ex parte Moore* (1880), 14 Ch. D. 379.
(*b*) *Holland* v. *Hodgson* (1872), L.R. 7 C.P. 328.
(*c*) *D'Eyncourt* v. *Gregory* (1866), 3 Eq. 382.

its permanent improvement are irremovable, such as doors, and windows(*d*).

Right of tenant to erect.

The right of a tenant to erect fixtures whether removable or not exists to this extent only, namely: they shall not be such as to diminish the value of the demised premises, nor to increase the burden upon them as against the landlord, nor to impair the evidence of title(*e*).

The principles upon which some fixtures may, and others may not, be distrained for rent in arrear have already been discussed(*f*).

Right to remove.

The question to be discussed now is what fixtures a tenant is entitled to remove and take away with him at the end of his term. In the absence of an express agreement, the general rule of law is that whatever is annexed to the freehold becomes part of it, and subject to the same rights of property as the land itself, according to the maxim, *Quicquid plantitur solo, solo cedit*(*g*). But the rule has been much relaxed and is subject to many exceptions(*h*).

The question whether a given article, which has been annexed to the freehold, is to be regarded as irremovable by the tenant is a question of fact to be decided on the circumstances of each particular case(*i*).

A thing may be regarded as a movable fixture between landlord and tenant which is not so regarded as between the heir, or devisee and the executor; in the latter case, if the thing was annexed to the freehold for the benefit of the inheritance, it is a fixture and passes with the land(*j*). So, the rule as between landlord and tenant differs from that as

(*d*) *Climie* v. *Wood* (1869), L.R. 4 Ex. 328.
(*e*) *Holderness* v. *Lang* (1886), 11 Ont. 1.
(*f*) See chapter XIII.
(*g*) *Holland* v. *Hodgson* (1872), L.R. 7 C.P. 328.
(*h*) *Gough* v. *Wood*, [1894] 1 Q.B. 719.
(*i*) *Wood* v. *Hewett* (1846), 8 Q.B. 913.
(*j*) *Hughes* v. *Towers* (1866), 16 U.C.C.P. 287.

between vendor and purchaser(*k*); and from that as between mortgagor and mortgagee(*l*).

A greater latitude has always been allowed in the case of landlord and tenant than in other cases, in favour of the tenant and against the claim of the freehold(*m*). The whole tendency of the courts in recent years has been to enlarge the rights of tenants in respect to fixtures(*n*).

As between landlord and tenant the term "fixtures" include,

(1) Irremovable fixtures, which are such things as may be affixed to (*e.g.*, doors and windows), or placed on (*e.g.*, rail fences), the freehold by the tenant, the property in which passes to the landlord immediately upon being so affixed or placed, and in which the tenant at the same time ceases to have any property; and Irremovable.

(2) Removable fixtures, which are:

(*a*) Such things as may be affixed to the freehold for the purpose of trade or of domestic convenience or ornament, qualified property in which remains in the tenant; or Removable.

(*b*) Such things as may be affixed to the freehold for merely a temporary purpose, or for the more complete enjoyment and use of them as chattels, the absolute property in which remains in the tenant(*o*).

The tendency of modern decisions seems to be to effectuate the apparent intention of the parties at the time the article in question was attached to the freehold. Thus, a steam engine placed upon the land, for the purpose of drilling the rock and experimenting for oil, resting on sills let into the ground, and fastened to the sills by bolts and spikes was held to be removable by the tenant(*p*). Intention.

(*k*) *Gardiner* v. *Parker* (1871), 18 Gr. 26.
(*l*) *Climie* v. *Wood* (1869), L.R. 3 Ex. 257; 4 Ex. 328.
(*m*) *Elwes* v. *Maw* (1802), 3 East 38.
(*n*) *Mears* v. *Callender*, [1901] 2 Ch. 388.
(*o*) *Argles* v. *McMath* (1895), 26 Ont. 224; 23 Ont. App. 44.
(*p*) *Burnside* v. *Marcus* (1867), 17 U.C.C.P. 430.

But the mere expression by the owner of an intention to sever a fixture from the freehold and sell it to another, even if communicated to one who subsequently becomes a purchaser of the freehold, will not operate to convert the fixture into a chattel, or to alter its character in any way; and in the absence of any reservation in the conveyance everything attached to the freehold passes thereby(*q*).

Material injury.

The rule respecting trade fixtures, as between landlord and tenant, is that all such as can be removed without materially injuring the freehold or building to which they are attached, may be removed(*r*).

In the absence of evidence of a contrary intention, machines affixed to the freehold merely for the purpose of steadying them, and used for the purpose of a manufacturing business for which the freehold is occupied, and to which it is devoted, become part of the freehold even though the mode of affixing them is such that they can easily be detached without injury either to themselves or to the freehold. In the absence of evidence of a contrary intention, similar pieces of machinery standing on the freehold, but not affixed to it, except by the leathern bands communicating to them motive power, retain the character of chattels, notwithstanding that the work done by them is an essential process in the manufacture to which the freehold is devoted. A fastening by cleats affixed to the building only, and not affixed to the machine except by being placed close against it, is not an affixing of the machine at all, and is not sufficient in itself to make the machine a part of the realty(*s*).

Trade fixtures.

A steam engine and boiler annexed to the freehold for

(*q*) *Minhinnick* v. *Jolly* (1898), 29 Ont. 238.

(*r*) *Hughes* v. *Towers* (1869), 19 U.C.C.P. 287; *Gibson* v. *Hammersmith Railway Co.* (1862), 2 Dr. & Sm. at p. 608.

(*s*) *Sun Life Assurance Co.* v. *Taylor* (1892), 9 Man. L.R. 89; *Longbottom* v. *Berry* (1869), L.R. 5 Q.B. 123, followed.

their more convenient use, are, if capable of removal without material damage to the freehold, trade fixtures, and may be removed by a tenant, although they would pass under a mortgage of the freehold to the mortgagee(*t*).

An engine and boiler put into premises leased as a factory have been held, as between landlord and tenant to be trade fixtures and to be removable by the tenant(*u*).

The saws and other machinery of a saw-mill have been held not to be trade fixtures(*v*).

Vendor and purchaser.

Shop fittings consisting of shelving made in sections, each section being screwed to a bracket affixed to the wall of a building, the whole being readily removable without damage either to the fittings or the building, and gas and electric light, fittings, consisting of chandeliers which were fastened by being screwed or attached in the ordinary way to the pipes or wires by which the gas and electric currents were respectively conveyed, and were removable by being unscrewed or detached without doing damage to the chandeliers or the building, have been held to be part of the land and to have passed by a conveyance of it to a purchaser(*w*).

A greenhouse, conservatory, and hothouse, affixed to the freehold, and the glass roofs have been held not to be removable by a tenant(*x*). But machinery for heating greenhouses, which rested by its own weight on bricks, and was not fastened to the freehold, was held to be removable; also, the pipes passing from the boilers through a brick

(*t*) *Climie* v. *Wood* (1869), L.R. 4 Ex. 328.

(*u*) *Pronquey* v. *Gurney* (1876), 37 U.C.R. 347.

(*v*) *Richardson* v. *Ranney* (1851), 2 U.C.C.P. 460.

(*w*) *Stack* v. *Eaton* (1902), 4 Ont. L.R. 335; *Bain* v. *Brand* (1876), 1 App. Cas. 762; *Holland* v. *Hodgson* (1872), L.R. 7 C.P. 328; *Hobson* v. *Gorringe*, [1897] 1 Ch. 182; *Haggert* v. *Town of Brampton* (1897), 28 S.C.R. 174, and *Argles* v. *McMath* (1895), 26 Ont. 224, 248, followed.

(*x*) *Gardiner* v. *Parker* (1871), 18 Gr. 26.

wall into adjoining buildings(*y*). A glass house erected for the mere purpose of pleasure and ornament is not removable by the tenant, but if erected by a nurseryman or gardener for the purpose of his trade it is so(*z*).

It has been questioned whether the proprietor of a skating rink was a person engaged in trade so as to make fixtures used in his business exempt from distress(*a*). A hardwood flooring, put down especially for skating, and capable of removal, was held to be a tenant fixture, and exempt from distress(*b*).

Counters and shelving have been held to be trade fixtures and removable by the tenant(*c*).

Farm tenants.

The rule of law by which trade fixtures may be removed has no application to buildings, machinery and other fixtures erected by agricultural tenants(*d*).

It has however been provided by an Imperial statute(*e*), that if any tenant of a farm after the 24th of July, 1851, with the consent in writing of his landlord, erects at his own cost any farm building, engine, or machinery, they may be removed by him subject to his giving one month's notice of his intention to remove them, and subject to the landlord's option to purchase them at a valuation.

Ornament.

A tenant may remove fixtures which are articles of ornament or domestic utility, provided that they can be removed without material injury to the freehold(*f*).

(*y*) *Ibid.*

(*z*) *Mears* v. *Callender*, [1901] 2 Ch. 388; following *Penton* v. *Robart* (1801), 2 East 88; 6 R.R. 376, notwithstanding the criticism of that case in *Elwes* v. *Maw* (1802), 3 East 38; 6 R.R. 523.

(*a*) *Howell* v. *Listowel Rink and Park Co.* (1887), 13 Ont. 476.

(*b*) *Ibid.*

(*c*) *Laidlaw* v. *Taylor* (1880), 14 N.S.R. 155.

(*d*) *Elwes* v. *Maw* (1802), 3 East 38.

(*e*) 14 & 15 Vict., c. 25, s. 3.

(*f*) *Elwes* v. *Maw* (1802), 3 East 38, at p. 53.

Chattels (such as tapestries) affixed by a tenant for life to the walls of a house for the purpose of ornament and the better enjoyment of them as chattels are, as against the remainderman, removable by the tenant for life, or by his executor after his death, even though they have been fixed as firmly as they would have been if it had been intended to annex them permanently to the freehold. The purpose of the annexation is to be inferred from the circumstances of each case. The executor ought to pay the expense of making good the damage done in removing the tapestries, but he is not bound to pay the cost of redecorating the room(*g*).

Domestic utility.

With regard to articles of domestic utility, the rule appears to be that they may be removed if they are only slightly affixed, and can be removed without destroying them, and without injury to the freehold(*h*).

Mortgagee.

Where a tenant of certain premises for a term of years mortgages such term by way of equitable deposit of the lease the mortgagee takes under his mortgage an interest in trade fixtures erected upon the leasehold premises by the tenant, and removable by him under the provisions of the lease at the expiration of the term, commensurate only with his interest in the term, and is not absolutely entitled to the proceeds of the sale of such fixtures. The right to sever remains in the mortgagor at the end of the term(*i*).

A mortgage of an electro-plating factory, "together with all the plant and machinery at present in use in the factory," does not cover patterns used in the business, sent

(*g*) *In re De Falbe, Ward* v. *Taylor*, [1901] 1 Ch. 523; *D'Eyncourt* v. *Gregory* (1866), L.R. 3 Eq. 382, disapproved; *Norton* v. *Dashwood*, [1896] 2 Ch. 497, explained and distinguished; followed in *Leigh* v. *Taylor*, [1902] A.C. 157.

(*h*) *Grymes* v. *Boweren* (1830), 6 Bing, p. 440.

(*i*) *Colonial Bank of Australia* v. *Riley* (1896), 22 V.L.R. 288; *Southport and West Lancashire Banking Co.* v. *Thompson* (1887), 37 Ch. D. 64, followed; *Meux* v. *Jacobs* (1875), L.R. 7 H.L. 481, discussed.

from time to time from the factory to foundries to have mouldings made, and not in the factory at the time of the making of the mortgage(*j*).

Purchaser.

In an action by plaintiff to recover damages for the removal of fixtures from property of the plaintiff, occupied by defendant as a tenant, the latter relied on a bill of sale from a former tenant, by whom the fixtures had been placed upon the premises, and under whom the defendant had gone in. The term for which the former tenant held, having expired before the removal of the fixtures, it was held that plaintiff must recover(*k*).

Where the owner of a saw-mill gave a mortgage on it to pay for machinery which was put in it, and affixed to the land, it was held that his son, who was tenant at will of the premises paying no rent, was not entitled to remove the machinery as trade fixtures as against the mortgagee(*l*).

Hire-purchase system.

Machines were supplied by the plaintiff on the hire-purchase system to the lessee for a long term of years of a factory, which he had mortgaged. The machines were affixed to the premises by the plaintiff's workmen by means of upright bolts let into the floor, which passed through holes in the bases of the machines, and upon which nuts were screwed. By the terms of the hire-purchase agreement the machines were not to become the property of the mortgagor until the last of a series of payments for their hire had been made by him, and, if default were made in those payments, the plaintiff was to have power to determine the hiring and remove the machines. The mortgagor failed to make the specified payments. The mortgagees having entered into

(*j*) *McCosh* v. *Barton* (1901), 2 Ont. L.R. 77.

(*k*) *Harriston* v. *Smith* (1888), 8 C.L.T. 58.

(*l*) *Anderson* v. *McEwen* (1859), 9 U.C.C.P. 176. As to whether a house resting by its own weight on blocks of wood is a fixture as between mortgagor and mortgagee, see *Phillips* v. *Grand River Ins. Co.* (1882), 46 U.C.R. 334.

possession of the factory, the plaintiff gave notice to determine the hiring, and claimed to remove the machines, but the mortgagees refused to give them up, claiming them as fixtures. In an action brought by the plaintiff against the mortgagees to recover the machines or their value, it was held that the machines were fixtures, and that the plaintiff was not entitled to recover(*m*).

Mistake of title.

If a stranger begins to build on land supposing it to be his own, and the real owner, perceiving his mistake, abstains from setting him right, and leaves him to persevere in his error, a Court of Equity will not afterwards allow the real owner to assert his title to the land. But if a stranger builds on land knowing it to be the property of another, equity will not prevent the real owner fro m afterwards claiming the land with the benefit of all the expenditures upon it. So if a tenant builds on his landlord's land, he does not, in the absence of special circumstances, acquire any right to prevent the landlord from taking possession of the land and buildings when the tenancy has determined(*n*).

Evidence of intention.

In an action upon a mortgage, the plaintiff claimed, as part of the freehold, a certain erection placed upon the mortgaged premises by the husband of the owner of the equity. The building was a small wooden structure of thin clap-board, lathed and plastered, and divided into three rooms, placed on loose bricks laid on the soil. It was first used as a shop, and then turned into a dwelling-house, and this was rented for a while by the husband and wife. The building could easily be moved with little or no injury to the soil; it was held that it was not in fact affixed or an-

(*m*) *Reynolds* v. *Ashby*, [1903] 1 K.B. 87; *Leigh* v. *Taylor*, [1902] A.C. 157, discussed; *Gough* v. *Wood*, [1894] 1 Q.B. 713, distinguished; *Chidley* v. *West Ham Churchwardens* (1875), 32 L.T. 486, commented upon; *Hobson* v. *Gorringe*, [1897] 1 Ch. 182, followed.

(*n*) *Ramsden* v. *Dyson* (1865), L.R. 1 H.L.C. 129.

nexed to the soil, but was merely a chattel which might be moved at any time. The onus was on the plaintiff to shew that it could not or ought not to be removed as against him, but the evidence of intention with which it was placed on the ground by the husband, and the other circumstances of its temporary and unsightly character, repelled the conclusion that it was to be deemed constructively attached to the freehold(*o*).

Trees.

At common law, a lessee is not entitled to cut down or remove orchard trees planted by him during the term(*p*). But a nurseryman is entitled to remove trees and shrubs grown for sale(*q*).

Agreement to remove.

Where a trade fixture is attached to the freehold, it becomes part thereof, subject to the right of the tenant to remove it—if he does so in proper time; in the meantime it remains part of the freehold(*r*). But where the parties have made a special contract, they have defined and made a law for themselves on the subject(*s*). In a lease dated in July, 1890, there was a provision that the lessees might, during the term, erect machinery upon the demised premises, which should be the property of the lessees and removable by them, but not so as to injure the building, etc. The lessees affixed machinery to the building demised, and afterwards, in April, 1892, made an assignment for the benefit of creditors. The lessors elected to forfeit, under a clause in the lease, but they permitted a purchaser of the machinery from the lessees' assignee, to remain in possession, paying rent until December, 1892, when she ceased, leaving the machinery on the premises. The defendants became

(*o*) *Miles* v. *Aukatell* (1898), 29 Ont. 21.

(*p*) *Mears* v. *Callender*, [1901] 2 Ch. 388.

(*q*) *Oakley* v. *Monck* (1866), L.R. 1 Eq., at p. 167.

(*r*) *Scarth* v. *Ontario Power Co.* (1893), 24 Ont. 446; *Meux* v. *Jacobs* (1875), L.R. 7 H.L.C., at pp. 490, 491, followed.

(*s*) *Ibid*; *Davey* v. *Lewis* (1860), 18 U.C.R., at p. 30, followed.

the purchasers of the freehold by virtue of a sale under the power in a mortgage in July, 1892, but the lease had come to an end before their title commenced. The plaintiffs claimed the machinery under a chattel mortgage made by the purchaser thereof on the 25th April, 1892, and a subsequent assignment from her of the whole of her interest therein, and in March, 1893, they brought this action to obtain possession. It was held that the machinery was, owing to the provisions in the lease, chattels and the property of the lessees, and continued to be so until they made the assignment, when it passed as chattels to their assignee, who transferred it as chattels to the purchaser and she to the plaintiffs; that the forfeiture of the term did not affect the right to the property, nor the right to remove it: that nothing had taken place to defeat that right, and the plaintiffs were in good time to exercise it. The defendants being in possession of the machinery, and being asked for it by the plaintiffs, asserted title in themselves, and warned the plaintiffs that if proceedings were taken they would set up such title, it was held that a wrongful detention of the goods was shewn, and that the action of replevin therefore lay(*t*).

In Ontario, under the *Act respecting Short Forms of Leases*(*u*), the short form of the proviso by which the lessee is entitled to remove fixtures is as follows: "Provided that the lessee may remove his fixtures." In a lease expressed to be made in pursuance of the Act, this form of proviso is to be read as if it were in the following words:

Statutory proviso.

"Provided always, and it is hereby expressly agreed that the lessee may at or prior to the expiration of the term hereby granted, take, remove and carry away from the premises, hereby demised all fixtures, fittings, plant, machinery, utensils, shelving, counters, safes or other articles upon the said premises in the nature of trade or

(*t*) *Scarth* v. *Ontario Power Co.* (1893), 24 Ont. 446.

(*u*) R.S.O. (1897), c. 125.

tenants' fixtures or other articles belonging to or brought upon the said premises by the said lessee but the lessee shall in such removal do no damage to the said premises, or shall make good any damage which he may occasion thereto."

A lease of land for five years gave the tenant a right to remove a certain building at its expiration, unless the landlord elected to purchase it at its value. The building stood upon piers and earth had been dumped in around to the level of the sill. It was held that the building was a fixture attached to the freehold, but that the right of removal enabled the lessee to sell the building to the defendant, and that his contract in so doing did not come within the Statute of Frauds(*v*).

Building.

Primâ facie, a building erected for an hotel is part of the freehold; but if it has been erected by a tenant for the purposes of trade, it is to be regarded, in the absence of evidence to the contrary, as a trade fixture. The right of a tenant to remove fixtures continues only during his original term, and during such further period of possession by him as he holds the premises under a right still to consider himself a tenant. Where a tenant, who had completed upon the demised premises a building, partly erected by a former tenant through whom he claimed, and which was erected and used by both for trade purposes, having held over after the expiration of the lease to the first tenant, and having subsequently been granted by his landlord a new lease, with the usual covenant to repair and a proviso that the lessee should have the privilege, at the expiration of the term, of removing any building erected on the demised lands, unless the same should be purchased by the lessor at a price to be fixed by the lessee, it was held that the building remained the property of the tenant as a trade fixture, and could be removed by him at any time during the term(*w*).

(*v*) *Oswald* v. *Whitman* (1889), 22 N.S.R. 13.

(*w*) *Gray* v. *McLennan* (1885), 3 Man. L.R. 337.

Under a lease containing a covenant at all times during the term to repair, and the said premises so repaired, "with all the appurtenances, and all things which at the time of execution of the said indenture were, or at any time during the term should be fixed or fastened to, or set up in or upon the premises," at the expiration of the term, peaceably to yield up "with all and singular the fixtures thereto belonging," in as good condition as the same were at the execution of the indenture, reasonable use excepted, it was held that the covenant extended to a building resting on blocks of wood, not let into the ground, also to a building laid upon scantling and old posts, not let into the ground, all placed on the demised premises during the term(*x*). Covenant to yield up fixtures.

Under a covenant to deliver up the demised premises together with all locks, etc., and other fixtures and articles in the nature of fixtures, the tenant is entitled to remove trade fixtures(*y*).

By the terms of a lease the lessee covenanted to keep and yield up the premises with all additions and improvements thereto (trade fixtures *bona fide* made by the lessee only excepted) in good and tenantable repair. The premises included a blacksmith's shop. The lessee, who carried on the business of a blacksmith and wheelwright, erected a building for the purpose of a forge and attached it to the shop. In order to use the addition for the purpose for which he erected it, he pulled down the greater part of the wall of the shop, and the two buildings were practically thrown into one and kept and used in common. At the termination of the lease the lessee pulled down and removed the building which he had erected and rebuilt the wall of the shop, leaving it in good repair. In an action by the lessor against the lessee for breach of covenant, it was held that the build- Addition not a trade fixture.

(*x*) *Allardice* v. *Disten* (1861), 11 U.C.C.P. 278.
(*y*) *Bishop* v. *Elliott* (1855), 11 Ex. 113, 321.

ing erected by the lessee was not a trade fixture, and that the lessor was entitled to damages for its removal(*z*).

An under lease of premises to be used for the business of a boot and shoe manufacturer contained a covenant by the lessee to yield up the premises on the determination of the term "together with all doors, locks, keys, bolts, bars, staples, hinges, iron pins, wainscots, hearths, stones, marble and other chimney pieces, slabs, shutters, fastenings, partitions, pipes, pumps, sinks, gutters of lead, posts, pales, rails, dressers, shelves, and all other erections, buildings, improvements, fixtures and things which then were or which at any time during the said term should be fixed, fastened or belong to the said demised messuage and premises or any part thereof." It was held that the covenant, by reason of the general words contained therein, extended to the trade fixtures used in the lessee's business of a boot and shoe manufacturer(*a*).

When removable.

In the absence of an express agreement, fixtures which a tenant is entitled to remove must be removed during the continuance of his original term(*b*), or during such further period of possession by him as he holds the premises under a right still to consider himself as a tenant(*c*). A tenant is not entitled to remove them after the landlord, by bringing an action of ejectment, has shewn that he has ceased to regard the lessee as his tenant(*d*). If the fixtures are not removed during the tenancy, the property in them vests in the owner of the reversion(*e*).

(*z*) *Weller* v. *Everitt* (1900), 25 V.L.R. 683; *Penton* v. *Robart* (1801), 2 East 88, commented on and not followed.

(*a*) *Lambourn* v. *McClellan*, [1903] 1 Ch. 806; *Bidder* v. *Trinidad Petroleum Co.* (1868), 17 W.R. 153, followed.

(*b*) *Minshall* v. *Lloyd* (1837), 2 M. & W. 450.

(*c*) *Weeton* v. *Woodcock* (1840), 7 M. & W. 14.

(*d*) *Barff* v. *Probyn* (1895), 11 Times L.R. 467.

(*e*) *Meux* v. *Jacobs* (1875), L.R. 7 H.L. 490.

The rule that fixtures must be removed during the tenancy applies, whether the term has been determined by effluxion of time, or by forfeiture(*f*), or by surrender(*g*).

But a tenant cannot by surrender defeat the rights of third parties, such as a mortgagee whose security includes the fixtures(*h*).

Reasonable time.

Where the lessor has elected to re-enter for a forfeiture, the lessee has a right, while he remains in possession, to remove fixtures put up by him for the purpose of his trade, and has a reasonable time after such election within which to do so. And where he attempts to do so within a reasonable time, and is prevented by the lessor, the latter is liable to an action for the value(*i*).

Where there is an original term of years, and then another tenancy after that, the only ground upon which the lessee for the original term can claim a right, after the expiration of the original term, to remove trade fixtures put up during such term, is that he has a right to do so during the continuance of the term or so long afterwards as he has a right to consider himself a tenant(*j*).

Where a tenant at will erects trade fixtures during his tenancy, he has a reasonable time after the expiration of his tenancy within which to remove the fixtures(*k*).

Where the tenant is entitled under an express agreement to remove fixtures, he may do so within a reasonable time after the expiration of the lease(*l*).

(*f*) *Pugh* v. *Arton* (1869), 8 Eq. 626.
(*g*) *Ex parte Brook* (1878), 10 Ch. D. 100.
(*h*) *Saint* v. *Pilley* (1875), L.R. 10 Ex. 137.
(*i*) *Argles* v. *McMath* (1895), 26 Ont. 224; 23 Ont. App. 44.
(*j*) *Bacchus Marsh Brick and Pottery Co.* v. *Federal Building Society* (1896), 22 V.L.R. 181.
(*k*) *Bacchus Marsh Brick and Pottery Co.* v. *Federal Building Society* (1896), 22 V.L.R. 181.
(*l*) *Sumner* v. *Bromilow* (1865), 34 L.J.Q.B. 130.

It is provided by section 322 of the *Criminal Code*, 1892, as follows:—

Stealing fixtures.

322. Every one who steals any chattels or fixtures let to be used by him or her in or with any house or lodging is guilty of an indictable offence and liable to two years' imprisonment, and if the value of such chattel or fixture exceeds the sum of twenty-five dollars to four years' imprisonment.

By section 504 of the *Criminal Code*, 1892, it is provided as follows:—

Destroying fixtures.

504. Every one is guilty of an indictable offence and liable to five years' imprisonment who, being possessed of any dwelling-house or other building, or part of any dwelling-house or other building which is built on lands subject to mortgage or which is held for any term of years or other less term, or at will, or held over after the termination of any tenancy, wilfully and to the prejudice of the mortgagee or owner—

(a) Pulls down or demolishes, or begins to pull down or demolish the same or any part thereof, or removes or begins to remove the same or any part thereof from the premises on which it is erected; or

(b) Pulls down or severs from the freehold any fixture fixed in or to such dwelling-house or building, or part of such dwelling-house or building.

SECTION II.

EMBLEMENTS.

Emblements.

Emblements are growing crops which require culture as distinguished from those which grow spontaneously; crops which have to be planted or sown annually, or like hops, which require annual training or culture. Hence, they include grain, potatoes, and most garden vegetables, but not fruits or grass. They are deemed personal property, and pass as such to the executor or administrator of the occupier if he dies before they are cut, reaped or harvested, instead of going with the land to the heir.

Emblements include such crops growing upon the land as ordinarily repay the labour bestowed on them, such as

grain, clover, flax, potatoes and hops(*a*), but not permanent profits of the soil, such as fruit or grass(*b*).

When entitled.

At common law, a tenant at will, or from year to year, or for other uncertain interest, is entitled, as against the reversioner, to the emblements upon the determination of the tenancy, provided such determination is not brought about by his own act. Thus, a tenant who surrenders his lease or incurs a forfeiture, is not entitled to emblements(*c*).

So, if a tenant who holds *durante viduitate* marries, and thus ends the tenancy, she is not entitled to emblements(*d*).

Sub-lessee.

But an under-lessee is not disentitled, although the head lease is determined by the act of the lessee(*e*).

In the case of a tenant whose term is uncertain by reason of its being liable to fall with the estate of the landlord entitled for an uncertain interest, as for example, an estate for the life of another, the right to continue the tenancy for the remainder of the current year has been substituted for the right to emblements, by an Imperial statute(*f*).

A lessee is entitled to the emblements if the lease, after the crops are sown, is terminated by the lessor by notice in pursuance of a proviso in the lease; and after the determination of a lease in such a way, the lessor cannot set up that the lease was forfeited by non-payment of rent accruing thereafter, so as to disentitle the lessee to the emblements(*g*).

Agreement as to crops.

Where the lessee agreed to give up possession on six months' notice in case of sale, but reserving the right of

(*a*) *Graves* v. *Weld* (1833), 5 B. & Ad. 105; *Haines* v. *Welch* (1868), L.R. 4 C.P. 91.

(*b*) 2 Black. Com. 123.

(*c*) *Lavis* v. *Eyton* (1830), 7 Bing. 154.

(*d*) *Bulwer* v. *Bulwer* (1819), 2 B. & A., p. 471.

(*e*) 2 Black. Com. 124.

(*f*) 14 & 15 Vict. (1851), c. 25, s. 1.

(*g*) *Campbell* v. *Baxter* (1865), 15 U.C.C.P. 42.

harvesting the crop in the ground, if any, it was held that he was entitled to the crop put in by him after receiving notice of the sale, but before the expiry of the six months(*h*).

In a three years' lease, the words "also to allow the said W. and J. N. (tenants) the right of leaving in fall crop the same quantity of land as is now in fall crop when they get possession," coupled with the fact that there was then a fall crop on part of the land, which had been sown by the preceding tenant, and which he was entitled to reap, were held to confer on the tenants the rights to sow a crop during the tenancy, which they might reap afterwards(*i*).

In an action of trover for an away-going crop, which the plaintiff contended he was entitled to under a covenant in his lease "that he should not sow fall grain in all fields now cleared in the first or last year of the lease," on proving that he had not sown the grain in *all* the fields, the Court held the word "all' must be construed "any"; that the lease, therefore, did not militate against the common law rule; and that the plaintiff was precluded from claiming the away-going crop(*j*).

Custom as to away-going crops.

A custom that the tenant shall have the way-going crop after the expiration of his term is effectual if not excluded by the express agreement in the lease(*k*). A custom of the country, by which the tenant of a farm, cultivating it according to the course of good husbandry, is entitled, on quitting, to receive from the landlord or incoming tenant a reasonable allowance for seeds and labour bestowed on the arable land in the last year of the tenancy, and is bound to leave the manure for the landlord, if he will purchase it—is not excluded by a stipulation in the lease under which he

(*h*) *Harrison* v. *Pinkney* (1880), 44 U.C.R. 509.
(*i*) *Campbell* v. *Buchannan* (1857), 7 U.C.C.P. 179.
(*j*) *Gilmore* v. *Lockhart* (1843), H.T. 6 Vict.
(*k*) *Wigglesworth* v. *Dallison* (1779), 1 Doug. 201.

holds, that he will consume three-fourths of the hay and straw on the farm, and spread the manure arising therefrom, and leave such of it as shall not be so spread on the land for the use of the landlord, on receiving a reasonable price for it(*l*).

Where there is a stipulation in a lease for a term certain that the lessee shall deliver up all the lands at the expiration of the lease, all question as to the customary right of the away-going crops is excluded. It would seem that there is in Ontario no custom of the country as to the away-going crops(*m*).

A tenant entitled to emblements, or a person entitled to a share thereof, may enter upon the lands after the determination of the tenancy for the purpose of harvesting and carrying away the crops(*n*).

(*l*) *Hutton* v. *Warren* (1836), 1 M. & W. 466.

(*m*) *Burrowes* v. *Cairns* (1845), 2 U.C.R. 288; *Kaatz* v. *White* (1869), 19 U.C.C.P. 36.

(*n*) *Kingsbury* v. *Collins* (1827), 4 Bing. 202.

CHAPTER XXVIII.

RIGHTS OF THE LANDLORD.

1. *Possession.*
2. *Double Rent.*
3. *Double Value.*
4. *Use and Occupation.*

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1. *Possession.*

Possession.

Upon the determination of the tenancy, the landlord is entitled to the vacant possession of the demised premises, and he may bring an action therefor(*a*).

2. *Double Rent.*

Double rent.

A tenant holding over after he has given notice of his intention to quit, is liable to pay double the rent or sum which he would otherwise have to pay. This provision is made by section 18 of the Statute 11 George II., c. 19(*b*), which, as re-enacted in Ontario, is as follows:—

11 Geo. II., c. 19.

21. In case any tenant shall give notice of his intention to quit the premises by him holden at a time mentioned in such notice, and shall not accordingly deliver up the possession thereof at the time in such notice contained the said tenant, his executors, or administrators, shall from thenceforward pay to the landlord or lessor double the rent or sum which he should otherwise have paid, to be levied, sued for, and recovered, at the same time and in the same manner as the single rent or sum, before the giving such notice, could be levied, sued for, or recovered; and such double rent or sum shall continue to be paid during all the time such tenant shall continue in possession as aforesaid.

(*a*) *Ibbs* v. *Richardson* (1839), 9 A. & E. 849.

(*b*) R.S.O. (1897), Vol. III., c. 342 s. 21; R.S.B.C. (1897), c. 110, s. 32.

This provision applies to all tenancies which the tenant is entitled to determine by notice(*c*).

The continuance of the relation of landlord and tenant is contemplated, and double rent, unlike double value, may be recovered by distress(*d*). Distress.

Where a tenant has given notice to quit and continues in possession, he may quit at the end of a year without giving a fresh notice, if he pays double rent(*e*).

But the landlord is not entitled to double rent unless the notice is valid and sufficient to determine the tenancy(*f*). Valid notice.

Thus, a notice given by the tenant that he will quit on the happening of a certain event, will not make him liable to pay double rent, if he holds over after the happening of such event(*g*).

3. *Double Value.*

A tenant wilfully holding over after the tenancy has expired is liable to pay to the landlord at the rate of double the yearly value of the lands for the period so held over. But in order to entitle a landlord to such double value it is necessary that a demand should be made in writing by the landlord for the delivery of possession. This is provided by section 1 of the Statute 4 George II c. 28(*h*), which as re-enacted in Ontario, is as follows:— Double value.

20. In case any tenant for any term of life, lives, or years, or other person who shall come into possession of any lands, tenements, or hereditaments, by, from, or under or by collusion with, such tenant, shall wilfully hold over any lands, tenements, or heredita- 4 Geo. II., c. 28.

(*c*) *Johnstone* v. *Hudlestone* (1825), 4 B. & C. 922; 28 R.R. 505.

(*d*) *Humberstone* v. *Dubois* (1842),, 10 M. & W. 765.

(*e*) *Booth* v. *Macfarlane* (1831), 1 B. & Ad. 904; 35 R.R. 488.

(*f*) *Johnstone* v. *Hudlestone* (1825), 4 B. & C. 922; 28 R.R. 505.

(*g*) *Farrance* v. *Elkington* (1811), 2 Camp. 591; 11 R.R. 807.

(*h*) R.S.O. (1897), Vol. III., c. 342, s. 20; C.S.N.B. (1904), c. 153, s. 28; R.S.B.C. (1897), c. 110, s. 14.

ments after the determination of such term or terms, and after demand made and notice in writing given for delivering the possession thereof by his landlord or lessor, or the person to whom the remainder or reversion of such lands, tenements, or hereditaments shall belong, or his agents thereunto lawfully authorized, then, and in such case, such person holding over shall, for and during the time he shall so hold over or keep the person entitled out of possession of the said lands, tenements, and hereditaments as aforesaid, pay to the person so kept out of possession, or his assigns, at the rate of double the yearly value of the lands, tenements, and hereditaments, so detained for so long time as the said are detained, to be recovered by action in any court of competent jurisdiction, against the recovering of which said penalty there shall be no relief in equity.

Application.

This remedy is limited by the words of the statute to "any term, for life, lives, or years." It has been held that the statute does not apply to a weekly tenancy(*i*), and it is probable that it does not apply to a monthly or quarterly tenancy(*j*). But it applies to a tenancy from year to year(*k*).

The statute only applies where the tenant holds over knowing that he has no right, and not where the tenant claims to hold under a fair claim of right(*l*). So, a tenant is not liable for double value in consequence of the holding over of his sub-tenant, or of a joint tenant, if done without his authority(*m*).

Notice.

Although a demand *and* notice in writing is mentioned by the statute, it has been decided that if possession is demanded by the notice, a separate demand is not necessary(*n*).

(*i*) *Lloyd* v. *Rosbee* (1810), 2 Camp. 453; 11 R.R. 764.

(*j*) See *Wilkinson* v. *Hall* (1837), 3 Bing. N.C. 508; 43 R.R. 728.

(*k*) *Ryal* v. *Rich* (1808), 10 East 48; *Lake* v. *Smith* (1805), 1 N.R. 174.

(*l*) *Swinfen* v. *Bacon* (1861), 6 H. & N. 846; *Wright* v. *Smith* (1805), 5 Esp. 203.

(*m*) *Rands* v. *Clark* (1870), 19 W.R. 48; *Hirst* v. *Horn* (1840), 6 M. & W. 393.

(*n*) *Wilkinson* v. *Colley* (1771), 5 Burr 2694.

But in the case of a yearly tenancy, the notice must be such a notice as is sufficient to determine the tenancy(*o*). And in the case of a tenancy for a fixed term, where no notice is necessary to determine the tenancy, a notice to quit at the end of the term is a sufficient notice within the statute(*p*).

Where a demise is for a certain time, no notice to quit is necessary at or before the end of the term to put an end to the tenancy, but a demand of possession is necessary to entitle the landlord to double rent or value; and such demand may be made for that purpose above six weeks afterwards, if the landlord has done no act in the meantime to acknowledge the continuation of the tenancy; and he will thereupon be entitled to double value as from the time of such demand, if the tenant held over; but if the rent were before reserved quarterly, and such demand be made in the middle of a quarter, the landlord cannot recover single rent for the antecedent fraction of such quarter(*q*).

Waiver of right.

The landlord may waive his right to recover double value by acceptance of rent, or other act done with the intention of creating a new tenancy; but such intention is a question of fact to be determined upon a consideration of all the circumstances in the case(*r*).

A claim against an overholding tenant for double the yearly value of the land, is an unliquidated claim, and therefore is not provable against an estate in the hands of an assignee for creditors(*s*).

An action for double value is an action for a penalty, and must be brought within two years from the time the cause of action arose(*t*).

(*o*) *Page* v. *More* (1850), 15 Q.B. 684.
(*p*) *Messenger* v. *Armstrong* (1785), 1 T.R. 53; 1 R.R. 148.
(*q*) *Cobb* v. *Stokes* (1807), 8 East 358; 9 R.R. 464.
(*r*) *Ryal* v. *Rich* (1808), 10 East 48.
(*s*) *Magann* v. *Ferguson* (1898), 29 Ont. 235.
(*t*) 3 & 4 Will. IV., c. 42, s. 3.

4. *Use and Occupation.*

Use and occupation.

If a tenant holds over under circumstances in which the landlord is not entitled to double value or double rent, the landlord may sue for compensation for use and occupation for the period of such overholding.

It is the duty of the tenant on the expiry of his term to deliver up the vacant possession to the landlord. And if a sub-tenant holds over, although against the will of the principal tenant, the latter is responsible to the landlord, and the landlord may sue him either for recovery of possession, or for compensation, or occupation rent, for the period during which the premises have been held over, or both(*u*).

If a tenant holds over after the tenancy has been determined, compensation for such overholding cannot be recovered by distress, except where double rent is payable(*v*).

The subject of use and occupation has already been more fully considered(*w*).

(*u*) *Ibbs* v. *Richardson* (1839), 9 A. & E. 849; see chapter XIV.

(*v*) *Alford* v. *Vickery* (1842), C. & M. 280.

(*w*) Chapter XIV.

CHAPTER XXIX.

REMEDIES FOR OBTAINING POSSESSION.

SECTION I.—RE-ENTRY.
SECTION II.—SUMMARY PROCEEDINGS.
SECTION III.—ACTION OF EJECTMENT.

SECTION I.

RE-ENTRY.

Re-entry.

Where a tenant holds over after the expiration of his lease, his landlord has a right to take possession of the premises, if he can do so without a breach of the peace(*a*).

If no one is in possession, the landlord is justified in breaking into the house, in order to obtain possession, although the tenant may have left some articles of furniture(*b*).

And even if the premises are occupied, he may enter and take possession, provided he does so in a manner not likely to cause a breach of the peace(*c*).

Forcible entry.

The landlord is liable to be indicted if he makes a forcible entry on land in the actual or peaceable possession of another. This is provided by section 89 of the *Criminal Code*, 1892, as follows:—

89.—1. Forcible entry is where a person, whether entitled or not, enters in a manner likely to cause a breach of the peace, or

(*a*) *Boulton* v. *Murphy* (1837), 5 O.S. 731; *Lacey* v. *Lear* (1802), Peak's Add. Cas. 210.

(*b*) *Hillary* v. *Gay* (1833), 6 C. & P. 284; *Turner* v. *Meymott* (1823), 1 Bing. 158.

(*c*) *Williams* v. *Taprell* (1892), 8 Times L.R. 241.

reasonable apprehension thereof, on land then in actual and peaceable possession of another.

2. Forcible detainer is where a person in actual possession of land, without color or right, detains it in a manner likely to cause a breach of the peace, or reasonable apprehension thereof, against a person entitled by law to the possession thereof.

3. What amounts to actual possession or color of right is a question of law.

4. Every one who forcibly detains land is guilty of an indictable offence and liable to one year's imprisonment(*d*).

The landlord is not liable in a civil action to the tenant for making a forcible entry(*e*), but he is liable in damages for any independent wrong, such as injuries to the tenant, or his family or property, done in the course of his entry(*f*).

When, however, the landlord has entered peaceably, he is not liable for injuries done in the exercise of his rights as owner to property which is unlawfully on the premises(*g*).

SECTION II.

SUMMARY PROCEEDINGS.

Provision has been made by statute in certain cases for the recovery of possession of demised premises by summary proceedings(*h*).

Overholding Tenant's Act.

In Ontario it is provided by sub-section 1 of section 3 of the *Overholding Tenant's Act*(*i*), that in case a tenant, whose tenancy has expired or been determined, wrongfully

(*d*) See also R.S.N.S. (1900), c. 173, s. 1.

(*e*) *Beddall* v. *Maitland* (1881), 17 Ch. D. 174.

(*f*) *Edwick* v. *Hawkes* (1881), 18 Ch. D. 199.

(*g*) *Jones* v. *Foley*, [1891] 1 Q.B. 730.

(*h*) R.S.O. (1897), c. 171; R.S.B.C. (1897), c. 182; R.S.N.S. (1900), c. 174; R.S. Man. (1902), c. 93; C.S.N.B. (1904), c. 153.

(*i*) R.S.O. (1897), c. 171.

refuses upon demand made in writing to go out of possession, his landlord may apply, upon affidavit, to the County Judge to make an enquiry. The sub-section is as follows:—

Application to Judge.

3.—(1) In case a tenant, after his lease or right of occupation whether created by writing or by verbal agreement, has expired or been determined, either by the landlord or by the tenant, by a notice to quit or notice pursuant to a proviso in any lease or agreement in that behalf or has been determined by any other act whereby a tenancy or right of occupancy may be determined or put an end to, wrongfully refuses, upon demand made in writing, to go out of possession of the land demised to him, or which he has been permitted to occupy, his landlord, or the agent of his landlord, may apply upon affidavit to the Judge of the County Court of the county, or union of counties, in which the land lies, and wherever such Judge then is, to make an inquiry as is hereinafter provided for(*j*).

In the construction of the Act:—

"Tenant" shall mean and include an occupant, a sub-tenant, under-tenant, and his and their assigns and legal representatives.

"Landlord" shall mean and include the lessor, owner, the person giving or permitting the occupation of the premises in question, and the person entitled to the possession thereof, and his and their heirs and assigns and legal representatives(*k*).

Style of proceedings.

The proceedings under the Act are to be entitled in the County Court of the county or union of counties in which the premises in question are situate, and shall be styled:—

"In the matter of (*giving the name of the party complaining*), landlord, against (*giving the name of the party complained against*), tenant"(*l*).

It is further provided that the judge shall in writing

(*j*) R.S.B.C. (1897), c. 182, s. 3; R.S.N.S. (1900), c. 174, s. 3; R.S. Man. (1902), c. 93, s. 11; C.S.N.B. (1904), c. 153, s. 30.

(*k*) R.S.O. (1897), c. 171, s. 2; R.S.B.C. (1897), c. 182, s. 2; R.S. Man. (1902), c. 93, s. 2; R.S.N.S. (1900), c. 174, s. 2.

(*l*) R.S.O. (1897), c. 171 s. 10; R.S.B.C. (1897), c. 182, s. 11; R.S.N.S. (1900), c. 174, s. 8; R.S. Man. (1902), c. 93, s. 21.

appoint a time and place for making the enquiry. This is enacted by sub-section 2 of section 3, which is as follows:—

Appointment.

3.—(2) Such judge shall in writing appoint a time and place at which he will inquire and determine whether the person complained of was tenant to the complainant for a term or period which has expired or has been determined by a notice to quit or for default in payment of rent or otherwise, and whether the tenant holds the possession against the right of the landlord, and whether the tenant does wrongfully refuse to go out of possession, having no right to continue in possession, or how otherwise (*m*).

A notice of the time and place appointed for holding the enquiry is to be served on the tenant, or left at his place of abode, together with a copy of the appointment, affidavit, and papers attached thereto, in pursuance of section 4, which is as follows:—

Notice to tenant.

4. Notice in writing of the time and place so appointed for holding such enquiry, and stating briefly the principal facts alleged by the landlord to entitle him to possession, shall be served by the landlord, upon the tenant or left at his place of abode, at least three days before the day so appointed, if the place so appointed is not more than twenty miles from the tenant's place of abode, and one day in addition for every twenty miles above the first twenty, reckoning any broken number above the first twenty as twenty miles, to which notice shall be annexed a copy of the Judge's appointment and of the affidavit on which the appointment was obtained, and of the papers attached thereto (*n*).

A demand of possession in writing may be sufficient, although it is not signed, if the tenant is not misled thereby (*o*). The delivery of copies with the notice, although not annexed thereto, is a sufficient compliance with the Act (*p*).

(*m*) R.S.B.C. (1897), c. 182, s. 4, as amended by stat. of B.C. (1899), c. 73, s. 2; R.S.N.S. (1900), c. 174, s. 3; R.S. Man. (1902), c. 93, s. 15.

(*n*) R.S.B.C. (1897), c. 182, s. 5, as amended by Stat. of B.C. (1899), c. 73, s. 3; R.S.N.S. (1900), c. 174, s. 4; R.S. Man. (1902), c. 93, s. 16.

(*o*) *In re Sutherland* v. *Portigal* (1900), 12 Man. L.R. 543; following *Morgan* v. *Leach* (1842), 10 M. & W. 558.

(*p*) *Ibid.*

Service of all papers and proceedings under the Act shall be deemed to have been properly effected if made as required by law, in respect of writs and other proceedings in actions for the recovery of land(*q*). Service.

It is provided by section 5 that the judge shall, at the time and place appointed, enquire into the matter in a summary manner, examine the witnesses upon oath, and he may make an order for the issue of a writ of possession, or he may dismiss the application. This section is as follows:—

5. If at the time and place appointed, as aforesaid, the tenant, having been duly notified, as above provided, fails to appear, the Judge, if it appears to him that the tenant wrongfully holds, may order a writ to issue to the sheriff in the Queen's name, commanding him forthwith to place the landlord in possession of the premises in question; but if the tenant appears at such time and place, the Judge shall in a summary manner, hear the parties and examine into the matter, and shall administer an oath or affirmation to the witnesses called by either party, and shall examine them; and if after such hearing and examination it appears to the Judge that the case is clearly one coming under the true intent and meaning of section 3 of this Act, and that the tenant wrongfully holds against the right of the landlord then he shall order the issue of such writ, as aforesaid, otherwise he shall dismiss the case; and the proceedings in any such case, shall form part of the records of the County Court; and the said writ may be in the words or to the effect of Form 1 or Form 2, in the Schedule to this Act, according as the tenant is ordered to pay costs or otherwise(*r*). Enquiry.

The judge may cause any person to be summoned as a witness to attend before him in any such case, in like manner as witnesses are summoned in other cases in the County Court, and under like penalties for non-attendance or refusing to answer in such case(*s*). Witnesses.

(*q*) Section 11 of the Ontario Act; R.S.B.C. (1897), c. 182, s. 12; R.S.N.S. (1900), c. 174, s. 9; R.S. Man. (1902), c. 93, s. 22.

(*r*) R.S.B.C. (1897), c. 182, s. 6, as amended by Stat. of B.C. (1899), c. 73, s. 4; R.S.N.S. (1900), c. 174, s. 5; R.S. Man. (1902), c. 93, s. 17.

(*s*) Section 8.

Where, on the expiration of a tenancy, crops remain to be valued, this should be done, and the amount tendered before applying under the *Overholding Tenant's Acts*(*t*).

A tenant remaining in possession after the expiration of his term, and paying two months' rent, cannot, in the middle of the third month, be treated by his landlord as an overholding tenant under this Act(*u*).

A landlord proceeding under this Act cannot recover mesne profits(*v*).

Mortgagor.

It has been held that a mortgagee, from whom the mortgagor has accepted a lease of the mortgaged premises, will not be permitted, on the expiration of the term, to proceed against the mortgagor as an overholding tenant(*w*).

Since the amendment of the *Overholding Tenant's Act*(*ww*), striking out of the Act the words "without colour of right," the judge of the County Court tries the right and finds whether the tenant wrongfully holds. And where the dispute was in reference to the tenancy, the landlord asserting it to be a monthly holding, and the tenant a yearly tenancy, it was held that the County Court judge had jurisdiction(*x*).

Before the amendment it was held that the Act conferred no authority upon the County Judge to try the question of the tenant's right of title; and as soon as it was made to appear that the right is really in dispute, there is then that colour of right which the Act contemplated, and the judge was bound to dismiss the case(*y*)

(*t*) *In re Boyle* (1865), 2 P.R. 134.

(*u*) *Adams* v. *Bains* (1847), 4 U.C.R. 157.

(*v*) *Allan v. Rogers* (1855), 13 U.C.R. 166.

(*w*) *In re Reeve* (1869), 4 P.R. 27.

(*ww*) R.S.O. (1887), c. 144, by 58 Vict. (Ont.), c. 13, s. 23.

(*x*) *Moore* v. *Gillies* (1897), 28 Ont. 358.

(*y*) *Price* v. *Guinane* (1888), 16 Ont. 264; *Bartlett* v. *Thompson* (1888), 16 Ont. 716.

Under the *Overholding Tenant's Act*(*z*), two things must concur to justify the summary interference of the County Court judge; the tenant must *wrongfully* refuse to go out of possession, and it must appear to the judge that the case is *clearly* one coming under the purview of the Act(*a*). Wrongful refusal.

It is only the proceedings and evidence before the judge, sent up pursuant to the *certiorari*, at which the High Court may look for the purpose of determining what is to be decided under section 6 of the Act. Where there is nothing in evidence to shew that the tenants had violated the provision of the lease for breach of which the landlord claimed the right to re-enter, the Court set aside the order of the County Court judge commanding the sheriff to place the landlord in possession(*b*).

The whole proceeding was held to be nugatory from the outset, where there was no proper notice specifying the breach complained of, as required by section 13 of the *Landlord and Tenant's Act*(*c*), which is applicable to summary proceedings under the *Overholding Tenant's Act*(*d*). Notice complaining of breach.

A verbal promise made at the time of the execution of the lease to a weekly tenant that he would not be required to give up possession until the landlord should build on the land, is not sufficiently definite to support the contention that the tenant was lawfully holding over, after a regular demand of possession and notice to quit had been served(*e*).

The questions whether a three months' notice to determine a tenancy required by a lease should be lunar or cal-

(*z*) R.S.O. (1897), c. 171.
(*a*) *In re Snure and Davis* (1902), 4 Ont. L.R. 82.
(*b*) *Ibid.*
(*c*) R.S.O. (1897), c. 170.
(*d*) *Ibid.*
(*e*) *Canadian Pacific* v. *Lechtzier* (1902), 39 C.L.J. 798.

endar months, and whether a notice given by the lessor after conveyance of the reversion is sufficient, should not, when there is any doubt in the matter, be decided by a County Court Judge on an application under the Act(*f*).

Forfeiture.

This Act gives jurisdiction to the County Judge in cases when the tenancy has been determined by forfeiture for breach of a covenant or condition contained in the lease(*g*).

Assignee for creditors.

In *Dobson* v. *Sootheran*(*h*), the lessees were partners and held under a lease which provided that any assignment by the lessees for the general benefit of their creditors should forfeit the term. The lessees, at a time when two-quarters' rent were overdue and in arrear, made such an assignment, and the assignee thereupon took possession of the premises and shortly afterwards paid the lessor two quarters' arrears of rent. A few weeks later the lessor served on the lessees a demand of possession and notice of application under the *Overholding Tenant's Act,* which they handed to the assignee, who appeared before the County Judge on the hearing of the application, and had himself added as a party to the proceedings. On motion by the assignee in the High Court to set aside the proceedings, it was held that the act of the lessees in making the assignment was an act whereby their tenancy was determined within the meaning of section 3 of the *Overholding Tenant's Act,* and that the assignee, having intervened in the proceedings, could not object that no demand had been served on him. It was held, also, that the receipt, after the forfeiture of the rent which had become due before the forfeiture, did not operate as any waiver thereof, and that a sufficient demand in writing of possession had been made upon the assignee by the landlord.

(*f*) *In re Magann and Bonner* (1897), 28 Ont. 37.

(*g*) *Nash* v. *Sharp* (1870), 5 C.L.J. 73; *Dobson* v. *Sootheran* (1888), 15 Ont. 15.

(*h*) *Dobson* v. *Sootheran* (1888), 15 Ont. 15.

Possession.

On moving for an order for delivery of possession, it must be shewn that the defendant is in possession. No order will be made against a tenant or third party in possession, not a party to the cause(*i*).

Costs.

The judges of the High Court may, from time to time, make such rules respecting costs, in cases under this Act, as to them seem proper; and the County Court Judge before whom any such case is brought, may, in his discretion, award costs therein, according to any such rule then in force, and if no such rule is in force, reasonable costs, in his discretion, to the party entitled thereto; and in case the party complaining is ordered to pay costs, execution may issue therefor, out of the County Court, as in other cases in the County Court, where an order is made for the payment of costs(*j*).

A successful tenant in an application by the landlord for possession may be deprived of costs, if it appears he is not acting in good faith(*k*).

Appeal.

It is provided by section 6 of the Ontario Act, that where a writ of possession has been issued, the High Court or a judge thereof, may, on motion, within three months after the issue of the writ, command the Judge to send up the proceedings and evidence in the case to the Court, certified under his hand, and the Court may examine into the proceedings, and, if the Court finds cause, may set aside the same, and may, if necessary, order a writ to issue to the sheriff, commanding him to restore the tenant to his possession, in order that the question of right, if any appears, may be tried, as in ordinary actions for the recovery of land(*l*).

(*i*) *McKenzie* v. *Wiggins* (1863), 2 Ch. Ch. 391.

(*j*) R.S.O. (1897), c. 171, s. 7; R.S.B.C. (1897), c. 182, s. 8; R.S. Man. (1902), c. 93, s. 19.

(*k*) *Russell* v. *Murray* (1902), 34 N.S.R. 548.

(*l*) R.S.B.C. (1897), c. 182, s. 7; R.S.N.S. (1897), c. 174, s. 6; R.S. Man. (1902), c. 93, s. 18.

An application under this section may be properly made to a Divisional Court(*m*).

Under this section the tenant is not entitled to have the proceedings removed into the High Court, *until* a writ of possession has been issued. The Act is intended to afford a speedy and simple method of obtaining possession, and if the tenant were allowed to make his application before the writ was issued, it would open the door to delays which it was the object of the Act to prevent(*n*).

Nova Scotia.

In Nova Scotia it has been held that there is no appeal from the decision of the County Court in an application for a warrant of possession against a tenant for overholding, that proceeding not being an "action" within the meaning of the interpretation clause of the Judicature Act, which is the proper guide to the meaning of the word, when used in the County Court Act(*o*).

Nothing in the Act contained shall in any way affect the powers of any judge or judges of the High Court under sections 26, 27 and 28 of *The Act respecting the Law of Landlord and Tenant*(*p*), or shall prejudice or affect any other right, or right of action, or remedy which landlords may possess in any of the cases herein provided for(*q*).

Proceeding before justices.

Provision is made by section 16 of the Statute 11 George II., chapter 19, whereby application may be made to two or more justices of the peace, who may, in certain cases where the tenant has deserted the premises, and there is no sufficient distress on the premises for rent in arrear, put the landlord in possession.

(*m*) *In re Scottish Ontario and Manitoba Land Co.* (1891), 21 Ont. 676.

(*n*) *In re Warbrick and Rutherford* (1903), 6 Ont. L.R. 430, per Street, J.

(*o*) *Hill* v. *Hearn* (1896), 29 N.S.R. 25; but now see interpretation clause County Court Act, R.S., 1900. In Manitoba, provision is made for an appeal by the Act R.S. Man. (1902), c. 93, s. 18.

(*p*) R.S.O. (1897), c. 170.

(*q*) Section 9.

This section, as re-enacted in British Columbia(*r*), is as follows:—

11 Geo. II., c. 19, s. 16.

30. And whereas landlords are often sufferers by tenants running away in arrear and not only suffering the demised premises to lie uncultivated without any distress thereon, whereby their landlords might be satisfied for the rent arrear, but also refusing to deliver up the possession of the demised premises, whereby the landlords are put to the expense and delay of recovering in ejectment: be it enacted:

That if any tenant holding any lands, tenements, or hereditaments at a rack rent, or where the rent reserved shall be full three-fourths of the yearly value of the demised premises who shall be in arrear for one year's rent, shall desert the demised premises and leave the same uncultivated and unoccupied, so as no sufficient distress can be had to countervail the arrears of rent, it shall be lawful for two or more Justices of the Peace of the county, district, or place, at the request of the landlord or his bailiff, or agent, to go upon and view the same, and to affix, or cause to be affixed, on the most conspicuous part of the premises, notice in writing what day (not less than fourteen days thereafter) they will return to take a second view thereof: And if upon such second view the tenant, or some person on his behalf, shall not appear, and pay the rent in arrear, or there shall not be sufficient distress upon the premises, then the said Justices may put the landlord into the possession of the said demised premises, and the lease thereof to such tenant, as to any demise therein contained only, shall from thenceforth become void.

It is further provided "that such proceedings shall be subject to review in a summary way by any judge of the Supreme Court of British Columbia, who is hereby empowered to order restitution to be made to such tenant, together with his expenses and costs, to be paid by the landlord, or to make such order as he shall think fit; and in case the judge shall affirm the act of the said justices, he may award such costs of appeal in favour of the landlord as may seem just"(*s*).

(*r*) R.S.B.C. (1897), c. 110, s. 30.

(*s*) 11 Geo. II., c. 19, s. 17; R.S.B.C. (1897), c. 110, s. 31.

Ontario.

These sections have been repealed in Ontario by the *Statute Law Revision Act*, 1902(*t*).

British Columbia.

In British Columbia it is further provided by sections 13 and 14 of the *Overholding Tenant's Act*(*u*), as follows—

13. In case a tenant fails to pay his rent within seven days of the time agreed on, or if the tenant make default in observing any covenant term or condition of his tenancy, such default being of such a character as to entitle the landlord to re-enter or to determine the tenancy, and wrongfully refuse or neglect, upon demand made in writing to pay the rent or to deliver up the premises demised, which demand shall be served upon the tenant, or upon some grown up person upon the premises, or if the premises be vacant, be affixed to the dwelling or other building upon the premises, or upon some portion of the fences thereon, or if the tenant make default in observing any covenant, term, or condition of his tenancy, such default being of such a character as to entitle the landlord to re-enter or to determine the tenancy, the landlord or his agent, may apply to the Registrar of the County Court of the county in which said premises are situate or partly situate, upon affidavit setting forth the terms of the demise or occupancy, the amount of rent in arrear, and the time for which it is so in arrear, producing the demand made for the payment of rent or delivery of the possession, and stating the refusal of the tenant to pay the rent or deliver up possession, and the answer of said tenant, if any answer were made, and that the tenant has no right to set-off or reason for withholding possession, or setting forth the covenant, term, or condition in performance of which default has been made, and the particulars of such forfeiture, and upon such filing the Registrar shall cause to be issued from the said County Court a summons calling upon such tenant, three days after service, to shew cause why an order should not be made for delivering up possession of the premises to the landlord, which summons shall be served in the same manner as the demand. Upon return of said summons, the Judge or acting Judge of said Court shall hear the parties on the evidence they may adduce upon oath, and make such order, either to confirm the tenant in possession or to deliver up possession to the landlord, as the facts of the case shall warrant, and in case the order be made for the tenant to deliver up possession and he refuse, then a bailiff of the said County Court shall, with such assistance as he may require, forthwith proceed under said order to eject and remove the said

Summons to tenant to shew cause.

(*t*) 2 Edward VII., c. 1, s. 2.

(*u*) R.S.B.C. (1897), c. 182.

tenant, together with all goods and chattels that he may have on or about the premises, and make the rent in arrear:

(a) Provided that if any tenant, in case the default be simply for non-payment of rent, before the execution of the order, pay the rent in arrear and all costs, the said proceedings shall be stayed and the said tenant may continue in possession as of his former tenancy:

(b) Provided also that in case the premises in question be vacant, or the tenant be not found in possession or if in possession and he refuse, on demand made in the presence of a witness to admit the bailiff, the latter, after a reasonable time has been allowed to the tenant or person in possession to comply with the demand for admittance, may force open any outer door in order to gain an entrance, and may also force any inner door for the purpose of ejecting the tenant or occupant and giving proper possession of the premises to the landlord or his agent.

14. The said Judge referred to in the last preceding section may award such costs as he may see fit, and as the circumstances of the case may warrant, to the landlord or to the tenant, as the case may be, which cost may be added to the costs of the levy for rent, if any such shall or can be made or may be recovered by action against the tenant in the proper Court.

Manitoba.

In Manitoba, provisions have been made similar to those contained in the sections just quoted(*v*).

North-West Territories.

In the North-West Territories, it is provided by section 469 of the *Judicature Ordinance* (*w*), as follows:—

469. Proceedings commenced by originating summons in the Supreme Court of Judicature in England may be so commenced under this Ordinance unless otherwise provided, and proceedings by a landlord to recover possession of demised premises from an overholding tenant may be so commenced.

(*v*) R.S. Man. (1902), c. 93, s. 29 *et seq.*

(*w*) C.O.,N.W.T., c. 21.

SECTION III.

ACTION OF EJECTMENT.

Instead of taking summary proceedings for the recovery of possession, a landlord may proceed by action; and if he seeks to recover mesne profits, double rent, double value, or arrears of rent, or other relief, he must proceed by action, as the relief by summary proceedings is confined to the recovery of possession(*x*).

County Court jurisdiction.

An action for the recovery of land must be brought, in Ontario, in the High Court of Justice, except in the following cases where it may be brought in a County Court:

(1) Where the value of the land does not exceed $200(*y*).

(2) Where the rent, or the yearly value of the land does not exceed $200, and,

(*a*) The term of tenant has expired, or has been determined by a legal notice;

(*b*) Where the rent is sixty days in arrear, and the landlord has by law the right to re-enter for non-payment thereof(*z*).

In such cases the County Court has and may exercise the same powers as may be exercised by the High Court.

Place of trial.

In Ontario, it is provided by Consolidated Rule 529 that, in actions for the recovery of land, the place of trial, to be named in the statement of claim, shall be the county town of the county in which the land is situate, and the action shall be tried at the place so named unless otherwise ordered by a court or a judge upon the application of either party.

By the *County Court Act*(*a*), actions for the recovery

(*x*) See *Allan* v. *Rogers* (1855), 13 U.C.R. 166.
(*y*) R.S.O. (1897), c. 55, s. 22, s.-s. 8.
(*z*) R.S.O. (1897), c. 55, s. 27.
(*a*) R.S.O. (1897), c. 55, s. 36.

of land, or for trespass or injury to land, are to be *brought* and *tried* in the county where the land lies.

An action to cancel a lease of a mining location, and to restrain the defendant from entering thereon, is not an action for the recovery of land(*b*).

In actions in the High Court for the recovery of land, although the trial must, unless otherwise ordered, be held in the county where the land is situate, the writ of summons may be issued in any country(*c*).

In Ontario, an action for the recovery of land is commenced by the issue of a writ of summons in the ordinary form, which may be specially endorsed, with or without a claim for rent or mesne profits, as follows:

Endorsement.

"The plaintiff's claim is to recover possession of lot No. — in the —— concession of the township, of —— in the county of ——— which was let by the plaintiff to the defendant for a term of —— years from the —— day of —— 19—, which term has expired (*or as the case may be*).

"The plaintiff also claims $—— for mesne profits, arrears of rent (*or as the case may be*).

"Place or trial, Chatham"(*d*).

Where a writ is thus specially endorsed, a motion may be made after appearance for final judgment(*e*).

Parties.

In an action by a landlord for possession, it is not necessary to make sub-tenants in actual possession parties defendant, and a judgment for possession may be given

(*b*) *Kendall* v. *Ernst* (1894), 16 P.R. 57.

(*c*) *Canada Permanent Loan and Savings Co.* v. *Foley* (1883), 9 P.R. 273.

(*d*) Con. Rule 138 (Ont.). Mesne profits are the profits of an estate which accrue to a tenant in possession intermediate between two dates, particularly the commencement and the termination of a possession held without right, and hence include claims for use and occupation, double value, and double rent.

(*e*) Con. Rule 603 (Ont.).

against the tenant under which the sub-tenant must go out(*f*).

Security for costs.

In an action for the recovery of the possession of land by a landlord against his tenant, the landlord is entitled in certain cases to an order requiring the tenant to give a bond for security for costs and damages. This is provided by sections 26, 27 and 28 of the *Landlord and Tenant's Act*(*g*), which are as follows:

Notice to find security.

26. In case (1) the term or interest of any tenant of any lands, tenements or hereditaments, holding the same under a lease or agreement in writing for any term or number of years certain, or from year to year, expires or is determined either by the landlord or tenant by regular notice to quit; and (2) in case a lawful demand of possession in writing, made and signed by the landlord or his agent, is served personally upon the tenant, or any person holding or claiming under him, or is left at the dwelling house or usual place of abode of such tenant or person; and (3), in case such tenant or person refuses to deliver up possession accordingly, and the landlord thereupon proceeds by action for recovery of possession, he may, at the foot of the writ of summons, address a notice to such tenant or person requiring him to find such security, if ordered by the Court or a Judge, and for such purposes as are hereinafter next specified.

Order for security.

27. Upon appearance of the party or in case of non-appearance then on making and filing an affidavit of service of the writ and notice, and on the landlord's producing the lease or agreement, or some counterpart or duplicate thereof, and proving the execution of the same by affidavit and upon affidavit that the premises have been actually enjoyed under such lease or agreement, and that the interest of the tenant has expired or been determined by regular notice to quit (as the case may be), and that possession has been lawfully demanded in manner aforesaid, the landlord may apply to the Court or a Judge for a rule or summons for such tenant or person to shew cause, within a time to be fixed by the Court or Judge on a consideration of the situation of the premises, why such tenant or person should not enter into a bond by himself and two sufficient sureties, in a reasonable sum, conditioned to pay the costs and damages which may be recovered by the plaintiff in the action, and the Court or Judge, upon cause shewn or upon affidavit of the service of the

(*f*) *Synod of Toronto* v. *Fisken* (1899), 29 Ont. 738.
(*g*) R.S.O. (1897), c. 170.

rule or summons in case no cause is shewn, may make the same absolute in whole or in part, and order such tenant or person within a time to be fixed, upon a consideration of all the circumstances, to give such bond to the plaintiff with such conditions and in such manner as may be specified in the said rule or summons, or the part of the same so made absolute.

Non-compliance.

28. In case the party neglects or refuses to comply with such rule or order, and gives no ground to induce the Court or Judge to enlarge the time for obeying the same, then the lessor or landlord, upon filing an affidavit that such rule or order has been made and served and not complied with, may sign judgment for the recovery of possession and costs of suit.

In Manitoba similar provisions have been made(*h*).

No action or other proceeding shall be commenced upon the bond given for security for costs after six months from the time when the possession of the premises or any part thereof has been actually delivered to the landlord(*i*).

Notice of writ.

It is provided by statute that every tenant, to whom a writ in an action for the recovery of land has been delivered, or to whose knowledge it comes, shall forthwith give notice thereof to his landlord, or to his bailiff or receiver, and if he omits so to do, he shall forfeit to the person of whom he holds, the value of three years' improved or rack rent of the premises demised or holden in the possession of such tenant, to be recovered by action in any Court having jurisdiction for the amount(*j*).

It is also provided that every tenant in possession who is not also tenant of the freehold, and who is served with a writ of summons in an action for the recovery of dower, shall forthwith give notice thereof to his landlord or other person under whom he entered into possession, under the penalty of forfeiting the value of three years' improved rent of the premises in the possession of the tenant to the

(*h*) R.S.M. (1902), c. 93, ss. 5, 6, 7, 8.

(*i*) R.S.O. (1897), c. 170, s. 29; R.S.M. (1902), c. 93, s. 10.

(*j*) R.S.O. (1897), c. 170, s. 19; R.S. Man. (1902), c. 93, s. 3.

person under whom he entered into possession to be recovered by action in the High Court(*k*).

Landlord may appear.

Any person not named as a defendant in a writ for the recovery of land, may, without leave, appear and defend, by filing with his appearance an affidavit stating that he is in possession, either by himself or his tenant, as the case may be, and if the possession is by his tenant, that the defendant named in the writ is his tenant(*l*).

A person who enters an appearance to defend an action for the recovery of land as landlord, in respect of property whereof he is in possession in person or by his tenant, shall state in his appearance that he appears as landlord(*m*).

Notice of appearance.

Such an appearance is to be entitled in the action; and the landlord so appearing is to give notice thereof forthwith, and in subsequent proceedings he is to be named as a party defendant; if he fails to give notice of appearance, the plaintiff may proceed as in case of non-appearance(*n*).

Any person appearing to a writ for the recovery of land may limit his defence to a part only of the land, describing the part with reasonable certainty in his appearance, or in a notice to be served within four days after appearance(*o*).

Pleading.

A defendant in an action for the recovery of land who is in possession by himself or his tenant, need not plead his title, unless his defence depends on an equitable estate or right, or he claims relief upon any equitable ground against any right or title asserted in the plaintiff; but, except in these cases, it shall be sufficient to state by way of defence that he is so in possession, and he may rely upon any ground of defence which he can prove(*p*).

(*k*) R.S.O. (1897), c. 67, s. 3; see also R.S.O. (1897), c. 285, s. 15 (2).

(*l*) Con. Rule 180; R.S.M. (1902), c. 40, s. 210.

(*m*) Con. Rule 182 (Ont.).

(*n*) Con. Rule 183 (Ont.).

(*o*) Con. Rule 184 (Ont.). See Form in Part V.

(*p*) Con. Rule 285 (Ont.).

The plaintiff must allege in his statement of claim the material facts on which he relies to prove his title(*q*). Thus, where it was alleged that by virtue of certain deeds the plaintiff was entitled to the possession of the land, without stating the purport of the deeds, or the plaintiff's pedigree, or shewing the devolution of title by which the land in question became vested in the plaintiff, the pleading was held to be embarrassing(*r*).

Likewise, a statement of claim which merely alleged that the plaintiff had been wrongfully dispossessed of the land by the defendant, was set aside for not shewing the plaintiff's interest in the land(*s*).

Particulars.

A defendant is entitled to particulars shewing the chain of relationship on which the plaintiff relies to establish his heirship(*t*).

A defendant in ejectment relying upon a lease to a third person as shewing title out of the plaintiff, need not shew an entry by the lessee under the lease, for until some one else be shewn in possession, holding out the lessee, he must be regarded as possessed of the term(*u*).

Where the plaintiff recovered judgment and sold the land under it, and afterwards executed a lease under which defendant continued in possession, it was held that whatever the defendant's original title was, it was extinguished by the sale under plaintiff's judgment and his subsequent taking under the lease, thereby recognizing plaintiff's title as landlord(*v*).

(*q*) Con. Rule 268 (Ont.).

(*r*) *Phillips* v. *Phillips* (1878), 4 Q.B.D. 127; *Davis* v. *James* (1884), 26 Ch. D. 778; *Jones* v. *Curling* (1884), 13 Q.B.D. 262.

(*s*) *O'Connor* v. *O'Hara* (1870), 8 L.R. Ir. 249; see also *Lyell* v. *Kennedy* (1889), 20 Ch. D. 491; 8 App. Cas. 217.

(*t*) *Palmer* v. *Palmer*, [1892] 1 Q.B. 319.

(*u*) *Doe d. King's College* v. *Kennedy* (1848), 5 U.C.R. 577.

(*v*) *McDonald* v. *Arbuckles* (1890), 22 N.S.R. 67.

Where a lessee took a lease of premises for two years, and covenanted to leave the premises without notice at the end of that time, it was held that on ejectment brought by the lessor at the end of the term the lessee could not set up a former lease to him for a longer period(*w*).

(*w*) *Doe d. Wimburn* v. *Kent* (1837), 5 O.S. 437.

CHAPTER XXX.

LIMITATION OF ACTIONS FOR POSSESSION.

The time within which an action must be brought to recover possession of land is governed in Ontario by the *Real Property Limitation Act*(*a*).

This Act is taken from the Imperial statute, 3 & 4 William IV., chapter 27, as modified by 37 and 38 Victoria, chapter 57.

It is provided by section 4 of the Ontario Act as follows:

Ten years.

4. No person shall make an entry or distress or bring any action to recover any land or rent, but within *ten years* next after the time at which the right to make such entry or distress, or to bring such action, first accrued to some person through whom he claims; or if such right did not accrue to any person through whom he claims, then within ten years next after the time at which the right to make such entry or distress, or to bring such action, first accrue to the person making or bringing the same (*b*).

(*a*) R.S.O. (1897), c. 133;

In England, by 3 & 4 Will. IV. (Imp.), c. 27; and 37 & 38 Vict. (Imp.), c. 57;

In Nova Scotia, by R.S.N.S. (1900, c. 167;

In Manitoba, by R.S.M. (1902), c. 100;

In British Columbia, by R.S.B.C. (1897), c. 123;

In the Northwest Territories, by C.O.,N.W.T., c. 31, s. 2.

(*b*) 3 & 4 Will. IV. (Imp.), c. 27, s. 2, the period was originally 20 years and was afterwards reduced to 12 years by 37 & 38 Vict. (Imp.), c. 57, s. 1.

In Nova Scotia, R.S.N.S. (1900), c. 167, s. 9, the period is 20 years.

In Manitoba, R.S.M. (1902), c. 100, s. 4, the period is 10 years.

In British Columbia, R.S.B.C. (1897), c. 123, s. 16, the period is 20 years.

In the Northwest Territories, the provisions of *The Real Property Limitation Act, 1874*, being chapter 57 of the Statutes of the Imperial Parliament, passed in the thirty-seventh and thirty-eighth years of Her Majesty's reign, have been declared to be in force and to have been in force in the Territories since the passing thereof: C.O.,N.W.T., c. 31, s. 2.

When right first accrued.

In the construction of the Act, the time when the right to make an entry or distress, or bring an action to recover any land or rent, shall be deemed to have first accrued, is governed by section 5.

Last receipt of rent.

Where the person claiming such land or rent, or some person through whom he claims, has in respect of the estate or interest claimed, been in possession or in the receipt of the profits of such land, or in the receipt of such rent, and has while entitled hereto, been dispossessed, or has discontinued such possession or receipt, then such right shall be deemed to have first accrued at the time of such dispossession or discontinuance of possession, or at the last time at which any such profits or rent were or was so received(*c*).

Death.

Where the person claiming such land or rent, claims the estate or interest of some deceased person who continued in such possession or receipt, in respect of the same estate or interest, until the time of his death, and was the last person entitled to such estate or interest who was in such possession or receipt, than such right shall be deemed to have first accrued at the time of such death(*d*).

Entitled under an instrument.

Where the person claiming such land or rent, claims in respect of an estate or interest in possession, granted, appointed, or otherwise assured by any instrument other than a will, to him or some person through whom he claims, by a person being in respect of the same estate or interest, in the possession or receipt of the profits of the land, or in receipt of the rent and no person entitled under such instrument has been in possession or receipt, then such right shall be deemed to have first accrued at the time at which the person claiming as aforesaid, or the person through whom he claims, became entitled to such possession or receipt by virtue of such instrument(*e*).

(*c*) R.S.O. (1897), c. 133, s. 5, s.-s. 1.

(*d*) Sub-section 2 of section 5.

(*e*) Sub-section 3 of section 5.

Wild lands.

In the case of lands granted by the Crown, of which the grantee, his heirs or assigns, by themselves, their servants or agents, have not taken actual possession by residing upon or cultivating some portion thereof, and in case some other person not claiming to hold under such grantee has been in possession of such land, such possession having been taken while the land was in a state of nature, then unless it can be shewn that such grantee, or such person claiming under him, while entitled to the lands, had knowledge of the same being in the actual possession of such other person, the lapse of ten years shall not bar the right of such grantee, or any person claiming under him, to bring an action for the recovery of such land, but the right to bring an action shall be deemed to have accrued from the time that such knowledge was obtained; but no such action shall be brought or entry made after twenty years from the time such possession was taken as aforesaid(*f*).

20 years.

Determination of lease.

When any person is in possession or in receipt of the profits of any land, or in receipt of any rent by virtue of a lease in writing, by which a rent amounting to the yearly sum of $4 or upwards is reserved, and the rent reserved by such lease has been received by some person wrongfully claiming to be entitled to such land or rent in reversion immediately expectant on the determination of such lease, and no payment in respect of the rent reserved by such lease has afterwards been made to the person rightfully entitled thereto, the right of the person entitled to such land or rent, subject to such lease, or of the person through whom he claims, to make an entry or distress, or to bring an action after the determination of such lease, shall be deemed to have first accrued at the time at which the rent reserved by such lease was first so received by the person wrongfully claiming as aforesaid, and no such right shall

(*f*) Sub-section 4 of section 5.

be deemed to have first accrued upon the determination of such lease to the person rightfully entitled(*g*).

Yearly tenancy.

Where any person in possession or in receipt of the profits of any land, or in receipt of any rent as tenant from year to year or other period, without any lease in writing, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress, or to bring an action to recover such land or rent, shall be deemed to have first accrued at the determination of the first of such years or other periods, or at the last time when any rent payable in respect of such tenancy was received, which ever last happened(*h*).

Tenancy at will.

Where any person is in possession or in receipt of the profits of any land, or in receipt of any rent, as tenant at will, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress, or to bring an action to recover such land or rent, shall be deemed to have first accrued either at the determination of such tenancy, or at the expiration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have determined(*i*).

But a mortgagor or cestui que trust shall not be deemed to be a tenant at will of his mortgagee or trustee(*j*).

Forfeiture.

Where the person claiming such land or rent, or the person through whom he claims, has become entitled, by reason of any forfeiture or breach of condition, then such right shall be deemed to have first accrued when such forfeiture was incurred or such condition broken(*k*).

Interest in possession.

Where any right to make an entry or distress, or to bring an action to recover any land or rent by reason of any

(*g*) Sub-section 5 of section 5.
(*h*) Sub-section 6 of section 5.
(*i*) Sub-section 7 of section 5.
(*j*) Sub-section 8 of section 5.
(*k*) Sub-section 9 of section 5.

forfeiture or breach of condition, has first accrued in respect of any estate or interest in reversion or remainder, and the land or rent has not been recovered by virtue of such right, the right to make an entry or distress, or to bring an action to recover such land or rent, shall be deemed to have first accrued in respect of such estate or interest at the time when the same became an estate or interest in possession as if no such forfeiture or breach of condition had happened(*l*).

Future estate.

Where the estate or interest claimed is an estate or interest in reversion or remainder, or other future estate or interest, and no person has obtained the possession or receipt of the profits of such land or the receipt of such rent, in respect of such estate or interest, then such right shall be deemed to have first accrued at the time at which such estate or interest became an estate or interest in possession(*m*).

A right to make an entry or a distress, or to bring an action to recover any land or rent, shall be deemed to have first accrued, in respect of an estate or interest in reversion or remainder, or other future estate or interest, at the time at which the same became an estate or interest in possession by the determination of any estate or estates in respect of which such land has been held, or the profits thereof or such rent have been received, notwithstanding that the person claiming such land or rent, or some person through whom he claims, has at any time previously to the creation of the estate or estates which have determined, been in the possession or receipt of the profits of such land, or in receipt of such rent(*n*).

Ten years.

If any person last entitled to any particular estate on which any future estate or interest was expectant has not

(*l*) Sub-section 10 of section 5.
(*m*) Sub-section 11 of section 5.
(*n*) Sub-section 12 of section 5.

been in the possession or receipt of the profits of such land or in receipt of such rent, at the time when his interest determined, no such entry or distress shall be made and no such action shall be brought by any person becoming entitled in possession to a future estate or interest, but within ten years next after the time when the right to make an entry or distress, or to bring an action for the recovery of such land or rent, first accrued to the person whose interest has so determined, or within five years next after the time when the estate of the person becoming entitled in possession has become vested in possession, whichever of those two periods is the longer(*o*).

Five years.

If the right of any such person to make such entry or distress, or to bring any such action, has been barred under this Act, no person afterwards claiming to be entitled to the same land or rent in respect of any subsequent estate or interest under any deed, will or settlement executed or taking effect after the time when a right to make an entry or distress, or to bring an action for the recovery of such land or rent, first accrued to the owner of the particular estate whose interest has so determined as aforesaid, shall make any such entry or distress, or bring any such action, to recover such land or rent(*p*).

Where the right of any person to make an entry or distress, or to bring an action to recover any land or rent to which he has been entitled for an estate or interest in possession, has been barred by the determination of the period limited by the Act which is applicable in such case, and such person has, at any time during the said period, been entitled to any other estate, interest, right or possibility in reversion, remainder or otherwise, in or to the same land or rent, no entry, distress or action shall be made or brought

(*o*) Sub-section 1 of section 6.

(*p*) Sub-section 2 of section 6.

by such person, or any person claiming through him, to recover such land or rent in respect of such other estate, interest, right or possibility, unless in the meantime such land or rent has been recovered by some person entitled to an estate, interest or right which has been limited or taken effect after or in defeasance of such estate or interest in possession(*q*).

Administration.

For the purposes of the Act, an administrator claiming the estate or interest of the deceased person of whose chattels he has been appointed administrator, shall be deemed to claim as if there had been no interval of time between the death of such deceased person and the grant of the letters of administration(*r*).

No person shall be deemed to have been in possession of any land within the meaning of the Act, merely by reason of having made an entry thereon(*s*).

No continual or other claim upon or near any land shall preserve any right of making an entry or distress, or of bringing an action(*t*).

No descent cast, discontinuance or warranty, which has happened or been made since the first day of July, 1834, or which may hereafter happen to be made, shall toll or defeat any right or action for the recovery of land(*u*).

Tenants in common.

Where any one or more of several persons entitled to any land or rent as coparceners, joint tenants, or tenants in common have been in possession or receipt of the entirety, or more than his or their undivided share of such land, or of the profits thereof or of such rent, for his or their own benefit, or for the benefit of any person or persons other than the persons entitled to the other share or shares of the

(*q*) Sub-section 3 of section 6.
(*r*) Section 7.
(*s*) Section 8.
(*t*) Section 9.
(*u*) Section 10.

same land or rent, such possession or receipt shall not be deemed to have been the possession or receipt of or by such last mentioned person or persons, or any of them(*v*).

Possession of relation.

Where a relation of the persons entitled as heirs to the possession, or receipt of the profits of any land, or to the receipt of any rent, enters into the possession or receipt thereof, such possession or receipt shall not be deemed to be the possession or receipt of or by the persons entitled as heirs(*w*).

Acknowledgment.

Where any acknowledgment of the title of the person entitled to any land or rent has been given to him or to his agent in writing, signed by the person in possession or in receipt of the profits of such land, or in the receipt of such rent, such possession or receipt of or by the person by whom such acknowledgment was given shall be deemed, according to the meaning of the Act, to have been the possession or receipt of or by the person to whom or to whose agent such acknowledgment was given at the time of giving the same, and the right of such last mentioned person, or of any person claiming through him, to make an entry or distress or bring an action to recover such land or rent, shall be deemed to have first accrued at and not before the time at which such acknowledgment, or the last of such acknowledgments, if more than one, was given(*x*).

The receipt of the rent payable by any tenant from year to year, or other lessee, shall, as against such lessee or any person claiming under him, but subject to the lease, be deemed to be the receipt of the profits of the land for the purpose of the Act(*y*).

Title extinguished.

At the determination of the period limited by the Act to any person for making an entry or distress, or bringing any

(*v*) Section 11.
(*w*) Section 12.
(*x*) Section 13.
(*y*) Section 14.

action, the right and title of such person to the land or rent for the recovery whereof such entry, distress or action respectively might have been made or brought within such period, shall be extinguished(*z*).

Disability.

If at the time at which the right of any person to make an entry or distress, or to bring an action to recover any land or rent, first accrues as in sections 4, 5, and 6, mentioned, such person is under any of the disabilities herein after mentioned(that is to say) infancy, idiotcy, lunacy, or unsoundness of mind, then such person, or the person claiming through him, notwithstanding that the period of ten years or five years (as the case may be) limited by the Act has expired, may make an entry or a distress, or bring an action, to recover such land or rent at any time within five years next after the time at which the person to whom such right first accrued ceased to be under any such disability, or died, whichever of those two events first happened(*a*).

Five years after.

20 years in all.

No entry, distress, or action, shall be made or brought by any person, who at the time at which his right to make any entry or distress, or to bring an action to recover any land or rent first accrued, was under any of the disabilities hereinbefore mentioned, or by any person claiming through him, but within twenty years next after the time at which such right first accrued, although the person under disability at such a time may have remained under one or more of such disabilities during the whole of such twenty years, or although the term of five years from the time at which he ceased to be under any disability, or died, may not have expired(*b*).

Death under disability.

Where any person is under any of the disabilities hereinbefore mentioned, at the time at which his right to make

(*z*) Section 15.
(*a*) Section 43.
(*b*) Section 44.

an entry or distress, or to bring an action to recover any land or rent first accrues, and departs this life without having ceased to be under any such disability, no time to make an entry or distress, or to bring an action to recover such land or rent beyond the said period of ten years next after the right of such person to make an entry or distress, or to bring an action to recover such lands or rent, first accrued or the said period of five years next after the time at which such person died, shall be allowed by reason of any disability of any other person(*c*).

The "rent" recovery of which is barred by the Statute of Limitations, does not apply to the rent incident to the reversion under an ordinary lease(*d*).

Crown.

Apart from express statutory provision, the Statute of Limitations does not run against the Crown, and it makes no difference that the land is vested in the Crown as trustee. Where, therefore, in ejectment by the Crown for land held as trustee for the University of Toronto, it appeared that defendant had held possession for twenty-seven years, the plaintiff was nevertheless held entitled to succeed(*e*).

In Ontario, the right of the Crown to bring an action for the recovery of land is limited by statute to sixty years after the right first accrued(*f*).

Adjoining occupants.

The statute does not run in favour of or against adjoining occupants of land while the fee is in the Crown. Thus, where the plaintiff and the defendant held the north and south halves of a lot respectively as lessees from the Crown, and the defendant entered and held possession

(*c*) Section 45.

(*d*) *Grant* v. *Ellis* (1841), 9 M. & W. 113; see chapter XII.

(*e*) *Regina* v. *Williams* (1860), 19 U.C.R. 397; see also *Attorney-General* v. *Midland Railway Co.* (1883), 3 Ont. 511; *Doe d. West* v. *Howard* (1837), 5 O.S. 462.

(*f*) 2 Edward VII. (1902), c. 1, s. 17.

up to a certain line for more than twenty years, and the plaintiff had held the remainder for some sixteen years, and they then each obtained patents for their halves, and on discovering that the lot overran, and that the defendant's fence encroached upon the other's half lot, the plaintiff brought ejectment, it was held that he was entitled to recover, as the possession by defendant could not effect the title derived under the patent, and the statute did not run while the fee was in the Crown(*g*).

Encroachment.

Where a landlord placed a tenant in possession of land, and the tenant knowingly encroaches on a part of an adjoining lot, it was held that the tenant's occupation of that part did not enure to create for the landlord a title to it(*h*).

Where a lessee of a lot had for more than twenty years, exercised acts of ownership over part of an adjoining lot, and claimed to have acquired title by possession to such part, it was held that a tenant taking in land adjacent to his own by encroachment, must, as between himself and his landlord, be deemed *primâ facie* to take it as part of the demised land, but that presumption will not prevail for the landlord's benefit against third persons(*i*).

Determination of lease.

Where, in the case of a lease for a term of years, the lessor permits the lessee to continue during the term without payment of rent, the statute does not begin to run against the lessor and those claiming under him until the determination of the lease(*j*).

(*g*) *Jamieson* v. *Harker* (1859), 18 U.C.R. 590; see also *Dowsett* v. *Cox* (1859), 18 U.C.R. 594.

(*h*) *Doe d. Smyth* v. *Leavens* (1847), 3 U.C.R. 411.

(*i*) *Bruyea* v. *Rose* (1890), 19 Ont. 433; *Doe d. Baddeley* v. *Massey* (1851), 17 Q.B. 373.

(*j*) *Liney* v. *Rose* (1867), 17 U.C.C.P. 186; *Doe* v. *Oxenham* (1840), 7 M. & W. 131, followed.

Effect of paying taxes.

The payment of taxes on the demised lands by the tenant is not the same as the payment of rent within the meaning of the Act, and is insufficient to keep alive the landlord's right of entry where no rent is paid.

Thus, where a tenant agreed to pay as rent for certain premises the sum of $6 a month and taxes, and for some eighteen years remained in possession, paying the taxes and paying nothing else, and the tenant, after the expiration of this period, gave to his landlord an acknowledgment of the indebtedness for rent for the whole period, it was held that the payment of taxes was not the payment of rent within the meaning of the *Real Property Limitation Act*, and that the tenant, although he had always intended to hold merely as a tenant, had acquired title by possession, and could not make himself liable, as for rent accruing after he had so acquired title, by giving to the landlord an acknowledgment of indebtedness in respect of rent(*k*).

A notice to quit given within the statutory period does not save the landlord from being barred by the statute(*l*).

Receipt of profits.

Where, during the time that the defendant was in possession of land as caretaker or tenant at will, the owner put his cattle thereon to be fed and cared for by the defendant, it was held that the produce of the land which the cattle ate was "profits" which the owner, by means of his cattle, took to himself for his own use and benefit, and as long as the cattle were upon the land, the defendant was not in exclusive possession, and the Statute of Limitations did not begin to run in his favour(*m*).

(*k*) *Finch* v. *Gilray* (1889), 16 Ont. App. 484; followed in *Coffin* v. *North American Land Co.* (1890), 21 Ont. 80; *Davis* v. *McKinnon* (1871), 31 U.C.R. 564, discussed.

(*l*) *Doe d. Ausman* v. *Minthorne* (1846), 3 U.C.R. 423.

(*m*) *Rennie* v. *Frame* (1898), 29 Ont. 586.

Where a tenant occupied land for twelve years under an agreement that he would make improvements in lieu of rent, but no definite term was agreed on, it was held that such tenant could not set up a title under the Statute of Limitations, as the landlord might be said to be in receipt of "profits" of the land through their increase in value by reason of the improvements(*n*).

Entry after statute begins to run.

A mere visit to the occupant of land by the owner of demised premises where he remains a day or two is not an entry on the land sufficient to stop the running of the statute, although the occupant then orally acknowledges the title of such owner(*o*).

It has been held that where the owner entered on the land and pulled down an old fence and put up a new one, before the statute had given title to an occupant, such acts amounted to a sufficient entry and resumption of possession to give the statute a new starting point(*p*).

An entry on land by the owner, and an assertion of his right, and a verbal submission by the occupant and consent on his part to remain as tenant to the owner, are sufficient to create a new tenancy at will, and to give a fresh point of departure under the statute(*q*).

Tenant at will.

A person who occupies land with the permission of the owner without more, is a tenant at will to such owner, and the statute does not begin to run in favour of such occupant until the expiration of a year from his entry(*r*).

If a tenancy at will is determined, either by the acts of

(*n*) *Workman* v. *Robb* (1882), 7 Ont. App. 389.

(*o*) *Brock* v. *Benness* (1898), 29 Ont. 468; *McCowan* v. *Armstrong* (1902), 3 Ont. L.R. 100.

(*p*) *Coffin* v. *North American Land Co.* (1891), 21 Ont. 80; see *Henderson* v. *Henderson* (1896), 23 Ont. App. 577.

(*q*) *Smith* v. *Keown* (1881), 46 U.C.R. 163; see also *Cooper* v. *Hamilton* (1881), 45 U.C.R. 502.

(*r*) *Grant* v. *O'Hara* (1882), 46 U.C.R. 277.

the parties, or by operation of law, as for example, by the death of the landlord, and the tenant at will continues in possession a new tenancy at will is deemed to arise by implication. In such a case, a new tenancy at will arising or created after the statute has begun to run, operates as a fresh starting point for the running of the statute(*s*).

Where a tenant at will of a certain cottage remained in possession of it for a period of thirteen years, and during that time she paid no rent, though the landlord from time to time entered upon the premises and did repairs thereon, it was held that such an entry did not operate in any way so as to determine the tenancy, there being no evidence that it took place against the tenant's will, and that the tenant acquired a statutory title to the premises by the reason of the *Real Property Limitation Act*(*t*).

McCowan v. Armstrong.

In *McCowan* v. *Armstrong*(*u*), the defendant was put by his father in possession of a farm in the autumn of 1879. His father told him that he had bought the farm for him, but the defendant knew that what was done had not the effect of transferring the title to him, and was aware that it must be obtained either by conveyance or devise from his father. The father did not intend to divest himself of the ownership of the farm, but to leave himself free, in devising it, as he intended, to his son, to charge it with the payment of such sum as he might think it right to require him to pay. The defendant continued in possession of the farm until his father's death, in 1900, occupying it for his own benefit, and having the exclusive enjoyment of the profits; he paid no rent and rendered no service or other return for it, and gave no acknowledg-

(*s*) *In re Defoe* (1882), 2 Ont. 623; *Smith* v. *Keown* (1881), 46 U.C.R. 163; *Cooper* v. *Hamilton* (1881), 45 U.C.R. 502.

(*t*) *Lynes* v. *Snaith*, [1899] 1 Q.B. 456.

(*u*) *McCowan* v. *Armstrong* (1902), 3 Ont. L.R. 100.

ment of his father's title; he also made valuable permanent improvements at his own expense. It was held that the title of the father had, long before his death, by force of the *Real Property Limitation Act*, become extinguished. The defendant became, upon his entry with the permission of his father, a tenant at will, and that tenancy never having in fact been determined, the father's right to entry first accrued at the expiration of one year from the commencement of it under sub-section 7 of section 5, and was barred at the expiration of eleven years.

New tenancy at will.

Upon the expiration of the tenancy at will, the possession of the defendant became that of a tenant at sufferance, and the running of the statute was not stopped by an entry, unless, before the statute had operated to extinguish the title of the testator, a new tenancy at will was created; and this would have been the case, even if the tenancy at will had been put an end to in fact, and not merely by force of sub-section 7 of section 5; the effect of the sub-section is, that it is for the purposes of the statute only that the tenancy at will is to be deemed to be determined at the expiration of a year from the time when it began(*v*).

It was held also that a visit made by the father to the son, within eleven years before action, when he lived with him on the farm for a few days was not an entry on the land, and did not put an end to the existing tenancy at will(*w*).

Assessment.

In 1879, and 1880, the farm was assessed in the name of the father as well as of the defendant, to the former as "freeholder," and the latter as "owner," and from 1880 to 1899, to both as freeholders, and in 1882, this was done

(*v*) *Ibid.*
(*w*) *Ibid.*

at the instance of the defendant, who also knew of the way in which the assessment was made in each of these years. It was held that this was not evidence of a new tenancy at will created within eleven years before the commencement of the action(*x*).

Acknowledgment after title barred.

By an agreement in writing, made a few days after the death of the father, between the devisees and legatees under the father's will, the defendant admitted and acknowledged that, although the farm was occupied by him, the father was at the time of his death the owner in fee simple of it, and agreed to abide by the will and to carry out the terms of it. By the will the father devised the farm to the defendant, charged with the payment of $4,000. This agreement was made before the will had been opened or the contents of it known to the defendant; no doubt existed as to the validity of the will; and the object of the agreement was, though this was not known by or communicated to the defendant, to get rid of any difficulty which might arise if the defendant asserted title to the farm under the *Real Property Limitation Act*, but the defendant did not in fact know of his rights under that statute. It was held that, in these circumstances, the agreement was not, even when viewed as a family arrangement, binding on the defendant(*y*).

It was held, also, that if there was any election by the defendant to take under the will, it was made under a mistake as to his rights; and besides if the agreement fell, what the defendant did which was relied on as being an election, being a part of the same transaction, must fall with it(*z*).

(*x*) *Ibid.*; *Doe d. Bennett* v. *Turner* (1840), 7 M. & W. 226, and (1842), 9 M. & W. 643, distinguished.

(*y*) *Ibid.*; *Fane* v. *Fane* (1875), L.R. 20 Eq. 698, applied and followed.

(*z*) *Ibid.*

Caretaker or tenant.

In 1849, the plaintiff's father, who owned a block of 400 acres of land, offered the plaintiff the choice of 100 acres, if he would live on it and take care of the remaining 300 acres. The plaintiff selected the south half of lot 1 in the 13th concession, and lived thereon, taking care of the residue of the block, till 1864, when he sold his 100 acres and moved up to the north half of this lot 1, where he had resided ever since. The father died in 1877, having devised the north half of this north half, to the defendant, another son, and the south half thereof to the plaintiff. The defendant claiming under the demise entered, whereupon the plaintiff brought trespass, claiming title by possession. It appeared that the plaintiff had erected buildings on the land in question, and cleared and cultivated it, taking the profits to his own use; and since 1865, the lot had been assessed in his name, and he had paid the taxes thereon. The plaintiff occasionally visited his father and told him what improvements he was making on the lot. The defendant swore that in 1871 he was sent by his father to the plaintiff to remonstrate with him for cutting timber and destroying the land, and to tell him that if he did not pay the taxes he would give the land to some one else; and that the plaintiff promised to cut no more and to pay the taxes. It was held that the plaintiff held the land in question as tenant at will, not as caretaker or agent of his father; that there had been no determination of the original tenancy, without which a new tenancy could not be created; and that he was therefore entitled to recover(*a*).

Oral acknowledgment.

An oral acknowledgment of title made during the ten years will not save the statute(*b*)

(*a*) *Ryan* v. *Ryan* (1880), 4 Ont. App. 563.

(*b*) *Doe d. Perry* v. *Henderson* (1846), 3 U.C.R. 486.

An acknowledgment is not sufficient under the statute unless it is given to the person entitled or his agent(*c*). An acknowledgment to a party's trustee is sufficient to take a case out of the statute(*d*).

Where a mortgagor wrote to the mortgagee in answer to a demand for payment, "I will comply with your request as to the repayment of $500 I borrowed from you so many years ago, and until I pay the money I will execute anything you wish me to do for its security," and there was evidence shewing that the only money ever lent to the mortgagor by the mortgagee was the sum so advanced on the mortgage, it was held that the acknowledgment was sufficient to take the case out of the statute(*e*).

Where a mortgagee in possession wrote, in 1871, to the holder of the equity of redemption as follows: "The amount due me in November, 1853, on your mortgages was as follows: (stating the amount) etc.; no part of that sum has since been paid to me, but the rents I have received have nearly kept down the interest," it was held that there was a sufficient acknowledgment of title to give a new starting point to the statute from the date of the letter(*f*).

An acknowledgment in writing after the ten years will not revive a title which the ten years' possession has extinguished(*g*).

Where the Statute of Limitations not merely bars the action, but divests the title to the land, or vests it in an-

(*c*) *Ruttan* v. *Smith* (1874), 35 U.C.R. 165.

(*d*) *McIntyre* v. *Canada Co.* (1871), 18 Gr. 367.

(*e*) *Barwick* v. *Barwick* (1874), 21 Gr. 39.

(*f*) *Miller* v. *Brown* (1883), 3 Ont. 210; see also *Cameron* v. *Grant* (1890), 23 N.S.R. 50; 18 S.C.R. 716; *Carsley* v. *McFarlane* (1893), 26 N.S.R. 48.

(*g*) *Doe d. Perry* v. *Henderson* (1846), 3 U.C.R. 486; *McDonald* v. *McIntosh* (1850), 8 U.C.R. 388; *McIntyre* v. *Canada Co.* (1871), 18 Gr. 367.

other person, that person need not plead the statute as a defence; but the defendant must negative the payment of rent for the statutory period(*h*).

Continuous possession.

Possession of the land, in order to ripen into title and oust the real owner, must be uninterrupted during the whole statutory period. If abandoned at any time the law will attribute it to the person having the title. Possession by a series of persons during the period, will bar the title, unless some of such persons were not in privity with their predecessors. Where one of two tenants in common had possession of the land as against his co-tenant, the bringing of an action in their joint names and the entry of judgments therein, gives a fresh right of entry to both, and interrupts the prescription accruing in favour of the tenant in possession(*i*).

In an action of ejectment the defendant shewed possession for twenty-four years. During the first ten of these years, the plaintiff had been under the disability of infancy, but the action was not brought until fourteen years after infancy had ceased. It was held the defendant's possession had ripened into title good against all the world(*j*).

(*h*) *Miller* v. *Wolfe* (1897), 30 N.S.R. 277.

(*i*) *Handley* v. *Archibald* (1900), 32 N.S.R. 1; 30 S.C.R. 130.

(*j*) *Shea* v. *Burchell* (1893), 27 N.S.R. 235.

PART V.

FORMS.

SECTION I.

LEASES, ETC.

NO I. *Statutory Form of Lease.*

(Ontario, R.S.O. (1897), c. 125.)

THIS INDENTURE, made the —— day of ——, in the year of our Lord one thousand nine hundred and ——, in pursuance of the *Act respecting Short Forms of Leases*, between —— of —— of the first part, and —— of —— of the second part.

WITNESSETH, that in consideration of the rents, covenants and agreements hereinafter reserved and contained on the part of the said party (or parties), of the second part, his (or their) executors, administrators and assigns, to be paid, observed and performed, he (or they) the said party (or parties) of the first part hath (or have) demised and leased, and by these presents do (or doth) demise and lease unto the said party (or parties) of the second part, his (or their) executors, administrators and assigns, all that messuage or tenement situate (or all that parcel or tract of land situate) lying and being (*here insert a description of the premises with sufficient certainty*).

TO HAVE AND TO HOLD the said demised premises for and during the term of ——, to be computed from the —— day of —— one thousand nine hundred and ——, and from thenceforth next ensuing and fully to be completed and ended. Yielding and paying therefor yearly and every year during the said term hereby granted unto

the said party (or parties) of the first part, his (or their) heirs, executors, administrators or assigns, the sum of ——, to be payable on the following days and times, that is to say: (on, etc.,) the first of such payments to become due and be made on the —— day of —— next.

THE SAID (lessee) covenants with the said (lessor) to pay rent and to pay taxes, except for local improvements, and to repair reasonable wear and tear and damage by fire, lightning and tempest only excepted, and to keep up fences, and not to cut down timber, and that the said (lessor) may enter and view state of repair, and that the said (lessee) will repair according to notice in writing, reasonable wear and tear, and damage by fire, lightning and tempest only excepted, and will not assign or sub-let without leave, and that he will leave the premises in good repair.

PROVIDED, that the lessee may remove his fixtures.

PROVIDED, that in the event of fire, lightning or tempest, rent shall cease until the premises are rebuilt.

PROVISO for re-entry by the said (lessor) on non-payment of rent or non-performance of covenants.

THE SAID (lessor) covenants with the said (lessee) for quiet enjoyment.

IN WITNESS, etc.,

Signed, Sealed, etc.,

No. 2. *Lease.*

(British Columbia, R.S.B.C. (1897), c. 117.)

THIS INDENTURE made the —— day of —— one thousand nine hundred and ——, in pursuance of the "*Leaseholds Act*," between (*here insert the name of the parties, and recitals, if any*), witnesseth that the said (lessor or lessors) doth (or "do") demise unto the said (lessee or lessees) his (or 'their") executors, administrators and assigns, all, etc. (parcels) from the —— day of —— for the term of —— thence ensuing, yielding therefor during the said term the rent of (*state the rent and mode of payment*). In witness whereof the said parties hereto have hereunto set their hands and seals.

No. 3. *Memorandum of Lease.*

(Manitoba, R.S.M. (1902), c. 148.)

I, A. B., of ——, being registered as owner, subject, however, to such incumbrances, liens and interests as are notified by memorandum underwritten (or indorsed thereon), of that land described as follows: —— do hereby lease to E. F., of ——, all the said land, to be held by him, the said E. F., as tenant for the space of —— years from (*here state the date and term*), at the yearly rental of —— dollars, payable (*here insert terms of payment of rent*), subject to the covenants and powers implied (*also set forth any special covenants or modifications of implied covenants*).

In witness whereof I have hereunto signed my name this —— day of ——.

Signed in presence of

No. 4. *Lease.*

(North-West Territories, R.S.C. (1886), c. 51.)

I, A. B., being registered as owner, subject, however, to such mortgages and encumbrances as are notified by memorandum underwritten (or endorsed hereon), of that piece of land (*describe it*), part of ——, section ——, township ——, range ——, containing —— acres, more or less (*here state rights of way, privileges, easements, if any, intended to be conveyed along with the land, and if the land dealt with contains all included in the original grant of certificate of title or lease, refer thereto for description and diagram, otherwise set forth the boundaries by metes and bounds*) do hereby lease to E. F., of (*here insert description*), all the said lands, to be held by him, the said E.F., as tenant, for the space of —— years, from (*here state the date and term*), at the yearly rental of $——, payable (*here insert terms of payment of rent*), subject to the covenants and powers implied (*also set forth any special covenants or modifications of implied covenants*).

I, E. F., of ——, do hereby accept this lease of the above-described lands, to be held by me as tenant, and sub-

ject to the conditions, restrictions and covenants above set forth.

Dated this —— day of ——.

Signed by above-named A. B.,
as lessor, and E. F., as lessee, this —— day of ——,
190—, in the presence of
X. Y.

(Signature of Lessor.)

(Signature of Lessee.)

(*Here insert memorandum of mortgages and encumbrances.*)

No. 5. *Lease of House.*

(*Short Form.*)

THIS INDENTURE, made the —— day of ——, 19—, in pursuance of the Act respecting Short Forms of Leases, between —— of ——, hereinafter called the lessor, of the first part, and —— of ——, herein after called the lessee, of the second part.

WITNESSETH, that in consideration of the rents, covenants and agreements hereinafter reserved and contained, on the part of the lessee to be paid, observed and performed, the lessor hereby demises and leases unto the lessee all that messuage or tenement, situate, etc.

TO HAVE AND TO HOLD the said demised premises for and during the term of —— years from the —— day of ——, one thousand nine hundred and ——, yielding and paying therefor the yearly rent of —— dollars in even portions on the —— days of —— and —— in each year during the said term, the first payment to be made on the —— day of —— next.

The lessee covenants with the lessor to pay rent and to pay taxes, except for local improvements, and to repair, reasonable wear and tear and damage by fire, lightning and tempest only excepted, and the lessor may enter and view state of repair, and that the lessee will repair according to notice in writing, reasonable wear and tear and damage by fire, lightning and tempest only excepted, and will not as-

sign or sub-let without leave, and that he will leave the premises in good repair, reasonable wear and tear and damage by fire, lightning and tempest only excepted. PROVIDED, that the lessee may remove his fixtures. PROVIDED, that in the event of fire, lightning or tempest, rent shall cease until the premises are rebuilt.

AND it is hereby declared and agreed that if the term hereby granted shall be at any time seized or taken in execution or in attachment by any creditor of the lessee, or if the lessee shall make any assignment for the benefit of creditors, or becoming bankrupt or insolvent shall take the benefit of any Act that may be in force for bankrupt or insolvent debtors, the then current (quarter's) rent shall immediately become due and payable, and the said term shall, at the option of the lessor, immediately become forfeited and determined.

PROVISO for re-entry by the lessor on non-payment of rent (whether lawfully demanded or not), or non-performance of covenants (or seizure or forfeiture of the said term for any of the causes aforesaid).

THE lessor covenants with the lessee for quiet enjoyment.

IT IS HEREBY declared and agreed that these presents and everything herein contained shall respectively enure to the benefit of and be binding unto the parties hereto, their heirs, executors, administrators and assigns respectively.

IN WITNESS, etc.

Signed, sealed, etc.

No. 6. *Lease.*

Of a Dwelling-House for Twenty-one Years, Determinable on Notice at the End of Seven or Fourteen Years—Usual Covenants by Lessee, Including Covenants Not to Use the House Except as a Dwelling-House.

THIS INDENTURE, made the —— day of ——, between A. B., of etc. (lessor), of the one part, and C. D., of etc. (lessee), of the other part. WITNESSETH, that in consideration of the rent hereinafter reserved, and of the lessee's

covenants hereinafter contained, the said A. B. (hereinafter called "the lessor"), hereby demises unto the said C. D. (hereinafter called "the lessee"), all that messuage or dwelling-house, etc. (parcels), to hold he same unto the lessee, for the term of twenty-one years from the —— day of ——, yielding and paying during the said term the yearly rent of $——, by four equal quarterly payments, on the 25th day of March, the 24th day of June, the 29th day of September, and the 25th day of December, in every year, the first quarterly payment to be made on the 25th day of March next: And the lessee hereby covenants with the lessor, in the manner following (that is to say): That the lessee will pay the rent hereby reserved at the times and in manner aforesaid, and will also pay and discharge all rates, taxes, assessments and charges whatsoever, whether parliamentary, parochial, or of any other description, which now are or during the said term shall be imposed or charged on or payable in respect of the said premises (or which now are or during the the said term shall be charged or imposed upon the said premises of the landlord or tenant in respect thereof): And also will at all times during the said term keep the said premises in good and substantial repair, and deliver up to the lessor at the expiration or sooner determination of the said term: And in particular will paint with two coats at least of good oil colour and in a proper and workmanlike manner the outside wood and ironwork of the said premises once in every four years of the said term, and such parts of the inside of the said premises as have been usually painted once in every seven years of the said term, the last painting, both outside and inside, to be in the year immediately preceding the determination of this lease, whether by effluxion of time or notice; and will at the same time with every outside painting restore and make good the outside stucco work wherever necessary, and at the same time with every inside painting whitewash and colour such parts of the inside of the said premises as are usually whitewashed and coloured: (And also will pay and contribute a fair proportion of the expenses of making, repairing and securing all party and other walls, gutters, sewers and drains belonging to the said demised premises in common with the adjacent premises): And also will permit the lessor, or his

agent, with or without workmen, and others, twice in every year during the said term, at convenient hours in the daytime to enter into and upon the said demised premises, and view and examine the state and condition thereof, and of all such decays, defects and wants of reparation as shall be then and there found, to give to the lessee notice in writing to repair and amend the same within six calendar months then next following, within which time the lessee will repair and amend the same accordingly: And also will insure and keep insured the said demised premises from loss or damage by fire, in the joint names of the lessor and lessee, in the —— insurance office, or in some other well established office to be approved of by the lessor, in the sum of $——, at least, and will pay all premiums necessary for that purpose within seven days after the same shall become due, and will whenever required produce to the lessor the policy of such insurance, and the receipt for every such payment, and will cause all moneys received by virtue of any such insurance to be forthwith laid out in rebuilding and reinstating the said premises, and if the moneys so received shall be sufficient for the purpose, will pay the deficiency out of his own moneys: And also will not at any time during the said term carry on or permit to be carried on, any trade or business upon the said premises, or permit the same to be occupied or used in any other manner than as a private dwelling house: And also will not (except by will) assign or underlet the said demised premises, or any part thereof, without the consent in writing of the lessor, first had and obtained (unless such consent shall be unreasonably withheld): Provided always, and it is hereby declared, that if the said yearly rent of ——, or any part thereof, shall be in arrear for the space of twenty-one days next after any of the days whereon the same ought to be paid as aforesaid, whether the same shall or shall not have been legally demanded, or if there shall be any breach or non-observance of any of the lessee's covenants hereinbefore contained, then and in any of the said cases it shall be lawful for the lessor, at any time thereafter, into and upon the said demised premises, or any part thereof, in the name of the whole to re-enter, and the same to have again, re-possess and enjoy as in his former estate: Provided also, and it is hereby

declared that if the lessee shall be desirous of determining this lease at the end of the first seven or fourteen years of the said term, and of such desire shall give to the lessor, or his agent, or leave at his usual or last-known place of abode in ——, six calendar months' previous notice in writing, then and in such case at the end of such seven or fourteen years, as the case may be, the term hereby granted shall cease, but subject to the rights and remedies of the lessor for or in respect of any rent in arrear, or any breach of any of the lessee's covenants: And the lessor hereby covenants with the lessee that the lessee paying the rent hereby reserved, and observing and performing the covenants and conditions herein contained, and on his part to be observed and performed, shall and may peaceably and quietly possess and enjoy the said premises hereby demised during the said term without any lawful interruption from or by the lessor or any person rightfully claiming from or under him. And it is declared that where the context allows the expression "the lessor" and "the lessee" used in these presents include respectively, besides the said A.B., his heirs (or if the lease is made under a power, successors in title); and besides the said C. D., his executors, administrators and assigns.

IN WITNESS, etc.

No. 7. *Lease of Furnished House.*

THIS INDENTURE, made the —— day of ——, 19—, in pursuance of the Act respecting Short Forms of Leases, between —— of ——, hereinafter called the lessor, of the first part, and —— of ——, hereinafter called the lessee, of the second part.

WITNESSETH, that in consideration of the rents, covenants and agreements hereinafter reserved and contained by the lessee to be paid, observed and performed, the lessor doth hereby demise and lease unto the lessee all that certain house and premises in the (Town) of ——, known as number ——, —— Street, together with the outbuildings, stable, garden and appurtenances thereto belonging, together with the use of the fixtures, furniture, plate, linen, utensils and effects (the receipt whereof in good order and condition is

hereby acknowledged by the lessee), and all of which are more particularly set out in the schedule hereto annexed, together with the right to such produce of the garden as the lessee shall require for the use of himself and his establishment.

TO HAVE AND TO HOLD the said premises for and during the term of —— from the —— day of ——, 19—, yielding and paying therefor to the lessor the (yearly) rent of —— dollars in even portions (in advance) on the —— day of each —— during the said term, the first payment to be made on the —— day of ——, 19—.

AND the lessee covenants with the lessor to pay rent and to pay telephone, gas, electric light and water rates from the —— day of ——, 19—, and to pay all damages or breakage caused or permitted by the lessee by reason of want of such care as would be given by an owner of the said premises under like circumstances, and to repair reasonable wear and tear and damage by fire, lightning and tempest only excepted, and to keep up fences (and not to cut down timber) and that the lessor may enter and view state of repair, and that the lessee will repair according to notice in writing, reasonable wear and tear and damage by fire, lightning and tempest only excepted, and will not assign or sub-let without leave, and will not carry on any business that shall be deemed a nuisance, or by which the insurance on the said premises will be increased, and that he will leave the premises in good repair, reasonable wear and tear, and damage by fire, lightning an tempest only excepted.

PROVIDED that the lessee may remove his fixtures. PROVIDED that in the event of fire, lightning or tempest, rent shall cease until the premises are rebuilt, or, at the option of the lessor, that the term hereby granted shall in such case forthwith come to an end, and the lessee shall cease to be held liable for any rent agreed to be paid under the above covenants except in respect of such rent as shall have already accrued due, and the lessee shall be entitled to be repaid by the lessor any rent paid in advance at such time and not yet due.

AND that the lessee will return to the lessor at the end of the said term the articles mentioned in the schedule hereto

annexed, in good repair and condition, ordinary wear and tear and damage by fire not caused by the carelessness of the lessee or the act of providence only excepted, and that he will replace such articles as shall be broken, damaged or missing with other articles of a like pattern and equal value.

AND he will employ a competent gardner to have charge and take proper care of the garden, and the trees, shrubs and flowers therein.

AND the lessor covenants that the said house and premises are now in good and substantial repair, and that any damage arising from want of such repair at this time will be made good by the lessor within a reasonable time after notice to him by the lessee.

PROVISO for re-entry by the lessor on non-payment of rent or non-performance of covenants.

THE LESSOR covenants with the lessee for quiet enjoyment.

IT IS HEREBY declared and agreed that these presents and everything herein contained shall respectively enure to the benefit of and be binding upon the parties hereto, their heirs, executors, administrators and assigns, respectively.

IN WITNESS, etc.

Signed, sealed, etc.

No. 8. *Short Form of Lease of Furnished Apartments.*

MEMORANDUM OF AGREEMENT, etc. (*as before*). The said A. B. (hereinafter called "the landlord") agrees to let, and the said C. D. (hereinafter called "the tenant") agrees to take: All those three rooms on the first floor of the messuage or dwelling-house, situate, etc., and all the furniture, articles, and things in or about the same specified in the schedule hereto, for the term of ——, computed from the —— day of ——, at the rent of —— for every calendar month, such rent to be paid on the first day of every calendar month, the first payment to be made on the first day of —— next: AND the tenant agrees at the expiration of the tenancy to deliver up the said rooms, furniture, articles and things in as good a condition as the same are now in, reasonable wear and tear and damage by fire excepted:

AND IT IS AGREED that if any monthly payment of rent

shall be in arrear for more than fourteen days, the landlord may re-enter on the said premises and determine this demise: AND the landlord agrees to pay all rates and taxes which may become payable in respect of the said premises during the tenancy.

IN WITNESS, etc.

No. 9. *Short Form of Lease.*

Of a House from Year to Year or for a Term of Three Years.

MEMORANDUM OF AGREEMENT, made the —— day of ——, 18—, between A. B., of, etc. (landlord), of the one part: the said A. B. (hereinafter called "the landlord") agrees to let, and the said C. D., of, etc. (landlord), of the one part, and C. D., of, etc. (tenant), of the other part: The said A. B. (hereinafter called "the tenant"), agrees to take all that messuage or dwelling-house, etc. (describing it): The tenancy to be from year to year, commencing on the —— day of ——, 19— (*or the tenancy to be for a term of three years*), at the yearly rent of $——, payable by equal quarterly payments on, etc. (*days of payment*), the last quarterly payment to be made in advance on the —— day of —— preceding the end of the tenancy, together with the quarterly rent due on that day. And the tenant agrees to pay all rates, taxes, and assessments payable by the tenant or occupier in respect of the premises during the tenancy: And also to keep all the glass in the windows, and all shutters, locks, fastenings, bells and other internal fixtures, in, upon and belonging to the premises, in good and sufficient repair to deliver up at the end thereof (reasonable wear and tear and damage by fire only excepted): And the tenant also agrees not to assign or underlet the premises without the consent in writing of the landlord: And it is agreed that if any rent shall be in arrear for twenty-eight days, or there shall be any breach by the tenant of the conditions above expressed the landlord may re-enter on the premises without giving any notice to quit, and expel the tenant therefrom: And the landlord agrees that the tenant paying the said rent, and observing the above conditions,

shall quietly hold and enjoy the said premises without any lawful interruption by the landlord or any person claiming under him.

IN WITNESS, etc.

No. 10. *Lease.*

For a Three Years' Term, With Option to the Tenant to Have a Lease for a Longer Term.

MEMORANDUM OF AGREEMENT, etc. (*same as last precedent to the end, and then add the following*): Provided always and it is agreed and declared that if at any time during the tenancy hereby created the tenant shall be desirous of having a lease of the said premises for a term of twenty-one years, determinable by him at the end of the first seven or fourteen years, and shall give to the landlord a notice in writing to that effect, then, and in such case, the landlord will grant to the tenant a lease of the said premises accordingly, for such term as aforesaid the lease to commence and the term to be computed from the quarter day next following the date of such notice, at the yearly rent of £——, and subject to the covenants and provisions contained in the form of lease which has been produced to the tenant and signed by him, being the form usually adopted on the —— estate, of which the said premises are part.

IN WITNESS, etc.

No. 11. *Lease.*

Of a Furnished House with Garden for a Short Period, Tenant to Take Care of Furniture and Keep Garden in Good Order, Landlord to Keep House in Repair.

MEMORANDUM OF AGREEMENT, etc.: The said A.B. (hereinafter called "the landlord"), agrees to let, and the said C. D. (hereinafter called "the tenant"), agrees to take: All that messuage or dwelling-house called ——, situate at ——, with the garden, grounds and other appurtenances thereto belonging, and also the furniture and effects therein, as per inventory signed by both parties, from the ——

day of ——, until the —— day of —— next, at the rent of £—— for every calendar month of the said tenancy, to be paid on the —— day of each month, the first payment to be made on the —— day of —— next: The tenant agrees to keep the said furniture and effects clean and in good condition and at the end of the tenancy to leave the said messuage, together with the said furniture and effects, clean and in as good state, condition, and repair as they are now in, and to make compensation for any damage done, or for any articles missing (reasonable wear and tear and damage by fire excepted); Also to keep the garden and grounds belonging to the said messuage in good order and condition during the tenancy, and so to leave the same at the end of the tenancy; Also not to assign or underlet the said premises or any part thereof, nor remove the said furniture and effects or any of them from the said premises, without the consent of the landlord. And it is agreed that if any rent, etc. (*condition for re-entry.*) The landlord agrees to execute all outside and inside repairs of the said messuage which may be found necessary in the course of reasonable wear, and to pay the ground rent, and all rates and taxes of every description, and to idemnify the tenant therefrom; And also that, etc. (for quiet enjoyment by tenant.)

IN WITNESS, etc.

No. 12. *Lease of Furnished Apartments for Six Months.*

MEMORANDUM OF AGREEMENT, etc. (*as before*). The said A. B. (hereinafter called "the landlord") agrees to let, and the said C. D. (hereinafter called "the tenant") agrees to take, All those three rooms on the first floor of the messuage or dwelling-house, situate, etc., and all the furniture, articles, and things in or about the same specified in the schedule hereto, for the term of six calendar months, computed from the —— day of ——, at the rent of $—— for every calendar month, such rent to be paid on the first day of —— next: And the tenant agrees at the expiration of the tenancy to deliver up the said rooms, furniture, articles, and things in as good a condition as the same are now in, reasonable wear and tear and damage by fire excepted: And it is agreed that if any monthly payment of rent shall be in

arrear for more than fourteen days the landlord may re-enter on the said premises and determine this demise: And the landlord agrees to pay all rates and taxes which may become payable in respect of the said premises during the tenancy.

IN WITNESS, etc.

No. 13. *Lease of Unfurnished Apartments on a Quarterly Tenancy.*

MEMORANDUM OF AGREEMENT, etc., (*as before*). The said A. B. (hereinafter called "the tenant") agrees to take, the following rooms, part of a dwelling-house, No. —— in —— Street, in the town of —— (namely), the whole of the first and second floors, together with the use, in common with the other occupants of the house, of the water-closet on the ground floor: The tenancy to be from quarter to quarter, commencing on the 25th day of this present month of March, and determinable on any quarter day by either party giving to the other a quarter's notice to quit: At the rent of $—— for every quarter, to be paid on every quarter day during the tenancy: And the tenant agrees to deliver up the said premises at the end of the tenancy is as good repair and condition as the same are now in, reasonable wear and tear and damage by fire excepted: And the landlord agrees to pay all rates and taxes which may become payable in respect of the said premises during the tenancy.

No. 14. *Lease of Unfurnished Lodgings.*

AGREEMENT made the —— day of ——, 19 ——, between —— of —— and —— of ——.

THE said —— hereby agrees to let and the said —— agrees to take the (two) rooms on the (first) floor of the house number —— in —— street in the (town) of —— for —— weeks beginning on the —— day of ——, 19 ——, at the monthly rent of —— dollars, and so on from week to week until this tenancy is terminated by either party giving to the other one week's notice.

IN WITNESS, etc.

Signed, Sealed, etc.

No. 15. *Agreement for Tenancy.*

To A. B.

I agree to let you the following premises namely: for one month from the —— day of ——, 19 ——, (to be used for a ——, and for no other purpose) and thereafter from month to month until either party shall give to the other one month's notice of his wish to put an end to this agreement, at the rent of —— per month, payable monthly in advance, on the —— day of each calendar month, (free of taxes, which are to be paid by the landlord). And if the said rent is not paid on the days named, this agreement is to cease, and I am to be at liberty to resume possession.

(*If it is intended to give the tenant power to remove his fixtures, the following clause may be added*).

IT IS HEREBY AGREED that if the tenant shall, during his said tenancy affix to or erect on the said premises any fixture or building (which shall be so affixed or erected instead of some fixtures or building affixed to or being on the premises at the date of the commencement of the said tenancy) then such fixture or building shall belong to and be removable by the tenant at any time during the said term, or within (twenty-one) days after the determination thereof: PROVIDED that the tenant shall make good all damages to the said premises by such removal, and shall give one month's previous notice in writing to the landlord of his intention to remove such fixture, and at any time before the expiration of the notice of removal the landlord, by notice in writing to the tenant, may elect to purchase such fixture at a fair value, and thereupon such fixture shall be left by the tenant and become the property of the landlord.

DATED this — day of ——, 19 ——.

WITNESS:

ACCEPTANCE.

To C. D. (landlord).

I agree to the above, and accept possession of the premises upon the terms stated, and agree not to alter the present arrangement of the premises, and to give up possession at the end of my tenancy in the same state as now in.

WITNESS:

No. 16. *Agreement for a Weekly Tenancy of a House or Part of a House.*

MEMORANDUM OF AGREEMENT dated the —— day of ——, 19 ——, Whereby A. B., of etc. (landlord), agrees to let, and C. D., of etc. (tenant), agrees to take the premises described below on a weekly tenancy at the weekly rent of ——, the tenancy to commence on Monday the —— day of ——, 18——, and to be determinable by either party on any Monday by a week's previous notice. The landlord agrees to pay all rates and taxes.

DESCRIPTION OF THE PREMISES.

The house No. —— in —— street, in the parish of ——, in the county of —— (or the following rooms in the house (describing them).

As witness the hands of the parties.

No. 17. *Lease of Offices.*

THIS INDENTURE made the —— day of ——, 19 ——, in pursuance of the Act respecting Short Forms of Leases, between —— of ——, hereinafter called the lessor, of the first part, and —— of ——, hereinafter called the lessee, of the second part.

WITNESSETH that in consideration of the rents, covenants and agreements hereinafter reserved and contained on the part of the lessee to be paid, observed and performed, the lessor doth hereby demise and lease unto the lessee for use and occupation as ——, and for no other purpose, all those certain premises forming part of the lessor's building known and described as room ——, etc.

TO HAVE AND TO HOLD the said demised premises for the term of ——, to be computed from the —— day of ——, 19 ——, paying therefor yearly and every year during the said term unto the lessor the sum of ——, to be payable on the following days and times, that is to say: on the (first) day of each of the months of —— in each year, the first of such payments to become due and be made on the —— day of next.

THE lessee covenants with the lessor to pay rent and to repair, reasonable wear and tear and damage by fire, lightning and tempest only excepted, and that the lessor may enter and view state of repair, and that the lessee will repair according to notice in writing, reasonable wear and tear and damage by fire, lightning and tempest only excepted, and will not assign or sub-let without leave, and that he will leave the premises in good repair, reasonable wear and tear and damage by fire, lightning and tempest only excepted, and will not carry on any business on the said premises which shall be deemed a nuisance, or be improper, noisy or contrary to law, or to any by-law of the (city) of ——, for the time being in force, or by which the said premises or any building thereon shall be injured, or by which the insurance on the block or building shall be increased, and will during the said term use and occupy the said premises as for a ——, and for no other purpose.

PROVISO for re-entry by the lessor on non-payment of rent (whether lawfully demanded or not) or non-performance on non-observance of covenants, or seizure or forfeiture of the said term for any of the causes herein mentioned. THIS proviso shall extend and apply to all covenants herein contained, whether positive or negative.

THE LESSOR covenants with the lessee for quiet enjoyment. And the lessor further covenants with the lessee:—

1. To heat the said premises with steam or other apparatus in such manner as to keep the temperature of said premises at not less than (sixty-five) degrees Fahrenheit during each day from the —— day of —— in each year until the day of —— ensuing (Sundays and holidays excepted), from the hour of —— a.m. to the hour of —— p.m., and in case the apparatus or any part thereof used in effecting the heating of the said premises at any time becomes incapable of heating the said premises as aforesaid, or be damaged or destroyed, the lessor shall have a reasonable time within which to repair the said damages, and the lessor covenants with the lessee to replace and repair the said apparatus with all reasonable speed, but the lessor shall not be liable for indirect or consequential damages, or for damages for personal discomfort or illness.

2. To give free use to the lessee (in common with other tenants of the said building), his agents, clerks, servants and all other persons seeking communication with him and them, of the stairway or passage from —— street to the said premises, and also of the elevator in the said building in each day (Sundays and public holidays excepted), and to keep a person in constant attendance from the hour of —— a.m. until —— p.m. with the exception of Saturdays, when the attendance shall be from —— a.m. until —— p.m. for the purpose of moving the said elevator, and in case the said elevator shall be injured or destroyed, the lessor shall forthwith repair and replace the same, and shall have a reasonable time for so doing, and it is agreed that the lessee, his clerks, and all other persons hereby permitted to use such elevator, shall do so at his, her and their sole risk, and under no circumstances shall the lessor be held responsible for any damage for injury happening to any person whilst using such elevator, or occasioned to any person by such elevator or any of its appurtenances, and whether such damage or injury happened by reason of the negligence or otherwise of the lessor or any of his employees, servants, agents, or any other person.

3. To supply water from the public main save at such times as the general supply of water may be turned off from the public main, and in case the pipes affording said supply be injured or incapable of affording the same the lessor shall forthwith commence repairing, and shall within a reasonable time effect the necessary repairs.

4. To permit the lessee, in common with other tenants, to use the water-closets and lavatories provided for that purpose, for his clerks, agents, and servants, and to keep at all times the said water-closets clean and in good working order, and supplied with water from the public mains, except at such times as are mentioned in the preceding paragraph.

5. To employ a caretaker who shall attend to, wash, dust and otherwise keep clean in a reasonable manner the said premises, and the floors, windows, desks, books, and papers connected therewith, but, except as to the obligation to cause such work to be done, the lessor shall not be respon-

sible for any act of omission or commission on the part of the person or persons employed to perform such work, but it is agreed that the lessee shall pay a charge of —— dollars per month to the lessor for such caretaking.

The lessee covenants with the lessor as follows:

1. That in case the lessee shall become insolvent or bankrupt, or make an assignment for the benefit of his creditors, or in case of non-payment of rent at the times herein provided, or in case the said premises or any part thereof become vacant and unoccupied for the period of —— days or be used by any other person or persons or for any other purpose than as above provided, without the written consent of the lessor, this lease shall, at the option of the lessor, cease and be void, and the term hereby created expire and be at an end, anything hereinbefore to the contrary notwithstanding, and the term current (month's) rent and (month's) additional shall thereupon immediately become due and be payable, and the lessor may re-enter and take possession of the said premises as though the lessee or his servants or other occupant or occupants of the said premises was or were holding over after the expiration of the said term, and the said term shall be forfeited and void.

2. That the rules and regulations hereto annexed shall be observed and performed by the lessee, and by his clerks, servants and agents.

3. That the lessee shall give to the lessor immediate written notice of any accident or defect in the water-pipes, gas-pipes or heating apparatus, telephone, electric light or other wires.

AND IT IS FURTHER AGREED by and between the parties hereto that in the event of such partial or total destruction by fire or other casualty of the said premises, or of the entry, passage or stairway leading thereto, as shall render such premises untenantable, or prevent reasonable and convenient access thereto, the rent hereby reserved shall at once cease to accrue and become payable until the said premises, entry, passage or stairway shall be rebuilt or restored to their former condition, but the lessee shall forthwith pay to the lessor the proportionate part of the then current rent accruing up to the time of such partial or total destruction.

And in case of total destruction of the said premises the lessee or the lessor may within one month after such destruction, on giving notice thereof in writing, to the other of them, terminate this lease.

AND IT IS FURTHER AGREED that if the lessor shall desire at any time during the said term to take down the said building or any part thereof for the purpose of rebuilding, he shall have the right, notwithstanding anything herein contained, to terminate this lease by giving to the lessee —— (month's) notice in writing of his intention to do so, which notice need not be given or expire on a gale day, and shall be deemed to be sufficiently served if posted on the door of the said office and a copy thereof sent through the post office to the lessee, addressed to him at ——, and the term hereby granted shall absolutely cease and determine at the expiry of the said —— (month's) notice, and the lessee will, on the day so fixed, deliver up possession of the said premises to the lessor without cost or damage to the lessor, and will pay the proportion of rent as herein provided up to the date of giving up possession as aforesaid.

IT IS HEREBY declared and agreed that these presents and everything herein contained shall respectively enure to the benefit of and be binding upon the said parties hereto, their heirs, executors, administrators and assigns respectively.

IN WITNESS, etc.

Signed, Sealed, etc.

No. 18. *Farm Lease.*

THIS INDENTURE, made —— the—— day of —— in the year of our Lord, one thousand nine hundred and ——, in pursuance of the Act respecting Short Forms of Leases: Between —— of —— hereinafter called the "Lessor" of the first part and —— of —— hereinafter called the "Lessee" of the second part.

WITNESSETH that in consideration of the rents, covenants and agreements hereinafter reserved and contained on the part of the said lessee, to be paid, observed and per-

formed, THE said lessor HATH demised and leased, and by these presents DOTH demise and lease unto the said lessee

ALL that parcel or tract of land and premises situate, lying and being in the —— of —— in the —— county of ——, containing by admeasurement —— acres, be the same more or less, and being composed of

(*Description*):

TO HAVE AND TO HOLD the said demised premises for and during the term of —— years, to be computed from the —— day of ——, one thousand nine hundred and ——, and from thenceforth next ensuing, and fully to be complete and ended.

YIELDING AND PAYING therefor yearly and every year during the said term hereby granted unto the said lessor the sum of —— dollars, without any deduction, defalcation or abatement whatsoever; to be payable on the following days and times, that is to say:—

The first of such payments to become due and be made on the —— day of ——, 190 ——.

The said lessee covenants with the said lessor to pay rent.

AND to pay taxes, except for local improvements.

AND to repair reasonable wear and tear and damage by fire, lightning and tempest only excepted.

AND to keep up fences.

AND not to cut down timber.

AND that the said lessor may enter and view state of repair, and that the said lessee will repair according to notice in writing, reasonable wear and tear and damage by fire, lightning and tempest only excepted.

AND will not assign or sub-let without leave.

AND will not carry on any business that shall be deemed a nuisance on the said premises.

AND that he will leave the premises in good repair, reasonable wear and tear and damage by fire, lightning and tempest only excepted.

PROVIDED that the lessee may remove his fixtures.

PROVIDED that in the event of fire, lightning or tempest, rent shall cease until the premises are rebuilt.

THE SAID LESSEE hereby covenants and agrees with the said lessor that in consideration of the premises, and of the leasing and letting by the said lessor to the said lessee of the lands above named for the term hereby created (and it is upon that express understanding that these presents are entered into) that notwithstanding anything contained in section thirty or any other section of chapter one hundred and seventy of the Revised Statutes of Ontario, 1897, or any amendment or amendments thereto that none of the goods or chattels of the said lessee at any time during the continuance of the term hereby created, on the said demised premises, shall be exempt from levy by distress for rent in arrears by said lessee as provided for by said section or sections, or any amendment or amendments thereto, of said Act above named, and that upon any claim being made for such exemption by said lessee or on distress being made by said lessor this covenant and agreement may be pleaded as an estoppel against said lessee in any action brought to test the right to the levying upon any such goods as are named as exempted in said section or sections, or any amendment or amendments thereto. Said lessee waiving as he hereby does, all and every benefit that could or might have accrued to him under and by virtue of the said section or sections of said Act, or any amendment or amendments thereto, but for the above covenant.

AND the said lessee doth hereby for himself, his executors, administrators and assigns, further covenant and agree with the said lessor in maner following, that is to say:

THAT the said lessee will, during the said term cultivate, till, manure and employ such parts of the said premises as are now or shall hereafter be brought under cultivation, in a good husbandman-like and proper manner, and will in like manner crop the same in a regular rotation of crops so as not to impoverish, depreciate or injure the soil, and at the end of said term will leave the said land so manured as aforesaid. AND will during the continuance of said term, keep down all noxious weeds and grasses, and will pull up, or otherwise destroy all docks, red roots, wild mustard, wild oats, twitch grass and Canada thistles which shall grow upon the said premises, and will not sow or permit to be sown any grain containing any seed of any noxious weeds

or grasses, or docks, red root, wild mustard, will oats, twitch grass or Canada thistles, and will not suffer or permit any such foul weeds or grasses to go to seed on the said premises. And will spend, use or employ in a proper husbandman-like manner all the straw and manure which shall grow, arise, renew or be made thereupon, and will not remove, or permit to be removed from said premises any straw of any kind, manure, wood or stone, and will carefully stack the straw in the last year of said term, and will each and every year of said term, turn all the manure thereon into a pile, so that it may thoroughly heat and rot, so as to kill and destroy any foul seeds which may be therein, and will thereafter and not before spread the same on the land.

AND will in each and every year of said term, make naked summer fallow of or put in some hoe crop at least —— acres of said premises, and will plough, hoe and otherwise cultivate the same in a thorough farm-like manner so as to kill and destroy all noxious weeds and grasses which may grow thereon.

AND will in each and every year of said term seed down with good timothy and clover seed, in a proper manner at least —— acres of said premises, and will, at the expiration of said term, leave at least —— acres thereof in grass.

AND will carefully protect and preserve all orchard, fruit, shade and ornamental trees on said premises from waste, injury or destruction, and will carefully prune and care for all such trees as often as they may require it, and will not suffer or permit any horses, cattle or sheep to have access to the orchard on said premises. And will not allow the manure to be placed or lie against the said buildings on said premises. And will allow any incoming tenant or purchaser to plough the said lands after harvest in the last year of said term, and to have stabling for one team and bedroom for one man and reasonable privileges and rights of way to do said ploughing.

PROVIDED also, and it is hereby expressly agreed and understood by and between the parties hereto, that if the term hereby granted or any of the goods or chattels of the said lessee shall be at any time during said term seized or taken in execution or attachment by any creditor of the said

lessee, or if the said lessee shall make any chattel mortgage or bill of sale of any of his crops or other goods and chattels, or any assignment for the benefit of creditors, or becoming bankrupt and insolvent, shall take the benefit of any Act that may be in force for bankrupt and insolvent debtors, or shall attempt to abandon said premises, or to sell and dispose of his farm stock and implements, so that there would not, in the event of such sale or disposal, be a sufficient distress on said premises for the then accruing rent, of which the said lessor shall be sole judge, then in every such case, the then current and next ensuing —— year's rent and the taxes for the then current year (to be reckoned upon the rate for the previous year, in case rate shall not have been fixed for the then current year) shall immediately become due and payable, and the term hereby granted shall immediately become due and payable, and the term hereby granted shall at the option of the said lessor immediately become forfeited, void and determined, and in every of the above cases such taxes or accrued portion thereof be recoverable by said lessor in the same manner as the rent hereby reserved. And also in case of removal by the lessee of his goods and chattels in whole or a substantial part thereof from off the said premises, the said lessor may follow and distrain the same for thirty days in the same manner as is provided for by law in cases of fraudulent or clandestine removal.

PROVISO for re-entry by the said lessor on non-payment of rent or non-performance of covenants.

THE said lessee covenants with the said lessor for quiet enjoyment.

AND IT IS EXPRESSLY AGREED between the parties hereto that all grants, covenants and agreements, rights, powers, privileges an liabilities contained in this mortgage shall be read and held as made by and with and granted to and imposed upon the respective parties hereto and their respective heirs, executors, administrators and assigns, and these presents shall be read and construed the same as if the words heirs, executors, administrators and assigns had been inscribed in all proper and necessary places.

IN WITNESS WHEREOF the said parties hereto have hereunto set their hands and seals.

SIGNED, SEALED AND DELIVERED
in the presence of

COUNTY OF
To Wit:

I, ——, of the—— of—— in the ——
county of ——, make oath and say:

1. THAT I was personally present and did see the within instrument and duplicate thereof duly signed, sealed and executed by ——, the parties thereto.

2. THAT the said instrument and duplicate were executed at ——.

3. THAT I know the said part ——.

4. THAT I am a subscribing witness to the said instrument and duplicate.

SWORN before me at the ——
of —— in the ——county of ——
this —— day of —— in the year
of our Lord 190 ——.

A commissioner for taking affidavits in H.C.J., etc.

No. 19. *Lease of Farm.—(Another Form.)*

THIS INDENTURE made the —— day of ——, 19 ——, in pursuance of the Act respecting Short Forms of Leases, between —— of ——, hereinafter called the lessor, of the first part, and —— of ——, hereinafter called the lessee, of the second part.

WITNESSETH that in consideration of the rents, covenants and agreements hereinafter reserved and contained, on the part of the lessee to be paid, observed and performed, the lessor doth hereby demise and lease unto the lessee all that certain parcel of land, situate, etc., containing by admeasurement —— acres, more or less.

TO HAVE AND TO HOLD the said demised premises for the term of —— years, to be computed from the —— day of ——, 19 ——, paying therefor yearly and every year dur-

ing the said term unto the lessor the sum of —— dollars, to be payable on the following days and times, that is to say: —— dollars in advance in each and every year during the said term, without any deduction, defalcation or abatement whatsoever, the first of such payments to become due and be paid on the —— day of —— next.

THE LESSEE covenants with the lessor to pay rent, and to pay taxes, except for local improvements, and to repair, reasonable wear and tear and damage by fire, lightning and tempest only excepted, and to keep up fences, and not to cut down timber (for any purpose whatsoever, except for rails or for buildings upon the said premises, or for firewood for the lessee's use to be consumed on the said premises) and that the lessor may enter and view state of repair, and that the lessee will repair according to notice in writing, reasonable wear and tear and damage by fire, lightning and tempest only excepted, and will not assign or sub-let without leave, and will not carry on any business that shall be deemed a nuisance on the said premises, and that he will leave the premises in good repair, reasonable wear and tear and damage by fire, lightning and tempest only excepted.

AND THE LESSEE further covenants and agrees with the lessor that the lessee will during the said term cultivate, till, manure, and employ such parts of the said premises as are now or shall hereafter be brought under cultivation in a good husbandman-like and proper manner, and will in like manner crop the same by a regular rotation of crops so as not to impoverish, depreciate or injure the soil, and at the end of the said term will leave the said land so manured as aforesaid, and will during the continuance of the said term keep down all noxious weeds and grasses, and will pull up or otherwise destroy all Canada thistles, ox eye daisy, wild oats, rag weed, burdock and wild mustard which shall grow upon the said premises, and will not sow or permit to be sown any grain infected by smut or containing any foul seeds, and will not suffer or permit any such foul weeds or grasses, to go to seed on the said premises, and will cut out and burn all black knot or any plum or cherry trees so often each year during the said term as it appears on such trees, and will cut down and burn any trees infected with the disease known as the yellows, and will not plant the bar-

berry shrub on the said lands, and will upon (fifteen) day's notice destroy any barberry shrubs then growing on the said lands, and will spend, use and employ in a proper husbandman-like manner all the straw and manure which shall grow, arise, renew or be made thereupon, and will not remove or permit to be removed from the said premises any straw of any kind, manure, wood or stone, and will carefully stack the straw in the last year of the said term, and will each and every year of the said term turn all the manure thereon into a pile, so that it may thoroughly heat and rot so as to kill and destroy any foul seeds which may be therein, and will thereafter, and not before, spread the same on the land.

AND will in each and every year of the said term make naked summer fallow of or put some hoe crop in at least —— acres of the said premises, and will plough, hoe, and otherwise cultivate the same in a thorough farm-like manner, so as to kill and destroy all noxious weeds and grasses which may grow thereon. And will in each and every year of said term seed down with good timothy and clover seed in a proper manner at least —— acres of the said premises and will at the expiration of the said term leave at least —— acres thereof in grass.

AND will carefully protect and preserve all orchard, fruit, shade and ornamental trees on the said premises from waste, injury or destruction, and will carefully prune and care for all such trees as often as they may require it, and will not suffer or permit any horses, cattle or sheep to have access to the orchard on the said premises. And will not allow the manure to be placed or to lie against the buildings on the said premises, and will allow any incoming tenant or purchaser to plough the said lands after harvest in the last year of the said term, and to have stabling for one team, and bed-room for one man, and reasonable privileges and rights of way to do the said ploughing.

PROVIDED and it is expressly agreed between the parties hereto, that in case the lessor should desire to sell the said premises during the said term, the said term may be determined at any time upon —— week's notice by a notice to such effect being delivered to any person upon the said

premises, or mailed by posting the said notice at —— post office in an envelope addressed to the lessee at —— post office, and that the lessee will at the expiration of the time limited by the said notice peaceably and quietly give up possession of the said premises to the lessor, provided that upon such earlier determination of the said term, and after the lessee shall have delivered up possession in manner aforesaid, and paid to the lessor the full proportion of rent and taxes up to the date of such earlier determination the lessee shall be entitled to be compensated for the value of the crops sown and then growing, or of the ploughing done on the said premises in preparing for a crop, the amount of such compensation to be determined by arbitration if the parties cannot agree upon the same.

PROVISO for re-entry by the lessor on payment of rent (whether lawfully demanded or not) or non-performance of covenants or seizure or forfeiture of the said term for any of the causes aforesaid. The lessor covenants with the lessee for quiet enjoyment.

IT IS HEREBY declared and agreed that these presents and everything herein contained shall respectively enure to the benefit of and be binding upon the parties hereto, their heirs, executors, administrators and assigns, respectively.

IN WITNESS, etc.

Signed, Sealed, etc.

No. 20. *Lease of Land With Special Reservations and Covenants.*

THIS INDENTURE' made the —— day of ——, 19——, in pursuance of the Act respecting Short Forms of Leases, between —— of ——, hereinafter called the lessor, of the first part, and —— of ——, hereinafter called the lessee, of the second part.

WITNESSETH that in consideration of the rents, covenants and agreements hereinafter reserved and contained on the part of the lessee to be paid, observed and performed, the lessor doth hereby demise and lease unto the lessee all that messuage or tenement (or all that certain parcel of land) situate, etc.

EXCLUSIVE USE OF PASSAGEWAY.

TOGETHER with the exclusive use and enjoyment of the passageway, of the width of —— feet, leading from the back part of the said demised premises to —— street aforesaid.

JOINT USE OF PASSAGEWAY.

TOGETHER with the right, in common with the lessor and the tenants or occupants of adjoining premises having the like right, to use the passageway in the —— side of the said premises leading to —— street, the said lessee contributing a due proportion of the expenses of repairing and maintaining the said passageway.

RESERVATION OF PASSAGEWAY.

Excepting and reserving unto the lessor the use at all times and for all purposes, in common with the lessee, of the passageway leading from —— street to the rear of the said premises.

RESERVATION OF TIMBER AND MINES.

Excepting and reserving unto the lessor all timber and trees now standing or growing, or hereafter to be standing or growing, upon the said premises or any part thereof, and all mines, minerals and quarries in, upon and under the same, (but without power to the lessor to cut down or remove any such timber or trees, or to dig for or work such mines, minerals or quarries except with the consent in writing of the lessee).

HABENDUM.

TO HOLD the said premises for the term of —— years from the —— day of ——, one thousand nine hundred and ——, paying therefor (monthly) and every (month) during the said term hereby granted unto the lessor the sum of —— dollars in each (year) payable in equal portions of —— dollars each in avance on the —— day of —— in each and every (month) during the said term, the first of such payments to be made on the —— day of ——, 19 ——, and the last of such payments to be made in advance on the —— day of ——, 19 ——.

USE OF YARD RESTRICTED.

PROVIDED that the lessee shall have the use of the said yard in rear of the said premises in common with the other tenants thereof, for the purpose of freely taking in or out of the said premises fuel or articles necessary to the lessee, but the lessee shall not place, leave or permit, or suffer to be placed or left by his servants or agents, any boxes, cases, barrels, debris, refuse, fuel or other material (other than ashes from the lessee's heating apparatus, which must be carefully deposited in the ashhouse prepared by the lessor for that purpose) in the said yard, the intention being that the lessor shall have entire control of the said yard, in order that it may be kept clean and clear for the use of all the tenants.

RESTRICTED USE OF PREMISES.

AND the lessee covenants that he will use the said premises for a (dry goods) shop or store, and for no other purpose.

LESSEE'S ADMISSION AS TO PLUMBING, ETC.

THE lessee admits and agrees that the plumbing work and drains in and about the said premises are now in a sanitary and satisfactory condition.

COMPLIANCE WITH MUNICIPAL HEALTH REGULATIONS.

THE lessor and the lessee further agrees that upon request being made or notice being given by the (city) health officer or other proper corporation officer of the said (city) to the lessee or the lessor, the lessee shall immediately comply with the demands contained in such request or notice in connection with the sanitary arrangement of the said premises, and shall put and place all plumbing work and drains in such a state as to fully comply with the requirements demanded by the said health officer or other officer, or the requirements of the board of health of the said (city), and to the satisfaction of the (city) officials having charge of such matters, and will save the lessor harmless and indemnified in connection therewith or of the infraction of the rules and requirements of the (city) health department,

and if not done as aforesaid the lessor may do the same and may charge the cost thereof against the lessee, and have the same rights to recover the moneys so expended as if they were arrears of rent in respect of the said demised premises.

To Keep Sidewalks Clear.

And the lessee covenants that he will keep the sidewalks about said premises clear of snow and ice and of any obstructions as required by the by-laws and regulations of the (city) of ——.

To Keep Gratings, etc., in Repair.

And that the lessee will at all times during the said term well and sufficiently repair and keep in repair and in a safe condition for passage over and upon the same, all area gratings, trap doors and other coverings of areas, coal shutes or man-holes upon or in connection with the said premises.

To Insure.

And that the lessee will insure and keep insured against fire, during the whole of the said term, the buildings for the time being on the said premises, in some responsible (old line) insurance company (approved of by the lessor) in the sum of —— dollars, and will, if requested so to do, produce the receipts for the premiums of such insurance for the then current year to the lessor or his agent.

To Paint.

And the lessee will once in every (four) years of the said term paint with two coats of good oil paint, and in a proper and workmanlike manner, the outside wood and iron work of the said premises, of a colour to be approved of by the lessor, and in the same manner all additions to the said premises as often as the same shall be needed, and will in like manner once in every (seven) years of said term paint such parts of the inside wood work as have been usually painted, and of colours to be approved of by the lessor.

To Keep Garden and Lawn in Order.

And that the lessee will during the said term keep up and preserve in good order and condition the lawn and

garden belonging to the said premises, and carefully protect and preserve all orchard, fruit, shade and ornamental trees, bushes, shrubs, plants and flowers, now growing or henceforth during the said term, to grow therein, from waste, injury and destruction, and will carefully prune, manure, cultivate and care for the same if and as often as they may require, and will not suffer nor permit any horses, cattle, or sheep to have access to the orchard on the said premises, and that the lessee will replace such of the bushes and shrubs as may die or require replacing, provided that it shall not be incumbent upon him to keep or deliver up the said premises in a better state of repair or condition than they are at present.

NOT TO ALTER OR TO ADD TO PREMISES.

AND that the lessee will not during the said term make or suffer any alterations or additions to or erect any new buildings upon the said premises without having first submitted a plan or specification thereof to the lessor and obtained his approval thereof in writing.

TO LEAVE HAY AND MANURE.

AND that the lessee will leave upon the said premises all the unspent hay, straw, and root crops and all manure and compost, for the benefit of the lessor or the incoming tenant, who shall pay a reasonable price thereof; in case of dispute, to be settled by a valuator agreed upon by the parties hereto (or as may be agreed).

TO PUT UP NOTICE TO LET OR SELL.

AND that the lessor or his agent may at any time within —— months before the expiration, or sooner, determination of the said term enter upon the said premises and affix a notice for selling or re-letting the same, which notice shall be affixed (describe place agreed on) and shall not be more than —— inches in height, and that the lessee will not remove the same.

LESSOR'S RIGHT TO ENTER AND EXHIBIT PREMISES.

AND that the lessee will permit the lessor or his agents to make such repairs to and alterations in the said premises as he shall deem necessary, and to exhibit the said premises

to any prospective tenant or purchaser, and will permit all persons having written authority therefor to view the said premises at all reasonable hours.

COVENANT FOR LIGHT AND AIR.

AND the lessor covenants that no building shall at any time be erected in the rear of the said premises so as to obstruct or interfere in any manner with the access of light or air to the said premises.

OTHER COVENANTS.

THE said lessee covenants with the said lessor to pay rent and to pay taxes, except for local improvements (and to pay all water and gas rates and electric lighting which shall be assessed or chargeable upon the said premises during the term hereby demised, or during the time the lessee shall occupy the said premises as tenant, to the lessor under these presents. PROVIDED, and it is hereby agreed that when and so often as the lessee neglects or omits to pay the said water rates, gas rates, and electric lighting, the lessor may pay them, and may thereupon charge them to the lessee, who hereby covenants to pay them forthwith, and hereby agrees with the lessor that the lessor shall have the same remedies and may take the same steps for the recovery thereof as the lessor might take for the recovery of rent in arrears under the terms of this lease; and to repair reasonable wear and tear and damage by fire, lightning and tempest only excepted, and to keep up fences and not to cut down timber; and that the said lessor may enter and view state of repair; and that the said lessee will repair, according to notice in writing, reasonable wear and tear, and damage by fire, lightning and tempest only excepted, and will not assign or sub-let without leave (but such consent shall not be unreasonable or arbitrarily withheld to an assignment or sub-letting of the said premises to a respectable and responsible person), and will not carry on upon the premises any business or occupation which may be offensive or annoying to the lessor, or which shall be deemed a nuisance, or by which the said premises or any building thereon shall be injured, or by which the insurance of the said premises will be increased, and that he will leave the premises in good

repair, reasonable wear and tear and damage by fire, lightning or tempest only excepted. PROVIDED that the lessee may remove his fixtures. PROVIDED that in the event of fire, lightning or tempest, rent shall cease until the premises are re-built. PROVISO for re-entry by the said lessor on non-payment of rent (whether lawfully demanded or not), or non-performance of covenants (or seizure or forfeiture of the said term for any of the causes herein mentioned). The said lessor covenants with the said lessee for quiet enjoyment.

PREMISES NOW IN GOOD REPAIR.

AND the lessor covenants with the lessee that the said messuage and appurtenances are now in good and substantial repair, and that the lessor will repair any damage arising from the lack of such repair at this present time upon reasonable notice to him by the lessee.

LESSEE NOT TO CLAIM EXEMPTIONS.

AND the lessee covenants and agrees with the lessor that notwithstanding anything contained in section 30 of chapter 170 of the Revised Statutes of Ontario, 1897, or in any other section of the said Act, or any other Act which has been or may hereafter be passed in amendment thereof, none of the goods or chattels of the lessee at any time during the continuance of the term hereby created, on the said premises shall be exempt from levy by distress for rent in arrear by the lessee, as provided for by the said section of the said Act above named, and that upon any claim being made for such exemption by the lessee, or on distress being made by the lessor, this covenant and agreement may be pleaded as an estoppel against the lessee in any action brought to test the right to the levying upon any such goods as are named as exempted in said section, the lessee waiving, as he hereby does, all and every benefit that could or might have accrued to him under and by virtue of the said section of the said Act, or amendment thereto, but for the above covenant.

PROVISO IN CASE OF ASSIGNMENT FOR BENEFIT OF CREDITORS, ETC.

AND it is hereby agreed between the parties hereto that if the term hereby granted, or any of the goods and chattels

of the lessee shall at any time during the said term be seized or taken in execution or attachment by any creditor of the lessee, or if a writ of execution shall issue against the goods or chattels of the lessee, or if the lessee shall make any chattel mortgage or bill of sale of any of his goods or chattels, or any assignment for the benefit of creditors, or becoming bankrupt or insolvent shall take the benefit of any Act which may be in force for bankrupt or insolvent debtors (in the case of the lessee being an incorporated company, add, or if any petition is filed or presented for the winding-up of the said company), or in case the said premises become vacant and unoccupied for the period of (ten) days, or be used by any other persons than such are entitled to use them under the terms of this lease, or in case they shall be used for any other purpose than as above provided, or in case the lessee shall attempt to abandon the said premises, or to sell and dispose of his goods and chattels so that there would not, in the event of such sale or disposal, be a sufficient distress on the said premises for the then accruing rent, then and in every such case the then current and next ensuing (quarter's) rent and the taxes for the then current year (to be reckoned upon the rate for the previous year, in case the rate shall not have been fixed for the then current year) shall immediately become due and be paid, and the lessor may re-enter and take possession of the said premises as though the lessee, or his servants, or any other occupant of the said premises, was holding over after the expiration of the said term, and the said term shall, at the option of the lessor, forthwith become forfeited and determined, and in every of the above cases such taxes as are accrued portion thereof shall be recoverable by the lessor in the same manner as the rent hereby reserved.

LESSOR MAY FOLLOW GOODS REMOVED.

PROVIDED also that in case of removal by the lessee of his goods and chattels from off the said premises, the lessor may follow them for thirty days in the manner provided for in the Act respecting fraudulent and clandestine removal of goods.

LESSOR MAY FOLLOW AND SELL GOODS REMOVED.

AND the lessee further agrees that if he leaves the said premises leaving any rent owing and unpaid, the lessor may

seize and sell the goods and chattels of the lessee at any place to which the lessee or any other person may have removed them, whether on or off the demised premises.

LESSOR MAY DETERMINE LEASE, PURCHASING IMPROVEMENTS AT VALUE FIXED BY ARBITRATION.

AND it is hereby agreed that the lessor on the determination of the term hereby granted, or any renewal thereof, shall be at liberty to determine this lease and all right of renewal thereof, by purchasing the buildings, erections and improvements then on the premises hereby demised, at a price to be determined, in case of dispute, by arbitration, the lessor to appoint one person, the lessee to appoint one person, and the two persons thus appointed to appoint a third, with all necessary powers, to value and appraise the same, and to appoint a time for payment of the value thereof so ascertained, and the award of a majority of such arbitrators shall be final between the said parties.

COVENANT TO SELL TO LESSEE.

AND the lessor covenants that he will upon payment to him by the lessee at any time within —— years from the date hereof of —— dollars, convey the premises hereby demised to the lessee, or to whomsoever he may direct or appoint.

DESTRUCTION OF PREMISES.

PROVIDED that if the premises hereby demised shall at any time during the term hereby agreed upon be destroyed by fire, lightning or tempest, so as, in the opinion of the lessor, to be total loss, then the rent hereby reserved shall be forthwith payable up to the time of the destruction of the said premises, and the said term shall immediately become forfeited and void, and the lessee shall be relieved from all further liability hereunder, and the lessor may forthwith re-enter and take possession of the said premises.

PROVIDED further, that if the said premises are only partially destroyed by any of the causes aforesaid, then and so often as the same shall happen, the lessor may, at his option, either forthwith rebuild and make the said premises fit for the purposes of the lessee, and the rent hereby re-

served, or a proportionate part thereof, according to the nature and extent of the injury sustained, shall abate, and all or any remedies for recovery of said rent or such proportionate part thereof shall be suspended until the said premises shall have been rebuilt or made fit for the purposes of the lessee; or the lessor may, at his option, instead of rebuilding, by notice in writing mailed to the lessee at his last known address, forthwith determine and put an end to this lease, and the lessor may thereupon recover the rent due and accruing due up to the time the said premises became unfit for occupation as aforesaid, and may deal with the said premises as fully and effectually as if these presents had not been entered into.

PROVIDED also that if the lessor shall not exercise the said option to determine the said lease, but shall proceed to forthwith rebuild the said premises and to make them fit for the purposes of the lessee, in case any dispute shall arise between the lessor and the lessee as to whether the said premises have been rebuilt or made fit for the purposes of the lessee within the terms of this proviso, so as to entitle the lessor to recover from the lessee the rent for the said premises, then and so often as the same shall happen the lessor may, at his option, thereupon determine and put an end to this lease by notice in writing as aforesaid, and the said lease shall thereupon become forfeited and void, and the lessor may forthwith recover the rent for the said premises due up to the time of the happening of any of the events aforesaid, and may take immediate possession of the said premises.

POWER TO RE-ELECT IF PREMISES BECOME VACANT.

PROVIDED also that if the said premises shall at any time become vacant during the said term in consequence of the removal of the lessee for non-payment of rent by legal process or any other cause, the lessor may re-enter the said premises and use such force for that purpose as the lessor shall think fit, without being liable to any prosecution therefor, and may thereupon treat the said lease as terminated and re-let the said premises for his own use, or the lessor may re-let the said premises as agent of the lessee, applying the avails thereof to the expenses that may accrue

in re-entering, and then to the payment of the rent due under these presents, and the balance to pay over to the lessee, or may hold the lessee for any balance remaining due after so applying the proceeds.

RENEWAL OF LEASE.

AND the lessor covenants with the lessee that if the lessee duly and regularly pay the said rent, and perform all and every the covenants, provisoes, and agreements herein contained, and on the part of the lessee to be paid and performed, the lessor will, upon the request and at the cost of the lessee, —— months previous to the determination of the term hereby created, grant to the lessee a renewed lease of the said hereby demised premises for a further term of ——, at a rent to be determined by (arbitration in the same manner as for purchase of the buildings hereinafter mentioned or as may be agreed), and so on at the end of each term of —— will grant a renewal lease for a like term, under and subject to the same covenants, provioes and agreements as are herein contained.

IT IS HEREBY declared and agreed that these presents and everything herein contained shall respectfully enure to the benefit of and be binding upon the parties hereto, their heirs, executors, administrators, and assigns respectively.

IN WITNESS, ETC.,

No. 21. *Lease of a Right of Sporting.*

THIS INDENTURE, made the —— day of ——, 19—, Between A.B. of, etc., of the one part, and C.D. of, etc., of the other part:

WITNESSETH, that in consideration of the rent and lessee's covenants hereinafter reserved and contained, The said A.B. doth hereby demise unto the said C.D.,

ALL THAT the exclusive right of hunting, coursing, shooting, fishing, and sporting in, over, and upon all, etc., (parcels), (except and reserved out of these presents unto the said A.B., his heirs and assigns, the exclusive right of shooting and sporting in, over and upon the several lands coloured red in the plan hereto annexed, and the exclusive

right of fishing in the river A., between the points marked C. and D. on the said plan). TO HOLD the said premises unto the said C.D., from the —— day of ——, last past for and during the term of —— years thence next ensuing, if the said C.D. shall so long live, but subject as regards ground game to the rights of the tenants of the said lands or any of them:

YIELDING AND PAYING therefor, the yearly rent of —— by equal quarterly payments, on the 25th day of March, the 24th day of June, the 29th day of September, and the 25th day of December in each year, with a proportionate part of the said rent, up to the day of decease of the said C. D. within the said term, the first payment to be made on the —— day of —— next.

AND the said C.D. doth hereby covenant with the said A.B., his heirs and assigns, in manner following—that is to say, that he, the said C.D., will pay the said rent at the times hereinbefore appointed for payment thereof, and will also pay all rates and taxes payable in respect of the said lands: AND ALSO that he, the said C.D., will at all times during the said term, keep up the head of game on the said lands, and will to the best of his power preserve the eggs and young of game birds from being destroyed or injured: AND ALSO will not at any time assign or under-let, or otherwise part with the present lease, or the rights and privileges hereby demised, or any of them, to any person or persons whomsoever, without the consent in writing of the said A.B., his heirs or assigns, first had and obtained for that purpose: AND the said A.B. doth hereby covenant with the said C.D. that he, paying the yearly rent hereby reserved, and observing and performing the covenants herein contained on his part, shall and may peaceably and quietly have, hold, and enjoy the rights and privileges hereby demised without any lawful interruption from or by the said A.B., or any person or persons claiming through, under, or in trust for him: AND that if this lease shall determine by the death of the said C.D. during the said term, he the said A.B., his heirs or assigns, will pay or allow to the executors, administrators and assigns of the said C.D., all expenses incurred by the said C.D. in preserving and rearing the game from the end

of the preceding season up to the day of the death of the said C.D.

IN WITNESS, ETC.

No. 22. *Lease for Lives on the Dropping of a Life pursuant to a Covenant for Perpetual Renewal Contained in a Lease for Lives which is Surrendered.*

THIS INDENTURE, made, etc., Between A. B. of, etc., (lessor) of the one part, and C.D. of, etc., (lessee) of the other part (Recite lease for lives of E.F. and G., and lives and life of survivors and survivor of them, and the covenant for renewal contained in the lease,—death of E.): AND WHEREAS the said C.D. hath requested the said A.B. to grant to him a renewed lease of the said premises pursuant to the covenant for this purpose contained in the said indenture, for the lives of F., G. and H., in consideration of a fine of ——:

NOW THIS INDENTURE WITNESSETH, that in pursuance of the aforesaid covenant, and in consideration of the sum of —— to the said A.B. paid by the said C.D. on or before the execution of these presents (the receipt, etc.,), and in consideration of the surrender of the said recited lease (which surrender is hereby made), and of the rent and lessee's covenants hereinafter reserved and contained, he, the said A.B. (hereinafter called "the lessor") hereby demises unto the said C.D. (hereinafter called "the lessee") ALL, ETC., (parcels).

TO HOLD the same unto the lessee from the date of these presents, for and during the lives of the said F., G. and H., and the lives and life of the survivors and survivor of them.

YIELDING AND PAYING therefor during the said term the yearly rent of ——, by equal quarterly payments on the —— day of ——, the —— day of ——, the —— day of ——, and the —— day of ——, the first of such quarterly payments to be made on the —— day of ——. (*Covenants by lessee to pay rent, rates, and taxes during the said term, to keep in repair, to permit lessor to inspect, to insure*):

AND THE LESSOR hereby covenants with the lessee that in case, on the decease of any one of the persons for whose lives this lease is granted, the lessee shall, within six calendar months from the dropping of such life, give to the lessor, or leave at his usual or last known place of abode, a notice in writing requesting a new lease of the premises for the lives of the two survivors of such persons, and the life of one person to be nominated in that behalf by the person or persons giving or leaving such notice, and shall within the said period pay the sum of —— to the lessor, by way of fine for the renewal of such lease, then and in such case the lessor shall and will remain within such period as aforesaid, at the request and cost of the lessee grant unto him, on the surrender of this present lease, a new lease of the said premises for the lives aforesaid, according to such notice, upon the same or the like terms, and under and subject to the same or the like covenants and provisions as are declared and contained in this present lease, including this covenant for renewal.

AS WITNESS, ETC.

No. 23. *Lease for Lives on the Dropping of a Life Pursuant to a Covenant for Perpetual Renewal Contained in a Lease for Lives which is Surrendered.*

THIS INDENTURE, made, etc., Between A.B. of, etc., (lessor), of the first part, and C.D. of, etc., (lessee), of the other part (*Recite lease for lives of E., F. and G., and lives and life of survivors and survivor of them, and the covenant for renewal contained in the lease,—death of E.*): AND WHEREAS the said C.D. hath requested the said A.B. to grant to him a renewed lease of the said premises pursuant to the covenant for this purpose contained in the said indenture, for the lives of F., G. and H. in consideration of a fine of ——: NOW THIS INDENTURE WITNESSETH, that in pursuance of the aforesaid covenant, and in consideration of the sum of —— to the said A.B. paid by the said C.D. on or before the execution of these presents (the receipt, etc.,), and in consideration of the surrender of the said recited lease

(which surrender is hereby made), and of the rent and lessee's covenants hereinafter reserved and contained, he, the said A.B. (hereinafter called "the lessee"), ALL, ETC., (parcels). TO HOLD the same unto the lessee from the date of these presents, for and during the lives of the said F., G. and H., and the lives and life of the survivors and survivor of them, YIELDIND AND PAYING therefor during the said term the yearly rent of ——, by equal quarterly payments on the —— day of ——, the —— day of——, the —— day of ——, and the —— day of ——, the first of such quarterly payments to be made on the —— day of (*Covenant by lessee to pay rent, rates, and taxes during the said term, to keep in repair, to permit lessor to inspect, to insure*): AND the lessor hereby covenants with the lessee that in case, on the decease of any one of the persons for whose lives this lease is granted, the lessee shall, within six calendar months from the dropping of such life, give to the lessor, or leave at his usual or last place of abode, a notice in writing requesting a new lease of the premises for the lives of the two survivors of such persons, and the life of one other person to be nominated in that behalf by the person or persons giving or leaving such notice, and shall within the said period pay the sum of —— to the lessor, by way of fine for the renewal of such lease, then and in such case the lessor shall and will within such period as aforesaid, at the request and cost of the lessee, grant unto him, on the surrender of this present lease, a new lease of the said premises for the lives aforesaid, according to such notice, upon the same or the like terms, and under and subject to the same or the like covenants and provisions as are declared and contained in this present lease, including this covenant for renewal.

IN WITNESS, ETC.

No. 24. *Lease Under a Power Created by Deed or Will.*

THIS INDENTURE made, etc., (*date and parties as usual*) WITNESSETH, that in consideration of the rent, etc., the said A.B. (hereinafter called "the lessor"), in exercise of the power for the purpose given to him by an indenture dated, etc., and made, etc., (*date and parties*), *or*, by the will of

L.M., late of, etc., dated the —— day of ——, 19—, and proved on the —— day of ——, 19—, in the Court of ——, and of all other powers (if any) him hereunto enabling, doth hereby appoint and demise, etc., (*the rest as usual*).

No. 25. *Lease by a Tenant for Life, etc., Under Settled Estates Act.*

THIS INDENTURE, made, etc., (*date and parties as usual*). Whereas under an indenture dated, etc., and made, etc., (*date and parties*), (*or,* under the will, etc.,) the said A.B. is beneficially entitled to the possession of the hereditaments intended to be hereby demised for his life, (*or for the life of X.Y., or, in the case of any other limited owner, state the nature of his ownership*).

NOW THIS INDENTURE WITNESSETH, that in consideration, etc., the said A. B. (hereinafter called "the lessor") in exercise of the power for the purpose given to him by the Settled Estates Act and of all other powers (if any) him hereunto enabling, doth hereby demise, etc., (*the rest as usual*).

No. 26. *Lease by Person Appointed by Court to Exercise Powers of Act on Behalf of Infant Tenant in Fee Simple.*

THIS INDENTURE, made the —— day of ——, 19—, Between E. F. of, etc., (person appointed by Court to act for infant) of the first part, A.B. of, etc., an infant under the age of twenty-one years (infant tenant in fee simple), of the second part, and C.D. of, etc., (lessee) of the third part. WHEREAS, F.G., late of, etc., died on the —— day of ——, 19—, intestate, seized in fee simple of the hereditaments intended to be hereby demised, and leaving the said A.B., his only son, and heir-at-law:

AND WHEREAS by an order of the High Court of Justice, dated the —— day of ——, 19—, and made in the matter of, etc., and of the Settled Estates Act, on the application of the said A. B. by L. M., his next friend, it was ordered that the powers conferred upon a tenant for life by the

Settled Estates Act might be exercised by the said E.F. on behalf of the said A.B. during his minority.

NOW THIS INDENTURE WITNESSETH that in consideration, etc., the said E.F., on behalf of the said A.B. (hereinafter called "the lessor") in exercise of the power for this purpose given to him by the Settled Estates Act, and of all other powers (if any) him hereunto enabling, doth hereby demise, etc., (*the rest as usual, omitting the lessor's covenant for quiet enjoyment*).

No. 27. *Lease by Husband Seised in Right of His Wife Under Settled Estates Act.*

THIS INDENTURE, made the —— day of ——, 19—, Between A.B. of, etc., (lessor), of the one part, and C.D. of, etc., (lessee), of the other part, WITNESSETH that in consideration, etc., the said A.B. (hereinafter called "the lessor"), being beneficially entitled to the possession of the hereditaments hereinafter described in right of E.B., his wife, who is seised in fee simple thereof, doth hereby, in exercise of the power for this purpose given to him by the Settled Estates Act, and of all other powers (if any) him hereunto enabling, demise, etc., (*the rest as usual*).

No. 28. *Lease by Wife Tenant for Life for Her Separate Use.*

THIS INDENTURE, made the —— day of ——, 19—, Between E.B., the wife of A.B., of, etc., (lessor), of the one part, and C.D. of, etc., (lessee), of the other part: (*Recite settlement under which E.B. is tenant for life, and adding* "for her separate use without power of anticipation").

NOW THIS INDENTURE WITNESSETH, that in consideration, etc., the said E. B. (hereinafter called "the lessor"), in exercise of the power for this purpose given to her by the Settled Estates Act, and of all other powers (if any) her hereunto enabling, doth hereby demise, etc., (*The rest as usual*).

No. 29. *Lease by a Lunatic by His Committee.*

THIS INDENTURE, made the —— day of —— 19——, between A. B. of etc., a lunatic so found by inquisition (lessor) by X. Y., the committee of his estate acting in this behalf, pursuant to an order of ——, dated the —— day of —— 19——, of the one part, and C. D. of etc., (lessee) of the other part: WITNESSETH that in pursuance of the said order, and in consideration, etc., the said A. B. (hereinafter called "the lessor"), by the said X. Y. his committee, doth hereby demise, etc.

No. 30. *Lease by Mortgagee and Mortgagor.*

THIS INDENTURE, made the —— day of ——, between A. B. of etc., (in whom the legal estate in the hereditaments hereinafter demised is vested by way of mortgage) (mortgagee) of the first part, C. D. of etc., (being the person entitled to the equity of redemption of the said hereditaments (mortgagor) of the second part, and E. F. of etc., (lessee) of the third part, WITNESSETH, that in cosideration, etc., the said A. B. (hereinafter called "the lessor") at the request of the said C. D. hereby demises, and the said C. D. hereby demises and confirms unto the said E. F. (hereinafter called "the lessee"). All etc.

AND the lessee hereby covenants with the lessor in manner following, that is to say: That, etc., (covenants by lessee, and proviso for re-entry, etc.

AND the lessor, and also the said C. D., as to their own respective acts and deeds, but not further or otherwise, do hereby respectively covenant with the lessee that he paying the rent hereby reserved, and observing and performing the lessee's covenants hereinbefore contained, shall and may peaceably and quietly possess and enjoy the said premises during the said term without any eviction or disturbance by the said covenanting persons respectively, or any person lawfully or equitably claiming from or under them respectively: PROVIDED always, and it is hereby agreed and declared, that the lessee shall pay the rent hereby reserved unto the said C. D. or other person for the time being entitled to the equity or redemption of the said premises,

until the lessor shall by a notice in writing require the payment of the said rent to himself, and until such notice the said C. D. or other the person entitled as aforesaid shall have the like remedy by distress for recovery or arrears of the said rent as he would have had if seized at law of the said premises in reversion expectant on this lease, and shall and may exercise all the rights and powers conferred by these presents on the lessor.

IN WITNESS, etc.

No. 31. *Lease by a Mortgagor Under a Power Created by the Mortgage Deed.*

THIS INDENTURE, made the —— day of ——, between C. D. of, etc., (mortgagor), of the first part, A. B. of, etc., (mortgagee) of the second part, and E. F. of, etc., (lessee) of the third part. WHEREAS under an indenture, etc., (*date and parties*), the hereditaments hereinafter described are vested in the said C. D. who is entitled to the equity of redemption of the said hereditaments and is in possession thereof, has power under the said indenture to lease the same in manner hereinafter expressed:

NOW THIS INDENTURE WITNESSETH, that in consideration etc., the said C. D. in exercise of the power vested in him for this purpose by the said indenture, and all other powers (if any) him hereunto enabling, hereby appoints and demises unto the said E. F. All, etc., (*habendum to lessee and reservation of rent*).

AND the said E. F. hereby covenants with the said A. B. and also by way of separate covenant with the said C. D. in manner following, that is to say: That he, the said E. F., his executors, administrators, and assigns (all of whom are hereinafter included in the expression "the lessee"), will pay to the person for the time being entitled to the reversion expectant on this lease (hereinafter called "the reversioner"), the rent, etc., (*covenant to pay rent and taxes.*) AND also that the lessee will, etc., (*covenants to repair and other lessee's covenants and proviso for re-entry,* substituting "the reversioner" for "the lessor"): AND the said C.

D. hereby covenants, etc., (covenant for quiet enjoyment), without any lawful interruption from or by the said C.D., or from or by the said A. B. or any person rightfully claiming from or under either of them: PROVIDED always, etc., (*proviso that rent shall be paid to mortgagor until notice*, etc., *substituting "the reversioner" for "the lessor"*).

IN WITNESS, etc.

No. 32. *Lease of Coal Mines.*

THIS INDENTURE, made the —— day of —— 19——, between A. B., of, etc., (lessor), of the first part, and C.D., of, etc., E. F., of, etc., and G. H., of, etc., (lessees), of the second part, WITNESSETH and declares as follows:—

1. In consideration of the rents and lessees' covenants hereinafter reserved and contained, the said A. B. (hereinafter called "the lessor"), in exercise of a power for this purpose given to him by an indenture, etc., (*date and parties*), and of all other powers (if any) him hereunto enabling, hereby appoints and demises unto the parties hereto of the second part (hereinafter called "the lessees"), All those mines, beds, veins, and seams of coal and cannel from the surface down to and including the mine, bed, vein, or seam, called the —— mine, as well opened as unopened, lying and being within and under, 1st, the lands situate in the township of ——, in the county of ——, containing together —— acres or thereabouts, delineated and coloured —— on the plan annexed to these presents, all which lands, (as well the surface thereof as the mines thereunder) are comprised in or subject to the uses of the said indenture of settlement, and, 2ndly, the lands situate in the said township of ——, containing —— or thereabouts, delineated and coloured on the said plan, which lands as to the surface thereof belong to ——, but the above-mentioned mines thereunder are comprised in and subject to the uses of the said indenture of settlement: TOGETHER with the rights and privileges to be exercised in connection with the said mines and premises hereinafter mentioned: TO HOLD the same unto the lessees from the —— day of ——, for and during the term of forty years thence next ensuing, subject to the provisions hereinafter contained.

2. It shall be lawful for the lessees at all times during the term hereby granted to work and get the mines hereby demised, and to manufacture and carry away the produce thereof, and for that purpose and in connection therewith but subject to the restrictions and conditions hereinafter expressed) to have and exercise in, over, upon or under the lands, under which the said mines lie, (but as regards the lands secondly hereinbefore described, so far only as it is competent for the lessor to grant the same) all necessary and proper easements, rights, and privileges, and in particular to do all or any of the following things (namely):—

To sink, make, erect, set up, and construct pits, shafts, levels, airways, waterways, engines, machinery, furnaces, kilns, ovens, workmen's cottages, railways, tramways, and other ways, canals, cuts, wharves, erections, and other works, and to use all existing works of the above description.

To deposit upon a convenient part of the said lands all coal, cannel, and slack gotten from the said mines, and all earth and spoil brought to the surface therewith, and all materials used in the working thereof.

To appropriate and use for any purpose connected with the working of the said mines any water within the said lands, and make and construct reservoirs and ponds for collecting such water, but so that in the exercise of this privilege the lessees shall not deprive any house, mill, or watering place for cattle, of a reasonable quantity of water as before accustomed, and shall not in any manner foul, impregnate, or otherwise deteriorate any springs or streams of water so as to render the sme useless and unprofitable.

To get and dig clay, gravel, sandstone, and slate from the said lands, and burn clay into bricks for the purposes of the works hereby authorized, but not for sale.

3. No pit or shaft shall be sunk, and no building or thing erected or set up, and no other surface operation carried on by virtue of the liberties and privileges above granted in or upon the demesned lands of —— house or any part thereof, nor, (without the lessor's consent) upon the site of any house or building, or any courtyard, fold, garden or orchard

attached or belonging to any house or building, nor shall any land be taken or occupied for any surface operation, if the same shall be required for working any mines of the lessor not included in this lease, or for the purpose of any of the works connected with such mines, and any other land not so required shall be suitable and convenient and equally available for such surface operations.

4. No coke ovens shall be erected or set up in such a position that any damage or inconvenience may thereby arise to existing buildings, and all coke ovens shall (as far as is reasonably practicable) consume their own smoke.

5. Before taking any land for surface operations, the lessees shall give to the lessor or his agent one calendar month's previous notice in writing, and shall also give a similar notice to the tenants or occupiers of the land proposed to be taken, or leave such notice at their respective usual places of abode, and every such notice shall properly and correctly specify, by name or other sufficient designation and by quantity, the land proposed to be taken, and the purpose for which the same is required. The lessor or his agent may at any time within one calendar month from the receipt of such notice state his objections (if any) to the proposed site, and the validity of such objections shall be determined by arbitration.

6. The lessees may at any time or times within six calendar months after the end of this lease carry away and dispose off any coal or other minerals which shall have been raised during the said term, and also remove all plant, machinery and utensils upon or under the said lands being in the nature of trade or tenant's fixtures, or other movable things of the lessees, which the lessor shall not elect to purchase under the provision in that behalf hereinafter contained.

7. The following rights, liberties and privileges are reserved to the lessor out of this demise (that is to say), Liberty for him, and any lessee or other person authorized by him in that behalf, to enter into and upon the abovementioned lands or any of them, and to search for, dig, work, and get all or any of the mines and minerals and other substances under the said lands which are not in-

cluded in this lease, and for the purposes aforesaid to sink, make, erect, and use such pits, shafts, levels, drains, watercourses, reservoirs, tunnels, buildings, engines, machinery, canals, railways, waggon-ways, and other ways, works and conveniences upon, through, or under the said lands, and the mines hereby demised, and the workings of the lessees under these presents as shall be necessary or expedient: AND ALSO for the purposes aforesaid to use any existing pits or shafts and other works in and upon the said lands not required by the lessees for the purpose of the mines hereby demised: AND ALSO to use in common with the lessees any canals, railways, waggonways, and other ways not existing, or which may hereafter be made by the lessees under the authority of these presents, and to cross or intersect any such last-mentioned canals, railways, waggonways, or other ways with or by any canals, railways, waggonways, or other ways to be made under the liberties and powers hereby reserved: PROVIDED always that the said reserved rights and privileges shall be exercised and enjoyed in such manner as not to hinder or interfere with the rights and privileges of the lessees under these presents: PROVIDED ALSO that if the lessor or any person authorized by him as aforesaid shall use any canal, railway, waggonway, or other way in common with the lessees under the said reserved liberty in that behalf, the lessor or other the person using the same as aforesaid shall pay and contribute a just and fair proportion of the expense of keeping the same in repair and working order, the amount of such proportion to be settled in case of dispute by arbitration: PROVIDED ALSO that fair and proper compensation shall be paid by the lessor or other the persons for the time being exercising the said excepted and reserved rights and privileges to the lessees for all loss, damage or injury which they may sustain or be put into by reason or in consequence of the exercise thereof, the amount of such compensation to be settled in case of difference by arbitration.

8. The certain yearly rent of —— shall be paid by the lessees to the lessor for and in respect of the mines and premises hereby demised, by equal half-yearly payments

on the —— day of ——, and the —— day of —— in every year, the first half-yearly payments to be considered as having become due on the —— day of ——. For and in respect of which certain yearly rent of ——, the lessees may in every year of this demise work and get from or out of the said demised mines and premises such a quantity of coal and cannel as at the rates hereinafter mentioned would yield or pay for that year footage rents equal in amount to the said certain yearly rent of. But the said certain rent shall always be paid, whether such quantity shall in fact be gotten or not.

9. The following footage rents shall be paid by the lessees to the lessor for and in respect of all coal and cannel gotten from or out of the said demised mines and premises over and above the quantity which the lessees are hereinbefore authorized to work and get in respect of the said certain yearly rent of —— (that is to say), the rent of —— for every acre of one foot in thickness, and so in proportion for a greater or less quantity than an acre, and for a greater or less thickness than one foot, of coal and cannel gotten from or out of the mines called the —— Mine and the —— Mine respectively, or either of them, the rent the sum of —— for every acre of one foot in thickness, and so in proportion as aforesaid, of coal and cannel gotten from or out of the mines called the —— Mine and the —— Mine respectively, or either of them, and the rent or sum of —— for every acre of one foot in thickness, and so in proportion as aforesaid, of coal and cannel gotten from or out of the other mines hereby demised or any of them. The said footage rents to be paid by half-yearly payments on the —— day of —— and the —— day of —— in each year for and in respect of the coal and cannel gotten during the then preceeding half-year. PROVIDED ALWAYS that if in any year of the said term the lessees shall not work and get from or out of the said demised mines and premises such a quantity of coal or cannel as at the rates above-mentioned would produce or yield footage rents equal in amount to the said certain rent of —— then, and as often as the same shall happen, the lessees may, during the next ten years of the said

term, or any of them, but not afterwards, work and get from or out of the said demised mines and premises such quantity of coal and cannel as shall be required to make up such deficiency without paying any rent for the same other than the said certain rent.

10. A deduction or abatement shall be made in making or taking the yearly calculation or admeasurement for the purpose of ascertaining the footage rents payable for the then preceding year for and on account of all coal left for the support of buildings under the covenant in that behalf hereinafter contained, or for faulty, thin, or bad coal, or for protection against water, but no such deduction or abatement shall be made for or on account of any pillars, walls, or ranges which may be left in the said mines otherwise than for the support of buildings, or for faulty, thin, or bad coal, or for protection against water as aforesaid, but all such pillars, walls, or ranges other than as aforesaid, shall be paid for in like manner as if the coal constituting the same had been actually gotten from or out of the said demised mines.

11. The further yearly rent of —— shall be paid by the lessees to the lessor for or in respect of every Cheshire acre of land belonging to the lessor, the surface whereof shall be occupied or used by the lessees for any of the purposes of this demise, and so in proportion for any less quantity than an acre, the said surface rent to be paid by equal half-yearly payments on the same days as the said certain rent of —— is hereinbefore made payable, and the first half-yearly payment thereof to be made on such of the said days as shall happen next after such occupation or use shall commence, and the last half-yearly payment thereof to be made on such of the said days as shall happen next after such occupation or use shall have ceased, and the land shall have been restored and rendered fit for cultivation again, and in case any difference of opinion shall arise as to what ought to be considered the occupation or use of the surface of any land for the said purpose aforesaid, or as to the day on which such occupation or use shall have commenced, or as to the amount of rent payable under the reservation aforesaid, the matter in

difference shall be settled by arbitration: PROVIDED ALWAYS that no such rent shall be paid or demanded in respect of any spoil banks or roads or ways now in existence and not used by the lessees.

12. The lessees hereby jointly and severally covenant with the lessor to pay the rents reserved by this lease at the times and in the manner above pointed in that behalf, and also to observe and perform the provisions hereinafter contained, which are or ought on their parts to be observed and performed.

13. In addition to the rents hereby reserved, the lessees shall pay and discharge all taxes, rates, assessments, and impositions whatsoever which shall from time to time be charged, assessed or imposed upon the said demised premises or any part thereof, or upon the owner or occupiers thereof by authority of parliament or otherwise.

14. The lessees shall, during the continuance of this demise, work and get the mines hereby demised in a skillful and workmanlike manner, according to the most approved practice of mining in the district, and as to each and every of the mines when opened without voluntary intermission, and shall keep all the pits, and shafts, machinery and works belonging to and used in connection with the said mines in good repair, working order and condition.

15. The lessees shall at all times during the continuance of this demise, effectually fence off and keep fenced off from the adjoining lands with good and substantial rails and posts all the pits, shafts, and banking room, roads, railways, canals, reservoirs, clay pits, and other places and conveniences made or used for working and carrying on the mines hereby demised, and maintain sufficient roads, gates, stiles, and fences for the convenient occupation of such lands, and for the passing and re-passing by the lessor and his tenants, agents, and servants, and others on foot, and with horses, carts, carriages, and cattle to and from the said lands, for all purposes whatsoever.

16. The lessees shall not work the mines hereby demised within the distance of fifty yards from the —— fault,

except in levels and narrow workings for the purpose of ascertaining its true direction, and shall not work the mines under and adjacent to any buildings now standing, or which may hereafter be erected on the said lands or any part thereof, without giving to the lessor or his agent one calendar month's previous notice in writing: AND the lessor or his agent may, at any time within ane calendar month after the receipt of such notice, mark out what coal shall be left as a support of such building, and the lessees shall leave such coal accordingly: AND if the lessor or his agent shall omit to mark out or to cause to be marked out what coal shall be left for the space of one calendar month after the receipt of such notice, the lessees shall leave so much coal as shall be sufficient to support the said buildings and protect the same from all damage and injury whatsoever by reason of working the said mines: AND if the lessees shall neglect or omit to leave a sufficient support for such building, and any damage or injury shall be thereby occasioned to such building, then and in such case the lessees shall pay to the lessor, or other the person or persons entitled to or interested in such building, full and adequate compensation for the damage or injury to be done thereto as aforesaid, the amount thereof to be settled in case of dispute by arbitration.

17. The lessees shall on or before the —— day of —— in every year during the continuance of this demise, and before the end of six calendar months from and after the determination thereof, account with the tenants and occupiers of any part of the lands within or under which the said mines and beds of coal and cannel shall be gotten, and also with all persons who may be injured by the working and getting of such mines, or in anywise relating thereto, and pay to them full compensation for all damage or injury done or occasioned through or by means or in consequence of the exercise of any of the liberties and privileges hereby granted, and shall indemnify and save harmless the lessor therefrom, the amount of such compensation to be settled in case of difference by arbitration.

18. The lessees shall within one calendar month after each of the half-yearly days hereby appointed for payment of rent make an exact map and admeasurement in acres, roods, perches, and yards of the gettings of the mines hereby demised during the preceding half-year, such admeasurement to be taken as land measure of —— yards to the perch or pole, and to include all pillars, walls, and ranges which may be left as aforesaid, and to particularize the quantities and thickness of each mine separately, or as near as may be, and such map to be on a scale of thirty yards to the inch: AND every such map and admeasurement shall be open at all times to the inspection of the lessor or his agent, who may make copies thereof.

19. The lessees shall at or before the expiration of the said term cause to be restored to their original or natural level, state, and condition, and fit for agricultural occupation, all such parts of the lands as shall have been appropriated and used for any of the purposes of this demise: AND if any land shall be permanently damaged or interfered with, so that the same cannot be restored as aforesaid, the lessees shall pay to the lessor at the end or sooner determination of that lease the sum of —— for every statute acre of such land, and so in proportion for any less quantity than an acre.

20. The lessees shall, at the expiration or sooner determination of the term, deliver up to the lessor in good repair, order, and working condition, all buildings and erections of brick, stone, or slate standing and being on the lands, and all pits, shafts, watergates, airgates, and levels belonging to the said mines, except pits, shafts, or other works which shall have been abandoned or disused in the ordinary and fair course of working of the said mines, and all such other works and things belonging to the said mines as are not in the nature of tenant's or trade fixtures removable by the lessees, and also all such articles and things (if any) as the lessor shall elect to purchase under the power hereinafter given to him in that behalf.

21. The lessor and his agents, servants, and workmen shall be at liberty at all reasonable times during the said term to descend any pits or shafts of the lessees into the

mines hereby demised for the purposes of examining the condition thereof, and of the works belonging thereto: AND the lessees with proper persons employed by them and acquainted with the workings of the said mines shall effectually assist the lessor or other the persons aforesaid in descending into the said mines, and in returning to the surface, and shall allow him or them the use of all necessary and proper machinery and plant for that purpose.

22. The lessees shall not assign or underlet the mines and premises hereby demised, or any part thereof, to any person or persons whomsoever, without the consent in writing of the lessor for that purpose first had and obtained, unless such consent shall be unreasonably withheld, and if any question shall arise as to whether the consent is not unreasonably withheld the same shall be settled by arbitration.

23. The lessor [or the said A. B.] hereby covenants with the lessees that they paying the rents hereby reserved, and observing and performing the covenants and provisions herein contained, and on their parts to be observed and performed, shall peaceably and quietly hold and enjoy the mines and premises hereby demised for and during the term hereby granted, without any lawful interruption from or by the lessor [or the said A. B.], or any person rightfully claiming from or under him.

24. If the rents hereby reserved or any of them, or any part thereof respectively, shall be behind or unpaid for the space of twenty-eight days next after any of the days whereon the same ought to be paid, then and so often as the case shall happen, the lessor may enter into and upon the mines and premises hereby demised, or any lands which shall for the time being be possessed or occupied by the lessees for the purposes of these presents, and may distrain all or any of the coal, cannel, horses, engines, machines, tools, implements, matters, and things which shall be found in or upon the same premises, and the same may take, lead, and drive, carry away, and impound, and in pound detain and keep, or otherwise may demean therein according to law, until the rent which shall be

then due, and all costs and expenses occasioned by the non-payment thereof, shall be fully paid and satisfied.

25. If the rents hereby reserved or any of them, or any part thereof respectively, shall be behind or unpaid for the space of sixty days next after any of the days whereon the same ought to be paid as aforesaid, whether the same shall have been legally demanded or not, or if the lessees shall commit any breach of the covenants and conditions contained in this lease and on their parts to be observed and performed, or any of them, then and in any such case it shall be lawful for the lessor at any time thereafter, and although he may not have taken advantage of some previous default of a like nature, into and upon the mines and premises hereby demised, or any part thereof, in the name of the whole to re-enter, and the same to have again, re-possess and enjoy, as of his former estate.

26. If at any time during the continuance of this demise the mines hereby demised shall become unworkable by reason of any large outbreak of water not caused by improper working or by any default of the lessees, then and in such case the lessees may determine the lease on the —— day —— in any year of the term hereby granted by giving to the lessor twelve calendar months' notice in writing to that effect, but without prejudice to the rights and remedies of the lessor, under or by virtue of these presents, for the recovery of any rent which may then remain unpaid, or in respect of any breach which may have been committed of any of the covenants herein contained on the part of the lessees.

27. If all the mines, seams, beds, or veins of coal and cannel hereby demised and getable to profit shall be wholly exhausted before the expiration of the term hereby granted therein, then this lease shall thereupon cease and determine as if the same had expired by effluxion of time, but without prejudice to the rights and remedies of the lessor for the recovery of any rent then remaining unpaid, or in respect of any breach which may have been committed of any of the covenants herein contained on the lessees' part.

28. If at the end or sooner determination of this demise the lessor shall be desirous of purchasing all or any of the

movable machinery, plant, articles, and things in, upon, or under the said lands, or any part thereof, and used or employed in connection with the mines hereby demised, (including all things in the nature of fixtures removable by the lessees during the continuance of this lease), and shall signify such his desire by notice in writing to the lessees six calendar months at least before the expiration or sooner determination of the said term (unless the said term shall be determined under the power of re-entry hereinbefore contained, in which case the notice may be given at any time within six calendar months after such determination of the said term), then and in such case the articles and things specified in such notice shall be left by the lessees and be taken by the lessor at a valuation to be made thereof, in case of any difference or dispute between the parties as to their value, in the manner hereinafter provided, and the amount of such valuation, when ascertained or settled, shall be paid to the lessees within three calendar months next after such valuation shall have been agreed upon and delivered to the parties, together with interest thereon after the rate of 4 per cent. per annum from the time of such delivery thereof.

29. If any dispute or difference shall arise between the lessor and the lessees concerning the value of the articles and things which the lessor shall elect to take or retain as aforesaid, or the amount to be paid by the lessor in respect thereof, or touching or concerning any other matter or thing which it is hereby provided shall be settled by arbitration, or touching any clause, matter, or thing whatsoever herein contained, or the operation or construction thereof, or any matter or thing in any way connected with these presents, or the rights, duties, or liabilities of either party under or in connection with these presents, then and in every such case the dispute or difference shall be referred to a single arbitrator [or to two arbitrators, one to be appointed by each party in difference] in accordance with and subject to the provisions of the Arbitration Act.

30. EVERY NOTICE hereby required or authorized to be given to the lessor may be either given to him personally or left at his usual or last-known place of abode in Eng-

land or Wales, or may be given to such agent or other person or in such manner as the lessor may from time to time direct, and every notice hereby required or authorized to be given to the lessees may be given to them or either of them personally, or left at their office or counting-house for carrying on the business of their works under these presents.

31. Where the context allows, the expressions "the lessor" and "the lessees," used in these presents, include, besides the said A. B., his successors in title (or heirs) and assigns, and besides the parties hereto of the second part, their executors, administrators, and assigns.

IN WITNESS, etc.

No. 33. *Lease of Railway.*

AN INDENTURE made the —— day ——, one thousand nine hundred and ——, between THE —— RAILWAY COMPANY, a corporation existing under the laws of the Dominion of Canada, for itself and the several companies which it controls, as hereinafter recited, and hereinafter called "the Canada Company," of the first part: and THE —— RAILWAY COMPANY, a corporation existing under the laws of the State of Michigan, and hereinafter called "the Michigan Company," of the second part:

WHEREAS the Canada Company is the proprietary owner of a main line of railway between the Niagara River and the Detroit River, and of several branch lines of railway appurtenant to its main line, all within the Province of Ontario, in the Dominion of Canada, and is also the owner of all, or substantially all, of the capital stock and bonded indebtedness of the several Companies referred to and set out in the Schedule hereunto annexed, and through the ownership of such stock and bonds controls the several Companies mentioned or referred to in said Schedule;

AND WHEREAS by an Act of the Parliament of the Dominion of Canada, duly made and passed in the year 1894, in the 57th and 58th year of Her Majesty's, the late Queen Victoria's reign, and Chaptered 66, the Canada Company

is authorized and empowered, among other things, to enter into an agreement with the Michigan Company for leasing to the Michigan Company the railway of the Canada Company in whole or in part, or any rights or powers possessed by the Canada Company, as also the surveys, plans, works, plant, material, machinery and other property to the Canada Company belonging on such terms and conditions as are agreed upon, and subject to such restrictions as to the Directors seem fit, provided that such agreement has been first sanctioned by two-thirds of the votes at a special general meeting of the shareholders duly called for the purpose of considering the same, at which meeting shareholders, representing at least two-thirds in value of the stock, are present in person or represented by proxy, and that such agreement has also received the approval of the Governor-in-Council, as is in the said Act more particularly provided;

AND WHEREAS at a special general meeting of the shareholders of the Canada Company, duly called and held at the Company's Head Office in the City of St. Thomas, on the third day of June, 1903, at which meeting were present or represented more than two-thirds in value of the whole stock of the Company, and by the votes of more than two-thirds of the shareholders then present in person or by proxy, IT WAS RESOLVED that the Canada Company should lease to the Michigan Company, its said main railway line and branches and other appurtenances upon the terms and conditions in this Indenture contained.

AND WHEREAS at a special general meeting of the shareholders of the Michigan Company, duly called and held at the Head Office of the Company in the City of Detroit, on the —— day of ——, 1903, at which were present more than —— in amount of the whole of the shareholders of the Michigan Company, IT WAS RESOLVED that the Michigan Company should lease from the Canada Company its said main line of railway and branches and other appurtenances upon the terms and conditions in this Indenture contained;

AND WHEREAS the terms and conditions of this Indenture were laid before the said meetings of shareholders

respectively, were duly considered, and were approved of by more than two-thirds of the votes of the shareholders of the Canada Company, as aforesaid, and by the votes of a majority of the shareholders of the Michigan Company, and this Indenture was then and there at said respective meetings sanctioned, approved of and ordered, by the votes of the respective shareholders as aforesaid, to be executed and accepted by the executive officers of the said respective Companies;

AND WHEREAS the Michigan Company represents that it has power and authority to enter into and accept a lease of the railway of the Canada Company, as in this Indenture provided, and to carry out the provisions, conditions and agreements in this Indenture contained;

AND WHEREAS the Canada Company and the Michigan Company, in pursuance of the laws of the Dominion of Canada, and of the State of Michigan, in such cases made and provided, and of every other power and authority them in that respect enabling, have agreed that the railway of the Canada Company shall be leased to the Michigan Company, and shall be run, used and operated by the Michigan Company upon the terms and conditions of this Indenture;

NOW THEREFORE THIS INDENTURE WITNESSETH that for and in consideration of the covenants and agreements of the Michigan Company hereinafter contained, and of the sum of one dollar to it in hand paid by the Michigan Company, (the receipt whereof is hereby acknowledged) the Canada Company, in pursuance of all powers it thereunto enabling, doth hereby demise, and lease, to the Michigan Company, its successors and assigns, the entire railway of the Canada Company as now existing, and being composed chiefly of:

(a) Its main line of railway between the City of Windsor, on the Detroit River, and the Town of Niagara Falls, on the Niagara River;

(b) Its St. Clair branch between the City of St. Thomas and the Village of Courtright on the St. Clair River;

(c) Its Amherstburg branch between the Town of Essex and the Town of Amherstburg, on the Detroit River;

(d) Its Fort Erie branch between the Town of Welland and the Village of Bridgeburg on the Niagara River;

(e) Its Niagara branch between the said Village of Bridgeburg and the Town of Niagara at the mouth of the Niagara River;

Together with all other branches, extensions and sidings, and also all rights of way, lands, machinery, fixtures, stations, shops, buildings, structures, improvements, appurtenances, tenements and hereditaments of whatever kind or description and wherever situate, now held or owned by the Canada Company, or which may at any time hereafter during this Indenture be acquired by the Canada Company, provided that such after-acquired property be acquired for some purpose incident to or connected with the maintenance, operation, construction or extension of the aforesaid railway with its branches and appurtenances;

ALSO all the engines (stationary and locomotive) cars, tenders, trucks and other rolling stock, tools, implements, machines and personal property of every kind and description belonging to the Canada Company, and in use or adapted for use upon or about the railway and premises demised, or the business thereof;

ALSO all the rights, powers and privileges, tolls and revenues which may now or at any time hereafter during this Indenture be lawfully exercised, enjoyed or received in or about the use, operation, management, maintenance, renewal, extension, alteration or improvement of the railway and appurtenances above described;

TOGETHER with the right to use the line of telegraph now existing in the manner and to the same extent and as now possessed by the Canada Company, or as the same may hereafter exist along the line of the said railway or its branches, or any extension thereof; all of which are hereinafter referred to as "the demised premises," but always excepting thereout and therefrom all lands of the

Canada Company lying South of Wellington Street, in the City of St. Thomas, commonly known as "the Canada Southern subdivision of lands," and the lands lying outside of the present yard at Montrose not necessary for the operation of the railway of the Canada Company.

TO HAVE AND TO HOLD the demised premises hereby leased unto the Michigan Company, its successors and assigns, from and including the first day of January, A.D. 1904, until the end of nine hundred and ninety-nine years, to be computed from the said first day of January, A.D. 1904, together with all rights, advantages, privileges, claims and demands of the Canada Company under all deeds, contracts, agreements, by-laws, franchises, or other rights, so far as the same may be lawfully assignable.

I.

THE Canada Company covenants and agrees with the Michigan Company, as follows:

II.

THE Michigan Company covenants and agrees with the Canada Company as follows:

III.

IT IS MUTUALLY AGREED between the Companies parties hereto as follows:

No. 34. *Underlease.*

For the Whole of the Term Granted by the Original Lease, Except Ten Days, and at Improved Rent. Underlessee Covenants to Observe all the Covenants in the Original Lease.

THIS INDENTURE, made the —— day of ——, between A. B.p., of, etc., (lessor) of the one part, and C. D., of, etc., (lessee) of the other part. WHEREAS by an indenture of lease, dated, etc., (*date and parties*), the messuage and hereditaments hereinafter described and intended to be demised were demised by the said C. D. unto the said A. B. for the term of eighty years computed from the

—— day of —— at the yearly rent of —— and subject to the lessee's covenants therein contained: AND WHEREAS the said A. B. has agreed to grant to the said C. D. an underlease of the said premises in the manner hereinafter expressed, NOW THIS INDENTURE WITNESSETH, that in pursuance of the said agreement and in consideration of the rent hereinafter reserved and the covenants of the said C. D. hereinafter contained, the said A. B. hereby demises unto the said C. D. ALL, etc., (*parcels*), And all other (if any) the premises comprised in the said indenture of lease, to hold unto the said C. D. for all the residue now unexpired of the said term of —— years granted by the said indenture of lease, except the last ten days of the said term, YIELDING AND PAYING, etc., (*reservation of rent*). And the said C. D. hereby covenants with the said A. B. that he, the said C. D., his executors, administrators, or assigns, will pay the rent hereby reserved, at the time and in the manner aforesaid: AND ALSO will at all times during the term hereby granted observe and perform all the covenants and conditions contained in the said recited indenture of lease, and on the lessee's part to be observed and performed, except the covenant for payment of the rent thereby reserved, and will keep indemnified the said A. B., his executors, administrators, and assigns, from and against the said covenants and conditions and all claims and demands in respect thereof: AND in particular will, at the expiration or sooner determination of the term hereby granted, deliver up the said premises to the said A. B., his executors, administrators, or assigns, in the same state and condition as the same ought to be in at the end of the term granted by the said indenture of lease under the covenant in that behalf entered into by the said A. B. in and by the said indenture, and so that the said A. B., his executors, administrators, or assigns, shall not under such covenant have to pay any moneys to his or their landlord, or to suffer any loss or injury on account of repairs or dilapidations:

(*Proviso for re-entry for non-payment of rent or breach of covenants, substituting for "lessor" the said A. B., his executors, administrators, or assigns, and for "lessee" the said C. D., his executors, administrators, or assigns*):

And the said A. B. hereby covenants with the said C. D., that he, the said A. B., his executors, administrators, or assigns, will at all times pay the said yearly rent of —— reserved by the said indenture of lease, and keep the said C. D., his executors, administrators, and assigns, indemnified therefrom, and from all actions, claims, and demands in respect thereof: AND also that the said C. D., his executors, administrators, and assigns, paying the rent hereby reserved, and observing and performing the covenants herein contained, and on his or their part to be observed and performed, shall and may peaceably and quietly possess and enjoy the premises hereby demised during the term hereby granted without any interruption by the said A. B. or any person lawfully or equitably claiming from or under him: And the said A. B. hereby acknowledges the right of the said C. D. to production and delivery of copies of the said indenture of lease, and undertake for the safe custody thereof.

IN WITNESS, etc.

No. 35. *Agreement.*

For a Building Lease for the Erection of One House for Ninety-nine Years.

AN AGREEMENT, made the —— day of ——, 19—, between A. B., of, etc., of the one part, and C. D., of, etc., of the other part, whereby it is agreed as follows:—

1. When and so soon as the messuage or dwelling-house mentioned in the third article of this agreement shall have been erected and completed by the said C. D., the said A. B. will, by a good and sufficient lease, demise unto the said C. D. all that piece or parcel of land (describe it) and the messuage or dwelling-house, and buildings to be erected thereon, for the term of ninety-nine years, computed from the —— day of —— last, at the yearly rent of a peppercorn, if demanded, for the first year of the said term, and at the yearly rent of —— during the residue thereof, payable quarterly on the —— day of ——, the —— day of ——, the —— day of ——, and the —— day of ——, the

first of such quarterly payments to be made on the —— day of ——.

2. The lease shall contain covenants by the lessee: To pay the said rent of $—— at the times and in manner aforesaid: To pay all taxes, rates, charges, and assessments, whether parliamentary, or of any other description, which during the term shall be charged, assessed, or imposed upon the premises or upon the landlord or tenant in respect thereof: To keep the said messuage or dwelling-house and buildings in good and substantial repair, and deliver the same up to the lessor at the end of the term in good and substantial repair: To insure and keep insured the said messuage or dwelling-house and buildings to at least three-fourths of the value thereof in the joint names of the lessee and lessor in one of the public fire insurance offices in ——, and at all times when required to produce the policy of insurance, and the receipts of the premiums in respect of the same, to the lessor or his agent, and to cause any money received by virtue of any such insurance to be forthwith applied in reinstating the premises, and if the same shall be insufficient to make up the deficiency: To pay a reasonable share and proportion for and towards the cost and expense of making, supporting, and repairing all pavements, fences, sewers and drains belonging to the said premises, in common with other messuages, tenements, or lands, and so that such proportion shall be ascertained by the surveyor of the lessor: To permit the lessor, with or without workmen, or others, twice or oftener in every year during the said term, to enter upon the said premises to view the condition thereof, and also during the last seven years to take a schedule of the landlord's fixtures: And the said lease shall also contain a condition for re-entry by the lessor on non-payment of rent for twenty-one days, or on breach of any of the lessee's covenants: And the said lease shall also contain all other covenants and conditions (if any) usually inserted in leases of the like nature.

3. The said C. D. will, before the —— day of ——, 19—, at his own expense, and at an outlay of —— at the least, in a good, substantial, and workmanlike manner, of

the best materials, and to the satisfaction of the surveyor of the said A. B., erect, build, and completely finish, fit for habitation and use, upon the front of the said piece of land towards the —— road, at the distance of —— feet from the boundary line of such road, coloured red in the said plan, a good and substantial brick messuage or dwelling-house of the rate of building, character and description in every respect specified in the specification hereunto annexed by way of the schedule and also such outbuildings, conveniences, and sewers as shall be necessary or proper to be used with such messuage or dwelling-house for rendering the same commodious.

4. If the said C.D. shall not complete the said messuage or dwelling-house before said —— day of ——, 19—, pursuant to article 3, or shall nor proceed with the works with proper diligence, then it shall be lawful for the said A. B. or his agent, if he thinks fit, to re-enter on the said piece of ground and resume possession thereof as of his former estate.

5. The said C. D. will accept a lease of the said premises for the term, at the rent, and subject to the covenants and conditions hereinbefore expressed, and will execute a counterpart thereof, and pay the costs and expenses of and incidental to the preparation and execution of this agreement and the said lease and the counterpart thereof.

IN WITNESS, etc.

No. 36. *Agreement.*

For a Lease for Ninety-nine Years of a Piece of Land on Which Several Dwelling-houses are Agreed to be Built by the Lessee. Special Provisions Enabling Him to have Separate Leases of the Several Houses and to Apportion the Rent.

MEMORANDUM OF AGREEMENT, made the —— day of ——, between A. B., of, etc., of the one part, and C. D., of, etc., of the other part, whereby it is agreed as follows:

1. When and so soon as the six several messuages or dwelling-houses, erections, and buildings hereinafter agreed

to be erected and built, shall be completely finished and made fit for habitation, occupation, and use, to the satisfaction of the architect or surveyor for the time being of the said A. B., and such architect or surveyor shall have granted his certificate in writing to that effect, the said A. B. will by one or more good and sufficient lease or leases demise to the said C. D. ALL that piece or parcel of land (describing it), and the messuages and buildings to be erected thereon, with their appurtenances, for the term of ninety-nine years, computed from the —— day of ——, at the yearly rent of one peppercorn for the first year of the said term, the rent for the second year thereof, and the rent of —— for the third year and remainder of the said term, such rent to be payable quarterly on the 25th day of March, the 24th day of June, the 29th day of September, and the 25th day of December in every year, the first of such quarterly payments to be made on the —— day of ——.

2. Every such lease shall contain the following covenants on the part of the lease: To pay the rent and the land-tax, sewers rate, and all other rates, taxes, charges, and assessments whatever, whether parliamentary, parochial, or of any other description, which during the said lease shall be charged, assessed, or imposed upon the premises, or upon the landlord or tenant in respect thereof, To keep the said premises in good and substantial repair, and deliver the same up in good and substantial repair at the end of the term, To paint the external wood, cement, and ironwork once in every four years, and the inside wood, iron, and other work before painted or usually painted, once in every seven years with two coats of good oil colour: To insure and keep insured against fire, in the joint names of the lessor and lessee, in the —— Office, or some other Office in ——, the buildings comprised in such lease in a sum at least equal to three-fourth parts of the value of such buildings, and to produce to the lessor the policy of every such insurance and the receipts for every premium whenever the same shall be demanded, and that any money received by virtue of any insurance shall be forthwith expended in reinstating the premises, and if the

same shall be insufficient for that purpose then to make up the deficiency out of his own moneys, To permit the lessor or his agent, with or without workmen and others, at all reasonable times of the day during the said term to enter and view the state of the premises, and during the last seven years of the term to take an inventory of the landlord's fixtures: Not to carry on any trade or business on the said premises, without the written consent of the lessor first had and obtained, and not to permit any encroachment upon the premises, or any right of light or other easement to be acquired over or upon the said premises adjoining or near thereto, and also that the lessee will, within twenty-one days after every assignment or underlease of the said premises, or any part thereof, shall have been made give notice in writing thereof to the lessor or his agent, stating the short effect and particulars of such assignment or under-lease: And every such lease shall contain a condition or proviso for re-entry by the lessor upon non-payment of rent for twenty-one days, or breach of any of the said covenants, and shall also contain all other covenants and provisions (if any) usually inserted in leases of the like nature.

3. The said C. D. shall at his option have either one lease of all the said six dwelling-houses to be erected as aforesaid, or separate leases of any one or more thereof, and in case of separate leases the said rent shall be rateably apportioned between the premises to be comprised in each lease, the amount of such apportioned rents respectively to be fixed and ascertained by the architect or surveyor for the time being of the lessor.

4. The said C. D. will on or before the —— day of ——, 19—, erect, cover in, and complete, fit for habitation and use, upon the piece of ground hereby agreed to be demised, in a good, substantial and workmanlike manner, with fit and proper materials, to be approved of by the architect or surveyor for the time being of the said A. B., and under his direction and inspection, and according to a plan, elevation, and detail drawings thereof, which have been signed by the parties hereto, and a copy whereof has been deposited with the said architect or surveyor, six

brick-built and slated dwelling-houses with the areas, fore-courts, iron railings, gates and garden walls, and other appurtenances thereto belonging.

5. (*Power to lessor to re-enter*).

6. The said C. D. will accept a lease or leases of the said premises for the term, at the rent, and subject to the covenants and conditions hereinbefore expressed, and will execute a counterpart of every such lease thereof, and will pay the costs and expenses of and incidental to the preparation and execution of this agreement, and of every such lease and counterpart.

IN WITNESS, etc.

SECTION II.

SPECIAL COVENANTS, PROVISOS, ETC.

No. 37. *Provision.*

In a Lease or Under-lease Enabling the Lessee to Purchase the Reversion in Fee Simple or the Term Granted by the Superior Lease upon Notice.

PROVIDED ALWAYS, and it is hereby agreed and declared, that if the lessee shall be desirous of purchasing the reversion in fee simple in the premises hereby demised (*or*, the unexpired residue of the term of years granted in the said premises by the said indenture, dated, etc., (*superior lease*), subject to the rent and lessee's covenants reserved by and contained in the said indenture), at the price of ——, and shall at any time before the —— day of ——, 19—, give to the lessor or leave for him at his usual or last known place of abode in —— a notice in writing to that effect, then and in such case the person giving or leaving such notice shall be the purchaser of the said reversion (*or*, of the unexpired residue of the said term subject as aforesaid), at the price of ——, as from the date of such notice subject to the following conditions (namely): 1stly, THE purchase-money shall be paid and the purchase shall be completed on such one of the quarterly days hereby

appointed for payment of rent as shall happen next after the expiration of three calendar months from the date of such notice, and if the said purchase shall not be completed on that day, the purchaser shall pay to the vendor interest on the said purchase-money, computed from that day up to the actual completion of the purchase, 2ndly, THE PURCHASER shall pay all arrears of rent up to the day appointed for the completion of the purchase, including the quarter's rent due on that day, 3rdly, UPON payment of the purchase-money and all arrears of rent at the time aforesaid, the vendor shall execute a proper conveyance (or assignment) of the said premises to the purchaser, such conveyance (or assignment) to be prepared by and at the expense of the purchaser, 4thly, THE vendoe shall, within one calendar month from the date of such notice as aforesaid, deliver to the purchaser or his solicitor an abstract of the vendor's title to the said premises, such title to commence with an indenture dated, etc., 5thly, WITHIN fourteen days after the delivery of the abstract the purchaser shall state in writing, and send to the vendor's solicitor, all objections and requisitions (if any) in respect of the title, and all objections and requisitions not sent within that time shall be deemed to be waived, and if any objection or requisition shall be made which the vendor shall be unable or unwilling to remove or comply with, the vendor may, by a notice in writing, rescind the sale without payment of any compensation or costs whatsoever.

No. 38. *Exception and Reservation of all Timber, Mines, Minerals, Etc.*

EXCEPT and always reserved unto the said A. B., his heirs and assigns, all timber and timber-like trees and trees likely to become timber and all other trees whatsoever, whether now standing or being upon the said demised premises: AND ALSO all mines, minerals and quarries: AND also reserving to the said A. B., his heirs and assigns, free liberty and power into, upon or over the said demised premises, upon or for any other reasonable purpose or

occasion whatsoever, doing thereby no wilful or unnecessary injury or damage to the corn, hay, grass, or fences of the said C. D., his executors, administrators or assigns.

No. 39. *Proviso for Compensation for Improvements.*

PROVIDED always, and it is hereby agreed and declared, that the tenant may execute in a workmanlike manner all such improvements of and additions to the said messuage and premises as he may think proper, keeping and delivering up in good repair all such improvements and additions (*insert a proviso for payment of the value thereof to the tenant at the end of the term*).

No. 40. *Arbitration Clause.*

PROVIDED always, and it is hereby agreed and declared, that if and whenever any dispute or question shall arise between the lessor and lessee and their respective heirs, executors, administrators and assigns, touching these presents, or anything herein contained, or the construction hereof, or the rights, duties or liabilities in relation to the premises, the matter in difference shall be submitted to and referred to two arbitrators or their umpire.

No. 41. *Covenant for Renewal.*

AND the lessor doth hereby, for himself and his assigns, covenant with the lessee that if the lessee, his executors, administrators or assigns, shall be desirous of taking a renewed lease of the said premises for the further term of —— years from the expiration of the said term hereby granted, and of such desire shall, prior to the expiration of the said last mentioned term, give to the lessor, his heirs or assigns, or leave at the last known place of business or abode in Canada six calendar months' previous notice in writing, and shall pay the said rent hereby reserved, and observe and perform the several covenants and agreements herein contained, and on the part of the lessee, his execu-

tors, administrators or assigns, to be observed and performed up to the expiration of the said term hereby granted, he, the lessor, his heirs or assigns, will, upon the request and at the expense of the lessee, his executors, administrators and assigns, (and upon payment by him or them of the sum of $—— as a premium on such renewal), and upon his or their executing and delivering to the lessor, his heirs or assigns, a duplicate thereof, forthwith execute and deliver to the said lessee, his executors, administrators or assigns, a renewed lease of the said premises for the further term of —— years at the same yearly rent, and under and subject to the same covenants, provisos and agreements as are herein contained other than this present covenant.

No. 42. *Covenant Not to Distrain.*

And the landlord hereby, for himself, his heirs, executors, administrators and assigns, covenants with the tenant, his executors, administrators and assigns, that, except in the case of the bankruptcy or insolvency of the tenant or his assigns, he, the said landlord, will not distrain for rent in arrear, if any, but will recover the said rent by ordinary action at law only.

No. 43. *Covenant to Insure.*

And also will, during every part of the said term, insure and keep insured the buildings for the time being on the ground hereby demised, in some responsible and respectable office for insurance against fire in the sum of ——, and will, if required so to do, produce the receipts for the premiums of such insurance for every current year to the landlord or his agent.

No. 44. *Proviso for Avoiding Lease on Insolvency.*

And also, that if the term hereby granted shall be at any time seized or taken in execution or attachment by any creditor of the said lessee or —— assigns, or if the

said lessee or —— assigns shall make any assignment for the benefit of creditors, or becoming bankrupt or insolvent, shall take the benefit of any Act that may be in force for bankrupt or insolvent debtors, the then current —— rent shall be immediately become due and payable, and the said term shall immediately become forfeited and void.

No. 45. *Proviso that the Tenant may Remove Buildings and Fixtures.*

PROVIDED always, and it is hereby agreed and declared, that if the tenant shall affix to or erect on the premises any fixture or building which shall not be so affixed or erected, instead of some fixture or building affixed to or being on the premises at the date of the commencement of the lease hereby granted, then such fixture or building shall belong to and be removable by the tenant at any time during the term hereby granted, or within twenty-one days after the determination thereof; PROVIDED always, that the tenant shall make good all damage to the said premises hereby demised, or any part thereof, by such removal, and shall give one month's previous notice in writing to the landlord of his intention to remove such fixture, and at any time before the expiration of the notice of removal the landlord, by notice in writing to the tenant, may elect to purchase such fixture at a fair value, and thereupon the same shall be left by the tenant and become the property of the landlord.

No. 46. *Proviso for Allowing House to be Inspected and for Re-letting.*

AND that the tenant will, at all reasonable times (at any time between the hours of two and five in the afternoon) during the three calendar months preceding the termination of the tenancy, at the request of the landlord or his agent, permit the said demised premises to be inspected by any person, or the agent, authorized in writing, of any person, *bona fide* desirous of becoming tenant to the

landlord, and having given his name and address to the tenant or one of his servants, and will also during the said three calendar months allow a notice "to let" to be displayed in one of the front windows of said premises.

No. 47. *Proviso for Re-entry—Compensation to Tenant for Improved Value.*

PROVIDED always, and these presents are on the express condition, that if and whenever the rent hereby reserved, or any part thereof, shall be unpaid for fifteen days after any of the days on which the same ought to have been paid (although no formal demand shall have been made thereof), or if and whenever there shall be a breach of any of the covenants and agreements herein contained on the part of the said lessee, his executors, administrators and assigns, then, and in either of such cases, it shall be lawful for the said lessor, at any time thereafter, into and upon the said demised premises, or any part thereof, in the name of the whole, to re-enter, and the same to have again, re-possess and enjoy in the manner and on the conditions following, that is to say: The tenant shall pay to the landlord all costs, as between solicitor and client, of and incident to such re-entry, and the landlord shall pay to the tenant such sum (if any) as shall be equivalent to nine-tenths of the premiums or increased capital value of such premises accruing to the landlord by reason of such re-entry, saving always to the landlord his rights to damage for breach of covenant.

No. 48. *Exception and Reservation of Use of Drains.*

EXCEPT and always reserved unto the said A. B., his heirs and assigns or executors, administrators and assigns, and his and their lessees and under-tenants, free passage and running of water and soil coming or to come from any other lands or buildings of the said A. B., his (heirs or assigns or executors, administrators or assigns) adjoining or near to the premises hereby demised, in and through the channels, drains, sewers and water-courses belonging or to be made thereto.

No. 49. *Exception and Reservation of all Mines.*

EXCEPT and always reserved unto the said A. B., his heirs and assigns, all mines, veins, seams and beds of stone, coal and cannel, and all other mines, minerals, delphs and quarries whatsoever, which now are or hereafter during the said term hereby granted or created, shall be found or be within or under the said hereby demised land and premises, or any part thereof, together with full and free liberty, power and authority to and for the said A. B., his heirs and assigns, and his and their servants and workmen and others, by his and their authority, with or without horses, carts and other carriages and all necessary implements and materials, at all times during the said term to enter into and upon the land and premises hereby demised, or any part thereof, other than any such part or parts of the surface thereof in or upon which there shall be any building, reservoir, drain, water-course or stream in use for carrying on the business which may be carried on by the said C. D., his executors, administrators or assigns, in and upon the said premises or adjacent thereto, and to sink any pit or shaft therein, and to make any way or ways therein or thereon for the purpose of carrying and conveying coals, stone or minerals, and to bore, search for, dig, get, carry away and dispose of such coal, cannel, stone, slate and minerals respectively, without paying any compensation for any unavoidable or ordinary damage to be done or occasioned thereby, he and they making compensation to the said C. D., his executors, administrators or assigns, for all damages to be done or occasioned in or by the making any pit or shaft in or under the said premises, or by making any rail or other ways as aforesaid thereon, or by digging, getting and carrying away such coals and cannel, stone, slate and other minerals in or after the rate and proportion following (that is to say), at the rate of —— for every superficial square yard of land for a year, and so in proportion for any greater or less quantity than a yard, or a longer or a shorter space than a year; AND ALSO excepting and reserving unto the said A. B., his heirs and assigns, full and free liberty at all reasonable times during the said term hereby created, with or without surveyors

and workmen, to enter into and upon all or any part of the said hereby demised premises, in order to view and inspect the state and condition thereof.

No. 50. *Proviso.*

For Resumption by Lessor of all or any Part of the Land Demised on Giving Three Months' Notice and Making Compensation for Improvements.

PROVIDED nevertheless, and it is hereby lastly declared and agreed by and between the said parties hereto, that in case the said A. B., his heirs or assigns, shall at any time, or from time to time during the continuance of the said term hereby granted, be minded and desirous of having any part (or parts of the whole) of the said land hereby demised delivered up to him or them, and of such his or their mind and desire, shall give three calendar months' notice in writing to the said C. D., his executors, administrators or assigns, or leave the same at his or their last or usual place of abode, or upon the said demised premises, such notice to expire at any time of the year, then at the expiration of such notice so given or left as aforesaid, he, the said C. D., for himself, his executors, administrators and assigns, doth hereby covenant peaceably and quietly to yield and surrender up, and that the said A. B., his heirs and assigns, shall and may take, peaceable and quiet possession of such part or parts of the said land as shall be mentioned and included in such notice as aforesaid, he, the said A. B., his heirs, or assigns, paying to the said C. D., his executors, administrators or assigns, a reasonable and fair compensation in respect of the moneys which may have been laid out by the said C. D., his executors, administrators or assigns, in improving the condition of so much of the said land as shall be so given up to the said A. B., his heirs or assigns as hereinbefore mentioned, and then and from thenceforth the rent reserved by this indenture shall be reduced at the rate of —— for each and every acre, and so in proportion for a less quantity than an acre, that may be given up to the said A. B., his heirs and

assigns as aforesaid, and the remainder of the said land shall be held by the said C. D., his executors, administrators or assigns, at such reduced rent, and the said A. B., his heirs and assigns, shall have the same powers and remedies in all respects as if the lease had originally been granted at such reduced rent, and all and every the covenants, clauses, provisions, stipulations and agreements herein contained shall be as valid and effectual of and for so much of the land hereby demised as shall not be included in any such notice, and this indenture shall be read and construed in all respects, in reference thereto, as if such reduced rent had been the original rent reserved therein and the land originally demised had been the land not included in any such notice as aforesaid, and the covenants, clauses, provisoes, stipulations and agreements herein contained had only related to such last mentioned land.

No. 51. *Notice to Take Land Pursuant to the Above Proviso.*

To J. G. and to all others whom it may concern:

Pursuant to and by virtue of a certain indenture of lease, dated the —— day of ——, 19 ——, and made between A.B., therein described, of the one part, and the said C. D., of the other part, I hereby give you notice, that I am desirous of having delivered up to me at the expiration of three calendar months from the service of this notice upon you, the peaceable and quiet possession of all that piece of land situate, etc. (and which said piece of land contains by admeasurement —— or thereabouts, and is butted and bounded or otherwise described as follows): (*insert description*), together with all the appurtenances thereunto belonging: And I require you to deliver up possession of the same to me accordingly, and to surrender all your interest in the same to me, at the expiration of the said three calendar months, and, in consideration thereof, I hereby offer and agree to allow you a reasonable and fair compensation in respect of any moneys which may have been laid out by you in improving the condition of the said piece or parcel of

land above described, and to release you from all liability to the payment of rent for the said piece of land with the appurtenances under the said indenture of lease from the time of my taking possession of the said piece of land: AND I hereby further give you notice, that the reversion in fee simple of and in all and singular the land and hereditaments comprised in the said indenture of lease with the appurtenances was conveyed to me by the said A. B., by indenture dated the —— day of ——, 19 ——, and made between the said A. B., of the one part, and me, the undersigned, of the other part, and that I am now the absolute owner of the said reversion.

Dated this —— day of ——, 19 ——.

E. F.

No. 52. *Covenant by Lessor to Produce to Lesee His Title Deeds.*

AND also shall and will at all times during the said term, at the request and expense of the said C. D. and E. F., their executors, administrators and assigns (unless prevented by inevitable accident) produce and shew forth to them or either of them, or to their or his attorney or agent, the several deeds, evidences and writing mentioned in the schedule hereunder written, and at the like request and costs (unless prevented as aforesaid) furnish the said C. D. and E. F., their executors, administrators and assigns, with copies or extracts attested or unattested of or from the same deeds, evidences and writings or any of them, and shall and will permit any person or persons lawfully appointed by the said C. D. and E. F., their executors, administrators or assigns, to examine such copies and extracts respectively with the originals: PROVIDED always, and it is hereby agreed and declared between and by the said several parties hereto, that in case the said A. B., his heirs or assigns, shall at any time hereafter during the said term deliver up or cause to be delivered up to any person or persons the same deeds, evidences and writings hereinbefore covenanted to be produced, and shall procure the person or persons to whom the same shall be so delivered, at his and their own cost, to enter into a covenant with the said C. D. and E. F., their execu-

tors, administrators or assigns, to the same purport and effect and of the same legal validity as the covenant lastly hereinbefore contained, then and in that case and upon delivery to the said C. D. and E. F., their executors, administrators and assigns, of such new covenant, the said covenant lastly hereinbefore contained shall cease and be void.

SECTION III.

ASSIGNMENT OF LEASE, ETC.

No. 53. *Assignment of Lease.*

THIS INDENTURE, made the —— day of ——, 19—, between —— of the —— of —— in the county of ——, ——, hereinafter called the assignor, of the first part, and of the —— of —— in the county of ——, ——, hereinafter called the assignee, of the second part.

WHEREAS by a lease dated the —— day of ——, 19——, made between —— as lessor, and ——, the assignor aforesaid as lessee, the said lessor did demise unto the said lessee the lands hereinafter mentioned to hold from the —— day of ——, 19——, for the term of —— years, at the yearly rent of —— dollars, and subject to the lessee's covenants and agreements therein contained.

NOW THIS INDENTURE WITNESSETH that in consideration of the sum of —— dollars now paid by the assignee to the assignor (the receipt whereof is hereby acknowledged) the assignor doth hereby grant and assign unto the assignee all that parcel of land situate, etc., together with the residue unexpired of the said term of years, and the said lease and all benefit and advantage to be derived therefrom.

TO HAVE AND TO HOLD the same unto the assignee, subject to the payment of the said rents, and the observance and performance of the lessee's covenants and conditions in the said lease contained.

AND THE assignor hereby covenants with the assignee that, notwithstanding any act of the assignor, the said lease is a good, valid, and subsisting lease, and that the rents

thereby reserved have been duly paid up to the —— day of —— last, and the covenants and conditions therein contained have been duly paid and performed by the assignor up to the day of the date hereof.

AND that notwithstanding as aforesaid the assignor now has in him good right, full power and absolute authority to assign the said lands and premises in manner aforesaid, according to the true intent and meaning of these presents.

AND THAT subject to the said rent, and the lessee's covenants and the conditions therein contained, it shall be lawful for the assignee to enter into and upon and hold and enjoy the said lands for the residue of the term granted by the said lease and every renewal thereof (if any) for his own use and benefit, without any interruption of the assignor or any other person whomsoever.

AND that the assignor shall and will from time to time, and at all times hereafter, at the request and costs of the assignee, execute such further assurances of the said lands as the assignee shall reasonably require.

AND THE ASSIGNEE hereby covenants with the assignor that the assignee shall and will from time to time during all the residue of the said term granted by the said lease and every renewal thereof pay the rent and perform the lessee's covenants, conditions and agreements therein respectively reserved and contained, and indemnify and save harmless the assignor therefrom and from all actions, suits, costs, losses, charges, damages and expenses for or in respect thereof.

AND it is hereby declared and agreed that these presents and everything therein contained shall respectively enure to the benefit of and be binding upon the parties hereto, their heirs, executors, administrators and assigns respectively.

IN WITNESS, etc.

Signed, Sealed, etc.

No. 54. *Assignment of Lease—(Another Form.)*

THIS INDENTURE, made the —— day of —— one thousand nine hundred and ——, between —— of ——,

hereinafter called the assignor of the first part, and —— of——, hereinafter called the assignee of the second part.

WITNESSETH that in consideration of —— now paid by the said assignor to the said assignee (the receipt whereof is hereby acknowledged), the said assignor doth grant and assign unto the said assignee, executors, administrators, and assigns, all and singular, the premises comprised in and demised by a certain indenture of lease, bearing date the —— day of —— one thousand nine hundred and ——, and made between —— (*parties, etc.*)

TOGETHER with the appurtenances to hold the same unto the said assignee, executors, administrators, and assigns, henceforth for and during the residue of the term thereby granted, and for all other the estate, term and interest (if any) of the said assignor therein. Subject to the payment of the rent and the performance of the lessees covenants and agreements in the said indenture of lease reserved and contained.

AND the said assignor for himself, his heirs, executors, and administrators, doth hereby covenant with the said assignee, his executors, administrators and assigns that notwithstanding any act of the said assignor he now has good right to assign the said lease and premises in manner aforesaid.

AND that subject to the payment of the rent and the performance of the lessees covenants, it shall be lawful for the assignee, his executors, administrators and assigns, peaceably and quietly to hold, occupy and enjoy the said premises hereby assigned during the residue of the term granted by the said indenture of lease, and receive the rents and profits thereof without any interruption by the said assignor, or any person claiming under him free from all charges and incumbrances whatsoever. And also that he, the said assignor and all persons lawfully claiming under him will, at all times hereafter, at the request and costs of the said assignor and all persons lawfully claiming under assign and confirm to him and them, the said premises for the residue of the said term as the said assignee, his executors, administrators or assigns shall reasonably require.

AND the said assignee for himself, his heirs, executors and administrators, doth hereby covenant with the said assignor, his executors and administrators, that the said assignee, his executors, administrators and assigns, will, from time to time, pay the rent and observe and perform the lessees covenants and conditions in the said indenture of lease, reserved and contained, and indemnify and save harmless the said assignor, his heirs, executors and administrators, from all losses and expenses in respect of the non-observance or performance of the said covenants and conditions or any of them.

IN WITNESS WHEREOF, the said parties hereto have hereunto set their hands and seals.

SIGNED, SEALED AND DELIVERED

In the presence of

No. 55. *Assignment of a Leasehold Messuage to a Purchaser.*

THIS INDENTURE, made the —— day of ——, between A. B. of, etc., (vendor) of the one part, and C. D., of, etc., (purchaser) of the other part: WHEREAS by an indenture of lease, dated the —— day of ——, and made between G. H., of the one part and the said A. B., of the other part. ALL that messuage or tenement, etc., (parcels as described in the lease) were demised unto the said A. B., his executors, administrators, and assigns, from the —— day of ——, then last past, for the term of —— years, at the yearly rent of ——, and subject to the covenants and conditions in the said indenture of lease contained, and on the part of the lessee to be observed and performed: AND WHEREAS the said A. B. has agreed to sell the said leasehold premises to the said C. D. at the price of ——: NOW THIS INDENTURE WITNESSETH, that in consideration of the sum of ——, to the said A. B. paid by the said C. D. on or before the execution of these presents (the receipt whereof the said A. B. hereby acknowledges), the said A. B., as beneficial owner, hereby assigns unto the said C. D., the messuage and premises comprised in and demised by the hereinbefore recited indenture of lease. TO HOLD the same unto the said C.D. for all the

residue now unexpired of the said term of ——years, subject to the rent reserved by the said indenture, and the covenants and conditions therein contained, and which henceforth on the part of the lessee ought to be observed and performed, AND the said C. D. hereby covenants with the said A. B. that the said C. D., his executors, administrators, and assigns, will during the residue of the said term pay the rent reserved by the said indenture, and observe and perform the covenants and conditions therein contained, and which henceforth on the lessee's part ought to be observed and performed, and will keep indemnified the said A. B. and his estate and effects from and against all claims and demands on account of the same.

IN WITNESS, etc.

No. 56. *Assignment of Leaseholds by Executors.*

THIS INDENTURE, made the —— day of ——, between A. B., of, etc., and C.D., of, etc., (executors) of the one part, and E. F., of, etc., (purchaser) of the other part. (*Recite lease to J. K., etc.*): AND WHEREAS (*after divers mesne assignments*) by an indenture dated, etc., and made, etc., the premises comprised in the said indenture of lease were assigned unto the said L. M. for the residue of the said term, subject to the said rent, covenants and conditions: AND WHEREAS the said L. M. died on the —— day of ——, having made his will dated the —— day of ——, and thereby appointed the said A. B. and C. D. executors thereof, who duly proved the same, on the —— day of ——, in the Surrogate Court of —— (or, *as the case may be*): AND WHEREAS the said A. B. and C. D. have agreed to sell the said leasehold premises to the said E. F. at the price of ——:

NOW THIS INDENTURE WITNESSETH, that in consideration of the sum of —— paid by the said E. F. to the said A. B. and C. D. (the receipt, etc.) the said A. B. and C. D., as the personal representatives of the said L. M., deceased, hereby assign unto the said E. F., ALL the hereditaments and premises comprised in and demised by the hereinbefore recited indenture of lease: TO HOLD the same unto the said E. F. for all the residue now unexpired of the said term of

—— years granted therein by the said indenture, subject to the rent reserved thereby, and the covenants and conditions therein contained, and which henceforth on the part of the lessee ought to be observed and performed: AND the said E. F. hereby covenants with the said A. B. and C. D. that the said E. F., his executors, administrators, and assigns, will during the said term pay the rent reserved by the said indenture, and observe and perform the covenants and conditions therein contained, and which henceforth on the lessee's part ought to be performed and observed, and will keep indemnified the said A. B. and C. D. and each of them, and the estate and effects of the said L. M., deceased, from and against all claims and demands on account thereof.

IN WITNESS, etc.

No. 57. *Assignment.*

Of a Portion of Leasehold Premises which are Held Under the Lease at an Entire Rent, the Rent Being Apportioned Between the Vendor and Purchaser.

THIS INDENTURE, made the —— day of ——, between A. B., of, etc., (vendor) of the one part, and C.D., of, etc., (purchaser) of the other part. (*Recite lease to E. F. for seventy-eighth years at yearly rent of ——, setting out the parcels as in the lease,—also assignment of lease by E. F. to A. B. for residue of term*): AND WHEREAS the said A. B. has agreed to sell to the said C. D. the messuage and premises intended to be hereby assigned (being part of the said leasehold premises) at the price of ——, and upon the treaty for the said sale it was agreed that the said yearly rent of —— should be apportioned in equal shares between the premises intended to be hereby assigned and the residue of the said leasehold premises, and that the parties hereto should enter into the covenants hereinafter contained: NOW THIS INDENTURE WITNESSETH that in consideration, etc., (the receipt, etc) the said A. B. as beneficial owner, hereby assigns unto the said C. D., ALL, etc., (*here set out the particular parcels which are agreed to be sold*), TO HOLD the some unto the said C. D. for all the residue now unexpired of the said term of seventy-eight years, subject to the pay-

ment of the yearly rent ——, being one moiety of the said yearly rent of —— reserved by the said indenture of lease, and subject to the covenants and conditions therein contained, and on the part of the said lessee to be observed and performed, so far only as the same relate to the premises hereby demised: AND THE SAID C. D. hereby covenants with the said A. B. that the said C. D., his heirs, executors, administrators, and assigns, will at all times hereafter during the said term pay the said yearly rent of ——, part of the said yearly rent of —— reserved by the said indenture of lease, and observe and perform all the covenants and conditions therein contained, and which henceforth on the part of the lessee ought to be observed and performed, so far as the same relate to the said premises hereby assigned, and will at all times hereafter keep indemnified the said A.B., his executors, administrators, and assigns, and his and their estate and effects, from and against all claims and demands for or on account of the non-payment of the said rent, or the breach of the said covenants and conditions, so far as the same relate as aforesaid: AND THE SAID A. B. hereby covenants with the said C. D. that the said A. B., his executors, administrators, or assigns, will at all times during the said term pay the yearly rent of ——, the residue of the said yearly rent of —— reserved by the said indenture of lease, and observe and perform all the covenants and conditions therein contained, and which henceforth on the part of the lessee ought to be observed and performed, so far as the same relate to such of the premises comprised in the said indenture of lease as are not hereby assigned, and will at all times hereafter keep indemnified the said C. D., his executors, administrators, and assigns, and his and their estate and effects, from and against all claims and demands for or on account of the non-payment of the said rent or the breach of the said covenants and conditions so far as the same relate as aforesaid: AND the said A. B. who retains the said indenture of lease, hereby acknowledges the right of the said C. D. to production and delivery of copies thereof and undertakes the safe custody thereof.

IN WITNESS, etc.

No. 58. *Assignment.*

To a Purchaser of Part of Leasehold Premises Held Under One Lease, Where the Remaining Part is sold at the Same Time to Another Purchaser and the Rent is Apportioned Between the Two.

THIS INDENTURE, made the —— day of ——, between A. B., of, etc., (vendor) of the one part, and C. D., of, etc., (purchaser) of the other part (*recite lease*): AND WHEREAS the said A. B. has agreed to sell to the said C. D. the messuage and premises intended to be hereby assigned (being part of the said leasehold premises), subject to the apportioned rent of —— at the price of ——. AND WHEREAS the said A. B. has sold the remainder of the said leasehold premises to E. F., subject to the yearly rent of ——, being the remainder of the said yearly rent of —— and the same have been or are intended to be assigned to the said E. F. by an indenture bearing even date with these presents, and made between the said A. B. of the one part, and the said E. F. of the other part, which indenture contains a covenant by the said E. F. to pay the said rent of —— apportioned to be paid in respect of the premises thereby assigned, and to observe and perform the covenants and conditions contained in the indenture of lease, and on the lessee's part to be observed and performed so far as the same relate to the said premises: NOW THIS INDENTURE WITNESSETH that (*assignment to C. D., and covenants by him to pay apportioned rent and observe covenants, etc., as in last precedent*).

IN WITNESS, etc.

No. 59. *Conveyance of a Leasehold Estate for Lives.*

THIS INDENTURE, made the —— day of ——, between A. B., of, etc., (vendor) of the one part, and C. D. of, etc., (purchaser) of the other part: WHEREAS by an indenture dated the —— day of ——, and made between G. H. of the one part, and the said C. D. of the other part, ALL, etc., (*here set out the parcels as described in the lease*) were

granted by the said G. H. unto the said A. B., his executors, administrators, and assigns, for the lives of —— and ——, and the life of the survivor of them, at the yearly rent of ——, and subject to the covenants and conditions in the said indenture of lease contained and on the part of the lessee, his executors, administrators, and assigns, to be observed and performed: AND WHEREAS the said A. B. hath agreed to sell his interest under the said indenture in the hereditaments to the said C. D. at the price of ——:

NOW THIS INDENTURE WITNESSETH, that in consideration of the sum of —— to the said A. B. paid by the said C. D. on or before the execution of these presents (the receipt whereof the said A. B. hereby acknowledges), the said A. B. as beneficial owner, hereby conveys unto the said C. D., ALL the hereditaments and premises comprised and granted by the hereinbefore recited indenture of lease: TO HOLD the same unto and to the use of the said C.D. for the lives of the said —— and ——, and the life of the survivor of them, subject to the rent, covenants and conditions reserved by and contained in the said indenture, and on the part of the grantee to be paid, observed, and performed: AND THE SAID C. D. hereby covenants with the said A. B., that the said C. D., his executors, administrators, and assigns, will pay the rent reserved by the said indenture of lease and observe and perform the covenants and conditions therein contained, and which henceforth on the lessee's part ought to be observed or performed, and will keep indemnified the said A. B. and his estate and effects, from and against all claims and demands on account of the same.

IN WITNESS, etc.

No. 60. *Assignment.*

Of Leaseholds for the Residue of a Term Determinable on Lives, and of the Benefit of a Covenant for Perpetual Renewal.

THIS INDENTURE, made the —— day of ——, between A. B., of, etc., (vendor), of the one part, and C. D., of, etc., (purchaser), of the other part: WHEREAS by an indenture, dated, etc., and made between X. Y., of the one

part, and the said A. B., of the other part, ALL (*parcels*) were demised by the said X. Y. unto the said A. B., his executors, administrators, and assigns, for the term of 99 years, from the —— day of ——, if F., G. and H., or any of them, should so long live, at the yearly rent of ——, and subject to the covenants and conditions in the said indenture of lease now in recital contained, and on the lessee's part to be observed and performed: AND by the indenture now in recital, the said X. Y. covenanted with the said A. B., that in case of the decease of such one of them the said F., G., and H., as should first die, the said A. B., his executors, administrators, or assigns, should within six calendar months from the dropping of such life give to the said X. Y., his heirs or assigns, or leave at his or their usual or last known place of abode, a notice in writing, requesting a new lease of the premises for 99 years if such two of them the said F., G., and H., as should be then living, and one other person to be nominated in that behalf by the person or persons giving or leaving such notice, or any of them should so long live, and should within the said periods pay the sum of —— to the said X. Y., his heirs or assigns, by way of fine, for the renewal of such lease, then and in such case the said X. Y., his heirs, or assigns, would within such period as aforesaid, at the request and cost of the said A. B., his executors, administrators, or assigns, grant unto him or them on the surrender of the lease now in recital, a new lease of the said premises for and determinable on the lives aforesaid according to such notice upon the same terms and under and subject to the same covenants, provisoes, and declarations as were contained in the lease now in recital, including the covenant for renewal: AND WHEREAS the said A. B. has agreed to sell all his estate and interest under the said indenture in the said hereditaments (including the benefit of the said covenant for perpetual renewal) to the said C. D. at the price of ——:

NOW THIS INDENTURE WITNESSETH, that in consideration of the sum of —— to the said A. B. paid by the said C. D. on or before the execution of these presents (the receipt, etc.), the said A. B., as beneficial owner, hereby assigns

unto the said C. D. ALL the messuage and premises comprised in and demised by the hereinbefore recited indenture: TOGETHER with the benefit of the covenant therein contained for the perpetual renewal of the said lease as hereinbefore is mentioned: TO HOLD the same unto the said C. D. for all the residue now unexpired of the said term of 99 years, determinable as aforesaid, and for all other the estate and interest therein of the said A. B., subject to the said yearly rent of ——, and the covenants and conditions in the same indenture contained, and on the lessee's part to be observed and performed: AND THE SAID C. D. hereby covenants with the said A. B., that the said C. D., his executors, administrators, and assigns, will during the said term determinable as aforesaid pay the yearly —— reserved by the said indenture, and observe and perform the covenants and conditions therein contained and on the lessee's part to be observed and performed, and will keep indemnified the said A. B., and his estate and effects, from all claims and demands on account thereof.

IN WITNESS, etc.

No. 61. *Assignment of Rent as Collateral Security to a Mortgage.*

THIS INDENTURE, made the —— day of ——, 19—, between ——, of ——, hereinafter called the assignor, of the one part, and ——, of ——, hereinafter called the assignee, of the other part.

WHEREAS by a certain indenture dated the —— day of ——, 19—, the assignor did grant and mortgage to the assignee all that certain parcel of land, situate, etc., to secure the payment of —— dollars with interest as therein mentioned.

AND WHEREAS the assignor did, by a certain indenture of lease dated the —— day of ——, 19—, lease the said land to one —— for a term of —— years at the yearly rental of —— dollars.

AND WHEREAS the assignor has agreed to assign the said lease and all benefit and advantage to be derived therefrom

to the assignee as collateral security for the payment of the said mortgage moneys.

NOW THIS INDENTURE WITNESSETH, that in consideration of the premises the assignor doth hereby assign, transfer and set over unto the assignee the said lease and the rent payable thereunder, and all benefit and advantage to be derived therefrom, to hold and receive the same unto the assignee, his heirs, executors, administrators and assigns.

PROVIDED that nothing herein contained shall be deemed to have the effect of making the assignee responsible for the collection of the said rent or any part thereof, or for the performance of any covenants, terms, or conditions, either by the lessor or lessee, contained in the said lease, and that the assignee shall not, by virtue of these presents, be deemed a mortgagee in possession of the said lands.

AND PROVIDED further that the assignee shall only be liable to account for such moneys as may actually come into his hands by virtue of these presents, less proper collection charges, and that such moneys when so received by him shall be applied on account of the said mortgage, to which these presents are taken as a collateral security.

IN WITNESS, etc.

SIGNED, SEALED, etc.

No. 62. *Consent of Lessor to Assignment of Lease by Endorsement.*

I, A. B., the lessor named in the within assignment of lease hereby consent to the said assignment of E. F., of ——, as within written.

WITNESS:

No. 63. *Consent of Lessor to Assignment of Lease by Separate Instrument.*

I, A.B., of ——, hereby consent to C.D., of —— assigning all that certain parcel of land situate, etc., comprised in an indenture of lease dated the —— day of ——, 19—, and

made between myself, of the one part, and the said C. D., of the other part, unto E. F., of ——, his executors and administrators, for the remainder of the term of —— years thereby created, subject to the payment of the rent reserved by and the performance and observance of the covenants, conditions and agreements contained in the said lease.

WITNESS my hand this —— day of ——, 19—.

WITNESS:

No. 64. *Form of Consent to Assignment by the Lessee: Another Form.*

I, A. B., do hereby consent to the assignment by C. D. of all his estate in the premises demised by an indenture of lease dated the —— day of ——, 19—, unto E. F., of ——, his executors and administrators; provided that this consent shall not authorize any further assignment of the premises or any part thereof, or in any way affect any of the covenants, conditions or provisions of the said lease except as hereby expressed.

DATED A. B.

WITNESS:
G. H.

No. 65. *Licence by Lessor to Lessee to Assign or Underlet.*

I, A. B., of, etc., being the lessor of a messuage and premises situate at ——, comprised in an indenture dated the —— day of ——, and made between me, of the one part, and C. D., of, etc., of the other part, and thereby demised to the said C. D. for a term of 21 years computed from the —— day of ——, 19—, do hereby consent to the said C. D. assigning (or under-letting) the same to E. F., of, etc., for the residue of the said term (*or for a term of seven years from —— day of ——, 19—*). BUT so that this consent shall not extend to authorize any further or other assignment or under-letting of the said premises.

AS WITNESS my hand this —— day of ——.

A. B. (lessor).

SECTION IV.

MORTGAGE OF LEASE, ETC.

No. 66. *Mortgage of a Leasehold Messuage by Demise, or Sub-Lease.*

THIS INDENTURE, made the —— day of ——, between A. B., of, etc., (mortgagor), of the one part, and C. D., of, etc., (mortgagee), of the other part: WHEREAS by an indenture of lease dated the —— day of ——, and made between G. H., of, etc., of the one part, and the said A. B., of the other part: ALL that messuage or tenement, etc., (*parcels as described in the lease*), were demised unto the said A. B., from the —— day of —— then last past for term of —— years, at the yearly rent of ——, and subject to the covenants and conditions therein contained, and on the part of the lessee to be observed and performed, including a covenant to insure the said premises against loss or damage by fire, in the joint names of the lessor and lessee, in the sum of —— at least: AND WHEREAS, etc., (*agreement for loan*): NOW THIS INDENTURE WITNESSETH that in consideration of the sum of —— paid to the said A. B. by the said C. D., on or before the execution of these presents (the receipt whereof the said A.B. hereby acknowledges), the said A. B. hereby covenants (*covenant to pay principal and interest*): AND THIS INDENTURE ALSO WITNESSETH that for the consideration aforesaid the said A. B. as beneficial owner, hereby demises unto the said C. D., the messuage and premises comprised in the said indenture of lease: TO HOLD the same unto the said C. D., for all the residue now unexpired of the said term of —— years granted therein by the said indenture (except the last day of the said term): PROVIDED ALWAYS, that if the said sum of —— with interest thereon, shall be paid on the —— day of —— next, according to the foregoing covenant in that behalf, the demise hereby made shall be void: AND the said A. B. hereby covenants with the said C. D., that he, the said A. B., his executors, administrators, and assigns, will at all times during the continuance of this

security keep the said messuage and premises insured against loss or damage by fire, in the sum of —— at least, in conformity with the covenant in that behalf contained in the said indenture of lease, and will pay all premiums payable in respect of such insurance within seven days after the same shall become due, and will on demand produce to the said C. D., his executors, administrators, or assigns, the policy of such insurance and the receipt for every premium payable in respect thereof: AND IT IS HEREBY DECLARED, that after any sale of the said premises or any part thereof, under the statutory power of sale, the said A. B., or other the person in whom the premises so sold shall for the time being be vested for the residue of the term granted by the said indenture of lease, shall stand possessed thereof, in trust for the purchaser, and to be assigned and disposed of as he may direct: AND IT IS HEREBY DECLARED that no lease by the said A. B., his executors, administrators, or assigns, of the said premises, or any part thereof, during the continuance of this security shall have effect unless the said C. D., his executors, administrators, or assigns, shall consent thereto in writing.

IN WITNESS, etc.

No. 67. *Mortgage of Leaseholds by Assignment.*

THIS INDENTURE, etc., (*same as last precedent to the end of first testatum*): AND THIS INDENTURE ALSO WITNESSETH, that for the consideration aforesaid the said A. B., as beneficial owner, hereby assigns unto the said C. D. ALL the messuage and premises comprised in the hereinbefore recited indenture of lease: TO HOLD the same unto the said C. D., for all the residue now unexpired of the said term of —— years granted therein by the said indenture of lease: PROVIDED ALWAYS, that if the said sum of ——, with interest thereon, shall be paid on the said —— day of ——next, according to the foregoing covenant in that behalf, the said premises shall, at the request and cost of the said A. B., his executors, administrators, or assigns, be re-assigned to him or them (*covenant for insurance and declaration as to leasing power if desired*).

IN WITNESS, etc.

No. 68. *Mortgage.*

Of Property Comprised in Several Leases by Assignment. Power to Mortgagee to Grant Under-Lease.

THIS INDENTURE, made the —— day of ——, between A. B., of, etc., (mortgagor), of the one part, and C. D., of, etc., (mortgagee), of the other part: (*recite several leases to A. B., and agreement for loan*): NOW THIS INDENTURE WITNESSETH, that in consideration of the sum of —— paid to the said A. B. by the said C. D. on or before the execution of these presents (the receipt whereof the said A. B. hereby acknowledges), the said A. B., etc., (*covenant to pay principal and interest*): AND THIS INDENTURE ALSO WITNESSETH, that for the consideration aforesaid the said A. B., as beneficial owner, hereby assigns unto the said C. D. ALL the lands, hereditaments, and premises comprised in and demised by the several hereinbefore recited indentures of lease: TO HOLD the same unto the said C. D. for all the residue now unexpired of the said several terms of years granted by the said indentures respectively: PROVIDED ALWAYS, that if the said sum of ——, with interest thereon, shall be paid on the —— day of —— next, according to the foregoing covenant in that behalf, the said premises shall, at the request and cost of the said A. B., his executors, administrators, or assigns, be re-assigned to him or them. And the said A. B. hereby covenants with the said C. D. that he, the said A. B., his executors, administrators, or assigns, will at all times during the continuance of this security keep the messuage and buildings comprised in this security insured against loss or damage by fire, in conformity with the covenants for insurance contained in the said indentures of lease respectively, and so that the total amount of such insurance shall not be less than ——, and will duly pay the premiums and other sums of money payable for that purpose, and immediately after every such payment will deliver to the said C. D., his executors, administrators, or assigns, the receipt for the same: AND IT IS HEREBY DECLARED AND AGREED that it shall be lawful for the said C. D., his executors, administrators, or assigns, at any time or times after he or they shall have entered

into possession or receipt of the rents and profits of the said premises by virtue of these presents, to grant any under-lease or under-leases thereof, or of any part thereof, for any derivative term or terms of years, and either in possession or reversion, and either with or without taking a premium for the making thereof, and at such yearly or other rents, and subject to such covenants and conditions, and generally upon such terms as he or they shall think proper.

IN WITNESS, etc.

No. 69. *Mortgage*

Of a Leasehold Estate for Lives to Two Mortgagees Who Make the Advance on a Joint Account, with Provisions for Renewal.

THIS INDENTURE, made the —— day of ——, between A. B., of, etc., (mortgagor), (hereinafter called "the mortgagor"), of the one part, and C. D. and E. F., of, etc., (mortgagees), (hereinafter called "the mortgagees"), of the other part: WHEREAS, etc., (*recite lease by X. Y. to the mortgagor for lives of L., M. and N., and agreement for loan*): NOW THIS INDENTURE WITNESSETH, that in consideration of the sum of —— paid to the mortgagor by the mortgagees on or before the execution of these presents, out of moneys belonging to them on a joint account (the receipt, etc.), the mortgagor hereby covenants, etc. (*covenants to pay principal and interest*): AND THIS INDENTURE ALSO WITNESSETH, that for the consideration aforesaid the mortgagor, as beneficial owner, hereby conveys unto the mortgagees, ALL those the said several pieces or parcels of ground, messuages, or tenements, buildings, hereditaments, and premises comprised in the hereinbefore recited indenture of lease, which premises are under-let as in the schedule hereto is mentioned, TOGETHER with the rents reserved by the several indentures of under-leases mentioned in the said schedule, and the benefit of the covenants therein contained, and on the part of the several under-lessees to be respectively observed and performed: TO HOLD THE SAME,

subject to the under-leases, unto the mortgagees, for the lives of the said L., M. and N., and the lives and life of the survivors and survivor of them, and for all other (if any) the estate and interest of the mortgagor therein (proviso for redemption and covenant by mortgagor to keep premises insured against fire): AND the mortgagor hereby covenants with the mortgagees that he, the mortgagor, will from time to time, during the continuance of this security, on the death of any person or persons for whose life or lives the said premises shall for the time being be held, join and concur with the mortgagees in obtaining a renewal of the subsisting lease for the time being of the said premises for a new life or new lives, as the case may be, to be added to the lives or life which shall be then in being, and so that the said renewed lease shall be vested in the mortgagees, subject to such right or equity of redemption as shall then be subsisting under these presents: AND ALSO will pay the fines, fees, and other expenses of procuring or otherwise attending every such renewal of the said lease, and that if for the space of three calendar months next after the dropping of any life upon which the now subsisting lease or any renewed lease of the said premises is or shall be held, the mortgagor shall not make or concur in such renewal as aforesaid, it shall be lawful for the mortgagees, if they shall think proper, by surrender of the then subsisting lease of the said premises or otherwise, to obtain such renewal of such lease for the time being as aforesaid, subject to such right or equity of redemption as aforesaid, and in such case the mortgagor will immediately thereupon pay and reimburse unto the mortgagees such sum or sums of money as they shall have paid for the fines, fees, or other expenses in or about the procuring or otherwise attending every such renewal, together with interest for the same, at the rate of —— per cent. per annum, to be computed from the time or respective times of the payment thereof: AND such sum or sums of money shall in the meantime be charged on the said hereditaments and premises in addition to the said principal sum of —— and the interest thereof. (*Declaration as to leasing power*). AND IT IS DECLARED that the expressions

"the mortgagor" and "the mortgagees" include all persons deriving title under them respectively wherever the context admits.

IN WITNESS, etc.

The schedule above referred to.

No. 70. *Mortgage of Freeholds and Leaseholds.*

THIS INDENTURE, made the —— day of ——, between A. B., of, etc., (mortgagor), of the one part, and C. D., of, etc., (mortgagee), of the other part: WHEREAS the said A. B. is seized in fee simple, free from incumbrances, of the freehold hereditaments hereinafter described: AND WHEREAS, etc., (*lease to A. B. and agreement for loan*). NOW THIS INDENTURE WITNESSETH, that in consideration, etc., the said A. B., etc., (*covenant by mortgagor to pay principal and interest*). AND THIS INDENTURE FURTHER WITNESSETH, that for the consideration aforesaid the said A. B., as beneficial owner, etc., (*conveyance of freeholds to mortgagee*), subject to the proviso for redemption hereinafter contained: AND THIS INDENTURE ALSO WITNESSETH, that for the consideration aforesaid the said A. B., as beneficial owner, hereby demises (*demise of leaseholds to C. D. for residue of term, reserving the last day*), subject to the proviso for redemption hereinafter contained: PROVIDED ALWAYS, that if the said sum of —— with interest thereon shall be paid on the —— day of —— next, according to the foregoing covenant in that behalf, then and in such case the freehold premises hereby conveyed shall, at the request and cost of the said A. B., his heirs or assigns, be reconveyed to him or them, and the demise hereby made of the said leasehold premises shall be void (*After a sale, last day of term to be held in trust for purchaser*): (AND IT IS HEREBY DECLARED that no lease made by the said A. B., his heirs, executors, administrators, or assigns, of the said premises or any part thereof during the continuance of this security shall have effect by force unless the said C. D., his executors, administrators, or assigns shall consent thereto in writing).

IN WITNESS, etc.

No. 71. *Mortgage.*

In Fee Where the Mortgagor Being in Occupation Attorns Tenant to the Mortgagee.

THIS INDENTURE, etc.: AND the said A. B. hereby attorns tenant to the said C. D. of the hereditaments hereby conveyed (or of such of the hereditaments hereby conveyed as are stated in the schedule hereto to be in the occupation of the said A. B.) at the yearly rent of ——; PROVIDED ALWAYS, that the said C. D., his heirs or assigns, may at any time determine the tenancy hereby created by giving to the said A. B., his executors or administrators, a notice in writing to that effect, or leaving such notice at or upon the said premises.

IN WITNESS, etc.

No. 72. *Redemise and Attornment.*

The mortgagees do hereby demise unto the said mortgagor the lands, etc., hereinbefore expressed to be hereby granted, and the said mortgagor doth hereby attorn tenant thereof to the said mortgagees at the rent of $—— per annum, being a fair and reasonable rent, to be paid in advance half-yearly on the —— day of June and December in every year, the first of such payments to be made on or before the execution of these presents, and the next on the said —— day of June and so on thenceforth, provided, nevertheless, that the said mortgagees, their executors, administrators and assigns, may, at any time after the said —— day of December, enter into and upon the said lands and hereditaments, or any part thereof, and thereby, or in any other way they or he may think fit, determine the tenancy hereby created, without giving to the mortgagor any previous notice to quit, and further, that nothing hereinbefore contained shall constitute the said mortgagees mortgagees in possession for any other purpose than the making of the above determinable demise, or subject to any liability to account or other liability incident to the position of mortgagees in possession.

No. 73. *Another Form.*

AND, for the purpose of better securing the punctual payment of the interest on the said principal sum, the mortgagor hereby attorns tenant to the mortgagee of the premises hereby demised at the yearly rent of ——, to be paid half-yearly on the —— day of —— and —— in each year, provided always, that the mortgagee, his executors, administrators or assigns, may, at any time after the said —— day of —— next, enter into and upon the said premises, or any part thereof, and determine the tenancy hereby created, without giving to the mortgagor any notice to quit.

No. 74. *Another Form.*

The mortgagor do attorn to and become tenants at will to the mortgagee, at a rent equal in amount to the interest hereby reserved, payable at the times mentioned in the above proviso (for redemption).

No. 75. *Notice of Mortgage by the Mortgagee to the Mortgagor's Tenant.*

To Mr. C. D.

Sir,—Take notice, that by an indenture dated the —— day of——, 19 ——, and made or expressed to be made between (as the case may be), the (messuage or dwelling-house and land, or as the case may be), with the appurtenances, situate and being (at —— or in the —— of ——), in the county of ——, now in your possession (together with other hereditaments) were granted and mortgaged to me, the said E. F., my heirs, executors, administrators and assigns, for —— years from the —— day of ——, 19——, for securing the sum of $ ——, with interest for the same at the rate of $ —— per cent., per annum (at a day now past, or on the day of —— next), and you are hereby required to pay to me all rent and arrears of rent due and payable (or all rent from the day of service of this notice), and hereafter to become due and payable from you in respect of the

said premises in your possession, and in case of any default I shall distrain or sue for the said rent, or bring an action to recover possession of the said (messuage or dwelling-house and land), with the appurtenances, in your possession, or otherwise put the law in force as I may be advised.

Dated this —— day of ——, 19 ——.

Yours, etc.,
E. F. of

No. 76. *Notice to Pay Rent to Mortgagee.*
(Another Form.)

Sir,—Take notice, that on, etc., the premises now in your occupation, situate at, etc., and held as tenant under (mortgagor) of, etc., were duly mortgaged to me for securing the repayment of —— and interest at the rate of, etc., on a certain day now past, and that such principal sum an arrear of interest is still due and unpaid, and I hereby give you further notice not to pay any rent now due or hereafter to become due for the same premises to the said (mortgagor), or to any other person than to me, or whom I shall appoint to receive the same, and to pay the same to me or such person accordingly.

Dated, etc.

(Signature of mortgagor).

To Mr. J. P.

SECTION V.

FORMS RELATING TO DISTRESS.

No. 77. *Power of Attorney to Distrain for Rent.*

KNOW ALL MEN that I (principal) of, etc., hereby appoint (attorneys) of, etc., jointly and severally my true and lawful attorneys and attorney for me and in my name jointly and severally to do all or any of the acts and things following, that is to say:

1. To demand, sue for, and receive all rent and arrears of rent now due (or which at any time after shall become

due), to me by or from the tenant or occupier of my messuage and hereditaments known as —— in the —— of —— in the county of ——, and now in the tenure or occupation of (*tenant*) his under-tenants or assigns and held at a yearly rent of ——.

2. On payment of such rent and arrears of rent as shall be due or any part thereof to give receipts and discharges for the same, and also to settle, pay and allow all demands for ground rent, taxes, claims on account of repairs and other lawful deductions.

3. On non-payment of the same rent and arrears of rent or any part thereof to enter into and upon the said premises and to make or cause to be made one or more distress or distresses of all or any hay, corn, goods, chattels, beasts, sheep or other effects or things whatsoever being in or upon the said demised premises or any part thereof for all such rent as was and now is due and owing to me to —— last past, for or on account of the said premises or any part thereof (or for all such rent as may at any time hereafter become due and owing to me).

4. To hold and to keep such distress or distresses when made or taken until payment and satisfaction be made for all such rent due to me and in arrear and all costs and charges of making such distress, and in case of non-payment thereof within the time limited after such distress made by the laws for the time being in force to appraise, sell and dispose of the same or cause the same to be appraised, sold and disposed of according to law.

5. To do or cause to be done all such acts, matters and things whatsoever in any wise relating to the said premises as fully to all intents and purposes as I the said (principal) could do in my own proper person in case these presents had not been made.

AND WHATSOEVER my said attorneys or attorney or either of them shall lawfully do or cause to be done in or about the premises I hereby agree to ratify and confirm.

IN WITNESS, etc.

(Signature and Seal of Principal).

No. 78. *Warrant of Distress.*

To A. B., my bailiff.

I hereby authorize and require you to distrain the goods and chattels in and upon the (house) and premises of C. D., situate and being (No. —— street), in the —— of —— in the county of ——, for $——, being ——, quarter's rent, due to me for the same (at —— or ——, as the case may be, or "on the —— day of —— last"), and to proceed thereon for the recovery of the said rent as the law directs. But you are hereby expressly prohibited from taking any property not legally liable to a distress for rent.

Dated the —— day of ——, 19—.

(Signed) A. B., of
or A. B., of
by P. Q., his agent.

No. 79. *Warrant of Distress: Another Form.*

To Mr. ——

my bailiff in this behalf:

Distrain the goods and chattels of —— liable to be distrained for rent in and upon the —— now lately in the tenure or occupation of —— situate on —— for the sum of —— dollars and —— cents, being rent for the term of —— due to me for the same on the —— day of —— in the year of our Lord one thousand nine hundred and ——. And for the said purpose aforesaid distrain within the time, in the manner and with the forms prescribed by law, all such goods and chattels of the said —— wheresoever they shall be found, as have been carried off the said premises, but are nevertheless liable by law to be seized for the rent aforesaid.

And proceed thereupon for the recovery of the said rent as the law directs.

And for your so doing this shall be your sufficient warrant and authority.

Witness my hand and seal this —— day of ——, in the year of our Lord one thousand nine hundred and ——.

Witness: C. D.

No. 80. *Warrant to Distrain Growing Crops.*

To A.B., my bailiff.

I hereby authorize and require you to distrain the goods and chattels (and also the cattle and growing crops), in and upon the farm, lands and premises of C.D., situate and being at —— in the ——, etc. (*as in preceding form to the end*).

No. 81. *Notice of Distress.*

To Mr. C.D., and all others whom it may concern.

TAKE NOTICE, that I, ——, as bailiff of and for A.B. your landlord have this day distrained on the premises in your occupation or possession, named in the inventory (above written or hereunto annexed), the (cattle) goods and chattels mentioned in the said inventory for $——, being —— quarter's rent due to (me, or the said A.B.), at —— last (or on the day of —— last), for the said premises: AND unless you pay the said rent, with the charges of distraining for the same, within five days from the service hereof, the said (cattle) goods, chattels will be appraised and sold according to law. (*If cattle or goods removed, mention the place thus,* "And take notice, that the said cattle have been removed to and are now in the common pound in and for the —— of ——, in the County of ——.")

Dated the —— day of ——, 19—.

(Signed) —— of ——,

Bailiff of the above-named A.B.

No. 82. *Notice of Distress of Growing Crops.*
11 *Geo.* II., *c.* 19, *s.* 8.

To C.D., and all others whom it may concern.

Take notice, that I (——, as bailiff of and for A.B. your landlord,) have this day distrained on the (farm, lands and) premises in your occupation or possession mentioned in the inventory (above written or hereunto annexed), the (cattle, goods and chattels, and also the) grow-

ing crops mentioned in the said inventory, for $——, being —— quarter's rent due to (me or the said A.B.), at —— last (or on the ——day of —— last)for the said (farm, lands and) premises: AND unless you pay the said rent, with the charges of distraining for the same (within five days from the date hereof, the said cattle, goods and chattels will be appraised and sold according to law, and) I shall (*or if signed by the bailiff say* "the said A.B. will") proceed to cut, gather, make, cure, carry and lay up the said crops, when ripe, in the barn or other proper place on the said premises, and in convenient time sell and dispose of the same in or towards satisfaction of the said rent, and the charges of such distress, appraisement and sale, according to law.

Dated the —— day of ——, 19—.

(Signed) ——,

Bailiff of the above mentioned A.B.

No. 83. *Notice of Distress for Arrears of Rent-charge.*

To Mr. A.B., and all whom this may concern.

Take notice that on the behalf of C.D. I have this day distrained, in and upon the farm and lands (called ——) in your possession, in the —— of ——, in the county of ——, the goods and chattels in the inventory hereunder written mentioned, for ——, being (one) year's annuity or rent-charge of —— per annum due to the said C.D. on —— last, and charged on and issuing and payable out of certain farms, lands and premises called ——, in the said —— of —— in the county of —— aforesaid, of which the farm and lands first above mentioned are part and parcel, and that unless the said arrears of the said annuity or rent-charge together with the expenses of this distress, are paid and satisfied, the goods and chattels will be disposed of according to law.

Dated, etc.

B.B.

No. 84. *Inventory of Goods Distrained.*

An inventory of the several goods and chattels distrained by me ——, the —— day of ——, in the year 19—, in the house, out-houses, and lands of ——, situate —— by authority and on behalf of ——, your landlord, for the sum of ——, being —— rent due to the said —— on the —— day of ——, 19—.

In the dwelling-house:

On the premises:

No. 85. *Inventory of Goods Distrained.*

Detailed Form.

An inventory of the goods and chattels (cattle and growing crops) distrained by —— as bailiff of and for A.B., of —— on the —— day of ——, 19—, in and upon the (house or farm, lands) and premises of C.D., situate and being (No. ——, —— street), in the —— of ——, in the County of —— for $——, being —— quarter's rent due to the said A.B. (at ——last, or "on the —— day of —— last").

1. In front room on ground floor.—One dining table, one sideboard, twelve chairs (*describe each article in this room intended to be distrained*).

2. In back room on ground floor.—(*Here describe each article in this room intended to be distrained*).

3, 4, 5, etc. (*Here describe in like manner each article intended to be distrained in the* "front room on first floor" —"back room on first floor"—"front room on second floor"—"back room on second floor," etc.—"front attic" —"back attic" — "front kitchen" — "back kitchen" — "wash-house"—"scullery"—"wine cellar"—"coal cellar" — "yard" — "garden" — "coach-house" — "stables" — "barns," etc., etc.)

In the Fields.

1. In the fields called or known as (name): cows, calves, oxen, bulls, sheep, lambs, horses, mares, geldings, colts, fillies, pigs (as the case may be).

2. In the field called or known as (name): haystacks, stacks of (wheat), about —— acres (more or less) of growing crops of (wheat or barley, oats, potatoes, peas, beans, as the case may be).

3. *Describe in like manner each close and the articles therein intended to be distrained. At the end of the list may (if wished) be added the following words or to the like effect, viz:—*

"And all other goods, chattels and effects on the said premises," or "and any other goods that may be found in and about the said premises to pay the said rent and expenses of this distress." *(But it would be too indefinite and incorrect to say, "and all other goods, chattels and effects on the said premises that may be required in order to satisfy the above rent, together with all necessary expenses.")*

Dated this —— day of ——, 19—.

(Signed) A.B. of ——,

(or ——, bailiff for the said A.B.)

No. 86. *Appraiser's Oath and Memorandum Thereof.*

You, and each of you, shall well and truly appraise the (cattle), goods and chattels mentioned in the inventory, according to the best of your judgment. So help you God.

No. 87. *Memorandum of Oath Endorsed.*

Memorandum that on the —— day of ——, 19—, L.M. of ——, and N.O. of ——, two sworn appraisers, were sworn upon the Holy Evangelists by me, P.Q. of ——, constable of the —— of ——, in the County of ——, well and truly appraise the (cattle), goods and chattels mentioned in (this or the within) inventory according to the best of their judgment.

As witness my hand,

P.Q., Constable.

Present at the swearing, the said L.M. and N.O. as above, and witness thereto.

R.S.

T.U.

No. 88. *Appraisement.*

WE, the above-mentioned L.M. and N.O. being duly sworn upon the Holy Evangelists by P.Q., the constable above named, well and truly to appraise the (cattle), goods and chattels mentioned in (this or the within written) inventory, according to the best of our judgment, and having viewed the said (cattle) goods and chattels, do appraise and value the same at the sum of $——.

AS WITNESS our hands the —— day of ——, 19—.

(Signed)

L.M. and N.O., Sworn Appraisers.

No. 89. *Notice to Tenant Who Claims Exemptions.*

(R.S.O. (1897), c. 170, s. 32.)

TAKE NOTICE that I claim $—— for rent due to me in respect of the premises which you hold as my tenant, namely (*here briefly describe them*), and unless the said rent is paid I demand from you immediate possession of the said premises, and I am ready to leave in your possession such of your goods and chattels as in that case only you are entitled to claim exemption for.

TAKE NOTICE FURTHER, that if you neither pay the said rent nor give me up possession of the said premises within three days after the service of this notice, I am by law entitled to seize and sell and I intend to seize and sell all your goods and chattels, or such part thereof as may be necessary for the payment of the said rent and costs.

THIS NOTICE is given under the Act of the Legislature of Ontario respecting the Law of Landlord and Tenant.

Dated this —— day of ——, 19—.

To C.D. (Signed) A.B.

(Tenant) (Landlord).

No. 90. *Advertisement of Bailiff's Sale.*

NOTICE is hereby given that the cattle, goods and chattels distrained for rent on the —— day of ——, 19—, by me ——, as bailiff to ——, the landlord of the premises of ——, the tenant, will be sold by public auction on the ——day of ——, 19—, at —— o'clock, which cattle, goods and chattels are as follows, that is to say: (*list of chattels to be sold*).

Dated this —— day of ——, 19—.

A.B.
Bailiff.

No. 91. *Notice of Set-off by Tenant.*

(*R.S.O.* (1897), *c.* 170, *s.* 33.)

TAKE NOTICE, that I wish to set off against rent due by me to you, the debt which you owe to me on your (promissory note, wages, *or as the case may be, give particulars in detail*).

Dated this —— day of ——, 19—.

To A. B.,
Landlord.
C. D.,
Tenant.

No. 92. *Request not to Remove Goods.*

To A. B. (or to ——, bailiff of A. B.).

Sir,—I hereby request you not to remove the goods and chattels which you have distrained and impounded for rent on the premises, situate at ——, in the County of ——, now in my occupation as (your tenant or tenant of the said A. B.), but to keep the said goods and chattels in the place where they are now impounded, until the —— day of —— next, inclusive, for my accommodation, and to give me the opportunity of obtaining money to pay the said arrears of rent with expenses of the distress, all extra expenses occasioned by keeping possession as aforesaid to form part of the expenses of and incident to the distress.

Dated this —— day of ——, 19—.

Yours, etc.,

Witness, E. F., of ——.

No. 93. *Request of a Tenant to His Landlord to Withdraw a Distress for Rent, with Liberty to Make a Second Distress.*

To A. B.

Sir,—I hereby request you, for my accommodation, to withdraw the distress for rent made by you on the (farm, land and) premises, situate at ——, in the County of ——, now in my occupation as your tenant: And in consideration of your so doing, I do hereby consent, promise and agree that it shall and may be lawful for you at any time (afterwards, or after the —— day of —— next) to make a second distress for the said rent, or for so much thereof as shall for the time being remain unpaid, and for the expenses of and incident to such second distress: And I will also pay you on demand all expenses incurred of and incident to the said first distress to the time of its being withdrawn for my accommodation as aforesaid.

Dated this —— day of ——, 19—.

Yours, etc.,

Witness, E. F., of ——.

No. 94. *Undertaking to Deliver Goods.*

We, the undersigned, acknowledge to have received from ——, bailiff, the following property, seized under and by virtue of a distress for rent against the goods and chattels of ——, at the instance of ——, which said property we undertake to deliver to him, the said bailiff, whenever demanded, in as good condition as they now are.

Witness our hands the —— day of ——, 19—.

Witness,

No. 95. *Request for Appraisement.*

To A. B.:

I hereby require you to cause the (cattle), goods and chattels which you have distrained for rent to be appraised, as required by law.

Dated this —— day of ——, 19—.

Yours,

C. D.

No. 96. *Request for Removal of Distress.*

To A. B.:

I hereby require you to remove the (cattle), goods and chattels which you have distrained for rent to a public auction room (or to the premises, No. —— Street), for sale.

Dated this —— day of ——, 19—.

C. D.

No. 97. *Request of Extension of Time to Replevy.*

To A. B.:

I hereby request that the period of five days within which, but for this request, I am entitled to replevy the (cattle), goods and chattels which you have distrained for rent be extended to (*state number of days*) from the date of your distress, and I hereby agree to pay any additional cost occasioned by your so doing.

Dated this —— day of ——, 19—.

E. F.

No. 98. *Request to Sell Before the Extended Time.*

To A. B.:

I hereby request you to sell the (cattle), goods and chattels which you have distrained for rent at any time before the expiration of the extended time within which I should, but for this request, be entitled to replevy them.

Dated this —— day of ——, 19—.

C. D.

No. 99. *Notice to Sheriff Under the* 8 *Anne, c.* 14, *s.* 1, *of Rent Due Landlord.*

To the Sheriff of the County of ——, and his under-Sheriffs and Bailiffs, and all others whom it may concern:

TAKE NOTICE, that the sum of $—— is now due and owing to (me or to L. K., of, etc.) from C. D., of ——, in the County of ——, for (one year's or one half year's or one quarter's) rent due on the —— day of —— last, of the

premises in his occupation at —— aforesaid, upon which premises, as I am informed, you have seized and taken in execution certain goods and chattels: AND you are hereby required not to remove any of the said goods and chattels from off the said premises until the said arrears of rent are paid, pursuant to the statute in such made and provided.

Dated this —— day of ——, 19—.

Yours, etc.,
I. K. of ——.
(Or E. F. of ——, agent for I. K. of ——.)

No. 100. *Notice by Sheriff to Execution Creditor.*

In the ————

BETWEEN A. B., Plaintiff,
and
C. D., Defendant.

Take notice, that the sum of $—— is due and owing from the above-named defendant to his landlord, I. K., of ——, for (one year's or one half year's or one quarter's) rent, due one the —— day of —— last, for and in respect of the (house or farm, land and) premises situate at ——, in the County of ——, and in the occupation of the said defendant, and upon which certain goods and chattels have been seized by the sheriff of ——, under the writ of *fieri facias* issued in this action (and the said sheriff has had notice of such arrears of rent): Now I do hereby, as the agent of the said sheriff and on his behalf, give you notice that unless the above-named plaintiff do forthwith pay the arrears of rent due to the said landlord, either to him or to his bailiff, pursuant to the Statute in such case made and provided, the said sheriff will withdraw from possession of the said goods and chattels under the said writ.

Dated this —— day of ——, 19—.

Yours, etc.,
L. M. (address).
Agent for the Sheriff of ——.

To the above-named plaintiff, and to Mr. ——, his solicitor or agent.

No. 101. *Declaration by Lodger.*

(*R.S.O.* (1897), *c.* 170, *s.* 39.)

ONTARIO,
County of ——.
To wit:

In the matter of a distress for rent by —— against ——.

I, A. B., of ——, ——, occupying as lodgings, rooms in house No. ——, in —— street, do solemnly declare:

That C. D., my landlord, has no right of property or beneficial interest in the furniture, goods and chattels distrained (or threatened to be distrained), for rent alleged to be due to —— (superior landlord), and of which an inventory is hereto annexed, but that such furniture, goods and chattels are my property (or in my lawful possession). I owe (immediate landlord) $——, on account of rent from —— to —— (*or*, no rent).

The inventory in this declaration is as follows:—

Inventory.

And I make this solemn declaration conscientiously believing the same to be true and by virtue of the Canada Evidence Act, 1883.

Declared before me at ——,
in the County of ——,
this —— day of ——,
19—.

(Signed) A. B.

A Commissioner, etc.,

No. 102. *Undertaking by a Landlord Not to Distrain on a Lodger's Goods.*

Sir,—In consideration of your becoming (or "having at my request become") a lodger in the house of my tenant, C. D., situate and being No. ——, —— street, in the —— of ——, in the County of ——, and of one dollar now paid by you to me (the receipt whereof is hereby acknowledged), I hereby undertake and promise you that I will not distrain upon any of your goods or chattels for any rent due

or to become due to me from the said C. D., except when rent shall be due and in arrear for —— or more from you to the said C. D., and then only to the extent of such last-mentioned arrears, with the lawful expenses of and incident to a distress for that amount.

To Mr. E. P.

Yours, etc.,
A. B.

SECTION VI.

NOTICES, ETC.

No. 103. *Notice to Tenant to Repair.*

Sir,—You are hereby required (forthwith or within three calendar months now next), to put in good tenantable repair, order and condition the (messuage) and premises, with the appurtenances, situate at ——, in the —— of ——, in the County of ——, which you now hold of (me, or of A. B., of ——), and particularly that you do all and singular the amendments and reparations specified in the schedule hereunder written.

Dated this —— day of ——, 19—.

Yours, etc.,
A. B., of ——
(Or E. F., of ——, surveyor of the said A. B.)

To Mr. C. D.

The schedule above referred to. (*Here specify the amendments and repairs required to be done.*)

No. 104. *Notice to Tenant to Repair*

(*Another Form.*)

To Mr. C. D.:

Sir,—Having surveyed the (messuage) and premises, with the appurtenances, situate at ——, in the —— of——, in the County of ——, now held by you under a lease, bearing date the —— day of ——, 19—, and expressed to be

made between A. B., of the one part, and you, the said C. D., of the other part, I find that the amendments and repairs specified in the schedule hereunder written are now necessary to be done pursuant to the covenants in that behalf contained in the said lease. And I do hereby give you notice to do all and singular such amendments and repairs (forthwith or within three calendar months next after the service of this notice).

Dated this —— day of ——, 19—.

Yours, etc.,

(E. F., of ——, Surveyor of the said A. B.)

The schedule above referred to. (*Here specify the amendments and repairs required to be done.*)

No. 105. *Notice by a Lessor to His Lessee Requiring Him to Put the Premises in Repair Pursuant to a Covenant Contained in the Lease.*

I hereby give you notice and require that in pursuance of the covenant in that behalf contained in the indenture of lease dated the —— day of ——, under which you hold the messuage and premises, etc. (*describing the premises shortly*), you do and execute, within —— calendar months from the date hereof, the repairs in and upon the said messuage and premises, which are specified in the schedule to this notice.

A. B. (Landlord).

To C. D. (Tenant):

Schedule.

No. 106. *Notice Specifying Breach of Covenant.*

To C. D.:

I hereby give you notice that you have broken the covenants and conditions in your lease, dated the —— day of ——, 19— (for repairing, *or as the case may be*), the messuage and premises embraced in said lease, and I require you to comply with the said covenants and conditions, and pay me $—— as compensation for such breaches.

Dated this —— day of ——, 19—.

Yours, etc.,

A. B.

No. 107. *Notice to Lessee Prior to Enforcing Right of Re-entry or Forfeiture.*

To C. D. (of ——), and to the lessee of (*here insert a description of the property*), hereinafter referred to as "the said premises," and to the persons interested.

Whereas by an indenture of lease made the —— day of ——, 19—, between A. B., of ——, of the one part, and C. D., of ——, of the other part, the said A. B. did demise and lease unto the said C. D. the premises above referred to, and which are more fully described in the said indenture to hold from the —— day of ——, 19—, for the term of —— years, yielding and paying unto the said A. B., his (heirs), executors, administrators and assigns, the annual rent of ——, payable quarterly on the usual quarter days (*let all this agree with the terms of the lease*): And whereas the said C.D. did by the said indenture covenant for himself, his heirs, executors, administrators and assigns, amongst other things that (here set out the covenants for breach of which the right of re-entry is to be enforced in the terms of the lease). (*If the notice is not given by the original lessor, but by somebody claiming under a derivitive title, here set out the steps by which the title passed to the person giving the notice, as for instance,* "And whereas by an indenture of assignment made the —— day of ——, 19—, between the said A. B., of the one part, and E. F., of the other part, the said A. B. did assign all his reversion of and in the said premises to the said E.F.") *If there is any condition precedent to the right to demand performance of the covenant, or the right of re-entry, here set it out. Thus, if the breach complained of be not repairing after three months' notice set out that the notice was given: this may be done as follows:* "And whereas I, the said A.B. (or E. F., then being the lessor of the said premises, and the person possessed of the reversion dependent on the term created by the said indenture of lease, and entitled to sue on the covenants therein contained, and to give the notice hereinafter referred to) did on the —— day of —— give or leave notice in writing on the said premises requiring certain repairs and dilapidations specified in a schedule annexed to the said notice to be done and performed within three months after the said date.

Now I, the said A. B. (or 'E. F., of ——, now being the lessor of the said premises, in whom the reversion of and in the said premises is vested," do hereby give you (and each of you) notice that the aforesaid covenants have been broken and that the particular breaches complained of are that (*here set out the breaches complained of. If the breach be for repairs this may be done as follows*: "that you did not in the particulars and respects set forth in the schedule hereto annexed well and sufficiently repair, uphold," etc., *following the terms of the covenant.* A schedule of the dilapidations and wants of repair should in this case be annexed to the notice).

AND I do hereby give you (and each of you) notice and require you to remedy the said breach (or "breaches") of covenant, and to make compensation for the said breach or breaches of covenant, which compensation I compute at the sum of ——, or such other compensation as may be fair and reasonable. And I hereby give you notice that unless within one month (insert a reasonable time) or a reasonable time hereafter you remedy the said breach (or 'breaches") and make reasonable compensation in money for the breach (or "breaches") to my satisfaction, I shall commence an action in the High Court of Justice for recovery of possession of the said premises.

Dated this —— day of ——, 19—.

(Signed) A. B.

Witness, etc.

(*If a schedule is referred to in the notice, here add it thus*):

The schedule referred to in the above notice.

(*Here fill in the schedule.*)

No. 108. *Notice Before Enforcing Right of Re-entry or Forfeiture.*

(*Another Form.*)

To C. D. (of ——, ——), the lessee (or assignee of the lease or the tenant) of the premises known as ——, situate (at ——), in the —— of ——, in the County of ——, and held under the indenture of lease (or lease in writing, or

agreement) dated ——, and made between —— and —— (or to the lessee of the premises known, etc., or to the persons interested in the premises known, etc., as before).

I, A. B. (of ——), the lessor (or assignee of the lessor, or the landlord) of the above-mentioned premises, hereby give you notice that the above-mentioned lease (or agreement), contains a covenant (or covenants, or an agreement) whereby the lessee (his executors, administrators and assigns) covenanted (or agreed) with the lessor, his (heirs, executors, administrators and assigns) that (*here set out or clearly state the substance of the covenants or stipulations for breach of which the right of re-entry is to be enforced*).

And I hereby give you notice that the said covenant (or agreement), has (or covenants have) been broken, and that I complain of the following breach (or breaches) thereof, namely, that (*here set out the particular breach or breaches complained of. If the breach be non-repair, this may be done by saying,* that the said premises are out of repair in the particulars and respects specified in the schedule annexed to this notice).

And I hereby require you, within a reasonable time (or within ——) after the service of this notice, to remedy the said breach (or all the said breaches) of covenant (or agreement).

And I hereby require you, within a like reasonable time (or within ——), to make to me a reasonable compensation in money, to my satisfaction, for the said breach (or breaches).

Dated the —— day of ——, 19—.

(Signed) A. B.

(*The above form can be readily modified to meet cases in which the notice is given by the landlord's agent. If a schedule is referred to in the notice, here add it thus*):

The schedule (of dilapidations) referred to in the above notice.

(*Fill in the schedule.*)

No. 109. *Notice Specifying Breaches of Covenant.*

(*Another Form.*)

To C. D., of, etc., lessee of the messuage and premises known as (*describe it shortly*), comprised in an indenture of lease, dated, etc., and made, etc. (*give date and parties*).

As solicitors and agents for and on behalf of A. B., of, etc. (lessor), being the person entitled to the reversion of the above-mentioned premises expectant on the said lease, we hereby give you notice that you have committed breaches of the covenants contained in the said lease, namely: 1st, that you have not kept the premises in good and substantial repair; 2nd, that you have not painted the outside wood and ironwork of the said premises with two coats of good oil colour once every four years; 3rd, that you have not painted such parts of the inside of the said premises as have been usually painted, with two coats of good oil colour once in every seven years (*or whatever the breaches complained of are*).

AND we hereby require you to remedy the said breaches by executing and doing the repairs and things specified in the schedule hereto, within three calendar months from this date, and we also require you to pay to the said A. B., by way of compensation for the said breaches, the sum of $——, being the costs and expenses incurred by him for surveyor's fees and solicitor's charges in respect of the said breaches.

AND we hereby further give you notice that if you make default in remedying the aforesaid breaches of covenant in manner above mentioned, or in making the compensation hereby required, the said A. B. will enter and take possession of the said premises.

Dated this —— day of ——, 19—.

The schedule above referred to. (*Specify the work to be done or other reparation.*)

No. 110. *Notice to Quit.*

(*By Landlord.*)

I hereby give you notice to quit and deliver up to me possession of the premises now held by you as my tenant,

situate at ——, in the (city) of ——, in the County of ——, on the —— day of —— next (or at the expiration of the year of your tenancy which will expire next after the end of one half year (*or as the case may be*) from the service of this notice.

Dated this —— day of ——, 19—.

To C. D (tenant), or to whom else it may concern.

Yours, etc.,
A. B. (landlord).

No. 111. *Notice to Quit by Landlord.*

(*Another Form.*)

Sir,—I hereby (*if as agent add,* as agent for your landlord, A. B.) give you notice to quit and deliver up the possession of the messuage (or rooms and apartments, or farm, land) and premises, with the appurtenances (known as ——) situate (at ——), in the —— of ——, in the (County) of ——, which you now hold of me (or the said A. B.) as tenant thereof, on the —— day of ——, 19—. (*If there be any doubt as to when the tenancy commenced, add*: or at the end of the year of your tenancy which will expire next after the end of one-half a year from the time of your being served with this notice).

Dated the —— day of ——, 19—.

To Mr. C. D. (the lessee or his assignee, if known. It need not in general be given to the under-tenants of the tenant) and all else whom this may concern.

Yours, etc., A. B. (or if as agent, say E. F., agent for the said A. B.).

No. 112. *Notice to Quit by Agent of Landlord.*

To Mr. C. D. (Tenant):

Sir,—I hereby, as agent for A. B., your landlord, and on his behalf, give you notice to quit and deliver up possession of the (house or farm, land) and premises, with the

appurtenances situate at —— (or in the —— of ——) in the County of ——, which you hold of him as tenant thereof, on the —— day of —— next (or at the expiration of the year of your tenancy which will expire next after the end of one half year from the service of this notice).

Dated the —— day of ——, 19—.

Yours, etc.,

E. F., of ——, agent for the above-named A. B.

No. 113. *Notice to Quit by a Landlord to a Tenant from Year to Year.*

You are hereby required to quit and deliver up on the —— day of ——, 19—, (or on other the day on which the current year of your tenancy will expire next after the end of half a year from the time of your being served with this notice), the possession of the messuage, etc. (*describe the property shortly*), which you now hold of —— (landlord).

Dated the —— day of ——, 19—.

A. B. (agent for said landlord.)

To C. D. (tenant).

No. 114. *Notice of Intention to Quit by Tenant.*

I hereby give you notice that I shall quit and deliver up to you on the —— day of —— next the possession of the premises situate at ——, which I now hold of you as your tenant.

Dated this —— day of ——, 19—.

To A. B.

(Landlord).

Yours, etc.,

C. D. (Tenant).

No. 115. *Notice of Intention to Quit by Agent of Tenant.*

To Mr. A. B. (Landlord):

Sir,—I hereby, as agent for C. D., your tenant, and on his behalf, give you notice that it is his intention to quit and deliver up possession of the (house or farm, land) and pre-

mises, with the appurtenances, situate at —— (or in the —— of ——), in the County of ——, now held by me as your tenant thereof, on the —— day of —— next.

Dated at ——, the —— day of ——, 19—.

Yours, etc.,

G. H., of ——, agent for the above-named C. D.

No. 116. *Notice to Quit by Tenant from Year to Year to Landlord.*

I hereby give you notice that I shall quit and deliver up on the —— day of ——, 19—, (or otherwise on the day on which the current year of my tenancy will expire next after the end of half a year from the time of your being served with this notice), the possession of the messuage, etc. (*describe the property shortly*), which I now hold of you as a yearly tenant.

Dated the —— day of ——, 19—.

A. B. (Tenant).

To C. D. (Landlord).

No. 117. *Notice by a Tenant to Determine a Lease Pursuant to a Power.*

I hereby give you notice that, in pursuance of the power for this purpose given to me by the indenture of lease dated the —— day of ——, and made between you of the one part and me of the other part, it is my intention to determine the lease thereby made on the —— day of —— next, and I shall therefore quit and deliver up possession to you of the messuage and premises situate at, etc., comprised in the said indenture of lease on the said —— day of ——.

Dated the —— day of ——, 19—.

A. B. (Tenant).

To C. D. (Landlord).

No. 118. *Notice to Quit Lodgings.*

Sir,—I hereby give you notice to quit and deliver up on —— next the rooms or apartments, with the appurtenances, in my house (No. —— —— Street, Toronto), which you now hold of me.

Dated —— day of ——, 19—.

Yours, etc.,
A. B.

To Mr. C. D.

No. 119. *Notice by Tenant to Quit Lodgings.*

Sir,—I hereby give you notice that on the —— day of —— next I shall quit and deliver up possession of the rooms and apartments, with the appurtenances, in your house (No. —— —— Street, Toronto), which I now hold of you.

Dated —— day of ——, 19—.

Yours, etc.,
C. D.

To A. B.

No. 120. *Notice*

By Joint Tenant or Tenant in Common (Landlord) to Determine a Moiety, etc.

To Mr. C. D.

Sir,—I hereby give you notice of my intention to determine the tenancy under which you now hold of me (one undivided third part or share as the case may be) of and in the (messuage or farm, land) and premises, with the appurenances, situate at —— in the county of ——, and require you to quit the same on the —— day of —— next (or at the expiration of the year of your tenancy, which shall expire next after the end of one half year from the service of this notice).

Dated the —— day of ——, 19—.

Yours, etc.,
A. B.

No. 121. *Notice*

To Determine a Lease for Twenty-one Years at the End of the First Seven or Fourteen Years.

To Mr. C. D.

Sir,—In pursuance of the proviso or power in this behalf contained in an indenture of lease dated the —— day of —— 19—, made or expressed to be made between (*as the case may be*), I, the undersigned (being the assignee of the immediate reversion of and in the tenements with the appurtenances demised by the said lease), do hereby give you notice that it is my intention to avoid the said lease, and to put an end to the term thereby granted at the end of the first (seven or fourteen, *or as the case may be*) years of the said term.

Dated the —— day of ——, 19—.

Yours, etc.,
E. F. of, etc.

No. 122. *Demand*

Of Possession at the End of a Term of Years, Otherwise Double Rent or Double Value.

To Mr. C. D. (Tenant).

Sir,—I hereby (as agent for and on behalf of your landlord, A. B.) demand and require you to quit and deliver up possession of (*describe the premises shortly*) with the appurtenances, situate at —— (or in the —— of ——) in the county of ——, forthwith, (*or, if the term has not expired, say*) "on the expiration of your term therein, which will expire on or about the —— day of —— next, or instant"), and take notice that if you hold over the said premises after the service hereof (or the expiration of the term) you will be liable to pay double value (or double rent) for the said premises, pursuant to the statute in such case made and provided.

Dated at —— the —— day of ——, 19—.

Yours, etc.,
A. B. (landlord),
(or E. F. of ——, agent for the above-named A.B.)

No. 123. *Demand of Possession to Determine Any Express or Implied Tenancy at Will.*

To Mr. C. D. (tenant).

I hereby (as agent of and for A. B.) demand and require you forthwith to quit and deliver up possession of the (messuage land and premises) with the appurtenances, situate at —— (or in the —— of ——), in the county of ——, now in your possession, and you are hereby warned not to commit any waste, spoil or damage in or upon the said premises, or any part thereof.

Dated at —— this —— day of ——, 19—.

Yours, etc.,
A. B. (landlord),
(or E. F. of ——, agent for the above-named A.B.)

No. 124. *Notice to Tenant to Attorn—To Receiver.*

(*Short Style of Clause*).

I, L. M. of (*residence and addition*), the receiver appointed in this cause of the rents and profits of the real estate of A.B., the testator, (*or as may be*) hereby give you notice and require you to attorn and become tenant to me for (*describe the property*) now occupied by you, and for such other part or parts of the said real estate as is or are in your occupation, and to pay to me your rent in arrear and the growing rent for the said premises.

Dated this —— day of ——, 19—.

L. M. (receiver).

To W. P. of (*residence and addition*).

No. 125. *Notice to Tenant to Pay Rent to Lessee Under Settled Estates Act.*

TAKE NOTICE that you are required to give up quiet and peaceable possession of —— according to the terms of your lease from the date ——, and FURTHER TAKE NOTICE that all rents accruing on and from the —— day of —— 19—, of the said premises are and will be payable to —— by you.

Dated —— day of ——, 19—.

C. D.

To A. B.

No. 126. *Notice*

By Lessee to Lessor of Election to Purchase the Premises, Pursuant to a Power Contained in the Lease for This Purpose.

I hereby give you notice that, pursuant to the power for this purpose given to me by an indenture of lease, dated the —— day of ——, whereby certain hereditaments and premises, situate, etc., were demised by you to me for the term of —— years, I elect and agree to purchase the said hereditaments and premises, and the inheritance thereof in fee simple, at the price of ——, and to pay the purchase money, and in all respects to comply with the terms prescribed by the said indenture of lease in respect of such premises by me, and I request you, on or before the expiration of one calendar month from the date hereof, to make out and deliver to me an abstract of the title to the said hereditaments and premises, according to the stipulation for this purpose contained in the said indenture of lease.

As WITNESS my hand this —— day of ——.

C. D. (lessee).

To A. B. (lessor).

No. 127. *Notice by Tenant to His Landlord of Ejectment Brought.*

In the High Court of Justice,

Between A. B., . . . plaintiff,

and

C. D., . . . defendant

Sir,—Take notice that you will receive herewith a copy of a writ of summons which has been served in an action for the recovery of the possession of the messuage, land (*as the case may be*), and premises at ——, and held by me (or "C. D.") as your tenant.

Dated ——.

Yours, etc.,

T. T.

To Mr. L. L.

SECTION VII.

FORMS OF PROCEEDINGS UNDER OVERHOLDING TENANTS ACT.

No. 128. *Demand of Possession Under "The Overholding Tenants Act."*

In the County Court of the County of ——

IN THE MATTER OF A.B., Landlord, against C.D., Tenant.

I, A.B., of the —— of ——, in the County of——, your landlord, do hereby demand and require you forthwith to go out of possession, and to deliver up to me possession of the lands demised to you, which land I now own, and which you have been permitted to occupy and hold the right of occupation (under and by virtue of a lease dated the —— day of ——, 19—), (or under a verbal agreement, *as the case may be, and specifying the nature of the agreement*), and which lease and right of occupation have been determined and have expired by effluxion of time (*or* by breach of the covenants in the said lease, *as the case may be*), which said land may be described as (*describe the land*).

Dated at —— this —— day of ——, 19—.

Yours, etc.,

A.B.

To C.D. (Tenant).

(Landlord).

No. 129. *Notice to Tenant to Deliver up Possession Under "The Overholding Tenants Act."*

(*Another Form.*)

I, (owner or agent of ——, the owner), hereby give you notice that unless peaceable possession of —— (*describe shortly the land or tenement demised to the tenant*), which was held of me (*or as the case may be*) under a tenancy from year to year (*or as the case may be*), which expired (or was determined) by notice to quit from the said —— (*or otherwise as the case may be*) on the —— day of ——,

19—, and which land (or tenement) is now held over and detained from the said ——, be given to —— (the owner or agent) before the expiration of —— clear days from the service of this notice, I, ——, shall on —— next, the —— day of ——, at —— of the clock of the same day, at ——, apply to the County Judge of the County of ——, being the County (or District) in which the said land (or tenement) (or any part thereof) is situated, to appoint a time and place at which he will enquire and determine whether you were tenant, as herein alleged, and whether you wrongfully hold over contrary to the statute in that behalf, and, if he so finds, to grant an order for a writ to cause the said —— to have possession of the said land (or tenement) and for payment of the costs of the proceedings.

Dated at ——, this —— day of ——, 19—.

To Mr. C.D.
(Tenant).

(Signed)
A.B. (Owner, or E.F., Agent for A.B.).

No. 130. *Affidavit of Service of Demand of Possession.*

In the County Court of the County of ——.

In the matter of A.B., Landlord,
against
C.D., Tenant.

I, E. F., of the —— of ——, in the County of —— (*occupation*), make oath and say as follows:—

1. That I did, on the —— day of ——, 19—, personally serve the above-named tenant, C.D., with the demand of possession hereto annexed, marked A, by delivering to and leaving with the said C.D. on the said day (upon the lands described in the said demand, *or, as the case may be*), in the —— of ——, in the County of ——, a true and correct duplicate original of said demand, and by producing and exhibiting to the said C.D. the said annexed demand.

2. At the same time, I also demanded of the said C.D. to deliver up to the said A.B. and to go out of possession of the said lands.

3. The said tenant, C.D., refused to go out of possession of the said lands, and gave no reasons for such refusal, (*or*, the reasons given for such refusal were as follows: *here state the reasons for refusal*).

SWORN, etc.

No. 131. *Affidavit*

For Appointment Under Overholding Tenants Act.

(R.S.O. (1897), Chap. 171.)

In the County Court of the County of ——.

In the matter of A.B., Landlord,

and

C.D., Tenant.

I, A. B., of the —— of ——, in the County of ——, (*occupation*) make oath and say:—

1. I am the above-named landlord.

2. Now produced and shewn to me and marked exhibit "A" is an indenture of lease creating the demise of the lands therein described from me to the above-named tenant, C.D. (*or set forth the terms of the demise or right of occupation, if verbal, or as the case may be*).

3. Now produced and shewn to me and marked exhibit "B" is a true copy of a demand made upon the said tenant, C.D., for the delivering up of possession of the said lands.

(*Here state that the term has expired, or set forth the breaches of covenants which entitle the landlord to possession, as for example*:)

4. That the sum of $——, being part of the yearly rent reserved in the said lease, payable on the —— day of —— last past, was in arrear and unpaid for the space of —— days and more after the said day by the said lease appointed for the payment thereof.

5. The said C.D. has not, in accordance with his covenant contained in the said lease, summer-fallowed, in a husbandlike and proper manner, at the proper season, at least —— acres of the said land in the —— year of the term demised by said lease, and has broken the said covenants in that behalf (*or, in place of the foregoing state-*

ments in paragraphs 4 and 5, state clearly the particular breach of the covenant complained of, and on which the right of entry has accrued, or the grounds on which the determination or forfeiture of the lease and right of re-entry are based).

6. By reason of the said several breaches of the covenants in the said lease, (*or*, of the expiration or determination of the term, as aforesaid, *or as the case may be*), I am entitled to re-enter upon the said demised premises and to remove the said tenant therefrom, and to re-possess the said lands, as in my first and former estate. (*Here add such facts and explanations in regard to the ground of the tenant's refusal as the truth of the case may require*).

Sworn, etc.

No. 132. *Appointment.*

In the County Court of the County of——.

In the matter of A.B., Landlord,

and

C.D., Tenant.

Upon the application of A.B., the above-named landlord, and upon reading his affidavit and papers filed, and it appearing to me that the tenant wrongfully holds over, and that the landlord is entitled to the possession of the lands in question herein, and mentioned in the said affidavit and papers: I appoint —— the —— day of ——, A.D. 19—, at —— o'clock in the —— noon at —— in —— the —— of ——, at which time and place I will enquire and determine whether the above-named tenant, C.D., was tenant of the said landlord for a period which has expired or been determined by notice to quit, or by breach of the covenants in the said lease, or by reason of any proviso in the said lease, or otherwise, and whether the tenant wrongfully holds possession of said lands, or any part thereof, against the right of the landlord, and whether the said tenant does wrongfully refuse to go out of possession having no right to continue in possession, or how otherwise.

Dated at —— the —— day of —— A.D. 19—.

Judge.

No. 133. *Notice to Tenant of Appointment.*

In the County Court of the County of ——.

BETWEEN:

A.B., Landlord,
and
C.D., Tenant.

TAKE NOTICE that the above-named A.B. of ——, in the County of ——, claims possession from you, the above-named C.D., of Lot —— in the ——Concession of the Township of —— in the County of —— on the ground that the term of the tenancy has expired (*or, as the case may be*).

AND FURTHER TAKE NOTICE that the Judge of the County Court of the County of —— has appointed —— day, the —— day of ——, 19—, at the hour of —— o'clock in the —— noon at his Chambers in the City of —— for the purposes stated in the appointment, a copy of which is hereto annexed.

Dated at —— the —— day of ——, 19—.

E. F.,
Solicitor for the said A.B.

To the above-named C.D.

No. 134. *Notice of Appointment Which May be Endorsed on Appointment.*

Take notice that His Honour, the Judge of the County Court of the County of ——, has appointed the time and place within mentioned for the purpose within mentioned.

Dated —— day of ——, A.D. 19—.

To the above-named tenant, C.D.

Yours, etc.,
Solicitor for the Landlord.

No. 135. *Affidavit of Service of the Appointment and Papers Attached.*

I, ——, of the —— of ——, in the County of —— (*occupation*), make oath and say:—

1. That I did on the —— day of ——, A.D. 19—, personally serve the above-named tenant, C. D., with the

appointment hereto annexed, marked C, together with the notice thereon endorsed, and the notice endorsed thereon as to the solicitor by whom the said appointment was issued, by delivering to and leaving with the said C.D. at the —— of ——, in the County of ——, on the said day, a true copy of the said appointment and notices, and by producing and exhibiting to him at the same time said annexed appointment and notices, and at the time of such service there was attached to said copy of appointment and notices so served, and I delivered to and left with the said C.D. true copies of the affidavits hereto annexed, marked D and E, together with the copy of lease (or statement setting forth the terms of the demise or occupation, and the reason why a copy of the instrument cannot be attached, as the case may be), and demand of possession annexed to said affidavits, marked A and B.

SWORN, etc.

No. 136. *Order Under Overholding Tenants Act For Writ of Possession.*

In the County Court of the County of ——.

E. F., Esquire,
Judge of the said Court
In Chambers.

—— day the —— day of ——, 19—.

IN THE MATTER OF A.B., Landlord,
and
C. D., Tenant.

UPON THE APPLICATION of the said A. B., upon reading the appointment granted by me herein on the —— day of ——, 19—, the affidavits of —— and the exhibits therein referred to, and upon hearing the said parties and their solicitors, and upon examining the witnesses called by them (*or no one appearing for the said C. D., although duly notified as appears by the affidavit of —— filed, or as the case may be*), and it appearing to me after hearing the said parties and examining into the matter, that the case is clearly one coming under the true intent and meaning of section 3

of The Overholding Tenant's Act, and that the tenant wrongfully holds against the right of the landlord:—

1. IT IS ORDERED that a writ of possession under the said Act to issue out of the County Court of the County of ——, directed to the Sheriff of the County of ——, in the King's name, commanding him forthwith to place the said landlord in possession of the lands in question herein, to wit (*here describe the lands*).

2. AND IT IS FURTHER ORDERED that the said tenant do pay to the said landlord his costs on the County Court scale of and incidental to this application and order forthwith after taxation thereof.

————,
Judge.

No. 137. *Judge's Order for Writ of Possession.*

(*Another Form.*)

(*Title of Court and Cause.*)

Upon reading the appointment granted by me herein and the affidavit of service thereof, and the other papers filed herein, and upon hearing the said parties, by their counsel (*or*, no one appearing for the above-named tenant, *as the case may be*), and it appearing to me that the case is clearly one coming under the true intent and meaning of section 2 of "The Acts respecting Overholding Tenants," and that the tenant wrongfully holds against the right of the landlord: I do adjudge the said A. B., the landlord, is entitled to the possession of the (here describe the lands), with the appurtenances; and I do order that a writ do issue out of the County Court of the County of ——, directed to the Sheriff of the County of ——, commanding him that he shall, without delay, cause the said A. B. to have possession of the said land and premises according to the provisions of the said Act, and I do further order and direct that the said C. D., the tenant, do pay the costs of the proceedings had under the said Act, of and incident to this application, and order to be taxed by the Clerk of this Court, on the

scale allowed in this Court in ordinary cases, so far as the proceedings allow it.

Dated at Chambers, this —— day of ——, A.D., 19—.

————,
Judge.

No. 138. *Order Dismissing Application.*

In the County Court of the County of ——.
E. F., Esquire, Judge of
the said Court:
In Chambers:
The —— day of ——, 19—.

IN THE MATTER OF A. B., Landlord,
against
C. D., Tenant.

Upon the application of the said A. B., upon reading the appointment granted by me herein, dated the —— day of ——, 19——, and the affidavits of ——, filed herein, and the exhibits therein referred to, upon hearing the said parties and examining into the matter:

I do order that the said application and the case against the said C. D. be, and the same are hereby dismissed, with costs against the said A. B., to be taxed by the Clerk of this Court on the scale of costs allowed in the Court in ordinary cases, so far as the proceedings allow it.

————
Judge.

SECTION VIII.

FORMS OF PROCEEDINGS IN ACTIONS.

No. 139. *Writ of Summons and Indorsement in Action for Recovery of Land.*

(*Use the ordinary form of writ, and indorse the claim thus*): The plaintiff's claim is to recover possession of (*describe the property, e.g.*) a house, No. ——, in —— Street, *or*, of a farm called ——, or Lot No. —— in the ——

Concession, situate in the Township of ——, in the County of —— (*If the plaintiff also seek to etablish his title to and recover rents of land*): and to establish his title to (*describe the property*), and to recover the rents thereof.

(*The following claims may be added without leave to either or both of the above*):

And the plaintiff claims $—— for mesne profits:

And for an account of rents (or arrears of rent) (or rent in arrear):

And for breach of covenants to (repair).

Place of trial: Chatham.

No. 140. *Affidavit of Service When Possession Vacant.*
(*Title, etc., of Action as usual.*)

I, P. S., of ——, ——, make oath and say as follows:

1. (*State facts showing that service "cannot otherwise be effected." Show the attempts which have been made to effect service, and the reasons for their failure. The actual or probable whereabouts of the defendant, if known, should be given, or, if such be the fact, it may be stated that he has absconded, and cannot be found.*)

2. On the —— day of ——, 19—, I posted a true copy of the writ of summons in this action upon the outer (or front) door of the dwelling-house (No. ——, in —— Street, in the —— of ——, in the (County) of ——), for the recovery whereof (and of other the premises mentioned in the said writ), this actions is brought (*or otherwise state the fixing of the copy writ on some conspicuous part of the premises*).

3. At the time of the said posting of the said copy, the said premises in the said writ mentioned, and for recovery of possession whereof this action is brought, were vacant and deserted by the above-named defendant, C.D., who (to the best of my knowledge, information and belief) was lately in possession and occupation thereof (as tenant to the above-named plaintiff), and (to the best of my knowledge and belief) no person was in or upon the said premises, or any part thereof, at the time I posted the said copy, and the said C. D. had before then removed himself

(and his family) and his furniture and goods from, and had utterly abandoned and deserted the possession of the said premises, and (to the best of my knowledge and belief) no person was then in possession or occupation thereof, or any part thereof.

4. The said writ of summons appeared to me to have been regularly issued out of the office of the —— —— against the above-named defendant, and was dated the —— day of ——, 19—, and at the time of my posting the said copy as aforesaid, the said writ and copy were subscribed and indorsed in the manner and form prescribed by the rules of —— Court.

5. I did on the —— day of ——, 19—, indorse on the said writ the day of the month and the week of the service of the said writ by the posting of the said copy thereof in manner aforesaid.

6. The said C. D. has not entered appearance, and no appearance has been entered, to the said writ of summons.

SWORN, etc. (*as usual*).

This affidavit is filed on behalf of the plaintiff.

No. 141. *Order Allowing Service.*

(*Formal parts as usual.*) Upon reading the affidavit of ——, filed herein the —— day of ——, 19—, it is ordered that service of the writ of summons in this action, effected on the —— day of ——, 19—, be good and sufficient service of the said writ for the recovery of possession of the land or property claimed in this action.

Dated, etc.

No. 142. *Notice Requiring Security.*

Take notice that you will be required, if you defend and if ordered by the Court of a Judge, to give security by yourself and two sufficient sureties, conditioned to pay the costs and damages which may be recovered in the action.

To ——.

————,

Plaintiff's Solicitor.

No. 143. *Judgment for Not Giving Security.*

In the ——

BETWEEN, A. B., Plaintiff,
and
C. D., Defendant.

The —— day of ——, 19—.

The defendant having been ordered to give security pursuant to the statute and having failed to do so,

It is adjudged that the plaintiff do recover possession of the land in the statement of claim mentioned, with the appurtenances, and $—— costs taxed (*or* costs to be taxed).

————,
Clerk, etc.

No. 144. *Affidavit by Party Not Named in Writ for Liberty to Appear and Defend.*

(*Title, etc., of action as usual.*)

I, E. F., of ——, ——, make oath and say as follows:

1. This action is brought for recovery of possession of a messuage (*or as the case may be*) and premises situate at ——.

2. I am in possession of the said (messuage and) premises (or of ——, part of the said premises) by myself, *or* by the above-named defendant C. D., as my tenant. (*If applicant be in possession, as to part by himself, and as to the residue by tenants, state the facts accordingly.*)

Sworn, etc.

No. 145. *Order for Leave to Appear—(Title, etc., as in Writ of Summons.)*

Upon hearing the solicitor for E. F., and upon reading the affidavit of E. F., filed the —— day of ——, 19—: It is ordered that the said E. F. be at liberty to appear to and defend the action, (*If as landlord, add,* as landlord of C. D., the defendant, *or,* one of the defendants named in the writ of summons), and to defend for the property claimed (*or,* for part of the property claimed, *as the case may be*).

Dated the —— day of ——, 19—.

No. 146. *Appearance by a Landlord Not Named in Writ.*

In the High Court of Justice,
Between A. B., . . . plaintiff,
and
C. D. and G. H., . . . defendants.

Enter an appearance for E. F. as landlord of the above-named C. D. (and G. H., *or as the case may be*) pursuant to order of ——, dated the —— day of ——, 19—, (*add if necessary, a statement that the said E. F. limits his defence, etc.*)

Dated, etc.

J. K. (solicitor for the said E. F.)

The said E. F. requires a statement of claim to be delivered.

No. 147. *Notice Of Appearance by Party Not Named in Writ—(Title, etc., as in Writ of Summons.)*

Take notice that pursuant to the order of ——, dated ——, L. L., on the —— day of ——, 19—, entered an appearance to this action (as landlord of the defendant C. D.) (limiting his defence to ——), and required, (*or*, did not require) a statement of claim to be delivered.

Dated ——.

(Signed) X. Y.
Of ———,
Solicitor for the said L. L.

To ———,
Solicitor for the plaintiff.

No. 148. *Notice That Defendant Limits His Defence to Part of the Claim—(Title, etc., of Action as Usual.)*

Take notice that the above-named defendant C. D. limits his defence to part only of the property mentioned in the

writ of summons, namely: (*Describing the property to which the defence is limited with reasonable certainty*).

Dated ———.

(Signed) D. Z.
of ——,
Solicitor for the defendant C. D.

To Mr. X. Y.,
Plaintiff's solicitor.

No. 149. *Confession of Action for Recovery of Land—(Rule 597.)*

In the —— Court of ——

Between A. B., plaintiff,
and
C. D., defendant.

I, the defendant C. D., hereby confess this action (*or*, confess this action as to part of the land claimed, namely: (*describe the part*)).

Dated the —— day of ——, 19—.

C. D.

Witness, E. F.,
Solicitor for the defendant C. D.

No. 150. *Judgment.*

In Default of Appearance in Action for Recovery of Land.
(*Title, etc., of Action as Usual.*)

The —— day of ——, 19—.

No appearance having been entered to the writ of summons herein, it is this day adjudged that the plaintiff recover possession of the land in the indorsement on the writ described as (*describe the property as in the writ*), and $— for his costs of suit as taxed.

No. 151. *Judgment*

In Default of Appearance as to Part of the Land Claimed.
(Title, etc., of Action as Usual.)

The —— day of ——, 19—.

The appearance here having been limited to part only of the land mentioned in the writ of summons, namely: (*describing the part to which the defence is limited*), and no appearance having been entered as to the said part of the said land, it is this day adjudged that the plaintiff recover possession of the said part of the said land, namely: (*describing the part*).

No. 152. *Judgment*

For Recovery of Possession and Rent, Where a Claim for Arrears of Rent Has Been Specially Indorsed on Writ.
(Title, etc., of Action as Usual.)

The —— day of ——, 19—.

No appearance having been entered to the writ of summons herein: It is this day adjudged that the plaintiff recover possession of the land in the indorsement on the writ described as (*describing the property as in the writ*), and also $—— on the said indorsement claimed for arrears of rent, and $—— for taxed costs.

No. 153. *Judgment*

In Default of Appearance by One of Several Defendants.
(Title, etc., of Action as Usual.)

The —— day of ——, 19—.

The above-named defendant C. D. not having appeared to the writ of summons herein: It is this day adjudged that the plaintiff recover against the said defendant C. D. possession of the land in the indorsement on the writ described as, (*insert description*) (but execution hereon is not to issue unless and until judgment has been recovered by the plaintiff against all the defendants herein).

No. 154. *Statement of Claim for Rent Under a Covenant in a Lease.*

The plaintiff's claim is for rent due under a covenant contained in a lease, dated the —— day of ——, 19—, of a house and land called ——, at ——, for —— years, from the —— of ——, 19—, whereby the defendant covenanted with the plaintiff to pay him rent for the said premises during the said term at the rate of $—— a year, by equal quarterly payments, on the —— (*or, as the case may be*).

The plaintiff claims $——.

No. 155. *Statement of Claim for Rent of Furnished House.*

1. By lease by deed (or agreement in writing, or as the case may be), the plaintiff let (or it was agreed between the plaintiff and the defendant that the defendant should let) to the defendant the house and land known and described as No.— on —— street in the —— of ——, with the furniture and effects which then were in the said house (or as set forth in a schedule annxed to said lease or agreement or as the case may be), for the period of —— months at the rent of $—— per month, payable monthly (*as the case may be*).

2. The defendant pursuant to said lease (or agreement) entered into possession of the said house and land with all the said furniture and effects, and paid the plaintiff the sum of $——, for the rent of the first month, but has not paid the rent due for the month of —— (*as the case may be*).

The plaintiff claims $—— and costs.

No. 156. *Statement*

Of Claim for Rent and Royalty on Lease of Colliery, and for Breach of Covenant to Work It in a Miner-like Manner.

1. By a lease under seal from the plaintiff and A. B. to J. S., dated the —— 18—, of the —— colliery, in the county of ——, for —— years from the —— day of

——, J. S. covenanted with the plaintiff and A. B. as follows:—

(1) To pay a yearly minimum or dead rent of $——, payable by instalments on the usual quarter day, and a yearly rent or royalty of $—— per foot of thickness for every statute acre surface measure of coal worked or gotten during the time after the first 150 feet.

(2) To work and get the coal in a usual and miner-like manner.

2. On November 1, 18—, A. B. died.

3. On November 7, 18—, J. S. assigned to the defendant.

4. $300 is now due by the defendant for dead rent, and $174 for royalties.

5. The defendant has worked the mine, but not in a usual or miner-like manner. He has improperly taken coal from the main engine dip, and neglected to leave proper pillars and supports in the dip and headings, so that the walls of the mine have fallen in, and the distant parts of the mine have been closed. In July, 18—, the defendant negligently allowed a fire to break out in the mine, and improperly flooded the mine with water.

The plaintiff claims:—

(1) $474 for rent and royalties, and interest until payment or judgment; and

(2) $5,200 damages for the defendant's negligence and breach of covenant.

No. 157. *Statement of Defence to Foregoing.*

The defendant says:—

1. The defendant assigned the lease and demised premises to C. D. by deed dated the —— day of ——, 18—.

2. The defendant has paid to the plaintiff all the dead rent and royalties accrued due up to the —— day of ——, 18—.

3. Nothing is now due by the defendant to the plaintiff for dead rent or royalties.

4. The defendant denies that he worked the mine in an unusual, or not in a miner-like manner, or that he has improperly or at all taken coal from the main engine dip, or

neglected to leave proper pillars and supports in the dip and headings, or that in consequence, or at all, the walls of the mine, or any of them, have fallen in, or the distant parts of the mine, or any of them, been closed, or that in July, 18—, or at any other time, he negligently, or at all, allowed a fire to break out in the mine, or that he improperly, or at all, flooded the mine with water.

No. 158. *Statement of Claim for Use and Occupation of Land.*

1. The defendant has by the permission of the plaintiff used and occupied a house and land of the plaintiff known and described as —— No.— on —— street in the city of ——, from the —— day of —— 19—, to the —— day of ——, 19—.

2. No express agreement was made between the plaintiff and the defendant as to the amount to be paid by the defendant for the use and occupation of the said house and land, but the fair and reasonable value of the use and occupation by the defendant of the said house and land is the sum of $——.

((*Or, where an agreement has been made*:) It was on the —— day of ——, 19—, (*if so*, by agreement in writing), agreed between the plaintiff and the defendant that the defendant should pay to the plaintiff the sum of $—— per month (*or as the case may be*) for the use and occupation of said house and land).

3. The defendant has not paid the plaintiff anything for such use and occupation.

The plaintiff claims $—— and his costs.

No. 159. *Statement of Claim Against Overholding Tenant for Double Rent.*

1. The defendant until the —— day of ——, 19—, was tenant to the plaintiff of a messuage and land as tenant from year to year at a yearly rent of $——, payable quarterly.

2. The defendant on the —— day of ——, 19—, duly gave to the plaintiff notice of his intention to quit the said premises at a time mentioned in such notice, namely, on the —— day of ——, 19—.

3. The defendant did not at the said time mentioned in such notice deliver up possession of the said messuage and land to the plaintiff, but continued in possession thereof until the —— day of ——, 19—.

4. Double rent of the said messuage and land during the said period between the —— day of ——, 19—, (*time named in notice*) and the —— day of ——, 19—, (*time of delivery of possession*) amounts to the sum of $——, which said sum is still wholly due to the plaintiff and unpaid.

The plaintiff claims $—— and costs of this action.

(*If the defendant is still in possession when the action is brought, a claim for delivery of possession should be added*).

No. 160. *Statement of Claim Against Overholding Tenant for Double Value.*

1. (*State tenancy and its termination as in previous form.*)

2. After the —— day of ——, 19—, (*date when the tenancy terminated*) namely, on the —— day of ——, 19—, the plaintiff as and being the defendant's landlord as aforesaid and the person to whom the reversion of the said messuage and land then belonged (by his agent thereto lawfully authorized) made a demand upon and gave notice in writing to the defendant for delivery to the plaintiff of the possession of the said messuage and land.

3. The defendant did not in accordance with such demand and notice deliver possession of the said messuage and land to the plaintiff, but wilfully held over the same and kept the plaintiff then being entitled to the possession of the land out of the possession thereof (until the —— day of ——, 19—.)

4. Double the yearly value of such messuage and land for the period from the (*date of termination of tenancy*) until the said (*date of delivery*), amounts to the sum of

$——, which said sum is still wholly due to the plaintiff and unpaid.

The plaintiff claims $—— and costs.

(*Or where possession has not been delivered up before action.*)

4. Double the yearly value of such messuage and land amounts to the sum of $——, and the defendant has not paid such double value nor any part thereof for the time he has retained possession of the said premises since the termination of the said tenancy.

The plaintiff claims:

1. The double value of the said premises from the termination of the said tenancy until the plaintiff shall recover possession of the premises.

2. Delivery of possession.

3. His costs of this action.

No. 161. *Statement Of Claim for Permissive Waste in a Dwelling-house Against a Tenant for Years, Bound by the Terms of His Tenancy to Repair.*

The plaintiff has suffered damage from the defendant wrongfully permitting waste to a dwelling-house, known as ——, whereof he was tenant to the plaintiff, by suffering the same to become ruinous and in decay in the roof, walls and timbers thereof for want of such needful and necessary repairing thereof as the defendant by the terms of his said tenancy was bound to do and effect.

Particulars:—

(The tenancy was under a lease dated ——, for —— years from the —— day of ——, 18—, *or, as the case may be.* The defects are as follows: *stating the same, and giving such other particulars as the nature of the case may require.*)

No. 162. *Statement*

Of Claim for Voluntary or Commissive Waste in a Dwelling-house.

The plaintiff has suffered damage by the defendant wrongfully committing waste in a dwelling-house known as ——, at ——, whereof he was tenant to the plaintiff under a tenancy from year to year (or, for a term of —— years from the —— of ——, 19—, *or, as the case may be*), by pulling down and removing the doors, windows, and fixtures belonging to the same and affixed thereto, and carrying away the said doors, windows, and fixtures and disposing of the same to his own use.

Particulars:—

No. 163. *Statement of Claim for Breach of Covenant to Repair.*

1. By repairing a covenant contained in a lease under seal from the plaintiff to the defendant, dated the —— day of ——, 19—, of a house being, etc., for —— years from the —— day of ——, 19—, the defendant covenanted to keep the premises in such repair and condition as therein mentioned.

2. The premises were, during the term, out of such repair as was acquired by the covenant.

3. They were yielded up out of such repair at the expiration of the term.

Particulars of dilapidations were delivered to the defendant's solicitor on the —— day of ——, 19—, and exceeded three folios.

The plaintiff claims $—— damages.

No. 164. *Statement*

Of Claim for Not Delivering Up Fixtures Upon the Premises in Good Repair.

1. The defendant became and was tenant to the plaintiff of a house of the plaintiff, No. ——, —— street, for a term of —— years, from the —— of ——, 19—, upon the

terms (amongst others) that the defenant should, at the expiration of the said term, deliver up to the plaintiff the said house, with all the fixtures therein, in the same state and condition as they were in at the commencement of the said term, reasonable wear and tear only excepted.

2. The defendant, at the expiration of the said term, delivered the said house up to the plaintiff, but did not deliver up to him the fixtures therein in the same state or condition as they were in at the commencement of the said term, reasonable wear and tear only excepted.

Particulars:—

The said terms were contained in an agreement bearing date the —— of ——, 19—, (*or, as the case may be.*)

The said term expired on the —— of ——, 19—, by effluxion of time (*or, as the case may be.*)

The following fixtures were broken or damaged:—

(*State same, specifying, as far as practicable, the extent and amount of damage.*)

No. 165. *Statement of Claim for Breach of Covenant for Quiet Enjoyment.*

1. By an indenture of lease under seal dated the —— day of ——, 19—, (made pusuant to the Act respecting Short Forms of Leases) the defendant demised to the plaintiff a certain dwelling-house, messuage of tenement known as (*describing it*) for the term of —— years, subject to the covenant and stipulations therein contained.

2. The defendant thereby covenanted with the plaintiff that the plaintiff paying the rent thereby reserved and performing the covenants in said lease, on his part contained should peaceably possess and enjoy the said demised premises for the said term without any interruption or disturbance from the lessor, his heirs, executors, administrators or assigns or any other person or persons lawfully claiming by, from, or under him, them or any of them.

3. The defendant at the time of the making of the said lease had not power to demise the said demised premises to the plaintiff and by reason thereof on the —— day of ——, 19—, one A. B., lawfully claiming the said demised

premises (*state the ground of the claim of A.B.*) entered thereon and evicted the plaintiff.

4. By reason of such eviction the plaintiff lost the use and occupation of the said demised premises and the profits of the business which he then was carrying on upon the said premises, and was put to great expense in providing himself with other premises and in removing his goods thereto.

The plaintiff claims $——.

No. 166. *Statement*

Of Claim by Lessor Against Assignee of a Lease Upon a Covenant in the Lease.

1. The plaintiff, by a deed dated the —— of ——, 19—, let to G. H. a messuage situate at ——, to hold for —— years from the —— of ——, 19—, and by the said deed the said G. H. covenanted for himself and his assigns with the plaintiffs that (*state the covenant.*)

2. By a deed dated the —— of ——, 19—, the said G. H., being then possessed of the said term for the portion thereof then unexpired, assigned to the defendant all of the estate of him, the said G. H., in the said term.

3. Afterwards, during the said term, the defendant (*state breach, giving particulars.*)

No. 167. *Statement of Claim by Lessor Against Executor of Lessee.*

1. (*As in paragraph 1 of the preceding form.*)

2. Afterwards, during the said term, on the —— of ——, 19—, the said G. H. died, having by his last will appointed the defendant his executor.

3. During the said term and before the death of G. H. (*state such breaches as occurred in the lifetime of G. H., giving particulars.*)

No. 168. *Statement of Claim by Lessee Against Assignee of Lease.*

The plaintiff's claim is for $——, payable to him by the defendant, for money paid by him for the defendant to A. B. at the defendant's request.

Particulars:—

The request is implied from the circumstances following:—

The plaintiff became tenant to A. B. of a house, No. ——, —— street, ——, under a lease which contained a covenant by the plaintiff to pay A.B. rent therefor during the term thereby granted at the rate of $—— a year, payable by equal quarterly payments on the ——.

The plaintiff, by deed bearing date the —— of ——, 19—, assigned the said term to C. D., and afterwards it became by assignment vested in the defendant. Whilst it was so vested in the defendant, and during the continuance of the said term, the plaintiff was compelled to pay $——, being the said quarterly payments to the said A. B. for the quarters ending ——, and —— 19—, and paid the same.

The plaintiff claims $——.

No. 169. *Statement Of Claim by Executor of Lessor Possessed of a Term Against Lessee.*

1. The plaintiff is the executor of the last will of G. H. deceased.

2. The said G. H., being possessed of a farm called ——, in the county of ——, for a term of years more than sufficient to enable him to make the lease hereinafter mentioned, by deed dated the —— of ——, 19—, let to the defendant the said farm to hold for —— years from the —— of ——, 19—, and the defendant by the said deed covenanted with the said G. H. (*state the covenant.*)

3. During the said term and during the lifetime of the said G. H., the defendant (*similarly state the breaches which occurred after the death.*)

No. 170. *Statement of Claim by Assignee of Lessor Against Lesee.*

1. G. H. being seized in fee (or, possessed for the residue of a term of —— years, commencing the —— of ——, 19—), of a messuage and land situate at ——, let the same by deed bearing date the —— of ——, 19—, to the defendant to hold for —— years from the —— of ——, 19—.

2. The defendant, by the said deed, covenanted with the said G. H. and his assigns that (*state the covenant.*)

3. Afterwards, and during the said term, the said G. H., by a deed bearing date the —— of ——, 19—, granted and assigned all his reversion of and in the said messuage and land to the plaintiff.

4. Afterwards, and during the said term, the defendant (*state breach, giving such particulars as to date, etc., as are practicable.*)

No. 171. *Statement*

Of Claim to Recover Possession of the Premises From the Tenant and Double Value for Holding Over.

1. The plaintiff is entitled to the possession of a farm and premises, being lot, etc., in the —— of ——, in the county of ——, which were let by the plaintiff to the defendant for the term of three years from the 29th of September, 19—, at the yearly rent of 300, which term has expired (*or* as tenant from year to year from the 29th of September, 19—, at the yearly rent of $300, which said tenancy was duly determined by notice to quit expiring on the 29th of September, 19—.

2. On the 29th of September, 19—, the plaintiff made demand and gave notice in writing to the defendant pursuant to the statute 4 Geo. II., ch. 28, for delivering possession of the demised premises to the plaintiff, but the defendant wilfully holds over and still keeps the plaintiff out of possession of the demised premises.

3. The yearly value of the demised premises is $400.

The plaintiff claims:—

(1) Possession.

(2) Double the yearly value so long as the defendant continues to hold over, calculated from the 29th of September, 19—.

No. 172. *Statement of Claim.*

Landlord Against Tenant to Recover Possession on a Forfeiture for Non-payment of Rent.

1. The plaintiff by deed dated the —— of ——, 19—, let to the defendant a messuage and premises known as ——, at ——, for a term of —— years from the —— of ——, 19—, at the yearly rent of $——, payable quarterly on the usual quarter days.

2. The said deed contained a clause of re-entry entitling the plaintiff to re-enter upon the said messuage and premises in case the said rent should be in arrear for 21 days.

3. On the —— day of ——, 19—, a quarter's rent became due, and on the —— of ——, 19—, both had been in arrears for 21 days, and both are still due.

4. Before the writ in this action was issued or served, the said two quarters' rent, making one-half year's rent, was due, and no sufficient distress was to be found on the said messuage and premises countervailing the said arrears of rent then and still due.

The plaintiff claims possession of the said lands and his costs of action.

No. 173. *Statement of Claim.*

To Recover Possession Upon a Forfeiture for Breach of Covenant to Repair, With Claims for Damages for Breach of Covenant, for Arrears of Rent, and for Mesne Profits.

1. On the —— of ——, 19—, the plaintiff, by deed, let to the defendant a house and premises, No. ——, ——

street, ——, for a term of —— years, from the —— of ——, 19—, at the yearly rent of $——, payable quarterly on ——.

2. By the said deed the defendant covenanted to pay the said rent to the plaintiff at the times aforesaid and to keep the said house and premises in good and tenantable repair (*or as the case may be*).

3. The said deed also contained a clause of re-entry, entitling the plaintiff to re-enter upon said house and premises, in case the rent thereby reserved, whether legally demanded or not, should be in arrear for 21 days, or in case the defendant should make default in the performance of any covenant upon his part to be performed.

4. On the —— of ——, 19—, a quarter's rent became due, and on the —— of ——, 19—, the same had been in arrears for 21 days; and the said rent is still due and unpaid.

5. On the —— of ——, 19—, the house and premises were not, nor are they now, in good or tenantable repair, and the plaintiff as such lessor thereupon (on the said last-mentioned day) served on the defendant a notice specifying the particular breach of the aforesaid covenant complained of, and requiring the defendant to remedy such breach, and requiring him to make compensation in money for such breach.

6. A reasonable time for the defendant to have remedied such breach, which was capable of remedy, and to have made reasonable compensation in money to the satisfaction of the plaintiff for the said breach, elapsed before this action, but the defendant has not remedied the said breach, nor has he made such or any compensation for the said breach.

7. The particulars of the breach to repair exceed three folios, and were delivered to the defendant's solicitor on the —— of ——, 19— (*or* as follows).

The plaintiff claims:

(1) Possession of the said house and premises.

(2) $—— for the said arrears of rent.

(3) $—— damages for the said breach of covenant to repair.

(4) $—— for mesne profits.

No. 174. *Statement of Claim.*

To Recover Possession Where the Tenancy Has Expired or Been Determined by Notice to Quit and for Mesne Profits.

1. The plaintiff is entitled to the possession of a farm and premises (*describing it*), which was let by the plaintiff to the defendant for the term of three years from the —— of ——, which term has expired (*or,* as tenant from year to year from the —— day of ——, which tenancy was duly determined by notice to quit expiring on the —— day of ——, 19—).

The plaintiff claims possession and $50 for mesne profits.

No. 175. *Statement of Claim.*

For Possession—Breach of Covenant—Damages for Breach of Covenant—Arrears of Rent.

1. On the —— day of —— the plaintiff, by deed, let to the defendant a house and premises, No. ——, —— Street, in the City of ——, for a term of 21 years from the —— day of ——, at the yearly rental of $——, payable quarterly.

2. By the said deed, the defendant covenanted to keep the said house and premises in good condition and tenantable repair.

3. The said deed also contained a clause of re-entry, entitling the plaintiff to re-enter upon the said house and premises, in case the rent thereby reserved, whether demanded or not, should be in arrear for twenty-one days, or in case the defendant should make default in the performance of any covenant upon his part to be performed.

4. On the ——, a quarter's rent became due; and on the ——, another quarter's rent became due. On the —— both had been in arrears for twenty-one days, and both are still due.

5. On the same, the houses and premises were not, and are not now in good or tenantable repair, and it would re-

quire the expenditure of a large sum of money to reinstate the same in good and tenantable repair, and the plaintiff's reversion is much depreciated in value.

The plaintiff claims:

(1) Possession of the said house and premises.

(2) $—— for arrears of rent.

(3) $—— damages for the defendant's breach of his covenant to repair.

(4) $—— per month for occupation of the house and premises from the ——, to the day of recovering possession.

(5) His costs of action.

No. 176. *Statement of Claim.*

By Landlord to Recover Possession—Tenancy Determined.

1. On the —— day of ——, the plaintiff let to the defendant a house, No. ——, —— Street, in the City of ——, as tenant from year to year, at the yearly rent of $420, payable quarterly, the tenancy to commence on the —— day of —— (or for —— years from the —— day of ——, 19—, under a lease by deed dated ——).

2. The defendant took possession of the said house and continued tenant thereof until the —— day of —— last (when the tenancy determined by a notice duly given, or when the said term expired by effluxion of time).

3. (*Where tenancy determined by notice.*) The defendant has disregarded the said notice and still retains possession of the house.

The plaintiff claims:

(1) Possession of the house.

(2) $—— for mesne profits from the —— day of ——.

(3) His costs of this action.

No. 177. *Defence and Counter-claim to Foregoing Claim.*

The defence and counter-claim of above-named C. D.

1. Before the determination of the tenancy mentioned in the statement of claim, the plaintiff, A. B., by writing dated the —— day of ——, and signed by him, agreed to

grant to the defendant, C. D., a lease of the house mentioned in the statement of claim, at the yearly rent of $——, for the term of 21 years, commencing from the —— day of ——, when the defendant, C.D.'s, tenancy from year to year determined, and the defendant has since that date been and still is in possession of the house under the said agreement.

2. By way of counterclaim the defendant claims to have the agreement specifically performed, and to have a lease granted to him accordingly.

No. 178. *Statement of Claim.*

For Taking an Excessive Distress.

1. The plaintiff has suffered damage by the defendant levying an excessive and unreasonable distress upon the goods of the plaintiff at No. ——, —— Street, whereof he was tenant to the defendant at a certain rent, for alleged arrears of the same rent contrary to the statute in such case made and provided.

2. The said goods were of much greater value than the amount of the said arrears and of the charges of the said distress and of the sale thereunder, and a part of them of sufficient value to have satisfied the said arrears and charges might then have been distrained by the defendant for the same.

Particulars.

Rent distrained for, $——.

Charges of distress and sale, $——.

Value of goods distrained, $——

No. 179. *Statement of Claim.*

For Refusing to Restore Goods Distrained on Tender of the Rent and Charges Before Impounding.

1. The plaintiff has suffered damage by the defendant, to whom the plaintiff was tenant of a farm at ——, wrongfully refusing to restore to the plaintiff certain goods of the plaintiff which the defendant had distrained for arrears of rent of the said farm.

2. Whilst the defendant was in possession of the plaintiff's goods under the said distress and before the impounding thereof, the plaintiff tendered to the defendant the said arrears of rent and the charges of the said distress, and requested the defendant to restore to the plaintiff his said goods, but the defendant wrongfully refused to restore the same to the plaintiff.

Particulars:—

No. 180. *Statement of Claim.*

For Distraining Beasts of the Plough.

The plaintiff has suffered damage by the defendant, to whom the plaintiff was tenant of a farm at ——, wrongfully distraining upon the said farm, and holding as a distress the plaintiff's beasts of the plough wherewith he tilled his said farm at a time when the defendant could and ought to have found on the said farm other distrainable goods sufficient to satisfy the rent distrained for and all charges consequent upon such distress.

No. 181. *Statement of Claim.*

For Distraining Twice for the Same Rent.

1. The plaintiff was tenant to the defendant of a house No. ——, —— Street, ——, at a yearly rent of $——, payable half-yearly by equal payments on the 24th of June and the 25th of December in each year.

2. The defendant, on the —— of ——, 19—, distrained certain goods of the plaintiff in the said house as a distress for (one half year's) arrears of the said rent.

3. At the time of making the said distress there were in the said house goods of the plaintiff liable to the said distress of more than sufficient value to have satisfied the said arrears and the charges of a distress for the same and of the sale thereof, and which the defendant could then have distrained to satisfy the same, of which the defendant then had notice.

4. The defendant afterwards, on the —— of ——, 19—, wrongfully made a second distress on certain goods of the plaintiff in the said house for the same arrears of rent for which the first-mentioned distress was made as above stated, and for the charges of such second distress.

No. 182. *Statement of Claim.*

For Distraining and Selling Where no Rent was Due, to Recover Double Value of Goods Sold—Under 2 *W. & M. sess.* 1, *c.* 5, *s.* 5.

1. The plaintiff was tenant to the defendant of a messuage known as ——, at ——, at a certain rent, and the defendant, when none of the said rent was due or in arrear, wrongfully distrained in the said messuage certain goods of the plaintiff as a distress for pretended arrears of the said rent, and wrongfully sold the said goods as such distress.

2. The plaintiff claims to recover from the defendant, by virtue of the statute in such case made and provided, double the value of the said goods so distrained and sold as aforesaid.

Particulars:

The distress was levied on the —— of ——, 19—.

The value of the goods distrained was $—— .

The sale took place at ——, on the —— of ——, 19—.

The goods were as follows: (*Describe the goods so far as practicable.*)

No. 183. *Statement of Claim.*

For Not Selling for the Best Price (*Under* 2 *W. & M. sess.* 1, *c.* 5, *s.* 2.)

The plaintiff has suffered damage by the defendant wrongfully selling goods of the plaintiff which the defendant had distrained for rent due in respect of (*describe the premises*), of which the plaintiff was tenant to the defendant, for less than the best price that could be gotten for the same, contrary to the statute in such case made and provided.

Particulars: (*Here state the special damage, etc.*)

No. 184. *Statement of Claim.*

For Selling Without the Statutory Notice.

The plaintiff has suffered damage by the defendant, to whom the plaintiff was tenant of the house No. ——, —— Street, ——, at a certain rent, wrongfully selling goods of the plaintiff which the defendant had distrained for rent due in respect of the said house, without notice of the said distress and of the cause of making the same having been given to the plaintiff or left at the said house (five) days before sale of the said goods, contrary to the statute in such case made and provided.

Particulars: (*State particulars of special damage, etc.*)

No. 185. *Statement of Claim.*

For Pound-breach, Claiming Treble Damage (Under 2 W. & M. sess. 1, c. 5, s. 4).

The plaintiff has suffered damage by the defendant (on the —— of ——, 19—) breaking a pound on the premises known as ——, wherein certain goods distrained by the plaintiff for rent due to him as the lessor of the said premises had been and were impounded by him, and then wrongfully seizing and carrying away the said goods, whereby the plaintiff lost the benefit of the said distress, and has sustained $—— damages.

Particulars:

The plaintiff claims under the statute in such case made and provided, treble the amount of the said damages.

No. 186. *Statement of Claim—Replevin.*

1. On or about the —— day of ——, 19—, the defendants wrongfully and unlawfully caused a distress to be levied upon the plaintiff's goods and chattels in or upon the house and premises known as No. ——, and situate in ——, in the County of ——, in respect of certain rent which the defendants falsely alleged to be due from the plaintiff in respect of said house and premises.

2. Under cover of such distress the defendants wrongfully took the plaintiff's said goods and chattels, that is to say (*describing them*), and unjustly retained the same until the plaintiff replevied them and gave and found security to commence and prosecute this action for the return of the goods and chattels, if the return of them shall be awarded.

3. By reason of the premises the plaintiff has suffered damage (*any special damage may be mentioned*).

The plaintiff claims $—— and the costs of this action.

No. 187. *Statement of Defence.*
Replevin—Rent in Arrear.
(*Formal Parts.*)

1. The plaintiff held, and still holds, the said premises as tenant to one J. S., at a yearly rental of $——, payable quarterly.

2. On the —— day of ——, 19—, $—— of the said rent was and the said amount still is due and in arrear from the plaintiff to the said J. S.

3. On the said —— day of ——, 19—, the said J. S. appointed the defendant his bailiff to distrain on the goods upon the said premises for the said arrears of rent, and the defendant accordingly took the goods mentioned in the plaintiff's statement of claim as a distress for the said rent.

No. 188. *Statement of Defence*
Setting Up Statute of Limitations.

1. The plaintiff's claim is barred by the Statute of Limitations (21 Jac. I. c. 16) (*or in action for the recovery of land,* by The Real Property Limitation Act).

No. 189. *Statement of Defence.*
Setting up Statute of Frauds.
(*Formal Parts.*)

1. The defendant says that there is no memorandum in writing sufficient to satisfy the Statute of Frauds of the agreement alleged in the plaintiff's statement of claim to have been made between the plaintiff and the defendant.

No. 190. *Notice of Motion.*

For Better Particulars of the Property Claimed.

(*Formal parts as usual*) for an order that the plaintiff deliver to the defendant better particulars of the property claimed herein; that in the meantime all further proceedings herein be stayed; and that the costs of this application be ——.

No. 191. *Notice of Motion.*

For Better Particulars of the Property Defended.

Formal parts as usual) for an order that the defendants (or defendant C. D.) do within three days deliver to the plaintiff better particulars of the property for which they defend (or he defends); and that, in default of such particulars being so delivered, the appearance (or the notice by the defendant (or the said C. D.) limiting his defence, dated ——) be set aside, and that the costs of this application be ——.

No. 192. *Particulars of Breaches of Covenant, etc., on a Forfeiture.*

(*Court and Style of Cause.*)

The following are the particulars of the breaches of covenant for which this action is brought, viz.: The non-payment of for —— quarter's (or, "half-year's") rent due on the —— day of —— last: The not repairing (*etc., as in the covenant for repairs, but specifying the non-repairs with sufficient particularity to inform the defendant of them*); The not insuring the premises between the —— day of ——, A.D., ——, and —— (*So proceed to state shortly any other breach of covenant in respect of which the action is brought*).

The above particulars are delivered pursuant to the order of ——, dated ——.

Dated ——.

Yours, etc.,

To Mr. D. Z.,
Defendant's solicitors (or "agent").

X. Y., Plaintiff's solicitor (or "agent").

SECTION IX.

MISCELLANEOUS FORMS.

No. 193. *Power of Attorney to Execute a Lease.*

TO ALL to whom these presents shall come I (*appointor*) of, etc., send greeting:

WHEREAS, I have agreed with (lessee) of, etc., to grant a lease to him of a certain messuage or tenement and premises situated at ——, in the County of ——, for the term of —— years, at the yearly rental of —— for premium of ——.

AND WHEREAS (being about to leave the Province of ——) I am desirous of authorising (*attorney*) of, etc., to complete the said contract on my part and to execute the proper conveyances and assurances thereof.

NOW KNOW YE that I, the said (appointer) hereby irrevocably appoint the said (attorney) to be my lawful attorney for (three) months from the date hereof for me and in my name, and for my use to perform the following acts:

1. (To demand and receive from the said (lessee) or his assigns the said premium of —— and to give a good receipt for the same, which receipt shall exonerate the person paying such money from seeing to the application thereof or being responsible for the loss or misapplication thereof.)

2. (Upon the receipt of the said premium) as my act and deed to seal, deliver and execute unto the said (lessee), his executors, administrators and assigns, a good, valid and effectual lease of the said messuage or tenement and premises for the term of —— years, under the clear yearly rent of ——, payable quarterly, and with such covenants

and provisos and agreements as are usual in leases between landlord and tenant, or as the said (attorney) shall think necessary or proper to be inserted.

AND I, the said (appointer), hereby declare that all and every the receipts, deeds, matters and things which shall be by him, my said attorney, given, made, executed or done for the aforesaid purposes, shall be as good, valid and effectual to all intents and purposes whatsoever, as if the same had been signed, sealed and delivered, given or made or done by me in my own proper person.

AND I hereby undertake from time to time and at all times, to ratify and confirm whatsoever my said attorney shall lawfully do or cause to be done in or concerning the premises by virtue of these presents.

IN WITNESS, etc.

(Signature and Seal of Appointor.)

No. 194. *Power of Attorney.*

To Demand Rent, and in Default of Payment to Re-enter, According to a Proviso for Such Re-entry in a Lease.

KNOW ALL MEN by these presents that I (*appointor*) of, etc., hereby appoint (*attorney*), of, etc., my true and lawful attorney for me and in my name and stead to do the following acts and things or any of them, that is to say:

1. To demand and receive from (*tenant*) of, etc., on or after the —— day of —— next the sum of ——, which will become due to me from the said (*tenant*) on that day for one half-year's rent for the messuage, lands and tenements which by an indenture of lease dated the —— day of ——, were by me demised unto the said (*tenant*) for a certain term of years yet unexpired.

2. In default of payment of the said sum of —— to enter into and upon the said messuage and premises and take possession of the same to the intent that the said indenture of lease may become void according to a certain proviso for that purpose therein contained.

3. Generally to execute and perform all things requisite and necessary to be done in and about the execution of these presents according to the true intent and meaning thereof.

IN WITNESS, etc.

(Signature and Seal of Appointor.)

No. 195. *Attornment.*

In the High Court of Justice:

BETWEEN A. B., Plaintiff,
and
C. D. and E. F., Defendants.

We, whose names are hereunto subscribed, being respectively the tenants in possession of the premises for which this action has been brought, situate in the —— of ——, in the County of ——, do hereby severally attorn and become tenants to A. B., of ——, for such parts of the said premises as are in our respective possessions, for the term and terms, and subject to the rent and rents, and to the several stipulations and conditions under which we now respectively hold the said parts of the said premises so in our respective possession as aforesaid, and we have this day severally paid unto the said A. B. the sum of one dollar each upon such attornment, on account of and in part payment of the ren tdue, and to become due from us, severally and respectively, for and in respect of the said premises, and we do severally and respectively become tenants thereof to the said A. B., from the —— day of ——.

AS WITNESS our hands this —— ay of ——, 19—.

C. D.
E. F.

WITNESS W. W.

No. 196. *Attornment.*

To a Receiver or to a Purchaser.

I, C. D., of ——, farmer, do hereby, with the privity and consent of A. B., my landlord, and of his mortgagee, N. M. (whose mortgage is become forfeited) testified by

their respectively signing their names in the margin hereof. attorn and become tenants to R. R., of ——, gentleman, of all that farm and messuage, lands) and premises mentioned in the schedule hereunder written, with the appurtenances, as the same are now in my tenure or occupation, to hold the same at and under the same rent, and subject to the same (covenants and conditions or stipulations, agreements and conditions) as those under which I now hold the same: And I have this day paid to the said R. R. the sum of —— for and on account and in part payment of the said rent.

As WITNESS, my hand, this —— day of ——, 19—.

The schedule above mentioned.

All that (*describe the property*).

(Signed) C. D.

WITNESS, E. F., of ——.

Received of Mr. C. D. the sum of —— as above mentioned.

(Signed) R. R.

WITNESS, E. F.

No. 197. *Acknowledgement*

Of Title to Bar the Statute of Limitations.

I, A. B., now in possession (or "in receipt of the profits," as the case may be) of the messuage (or "farm, land," etc.) and premises, with the appurtenances, at ——, in the —— of ——, in the County of —— (*it may prevent dispute to describe the property here more particularly*) hereby acknowledge that I am in possession (or, "in receipt," etc.) by the sufferance and subject to the title of C. D., the person really entitled to the possession (or, "the receipt," etc.) of the said premises: And I give this acknowledgment with the intent that my possession (or "receipt," etc.) of the said premises may be deemed to be the possession of (or, "the receipts of the profits by") the said C. D., so as to preserve his, the said C. D.'s, right of entry into the same, according to the intent of the statute in that behalf provided.

Dated, etc.

(Signed) A. B.

To Mr. C. D.:

No. 198. *Consent of Owner*

To Alterations Being Made in Leased Premises.

I, the undersigned A. B., of ——, being the owner of the lands and premises described in a certain lease dated the —— day of ——, 19—, and made between me, the said A. B., of the one part, and C. D., of ——, of the other part, subject to the terms thereby granted (which lands and premises as to the part known as ——, are now vested in E. F., of ——, by virtue of an assignment of lease dated the —— day of —— 19—, and made between the said C. D. and the said E. F.), do hereby consent to the alterations to be made in (the front elevation of) the said premises described in the said lease, as shewn on the plan and elevation drawing (hereto annexed).

PROVIDED that all covenants and conditions contained in the said lease (and assignment) shall, so far as applicable, be considered to apply henceforth to the alteration hereby consented to and authorized, as well as to all matters and things mentioned or comprised in the said lease (and assignment. *(Here insert any special provisions and stipulations necessitated by the particular form of the original lease, care being taken to provide for the event of the insurance on the property being affected by the change in tenancy or by alteration of the premises.)*

WITNESS my hand this —— day of ——, 19—.

No. 199. *Agreement*

By a Lessee With His Landlord for Apportionment of the Rent With a View to the Sale of the Reversion in Lots.

THESE PRESENTS are made the —— day of ——: Between (tenant) of, etc., (hereinafter called the tenant), of the one part, and (landlord) of, etc., (hereinafter called the landlord), of the other part.

WHEREAS, by an indenture of lease dated the —— day of ——, and made between the landlord of the one part and the tenant of the other part in consideration of the rent and covenants therein reserved and contained, the landlord demised unto the tenant the several pieces of land therein de-

scribed for the term of ninety-nine years from the date thereof, at the yearly rent of ——.

AND WHEREAS the tenant has built —— houses on the said demised premises, which are now known by the several short descriptions set forth in the schedule hereto.

AND WHEREAS the landlord contemplates selling the fee simple and inheritance of and in the said houses (subject to the said lease) separately in lots, either by public auction or private contract, and desires to apportion the said yearly rent among the said houses in manner hereinafter appearing, and the tenant has consented thereto.

NOW THESE PRESENTS WITNESS that it is hereby mutually agreed that the said rent of —— reserved by the said indenture of lease shall be apportioned in manner following, that is to say: —— part thereof shall henceforth issue and be payable exclusively out of so much of the said demised hereditaments as are shortly described in the first part of the schedule hereto; —— further part thereof shall henceforth issue and be payable exclusively out of so much of the said hereditaments as are shortly described in the second part of the said schedule, and —— residue thereof shall henceforth issue and be payable exclusively out of so much of the said hereditaments as are shortly described in the third part of the said schedule.

IN WITNESS, etc.

(Signatures and seals of both parties.)

THE SCHEDULE above referred to.

No. 200. *Apportionment of Rent.*

Reserved on a Lease on Severance of the Lessee's Estate, the Landlord being a Party.

THIS INDENTURE is made the —— day of ——: Between (landlord) of, etc., of the first part (lessee) of, etc., of the second part; (first purchaser of, etc., of the third part, and (second purchaser) of, etc., of the fourth part.

WHEREAS by an indenture of lease dated the —— day of ——, and made between the said (landlord) of the one part, and the said (lessee) of the other part, the heredita-

ments described in the first and second schedules hereto were demised by the said (landlord) unto the said (lessee) for the term of —— years from the date thereof at a yearly rent of $——.

AND WHEREAS the said (lessee) has agreed with the said (first purchaser) for the sale to him of the hereditaments described in the first schedule hereto, and has likewise agreed with the said (second purchaser) for the sale to him of the hereditaments described in the second schedule hereto, subject, nevertheless, as to both the said hereditaments to the provisions of the said indenture of lease, but so that the said yearly rent of $—— should be apportioned in manner hereinafter appearing.

AND WHEREAS such agreements as aforesaid were expressed to be conditional upon the said (landlord) consenting to such apportionment, and for that purpose joining in these presents which the said (landlord) at the request of the said (lessee) has agreed to do.

NOW THIS INDENTURE WITNESSETH that it is hereby agreed between the several parties hereto as follows, that is to say:—

1. The said yearly rent of $——, reserved by the said recited lease shall be apportioned in such manner that there shall be payable out of the hereditaments described in the first schedule hereto the yearly sum of $——, and no more, and out of the hereditaments described in the second schedule hereto, the yearly sum of $——, and no more, during the remainder of the term of —— years created by the said indenture of lease as aforesaid.

2. The apportionment hereby made shall be binding upon the said (landlord), his heirs and assigns, and shall operate and enure for the benefit of the said (lessee), his executors, administrators and assigns, but so that the same shall take effect only upon completion of the said purchase, and should the same for any reason whatsoever fail to be completed before the —— day of —— next, then the apportionment hereby made shall be of no effect.

3. Save as aforesaid, nothing herein contained shall be deemed to affect prejudicially any of the rights, powers or remedies which by law or by the said indenture of the —— day of ——, or otherwise are conferred upon the said

(landlord), his heirs or assigns, in respect of the said yearly rent, but the same rights and remedies shall continue in full force and shall extend and apply to the hereby apportioned parts of the said rent and the said several parts of the said hereditaments as fully as they applied heretofore to the whole of such rent and hereditaments respectively.

IN WITNESS, etc.

(Signatures and Seals of all parties.)

THE SCHEDULES above referred to.

No. 201. *Apportionment of Rent.*

Between Two Purchasers of Leasehold Premises Held Under One Lease (the Landlord Not Being a Party), With Mutual Covenants by Each With the Other to Pay His Apportioned Rent, and to Perform the Covenants of the Lease, With Cross Powers of Distress Between Them.

THIS INDENTURE, made the —— day of ——: Between (one purchaser) of, etc. (hereinafter called the first purchaser, which expression shall, where the context permits, include also his executors, administrators and assigns) of the one part, and (other purchaser) of, etc. (hereinafter called the second purchaser, which expression shall, where the context permits, include also his executors, administrators and assigns), of the other part.

WHEREAS, by an indenture of lease dated the —— day of ——, and made between (landlord) of the one part, and (lessee) of the other part, the said (landlord) demised all that piece or parcel of land (parcels) unto the said (lessee) for the term of (ninety-nine) years from the —— day of ——, subject to the yearly rent of ——, payable quarterly as therein mentioned, and to certain covenants and conditions in the indenture of lease now in recital reserved and contained.

AND WHEREAS the said (lessee) shortly after obtaining the lease of the said piece of land erected two houses with suitable offices thereon, and has since sold one of the said houses and premises to the first purchaser, and the other to

the second purchaser, and the same have been respectively assigned by the (lessee) to the first purchaser and second purchaser by two several indentures of assignment of even date herewith, but executed previously hereto for all the residue of the said term of (ninety-nine) years, subject nevertheless, to the payment of the yearly rent of —— in respect of each of the said houses, being one moiety of the yearly rent of ——, reserved by the said lease, and also subject to the covenants and conditions therein contained, and on the tenant's part to be observed and performed so far as the same severally relate to each of the said houses and premises so assigned as aforesaid.

AND WHEREAS at the time of entering into the contract for the purchase of the said two houses it was agreed that the said yearly rent of —— should be apportioned equally between the first purchaser and the second purchaser, and that they should respectively enter into the covenants and agreements hereinafter contained.

NOW THIS INDENTURE WITNESSETH that it is hereby mutually agreed as follows, that is to say:

1. The first purchaser will at all times hereafter during the residue of the said term of (ninety-nine) years pay or cause to be paid to the person or persons for the time being entitled to receive the said yearly rent of —— reserved in the said lease the clear yearly rent of ——, being one moiety of the said yearly rent of ——, as the same shall from time to time become due and payable, and will duly observe and perform the covenants and conditions in the said lease contained and on the tenant's part to be observed and performed so far as the same relate to the house and premises so purchased by the first purchaser and so assigned to him as aforesaid, and will at all times hereafter keep the second purchaser indemnified against all actions and other proceedings which may be brought against him, the second purchaser, by reason of non-payment of the rent or non-observance or non-performance of any of the said covenants or conditions.

2. In case the second purchaser shall at any time or times hereafter incur any costs or expenses on account of the said yearly rent of ——, or on account of any breach of non-observance or non-performance of the said covenants

or conditions on the tenant's part to be observed and performed, then and in every such case the same shall be charged upon the said house and premises assigned to the first purchaser as aforesaid.

[And further, in every such case it shall be lawful for the second purchaser to enter upon the said house and premises assigned to the first purchaser as aforesaid and distrain for all such costs and expenses which the second purchaser shall so incur, and to take away, detain and keep the distress and distresses then and there found until all such charges and expenses together with the costs of keeping such distress or distresses shall be fully paid and satisfied and in default of payment thereof in due time after such distress or distresses shall have been so taken to dispose of the same according to law as in case of distress for non-payment for rent reserved upon a common demise, to the intent that the second purchaser may be fully paid and satisfied all such costs and expenses as aforesaid.]

3, 4. [*Repeat clauses 1 and 2, substituting throughout second purchaser for first purchaser, and vice versa.*]

IN WITNESS, etc.

(Signature and Seals of both Parties).

No. 202. *Renewal of Lease.*

THIS INDENTURE, made the —— day of ——, 19—, between the within named A. B. (hereinafter called the lessor), of the one part, and the within named C. D. (hereinafter called the lessee), of the other part: WHEREAS the residue of the within mentioned term of —— years is now vested in the leseee, subject to the payment of rent reserved by and to the performance of the lessee's covenants contained in the within written indenture: AND WHEREAS the reversion in fee expectant, on the determination of the said term, is now vested in the lessor, AND WHEREAS the lessor has agreed with the lessee to demise to him the within mentioned messuage and hereditaments for the further term of —— years, to commence on —— day of ——, ——, at the rent and subject to the covenants and provisions hereinafter reserved and contained or referred to: NOW THIS IN-

DENTURE WITNESSETH that, in consideration of the rent hereinafter reserved and the covenants by the said ——, hereinafter contained or referred to, the lessor doth hereby demise unto the lessee, his executors, administrators and assigns, all the messuage or dwelling-house and premises comprised in and demised by the within written indenture (except and reserving as is within excepted and reserved). To hold the said messuage and premises hereinbefore expressed to be hereby demised for the term of —— years, from the said —— day of ——, 19—, subject nevertheless to the yearly rent of $——, payable at the like times and in like manner as the rent reserved by the within written indenture, and subject to the performance and observance of the covenants and conditions on the part of the lessee, and the like proviso for re-entry in case of non-payment of rent or breach of covenant, or the happening of any of the other events in the within written indenture in that behalf mentioned, and with the benefit of the like covenants and agreements on the part of the lessor, and subject to and with the like provisions and conditions in all respects as are in the within written indenture contained, in like manner as if all such covenants, agreements, conditions and provisions had been herein repeated, with such modifications only as the difference in the names of the parties, and in the amount of the rent, and in the term of the lease and other circumstances may require, and the lessor doth hereby for himself covenant with the lessee, his executors, administrators and assigns, and the lessee doth hereby, for himself and his assigns, covenant with the lessor, his heirs and assigns, that they, the said respective covenanting parties, their heirs, executors, administrators and assigns, respectively, shall and will, during the said term of —— years, perform and observe all such covenants, agreements, and provisions as aforesaid, which, on his or their respective parts are, or ought to be performed and observed: PROVIDED always, and it is hereby agreed, that if the term of —— years granted by the within written indenture shall be determined by virtue of the conditions or provision for re-entry therein contained, then these presents shall become absolutely void.

IN WITNESS, etc.

No. 203. *Surrender of Lease by Indorsement.*

THIS INDENTURE, made the —— day of ——, 19—, between the within named C. D. of the one part, and the within named A. B. of the other part.

WITNESSETH that the said C. D. at the request of the said A. B., and in consideration of the sum of $——, now paid by the said A. B. to the said C. D. (the receipt whereof is hereby acknowledged), doth assign, surrender and yield up unto the said A. B., his (heirs or executors, administrators) and assigns, all (that messuage or tenement, land) and premises, with the appurtenances comprised in and expressed to be demised by the within written indenture, together with the said indenture: And all the estate, right, title, interest, property, profit, possession, benefit, claim and demand, legal and equitable, of him the said C. D. of, in and to the said premises respectively:

TO HAVE AND TO HOLD the same unto the said A. B., his (heirs or executors, administrators) and assigns, for the residue and remainder now to come and unexpired of the term of —— years granted by the within written indenture, and for all other the term, estate and interest of the said C. D. of and in the said premises respectively: To the intent that the said term of —— years may emerge and be extinguished in the reversion (freehold and inheritance or estate and interest) of the said A. B. of and in the said premises: AND the said C. D. doth hereby for himself, his heirs, executors and administrators, covenant with the said A. B., his (heirs or executors, administrators) and assigns, that he, the said C. D., hath not executed or done, or knowingly suffered, or been party or privy to any deed or thing whereby or by reason or means whereof the premises hereinbefore expressed to be surrendered or otherwise assured, or any of them or any part thereof, or these presents, are, is or may be charged, incumbered, affected or impeached in title, estate or otherwise howsoever.

IN WITNESS, etc.

No. 204. *Surrender by Deed-Poll (Indorsed.)*

TO ALL TO WHOM these presents shall come, C.D. of —— sends greeting: KNOW ye that the said C. D., at the request of the within named A. B., and in consideration of the sum of $——, now paid by the said A. B. to the said C. D. (the receipt whereof is hereby acknowledged), DOTH assign, surrender and yield up unto the said A. B., his (heirs or executors, administrators) and assings, all, etc., (remainder as in No. 15, including the covenant against incumbrances).

IN WITNESS whereof the said C. D. hath hereunto set his hand and seal, on the —— day of ——, 19—.

SIGNED, SEALED AND DELIVERED by the above named C. D. in the presence of ——.

I accept the above surrender.

(Signed A. B.

No. 205. *Surrender of Lease by Separate Instrument.*

THIS INDENTURE, made the —— day of ——, 19—, between C. D., of —— (lessee), of the one part, and A. B., of —— (lessor), of the other part.

WHEREAS by an indenture dated the —— day of ——, 19—, and made between the said A. B., of the first part, and the said C. D., of the second part, the said A. B. did demise and lease unto the said C.D. all that messuage or tenement (or all that certain parcel of land, as the case may be) situate, etc., for the term of —— years from the —— day of ——, 19—, at the yearly rent of —— dollars, and subject to the covenants and conditions therein contained and on the part of the lessee to be observed and performed.

AND WHEREAS the rents and covenants reserved by and contained in the said in part recited indenture of lease, and on the part of the said lessee to be paid, observed and performed, have been duly paid, observed and performed by the said C. D. up to the date of these presents, and the said C. D. has agreed to surrender the said (lands) to the said A. B.

NOW THIS INDENTURE WITNESSETH that (in consideration of —— dollars now paid by the said A. B. to the said C. D., the receipt whereof is hereby acknowledged, the said C. D. hereby assigns and surrenders unto the said A. B., his heirs, executors, administrators and assigns, all the lands comprised in and demised by the said indenture of lease, to the intent that the unexpired residue of the said term of —— years created by the said indenture of lease, and all other the estate and interest of the said C. D. in the said lands, under or by virtue of the said indenture, may be merged and extinguished in the reversion and inheritance of the said lands.

AND the said C. D.,for himself, his heirs, executors and administrators, doth hereby covenant with the said A. B., his heirs, executors, administrators and assigns, that he, the said A. B. now hath in himself good right, full power and absolute authority to assign an surrender the said lands in manner aforesaid, and that he hath not at any time, done or executed any act, deed, matter or thing whereby the said lands, or any part thereof, are, is, shall or may be in any wise charged or incumbered.

IN WITNESS, etc.

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