ONTARIO LAND LAWS

W. E. LEAR

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LAND LAWS

TREATING CHIEFLY ON THE RELATION OF

LANDLORD and TENANT

By

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LAND LAWS

CHAPTER 1.

LAND LAWS IN GENERAL.

Sect. 1. What are Lands, Tenements and Hereditaments?

"In the beginning God created heaven and earth."—Gen. 1: 1. The meaning conveyed by the word *earth* is the legal meaning of the word *land*. To the ordinary person land means arable ground only, but in law the word includes not only the surface of the earth, but also all substances of the earth under all circumstances, and everything attached to it, either above or below the surface, whether by the course of nature, as trees, herbage, stones, minerals, and water, or by the hand of man, as houses, barns, etc., and all improvements of a permanent character fixed to the land forms part of it. A lake or pond is not sold and conveyed as *water*, but as *land* covered with water, and a *house* and *lot* are not conveyed as a house and lot, but as a parcel of land. The house being attached to the lot, passes under the deed as part of the land.

Generally the word *tenement* is applied only to houses or other buildings, but in its legal meaning it signifies everything that may be held, provided it is of a permanent nature. Land and houses are tenements, so also a franchise, an office, a right of common, a peerage, or any other property of a like nature, is a tenement.

A *messuage* is a dwelling house with its outbuildings and some adjacent land assigned to its use. Baron Parke laid it down that a messuage and a dwelling house are substantially the same thing, and therefore if rooms be so occupied as to be in fact a dwelling house, they may be described as a messuage. *Monks* v. *Dykes* (1839) 4 M & W. 567.

The word *hereditament* has a still more comprehensive meaning in law than either land or tenements. It includes not only land and tenements, but everything that may be inherited. Thus, an heir-loom, or an article of furniture, which by custom in England, descends to the heir with an house, is not land nor a tenement, but a chattel; and yet being inheritable it is an hereditament.

Corporeal hereditaments are those which are of a substantial and permanent nature capable of actual visible possession and are all included within the legal meaning of the word land. *Incorporeal hereditaments* are those which are not capable of actual visible possession, such as rents, annuities, pensions, tithes, franchises, rights of way and other profits incidental to or arising out of the ownership of land.

You are now in a position to grasp the meaning of the legal term of *lands, tenements and hereditaments,* which are the only things considered in law to be *Real Property.* They are *real* in the sense that they are permanently fixed and immovable. All other things are considered in law to be *Personal Property,* because they are movable and may accompany the *person* of the owner, no matter to where he may go.

2. Who May Own Real Property?

Every person may own land anywhere in Canada, and it matters not whether the person is a man, woman or child, for even an *enfant en ventre sa mere* (unborn child) may have a deed of land made to it provided the mother is quick with child. Neither does it make any difference whether the person is married or unmarried, sane or insane, a resident within Canada or not, or whether he is a citizen by birth, or naturalization, or an unnaturalized alien, he is still entitled to own land in Canada.

On and from the 23rd day of November, 1849, every alien shall be deemed to have had and shall hereafter have the same capacity to take by gift, conveyance, descent, devise, or otherwise, and to hold, possess, enjoy, claim, recover, convey, devise, impart and transmit real estate in Ontario as a natural born or a naturalized subject of His Majesty. R.S.O. (1914) c. 108, s. 2.

Joint stock companies have no right to own land unless their charter so provides, or unless a license to hold lands has been granted by the Crown.

3. Title to land.

The only true and solid foundation of man's title to land is found in Holy Writ, where we are informed that God gave to man dominion over all the earth; and over the fish of the sea, and over the fowl of the air, and over every living thing that moveth upon the earth. The earth, therefore, and all things therein, are an immediate gift of the Creator to mankind in general, not to any one man in particular. And history informs us that before our war-like ancestors came to this continent the native Americans respected the terms of the original gift. Land was then held in common for the benefit of the tribe in general—no one pretended to have any special right to or interest in any particular piece of land. Every one took from the public stock to his own use such things as his immediate necessities required, and this was done without the services of a conveyancer or real estate agent.

In the early history of the Saxon people, land was for the most part owned by the people in common. The only property that was not subdivided among the people generally to be held in common, was that actually occupied by the residence of the family. Thus, if a person built a house, the land occupied by the house was regarded as his property, and was not subject to be divided. But the fields outlying the villages were held in common and divided from time to time among the people, as was done in Russia until quite recent times. These lands were then cultivated by the person to whom they were given. These general notions of property were then sufficient to answer all the purposes of human life; and might still have answered them had it not been for the Norman Conquest.

4. The Feudal System.

At the time of the conquest of England by William I., the Biblical idea of land tenure was cast aside and the rule that "to the victor belongs the spoils" became the law of the land. William, having become king by the right of conquest, was afraid that some other person might try to obtain the throne in the same way as

he had done, or that the people might rise in rebellion and drive him out of the country. He, therefore, proceeded to confiscate nearly all the lands and divide them up among his military followers, the chief ones becoming Lords of Manors. In 1085 all the great land-holders met the king at Salisbury plains and took oath of fealty or hommage, which was an acknowledgment that they held their lands from William as Lord Paramount, instead of from the Lord God Almighty. And from that day to this it has been the law that all title to land is derived from the crown, and there can be no valid title unless the grant can be traced back to the crown.

The grants of lands by William I. were not by way of absolute gifts, the absolute ownership of all lands was then declared to be vested in the king. The king granted merely the right to use the lands and to hold exclusive possession of them as a *tenant* of the king. This right to possession and use of lands has ever since been known in law as the *estate* of the tenant.

5. Classification of Estates.

Several different persons may hold an estate in the same lands at the same time. One man may (in the language of the street) own the land, another may hold a lease of the land for a term of years, and a third person may have the right to work a mine under ground. The estate which a person may hold in lands is classified according to the *quantity of interest* held. Estates are divided into *freehold estates* and *estates less than freehold,* generally called *chattels.*

6. Freehold Estates.

Freehold estates are again divided into estates *of inheritance* and estates *not of inheritance.* Estates of inheritance are called *fees* and they are either estates of unqualified inheritance (*a fee-simple*) or estates of qualified inheritance; the most common estate of qualified inheritance is an estate in *fee-tail* or an entailed estate as it is generally called.

7. Mines and Minerals.

There may be distinct ownerships in the minerals contained in the same parcel of land. One person may own the iron, another the limestone. So one may own one vein of coal, and another a separate vein, if distinguishable, lying beneath or by the side of the other, within the same parcel of land. And as incident to the ownership of a mine, where another owns the surface, is the duty of keeping the entrance to it so guarded as not to endanger the safety of the animals lawfully upon the surface.

8. Land Tenure in Ontario.

The first Parliament of Upper Canada was opened at Newark (Niagara) on the 17th September, 1792. Eight bills were passed; one of which provided for the introduction of the English Civil Law, as it stood in that year. This Act as it now stands reads as follows:

In all matters of controversy, relative to property and civil rights, resort shall 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 Courts of Ontario shall be regulated by the rules of evidence established in England, as they existed on that day, except so far as such 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 of Canada, or of the Province of Ontario, still having the force of law in Ontario. R.S.O. (1914) c. 101, s. 2.

The *Constitutional Act* of 1791, being Imperial Act 31 Geo. III, c. 31, s. 43, declared that all lands, in what is now the Province of Ontario, should be held in *free and common soccage*. Soccage means tenure, common soccage means common tenure, that is, all holders of lands in Ontario were to hold from a common Lord Paramount (the king), and free means free from any kind of military or feudal service. As all lands in the province were originally granted by the king on this tenure, it must necessarily follow that all lands in the province are now held in free and common soccage, or in fee-simple as we now express the estate.

9. Form of Ontario Crown Grant.

PROVINCE OF ONTARIO

John Beverley Robinson

VICTORIA, by the Grace of GOD, of the United Kingdom of Great Britain and Ireland, QUEEN, Defender of the Faith, &c., &c., &c.

To all to whom these Presents shall come—GREETING:

[L.S.]

Know ye, that We, of our Special Grace, certain Knowledge, and mere Motion, have GIVEN and GRANTED, and by these Presents do give and grant, under the authority of "The Free Grants and Homesteads Act," unto *JOHN WILSON, of the Township of Croft in the District of Parry Sound, Yeoman, a Free Grant Settler,* his heirs and assigns, forever, ALL these Parcels or Tracts of Land, situate in the Township of *Croft in the District of Parry Sound,* in our said Province, containing by admeasurement *one hundred and eighty-eight acres,* be the same more or less, being composed of *LOT NUMBER NINETEEN (One Hundred Acres), and LOT NUMBER TWENTY (Eighty-Eight Acres), in the Ninth Concession of the said Township of CROFT. Reserving free access to the shore of Ah-Mik Lake for all Vessels, Boats and Persons.*

for which *the said JOHN WILSON* was located under the said Act, on the *Fourth* day of *August, A.D.* 1877, *for Lot Number Nineteen, and on the Twenty-first day of March A.D.* 1877 *for Lot Number Twenty.*

To have and to hold the said Parcels or Tracts of Land, hereby granted, conveyed and assured unto the said *JOHN WILSON, his* Heirs and Assigns for ever; saving, excepting and reserving, nevertheless, unto Us, Our Heirs and Successors, all gold, silver, copper, lead, iron, or other mines or minerals, and the free uses, passage and enjoyment of, in, over and upon all navigable waters that shall or may be hereafter found on or under, or be flowing through or upon any part of the said Parcels or Tracts of Land hereby granted as aforesaid.

GIVEN under the Great Seal of Our Province of Ontario: **Witness:** The Honourable JOHN BEVERLEY ROBINSON, Lieutenant-Governor of Ontario.

At Toronto, this *Tenth* day of *March,* in the year of Our Lord one thousand eight hundred and eighty-five, and in the Forty-eighth year of Our Reign.

Fiat No. 676
Des. No. 11354

A.A. By Command of the Lieutenant-Governor in Council.

1. Estate

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CHAPTER 2.

FREEHOLD ESTATES.

1. Estate in Fee-simple.

The largest possible estate which one may hold in lands is an estate in fee-simple. The holder of an estate in fee-simple has the right to hold possession and to use the land in any way which may be imagined. He may sell his holding to any person whom he may wish so to do, and he may do so at any time during his lifetime, or he may will it to any one to hold from and after his death. In case he does not sell or will it to any person, the land will at his death pass to his heir or heirs, collateral and lineal, according to the rules of descent. When an estate in fee-simple passes to a purchaser, a devisee, or an heir, then the purchaser, the devisee, or the heir holds the estate in exactly the same way as the former holder. Again the holder of an estate in fee-simple may carve out of his estate a lesser estate and grant such lesser estate to another person. We will deal with these lesser estates as we pass along, but I might mention in passing that the most common instance of a lesser estate being carved out of an estate in fee-simple is where an estate for a term of years is granted by way of a lease. It may appear to the reader that the holder of an estate in fee-simple has such an unqualified interest in the land that he is in fact the absolute owner of it. For all general purposes he is the owner, but the king as Lord Paramount is still the absolute owner of all lands held in fee-simple.

An estate in fee-simple is created by a grant from the crown and in that grant the terms of the estate to be held are carefully set out. The words used in what is called the *habendum* clause of the grant set out in chapter 1, sect. 9, are, "*To have and to hold the said parcels or tracts of land, hereby granted, conveyed and assured unto the said John Wilson, his heirs and assigns for ever.*" These words mark out the limit of the estate granted by the crown,

and any right not included within the meaning of these words is not granted to the holder of the estate, but is reserved to the crown.

We will suppose a case. John Smith receives a grant of lands from the king to hold in fee-simple. The words "to have and to hold unto the said John Smith for ever" are sufficient to give him the exclusive use of the lands during his life. This is the longest time any person can use lands and when John Smith dies his right to use the lands dies with him. But the grant says that he is "to have and to hold unto the said" (John Smith) "*his heirs,*" etc. Therefore, if when John Smith dies he leaves a son and heir (William Smith), then William Smith steps into his father's estate without any deed or will or other document of any kind. This is so because the grant from the king says so, and the grant from the King goes still further and says that John Smith is "to have and to hold unto the said" (John Smith), "his heirs" (William Smith) "*and assigns,*" etc. The word assigns gives John Smith the right to sell his estate to any person whom he may find willing to purchase it. If John Smith sells his estate during his life time, or assigns it by way of a will, then the heir (William Smith) is cut out of the estate entirely and will have no interest in the estate after the death of his father. In case of a sale the purchaser obtains exactly the same estate as was held by John Smith, likewise the devisee under a will obtains the same estate.

We will suppose that John Smith lived on the lands during his life and did not make a will. Then by operation of the grant his heir (William Smith) becomes the holder of the estate. Now William Smith possesses all the rights which his father had; he may use the lands or he may assign them, but if he does neither then his heirs (Mary Smith-Rogers and Herman Smith) will take the estate at his death by operation of the original grant from the King. And so on the estate will pass from father to son or to their "*assigns for ever.*"

By this time it must seem to you that if the king has parted with the lands "*for ever*" then surely John Smith was the absolute owner of the lands. We are now getting nearer to the point. John Smith cannot hold possession of the lands for ever, because by the course of nature he will die some time. Then his estate has come to an end so far as he is concerned. Now we will suppose that

John Smith was a bachelor and left no heir to inherit the estate. In such a case if John Smith did not assign his estate during his lifetime by deed or will, then there would be no one who could claim the estate through the original grant from the crown; therefore the estate has come to an end and the lands will revert back to the absolute owner, the king, and he may grant the lands out again to any person. When an estate in fee-simple comes to an end we say that it has escheated to the crown.

2. Escheats to the Crown.

Where a person dies in possession of or entitled to real estate in Ontario intestate as to such real estate without any known heirs the Attorney-General without obtaining letters of administration may bring an action, either in his own name, on behalf of His Majesty, or in the name of His Majesty, to recover possession of such real estate and shall be entitled to judgment and to recover possession, unless the person claiming adversely shows that the deceased did not die intestate as to such real estate, or that he left heirs, or that he or some other person is entitled to such real estate. R.S.O. (1914) c. 73, s. 9.

Where land has escheated to the Crown by reason of the person last seized thereof or entitled thereto having died intestate and without lawful heirs, or has become forfeited for any cause to the Crown, the Attorney-General may cause possession thereof to be taken in the name of the Crown; or if possession is withheld may cause an action to be brought for the recovery thereof, without an inquisition being first made. R.S.O. (1914) c. 104, s. 2 (1).

The proceedings in the action may be in all respects similar to those in other actions for the recovery of land. R.S.O. (1914) c. 104, s. 2 (2).

Lands in Canada which escheat to the Crown belong to the province in which they are situated: *Atty.-Gen'l. Ont.* v. *Mercer* (1883) C. R. [8] A.C. 586; 8 A.C. 767; 52 L.J.P.C. 84; 49 L.T.R. 312.

There is no escheat of equitable estate: on failure of heirs the use vests in the person holding the seizure. *Re Reycraft* (1910), 20 O. L. R. 437.

The Lieutenant-Governor in Council may grant any land which has heretofore so escheated or become so forfeited or which hereafter so escheats or becomes so forfeited, or any part thereof,

or any interest therein, to any person for the purpose of transferring or restoring the same to any person having a legal or moral claim upon the person to whom the same had belonged, or of carrying into effect any disposition thereof which such person may have contemplated, or of rewarding any person making discovery of the escheat or forfeiture, as to the Lieutenant-Governor in Council may seem meet. R.S.O. (1914) c. 104, s. 3.

Any such grant may be made without actual entry or inquisition being first made; and if possession of the land is withheld, the person to whom the grant is made may institute, in any court of competent jurisdiction, proceedings for the recovery thereof. R.S.O. (1914) c. 104, s. 4.

Where any such forfeiture takes place the Lieutenant-Governor in Council may waive or release any right to which the Crown may thereby have become entitled, so as to vest the land, either absolutely or otherwise, in the person who would have been entitled thereto but for the forfeiture; and the waiver or release may be either for valuable consideration or otherwise, and may be upon such terms and conditions as to the Lieutenant-Governor in Council may seem meet. R.S.O. (1914) c. 104, s. 5.

3. Estates Subject to Condition.

I mentioned in sec. 1 that the holder of an estate in fee-simple could carve out of his estate any lesser estate and grant the lesser estate to another person, and I said in secs. 1 and 2 that the holder of an estate in fee-simple had the absolute right to assign or sell his estate to any person to whom he might choose so to do. Therefore, if the holder of an estate in fee-simple makes a deed or will of the lands to another and in the deed or will reserves a condition that the purchaser or devisee shall not assign, or sell, or *alienate,* (as it is generally called in law) the lands, then the purchaser or devisee takes not a fee-simple but an estate in fee subject to a condition. Every *restraint upon alienation,* that is, *every condition or provision against sale* is inconsistent with the nature of a fee-simple, and if a partial restraint be annexed to the fee, as a condition not to alienate (sell) for a limited time, or not to sell to a particular person, the estate granted is an estate in fee subject to a condition.

Where an estate is granted upon a condition and where that condition is broken, then the estate in fee subject to a condition comes to an end and the lands revert back to the person who created the estate in fee subject to a condition, that is, the person who last held the estate in fee-simple, and like the king in case of an escheat, the holder of the fee-simple again has the right to possess the estate as though he had never made a deed or will of the lands at all. This right which remained in the holder of the estate in fee-simple to again repossess the lands upon breach of the condition is called a *reversion*, and in case the *reversioner* died, during the time the estate in fee subject to a condition was in existence, then the heirs of the reversioner inherit the estate in fee-simple. Where the condition upon which an estate is held is complied with, the rights of the reversioner are extinguished and the holder of the estate in fee subject to a condition becomes the holder of an estate in fee-simple.

4. Estate in Fee-tail.

The holder of an estate in fee-simple and in some cases the holder of an estate in fee subject to a condition may create an estate in fee-tail, (or an estate in tail, or an estate tail) by deed or will. There are several different kinds of estates in fee-tail, but they all are estates in fee subject to a condition. An estate in fee-tail may be created by granting lands to a man and *to the heirs of his body*, in which case his collateral heirs can never inherit and the lands will pass to his lineal descendants only. It may be created by a grant to a man and *to the heirs of his body by a particular named woman*, and it may be created so as to descend to *heirs male* only, or to *heirs female* only, or to *a particular named heir* and to the heirs of the body of the named heir, and by a named woman, and male or female, according to the wish of the person creating the estate in fee-tail.

All estates in fee-tail will come to an end, upon failure of the posterity named, and the lands will revert back to the reversioner, (who is the person who created the estate in fee-tail) and his heirs generally, in case he should die during the time the estate in fee-tail is in existence.

5. Estate for Life.

The next estate in importance is an estate for life, or what the man on the street generally calls a life lease. When the measure of the duration is the life of the holder of the estate, it is called an "estate for the tenant's own life," but when the estate is for the life of another person it is designated an "estate *pur autre vie*," a French phrase for other life. The former estate, in the estimation of the law, is considered better and of a higher nature than one for the life or lives of another or others. Among the instances of life estates is where a grant is made to a person expressly for his life, or to a woman so long as she shall remain a widow, or to a man and his wife so long as they both live. And the reservation by the grantor (the vendor or seller of lands), of the use and control of the lands granted, during his life creates in him a life estate, with all its incidents.

A tenant for life is regarded as so far the owner of an independent estate, that, unless restrained by the terms of his grant, he may convey his entire interest, or carve any lesser estate out of it in favour of another. In other words, he may assign his entire estate, or sub-let the whole or any part of the same for a long or short period, not exceeding that of his own life. He cannot, however, convey his estate except by deed. He cannot dispose of any interest in the land by will, because his estate comes to an end at his death and the land reverts back to the reversioner or his heirs.

Every tenant for life is entitled, of common right, to take reasonable *estovers*, that is, wood from off the land, for fuel, fences, agricultural erections, and other necessary improvements. But a tenant for life must not destroy timber, nor do any other permanent injury to the inheritance, for that would expose him to the action and penalties of waste at the suit of the reversioner.

The lawful representatives of a tenant for life are entitled to the profits of the growing crops, in case the estate determines by his death before the produce can be gathered. This rule extends to every case where the estate for life determines by the act of God, or by the act of law, but not to cases where the estate is terminated by the voluntary, wilful, or wrongful act of the tenant himself. It is applicable to the products of the earth which are annual, and raised by the yearly expense and labour of the tenant;

but not to grass or fruit which are the natural products of the soil, and do not essentially owe their annual existence to the cultivation by man.

6. Dower.

Dower is a provision which the law makes for the support of the wife after her husband's death; being a life interest in one-third of all the lands of which the husband owned in fee-simple or in fee-tail during marriage.

In Canada the right of dower is not uniform throughout all the provinces. The wife is most favoured in the province of Quebec, where she is entitled to one-half of her husband's lands or *immovables*, as they are called in the Quebec law.

In Ontario, New Brunswick, Nova Scotia and Prince Edward Island she is entitled to one-third interest, for her life, in her husband's lands.

In British Columbia and Newfoundland the law is the same as in England. The wife has one-third interest as dower, providing her husband dies legally entitled to lands without having absolutely disposed of them by deed or will. Where the husband enters into an agreement in writing not to bar dower it may be enforced in these provinces.

In Manitoba, Alberta, Saskatchewan and the North-West Territories, the wife has no dower rights at all, but if the husband dies without leaving a will and leaves real estate, the wife takes the same interest in the land as she does in his personal property.

Ordinarily there are three requisites to the right to dower:

(1) there must be a legal marriage,
(2) the husband must have held an estate in fee-simple or fee-tail during coverture, and
(3) the death of the husband.

The wife is entitled to dower in lands devised to her husband but not yet taken possession of by him, and she is also entitled to dower in the equitable estates of her husband if he does not dispose of them during his life time. An equitable estate is where lands are acquired subject to a mortgage; the person who holds the mort-

gage holds what is called the *legal estate* and the person who gives the mortgage holds what is called an *equity of redemption*, that is, the right to pay the mortgage off and again receive the legal estate. Where a husband buys lands subject to a mortgage the wife has no dower if the husband sells during his life time, but if he still owns them at his death the wife is entitled to dower.

There is no dower in wild lands in their natural state which are no part of a farm, neither is there dower in purely mining lands, nor in lands in which the husband had only a life estate.

Dower is not available until the husband's death, during his life time a wife has no interest in her husband's estate. He may sell or mortgage it without her joining in the deed or mortgage, but the purchaser or money lender takes a chance that the wife may outlive the husband, and in that case the wife would be entitled to dower from the purchaser.

7. Bar of Dower.

Where the marriage is dissolved by a valid divorce the wife has no right to dower, it being barred by operation of the divorce. Where a wife has been guilty of adultery, unless it has been condoned by the husband, her right to dower is barred by her infidelity. This is so notwithstanding that the husband never knew of the fact, and it may be pleaded in answer to an action for dower.

A wife need not be twenty-one years of age in order to bar her dower by deed or mortgage. If she signs a deed it bars her dower completely, but where she bars her dower by way of mortgage, it only affects her rights to the extent of the mortgage, and she is still entitled to her dower when her husband dies, and it is calculated on the value of the land. If the land is worth $3,000 and it is subject to a mortgage of $2,000, she is entitled to the income of the whole of the surplus as dower, not one-third of the $1,000.

Where a husband goes away and is not heard from for seven years he is (in Ontario) presumed to be dead, and the widow is then entitled to claim dower. The Statute of Limitations will commence to run at the end of the seven years, and if the wife does not claim her dower within ten years her right will be barred by statute, or outlawed, as it is sometimes called. R.S.O. (1914) c. 75, s. 26.

8. Widow's Election.

Where the husband dies possessed of land and leaves a will giving the land to some person other than the wife, the widow then has what is called the right of election, viz., she may either take what her husband gave her by his will or she may refuse to take it and elect to take her dower. She is entitled to take both unless the will specially states that what is given to her by the will is to be in lieu of her dower.

9. Tenant by the Curtesy.

Tenant by the Curtesy is an estate which the husband takes, upon the death of his wife, in the lands of which she held in fee-simple or fee-tail at the time of her death, or at any time during coverture, provided they have had lawful issue born alive. It is a freehold estate for the term of his natural life. The right also extends to her equitable estates in lands. Upon the wife's death the husband is at once in as tenant by the curtesy, without having to resort to any preliminary form to consumate his title to the lands.

10. Requisites for Curtesy.

There are four requisites to entitle a husband to curtesy,

(1) there must be a legal marriage,
(2) the wife must have held lands in fee-simple or fee-tail during coverture,
(3) a child must be born alive during coverture, and
(4) the death of the wife.

In Canada the right of curtesy has been greatly modified by statute. In all the provinces, except Nova Scotia and Quebec, a wife may not only hold her own lands entirely free from her husband's control and debts, but she may dispose of them during her life time or by will, without her husband's consent or signature. A married woman may also sell her separate property to her husband direct, or the husband to his wife direct, without making the transfer through a third person.

In New Brunswick and Prince Edward Island the right of curtesy is in full force, and in Nova Scotia the wife cannot deed

away lands or dower in lands without her husband joining in the deed; neither can she dispose of her lands by will unless her husband gives his consent in writing.

In Ontario a husband has curtesy in lands of his deceased wife, which have not been sold during her life time, provided the wife dies without leaving a will. If she makes a will and leaves the lands to some person other than her husband, he has no right of election as a widow has in the case of dower.

11. Joint Tenancy.

A joint tenancy is where several persons hold land jointly in equal shares by purchase at the same time and by the same instrument. Each has the whole and every part of the land, with the benefit of survivorship, unless the tenancy be previously severed. While joint tenants constitute but one person in respect to the estate as to the rest of the world, yet as between themselves each is entitled to his share of the rents and profits so long as he lives, and the survivor or survivors take the entire estate upon the death of one of the joint tenants, to the exclusion of his heirs or personal representatives. It can only be created by conveyance, devise, or act of the parties, and not by operation of law.

By the common law in England, if an estate is conveyed to two or more persons, without it being indicated how the same is to be held, it will be understood to be a joint tenancy; but in Canada such estates are regarded as tenancies in common, except in the case of joint trustees. All estates owned by two or more persons are taken to be tenancies in common, unless expressly declared to be joint tenancies by the deed or instrument creating them.

12. Tenancy in Common.

A tenancy in common is created where two or more persons hold real estate by unity of possession; they may hold by several and distinct titles, or by title derived at the same time, by the same deed or descent. In this respect the Canadian law differs from the English doctrine. By the latter, this tenancy is created by deed or will, or by a change of title from joint tenancy or coparcenary, or it arises in many cases by operation of law. In this country it may be created by descent, as well as by deed or will; and whether

the estate be created by act of the party or by descent, tenants in common are deemed to have several and distinct freeholds,—a circumstance which is a leading characteristic of tenancy in common. Each owner, in respect to his share, has all the rights, except that of sole possession, which pertain to an absolute estate; and, if he wishes to convey his share to his co-tenant, he must do so by the same kind of deed that would be necessary to convey it to a stranger.

What would be necessary in a deed or will to constitute a tenancy in common, where several persons are grantees or devisees of an estate, is often a question of nice law; but generally in Canada, wherever two or more persons acquire the same estate by the same act, deed, or devise, and no indication of an intent is therein made to the contrary, they will hold as tenants in common. The owners can compel each other, by process of law, to make or submit to a partition; and they are liable to each other for waste, and are bound to account to each other for a due share of the profits of the estate in common.

Independently of statutory enactments in the different provinces the law as to making improvements or repairs upon the common property, when either co-tenant is unwilling to join in the same, seems to be this: One tenant in common cannot go on and make improvements, erect buildings and the like, on the common property, and make his co-tenant liable for any part of the same, nor has he a right to hold and use these to the exclusion of his co-tenants. If the property is not susceptible of convenient partition, like a mill or a house, and requires repairs for its preservation, either tenant may issue a writ to compel his co-tenant to join in making such repairs.

CHAPTER 3.

ESTATES LESS THAN FREEHOLD.

1. Tenant for Term of Years.

An estate for a term of years may be created by a reservation in a deed, and it may be created under a will, but it is nearly always created by contract between Landlord and Tenant. When the owner of lands lets the possession and the use of them to another person, the relation of landlord and tenant is created. The agreement between the landlord and the tenant is called a *lease;* the landlord is called the *lessor* and the tenant is called the *lessee.* The consideration which the landlord receives for the use of the lands is called *rent,* and the time for which the tenant is to hold possession is called the *term.*

Leases may be either verbal or written, but the terms and conditions of a verbal lease are so likely to be forgotten that it is always better to have all leases made in writing. A written lease containing all that has been agreed to tends to prevent disputes and law suits. Written leases should be made in duplicate, one copy for each party. Where a seal is not attached to a lease which requires a seal, the writing is only an agreement for a lease upon the terms and conditions agreed.

All leases and terms of years of any messuages, lands, tenements or hereditaments shall be void at law unless made by deed. R.S.O. (1914) c. 102, s. 2 (2).

Subject to section 9 of *The Conveyancing and Law of Property Act* no lease, estate or interest, either of freehold or term 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 or operation of law. R.S.O. (1914) c. 102, s. 3.

The foregoing two sections do not apply to a lease, or an agreement for a lease, not exceeding the term of three years from the making thereof, the rent upon which, reserved to the landlord during such term, amounts unto two-thirds at the least of the full improved value of the thing demised. R.S.O. (1914) c. 102, s. 4.

A verbal lease for *one* year, or less, is valid in all the provinces, and the landlord may recover his rent though the tenant never takes possession, and the tenant may bring an action for possession if it is refused him.

In all the provinces, except Quebec, a verbal lease for a term not exceeding *three* years from the making of the lease is valid, where the tenant goes into possession, but a lease for three years to commence at some future time is a lease for more than three years.

Where a lease for more than one year but not exceeding three years is made verbally or in writing but not under seal and the tenant does not go into possession, no action will lie to compel the tenant to go into possession or to pay rent, nor to compel the landlord to give possession to the tenant. Still it may be ground upon which to maintain an action to recover damages for breach of contract.

All agreements for a lease, no matter for how short a term, must be in writing. In the province of Quebec all leases for over *one* year must be in writing and registered. In all the other provinces all leases for a term of over *three* years must be in writing, under seal, and (except Ontario) registered.

In Ontario a lease for a term not exceeding *seven* years, where the actual possession goes along with the lease, does not require registration, but every lease for more than seven years must be registered, otherwise it is fraudulent and void against any subsequent purchaser or mortgagee who has no actual notice and the tenant may be ejected by such purchaser or mortgagee, after receiving six months' legal notice to quit. R.S.O. (1914) c. 124, s. 71.

2. Who May Make Leases?

Generally only persons of the full age of twenty-one years of age and of sound mind may contract as landlord and tenant. A lease to a minor (viz., a person under 21 years of age) for necessary apartments or lodgings is perfectly good, and a lease by or to a minor of other property is not illegal, but he may repudiate it at any time before he becomes of age, or he may then ratify it if he so desires. If the rent falls due after he attains his majority, and if he has not repudiated the lease, he will be liable for the rent, no matter whether it was for necessary lodgings or not.

In Quebec an emancipated minor may grant leases for terms not exceeding nine years, receive his revenues and give receipts for same, and perform all other acts of mere administration, and be held liable on his contracts in connection with his business or trade.

In all the provinces leases made or accepted by lunatics or idiots may be enforced by them, but if the other party wishes to enforce the lease they must show that the lease was for the necessity of the lunatic, that they had no knowledge of their condition, and that they did not take advantage of it.

In Manitoba a habitual drunkard cannot make a valid lease, and in all the other provinces if he were so drunk as not to be capable of knowing what he was doing, he may repudiate it when he sobers up, or he may ratify it and make it binding.

3. Term of a Lease.

A lease may be made to commence from a day that is past, or a day yet to come, as well as on the day on which the lease is made. A lease may be made for the life of the tenant, in which case the tenant would hold an *estate for his own life*, or it may be made for the life of the landlord, and in that case the tenant would hold an estate *pur autre vie*. (C. 1, s. 13.) A lease may be made for any length of time, viz., a week, a month, or a year, or for any number of weeks, months or years, or it may be made without the mention of any term at all. In the latter case the tenant is a *tenant at will*, which is explained in the next section.

4. Tenant at Will.

An estate at will is created where a tenant has taken possession of lands under a lease to hold during the will of either party. Such a lease may be determined at any moment at the will of either the landlord or the tenant, properly signified to the other party, or it may provide that a certain length of time shall elapse after notice before the estate shall terminate; or the termination of such an estate may be prescribed by statute.

Every estate or interest of freehold and every uncertain interest of, in, to, or out of any messuages, lands, tenements or hereditaments shall be made or created by writing signed by the parties making or creating the same, or their agents thereunto lawfully authorized in writing, and if not so made or created shall have the force and effect of an estate at will only, and shall not be deemed or taken to have any other or greater force or effect. R.S.O. (1914) c. 102, s. 2 (1).

But the above sect. does not apply to a lease, or an agreement for a lease, not exceeding the term of three years from the making thereof, the rent upon which, reserved to the landlord during such term, amounts unto two-thirds at the least of the full improved value of the thing demised. R.S.O. (1914) c. 102, s. 4.

5. Tenant by Sufferance.

Where a tenant has come rightfully into possession of lands by permission of the landlord, and continues to occupy the same after the term of his tenancy has expired, he is said to be a tenant by sufferance. Blackstone says that, "He is one who comes in by right, and holds over without right." While he holds without right, yet he is not a trespasser. As he holds only the mere naked possession of the land, no notice to quit need be given him. We now speak of a tenant by sufferance as an *Over-holding Tenant.* As to the rights and remedies of Landlords against Over-holding Tenants see section

6. Tenant from Year to Year.

Where a tenancy for one or more years expires and the tenant remains in possession, without any new agreement being made, and the landlord receives from him rent which has become due after the expiration of the term, the tenant, by implication of the law, becomes a tenant from year to year, upon the terms of the original lease. If either party wishes to terminate a tenancy from year to year he must give the required six months' notice.

A tenancy from year to year is ordinarily implied from the payment and the acceptance of rent; but this presumption may be rebutted by proving that it was paid or received by mistake. A tenancy by implication is a question of fact, not of law, and the facts must be evident. *Hyatt* v. *Griffiths*, 17 Q.B. 505.

If an annual rent is reserved in the lease, the tenancy is from year to year, although the lease or agreement provides that the tenant shall or may quit at a quarter's notice. Such a contract differs from the usual letting from year to year only in the agreement by the parties to reduce the ordinary six months' notice to quit to three months. But if it is expressly agreed that the tenant shall be subject at all times to quit on six months' notice, given him at any time, this constitutes a half-yearly tenancy, and the tenant holds from six months to six months, from the time he became tenant. If he holds till one of the parties shall give to the other three months' notice to quit, then it is a quarterly tenancy. The same applies to a monthly or weekly tenancy.

In the province of Quebec, if a tenant holds over for more than eight days without any opposition or notice from the landlord, the lease is thereby renewed for another year, or where the original lease was for less than a year, then it is renewed for such term as was provided for in the lease.

CHAPTER 4.

THE LANDLORD AND TENANT ACT.

Being R.S.O. (1914), Chapter 155.

His Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

1. Short Title.

This Act may be cited as *The Landlord and Tenant Act.*

The law of landlord and tenant is, to a large extent, affected by the English Statutes in force on the 15th day of October, 1792; see ch. 1, sec. 5. The principal English Statutes dealing with the subject in force are:

1266.—51 Hen. 3, Stat. 4. Owner may feed cattle impounded. Beasts of the plow or sheep are not distrainable.

1267.—52 Hen. 3, Stat. 4. (Statute of Malbridge) Distress ought not to be excessive.

Stat. 15. Distress not to be taken on the highway or street.

Stat. 23. No waste to be committed without license.

1275.—3 Edw. 1, Stat. 16, 17: (Westminster the First). Distress not to be driven out of the County.

1278—6 Edw. 1, c. 1, s. 2: Plaintiff in replevin entitled to costs.

C. 5: Waste, tenants for life or years liable for.

1285—13 Edw. 1, c. 2, 3, 37: (Westminster the Second). Replevin Bonds.

1290—18 Edw. 1, c. 1: Attornments.

1381—5 Rich. 2, Stat. 1, c. 7: Forcible entry.

1429—8 Hen. 6, c. 9: Forcible Entry.

1515—7 Hen. 8, c. 4, s. 3: Defendant in replevin entitled to costs and damages.

1529—21 Hen. 8, c. 9, s. 3: Extends 7 Hen. 8, c. 4, s. 1.

1540—32 Hen. 8, c. 9: Rights of Entry.

C. 34: Assignees of reversion take benefit of covenants and agreement of lessees.

C. 37: Distress may be by executors or administrators, or by tenants, *pur autre vie* after death of *cestui que vie.*

1554—2 Ph. & Mary, c. 12, s. 1: Cattle distrained must not be driven out of the hundred, rape, wapentake or lathe except to a pound overt without the shire, not above three miles.

S. 2. Costs of impounding.

1606—4 Jas. 1, c. 3. Defendant in replevin, whether claiming property or not, entitled to costs.

1623—21 Jas. 1, c. 15. Forcible Entry.

C. 16. Limitation in actions without specialty for six years.

1665—17 Car. 2, c. 7, s. 2. Defendant proceeding by Writ of inquiry shall recover costs.

S. 4. If value of cattle distrained is insufficient, distress may be made again.

1666—19 Car. 2, c. 6. *Cestui que vie* abroad accounted dead if no sufficient proof otherwise.

1677—29 Car. 2, c. 8, s. 1. (Statute of Frauds) Leases by parol create estate by will.

S. 2. Leases for three years, excepted if rent is two-thirds of improved value.

1690—2 Wm. & M. sess. 1, c. 5, s. 2. Power to sell distress after notice if not replevied in five days; goods must be appraised by the sworn appraisers and sold for best price, overplus to be held for owners use.

S. 3. Hay, straw or corn in sheaves or cocks or loose may be distrained.

S. 4. Treble damages and treble costs for pound breach or rescue.

S. 5. If no rent due at time of distress and goods sold, double value of goods recoverable and full costs.

1705—4 Ann c. 16, s. 9. Grants of reversion valid without attornment of tenant.

6 Ann c. 18, 1-5. Remaindermen, reversioners or expectant heirs have right to production of *cestui que vie*..

1709—8 Anne c. 14, s. 1. No goods to be taken in execution unless execution creditor pays the landlord or his bailiff the rent due up to one year's arrears.

S. 2. Where fraudulent and clandestine removal, goods might be followed for five days (extended by 11 Geo. 2, c. 19, s. 1.)

Ss. 6, 7. Distress may be made within six months after determination of term for rent due before.

1731—4 Geo. 2, c. 28, s. 1. Double value recoverable by suit on holding over after landlord's notice to quit.

S. 5. Distress for rent seck;

S. 6. Renewals without surrender of under leases;

1738—11 Geo. 2, c. 19, s. 1. Where goods of tenants; (*Martin* v. *Hutchinson* (1891) 21 O. R. 388), fraudulently or clandestinely removed by tenant to prevent distress for arrears due or made payable, they may be distrained within thirty days.

S. 2. Except goods bona fide sold for valuable consideration before seizure.

S. 3. Tenants and persons wilfully and knowingly assisting them in such fraudulent and clandestine removal or concealment are liable in action of debt to double value of goods carried off or concealed.

S. 4. If goods carried off or concealed do not exceed £50, offender or offenders may be fined double value of such goods before two justices of peace,

and if unpaid, distress may be levied and if insufficient offender may be committed for six months.

S. 5 & 6. Appeal given to next general quarter session from order. If recognizance be given in double the sum, order not to be executed.

S. 7. If goods locked up, building may be broken open in day time, with assistance of peace officer, and if in a house oath must first be made before justice of peace.

S. 8. Cattle or stock on common appendant or appurtenant to premises may be distrained.

S. 8 & 9. Growing crops may be distrained and when ripe to be cut and appraised and sold; notice of place of storing to be given in one week.

S. 10. Distress may be impounded and sold on premises.

S. 11. Attornment to stranger void unless under decree or order or to a mortgagee after mortgage forfeited or with consent of landlord.

S. 14. Use and occupation may be recovered for.

S. 15. Rent apportioned where tenant for life dies before gale day.

S. 16 & 17. Recovery of deserted premises before justice of peace where one year's rent in arrar.

S. 18. Where tenant holds over after giving a notice to quit, double rent may be distrained for.

S. 19. Where rent due, distress not unlawful for irregularity and only special damage recoverable.

S. 20. Parties distraining may tender amends.

S. 21. Defendant may plead the general issue in actions of trespass and illegal distress.

S. 22. Defendant may plead that plaintiff held premises at certain rent then past due.

S. 23. Replevin Bonds in two sureties in double value of goods to be given by plaintiff to officer replevying.

1774—14 Geo. 3, c. 78, s. 83. Insurers may expend insurance moneys in re-buildings. (Repealed by 50 V. c. 26, s. 15 O.)

S. 86. Unless specially agreed tenant not liable for accidental fire: *Gaston* v. *Wald* (1860) 19 U. C. R. 586; *Furlong* v. *Carroll* (1882) 7 A. R. 145, 169.

2. Interpretations.

In this act,

(*a*) "Crops" shall mean and include all sorts of grain, grass, hay, hops, fruits, pulse and other products of the soil;

(*b*) "Landlord" shall mean and include lessor, owner, the person giving or permitting the occupation of the premises in question and his and their heirs and assigns and legal representatives, and in Parts II. and III. shall also include the person entitled to the possession of the premises;

Any person who gives the occupation of premises to another is a landlord. *Pepall* v. *Broom* (1911) 19 O. W. R. 512; 2 O. W. N. 1275.

A mortgagee is not a *person giving or permitting occupation* within the meaning of above sub-sect. *Re Mitchell & Fraser*, (1917) 40 O. L. R. 389.

(*c*) "Standing crops" shall mean crops standing or growing on the demised premises;

(*d*) "Tenant" shall mean and include lessee, occupant, sub-tenant, under-tenant, and his or their assigns and legal representatives.

A mortgagor is not an *occupant* within the meaning of above sub-sec. *Re Mitchell & Fraser* (1917) 40 O. L. R. 389.

PART I.

3. Relation of Landlord and Tenant.

The relation of landlord and tenant shall not depend on tenure, and 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; nor shall it be necessary in order to give a landlord the right of distress that there shall be an agreement for that purpose between the parties.

[Origin: Landlord and Tenant Law Amendment Act of Ireland (1860), 23 & 24 Viet. c. 144, s. 3.]

Prior to 15th April, 1895, it was necessary that the landlord be legally entitled to the immediate reversion or reminder in the land demised to give him the right of distress, and if the landlord afterwards assigned the reversion either absolutely or by way of mortgage the remedy by distress for arrears was lost; *Wittrock* v. *Halliman* (1856) 13 U. C. Q. B. 135; *Oliver* v. *Mowat* (1874) 34 U. C. Q. B. 472; *Meagher* v. *Coleman* (1880) 13 N. S. R. 271; *Dauphinais* v. *Clark* (1885) 3 Man. R. 225.

To avoid this difficulty 58 Viet. (Ont.) c. 26, s. 4, was passed, but it was repealed and above section substituted by 59 Viet. (Ont.) c. 42, s. 3. The effect of the section is not to take away the landlord's common law right to distress. It simply enacts that the relation of landlord and tenant shall not depend upon tenure or service. *Harpelle* v. *Carroll* (1896) 27 O. R. 240.

4. Covenants Running with Reversion.

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 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.

[Origin: 32 Hen. VIII. c. 34, s. 1.]

32 Henry VIII., ch. 34, does not apply to leases not under seal: *Rogers* v. *National Drug and Chemical Co.*, 2 O. W. N. 763, 18 O. W. R. 686, 23 O. L. R. 234, 24 O. L. R. 486.

What covenants run with the land: see *Spencer's Case*, 1 Smith L. C., p. 52.

Mortgagee's right to rent: see *Moss* v. *Gallimore*, 1 Smith L. C. 514.

Rights and liabilities of mortgagor's tenant by a demise made subsequently to the mortgage: *Keech* v. *Hall*, 1 Smith L. C. 511.

Covenant by lessor—reversion conveyed to wife: see *Ambrose* v. *Fraser*, 14 O. R. 551.

Covenant by tenant of a "tied house" to buy beer from landlord and his successors in business—assigns not mentioned: see *Manchester Brewery* v. *Coombs* [1901], 2 Ch. 608.

Assignment of reversion: subsequent purchase of adjoining property by assignee: liability of assignee for nuisance on the adjoining premises: *Davis* v. *Town Properties* [1903], 1 Ch. 797.

A covenant running with the reversion entered into by the lessor with the lessee remains binding on the lessor notwithstanding he has assigned the reversion: *Eccles* v. *Mills* [1898], A. C. 360; *Stuart* v. *Joy* [1904], 1 K. B. 362.

Covenant to repair: demise by under lessee of part of premises: covenant with under-lessee for covenantor and assigns to observe as to part not demised covenant running with land: see *Dewar* v. *Goodman* [1907], 1 K. B. 612. [1908], 1 K. B. 94.

Rights of assignee of lessor: *Rickett* v. *Green* [1910], 1 K. B. 253.

Suit by statutory assignee of reversion: *Sunderland Orphan Asylum* v. *River Weir Commissioners* [1912], 1 Ch. 191.

5. Rent and Benefit of Lessee's Covenant.

Rent reserved by a lease, and the benefit of every covenant or provision therein contained, having reference to the subject-matter thereof, and on the lessee's part to be observed or performed, and every condition of re-entry and other condition therein con-

tained shall be annexed and incident to, and shall go with the reversionary estate in the land or in any part thereof, immediately expectant on the term granted by the lease, notwithstanding severance of that reversionary estate, and shall be capable of being recovered, received, enforced and taken advantage of, by any person from time to time entitled, subject to the term, to the income of the whole or any part, as the case may require, of the land leased.

[Origin: 44-45 V., c. 41, s. 10, Imp.]

The assignee of the reversion is entitled to the benefit of a clause in a lease providing for its determination at the end of any one month by either party giving to the other one month's notice. *Re Robinovitch & Booth* (1914) 31 O. L. R. 88.

Rent which has accrued due does not pass to the purchaser of the reversion unless expressly assigned to him; nor does he (in Ontario) obtain any right of re-entry for breach of contract to pay rent which took place before the reversion was assigned to him. The law in England has been changed on this point, by the Conveyancing Act, 1911. *Brown* v. *Gallagher & Co.* (1914) 31 O. L. R. 323.

6. Lessee's Rights Against Lessor's Assigns.

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 persons, of the revision 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.

[Origin: 32 Hen. VIII. c. 34, s. 2.]

7. Lessor's Covenants Run with Reversion.

The obligation of a covenant entered into by a lessor with reference to the subject-matter of the lease shall, if, and as far as the lessor has power to bind the reversionary estate immediately expectant on the term granted by the lease, be annexed and incident to and shall go with that reversionary estate, or the several parts thereof, notwithstanding severance of that reversionary estate, and may be taken advantage of and enforced by the person

in whom the term is from time to time vested by conveyance, devolution in law, or otherwise; and, if, and as far as the lessor has power to bind the person from time to time entitled to that reversionary estate, such obligation may be taken advantage of and enforced against any person so entitled.

[Origin: 44-45 V., c. 41, s. 11, Imp.]

8. Apportionment of Condition of Re-entry.

Notwithstanding the severance by conveyance surrender or otherwise, of the reversionary estate in any land comprised in a lease, and notwithstanding the avoidance or cesser in any other manner of the term granted by a lease as to part only of the land comprised therein, every condition or right of re-entry, and every other condition contained in the lease, shall be apportioned, and shall remain annexed to the severed parts of the reversionary estate as severed, and shall be in force with respect to the term whereon each severed part is reversionary, or the term in any land which has not been surrendered, or as to which the term has not been avoided or has not otherwise ceased, in like manner as if the land comprised in each severed part, or the land as to which the term remains subsisting, as the case may be, had alone originally been comprised in the lease.

[Origin: 44-45 V., c. 41, s. 12, Imp.]

9. Application of ss. 5, 7 and 8.

Sections 5 and 7 and section 8 so far as it is applicable to leases not made by deed shall apply only to leases made after the 24th day of March, 1911.

10. Sub-Lessee Has No Right to Call for Title.

(1) On a contract to grant a lease for a term of years to be derived out of a leasehold interest, with a leasehold reversion, the intended lessee shall not have the right to call for the title to that reversion.

(2) This section applies only if, and as far as the contrary intention is not expressed in the contract, and shall have effect subject to the terms of the contract and to the provisions therein contained.

(3) This section shall apply only to contracts made after the 24th day of March, 1911.

[Origin: 44-45 V., c. 41, s. 13, Imp.]

11. Defects in Leases Made Under Powers of Leasing.

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 the person who, subject to any lease lawfully granted under such power, would have been entitled to the land comprised in such lease, such lease, in case the same was made in good faith, and the lessee named therein, his heirs, executors, administrators, or assigns, have entered thereunder, shall be considered a contract for a grant, at the request of the lessee, his heirs, executors, administrators, or assigns, of a valid lease under such power, to the like purport and effect as such invalid lease, 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 by such contract; but no lessee under any such invalid lease, his heirs, executors, administrators, or assigns, shall be entitled, by virtue of any such contract, 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.

[Origin: 12-13 V., c. 26, s. 2, Imp.]

A person entitled to the income of land under a trust or direction for payment thereof to him during his own or any other life, is entitled to exercise the power of leasing conveyed by R. S. O. 1897, ch. 71, sec. 42; R. S. O. (1914), ch. 74, sec. 33; see also *National Trust* v. *Shore*, 11 O. W. R. 328, 16 O. L. R. 177.

Right to call for valid lease in exercise of power: *Atkinson* v. *Farrell*, 27 O. L. R. 204; 4 O. W. N. 73; 8 D. L. R. 582.

See *Morris* v. *Cairncross*, 9 O. W. R. 918, at p. 925, 14 O. L. R. 544.

12. Confirmation of Lease.

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.

[Origin: 13-14 V., c. 17, s. 2, Imp.]

13. Reversioner Able and Willing to Confirm.

Where, during the continuance of the possession taken under any such invalid lease, the person for the time being entitled, subject to such possession, to the land 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, or any person who would have been bound by the lease if the same had been valid, upon the request of the person so able to confirm the same, shall 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, or by some other persons by them 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.

[Origin: 13-14 V., c. 17, s. 3, Imp.]

14. Validation of Lease by Grantor.

Where a lease granted in the intended exercise of any power of leasing is invalid by reason that, at the time of the granting thereof, the person granting the same could not lawfully grant such lease, but the estate of such person in the land comprised in such lease has continued after the time when such, or the like lease, might have been granted by him in the lawful exercise of such power, 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 of sections 11 to 17 shall apply to every such lease.

[Origin: 12-13 V., c. 26, s. 4, Imp.]

15. Exercise of Power of Leasing.

Where a valid power of leasing is vested in, or may be exercised by, a person granting a lease, and, by reason of the determination of the estate or interest of such person, or otherwise, such lease cannot have effect and continuance according to the terms thereof independently of such power, such lease shall, for the purposes of the next preceding four sections, be deemed to be granted in the intended exercise of such power, although such power is not referred to in such lease.

[Origin: 12-13 V., c. 26, s. 5, Imp.]

16. Covenants for Title, Quiet Enjoyment, and Re-entry.

Nothing in sections 11 to 17 shall extend to, prejudice, or take away, any right of action, or other right or remedy to which, but for the next preceding five sections, the lessee named in any such lease, 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 prejudice, or take away, any right of re-entry, or other right or remedy to which, but for such 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.

[Origin: 12-13 V., c 26, s. 7, Imp.]

17. Certain Lease Excepted.

The next preceding six sections shall not extend to any lease where, before the 10th day of June, 1857, the land comprised therein has 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.

[Origin: 12-13 V., c. 26, s. 7, Imp.]

18. Merger, Etc., of Reversions.

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 lease, the next vested right to the land, shall to the extent of and for preserving such incidents to and obligations on the reversion as but for the surrender or merger thereof would have subsisted, be deemed the reversion expectant on the lease.

[Origin: 8-9 V., c. 106, s. 9, Imp.]

Merger of a term is where there is a union of the term with the immediate reversion, both being vested at the same time in one person in the same right; *Salmon* v. *Swand* (1622) 3 Cro. R. Jac. 619; *Burton* v. *Barclay* (1831) 7 Bing. 745.

Formerly if a tenant for a term of years under a lease for a less term and afterwards assigned his reversion, and the assignee took a conveyance of the fee, by which his former reversionary interest was merged, the covenants of the sub-lease incident to that reversionary interest were thereby extinguished; *Webb* v. *Russell* (1789) 3 T. R. 393; 1 R. R. 725; *Thorn* v. *Woolcombe* (1832) 3 B. & Ad. 586; but now the above section preserves the incidents and obligations as they would have substituted but for the merger or surrender of the reversion.

19. Right of Re-entry.

(1) In every demise, whether by parol or in writing, and whenever made, unless it is 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.

[Origin: R.S.O. (1897), c. 170, s. 11.]

At comman law, when a forfeiture was claimed by the landlord, for non-payment of rent reserved in a lease, great strictness was required. A demand of the precise sum of rent had to be made upon the demised land before sunset on the day when due; if any requisite was omitted, the forfeiture was not complete. Where the lease, however, gave a right of re-entry for non-payment of rent "though no formal or legal demand should be made for payment thereof,"

ejectment might be maintained, without any entry or demand of rent; *Doe* v. *Masters* (1824) 2 B. & C. 490; *Campbell* v. *Baxter* (1864) 15 C. P. 42 at 47.

The demand at common law.

(a) must be made by landlord or his agent duly authorized in that behalf; *Roe* v. *Davis* (1806) 7 East 363; *Toms* v. *Wilson* (1862) 32 L. J. Q. B. 33.

(b) must be made on the very last day, *Smith & Bustard's Case* (1589) 1 Leon 141; *Doe* v. *Wandless* (1797) 7 T. R. 117, 4 R. R. 393; *Doe* v. *Roe* (1849) 7 C. B. 134.

(c) must be made a convenient time before and continued till sunset; *Wood & Chiver's Case* (1573) 4 Leon 179; *Acocks* v. *Phillips* (1860) 5 H. & N. 183.

(d) must be made on the land and at the most notorious place on it; *Cole Ejec.* 413; and if the lease or agreement mentions a place where rent is to be paid, it must be made there, *Buskin* v. *Edmonds* (1595) Cro. Eliz. 415; *Borrough's Case* (1596) 4 Co. R. 73.

(e) must be made of the exact sum then payable; *Fabian* v. *Winston* (1589) Cro. Eliz. 209; *Fabain & Windsor's Case* (1590) 1 Leon 305.

(f) must be of only the last quarter, even if more is due; *Scot* v. *Scot* (1588) Cro. Eliz. 73; *Tomkins* v. *Pincent* (1702) 7 Mod. 97; *Doe* v. *Paul* (1829) 3 C & P. 613.

The agreement for re-entry is deemed to be included in every demise by parol or in writing made after 25th March, 1886; s. 19.

Where the lease gave a right of re-entry "if and whenever any one quarters rent should be arrear for twenty-one days, and not sufficient distress could be found," and a distress yielded only sufficient to pay two out of three quarters rent owing, the right of re-entry was enforced. *Shepherd* v. *Berger* [1891] 1 Q. B. 597.

Where a lease provided for re-entry if the lessees, being a Company, should enter into liquidation voluntary or compulsory, and the lessees, a solvent company, went into liquidation for reconstruction purposes only, there was a right of re-entry; *Horsey* v. *Steiger* [1898] 2 Q. B. 259; [1899] 2 Q. B. 79.

The institution of summary proceedings under sect. 75 is an unequivocal exercise of the landlord's option to determine a lease and of his right of re-entry for non-payment of rent overdue for 15 days. *Re Bagshaw & O'Connor* (1918) 42 O. L. R. 466.

The acceptance of rent overdue is not a waiver by the landlord of his right of re-entry. *Re Bagshaw & O'Connor* (1918) 42 O. L. R. 466; but the acceptance of rent when it becomes due is a waiver of a forfeiture, because it recognises the lease as subsisting. *Grossman* v. *Modern Theatres* (1919) 45 O. L. R. 564.

See page 106 *post.*

(2) In every such demise as aforesaid there shall be deemed to be included an agreement that if the tenant or any other person shall be convicted of keeping a disorderly house, within the meaning of *The Criminal Code,* on the demised premises, or any part thereof, it shall be lawful for the landlord at any time thereafter,

into the demised premises, or any part thereof, to re-enter and the same to have again, re-possess and enjoy as of his former estate.
[Origin: 2 Geo. V. c. 25, s. 1, Ont.]

20. Forfeiture of Leases.

(1) In this section and the next following three sections

(*a*) "Lease" shall include an original or derivative underlease and a grant at a fee farm rent or securing a rent by condition and an agreement for a lease where the lessee has become entitled to have his lease granted.
[Origin: 44-45 V., c. 41, s. 14; 55-56 V., c. 13, s. 5, Imp.]

(*b*) "Lessee" shall include an original or derivative underlessee and the heirs, executors, administrators and assigns of a lessee and a grantee under such a grant and his heirs and assigns.

(*c*) "Lessor" shall include an original or derivative underlessor and the heirs, executors, administrators and assigns of a lessor and a grantor under such a grant and his heirs and assigns.

(*d*) "Mining Lease" shall mean a lease for mining purposes, that is a searching for, working, getting, making merchantable, smelting or otherwise converting or working for the purposes of any manufacture, carrying away or disposing of mines or minerals, and substances in, on or under the land, obtainable by underground or by surface working or purposes connected therewith and shall include a grant or license for mining purposes.
[Origin: 44-45 V., c. 41, s. 2 (xi), Imp.]

(*e*) "Under-lease" shall include an agreement for an underlease where the under-lessee has become entitled to have his under-lease granted.

(*f*) "Under-lessee" shall include any person deriving title under or from an under-lessee.

In an action for recovery of demised premises where rent is in arrears, a sub-lessee who has paid rent to the lessors is a "tenant," and is entitled to a stay of proceedings upon payment of arrears and costs: *Moore* v. *Smee* [1907], 2 K. B. 8.

(2) 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, other than a proviso in respect of the payment of rent, 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 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.

[Origin: 44-45 V., c. 41, s. 14 (i); 55-56 V., c. 13, s. 5, Imp.]

A sufficient notice is a condition precedent to forfeiture in cases where notice is required; *Horsey* v. *Steiger* [1898] 2 Q. B. 259; [1899] 2 Q. B. 79.

The notice here required is necessary as a preliminary to re-entry without action as well as to suit to recover possession. *Greenwood* v. *Rae* (1916) 36 O. L. R. 367.

The notice must be given in such detail as will enable the lessee to understand what is complained of, so that he may have an opportunity of remedying the breach before action brought. A mere general notice of breach of a specified covenant, such as "you have broken the covenants for repairing the inside and outside of the houses" describing them, is not sufficient; *Fletcher* v. *Nokes* [1897] 1 Ch. 271; followed by *Re Serle, Gregory* v. *Serle* [1898] 1 Ch. 652.

A letter written to the tenant complaining of his cutting timber without authority, and followed by a notice given in the words, "You have broken the covenants as to cutting timber, etc.," without more particularly specifying the breach and claiming compensation was decided to be sufficient; *McMullen* v. *Vannatto* (1894) 24 O. R. 625.

The notice may be good, though it alleges a breach which has not been committed; *Gannell* v. *London Brewing Co.* [1900] W. N. 16.

Where the breach is capable of remedy the notice should require the lessee to remedy it, but if the lessor does not want it he need not in addition ask compensation in money, and the notice is good even if compensation in money is not asked for; *Lock* v. *Pearce* [1893] 2 Ch. 271, in which *North London Land Co.* v. *Jacques* (1884) 49 L. T. 659, was disapproved.

Surveyor's fees and solicitor's charges in respect of preparation of the notice of the breach cannot be allowed as compensation for breach of the covenants in a lease; *Skinner Co.* v. *Knight* [1891] 2 Q. B. 512; *Lock* v. *Pearce* [1893] 2 Ch. 271.

Where the breach of covenant was a continuing one, the covenant being one to repair, and three days after the expiration of notice to repair was given a quarter's rent became due, and the lessor brought an action to recover possession and the quarter's rent due, it was decided that the covenant, being a continuing

one, no new notice was required in respect of the non-repair after the expiration of the time specified in the notice, and the claim for rent did not affect the right to possession in respect of non repair after the date when the rent fell due; *Penton* v. *Barnett* [1898] 1 Q. B. 276.

Relief need not necessarily be claimed by the pleadings; *Mitchison* v. *Thompson* (1883) 1 C. & E. 72.

The relief must be asked for before the lessor has actually re-entered; *Rogers* v. *Rice* [1892] 2 Ch. 170. This is now altered in England by Imp. Act, 55 & 56 Vic., c. 13, s. 2 (1).

An under lessee of part of the demised premises cannot be relieved from a forfeiture incurred for breach of covenant to repair contained in the head lease; *Bert* v. *Gray* [1891] 2 Q. B. 98.

The recovery may be limited to the land alone, and not extend to the buildings if the latter have been purchased by the lessee from the lessor; *Toronto Hospital Trustees* v. *Denham* (1880) 31 C. P. 203.

Where a provision in a lease gave the landlord the right to re-enter upon the tenant making a chattel mortgage, the tenant was held entitled to nominal damages only, where the landlord re-entered without action and without giving the required notice. *Greenwood* v. *Rae* (1916) 36 O. L. R. 367.

Remedies on forfeiture: (a) Re-entry without action (eviction); (b) action claiming forfeiture; (c) Summary ejectment under sec. 75, page 85 *post*.

Relief against forfeiture may arise at common law, in equity or under the Judicature Act, R. S. O. (1914), ch. 56.

Relief against forfeiture is refused: (a) where non-payment of rent, right to relief being limited under sec. 20 (2), (3), (6); (b) where breach of covenant not to assign or sub-let, 20 (9*a*); (c) bankruptcy, 20 (9*a*). (d) Mining leases, 20 (9*b*).

Requirements of the statute considered as to notice of breack and intention to forfeit—principles and form of notice discussed: see *Rose* v. *Spicer* [1911], 2 K. B. 234; *Holman* v. *Knox*, 20 O. W. R. 121; 3 O. W. N. 151, 745, 21 O. W. R. 325; 25 O. L. R. 588.

Notice specifying breach: *Walters* v. *Wylie*, 20 O. W. R. 994, 3 O. W. N. 567.

The notice required under this section is applicable to summary proceedings re Overholding Tenants. Proceedings under a forfeiture without such notice are nugatory, (see Part iii.): *Re Snure & Davis*, 4 O. L. R. 82.

(3) Where a lessor is proceeding by action or otherwise, to enforce any right of re-entry or forfeiture, whether for non-payment of rent or for other cause, the lessee may, in the lessor's action, if any, or if there is no such action pending, then in an action brought by himself, apply to the Court for relief; and the Court may grant such relief, as having regard to the proceedings

and conduct of the parties under the foregoing provisions of this section and to all the other circumstances the Court thinks fit, and on such terms, as to payment of rent, costs, expenses, damages, compensation, penalty, or otherwise, including the granting of an injunction to restrain any like breach in the future as the Court may deem just.

A lessee is not entitled, as of right, to relief against forfeiture for non-payment of rent, that relief may be refused on collateral grounds. In this case the trial of an action for relief from forfeiture for non-payment of rent took place after the lease expired by effluxion of time, no relief was granted, even though the lease gave an option of purchase; *Coventry* v. *McLean* (1894) 22 O. R. 1; 21 A. R. 176.

What amounts to breach of covenant to repair amounting to waste. Conversion of building from chapel to theatre, held not to amount to this: *Hyman* v. *Rose, Rose* v. *Spicer* [1911], 2 K. B. 234 [1912], A. C. 623.

Alterations to make a building more suitable for business purposes is not a breach of a covenant against waste and in any case relief against any such forfeiture would be granted upon payment into Court of such amount as would ensure a return of the premises to their old plight and conditions at the expiration of the lease: *Hyman* v. *Rose* [1912] A.C. 623; *Sullivan* v. *Dore* ((1913) 25 O. W. R. 31, 5 O. W. N. 70.

Measure of damages for breach of covenant to keep in repair: *Joyner* v. *Weeks* [1891], 2 Q. B. 31.

Relief against forfeiture of right of renewal: *Grenville* v. *Parker* [1910], A. C. 335.

Effect of order relieving against forfeiture: *Dendy* v. *Evans* [1909], 2 K. B. 894, [1910], 1 K. B. 263.

Parties necessary to application for relief against forfeiture, when original lessee not necessary party: *Humphreys* v. *Morten* [1905], 1 Ch. 739.

Who are necessary parties to a claim for relief against forfeiture: *Hare* v. *Elms* [1893], 1 Q. B. 604.

The scope of the inquiry under sect. 75 is limited to the matters enumerated in that sect., and if the tenant desires equitable relief he must seek it in the manner provided in above sect. either by bringing an independent action or by an application to the Court in the lessors action to enforce his rights of re-entry: *Lock* v. *Pearce* [1893] 2 Ch. 271; *Re Bagshaw & O'Connor* (1918) 42 O. L. R. 475.

Where defendant committed waste by cutting down 51 trees for firewood, 48 of which were timber trees, he was allowed relief against forfeiture upon payment of damages. *McPherson* v. *Giles* (1919) 45 O. L. R. 441.

Where the lease provided "in case the said premises . . . become and remain vacant and unoccupied for the period of ten days, without the written consent of the lessor, this lease shall cease and be void, and the term

hereby created expire and be at an end, and the lessor may re-enter . . " as in the case of a holding over, the lessee cannot take advantage of that condition, it is a condition subsequent, a breach of which could only avoid the lease at the instance of the lessors; *Palmer* v. *Mail Printing Co.* (1897) 28 O. R. 656.

A lessor may become purchaser of his lessee's interest at Sheriff's sale, under a third party's execution, and the term will merge in the fee, and the lessor will be entitled to possession; *Stroud* v. *Kane* (1856) 13 U. C .R. 459; but there must be an assignment by deed by the sheriff of the term to the purchaser; *Duggan* v. *Kitson* (1861) 20 U. C. R. 316.

Forfeiture of lease for non-payment of rent: *Fenny* v. *Casson*, 12 O. W. R. 404, 722.

Mere knowledge of or acquiescence in an act constituting a forfeiture is no waiver, but permitting expenditure of money in improvements, or receipt of rent may be; *McLaren* v. *Kerr* (1876) 39 U. C. R. 507.

If there is a continuing breach of covenant, the forfeiture may be claimed, even though rent was accepted after the breach commenced but before it ended; *Leighton* v. *Medley* (1882) 1 O. R. 207.

The following are covenants which may have continuing breaches: To keep in repair, *Ainley* v. *Balsden* (1857) 14 U. C. R. 535; to keep buildings insured, *Doe* v. *Gladwin* (1845) 6 Q. B. 953; *Pentell* v. *Harborne* (1848) 11 Q. B. 368; *Hyde* v. *Watts* (1843) 12 M. & W. 254; *Doe* v. *Peck* (1830) 1 B. & Ad. 428, 35 R. R. 339; to keep an hotel furnished, *Rossin* v. *Joslin* (1859) 7 Gr. 198; not to use rooms in a particular manner; *Doe* v. *Woodbridge* (1829) 9 B. & C. 376, 33 R. R. 203.

Waiver of Forfeiture. A distress is an acknowledgment of the subsistence of the tenancy up to the time that the rent distrained for became due and will therefore be a waiver of any forfeiture committed before that time; *Ward* v. *Day* (1863) 4 B. & S. 386; 5 B. & S. 359; *Walrond* v. *Hawkins* (1875) L. R. 10 C. P. 342; but if the breach is a continuing one the forfeiture will not be waived; *Doe* v. *Peck* (1830) 1 B. & Ad. 428; 35 R. R. 339.

A landlord who sued for possession for non-payment of rent, and also claimed arrears not realized on a prior distress, was entitled to the rent but was denied possession; *Kirkland* v. *Braincourt* (1890) 6 T. L. R. 441. See also *Baker* v. *Atkinson* (1886) 11 O. R. 735; (1887) 14 A. R. 409; *Linton* v. *Imperial Hotel Co.* (1889) 16 A. R. 337.

If the lessor brings ejectment for a forfeiture, and afterwards accepts rents, distrains or sets up as a cause for forfeiture, a subsequent non-payment of rent, it is no waiver; *Doe* v. *Meux* (1825) 4 B. & C. 606, 1 C. & P. 346; *Jones* v. *Carter* (1846) 15 M. & W. 718; *Grimwood* v. *Moss* (1871) L. R. 7 C. P. 239, 360; *Toleman* v. *Portbury* (1872) L. R. 7 Q. B. 344.

The landlord after commencing an action of ejectment may distrain for rent, subsequently accruing due, and the receipt of such rent will not *per se*

set up the former tenancy which ended on the election to forfeit manifested by the issue of the writ; *McMullen* v. *Vannatto* (1894) 24 O. R. 625.

The lessor may be estopped from declaring a forfeiture, where after knowlege of the breach, he permits the lessee to expend large sums of money without objection, which would be lost if a forfeiture were allowed; *Benavides* v. *Hunt* (1891) 79 Texas 383; also see *Ramsden* v. *Dyson* (1865) L. R. 1 H. L. 129; *Plimmer* v. *Wellington* (1884) 9 A. C. 699.

If the lessor brings an action for possession claiming forfeiture for non-payment of rent, and also for the arrears, the election to forfeit is complete, and payment of arrears and costs before trial does not allow the lessor to retract the forfeiture; *Denison* v. *Maitland* (1893) 22 O. R. 166.

An unqualified demand of rent would appear to waive a forfeiture; *Doe* v. *Birch* (1836) 1 M. & W. 402.

If rent is demanded without qualification and paid, a receipt "without prejudice" will not prevent the payment from waiving a forfeiture; *Strong* v. *Stringer* (1889) 61 L. T. 470.

Receipt of rent of telephone wires for one day after the tenancy would otherwise have determined, by reason of a notice, prevented the tendency from coming to an end; *Keith* v. *National Telephone Co.* [1894] 2 Ch. 147.

Where the lessee requested the lessor to credit a balance of a note on rent, but it was credited on another account, it was no acceptance of rent; *McDonald* v. *Peck* (1859) 17 U. C. R. 270.

A license in variation of a sealed instrument must be under seal; *Kaatz* v. *White* (1868) 19 C. P. 36; and whether by deed or not, unless it is coupled with a valid grant, it is revocable upon reasonable notice by the grantor; *Wood* v. *Leadbitter* (1845) 13 M. & W. 838; *Cornish* v. *Stubbs* (1870) L. R. 5 C. P. 334; *Mellor* v. *Watkins* (1874) L. R. 9 Q. B. 400.

SS. 14 & 15 (Imp. Act, 22 & 23 Vic., 35 ss. 1 & 2), were doubtless passed to abrogate the rule in *Dumpor's Case*, 1 Sm. L. C. (9 Ed.) 43, where it was decided that a license once given put an end to the right of re-entry for any subsequent assignment without license. Upon a lease made pursuant to the Short Forms of Leases Act, containing a condition for re-entry on assigning or subletting without leave, when the lessor gives a license to assign part of the demised 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 requires the right of re-entry on the whole or a part in the name of the whole.

A lessee obtained from his lessor a license to assign, on condition that the assignee would not at any time assign without the consent of the lessor, further arrangements were made by the assignee without license and a forfeiture was upheld; *Eyton* v. *Jones* (1870) 21 L. T. 789.

(4) This section shall apply, 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 a statute.

(5) 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.

(6) Where the action is brought to enforce a right of re-entry or forfeiture for non-payment of rent and the lessee at any time before judgment pays into court all the rent in arrear and the costs of the action, the proceedings in the action shall be forever stayed.

(7) Where relief is granted under the provisions of this section the lessee shall hold and enjoy the demised premises according to the lease thereof made without any new lease.

(8) This section shall apply to leases made either before or after the commencement of this Act and shall apply notwithstanding any stipulation to the contrary.

(9) This section shall not extend—

(*a*) To a covenant or condition, against the assigning under-letting, 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 lessee making an assignment for the benefit of creditors under *The Assignments and Preferences Act*, or on the taking in execution of the lessee's interest; or

As to breach of covenant not to assign or sub-let; see also sec. 23, *post;* page 55 and see page 101.

Court will not grant relief against forfeiture of lease on account of breach of covenant not to assign or underlet: see *Eastern Tel. Co.* v. *Dent* [1899], 1 Q. B. 835.

Action for possession on ground of breach of covenant not to sub-let: *Curry* v. *Pennich*, 4 O. W. N. 712, 1065; 23 O. W. R. 922; 24 O. W. R. 357; 10 D. L. R. 166, 548.

Condition against assigning: *Fitzgerald* v. *Loveless* (*Barbour*), 17 O. L. R. 254, 11 O. W. R. 390, 12 O. W. R. 807; 42 S. C. R. 254.

Assignment for benefit of creditors as breach of covenant not to assign or sub-let: *Gentle* v. *Faulkner* [1900], 2 Q. B. 267.

Mortgagees of the demised premises having notified the sub-tenants to pay rent to them, the assignee for benefit of creditors in possession paid to them a

sum in satisfaction of their claim with the assent of the lessors against whose demand it was charged. Held that this was no waiver of the lessors' right to claim a forfeiture under proviso in lease against assignments and bankruptcy: *Littlejohn* v. *Soper*, 1 O. L. R. 172, 31 S. C. R. 572.

A lease to a joint stock company provided that in case the lessee should assign for benefit of creditors, 6 months' rent should become due and the lease should be forfeited. The fact that the lessors were principal shareholders and had moved the by-law for winding-up, made no difference in their position as individuals. The assignee held possession three months and the lessors accepted rent from him for that time, and from sub-lessees for the month following. The lessors had claimed the 6 months' rent and elected to forfeit. The assignee had a statutory right to remain in possession 3 months. The lessors were held not to have waived their right to forfeit: *Littlejohn* v. *Soper*, 1 O. L. R. 172, 31 S. C. R. 572.

Forfeiture of lease by solvent company going into voluntary liquidation: *Freyer* v. *Ewart* [1902], A. C. 187.

Apart from the provisions of sec. 38, an assignment for benefit of creditors by a tenant who holds under a lease with a covenant "not to assign or sub-let" or with the common provision "if the term hereby granted shall, etc. . . . or if the lessee or his assigns shall make any assignment, etc. . . . ," gives the landlord an immediate right to eject, and without giving notice of breach: *Kerr v. Hastings*, 25 C. P. 429; *Magee* v. *Rankin*, 29 U. C. R. 257; *Argles* v. *McMath*, 26 O. R. 224, 23 A. R. 44.

There must be an election to forfeit on the part of the landlord: *Linton* v. *Imperial Hotel Co.* (1889) 16 A. R. 337; *Palmer* v. *Mail Printing Co.* (1897) 28 O. R. 656.

Acceptance of arrears of rent is not an election not to forfeit: *Soper* v. *Littlejohn*, 1 O. L. R. 172, 31 S. C. R. 572.

Granting a new lease is an undoubted election to forfeit: *Tew* v. *Routley*, 31 O. R. 358. Noted on page 68 *post*.

Covenant or condition for forfeiture on bankruptcy of lessee: see sec. 38 note.

(*b*) In the case of a mining lease, to a covenant or condition for allowing the lessor to have access to or inspect books, accounts, records, weighing machines or other things, or to enter or inspect the mine or the workings thereof.

(10) Where the right of re-entry or forfeiture is in respect of a breach of a covenant or condition to insure, relief shall not be granted if at the time of the application for relief there is not an insurance on foot in conformity with the covenant or condition to insure, except in addition to any other terms which the Court may impose upon the term that the insurance is effected.

21. Leases, Under-leases, Forfeiture.

Where a lessor is proceeding by action or otherwise to enforce a right of re-entry or forfeiture under any covenant, proviso, or stipulation in a lease, the court on application by any person claiming as under-lessee any estate or interest in the property comprised in the lease or any part thereof, either in the lessor's action if any, or in any action brought by such person for that purpose, may make an order vesting for the whole term of the lease or any less term the property comprised in the lease or any part thereof in any person entitled as under-lessee to any estate or interest in such property upon such conditions, as to execution of any deed or other document, payment of rent, costs, expenses, damages, compensation, giving security, or otherwise, as the court in the circumstances of each case shall think fit, but in no case shall any such under-lessee be entitled to require a lease to be granted to him for any longer term than he had under his original sub-lease.

[Origin: 55-56 V., c. 13, s. 4, Imp.]

22. Parties to Action for Re-entry or Forfeiture.

Where a lessor is proceeding by action to enforce a right of re-entry or forfeiture under any covenant, proviso or stipulation in a lease, every person claiming any right, title or interest in the demised premises under the lease if it be known to the lessor that he claims such right or interest or if the instrument under which he claims is registered in the proper registry or land titles office shall be made a party to the action.

23. License to Assign Unreasonably Withheld.

In every lease made after the 24th day of March, 1911, containing a covenant, condition or agreement against assigning, underletting, or parting with the possession, or disposing of the land or property leased without license or consent, such covenant, condition or agreement shall, unless the lease contains an expressed provision to the contrary, be deemed to be subject to a proviso to the effect that such license or consent shall not be unreasonably withheld.

See notes to sec. 20 (9) *ante*, and page 101 *post*.

24. Licenses.

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 is 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, or to the actual assignment, under-lease or other matter thereby specifically authorized to be done, but shall not 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.

[Origin: 22-23 V., c. 35, s. 1, Imp.]

25. Operation of Partial Licenses.

Where in a lease there is a power or condition of re-entry on assigning or underletting or doing any other specified act without license, and 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 in respect of part only of such property such license shall not operate 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 interest in the property, or by the lessee or owner of the rest of the property, over or in respect of such shares or interest 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.

[Origin: 22-23 V., c. 35, s. 2, Imp.]

See page 106 *post.*

Secs. 24 and 25 are to be read together, the former referring to all cases and making licenses to alien applicable *pro hac 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: *Baldwin* v. *Wanzer* (1892) 22 O. R. 612.

Under a lease made pursuant to the Short Forms of Leases Act, containing a condition for re-entry on assigning or subletting without leave, when the lessor gives a license to assign part of the demised premises, he may re-enter upon the remainder for breach of the covenant not to assign or sublet, notwithstanding that the proviso for re-entry requires the right of re-entry on the whole or a part in the name of the whole: *Baldwin* v. *Wanzer*, (1892) 22 O. R. 612.

26. Waiver of Covenant.

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, 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.

[Origin: 23-24 V., c. 38, s. 6, Imp.]

27. Covenant to Pay Taxes.

(1) Unless it is otherwise specifically provided in a lease made after the commencement of this Act a covenant by a lessee for payment of taxes shall not be deemed to include an obligation to pay taxes assessed for local improvements.

(2) In the case of a lease made under *The Short Forms of Leases Act* where the words "except for local improvements" are struck out or omitted from the covenant number 3 in Schedule "B" of that Act such striking out or omission shall be deemed to be a specific provision otherwise made within the meaning of subsection 1.

As to liability of tenant to pay night watchman: see R. S. O. (1914), ch. 192, sec. 400 (50) (*a*).

Taxes under the Muncipal Drainage Act R. S. O. (1914) c. 198 are not by s. 92 included in covenant, unless specially provided for; but taxes for repairs to ordinary drains would be; *Farlow* v. *Stevenson* [1900] 1 Ch. 128; *Brett* v. *Rogers* [1897] 1 Q. B. 525.

Where any lease was made prior to 1st September, 1897, the lessee is liable under the usual covenant to pay taxes, for local improvement taxes and for additions made under the Assessment Act year by year to the amount of the taxes in arrears or additions made by the municipality; *Boulton* v. *Blake* (1886) 12 O. R. 532, or for a specific rate created by a corporation by-law as well as all other taxes; *Wilkie* v. *Toronto* (1862) 11 C. P. 379.

Where a lessee covenanted in 1872 in a lease commencing 27th September, 1872, to pay "all taxes, rates or assessments whatsoever, whether parliamentary, municipal or otherwise which *now are*, or which during the continuance of 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, he was not liable for the taxes in 1872 which had been assessed and charged on 15th April, 1872, because the words "all rates, etc., which now are" refered to the kind or character of the tax assessable," and the words "or which shall at any time, etc.," to any other kind of taxes which might thereafter be imposed; *MacNaughton* v. *Wigg* (1875) 35 U. C. R. 111.

The tenant is not liable for taxes where the lease is silent on the subject; *Dove* v. *Dove* (1868) 18 C. P. 424.

By the Assessment Act, R. S. O., (1914) c. 195, s. 97, "Any tenant may deduct from his rent any taxes *paid* by him, which as between him and his landlord the latter ought to pay"; but this applies only where the tenant could have been compelled to pay the taxes; *Carson* v. *Veitch* (1885) 9 O. R. 706.

28. Notices to Quit.

A week's notice to quit and a month's notice to quit, respectively, ending with the week or the month, shall be sufficient notice to determine, respectively, a weekly or monthly tenancy.

In the case of a yearly tenancy, the notice to quit required is a half-yearly one, or 183 days, to quit at the end of the first or some other year of the tenancy; six lunar months is insufficient; *Clayton* v. *Blakey* (1798) 2 Sm. L. C. (9 Ed.) 122, 8 T. R. 3; *Duppa* v. *Mayo* 1 Wm. Saund (1871 Ed.) 385-6.

Tenancies from year to year require a half-year's or 183 days' notice to quit at the end of the first or some other year of the tenancy. *Good* v. *Howells* (1838) 4 M. & W. 198; *Doe* v. *Horn* (1838) 3 M. & W. 333.

A notice to quit is a certain reasonable notice required by law or by custom, or by special agreement, to enable the landlord or tenant, or the assignees, or representatives of either of them without the consent of the other, to determine a tenancy from year to year or month to month; *Cole Ejec.* 30.

The notice must be clear and certain in its terms, and not ambiguous or optional. It is not defective if it states that double rent will be charged, as that is a penalty for holding over under the Statute. *Doe* v. *Jackson* (1779) 1 Doug. 175.

A notice in other respects sufficient was good though it contained the following "and I hereby further give you notice that should you retain possession of

the premises after the day before mentioned, the annual rental of the premises now held by you from me will be £160 payable quarterly in advance; *Ahern* v. *Bellman* (1879) 4 Ex. D. 201.

Where a lease was determinable at the end of seven years by six months' notice, a letter by the lessee stating "that he would not be able to stop over the first seven years of his term, unless his rent was reduced," did not invalidate the notice. *Bury* v. *Thompson* [1895] 1 Q. B. 231, 696.

A notice to quit on the anniversary of the day "at," or "in," or "from," or "on and from" which the term commenced, is good. It is, however, well settled that a notice ought to expire on the last day of the current term; *Sidebotham* v. *Holland* [1895] 1 Q. B. 378.

A parol notice to quit is good. *Bird v. Defonville* (1846) 2 C & K. 415.

A notice given on March 24th, 1898, to quit on June 24th, 1898, or "at the end of your current year's tenancy," is a good notice for March 25th, 1899, when the next year's tenancy expired, as it could not be understood by the tenant that the words "current year" applied to the few hours of the year which had still to run; *Wride* v. *Dyer* [1900] 1 Q. B. 23.

If a corporation is the landlord, the notice should be directed to the corporation and not to its officers. *Doe* v. *Woodman* (1807) 8 East. 228; *Burwell* v. *London Free Press Co.* (1895) 27 O. R. 6; but it, of necessity, will be served on one of its officers, if served personally.

Where there is a verbal lease for more than three years to continue and expire on a day certain, and the tenant takes possession, he, as well as his subtenant for an indefinite period, is bound to quit possession without notice, and if either remain in possession after the expiration of the lease he is an overholding tenant; *Magee* v. *Gilmour* (1889) 17 O. R. 620.

Where the tenant holds over after the expiration of his tenancy, the terms on which he continues to hold are matters of evidence rather than law, and where the overholding tenant's term was one for eleven months, he was only entitled to a month's notice to quit after his lease expired; *Eastman* v. *Richard* (1896) 17 C. L. T. 315, (1899) 29 S. C. R. 438.

No particular contract is to be inferred from the mere fact of a holding over after the expiration of the term; *Lindsay* v. *Robertson* (1899) 30 O. R. 229.

The affidavit filed by the landlord on the application is not evidence, it is inceptive only and intended to show some grounds for proceeding; *Re O'Connell* (1865) 1 C. L. J. 163.

The demand of possession must be personally served and the notice of the time and place appointed must be personally served or left at the tenant's place of abode; *Nash* v. *Sharp* (1870) 5 C. L. J. 73.

"At least three days" means "clear days," *i.e.* excluding the first as well as the last day; *Young* v. *O'Rielly* (1864) 24 U. C. R. 172.

A landlord is not liable in trespass for ejecting a tenant where the tenancy has expired, although he may have taken proceedings under the Act; *Rees* v. *Davis* (1858) 4 C. B. N. 56; *Jones* v. *Foley* [1891] 1 Q. B. 730.

29. Tenants to Notify Landlords.

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 landlord's bailiff or receiver; and, if he omits so to do, he shall be answerable to his landlord for all damages sustained by him by reason of the failure to give such notice.

In dower actions, the tenant in possession who is not also the tenant of the freehold, must notify his landlord on being served with a writ, under penalty of forfeiting three years improved rent of the premises; R. S. O. (1914) c. 70, s. 22. And in actions of ejectment when a tenant is served he likewise must immediately give notice to his landlord, or forfeit the value of three years improved or rack rent; s. 29.

As to duty of tenant to notify landlord of construction of ditches: see R. S. O. (1914), ch. 260, sec. 15 (2).

30. Exemptions from Distress.

(1) The goods and chattels exempt from seizure under execution shall not be liable to seizure by distress by a landlord for rent, except as hereinafter provided.

(2) In the case of a monthly tenancy the exemption shall only apply to two months' arrears of rent.

(3) The person claiming such exemptions shall select and point out the goods and chattels which he claims to be exempt.

The exemption given by s. 30 (1) has not been lessened by s. 30 (2), as that sub-section is not capable of an intelligible construction, and is therefore inoperative; *Harris* v. *Canada Permanent L. & S. Co* (1897) 17 C. L. T. 424, 34 C. L. J. 39; *Shannon* v. *O'Brien* (1898) 34 C. L. J. 421.

Goods exempt from execution: see R. S. O. (1914), ch. 80, secs. 3 to 9.

The following are also exempt:—Sheep, where there are other goods sufficient to pay the rent; *Hope* v. *White* (1871) 22 C. P. 5.

Beasts that gain the land while there is other sufficient distress to be found; 51 Hen. 3, Stat. 4.

Goods entrusted to persons carrying on certain trades to exercise their trades upon them; *Patterson* v. *Thompson* (1881) 46 U. C. R. 7, 9 A. R. 326; See also *Mitchell* v. *Coffee* (1880) 5 A. R. 525.

Goods in the custody of the law cannot be distrained; *Grant* v. *Grant* (1883) 10 P. R. 40.

A hardwood flooring put down by the tenant of a roller rink which might be removed; *Howell* v. *Listowel R. & P. Co.* (1887) 13 O. R. 476.

Trade fixtures attached to the freehold; *Davey* v. *Lewis* (1859) 18 U. C. R. 21; see *Rogers* v. *Ontario Bank* (1891) 21 O. R. 416.

Timber being used by a tenant, who is a shipbuilder, in repairing vessels and the vessels being repaired; *Gildersleeve* v. *Ault* (1858) 16 U. C. R. 401.

Goods of an ambassador; 7 Anne c. 12, s. 3.

Hop poles in the ground after the hops are gathered are not distrainable; *Alway* v. *Anderson* (1848) 5 U. C. R. 34.

An injunction may be granted restraining the sale of exemptions; *Harris* v. *Canada Permanent* (1897) 17 C. L. T. 424, 34 C. L. J. 39. The person claiming exemptions must select and point out the things he claims as exemptions; s. 30 (3); and he must give up possession of the premises or be ready and offer to do so; s. 33 (1).

The exemption only applies to goods owned by the tenant himself and not where merely claimed by his wife as hers; *Dutton* v. *Wilkinson*, (Meredith, C.J., unreported), Sept. 22nd, 1898.

The exemptions may be seized and sold if the tenant refuses to give up possession after receiving a notice from the landlord to give up possession or pay the rent; s. 34 page 65, form 1 page 89.

Seizure of implements of trade (note difference in wording of English Act): *Boyd* v. *Bilham* [1909], 1 K. B. 14.

31. Property Not Owned by Tenant.

(1) A landlord shall not distrain for rent on the goods and chattels 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 favor of a person claiming title under an execution against the tenant, or in favor of a 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 or chattels on the premises in the possession of the tenant under a contract for purchase, or by which he may or is to become the owner thereof upon performance of any condition nor where goods or chattels have been exchanged between tenants or persons by the one borrowing or hiring from the other for the purpose of defeating the claim of 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, if 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.

Goods and chattels of third persons are exempt except in the following cases:—

(a) Where title is claimed under an execution against the tenant.

(b) Where title is derived by purchase, gift ,transfer or assignment from tenant, whether absolute, or in trust, or by way of mortgage.

(c) Where the tenant has an interest in goods under a contract of purchase or hiring agreement, his interest only may be sold; *Carroll* v. *Beard* (1896) 27 O. R. 349.

(d) Where goods have been exchanged, with the object of defeating the distress.

(e) Where the property is claimed by the tenant's wife, husband ,daughter, son, daughter-in-law or son-in-law.

(f) Where the property is claimed by any other relative of the tenant who lives on the premises as a member of his family.

(g) Where the property is claimed by virtue of a purchase, gift, transfer or assignment from any relative mentioned in (e) or (f).

A mortgage from the tenant's wife is entitled to the exemption; *Stott* v. *Spain* (1892) 28 C. L. J. 469.

Goods of tenant's wife under hire purchase agreement: *Shenstone* v. *Freeman* [1910], 2 K. B. 84; *Rogers* v. *Martin* [1911], 1 K. B. 19.

Distress for rent—goods on hire purchase: *Hackney Furnishing Co.* v. *Watts* [1912], 3 K. B. 225.

(2) Nothing in this section shall exempt from distress goods or chattels in a store or shop managed or controlled by an agent or clerk for the owner of such goods or chattels where such clerk or agent is also the tenant and in default, and the rent is due in respect of the store or shop or premises rented therewith and thereto belonging, if such goods or chattels would have been liable to seizure but for this Act.

(3) Subject to the provisions of section 34 "tenant" in this section shall include a subtenant 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 arrear, whether or not he has attorned to or become the tenant of the landlord.

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, are not in occupation "under" the assignees, and their goods are not liable for distress: *Farwell* v. *Jamieson*, (1896) 27 O. R. 141, 23 A. R. 517, 26 S. C. R. 588.

32. Goods of Lodgers Protected from Distress.

(1) If a superior landlord distrains or threatens to distrain any goods or chattels of a boarder or lodger for arrears of rent due to him 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 statutory declaration, made by the boarder or lodger, setting forth that the immediate tenant has no right of property or beneficial interest in such goods or chattels, and that they 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 immediate tenant; and to such declaration shall be annexed a correct inventory, subscribed by the boarder or lodger, of the goods and chattels mentioned in the declaration; and the boarder or lodger may pay to the superior landlord, or to the bailiff or other person employed by him, the amount, if any, so due, or so much thereof as is sufficient to discharge the claim of the superior landlord.

A lodger is a tenant with the right of exclusive possession of a part of a house, the landlord, by himself or an agent, retaining general dominion over the house itself. *Wharton's Lexicon*, 11th Ed. 522.

Persons occupying rooms for business purposes in the day time are not lodgers; *Heawood* v. *Bone* (1884) 13 Q. B. D. 179.

Persons residing in an hotel at a certain sum per month are boarders and not guests; *Newcombe* v. *Anderson* (1886) 11 O. R. 665.

A person is a lodger within above section although he has substantially the whole house, his immediate landlord retaining possession only of an housekeeper's room in the basement and two or three empty rooms in the attic, and a stable, and although he may in law be an under tenant; *Phillips* v. *Henson* (1877) 3 C. P. D. 26; and although he has the right of exclusively occupying the greater part of the premises and has separate and uncontrolled power of ingress and egresss, and neither his landlord nor his agent resides or sleeps in the house and the lodger acts as caretaker of the part reserved; *Ness* v. *Stephenson* (1882) 9 Q. B. D. 245; but the landlord must retain the dominion and control over the premises which a master of the house usually has; *Morton* v. *Palmer* (1882) 51 L. J. Q. B. 7.

The question whether a person is a lodger or not should not be left to a jury as that would be in effect asking the jury to construe the section. *Morton* v. *Palmer* (1882) 51 L. J. Q. B. 7.

(2) If the superior landlord, bailiff or other person, after being served with the declaration and inventory, and after the

boarder or lodger has paid or tendered to him the amount, if any, which, by subsection 1, the boarder or lodger is authorized to pay, levies or proceeds, with a distress on the goods or chattels of the boarder or lodger, the superior landlord, bailiff or other person shall be guilty of an illegal distress, and the boarder or lodger may replevy such 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 the truth of the declaration and inventory may be inquired into.

An inventory is sufficiently "subscribed" if it is referred to in the declaration to which it is annexed, and the declaration signed: *Godlonton* v. *Fulham, etc., Co.* [1905], 1 K. B. 431.

The declaration under above section must be made after each distress against which protection is sought; *Thwaites* v. *Wilding* (1883) 12 Q. B. D. 4, 15 L. J. Q. B. 1; but it need not necessarily state that no rent is due. *Harris, Ex p.* (1885) 16. Q. B. D. 4.

An action for illegal distress lies against the bailiff who proceeds with a distress on lodger's goods after being served with the declaration and inventory, and after the lodger has paid or tendered to the superior landlord the rent, if any, due from him to his immediate landlord: *Lowe* v. *Darling* [1905], 2 K. B. 501, [1906], 2 K. B. 772.

A declaration made on the 5th day after distress has been levied is good, as under 2 W. & M. sess. 1 c. 5, s. 2, R. S. O. (1897) c. 342, s. 18(2) a sale cannot be held until after that day; *Sharp* v. *Fowle* (1884) 12 Q. B. D. 385.

(3) Any payment made by a boarder or lodger pursuant to subsection 1 shall be a valid payment on account of the amount due from him to the immediate tenant.

33. Tenant Claiming Exemption Must Give Up Possession.

(1) A tenant in default for non-payment of rent shall not be entitled to the benefit of the exemption provided for by section 30 unless he gives up possession of the premises forthwith, or is ready and offers 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 of them for the landlord, shall be considered an agent of the landlord for the purpose of the offer and surrender to the landlord of possession.

34. Seizure of Exempted Goods.

(1) Where a landlord desires to seize exempted goods, he shall, after default has been made in the payment of rent and before or at the time of seizure serve the tenant with a notice, Form 1.

(2) The surrender of possession in pursuance of the notice shall be a determination of the tenancy.

35. Set Off by Tenant.

(1) A tenant may set off against the rent due a debt due to him by the landlord.

(2) Notice of the claim of set-off, Form 2, may be given before or after the seizure.

(3) When the notice is given the landlord shall be entitled to distrain, or to proceed with the distress, only for the balance of the rent after deducting any debt justly due by him to the tenant which is mentioned in the notice.

The right of distress is suspended where rent is attached as to the part attached; *Patterson* v. *King* (1896) 27 O. R. 56.

Damages for breach of covenant to repair are not a "debt" so as to constitute a set-off against the rent, although under the Judicature Act, they might be the subject of counterclaim: *Walter* v. *Henry*, (1889) 18 O. R. 620.

The notice of set-off may be given after the distress, but before sale, and if the debt set-off exceeds the rent, the landlord should abandon proceedings, or he becomes a trespasser. The notice does not make the distress illegal *ab initio*, and, if the sale proceeds, "double value" under 2 W. & M. sess. 1, c. 5, s. 5, R. S. O. (1897) c. 342, s. 18 (2) cannot be recovered as that Statute requires both seizure and sale to be unlawful; *Brillinger* v. *Ambler* (1897) 28 O. R. 368.

See sec. 54 (2) *post*, page 76.

36. Service of Notices as to Exemptions or Set Off.

(1) Service of notices under sections 28, 34 and 35 shall be made either personally or by leaving the same with a grown-up person in and apparently residing on the premises occupied by the person to be served.

(2) If the tenant cannot be found and his place of abode is not known, or admission thereto cannot be obtained, the posting up of the notice on some conspicuous part of the premises shall be good service.

37. Defect in Form not Invalid.

No proceeding under the next preceding four sections shall be rendered invalid by any defect in form.

38. Landlord's Lien for Rent After Assignment for Benefit of Creditors.

(1) In case of an assignment for the general benefit of creditors by a tenant the preferential lien of the landlord for rent shall be restricted to the arrears of rent due during the period of one year next preceding, and for three months following the execution of the assignment, and from thence so long as the assignee retains possession of the premises.

A landlord has no preferential claim for rent against an insolvent estate if there were no distrainable goods on the premises at the time of the assignment: *Magann* v. *Ferguson*, 29 O. R. 235.

The landlord's right to preferential payment depends on the existence of distrainable effects, though an actual distress need not be made: *Re McCracken*, 4 A. R. 486; *Eacrett* v. *Kent*, 15 O. R. 9; *Lazier* v. *Henderson*, 29 O. R. 673; *Linton* v. *Imperial Hotel Co.*, (1889) 16 A. R. 337.

The landlord's right to a preference does not depend on the existence of a formal lease: *Re Erly*, 2 A. R. 617.

Under a lease reserving rent payable quarterly in advance and containing the usual forfeiture and three months' acceleration clause in case the lessee makes assignment for benefit of creditors, the landlord, in case of such assignment, becomes entitled to recover by distress and has a preferential lien for—in addition to the rent due and in arrear for the quarter preceding the assignment—the rent for the current quarter in which the assignment is made which was also due and in arrear, as well as a further quarter's rent: *Tew* v. *The Toronto Savings and Loan*, 30 O. R. 76.

"Arrears of rent due, for three months, following the execution of such assignment" means "arrears of rent becoming due during the three months following the execution of the assignment." Under the usual provision therefore the landlord is entitled to the current quarter's rent and, in addition, to the quarter's rent payable in advance on the quarter day next after the assignment. The expression "the perferential lien of the landlord for rent," means that the landlord is entitled to be paid the amount found due to him as a preferred creditor out of the proceeds of the goods upon the premises at the date of the assignment which were subject to distress, although there was no actual distress: *Lazier* v. *Henderson*, 29 O. R. 673.

The restriction on the landlord's rights as provided in this section applies only for the benefit of the creditors: *Railton* v. *Wood*, 15 App. Cas. 363.

Acceleration clauses in leases which work adversely to creditors have been attacked (*Re Hoskins*, 1 A. R. 379), but it is now clear the landlord may distrain for rent accruing due after assignment: *Linton* v. *Imperial Hotel Co.* (1889) 16 A. R. 337; *Eacrett* v. *Kent*, 15 O. R. 9.

As to agreements between the parties regarding accelerated rent: see *Linton* v. *Imperial Hotel Co.* (1889) 16 A. R. 337; *London and Westminster Loan, etc., Co.* v. *London & N. W. Ry.* [1893], 2 Q. B. 49.

The provision of the section is intended to prevent a landlord, where there is an acceleration clause, getting an unreasonable amount of rent in advance: *Langley* v. *Meir*, 25 A. R. 372. In that case, the learned Judges do not seem to have been entirely in accord in their views in regard to the meaning and effect of this statute. It was held, however, per Burton, C.J.O., and Maclennan, J.A., that sub-sec. 1 is a restrictive provision and limits the landlord's lien, even though in the lease which he claims there is an acceleration clause wider in its terms than the statutory provisions, and it does not give to the landlord an absolute right to three months' rent upon an assignment for benefit of creditors being made. See also *Clarke* v. *Reid*, 27 O. R. 618, where a different conclusion was reached, criticised in *Langley* v. *Meir*, 25 A. R. 372.

See also as to forfeiture and right of assignee to retain possession: *Littlejohn* v. *Soper*, 1 O. L. R. 172, 31 S. C. R. 572, noted page 54 *ante*.

The statute does not apply to a tenancy from month to month, but to a case where there is a term of at least a year's duration: *Semi-Ready* v. *Tew*, 13 O. W. R. 476, 14 O. W. R. 393, 576, 19 O. L. R. 227.

Where tenant's goods, in the hands of assignee are destroyed by fire, landlord not entitld to rank for preferential lien on the insurance moneys representing them, but must rank rateably with other creditors: *Miller* v. *Tew*, 1 O. W. N. 269, 14 O. W. R. 207, 1173, 20 O. L. R. 77.

(2) Notwithstanding any provision, stipulation or agreement in any lease or agreement, in case of an assignment for the general benefit of creditors, or of an order being made for the winding-up of an incorporated company, the assignee or liquidator may, within one month from the execution of the assignment or the making of the winding-up order, by notice in writing signed by him given to the landlord elect to retain the premises occupied by the assignor or company at the time of the assignment or winding-up order for the unexpired term of any lease under which such premises were held, or for such portion of the term as he shall see fit, upon the terms of the lease and subject to payment of the rent therefor provided by such lease or agreement.

The effect of this section is to place the assignee who has elected by notice in writing to retain the premises occupied by the assignor for the unexpired term of the lease, in the same position as respects the lease as if the assignment had not been made, the landlord being entitled to the full amount of the rent

under the lease but nothing more. Where accelerated rent due for the unexpired term of a lease containing the usual forfeiture clause on an assignment being made by the lessor, had been paid by the assignee who had elected to retain the premises to the end of the term, he was entitled to recover back a further sum for rent of the premises for a portion of the same period which he had paid under protest to avoid distress: *Kennedy* v. *MacDonell*, 1 O. L. R. 250; *Lazier* v. *Armstrong*, 5 O. W. R. 596.

A lease contained the usual forfeiture and acceleration condition in case of assignment by the lessee. The lessee made an assignment for benefit of creditors. Subsequently the lessor distrained for rent and taxes due by virtue of the provisions of the lease at the date of the assignment, and afterwards granted a new lease of the premises. The assignee had not given the notice required by this section. It was held that the distress was not a waiver of the forfeiture. The granting of the new lease was election to forfeit and dated back to the time of the forfeiture, viz., the date of the assignment. The assignor might have avoided the forfeiture and the acceleration of the payment of the rent and taxes by giving the notice provided in sub-sec. 2: *Tew* v. *Routley*, 31 O. R. 358.

As to position of mortgagee claiming rent: see *Munro* v. *Commercial Building, etc., Society*, 36 U. C. R. 464; *Hobbs* v. *Ontario Loan and Debenture Co.*, 18 S. C. R. 483; and see R. S. O. 1914, ch. 112, sec. 14.

The above sub-sect. does not take away the landlord's common law right to distrain and the usual acceleration clause in a lease is not to be regarded as fraudulent and void against creditors. *Alderson* v. *Watson* (1916) 35 O. L. R. 564.

The preferential lien of the landlord for rent means that the landlord has a statutory lien upon the goods available for distress, independent of actual distress or possession, for the amount allowed in above section; and where a winding-up order is made under the Dominion Act, after an incorporated company has made an assignment for creditors, the assets become vested in the liquidator subject to the preferential lien of the landlord. *Re Fashion Shop Co.* (1915) 33 O. L. R. 253.

The words *execution of the assignment* means the completion of the deed of assignment by delivery as well as by signing and sealing; and where an assignment was signed and sealed, on the day a month's rent in advance fell due, but was not delivered nor intended to be delivered until the next day, the landlord was held entitled to a preference for three months' rent in addition to rent for the month which had just started. *Re Metropolitan Theatres, Magee Case* (1917) 40 O. L. R. 345.

A landlord distrained and the goods or the proceeds thereof were claimed by a chattel mortgage and by an assignee for creditors of the tenants. Held, that the assignee was entitled to nothing because the chattel mortgage exceeded the value of the goods and as between the landlord and the chattel mortgagee it was held that the landlord could assert his full claim for two years' rent. The limitation of the landlord's claim to one year's rent can be invoked by the assignee

only to protect his own interests, it does not enure for the benefit of a chattel mortgagee. *Alderson* v. *Watson* (1916) 36 O. L. R. 502.

39. Distress.

Every person may have the like remedy by distress, and by impounding and selling the property distrained in cases of rents seck, as in case of rent reserved upon lease.

[Origin: 4 Geo. II. c. 28, s. 5.]

A sublease for a period co-extensive with or longer than the sublessor's term, operates as an assignment and the sublessor cannot distrain for rent in arrear: *Lewis* v. *Baker* [1905], 1 Ch. 46.

As to power of landlord's assignee to distrain: *Hope* v. *White*, 18 C. P. 430, 19 C. P. 479.

40. Distress After Lease Expired.

A person having any rent due and in arrear, 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 lease, in the same manner as he might have done if the lease had not been ended or determined, if such distress is made within six months after the determination of the lease, and during the continuance of the landlord's title or interest, and during the possession of the tenant from whom the arrears became due.

[Origin: 8 Anne, c. 18 or c. 14, Ruffhead's Ed., ss. 6, 7.]

Permission to a tenant to remain in possession after expiry of lease does not create a new tenancy so as to bar landlord's right of distress for previously accrued rent: *Lewis* v. *Davies* [1913], 2 K. B. 37.

Attornment, demise to mortgagor, rent reserved, intention: see *Hobbs* v. *Ontario Loan, etc., Co.*, 18 S. C. R. 483.

See also as to distress by mortgagee after termination of implied tenancy: *Lambert* v. *Marsh*, 2 U. C. R. 39.

Distress by landlord whose interest has expired: see *Hartley* v. *Jarvis*, 7 U. C. R. 545.

41. Recovery of Rent After Death of Life Tenant.

A person entitled to any rent or land for the life of another may 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 depended, as he might have done if the person by whose death the estate in such rent or land determined had continued in life.

[Origin: 32 Hen. VIII. c. 37, s. 4.]

42. Distress Must be Reasonable.

Distress, whether for a debt due to the Crown or to any person, shall be reasonable.

[Origin: St. of Marlbridge, 52 Hen. III. c. 4, part; St. of uncertain date. See Imp. Rev. St. (1870), p. 126.]

43. Property Liable to Distress.

A person having rent due and in arrear upon any demise, lease, or contract, may seize and secure any sheaves or cocks of grain, or grain loose, or in the straw, or hay, lying or being in any barn or granary, or otherwise upon any part of the land charged with such rent, and may lock up, or detain the same, in the place where the same is found, for or in the nature of a distress until the same is replevied; and, in default of the same being replevied, may sell the same, after appraisement thereof to be made; but such grain, or hay, so distrained shall not be removed by the person distraining, to the damage of the owner thereof, out of the place where the same is found and seized, but shall be kept there as impounded, until it is replevied or sold in default of replevying.

[Origin: 2 W. & M., Sess. 1, c. 5, s. 3.]

Goods held by a tenant under a conditional sale agreement may be seized by the landlord upon payment of the amount due the vendor and the landlord may add the amount so paid to his claim for rent. Ont. Stat. 6 Geo. V (1916) c. 24, s. 23.

What things are privileged from distress: *Simpson* v. *Hartopp,* 1 Smith's L. C. 437.

Where a landlord has distrained goods 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 the third persons: *Pegg* v. *Starr,* 23 O. R. 83.

44. Cattle and Standing Crops.

(1) A landlord may take and seize as a distress for arrears of rent any cattle or live stock of his tenant, feeding or pasturing upon any highway or on any way belonging to the demised premises or any part thereof.

(2) Subject to the provisions of subsection 4, a landlord may take and seize standing crops as a distress for arrears of rent, and

may cut, gather, make, cure, carry and lay up the same, when ripe, in the barns or other proper place on the demised premises, and if there is no barn or proper place on the demised premises, then in any other barn or proper place which the landlord hires or otherwise procures for that purpose as near as may be to the premises, and may in convenient time appraise, sell or otherwise dispose of the same towards satisfaction for the rent for which such distress is made, 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.

[Origin: 11 Geo. II. c. 19, s. 9.]

(3) Notice of the place where the goods and chattels so distrained are lodged or deposited shall within one week after the lodging or depositing thereof, be given to the tenant or left at his last place of abode.

(4) If after a distress of standing crops so taken for arrears of rent, and at any time before the same are ripe and cut, cured or gathered, the tenant pays to the landlord for whom the distress is taken the whole rent then in arrear, with the full costs and charges of making such distress, and occasioned thereby, then upon such payment or lawful tender thereof, the same and every part thereof shall cease, and the standing crops so distrained shall be delivered up to the tenant.

(5) Where standing crops are distrained for rent they may, at the option of the landlord, 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.

(6) Any person purchasing standing crops at such sale shall be liable for the rent of the land upon which the same are standing at the time of the sale, and until the same are removed, unless the rent 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 occupies it.

SS. 44 (5) and 44 (6) are taken from Imp. Act, 14 & 15 Viet. c. 25 and alter the law laid down in *Wright* v. *Dewes* (1834) 1 A. & E. 641, 40 R. R. 384 and *Wharton* v. *Naylor* (1848) 12 Q. B. 673.

45. Sheep and Cattle, When Exempt.

Beasts that gain the land and sheep shall not be distrained for a debt due to the Crown, nor for a debt due to any man, nor for any other cause, if there are other chattels sufficient to satisfy the debt or demand; but this provision shall not affect the right to impound beasts which a man finds on his land damage feasant.

[Origin: St. of uncer. date. See Imp. Rev. St. (1870), p. 126.]

46. Where Distress May be Taken.

Save as provided by section 45, and as hereinafter provided, goods or chattels which are not at the time of the distress upon the premises in respect of which the rent distrained for is due, shall not be distrained for rent.

[Origin: St. of Marlbridge, 52 Hen. III. c. 15.]

47. Fraudulent Removal of Goods or Chattels.

(1) Where any tenant, 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 is reserved, due, or made payable, fraudulently or clandestinely, conveys away, or carries off or from such premises his goods or chattels, to prevent the landlord from distraining the same for arrears of rent so reserved, due, or made payable, the landlord, or any person by him for that purpose lawfully empowered may, within thirty days next ensuing such conveying away, or carrying off, take and seize such goods and chattels wherever the same are found, as a distress for such arrears of rent, and the same sell, or otherwise dispose of, in such manner as if such goods and chattels had actually been distrained by the landlord upon such premises for such arrears of rent.

[Origin: 11 Geo. II. c. 19, s. 1.]

(2) No landlord or other person entitled to such arrears of rent shall take or seize, as a distress for the same, any such goods or chattels which have been sold in good faith and for a valuable

consideration, before such seizure made, to any person not privy to such fraud.

[Origin: 11 Geo. II. c. 19, s. 2.]

A tenant is not liable to prosecution under this statute for the fraudulent and clandestine removal of goods not his own property, nor can goods which are not the tenant's property be distrained off the premises: *Martin* v. *Hutchinson*, (1891) 21 O. R. 388.

Fraudulent removal of goods: *Reg.* v. *Lackie*, 7 O. R. 431.

48. Landlord May Break in to Seize Goods Fraudulently Removed.

Where any goods or chattels fraudulently or clandestinely conveyed or carried away by any tenant, his servant or agent, or other person aiding or assisting therein, are or are believed to be in any house, barn, stable, outhouse, yard, close or place, locked up, fastened, or otherwise secured, so as to prevent them from being taken and seized as a distress for arrears of rent, the landlord or his agent may take and seize, as a distress for rent, such goods and chattels, first calling to his assistance a constable or peace-officer who is hereby required to aid and assist therein, and in case of a dwelling-house, oath being also first made of a reasonable ground to believe that such goods or chattels are therein, and in the daytime break open and enter into such house, barn, stable, outhouse, yard, close or place and take and seize such goods and chattels for the arrears of rent, as he might have done if they were in an open field or place upon the premises from which they were so conveyed or carried away.

[Origin: 11 Geo. II. c. 19, s. 7.]

49. Penalty for Fraudulently Removing Goods.

If a tenant so fraudulently removes, conveys away or carries off his goods or chattels, or if any person wilfully and knowingly aids or assists him in so doing, or in concealing the same, every person so offending shall forfeit and pay to the landlord double the value of such goods, to be recovered by action in any court of competent jurisdiction.

[Origin: 11 Geo. II. c. 19, s. 3.]

See *R.* v. *Lackie*, 7 O. R. 431.

50. Impounding Distress.

(1) Beasts or cattle distrained shall not be removed or driven out of the local municipality, as defined by *The Municipal Act*, in which they are distrained, except to a fitting pound or enclosure within the same county or district not more than three miles distant from the place where the distress is taken.

[Origin: St. of Westminster Prim., 3 Edw. I. c. 16; and 1 P. & M. c. 12, s. 1 part.]

(2) No cattle, or other goods or chattels, distrained or taken by way of distress for any cause at one time shall be impounded in several places.

[Origin: 1 P. & M. c. 12, s. 1, part.]

(3) Every person offending against this section shall forfeit to the person aggrieved $20, in addition to the damages sustained by him.

(4) Any person lawfully taking any distress for any kind of rent may impound or otherwise secure the distress so made, in such place, or on such part of the premises chargeable with the rent, as is most fit and convenient for that purpose, and may appraise, sell and dispose of the same upon the premises; and it shall be lawful for any person to come and go to and from such place or part of the premises where any distress for rent is so impounded and secured to view, appraise and buy, and to carry off or remove the same on account of the purchaser thereof.

[Origin: 11 Geo. II. c. 19, s. 10.]

Where cattle shall be taken: *Coaker* v. *Willcocks* [1911], 1 K. B. 649, 2 K. B. 124.

Removal of goods to a distance to sell: *Macgregor* v. *Defoe*, 14 O. R. 87.

51. Pound Breach, or Rescue, Damages for.

Upon any pound breach or rescue of goods or chattels distrained for rent, the person offending, or the owner of the goods distrained, in case the same are afterwards found to have come to his use or possession, shall forfeit to the person aggrieved $20, in addition to the damages sustained by him.

[Origin: 2 W. & M., Sess. 1, c. 5, s. 4.]

52. Sale of Goods Distrained.

Where any goods or chattels are distrained for any rent reserved and due upon any demise, lease or contract, and the ten-

ant or owner of them does 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 conspicuous place on the premises charged with the rent distrained for, replevy the same, then, after such distress and notice and the expiration of such five days the person distraining shall cause the goods and chattels so distrained to be appraised by two appraisers, who shall first be sworn 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 same were distrained 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.

[Origin: See 2 W. & M., Sess. 1, c. 5, s. 1.]

A landlord cannot himself become the purchaser of goods sold by him under distress: *Moore Nettlefield Co.* v. *Singer* [1904], 1 K. B. 820.

Seizure by mortgagee of goods in custody of landlord's bailiff: agreement between tenant and bailiff: *Langtry* v. *Clark*, 27 O. R. 280; *Anderson* v. *Henry*, 29 O. R. 719.

53. Wrongful, or Irregular, Distress.

Where any distress is made for any kind of rent justly due, and any irregularity, or unlawful act, shall afterwards be done by the person 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 person making it be deemed a trespasser *ab initio*, but the person aggrieved by such unlawful act or irregularity may recover by action full satisfaction for the special damage sustained thereby.

[Origin: 11 Geo. II., c. 19, s. 19.]

The right of distress is suspended where rent is attached as to that portion of the rent which has accrued up to the attachment and distress for such portion is wrongful: *Paterson* v. *King* (1896) 27 O. R. 56.

Liability for conversion: *Peasycoed Collieries* v. *Partridge* [1912], 2 K. B. 345.

Rights of distrainor to climb over wall of next house: *Long* v. *Clarke* [1894], 1 Q. B. 119.

When rightfully on the premises, distrainor has no right to break open door of warehouse: *American Concentrated Meat* v. *Hendry*, 68 L. T. R. 742.

54. Damages for Wrongful Distress.

(1) A distrainor who takes an excessive distress, or takes a distress wrongfully, shall be liable in damages to the owner of the goods or chattels distrained.

[Origin: St. of Marlbridge, 52 Hen. III. c. 4, in part and St. of Westminster Prim., 3 Edw. I. c. 16.]

(2) Where a distress and sale are made for rent pretended to be in arrear and due, when, in truth, no rent is in arrear or due to the person distraining, or to the person in whose name or right such distress is taken, the owner of the goods or chattels distrained and sold, his executors, or administrators, shall be entitled by action to be brought against the person so distraining, to recover full satisfaction for the damage sustained by the distress and sale.

[Origin: 2 W. & M., Sess. I, c. 5, s. 5.]

The right to damages for excessive distress given by the Statute of Marlbridge was not interfered with or modified by 11 Geo. II., ch. 19, sec. 19. Consideration of these statutes and amount of damages recoverable: *Hessey* v. *Quinn*, 1 O. W. N. 1039, 15 O. W. R. 505, 20 O. L. R. 442, 16 O. W. R. 628, 21 O. L. R. 519.

In an action of this kind special damage may be recovered in addition to the value of the goods: *Bodley* v. *Reynolds*, 8 Q. B. 779; *Reilly* v. *McMinn* (1874) 15 N. B. R. 370; *Jarvis* v. *Hall*, (1912) 23 O. W. R. 282; 4 O. W. N. 232.

Measure of damages: *Lee* v. *Ianson*, 1 O. W. N. 586.

Under the reading of R. S. O. (1897) 342, sec. 18 (2), it was held that the substitution in this enactment of the word "may" instead of "shall and may" in 2 W. & M. sess. 1, ch. 5, sec. 5, effects no difference. The Court had no discretion as to amount or as to the costs: *Webb* v. *Box*, 19 O. L. R. 540, 20 O. L. R. 220, 14 O. W. R. 802, 15 O. W. R. 205, 1 O. W. N. 112, 317.

Both seizure and sale must be unlawful; service of a notice of set-off under section 35 *ante*, does not make the distress illegal and the landlord is not liable for double value for selling: *Brillinger* v. *Ambler* (1897) 28 O. R. 368; sec. 35, *ante*.

"Recover" means recover by the verdict of a jury; not by arbitration: *Clark* v. *Irwin*, 8 U. C. L. J. 21.

In an action for wrongful distress for rent before it was due, it must be alleged that the goods were sold and "double value" (under the former wording) claimed pursuant to the statute, otherwise the action is simply for conversion: *Williams* v. *Thomas*, 25 O. R. 536.

No tenancy need be pleaded; it is sufficient if it appear that the seizure was made under color of distress: *Stoddart* v. *Arderly*, 6 O. S. 305.

55. Goods Taken in Execution Not to be Removed Without Payment of Rent.

(1) Goods or chattels lying or being in or upon any land leased for life or lives, or term of years, at will, or otherwise, shall not be liable to be taken by virtue of any execution issued out of the Supreme Court, or out of a County or District Court, on any pretence whatsoever, unless the party at whose suit the execution is sued out before the removal of such goods and chattels from the premises by virtue of such execution, pays to the landlord, or his bailiff, all money due for rent of the premises at the time of the taking of such goods or chattels by virtue of such execution if the arrears of rent do not amount to more than one year's rent.

[Origin: 8 Anne, c. 18, or Ruffhead's Ed., c. 14, s. 1.]

(2) If such arrears exceed one year's rent the party at whose suit such execution is sued out, on paying the landlord, or his bailiff, one year's rent, may proceed to execute his judgment.

(3) The sheriff, or other officer shall levy and pay to the execution creditor as well the money so paid for rent as the execution money.

As to executions out of Division Courts, see The Division Courts Act, R. S. O (1914) c. 63, s. 216.

The Assessment Act does not warrant a municipal tax collector seizing for arrears of taxes goods which being under distraint by a landlord are *in custodia legis*: *Knyston* v. *Rogers*, 31 O. R. 119.

Demise to mortgagor: seizure of mortgagor's goods: mortgagee's claim under this statute: see *Hobbs* v. *Ontario Loan and Debenture Co.*, 15 O. R. 440, 16 A. R. 525; 18 S. C. R. 483.

Landlord's claim for rent: chattel mortgagee's claim and execution creditor: see *Clarke* v. *Farrell*, 31 C. P. 584.

Where landlord makes a mistake as to particulars of rent due: *Tomlinson* v. *Jarvis*, 11 U. C. R. 60.

The sheriff is not liable for removing goods when rent is due unless he has notice: *Kingston* v. *Shaw*, 6 C. L. J. 280; 20 U. C. R. 223.

Formal notice is not necessary; it may be implied from the landlord's acts: *Sharpe* v. *Fortune*, 9 C. P. 523; or it may be oral: *Brown* v. *Ruttan*, 7 U. C. R. 97.

Where goods are seized under execution on leasehold premises and claimed by a third party, and where the goods are sold under an interpleader order: see as to landlord's rights: *Robinson* v. *McIntosh*, 4 Terr. L. R. 102.

Landlord's right to rent as against execution creditor: *Cox* v. *Harper* [1910], 1 Ch. 480.

Payment by execution creditors of rent claimed; recovery back: *Baker* v. *Atkinson* (1887) 11 O. R. 735; 14 A. R. 409.

Seizure for taxes; priorities: *Kingston* v. *Rogers*, 31 O. R. 19.

Mortgagee's rights as against execution creditor: see *Trust & Loan* v. *Lawrason*, 6 A. R. 286, 10 S. C. R. 679; *Ontario Loan and Debenture Co.* v. *Hobbs*, 15 O. R. 440; 16 A. R. 255; 18 S. C. R. 483.

After sale by sheriff, the goods must be removed within a reasonable time or they will be liable to distress for rent: *Hughes* v. *Towers*, 16 C. P. 287; *Langton* v. *Bacon*, 17 U. C. R. 559.

Mutual rights of landlord's bailiff and sheriff's officer: *Beatty* v. *Rumble*, 21 O. R. 184; *Gordon* v. *Rumble*, 19 A. R. 440.

Sheriff disobeying interpleader order liable to attachment: *McLean* v. *Anthony*, 6 O. R. 330; *Henderson* v. *Wilde*, 5 U. C. R. 585.

Goods in the custody of the law cannot be distrained by the landlord. *Grant* v. *Grant* (1883) 10 P. R. 40. But the sheriff's possession may be such as will not preclude the landlord from distraining: *McIntyre* v. *Stata*, 4 C. P. 248; *Roe* v. *Roper*, 23 C. P. 76; *Whimsell* v. *Gifford*, 3 O. R. 1; *Langtry* v. *Clark*, 27 O. R. 280; *Anderson* v. *Henry*, 29 O. R. 719.

Where the sheriff realized under his execution and paid over money, taking a bond of indemnity, he was held not entitled to an interpleader against the landlord: *Adams* v. *Blackwall*, 10 P. R. 168.

56. Crops Seized Under Execution.

Where all or any part of the standing crops of the tenant of any land is seized and sold by any sheriff or other officer by virtue of any writ of execution, such crops, so long as the same remain on the land, in default of sufficient distress of the goods and chattels of the tenant, shall be liable for the rent which may accrue and become due to the landlord after any such seizure and sale, and to the remedies by distress for recovery of such rent, and that notwithstanding any bargain and sale or assignment which may have been made or executed of such crops by any such sheriff or other officer.

[Origin: 14-15 V. c. 25, s. 2.]

57. Liability of Tenants Overholding.

Where a tenant for any term for life, lives or years, or other person who comes into possession of any land, by, from, or under, or by collusion with such tenant wilfully holds over such land or any part thereof, after the determination of such term, and after notice in writing given for delivering the possession thereof by his

landlord, or the person to whom the remainder or reversion of such land belongs, or his agent thereunto lawfully authorized, such tenant or other person so holding over shall, for and during the time he so holds over or keeps the person entitled out of possession, pay to such person, or his assigns, at the rate of double the yearly value of the land so detained, for so long as the same is detained, to be recovered by action in any court of competent jurisdiction, against the recovering of which penalty there shall be no relief.

[Origin: 4 Geo. II. c. 28, s. 1.]

A claim for damages under this section is an unliquidated claim and not provable against an estate in the hands of an assignee under R. S. O. (1914), ch. 134; *Magann* v. *Ferguson*, 29 O. R. 235.

58. Tenants Giving Notice to Quit.

Where a tenant gives notice of his intention to quit the premises by him holden at a time mentioned in such notice, and does not accordingly deliver up the possession thereof at the time mentioned in such notice, the tenant shall from thenceforward pay to the landlord double the rent or sum which he should otherwise have paid, to be levied, sued for, and recovered at the same times 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 while such tenant continues in possession.

[Origin: 11 Geo. II. c. 19, s. 18.]

59. Executors or Administrators.

The executors or administrators of a landlord may distrain for the arrears of rent due to such landlord in his lifetime, and may sue for the same in like manner as such landlord might have done if living, and the powers and provisions contained in this Act relating to distresses for rent shall be applicable to the distresses so made.

As to waste see Law and Transfer of Property Act, R. S. O. (1914), ch. 109, sec. 29, *et seq.*

60. Attornment to Stranger.

Every attornment of a tenant of any land to a stranger claiming title to the estate of his landlord shall be absolutely null and

void; and the possession of his landlord shall not be deemed to be changed, altered or affected by any such attornment; but nothing herein shall vacate or affect any attornment made pursuant to and in consequence of a judgment or order of a court, or made with the privity and consent of the landlord, or to any mortgagee after the mortgage has become forfeited.

[Origin: 11 Geo. II. c. 19, s. 11.]

61. Attornment, Unnecessary When?

(1) Every grant or conveyance of any rent or of the reversion or remainder of any land shall be good and effectual without any attornment of the tenant of the land out of which such rent issues, or of the particular tenant upon whose particular estate any such reversion or remainder is expectant or depending.

(2) A tenant shall not be prejudiced, or damaged by the payment of rent to any grantor or by breach of any condition for non-payment of rent, before notice to him of such grant by the grantee.

[Origin: 4-5 Anne, c. 3 or Ruffhead's Ed., c. 16, ss. 9,10.]

Necessity for attornment: *Horn* v. *Beard* [1912], 3 K. B. 181. Landlord's agent: *Hope* v. *White*, 17 C. P. 52.

62. Lease May be Renewed Without Surrender of Under-lease.

(1) Where a lease is duly surrendered in order to be renewed, and a new lease is made and executed by the chief landlord, the new lease shall, without a surrender of all or any of the under-leases, be as good and valid as if all the under-leases derived thereout had been likewise surrendered at or before the time of taking of such new lease.

[Origin: 4 Geo. II. c. 28, s. 6.]

(2) Every person in whom any estate for life, or lives, or for years, is from time to time 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 land in the respective under-leases comprised, as if the original lease had been 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 land comprised in any such under-lease for the rents and duties reserved by such new lease,

so far as the same do not exceed the rents and duties reserved in the lease out of which such under-lease was derived, as he would have had if such former lease had been still continued or as he would have had if the respective under-leases had been renewed under such new principal lease.

63. Renewal of Lease by Absentees.

(1) Where any person who, in pursuance of any covenant or agreement in writing if, within Ontario and amenable to the process of the Supreme Court, might be compelled to execute any lease by way of renewal, is not within Ontario, or is not amenable to the process of the Court, the Court, upon the motion of any person entitled to such renewal, whether such person is, or is not, under any disability, may direct such person as the Court thinks proper to appoint for that purpose to accept a surrender of the subsisting lease, and to make and execute a new lease in the name of the person who ought to have renewed the same.

[Origin: 11 Geo. IV. & 1 W. IV. c. 65, s. 18.]

(2) A new lease executed by the person so appointed, shall be as valid as if the person in whose name the same was made was alive and not under any disability, and had himself executed it.

(3) In every such case it shall be in the discretion of the Court to direct an action to be brought to establish the right of the person seeking the renewal, and not to make the order for such new lease unless by the judgment to be made in such action, or until after it shall have been entered.

(4) A renewed lease shall not be executed by virtue of this section in pursuance of any covenant or agreement, unless 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 tenant be first paid and performed, and counterparts of every such renewed lease shall be duly executed by the tenant.

[Origin: 11 Geo. IV. & 1 W. IV. c. 65, s. 20.]

(5) All sums of money which are had, received or paid for, or on account of, the renewal of any lease by any person out of Ontario or not amenable to the process of the Supreme Court, after

a deduction of all necessary incidental charges and expenses, shall be paid to such person or in such manner or into the Supreme Court to such account, and be applied and disposed of as the Court shall direct.

[Origin: 11 Geo. IV., & 1 W. IV., c. 65, s. 21.]

(6) The Supreme Court may order the costs and expenses of and relating to the applications, orders, directions, conveyances and transfers, or any of them, to be paid and raised out of or from the land or the rents in respect of which the same are respectively made, in such manner as the Court shall deem proper.

[Origin: 11 Geo. IV. & 1 W. IV. c. 65, s. 35.]

As to costs: see R. S. O. (1914) c. 56, s. 74.

PART II.

64. Interpretation.

In this Part—

(*a*) "Judge" shall mean Judge of the County or District Court of the county or district in which a distress to which this Part applies is made.

65. Disputes as to Right to Distrain.

Where goods or chattels are distrained by a landlord for arrears of rent, and the tenant disputes the right of the landlord to distrain in respect of the whole or any part of the goods or chattels, or disputes the amount claimed by the landlord, the tenant may apply to the Judge to determine the matters so in dispute, and the Judge may hear and determine the same in a summary way, and may make such order in the premises as he may deem just.

66. Order of Judge Pending Determination of Dispute.

Where notice of such an application has been given to the landlord the Judge, pending the disposition of it by him, may make such order as he may deem just for the restoration to the tenant of the whole or any part of the goods or chattels distrained, upon the tenant giving security, by payment into Court or otherwise as the Judge may direct, for the payment of the rent which

shall be found due to the landlord and for the costs of the distress and of the proceedings before the Judge and of any appeal from his order, or such of them as the tenant may be ordered to pay.

67. Jurisdiction of Judge.

The Judge shall have jurisdiction and authority to determine any question arising upon the application which the Court of which he is Judge has jurisdiction to determine in an action brought in that Court.

68. Direction of Judge that Action be Tried.

Where the amount of the rent claimed by the landlord exceeds $800 or where any question is raised which a County or District Court would not have jurisdiction to try in an action brought in such Court, the Judge shall not, without the consent in writing of the landlord, deal with the application summarily, but shall direct an action to be brought or an issue to be tried in the Supreme Court for the determination of the matters in dispute.

69. Interim Order Restoring Goods.

(1) Where the Judge under the next preceding section directs an action to be brought or an issue to be tried, he shall have the like power as to the restoration to the tenant of the goods or chattels or of any part of them as is conferred by section 66, and where it is exercised the security shall be as provided in that section, except that, as to costs, it shall be not only for the costs of the proceedings before the Judge, but also for the costs of the action or issue, including any appeal therein or such of them as the tenant may be ordered to pay.

(2) The Supreme Court shall determine by whom and in what manner the costs of the action or issue and of the application to the Judge shall be borne and paid.

(3) Judgment may be entered in accordance with the direction of the Court, made at or after the trial, and may be enforced in like manner as a judgment of the Court.

70. Decision of Judge Final, When?

Where the amount claimed by the landlord does not exceed $100, the decision of the Judge shall be final.

71. When Appeal Lies?

Where the amount claimed by the landlord exceeds $100, an appeal shall lie from any order of the Judge made on an application to him under the provisions of section 65, by which the matters in dispute are determined, in like manner as if the same were a judgment of the Court of which he is Judge, pronounced in an action.

72. Appeal When Action Tried.

Where an issue is tried there shall be the same right of appeal from the judgment as if the judgment had been pronounced in an action.

73. Scale of Costs.

Where the amount claimed by the landlord does not exceed $100 the costs of the proceedings before the Judge shall be on the Division Court scale, and where the amount claimed exceeds $100 they shall be on the County Court scale, except in an action or issue in the Supreme Court directed under section 68.

74. Other Remedies of Tenant.

Nothing in this Part shall take away or affect any remedy which a tenant may have against his landlord or require a tenant to proceed under this Part instead of by bringing an action, but where instead of proceeding under this Part he proceeds by action, the Court in which the action is brought, if of opinion that it was unnecessarily brought, and that a complete remedy might have been had by a proceeding under this Part, may direct the tenant although he succeeds, to pay any additional costs occasioned by his having brought the action.

PART III.

75. Overholding Tenants.

(1) Where a tenant after his lease or right of occupation whether created by writing or by parol 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 or neglects, to go out of possession of the land demised to him, or which he has been permitted to occupy, his landlord may apply upon affidavit to the Judge of the County or District Court of the county or district in which the land lies to make the inquiry hereinafter provided for.

The goods of boarders and lodgers seized for rent of the premises must be freed from distress if the steps prescribed by s. 32 page 63, are taken.

A tenant is a person who holds of another, he does not necessarily occupy. In order to occupy a person must be personally resident by himself or his family; *R.* v. *Ditcheat* (1827) 9 B. & C. 183.

The tenant, though absent, is, speaking generally, the "occupier of premises; *R.* v. *Poynder* (1822) 1 B. & C. 178.

Occupant: see *Re Grant* v. *Robertson*, 8 O. L. R. 297.

A person in possession under an agreement for purchase who makes default may, in New Brunswick, be ejected as a tenant at will: *Ackerman* v. *Boyd* (1899) 19 C. L. T. 403.

A servant or other person who may be there virtute officii is not a tenant but has merely the use, not the occupation of the premises; *White* v. *Bayley* (1861) 10 C. B. N. S. 227; *Mayhew* v. *Suttle* (1855) 4 E. & B. 346; *Clark* v. *St. Marys Bury S. Edmonds* (1856) 1 C. B. N. S. 23; *Bent* v. *Roberts* (1877) 3 Ex. D. 66; *R.* v. *Spurrell* (1865) L. R. 1 Q. B. 72; but such a person may be ejected under the Act; *Fowke* v. *Turner* (1876) 12 C. L. J. 140.

It would seem that a trespasser or squatter does not come within the Act as he does not hold under a lease, and his right of occupation is not created by writing or verbal agreement.

(2) The 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, having no right to continue in possession, wrongfully refuses to go out of possession.

To give the County Court Judge jurisdiction under the Act, the following requisites must appear upon affidavit:—

1. That there was a lease or right of occupation created by writing or by verbal agreement.

2. That the term or right of occupation has expired or been determined. The determination may be (a) by notice to quit, (b) notice pursuant to a proviso in the lease or agreement, (c) by any other act whereby a tenancy or right of occupancy may be determined or put an end to, such as cessation of employment; *White* v. *Bayley* (1861) 10 C. B. N. S. 227;.

3. That demand has been made in writing on the tenant or occupant to go out of possession of the land demise or occupied.

The demand of possession need not be signed: *Re Sutherland & Portigal* (1899), 19 C. L. T. 257.

4. That the tenant or occupant *wrongfully refuses* to go out of possession.

It is now competent for a County Judge to try and determine a question of fact where the testimony is conflicting: *Re Graham and Yardley*, 14 O. W. R. 30.

A County Court Judge has no power under above section to make a summary order for the issue of a writ of possession, at the instance of a mortgagee against the mortgagor in possession. *Re Mitchell & Fraser* (1917) 40 O. L. R. 389.

(3) Notice in writing of the time and place appointed, stating briefly the principal facts alleged by the complainant as entitling him to possession, shall be served upon the tenant or left at his place of abode at least three days before the day so appointed, if the place 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 it was obtained, and of the documents to be used upon the application.

A tenant overholding after 1st March did so by the landlord's consent pending negotiations. When these ended on March 19 the landlord served a notice demanding possession on March 23. On the tenant's failure to give up possession on that day, the landlord instituted proceedings under this Act without further demand of possession. Held that the tenant was a tenant at will. The notice of 19th March had the effect of extending his tenancy to March 23 and a demand

of possession after that date was necessary to give the County Court Judge jurisdiction: *Re Grant and Robertson*, 3 O. W. R. 846, 8 O. L. R. 297.

Where entry is sought for breach of provision in a lease the notice under sec. 20 (2) *ante* specifying the breach, must be given, as that is applicable to summary proceedings under this Act: *Re Snure and Davis*, 4 O. L. R. 82.

On an application for an order under this Act a copy of the affidavit filed on the application was not served. Counsel appeared and took the objection and the application was adjourned to have the affidavia served and the matter was subsequently heard, argued, and the order made. It was held that the right to have a copy of the affidavit served could be and had been waived: *Re Dewar and Dumas*, 8 O. L. R. 141.

The scope of the inquiry is limited to the matters enumerated in above sect. If the tenant desires equitable relief, he must seek it in the manner provided by sect. 20, either by bringing an independent action or by an application to the Court in the lessor's action to enforce his rights of re-entry: *Lock* v. *Pearce* [1893] 2 Ch. 271; *Re Bagshaw & O'Connor* (1918) 42 O. L. R. 475.

76. How to Entitle Proceedings.

The proceedings under this Part shall be intituled in the County or District Court of the county or district in which the land lies, 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."

77. Proceedings on Appearance and on Default.

(1) If at the time and place appointed the tenant fails to appear, the Judge if it appears to him that the tenant wrongfully holds against the right of the landlord, may order a writ of possession, Form 3, directed to the sheriff of the county or district in which the land lies to be issued, commanding him forthwith to place the landlord in possession of the land.

(2) If the tenant appears, the Judge shall, in a summary manner, hear the parties and their witnesses, and examine into the matter, and if it appears to the Judge that the tenant wrongfully holds against the right of the landlord, he may order the issue of the writ.

Possession is the only relief that may be granted under above sect. *Re Bagshaw & O'Connor* (1918) 42 O. L. R. 473.

Under this Act two things must concur to justify the summary interference of the County Court Judge: (1) the tenant must *wrongfully* refuse to go out of

possession, and (2) it must appear to the Judge that the case is *clearly* within the purview of the Act: *Re Snure and Davis*, 4 O. L. R. 82.

Since the words "without colour of right" have been struck out of the statute by 58 Vic. ch. 13, sec. 23, the County Court Judge has jurisdiction to decide applications where there is some contest, but only simple, clear cases may be tried in this summary way: *In re Lumbers and Howard*, 9 O. L. R. 680; *Re Grant and Robertson*, 8 O. L. R. 297; *Ryan* v. *Turner*, 14 Man. R. 624; *Magann* v. *Bonner*, 28 O. R. 37.

Where the dispute was whether the tenancy was monthly or yearly the County Judge had jurisdiction: *Moore* v. *Gillies*, 28 O. R. 358.

Dispute as to tenancy in overholding proceedings: see *St. David's Spring* v. *Lahey*, 23 O. W. R. 12, 4 O. W. N. 32.

Right of Judge to decide on conflicting evidence: *Re Dickson and Graham*, 4 O. W. N. 100, 27 O. L. R. 239.

See under R. S. O. 1887, ch. 144; *Price* v. *Guinane*, 16 O. R. 264; *Bartlett* v. *Thompson*, 16 O. R. 716; *Longhi* v. *Sanson*, 46 U. C. R. 446; *Dobson* v. *Sootheran* (1887) 15 O. R. 15.

78. Appeal.

(1) An appeal shall lie to a Divisional Court from the order of the Judge granting or refusing a writ of possession and the provisions of *The County Courts Act* as to appeals shall apply to such an appeal.

Injunction not granted to stop proceedings under this Act; proceedings cannot be removed until writ of possession issued: *Re Brown and Godwin*, 17 O. W. R. 102, 2 O. W. N. 125.

It is only the proceedings and evidence before the Judge sent up pursuant to *certiorari*, at which the Supreme Court may look for the purpose of determining what is to be decided under this section. Where there was nothing in the 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 for possession: *Re Snure and Davis*, 4 O. L. R. 82.

Ie seems that proceedings under this Act can be removed into the Supreme Court only when this section applies, *i.e.*, after a writ of possession has been issued: *Re Warwick and Rutherford*, 6 O. L. R. 431.

Appeal from refusal to grant writ: *Re Dickson and Graham*, 27 O. L. R. 239.

An application under this section should be made to a Divisional Court: *Re Scottish Ontario and Manitoba Land Co.*, 21 O. R. 676.

(2) If the Divisional Court is of opinion that the right to possession should not be determined in a proceeding under this Part the Court may discharge the order of the Judge and the landlord may in that case proceed by action for the recovery of possession.

It is open to the Court reviewing the decision of the County Judge to say that upon the facts or upon the law the case is not a clear one and thereupon discharge the order: *Re Lumbers and Howard*, 9 O. L. R. 680.

Matters for the Appellate Court: *Re Dickson and Graham*, 27 O. L. R. 239.

(3) When the order is discharged, if possession has been given to the landlord under a writ of possession the Court may direct that possession be restored to the tenant.

PART IV.

79. Practice and Procedure.

Except as therein otherwise provided the practice and procedure under Parts II and III shall be in accordance with the practice and procedure in the County Courts.

FORM 1. Notice to Tenant.

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 possession of the said premises within three days after the service of this notice, I am by *The Landlord and Tenant Act* 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.

Dated this day of 19

A.B. (*landlord*).

To *C. D.* (*tenant*).

FORM 2. Notice to Landlord of Set-off by Tenant.

Take notice, that under *The Landlord and Tenant Act* I wish to set off against rent due by me to you, the debt which you owe to me on your promissory note for

dated (*or as the case may be.*)

Dated this day of 19 .

C. D. (tenant).

FORM 3. Writ of Possession.

ONTARIO,

TO WIT:

George the Fifth, by the Grace of God, of the United Kingdom of Great Britain and Ireland, and of the British Dominions beyond the Seas, King, Defender of the Faith.

[L.S.]

To the sheriff of the

Greeting:

Whereas

Judge of the Court of , by his order dated the day of 19 , made in pursuance of *The Landlord and Tenant Act*, on the complaint of against adjudged that was entitled to the possession of with the appurtenances in your Bailiwick, and that a Writ should issue out of our said Court accordingly, (*if costs are awarded add* and also ordered and directed that the said should pay the costs of the proceedings had under the said Act, which have been taxed at the sum of).

THEREFORE, WE COMMAND YOU that without delay you cause the said to have possession of the said land and premises, with the appurtenances, (*if costs are awarded add* and We also command you that of the goods and chattels and lands and tenements of the said in your Bailiwick, you cause to be made being the said costs so taxed and have that money in Our said Court immediately after the execution hereof, to be rendered to the said).

And in what manner you shall have executed this Writ make appear to Our said Court, immediately after the execution hereof, and have there then this Writ.

Witness, Judge of Our said Court at , this day of 19 .

Clerk.

Issued from the office of the Clerk of the County (*or* District) Court of the County (*or* United Counties, *or* District) of

Clerk.

CHAPTER 5.

THE SHORT FORMS OF LEASES ACT

Being R.S.O. (1914), Chapter 116.

His Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

1. Short Title.

This Act may be cited as "*The Short Forms of Leases Act.*"

2. Meaning of Covenants Extended.

Where a lease under seal made according to the form set forth in Schedule A, 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, and distinguished by any number therein, such lease shall have the same effect as if it contained the form of words contained in Column Two of Schedule B, distinguished by the same number as is annexed to the form of words used in such lease; but it shall not be necessary, in any such lease, to insert any such number.

A lease expressed to be made in pursuance of the Act respecting Short Forms of Leases is not in fact made pursuant to that Act when it is not under seal, as the Act applies only to leases which are under seal: *Alexander* v. *Herman* (1912) 21 O. W. R. 462; 3 O. W. N. 755.

What is a sufficient reference to the Act to bring a lease within its provisions; see *Davis* v. *Pitchers* (1875), 24 C. P. 516.

3. Substitution of Name or Designation.

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

"Any name, etc.":—e.g. party of the first part. *Emmett* v. *Quinn* (1882) 7 A. R. 328.

(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, and corresponding changes shall be taken to be made in the corresponding forms in the second column.

(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.

(4) Where the premises demised are of freehold tenure, the covenants 2 to 9 shall be taken to be made with, and the proviso 12 to apply to the heirs and assigns of the lessor; and where the premises demised are of leasehold tenure, such 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, it shall, when the premises demised are of freehold tenure, include the heirs, executors, administrators and assigns of the lessor, and when the premises demised are of leasehold tenure it shall include the executors, administrators and assigns of the lessor, and where the word "lessee" occurs in the second column it shall include the executors, administrators and assigns of the lessee.

This sub-section 5 was added after a decision had been given to the effect that a covenant "not to assign or sub-let without leave" did not run with the land *except where the assigns were expressly named. Crawford* v. *Bugg* (1886) 12 O. R. 8.

See note to section 5 post.

4. Failure of Deed.

Any lease or part of a lease which fails to take effect by virtue of this Act, shall nevertheless be as effectual to bind the parties thereto, as if this Act had not been passed.

5. Covenants to Run with Land.

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 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 shall, when inserted in a lease, apply to a breach of either an affirmative or negative covenant.

The above section is aimed at the mischief caused by *Lee* v. *Lorch.* (1875) 37 U. C. R. 262, which left it extremely uncertain whether the covenant not to assign or sub-let ran with the land so as to bind the heirs, etc., and decided that the right of entry is for non-performance of covenants; that is to say, for *not* doing something which the tenant had engaged to do. The result of the present section is to make the covenant run with the land, and also apply to the case of the tenant *doing* something which he was not to have done.

Covenants running with reversion: see page 38.
Apportionment of condition of re-entry, page 41.
See note under section 3 (5) *supra.*

SCHEDULE A.

FORM OF LEASE.

THIS INDENTURE, made the *first* day of *January,* one thousand nine hundred and *twenty,*

In pursuance of the Short Forms of Leases Act,
Between

JOHN SMITH, of the City of Toronto, in the County of York, Merchant, hereafter called the LESSOR of the FIRST PART,

AND

HENRY JONES, of the same place, Mechanic, 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 the Lessor DO*TH* demise and LEASE unto the Lessee, *his* executors, administrators and assigns,

Demise and Lease:—When a lease for years is made by the words demise, or grant, the law intends a covenant on the part of the lessor that the lessee shall quietly hold and enjoy. Touchstone, p. 160; *Saunders* v. *Roe* (1867) 17 C. P. 344. But when the word "lease, is used alone there is no English case deciding that a similar intendment is to be made. *Ross* v. *Massingberg* (1862) 12 C. P. 64. See also *Smart* v. *Stuart,* 5 O. S. 301 as to implied covenant for quiet enjoyment, and *Harvey* v. *Ferguson,* 9 U. C. R. 431, as to the effect of "lease

and to farm let."

ALL THAT parcel or tract of land situate, lying and being *in the City of Toronto, in the County of York, and being composed of the south half of Lot number eighteen* (18) *on the east side of Glencairn Road, according to Plan* 435 *E registered in the Registry Office for the Eastern Division of the City of Toronto,*

TO HAVE AND TO HOLD the said demised premises for and during the term of *Five* years, to be computed from the *first* day of *January,* one thousand nine hundred and *twenty,* and from thenceforth next ensuing, and fully to be complete and ended,

It is better in filling in the lease to put in the exact date as above rather than the more compendious form "the first day of January *now next.*" We learn this from *Bell* v. *McKindsey* (1863) 23 U. C. R. 162; 3 E. & A. R. 9, where the lease was dated March 15th, 1862, but the lease was re-executed in July, 1862, and the term was held to be computed from April 1st, 1863, instead of April 1st, 1862; leases as other deeds, taking effect from delivery, not from date.

Under a lease dated 1st October, 1857, *habendum* for five years from the date thereof, "yielding and paying therefor on the first day of October during the said term," it was proved that the first year's rent had been paid in advance, It was held, however, that the rent was not payable in advance under the terms of the lease, and that the term included the whole of the 1st October, 1862. *McCallum* v. *Snyder* (1860) 10 C. P. 191. See also *Eckhardt* v. *Raby,* 20 U. C. R. 458.

Where the habendum of a lease purporting to be made according to this Act was, "during the term of occupancy as tenant of the lessee by said G. T. of premises on K. street, belonging to the said lessee. The said term to be computed from the first day of July, A.D. 1880, and from thenceforth next ensuing, and fully to be completed and ended as soon as the said G. T. shall vacate the said premises or cease to reside thereon." It was held that this lease did not operate as a lease for years, owing to the uncertainty of the termination thereof, but would be a tenancy at will until payment of rent, when it would be a tenancy from year to year. *Reeve* v. *Thompson* (1887) 14 O. R. 499.

YIELDING AND PAYING therefor yearly and every year during the said term unto the said Lessor, *his* heirs, executors, administrators or assigns, the sum of *Five Hundred* Dollars, to be payable on the following days and times, that is to say:

On the first days of January and July in each year during the said term the sum of Two Hundred and Fifty Dollars for six months' rent in advance shall be due and payable.

THE first of such payments to become due and be made on the *first* day of *January,* 1920:

THE SAID LESSEE covenants with the said Lessor to pay rent; (*See Sch. B.* 1, 2 *at foot of this page.*)
AND to pay taxes, except for local improvements; (*See page* 96.)
AND to repair reasonable wear and tear, and damage by fire, lightning and tempest only excepted; (*See page* 97.)
AND to keep up fences; (*See page* 99.)
AND not to cut down timber; (*See page* 100.)
AND that the said Lessor may enter and view state of repair; (*See page* 100.)
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; (*See page* 100.)
AND will not assign or sub-let without leave; (*See page* 101.)
AND that he will leave the premises in good repair (reasonable wear and tear and damage by fire, lightning and tempest only excepted); (*See page* 104.)
PROVIDED that the Lessee may remove *his* fixtures; (*See page* 104.)
PROVIDED that in the event of fire, lightning or tempest, rent shall cease until the premises are rebuilt; (*See page* 105.)
PROVISO for re-entry by the said Lessor on non-payment of rent, or non-performance of covenants; (*See page* 106.)
THE said Lessor covenants with the said Lessee for quiet enjoyment; (*See page* 108.)

IN WITNESS WHEREOF the said parties hereto have hereunto set their hands and seals.

Signed, Sealed and Delivered
IN THE PRESENCE OF

SCHEDULE B.

COLUMN ONE.	COLUMN TWO.
1. The said lessee covenants with the said lessor.	1. And the said lessee doth hereby covenant with the said lessor in manner following, that is to say:
As to joint covenants: see Mercantile Amendment Act, R. S. O. 1914, ch. 133, sec. 6.	
2. To pay rent.	2. That he, the said lessee, will, during the said term, pay unto the said lessor the rent hereby reserved, in manner hereinbefore mentioned, without any deduction whatsoever.

A covenant to pay rent runs with the land and binds the assignee of the lessee of demised premises though not named. *Crawford* v. *Bugg* (1886) 12 O.R. 12.

Rent is the same as any other debt and unless the lease otherwise provides, the tenant is bound to seek out the landlord and pay or tender him the money on the day it is due, but the tenant has the whole day on which it falls due in which to pay it. Therefore, the landlord can take no proceeding to collect his rent until the day after it falls due, and this is so even though the tenant is leaving the premises.

For method of reckoning rent in a mining lease, see *Palmer* v. *Wallbridge* (1888) 14 A. R. 460; 15 S. C. R. 650.

As to right of executor to sue for rents owing to testator, see *Thatcher* v. *Bowman* 18 O. R. 265.

3. And to pay taxes, except for local improvements.

3. 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 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.

Where a lease is silent as to the payment of taxes, the landlord should pay them. *Dove* v. *Dove*, (1868) 18 U. C. C. P. 424.

A tenant covenants to pay the rent without deduction cannot claim a deduction for payment of taxes. *Grantham* v. *Elliott* (1842) 6 O. S. 192; *Wade* v. *Thompson*, 8 L. J. 22. See *McAnany* v. *Tickell* (1864) 23 U. C. R. 449; *Bickle* v. *Beatty* (1859) 17 U. C. R. 465.

Assessment as occupier:—*McCarrall* v. *Watkins* (1860) 19 U. C. R. 248.

Time within which taxes payable:—*Taylor* v. *Jermyn* (1865) 25 U. C. R. 86.

Liability of lessee of municipality:—*Scragg* v. *London* (1869) 28 U. C. R. 457.

Payment before statement of claim:—*Buckley* v. *Beigie* (1885) 8 O. R. 85.

Payment of taxes does not take out of Statute of Limitations. *Finch* v. *Gilray*, (1889) 16 A. R. 484; *Coffin* v. *N. A. Land Co.*, (1891) 21 O. R. 80.

Deduction of taxes from rent: *Carson* v. *Veitch* (1885) 9 O. R. 706.

Where the words *except for local improvements* are struck out or omitted from the above covenant the effect is to make the tenant liable, not merely for the expense of local improvements, but for works assessed upon the property as benefited thereby. See page 57 *ante*.

An ordinary lease under this Act containing the words "and to pay taxes" covers a special rate created by corporation by-law as well as all other taxes: *Re Michie & Toronto* (1862) 11 C. P. 379. See *Aldwell* v. *Hannah* (1857) 7 U. C. C. P. 9.

Where a tenant agrees to pay taxes on the land demised to him, the omission of his name from the assessment roll or the failure of the landlord to resort to

the Court of Revision to have the omission rectified would not relieve him from his obligation: *Janes* v. *O'Keefe*, 26 O. R. 489, 23 A. R. 129.

A covenant to pay taxes on the demised premises will not include the payment of taxes on buildings erected over a lane described as "north of the demised premises:" *Janes* v. *O'Keefe*, 26 O. R. 489, 23 A. R. 129.

The covenant to pay all "taxes . . which now are or shall at any time be rated, etc.," refers to the kinds of taxes, rates, etc., and not to the commencement of the tenancy. Consequently a tenant taking a lease in September did not have to pay any of the taxes for that year, as they had already been assessed against the landlord: *MacNaughton* v. *Wigg* (1874), 35 U. C. R. 111; but see *Heydon* v. *Castle* (1888), 15 O. R. 257.

The covenant includes local improvement rates and percentages added under the Assessment Act on amounts in arrear: *Boulton* v. *Blake* (1886) 12 O. R. 532.

A tenant became purchaser at a tax sale of the lands of which he was tenant, and in respect of which he had covenanted to pay the taxes for which the land was sold. In an action brought by the mortgagee, it was held that he could not hold title so acquired against his lessors: *Heyden* v. *Castle* (1888) 15 O. R. 257; see *Meehan* v. *Pears*, 30 O. R. 433.

Covenant to pay "all rates and taxes" payable in respect of the demised property includes water rates where the water service is installed at the time of the demise: *Bourn* v. *Salmon & Co.* [1907], 1 Ch. 616. And see now in Ontario provisions of R. S. O. 1914, ch. 204, sec. 27.

Construction of covenant to pay taxes: what are regular and ordinary taxes: *St. Mary's Young Men's, etc., Society* v. *Albee*, 43 S. C. R. 288.

Covenant of lessor to pay taxes: increase consequent on sub-lease: *Salaman* v. *Holford* [1909], 2 Ch. 64, 602.

Covenant to pay taxes: see *Foulger* v. *Arding* [1902], 1 K. G. 700; *Surtees* v. *Woodhouse* [1903], 1 K. B. 396; *Wise* v. *Rutson* [1899], 1 Q. B. 474; *Baylis* v. *Jiggins* [1898], 2 Q.B. 315; *Floyd* v. *Lyons* [1897], 1 Ch. 633.

Repair of drains: *Brett* v. *Rogers* [1897], 1 Q. B. 525; *Farlow* v. *Stevenson* [1900], 1 Ch. 128.

Liability: *Re Warriner* [1903], 2 Ch. 367. See also Assessment Act, R. S. O. 1914, ch. 195, sec. 97, and sec. 27 *ante* page 57.

When tenant's covenant to pay taxes includes drainage assessment: R. S. O. 1914, ch. 198, sec. 92.

4. And to repair, reasonable wear and tear and damage by fire, lightning and tempest only excepted.

4. 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.

Covenants to repair run with the land and bind the assignee of the lease of demised premises, though not named. *Crawford* v. *Bugg* (1886) 12 O. R. 12.

Independently of any express agreement on the part of the tenant, and in the absence of the landlord's undertaking to keep the premises in repair, the law imposes upon the tenant that obligation, and he is bound to make ordinary tenantable repairs, such as to keep the house wind and water tight, to repair windows and doors broken by him. It is not in the power of a tenant to make repairs at the expense of his landlord, unless there be a special agreement between them authorizing him so to do. The tenant takes the premises for better or for worse, and cannot involve the landlord in expense for repairs without his consent.

To repair is not the same as to put in repair, which may require the building of something new. The ordinary covenant is merely to maintain things in use in the state they were in when the premises were demised. *Martyn* v. *Clue*, (1852) 18 Q. B. 674.

Unless there is a provision made in the lease excepting the tenant from making repairs, he is obliged to make them, and to continue the payment of rent during the term, although the premises may become untenantable for want of repairs, or from any other cause, or should be burned down. If the premises are insured, the tenant cannot compel the landlord to expend the insurance money in rebuilding, unless the landlord has expressly engaged so to do. And a covenant to repair is of itself sufficient to bind the tenant to rebuild in case of fire or any other accident, unless there is a provision excepting "damage by fire, lightning and tempest." While this clause will exonerate the tenant it will not of itself bind the landlord to restore the premises.

When a lessee covenants to keep an *old* building in repairs, he is not liable for such dilapidations as result from the natural operation of time and the elements. *Entteridge* v. *Munyard* 1 Moo. & R. 334.

In determining the relative sufficiency of repairs the jury may consider whether a house was new or old at the time of the demise: *Stanley* v. *Towgood*, 3 Bing. N. C. 4, and what was its *then* state of repair and condition generally *Burdett* v. *Withers*, 7 A. & E. 136, but not in detail: *Mantz* v. *Goring*, 4 Bing. N. C. 451; *Yonge* v. *Mantz*, 6 Scott 277; *Woolcock* v. *Dew*, 1 F. & F. 337.

"Tenantable repairs of buildings in a general covenant for that purpose are intermediate between substantial repairs, which consist of bricklayers' and carpenters' work, and ornamental repairs, which consist of papering, painting, and whitewashing: Wood on Dilapidations, p. 8. The tenant is bound to preserve the fabric of the buildings from permanent decay, and for that purpose is obliged to repair the external covering of the house, whether slated, tiled, or thatched, and he must repair the place and restore broken windows, and mend chimneys when injured. So any damage done to the woodwork of the building through want of ordinary care, and not caused merely by time and use, must be restored. Such as permitting the racks of a stable to become decayed. *Anon*, 2 Vent. 214.

"The tenant is only bound to maintain an old building in suitable repair. It is not meant that an old building is to be restored in a new form at the end of the term or of greater value than at the commencement; but the tenant is to take care that the premises do not suffer more than the operation of time and nature would affect. He is bound, I take it, by reasonable application and labour to keep the premises as nearly as possible in the same condition as when they were demised." *Belcher* v. *McIntosh*, 8 C. & P. 720; 2 Moo. & R. 186.

Effect of this covenant "to keep the demised premises in good repair . . and all fixtures," etc., and covenant that the lessee may remove his fixtures: see *Cronkhite* v. *Imperial Bank* (1907), 8 O. W. R. 18, 9 O. W. R. 326, 14 O. L. R. 270.

Statutory covenants 4 and 7 are qualified by the exception contained in statutory covenant 9 (*q.v.*): *Morris* v. *Cairncross*, 9 O. W. R. 918, 14 O. L. R. 544; *Emmett* v. *Quinn* (1882), 27 Gr. 420; 7 A. R. 306; *Delamalter* v. *Brown*, 9 O. L. R. 351.

Under this covenant the tenant is bound to repair the demised premises and all fixtures made or erected during the term which he had a right to make. The right to erect such fixtures exists to this extent, that they shall not diminish the value of the demised premises, nor increase the burden upon them as against the landlord, nor impair the evidence of title. The landlord's reversion not being injured by acts such as these, there is not waste and no forfeiture: *Holderness* v. *Lang* (1886), 11 O. R. 1.

Covenant to repair, and implied covenant by tenant not to commit waste: *Defries* v. *Milne* [1913], 1 Ch. 98; but see *Witham* v. *Kershaw* (1885), 16 Q. B. D. 613, 616.

Notice by sanitary authority to construct outside drain: *Howe* v. *Botwood* [1913], 2 K. B. 287.

Effect of covenant by tenant to repair: *Bornstein* v. *Weinberg*, 4 O. W. N. 534, 27 O. L. R. 536. Natural decay of old building: *Surcott* v. *Wakely* [1911], 1 K. B. 905.

Damages for breach: *Clare* v. *Dobson* [1911], 1 K. B. 35.

Repairs voluntarily done by landlord and negligently executed by landlord's servants: injury to tenant's wife: non-liability of landlord: *Malone* v. *Laskey* [1907], 2 K. B. 141.

Duty of landlord to repair, and his liability to stranger injured on the premises: *Marcille* v. *Donnelly*, 1 O. W. N. 195.

Covenants to repair: see art. 47 C L. J. 733, 48 C. L. J. 8.

5. And to keep up fences.

5. And also will, from time to time, during the said term, keep up the 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.

Where an enterprising conveyancer ran together this covenant and the preceeding one into one covenant "to repair and keep up fences," he lost the benefit of the extended form in column 2. *Emmett* v. *Quinn*, (1882) 27 Gr. 420; 7 A. R. 322.

As to erection of new fences, see *Cook* v. *Edwards*, 10 O. R. 341.

Covenant as to building of line fences, see *Houston* v. *McLaren*, 14 A. R. 103.

Where rent is accepted after the removal of a fence, such acceptance is a waiver of the forfeiture, if any: *Leighton* v. *Medley*, (1882) 1 O. R. 217.

Breach of wall to make door is breach of covenant; erection and repair of fixtures. *Holderness* v. *Lang* (1886) 11 O. R. 1.

Effect of covenants in farm leases: *Atkinson* v. *Farrell*, 4 O. W. N. 73, 27 O. L. R. 204, 8 D. L. R. 582.

6. And not to cut down timber.

6. 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.

The tenant may cut timber for the purposes of building or repairing fences, or repairing the buildings and for other necessary purposes, but he has no right to cut any ornamental trees, fruit trees, nor trees used as a wind-break etc. for this would amount to waste. He cannot cut firewood to sell, nor can he cut any for any purpose, so long as there is sufficient dead-wood on the premises for his consumption.

A tenant, whether for life or for years, may cut timber trees for the necessary repairs of the house and fences, even though he has agreed to repair at his own expense; but then it must be for the repairs of such buildings as were on the premises when he entered into possession, and not for such as he may have subsequently erected.

A covenant provided that the lessee was not to cut down timber "for any purpose whatever, except for firewood, but that the lessee is to have the privilege of using for any purpose all the lying down hardwood timber, cedar only excepted." This covenant restricted the statutory covenant but extended the common law right, which was limited to lying down dead timber. The covenant allowed the lessee to use all lying down hardwood timber, sound or unsound, subject to the exception as to cedar: *Smellie* v. *Watson*, 9 O. L. R. 635.

Defendant cut down 51 trees for firewood, 48 of which were timber trees, held to be waste. *McPherson* v. *Giles* (1919) 45 O. L. R. 441.

7. 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.

7. And that it shall be lawful for the lessor and his agents, at all reasonable times during the said term, to enter the said demised premises to examine the condition thereof; and further, that all want of reparation that upon such view shall be found, and for the amendment of which notice in writing shall be left at the premises, the said lessee 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.

The covenant to repair according to notice is qualified by any exceptions that may be made in covenant to repair, even although the same exceptions are not expressly made in the covenant to repair according to notice. *Thistle* v. *Union Forwarding & Ry. Co.* (1878) 29 C.P. 76.

"As between landlord and tenant the former is not liable to repair during the term in the absence of contract. Therefore the tenant's remedy rests not upon the negligence of the owner, but upon the contract to repair. In case of slight repairs the tenant is justified after notice of want of repair, and reasonable time elapses, to expend what is needed in making the repairs and charging it against his landlord, or taking it out of the rent." *Brown* v. *Toronto General Hospital* (1893) 23 O. R. 603.

See *Crawford* v. *Bugg* (1886) 12 O. R. 8.

Notice to repair: form: *Holman* v. *Knox*, 20 O. W. R. 121, 3 O. W. N. 151, 745; 21 O. W. R. 325; 25 O. L. R. 588.

See effect of this clause, in view of the provisions of the Settled Estates Act: *Morris* v. *Cairncross*, 9 O. W. R. 918; 14 O. L. R. 544. See R. S. O. 1914, ch. 74, sec. 3.

8. And will not assign or sub-let without leave.

8. 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 first had and obtained.

If this covenant is not inserted in a lease the tenant has the right to assign his lease or sub-let the premises. An *assignment* is the transfer of the tenant's interest in the whole or a part of the premises for the remainder of his term, while a *sub-lease* is a transfer of such interest for a part of the remainder of his term. If a tenant assigns or sub-lets his tenancy, and the person to whom he assigns fails to pay the rent, the original tenant is liable in an action for the rent, unless the landlord has expressly absolved him from responsibility by accepting the new tenant.

Where the above covenant not to assign or sub-let is inserted in a lease the tenant is liable to forfeit his term should he try to assign or sub-let without the landlord's written consent, but by sec. 23 of the Landlord and Tenant Act, the landlord may not unreasonably withhold his consent.

A covenant by a tenant *"not to assign or sublet without leave, but such leave shall not be wilfully or arbitrarily withheld"* is not construed as implying a covenant on the part of the landlord not to refuse his consent arbitrarily or unnecessarily; but if in fact it is so refused, the result is that the tenant is at liberty to assign without the landlord's consent; and he can obtain a declaration by the court of his right so to do; 18 *Hals. Laws, Eng.*, 579 parts. 111 *et seq.*

"Wilful" refusal is defined as being without any reason if the objection is merely capricious; *Re Windsor Haines and South Western Ry. Act* (1850) 12 Beav. 522 at 524: A refusal arising from an exercise of mere will or caprice;

Bradshaw, ex p. (1848) 16 Sim. 174; *Re Comrs. of Ryde* (1856), 26 L.J. N.S.Ch. 299 at 300.

"Arbitrary" refusal is where the reason given is capricious, uncertain, or unreasonable: *Governors of Birdwell Hospital* v. *Faulkner*, (1892) 8 Times R. 637; Not a fair and reasonable ground; *Treloar* v. *Briggs* (1874) L. R. 9 Ex. 151 at 155: Without any reasonable ground; *Quinion* v. *Horne* [1906] 1 Ch. 596 at 602.

Where a lease contained a covenant that the tenant would *not assign without leave, but such leave shall not be wilfully or arbitrarily withheld*, and the landlord arbitrarily refused his consent, an agreement to assign was held insufficient to cause a forfeiture and the tenant was at liberty to assign without consent; *Cornish* v. *Boles* (1914) 31 O. L. R. 505.

See *Grossman* v. *Modern Theatres* (1919) 45 O. L. R. 564.

The right of re-entry under this Act applies to the breach of negative as well as affirmative covenants, so that there is re-entry for breach of this covenant. The making of an agreement for the assignment of lease, the settlement of the terms, and the entry of the assignee, constitute sufficient breach; the actual making of the document of transfer is immaterial: *McMahon* v. *Coyle*, 5 O. L. R. 618; *Toronto Hospital* v. *Denham* (1880) 31 C. P. 203; *Eastern Telegraph Co.* v. *Dent* [1899], 1 Q. B. 835.

A subsequent oral acquiescence is not sufficient to bind the lessor, as having waived the forfeiture. *Carter* v. *Hibblethwaite* (1856) 5 C. P. 475.

There is no authority requiring either a notice to quit or a demand of possession previous to bringing ejectment for a forfeiture, when the lease contains a power of re-entry for non-performance of a covenant to repair, or for under-letting without consent, contrary to the terms of the lease. What is sufficient evidence of underletting, *Connell* v. *Powell*, 13 C. P. 91.

Assignment for benefit of creditors, *Magee* v. *Rankin*, 29 U. C. R. 257.

Effect of assignment in insolvency on the right of distress. *Graham* v. *Long*, 10 O. R. 248; *Baker* v. *Atkinson* (1887), 11 O. R. 735; 14 A. R. 409; *Linton* v. *Imperial Hotel;* (1889) 16 A. R. 337.

Where sub-tenant agrees to go out when required: *Leys* v. *Fiskin*, 12 U. C. R. 604.

Assignment by way or mortgage: *Bacon* v. *Campbell*, 40 U. C. R. 517.

Action of trespass by under-tenant (without leave): *McArthur* v. *Alison*, 40 U. C. R. 576.

Measure of damages for breach of covenant: The lessor was held entitled to a quarter's rent accruing due at the time of the breach, without deduction for rents realized by him during the quarter: *Patching* v. *Smith*, 28 O. R. 201; see *Williams* v. *Earle*, L. R. 3 Q. B. 739.

The words "any person" in the long form of the covenant include the original lessee. Where an assignment has been made by him with consent, a re-assignment to him without a fresh consent is a breach of the covenant: *Munro* v. *Waller*, 28 O. R. 29.

Where the landlord knew of the assignment and did not claim a forfeiture, but insisted on claiming rent from the lessee, the lessee was entitled to recover from the assignee what he was obliged to pay, although the consent of the lessor had not been procured: *Brown* v. *Lennox*, 22 A. R. 442.

When a landlord gives a license to assign part of the demised premises, he may enter on the remainder for breach of the covenant, notwithstanding that the proviso for re-entry requires re-entry on the whole or a part in the name of the whole: *Baldwin* v. *Wanzer* (1892), 22 O. R. 612.

While acceptance of rent with knowledge of the breach will waive forfeiture, does it follow that the lessors are disentitled to rely on the breach as a ground for refusing to renew: *Finch* v. *Underwood*, 2 Ch. D. 310.

When persons become assignees of a lease with this clause with leave, they become bound by the covenant and provision; *Fitzgerald* v. *Loveless (Barbour)*, 11 O. W. R. 390; 12 O. W. R. 807, 17 O. L. R. 254; 42 S. C. R. 254; and sec. 5 *ante* page 92 *ante*.

Assigning and sub-letting: see *Varley* v. *Coppard*, L. R. 7 C. P. 505; *Bristol* v. *Westcott*, 12 Ch. D. 461; *Horsey* v. *Stieger* [1898], 2 Q. B. 259; [1899], 2 Q. B. 79; *Langton* v. *Hewson*, 92 L. T. 805; *Barrow* v. *Isaacs* [1891], 1 Q. B. 417.

Liability of executors: consideration of this and covenant to repair: *Crawford* v. *Bugg*, (1886) 12 O. R. 8.

Where an assignment was made by the administrator of lessee in spite of a covenant of the deceased not to assign, etc., the administrator was, by Richards, C.J., considered not bound by the covenant, because not named in it, but A. Wilson, J., inclined to think that the covenant was one concerning land which would bind the assigns though not named, but that the proviso for re-entry did not apply to it: *Lee* v. *Lorsch* (1875), 37 U. C. R. 262.

Where it is stipulated that leave to assign shall not be "unreasonably withheld": as to unreasonableness see *Re Sparks Lease; Berger* v. *Jenkinson* [1905], 1 Ch. 456. Leave unreasonably withheld: *Evans* v. *Levy* [1910], 1 Ch. 452. Proviso that leave to assign shall not be unreasonably withheld: Construction of this, in view of proposed assignment to a company: *Jenkins* v. *Price* [1908], 1 Ch. 10.

See provision that leave to assign not to be unreasonably withheld: see page 55 *ante*.

Effect of assigning part of demised premises on covenant for renewal: *C. P. R.* v. *Brown Milling Co.*, 18 O. L. R. 85, 42 S. C. R. 600.

Assignment to co-partner breach of covenant: *Fitzgerald* v. *Loveless (Barbour)*, 11 O. W. R. 390; 12 O. W. R. 807; 17 O. L. R. 254, 42 S. C. R. 254.

Giving temporary permission to cross property not a breach of this covenant: *Kinnear* v. *Shannon*, 13 O. W. R. 502.

Covenant not to assign: *McEachern* v. *Colton* [1902], A. C. 104; *Grove* v. *Portal* [1902], 1 Ch. 727; *Harman* v. *Ainslie* [1904], 1 K. B. 698.

Covenant not to assign, save to "a responsible and respectable person" does not extend to include a company: *Willmott* v. *London Road Car Co.* [1910], 1 Ch. 754.

Breach of covenant against sub-letting: *Curry* v. *Pennock*, 4 O. W. N. 712, 1065, 23 O. W. R. 922, 24 O. W. R. 357, 10 D. L. R. 166, 548.

9. And that he will leave the premises in good repair, reasonable wear and tear and damage by fire, lightning and tempest only excepted.

9. And further, that 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 the 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.

A lease under this Act contained a covenant to "leave the premises in good repair, ordinary wear and tear only excepted." It was held that the added words were not an exception or qualification within the meaning of the Act, and the covenant had to be construed as it stood, without the aid of the long form, and therefore, that the exception as to damage by fire did not apply: *Delamatter v. Brown*, 9 O. L. R. 351; see also *Morris* v. *Cairncross*, 9 O. W. R. 918, 14 O. L. R. 544, as to deviations from statutory form of this covenant and effect on conditions 3 and 6, which are qualified by the statutory exception in this covenant: also *Emmett* v. *Quinn* (1882), 27 Gr. 420; 7 A. R. 306.

The covenant to leave the demised premises in repair does not restrict the right of the tenant to remove his trade fixtures: *Argles* v. *McMath*, 26 O. R. 224, 23 A. R. 44.

Destruction by fire: see *Evans* v. *Skelton*, 16 S. C. R. 637; *Williams* v. *Tyas*, 4 Gr. 533.

Covenant to repair runs with the land, and an assignee of the term is only liable for breaches occurring previous to his assignment to another: *Crawford* v. *Bugg*, 12 O. R. 8.

Covenant to leave in repair buildings to be erected by tenant. Right of grantee of lands to sue: *Lucas* v. *McFee*, 12 O. W. R. 939.

10. Provided, that the lessee may remove his fixtures.

10. Provided, 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 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.

This section deals with what are called *Trade Fixtures*, viz. articles used in connection with a trade or business. A clause giving the tenant a right to remove his fixtures does not give him any right to remove the *landlord's* fixtures.

The tenant has no right to remove any additions which he may have made to the property such as greenhouses, pigsties, and stables. These are permanent fixtures and become the property of the landlord the moment that they are fixed to the land. Neither can the tenant remove any shrubbery or flowers planted by him in the garden.

The tenant must remove his fixtures *before his term has expired, or at least before he surrenders possession.* If he leaves without removing them, they revert to the landlord immediately upon termination of the lease.

Where the determination of a lease depends upon an uncertain event such as an election to forfeit upon making an assignment for the benefit of creditors, a reasonable time must be allowed for the removal of trade fixtures after the election to forfeit: *Argles* v. *McMath*, 26 O. R. 224, 23 A. R. 44.

A tenant when he renews his lease must be careful to preserve his rights to remove fixtures, and without express stipulation he may lose the right. Words of the proviso considered: *Cronkhite* v. *Imperial Bank* (1907), 8 O. W. R. 18, 9 O. W. R. 326, 14 O. L. R. 270.

Where a tenant surrenders his lease to his landlord a mortgagee or purchaser from the tenant has a right to remove fixtures within a reasonable time. This also applies in favour of debenture holders of a company which forfeits its lease by passing a winding-up resolution: *Re Glasdid Copper Mines* [1904], 1 Ch. 819.

A covenant to deliver up premises with all fixtures extends to all fixtures on the premises: *Leschalles* v. *Woolf* [1908], 1 Ch. 641. Fixtures: see *Lyon* v. *London City and Midland Bank* [1903], 2 K. B. 135; *Monti* v. *Barnes* [1901], 1 K. B. 205; *Reynolds* v. *Ashby* [1904], A. C. 466; *In re Hulse, Beattie* v. *Hulse* [1905], 1 Ch. 406; *Leigh* v. *Taylor* [1902], A. C. 157.

A bar cabinet and a beer pump are tenant's fixtures. *Simons* v. *Mulhall* (1913) 24 O. W. R. 736.

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

11. Provided, and it is hereby expressly agreed, that in case the premises hereby demised or any part thereof shall at any time during the said term 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.

"In case of fire:" see Accidental Fires Act, R. S. O. 1914, ch. 118.

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

12. Provided, 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, then and in either of such cases it shall be lawful for the lessor 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 former estate; anything contained to the contrary notwithstanding.

Under certain circumstances the Court will relieve the tenant against forfeiture of his lease under this covenant. See page 48.

The institution of summary proceedings, under sec. 75, *ante* page 85, is an unequivocal exercise of the landlord's right of re-entry for non-payment of rent overdue for 15 days. Re *Bagshaw* v. *O'Connor* (1918) 42 O. L. R. 466.

The acceptance of rent overdue is not a waiver by the landlord of his right of re-entry. *Re Bagshaw & O'Connor* (1918) 42 O. L. R. 466; but the acceptance of rent when it becomes due is a waiver of a forfeiture, because it recognises the lease as subsisting. *Grossman* v. *Modern Theatres* (1919) 45 O. L. R. 564.

Where a proviso stated that *"It should be lawful for the landlord to re-enter,* held, that the effect of the non-payment of rent upon such a demise would be to make it not void upon *ipso facto* but only void upon proper proceedings being taken for that purpose; and consequently that until such proceedings were taken the term would subsist in the tenant. *Doe King's College* v. *Kennedy* (1849) 5 U. C. R. 577.

Where proviso stated that, *"This lease will be void if the lessee fails to perform this agreement,"* held that such a proviso or agreement is that the lease shall be voidable only at the option of the lessor, and in order to take advantage of such a proviso, and to entitle the lessor absolutely to determine the lease for non-payment of rent, a formal and legal demand of the rent is necessary. *Faugher* v. *Burley* (1875) 37 U. C. R. 498. See also *McLellan* v. *Rogers*, 12 U. C. R. 571.

Fifteen days. Notice was given terminating a lease on 20th March, 1863, the half-year's rent became due 15th March, and the lessor claimed that the lease was determined under the proviso for re-entry, held, that as the forfeiture under that proviso would not have been complete until 30 March, and as the term ended on 20th March, there was therefore nothing to forfeit. *Campbell* v. *Baxter* (1864) 15 C. P. 42.

Waiver of right of entry. Mere knowledge of acquiescence in an act constituting a forfeiture does not amount to waiver. There must be some expenditure of money in improvements or some positive act of waiver, e.g. a submission to arbitration: *Black* v. *Allan*, 17 C. P. 240; or extension of time: *Flower* v. *Duncan*, 13 Gr. 242; or receipt of rents: *McLaren* v. *Kerr* (1876) 39 U. C. R. 507.

As to receipt of rent as waiver: *Roe* v. *Southard,* 10 C. P. 488; *McDonald* v. *Peck* (1859), 17 U. C. R. 270; *Bleecker* v. *Campbell,* 4 L. J. 136; *Roaf* v. *Garden,* 23 C. P. 59; *Manning* v. *Dever* 35 U. C. R. 294; *Leighton* v. *Medley* (1882), 1 O. R. 207.

But receipt of rent that has accrued before forfeiture is not a waiver: *Dobson* v. *Sootheran* (1887) 15 O. R. 15; and where a lessor has re-entered for a forfeiture, receipt of rent will not prejudice as there can be no waiver after entry: *Thompson* v. *Baskerville* (1877) 40 U. C. R. 614.

As to delay in proceedings: *Kerr* v. *Hastings* 25 C. P. 429.

As to continuing breaches: *Ainsley* v. *Balsden* (1857), 14 U. C. R. 535; *Holderness* v. *Lang* (1886), 11 O. R. 1.

No reservation of right of re-entry to a stranger to legal estate: *Hyndman* v. *Williams,* 8 C. P. 293.

Right of re-entry not affected by penalty attached to breach of covenant: *Sheldon* v. *Sheldon,* 22 U. C. R. 621.

Non-payment of taxes as a cause of forfeiture: *Taylor* v. *Jermyn* (1865), 25 U. C. R. 86.

Effect of proviso for determining lease by notice, on right of re-entry: *Heley* v. *The Canada Co.,* 23 C. P. 20, 597.

Ambiguous covenant: *McLaren* v. *Kerr* (1876) 39 U. C. R. 507.

Where the lessee was ejected by title paramount to the lessor he could not recover on an implied covenant in the word "demise," as it is controlled by the express covenant for quiet enjoyment which is limited to the acts of the lessor and those claiming under him: *Davis* v. *Pitchers* (1875), 24 C. P. 516.

Under a lease under this Act containing a covenant not to assign or sub-let without lease, when the lessor gives leave to assign part of the demised premises he may re-enter upon the remainder for breach of the covenant not to assign or sub-let, notwithstanding that the proviso for re-entry requires the right of re-entry on the whole or a part in the name of the whole: *Baldwin* v. *Wanzer,* (1892), 22 O. R. 612.

The right of re-entry exists for the breach of a negative as well as an affirmative covenant. There is a right of entry for breach of the covenant not to assign or sub-let without leave: *McMahon* v. *Coyle,* 5 O. L. R. 618; *Toronto Hospital* v. *Denham* (1880), 31 C. P. 203.

The following additions to the statutory form did not exclude the application of the statute: Proviso for re-entry *by the said lessor* on non-payment of rent, *whether lawfully demanded or not,* or on non-performance of covenants, *or seizure or forfeiture of the said term for any of the causes aforesaid;* and the proviso extended to covenants after as well as before it in the lease: *Crozier* v. *Tabb* (1876) 38 U. C. R. 54.

Acquiescence in failure to observe terms of lease: *Peterson Lake* v. *N. S. Silver Cobalt,* 1 O. W. N. 619, 2 O. W. N. 970.

Retraction of forfeiture: see *Denison* v. *Maitland* (1893), 22 O. R. 166. See pages 53, and 56 *ante.*

Forfeiture for bankruptcy or assignment for benefit of creditors: See page 53 *ante*.

Power of Court to relieve against forfeiture: see page 48 ante.

Proviso for re-entry on default of performance of covenants is not limited to breaches of affirmative covenants: *Harman* v. *Ainslie* [1904], 1 K. B. 698. What amounts to waiver of forfeiture: effect of payment and tender of rent and of bringing action and distress: *Fenny* v. *Casson*, 12 O. W. R. 404, 722.

Breach of condition for which the lessors are entitled to enter puts an end to a right of renewal provided for in the lease: *Fitzgerald* v. *Loveless* (*Barbour*), 17 O. L. R. 254; 11 O. W. R. 390; 12 O. W. R. 807; 42 S. C. R. 254.

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

13. And the lessor doth hereby covenant with the lessee, that he paying the rent hereby reserved and performing the covenants hereinbefore on his 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, or any other person or persons lawfully claiming by, from or under him.

Quiet enjoyment. The effect of the covenant is that the lessor agrees to be bound by any act of interruption by himself or by any person whom he has expressly or impliedly authorized to do the act, but is not responsible for wrongful or negligent acts which he has not authorized: *Sanderson* v. *Berwick*, 13 Q. B. D. 547; *Williams* v. *Gabriel* [1906], 1 K. B. 155, 75 L. J. K. B. 149.

A lessee evicted by the assignee of mortgages created prior to the lease brought action for breach of covenant for quiet enjoyment; held, that he could not recover as the assignee of the mortgages was a person not "claiming by, from or under" the lessor, but claiming under the lessor's predecessor in title; and that it made no difference that the lessor had assumed the mortgages: *Bellamy* v. *Barnes* (1879) 44 U. C. R. 315.

When the lessee was evicted by title paramount to the lessor, it was held that he could not recover as for breach of covenant for quiet enjoyment, which is limited to the acts of the lessor and those claiming under him: *Davis* v. *Pitchers*, (1875) 24 C. P. 516.

An agreement postponing a lease to a mortgage places the lessee in no worse position than if the mortgage had been made prior thereto, so that the lessee merely holds subject to the mortgage, and subsequent mortgagees hold subject to the lease, and the covenant for quiet enjoyment holds good and any breach of it entitles the lessee to damages. *Anderson* v. *Stevenson* (1888) 15 O. R. 563.

Enjoyment interfered with by Act of Legislature: *Snarr* v. *Baldwin*, (1862) 11 C. P. 353.

By-law of lessors as a breach of covenant: *Reynolds* v. *Toronto* (1865) 15 C. P. 276.

Expropriation by Railway: *Clarke* v. *Grand Trunk Ry.* (1874) 35 U. C. R. 57.

Proviso for re-entry should be stated: *Purser* v. *Bradburn* (1875) 25 C. P. 108.

Lease of flat with passages, etc.: *Maclennan* v. *Royal Ins. Co.* (1875) 37 U. C. R. 284.

Covenant independent of lease for years: *Thompson* v. *Crawford* (1863) 13 C. P. 53.

Lessee entitled to continuation of existing light and ventilation as an appurtenance to the lands demised: *Ellis* v. *White*, 11 O. W. R. 184; see R. S. O. 1914, ch. 109, sec. 15; R. S. O. (1914), ch. 115 ss. 2, 3.

Attempt by lessors to impose fee for entrance to park in which leased house is erected: *Irving* v. *Grimsby Park Co.*, 11 O. W. R. 748, 16 O. L. R. 386.

Quiet enjoyment: right to support and protection against subsidence: *Markham* v. *Paget* [1908[, 1 Ch. 697. Quiet enjoyment: *Baynes* v. *Lloyd* [1895], 2 Q. B. 610; *Jones* v. *Lavington* [1903], 1 K. B. 253.

Nuisance on adjoining property: *Davis* v. *Town Properties* [1903], 1 Ch. 797.

6. Covenant that Land is Free from Encumbrance.

A covenant by the landlord that the *lessor covenants with the lessee that the lands are free from encumbrance* is not contained in the Ontario statutory form of a lease, but it is one which should be insisted on by the tenant, for without it he may be deprived of his term by reason of some prior encumbrance, or be subjected to the burden of some inconvenient easement unknown to him when he accepted the lease and he would be without any adequate redress for the injury which he might sustain.

It would be well for a tenant before accepting a lease, to inquire whether the landlord himself may not hold for a term of years; and if so, whether there may not be some restriction in his lease that may render the property unfit for the purpose he requires it for, and whether the rent reserved in this original lease, with the taxes and assessments in respect thereto, have been paid.

It is not necessary, in order to maintain an action on this covenant, that the tenant should be actually ousted by the holder of the encumbrance, the mere liability or chance that he may be disturbed being a breach of the covenant; but nothing more than nominal charges can be recovered before actual injury has been sustained.

7. Covenant to Renew Lease.

Another covenant on the part of the landlord is sometimes inserted in a lease which adds much to the stability of the tenant's interest, and affords an inducement to permanent improvement,

is that *the lessor covenants with the lessee that he will at the expiration of the term hereby granted, renew the lease* for the same or some other term mentioned. A good precedent for drafting such a covenant will be found in O'Brien's Conveyancer 5th ed. 633. Under this covenant the landlord is bound to make another lease of the premises, either to the tenant or his assignee.

Sometimes, instead of a covenant for a renewal, it is agreed that the tenant may have the option for a further term. In this case, if notice is stipulated for, it must be given; but if it is not stipulated for, the tenant's mere continuance in possession and paying rent, though with no express notice of his desire for the further term, entitles and binds him thereto.

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