# Canada Law Journal.

VOL. XLI. OCTOBER 1. NO. 19.

## *MASTER AND SERVANT.*

### SERVICE DISTINGUISHED FROM TENANCY.



1. Generally.—The cases which depend upon the character of the occupation of premises by a person who is residing thereon, while engaged in work which he has undertaken to perform for the owner of the premises, are divisible into two main classes:

(*a*) Those in which the sole question to be determined was, whether the relation of master and servant, or the relation of landlord and tenant, was created by the contract between the owner of the premises occupied and the person performing the work.

(*b*) Those in which it is conceded, or established by satisfactory evidence, that the person performing the work was, in respect to such work, a servant of the owner of the premises occu-

pied, and the question to be determined is, whether he should be regarded as a servant or a tenant in respect to some matter extrinsic to the stipulated work[1].

Both these questions are primarily for the consideration of the jury or other tribunal whose function it is in the given instance to determine issues of fact[2], the conclusion arrived at being, of course, subject to review in a higher court, which has all the facts before it[3]. If the action is being tried in a court consisting of a judge and jury, it is unnecessary to submit to the jury the character of the occupation, if that depends upon the significance of substantially undisputed facts[4]; but this question cannot be determined, as one of law, if the evidence is conflicting, or diverse inferences may be drawn therefrom[5].

"The terms of the contract, so far as the parties differ, it is the duty of the jury to determine; but the terms being fixed, their legal import is for the court to declare. This should be determined upon a consideration of the nature and purpose of the contract, and the character of the business to which it relates"[6].

**2. Service or tenancy.**—The manner in which the former of the questions stated in the preceding section has been answered

---

[1] "There is no inconsistency in the relation of master and servant with that of landlord and tenant. A master may pay his servant by conferring on him an interest in real property, either in fee, for years at will, or for any other estate or interest; and if he do so, the servant then becomes entitled to the legal incidents of the estate as much as if it were purchased for any other consideration." *Hughes* v. *Overseers of Chatham* (1843) 5 Mann. & Gr. 54 (78).

[2] *Hughes* v. *Overseers of Chatham* (1843) 5 M. & G. 14; 7 Scott N.R. 581; *Clark* v. *Bury St. Edmonds* (1856) 1 C.B.N.S. 23, 26 L.J.C.P. 12; *R.* v. *Hardis* (1789) 3 T.R. 497.

In *R.* v. *Snape* (1837) 6 Ad. & El. 278, (a settlement case), Williams, J., remarked that the court would not be critical in examining the grounds of the finding of the inferior tribunal.

In *R.* v. *Seacroft*, 2 M. & S. 472, it was declared that the court of sessions was the proper forum to determine the effect of the evidence and the contention of counsel that a certain presumption might be drawn by the court of review from the facts stated was rejected.

[3] *R.* v. *Field* (1794) 5 T.R. 587 (ratability of occupier, as determined by court of sessions) and cases cited passim in the ensuing sections.

[4] *Kerrains* v. *People* (1873) 60 N.Y. 221.

[5] *Kerrains* v. *People* (1873) 60 N.Y. 221.

[6] *Bowman* v. *Bradley* (1892) 151 Pa. 351, 24 Atl. 1062.

In *Kerrains* v. *People* (1873) 60 N.Y. 221, the effect of the arrangement was determined by the court as a question of law upon the contract and facts, as stated, and the conclusion so arrived at was upheld by the court of review.

by the courts with relation to various states of fact is shewn by the decisions collected in the subjoined note [1].

---

[1] (*a*) *Occupancy as incident to contracts for cultivating land on shares.*—The cases cited below not only disclose a considerable diversity of opinion as to the juridical standpoint which is appropriate in dealing with contracts of this type, but also indicate that, even where the standpoint has been the same, the courts have not always arrived identical conclusions with respect to essentially similar facts.

A "cropper," (*i.e.*, a labourer who is paid for his labour by being given a proportion of the crop which he helps to harvest) is not a tenant, since he has no estate in the land, nor in the crop till the landlord assigns him his share. He is as much a servant as if his wages were fixed and payable in money. *Haskins* v. *Royster* (1874) 70 N.C. 601, 16 Am. Rep. 780, (action for enticement of cultivator, held to be maintainable).

*Burgie* v. *Davis* (1879) 34 Ark. 179 (holding that the law governing landlord's liens had no application to the case, but that the "cropper" was entitled to file a labourer's lien on the crop for whatever was due to him).

A contract between A. and B. that A. might tend so much of B.'s land as he could cultivate with one horse during a certain year, and that A. was to pay B. as "rent," two bales of cotton out of the first picking—no part of the crop to belong to A. until the rent was paid—constitutes A. a cropper, not a tenant. *Heywood* v. *Rogers* (1875) 73 N.C. 320. In *Neal* v. *Bellany* (1875) 73 N.C. 384, the effect of this decision was thus stated: "Where the crop is to be the property of the owner of the land, that fixes the character of cropper, and not of tenant, upon the man who is to do the work." In the later case service was held to be inferable, where the agreement was that A. was to pay B., the owner of the land, two bales of cotton provided he also kept up the fences and cleaned the ditches properly, and three bales if this work was neglected, and that B. was to make certain advances to A. to assist him in making the crop.

Where A. contracts to raise a crop on B.'s land, in consideration that B. will furnish tools, team, and feed, for the team, and give him one-half the crop raised, and out of A.'s half B. is to retain sufficient to pay what A. may owe for supplies, the contract is one of service, the wages being half the crop minus the amount of the debt for supplies. *Sawtell* v. *Moore* (1879) 34 Ark. 687, (landlord held not to be a mere tenant in common of the crop, so as to be obliged to file a copy of the contract in order to secure his lien for supplies as is provided by the Ark. Act of March 6, 1875).

One who takes charge of another's ranch with the understanding, that he is to receive for his services, a certain sum per month, and that, after paying from the gross proceeds the operating expenses inclusive of his own salary, and deducting what was due for supplies and equipment furnished by him, he is to return the residue to the owner, is a servant, not a tenant. *Todhunter* v. *Armstrong* (1898, Cal.) 53 Pac. 446, (holding that, even if a lien were actually constituted by an oral agreement, which was denied, that the occupant was to remain in possession until he was fully settled with and paid, it would not be a defence to an action by the owner to recover possession).

The relation of employer and labourer, not that of landlord and tenant, is created by a contract which requires a labourer to take in charge, plant and cultivate, the several parcels of land designated by the landowner, according to the directions of such landowner, to house two crops, and see that no portion is removed, until the owner has deducted for himself the amounts stated, and which binds them to be of good moral behaviour, and respectful to the landowner, his family and agent. *McCutchen* v. *Crenshaw* (1893) 40 S.C. 511 (held that the labourer had no such interest in his share of the crop as would support a merchant's lien for advances to him).

**3. Character of occupation, whether as servant or tenant. Generally.**—In the reported cases belonging to the second of the two

---

The prosecutor contracted with defendant to employ him to labour on a certain tract of land, agreeing to furnish land, team, food for the team, tools and seed, while the defendant was to furnish the labour and feed it, and to be responsible for all implements used by him. The prosecutor was to have one-half of the crop, and the defendant the other half, from which he was to pay all advances made him, and any help it might be necessary for him to hire. *Held*, that the relation was either that of master and servant or tenants in common, and that in either relation the prosecutor had a general ownership in the crops, and not a lien or claim under Ala. Code (1876) § 4353 punishing the selling of crops on which another has a "lien or claim." This provision is not intended for the protection of tenants in common against fraudulent acts of co-tenants, nor for the protection of masters against fraudulent acts of servants. *Ellerson* v. *State* (1881) 69 Ala. 1.

Under a more recent Alabama statute, Code 1896, § 2712, (Code of 1886, § 3065), it is provided as follows: "When one party furnishes the land and the team to cultivate it, and another party furnishes the labour, with stipulations, express or implied, to divide the crop between them in certain proportions, the contract of hire shall be held to exist."

Occupation of a separate and distinct house on a plantation, several hundred yards away from that of the owner of the plantation, under a contract by which the occupant is to have for his services as a labourer the use of the house and a monthly allowance of meal and meat, and a right to cultivate a small strip of land for his own benefit, constitutes him a lessee. *State* v. *Smith* (1888) 100 N.C. 466, 6 S.E. 8[illegible] (owner who expelled occupant by threats and a display of deadly weapons was held liable to be indicted for a forcible entry).

The relation of landlord and tenant is created by an agreement by an mortgagor to give a certain person all he can raise on a certain part of land in return for services. *Calvin* v. *Shimer* (1888) N.J.L. 13 Cent. 374, 15 Atl. 255. The contention of the defendant was that the petitioner was a tenant, the rent being paid in labour instead of money, while the petitioner insisted that the agreement was one, to take pay for services in grain of his own raising. Bird, V.C., upheld the former view, and held that the crops raised on the land passed with the title on a sale under foreclosure.

The relation of landlord and tenant exists, where one agrees to furnish another with a dwelling house, land, and a team and tools for working it, and the latter is to cultivate properly the soil and make payment of one-half the crops gathered. *Schlicht* v. *Callicott* (1898) 76 Miss. 487, 24 So. 869, (landlord held to be entitled to a remedy by way of attachment under a statute relating specifically to landlords and tenants).

A tenancy was held to be inferable, where the contractor agreed to cultivate during one year at his own cost the land of the contractee, to gather the crops, and to keep the fences in repair, while the contractee stipulated that the contractor should occupy the premises during the year. *Whaley* v. *Jacobson* 21 S.C. 51, (question involved was the right of the occupant to encumber the crop with a lien).

Arrangements of this character have also been viewed from other standpoints, suggestive of other distinctions besides that which is emphasized in the foregoing cases. Thus we find it laid down that a contract between a landowner and his labourers to cultivate a crop on shares creates a tenancy in common in the crop, and not the relation of landlord and tenant. *Smith* v. *Rice* (1876) 56 Ala. 417; *Brown* v. *Coats* (1876) 56 Ala. 417, 439; *Ragsdale* v. *Kinney*, (1898) 119 Ala. 454. But see Alabama cases, and Code section, supra.

classes differentiated in § 1, ante, one or other of the following points has been determined:

(*a*) The liability of the servant to certain taxes.

(*b*) The servant's acquisition of a settlement under the Poor

---

As to the doctrine that a contract with labourers for the raising of a crop a portion of which they are to receive as payment for their labour does not make them the partners of the landowner, see cases cited in 955a, note 1, ante.

That a contract between landowner and labourer for raising a crop on shares creates the relation of landlord and tenant, unless the intention to make them partners or tenants in common with respect to the crop clearly appears, was held in *Birmingham* v. *Rogers*, 46 Ark. 254.

An independent contract, and not service, is inferable where it is agreed that B. shall furnish himself and two daughters and another person to work as labourers on A.'s land, the land and mules for its cultivation to be furnished by A., and that B. is to receive a share of the crop. *Barnon* v. *Collins* (1873) 49 Ga. 580, (action for enticement held not to be maintainable).

In *Duncan* v. *Anderson* (1876) 56 Ga. 398, it was assumed by the court that a "cropper" or person cultivating land or shares was not a servant of the owner, the decision being that the owner was not liable for the tort of the cropper in hiring a labourer previously hired by, and bound to work for the plaintiff.

In *Ponder* v. *Rhea* (1877) 32 Ark. 436, the relation of the cropper to the landowner seems to have been regarded as being rather that of an independent contractor than of a servant, but the precise theory of the court is somewhat obscure.

(*b*) *Occupancy in relation to other contracts for the cultivation of land.*—The relation of master and servant does not exist where one who was under a contract to cultivate land for a certain rental, and, in addition, to work for the landlord, if called upon, whenever he was at leisure, for a certain price per day. The service provided for is a mere incident to the contract of rental. *State* v. *Hoover* (1890) 10 L.R.A. 726, 107 N.C. 795, 12 S.E. 451, (acting for enticement of cultivator, held not to be maintainable).

By an instrument in writing C., a landowner, specified certain services to be performed by H., who was "to have the house rent, use of garden, firewood, and pasturage for what cows he kept for family use," and it was also stipulated that H. was to have possession till a specified date. *Held*, that H. was not a mere agent for C., but took an interest in the premises as lessee, and was entitled to possession until the appointed term had expired. *Colcord* v. *Hall* (1859) 3 Head. 625.

(*c*) —— *to contracts for the keeping of a hotel.*—In *State* v. *Page* (S.C. Ct. of App. 1843) 1 Spears L. 408, 40 Am. Dec. 608, it was held that the following provisions, standing by themselves did not make a lease of a hotel, viz., that for seven years the person in question was to "reside with his family in the hotel, free of all charge for board and rent," "that he was to conduct the same in the manner contemplated by the parties, and have the sole and exclusive management thereof," and that, at the end of the term, the furniture should be returned to the owners of the hotel. The conclusion that no lease was intended was held to be indicated by other stipulations, viz., that the occupant was to "keep the hotel, for the term of seven continuous years," that, "as the landlord he should provide for the hotel," that he "should contract no debts on account of the concern without the consent of the directors," that he should "keep constantly in his employment a bookkeeper, who was to be discharged if the directors disapproved of him, and that the books were to be open to the

Laws. The rule uniformly adopted for construing the Statute of 13 & 14 Car. 2, c. 12, was that the words "coming to settle in a

---

examination of the directors. It was accordingly held that the occupant of the hotel was in possession as the agent of the owners, and that he had no legal interest in the possession which could be set up against an execution for a debt of the owners. In *City Council* v. *Page* (1843) 1 Spears Eq. 159 (p. 177), Harper, Ch., considered that under this instrument the occupant was undoubtedly a lessee.

(*d*)——*to logging contracts.*—The defendant made a contract with D. by which D. was to operate during the milling season a shingle mill then in *the control of the defendant*, and "*manufacture certain brands of shingles from logs to be furnished by defendant*," and receive payment therefor from defendant at a fixed rate, and hire and pay the men employed, furnish tools and implements, repair breaks in machinery not costing over $5 (larger breaks to be repaired at defendant's expenses), and load the shingles at his own expense, (the defendant, however, to pay such expense beyond a certain figure, until a side track to the mill was completed). Defendant was to put the mill in running order, furnish the logs, and remove surplus and refuse timber. *Held*, in an action by a third person against defendant, to recover damages for injuries caused by sparks emitted from the smoke-stack of the mill, that the contract was not a lease, but simply for performance of labour, and that defendant was liable for any defective condition of the mill. The court said that the effective words of the contract were those italicized, and that it was clearly a hiring on the part of the defendant, accompanied on his part by an agreement that D. in the performance of the stipulated work, was to have the use of certain machinery of the defendant's. The absence of any words giving possession of the mill to D. was also commented on. *Whitney* v. *Clifford* (1879) 46 Wis. 138, 32 Am. Rep. 703.

(*e*)——*to contracts for the boarding of the landowner's employés.*—It was held that a woman who occupied a house belonging to a railway company and on its line under an agreement with the company to board its employés—the price of board to be paid by them, and the company to aid her in collecting her pay for board by retaining the same for her out of the wages of such employés—was not a servant or employé of the company, but that the relation of the parties is that of landlord and tenant. *Doyle* v. *Union P.R. Co.* (1892) 147 U.S. 313, 37 L. ed. 223, (action for injuries caused by a snowslide, held not to be maintainable—railway company not bound to provide a safe place of work). It was unsuccessfully contended that the circumstances of her being aided by the company in collecting her pay for the board changed her position from that of tenant at will to servant.

(*f*)——*to contracts for the operation of a factory.*—In *Fiske* v. *Framingham Mfg. Co.* (1833) 14 Pick. 491, the construction of the contract in question was thus discussed: "Some of the provisions have a double aspect, and consistently with them he might be either the agent or the lessee of the defendants, but there are others which admit of only one construction. He was to keep the factory in repair, except that the defendants were to repair the main gearing if it should be necessary: he was to have possession for the purpose of doing what he had stipulated to perform: he had the control of the factory, and could employ what servants he would, and regulate their wages; he might determine how much water should be turned upon the mill; he was entitled to the use of the land about the factory and to the buildings thereon: and whether these buildings were let to labourers employed by him, or to others, rent would probably be paid to him, either in a diminution of wages or otherwise. These provisions are appropriate in the case of a lease. The words, 'that no rent is to be charged by the company,' also tend to prove that a letting was contem-

place," meant by renting or holding in the character of tenant[1]. "If the occupation was ancillary to the service [see next section] so as to make the occupation of the servant merely the occupation of the master, then no settlement was gained"[2].

(c) The exercise of the elective franchise by the servant. As precedents bearing upon the right of voting, the English cases of which the effect will be stated in the ensuing sections are of much less importance in the United Kingdom itself, since the recent extension of the franchise (see 10 post), and are of no importance whatever in countries where manhood suffrage prevails. But they supply many useful analogies and statements of general principles which will serve as a guide to the practitioner in other connections[3]. The cases of which the effect is stated

---

plated. It was argued that a reservation of rent was essential to a lease, but this point is immaterial, for taking the whole agreement together, it was manifest that the defendants received rent in the price at which their goods were manufactured. We are therefore of opinion, that Bird was not the servant of the defendants, but their lessee, having the control and possession of the premises mentioned in their agreement, and consequently that the defendants are not liable to the plaintiff in this action." (Action for damages caused to a neighbour by the negligence of the occupant in letting off the water from the pond too rapidly).

Under an instrument in the form of a lease, a party named as lessee was to have control of a factory, and was to return to the company owning the plant the profits of the business over a fixed amount. The lessee was to have authority to employ and discharge servants to work in the factory, and no restrictions as to the management of the business were reserved by the lessor. *Held*, that the agreement was in law a lease. *Ault Woodenware Co.* v. *Baker* (1900 Ind. App.) 58 N.E. 265. (lessor held not to be liable for an injury sustained by a servant of the lessee owing to the mismanagement of the latter).

[1] Ld. Ellenborough in *R.* v. *Bowness*, 4 M. & S. 212.

Speaking of the kind of settlement which is acquired by renting premises, Denman, C.J., said: "The kind of settlement relied upon in this case has grown out of the 13 & 14 Car. 2, c. 12, § 1, which confines the power of removal to cases where persons come to settle on any tenement under the yearly value of £10, and by implication has been held to confer a settlement on a person who comes to settle on a tenement of that value; and the lawful occupation of a tenement of that annual value by a party in his own right, has been held to satisfy the words coming to settle. The word 'renting' is not to be found in the statute." *R.* v. *St. Mary Newington* (1833) 5 B. & Ad. 540.

[2] *R.* v. *Bishopton* (1839) 9 Ad. & El. 824.

In order to confer a settlement by renting a tenement, "the party must have a residence which might be called his own home, as tenant;" residence "in the character of a servant merely" is not sufficient to satisfy the words of the statute "coming to settle." *R.* v. *Shipdham* (1823) 3 D. & R. 384, per Bayley, J.

[3] As, for example, where the question involved is, whether the servant has a right to retain possession of the premises after he ceases to be a servant. See *Kerrains* v. *People* (1873) 60 N.Y. 221, where the passage quoted from the judgment in the *Hughes Case* in § 5, note 1, subd. (*a*), was cited by the court, as laying down concisely the correct rule for determining the question involved.

under various heads in the note to § 5, post, turn upon the construction of the electoral laws which were in force at different periods, and deal with the question whether claimant was entitled to vote (1) as a "leaseholder" under one or other of those laws; or (2) as one who "occupied as owner or tenant (Reform Act of 1892, c. 45, § 27, and Reform Act of 1867); or (3) as "occupier of a building of the value of £10 yearly," under the same Act. The construction put upon the Act of 1884, which introduced a "Service Franchise," is shewn by the cases cited in 8, post.

(*d*) The right of the master to resume possession of the premises occupied. A servant whose occupation is independent of, and not merely ancillary to, his employment, but is liable to be determined by the dissolution of the contract, is a tenant at will[4]. On the other hand, where the occupation is merely in the character of a servant, no interest in the premises, even to the extent of a tenancy at will, vests in the occupant[5]. The legal

---

[4] *R.* v. *Lakenheath* (1823) 1 B. & C. 531; *O'Connor* v. *Tyndall* (1830) 2 Jones (Ir.) 20 (per Foster, B.).

[5] Combating the contention that the servant under such circumstances took an estate on the premises, Willes, J., said: "I can see very weighty reasons why it should be intended not to vest. And I do not by any means agree that this is a dry and barren point: because, though generally speaking the relation of master and servant or principal and agent may, where the servant or agent has been guilty of misconduct, be terminated at any moment, if such an arrangement as this were held to vest in the servant or agent an interest in the employer's premises, the servant might set his employer at defiance, and, though the latter were perfectly justified in putting an end to the relation of master and servant between them, the former might insist upon holding on as a tenant until the expiration of a regular notice to quit." *White* v. *Bayley* (1861) 10 C.B.N.S. 227.

In *Kerrains* v. *People* (1873) 60 N.Y. 22, the court expressed its disapproval of the doctrine laid down in *People* v. *Annis*, 45 Barb. 304, to the effect that immediately upon the termination of the service a tenancy at will, or by sufferance, springs up and laid down the law as follows: "In order to have that effect the occupancy must be sufficiently long to warrant an inference of consent to a different holding. Any considerable delay would be sufficient, but I can see no principle which would change the occupant *eo instanti*, from a mere licensee to a tenant. The employer should resume control of his property within a reasonable time or consent would be inferred. Whether this time is a day or a week may depend upon circumstances." *Doyle* v. *Gibbs*, 6 Lans. 180, was cited as a case in which the permission of the employer that the employed might remain until his wife recovered from an illness, was held not to amount to a consent."

Many of the cases cited in the following notes expressly recognize, or take for granted, the same doctrine.

The statement made in *McGee* v. *Gibson* (1840) 1 B. Mon. 105, that a man occupying merely as a servant is a tenant at will is clearly erroneous.

consequences of determining the contract of employment of a servant whose occupation is of this description are as follows: That the master becomes entitled to resume possession of the premises immediately[s], this right being enforceable, irrespective of the question whether the servant was or was not justifiably discharged[t]; that he may eject the servant without any process of

---

[s] In a case where a farm labourer was provided with a house to live in and cattle for the use of himself and family, the court said: "If it [*i.e.*, what was delivered into the possession of the servant when he began work] he regarded as part of the compensation for labour stipulated for, then the right to the compensation ceased when the labour was discontinued. Bowman had the same right to insist on the payment of the cash part of his wages as on that part which provided his family a place to live. His right under the contract of hiring was like that of the porter to the possession of the porter's lodge; like that of the coachman to his apartments over the stable; like that of the teacher to the rooms he or she may have occupied in the school buildings; like that of the domestic servants to the rooms in which they lodge in the house of their employers. In all these cases and others that might be enumerated the occupancy of the room or house is incidental to the employment. The employé has no distinct right of possession, for his possession is that of the employer, and it cannot survive the hiring to which it is incidental, or under which it is part of the contract price for the services performed. So in this case, if the contract was simply a contract for labour at one dollar per day and a house to live in, the plaintiff held the house by the same title and for the same purpose that he did the land or the cattle in the care of which his labour was to be performed. When his contract ended, his rights in the premises were extinguished, and it was his duty to give way to his successor." *Bowman* v. *Bradley*, 151 Pa. 351, 24 Atl. 1062.

See also *Hunt* v. *Colson* (1833) Moore & Sc. 790, (denying right of servant to maintain an action of trespass against his master's agent for pulling down the house occupied by him); *Eichengreen* v. *Appel* (1891) 44 Ill. App. 106, and the cases cited in the following notes.

In *Whyte* v. *School Board of Haddington* (1874) 1 Sc. Sess. Cas., 4th Ser., 1124, the employers were held entitled to a summary warrant to remove the servant.

[t] *Collison* v. *Warren* (C.A. 1898 17 Times L.R. 362, (where the plaintiff in a suit in which he was claiming to be entitled under a certain contract to be retained in the employment of the defendant as manager of a hotel was enjoined from continuing to reside in the hotel); *McAlister* v. *Ogle* (1856) 1 Ir. Jur. N.S. 313; *Scott* v. *McMurdo* (1869) 6 Sc. L.R. 301.

These decisions, as well as those which are cited in the preceding and the following notes, shew that one of the judges of the Supreme Court of New South Wales was in error when he laid it down that the curator of a museum to whom a portion of the building had been assigned as a residence was entitled to remain in his apartments, alleged by him to be wrongful, until he had at least received a legal notice to quit, and that his official possession was sufficient to enable him to maintain an action of trespass against one of the board of trustees who had entered on the premises occupied by him. *Krefft* v. *Hill* (1875) 13 New So. Wales S.C.R. (L.) 280.

The doctrine which prevails in Quebec seems to be different from that of the common law courts. In *Reid* v. *Smith* (Ct. of Review, 1872) 6 Que. L.R. 367, 4 L.N. 157, an action of ejectment was brought to recover possession of a house which had been leased to the defendant under one of the

law[8]; and without giving him notice to quit[9]; or may obtain possession by means of an action of forcible entry and detainer after giving due notice to quit[10]; that an action of trespass will not lie against the master for breaking and entering the premises[11]: that the servant is not entitled *de jure* to have a reasonable time allowed him for the removal of his household effects[12],

---

stipulations of a contract which bound him to act as superintendent of the plaintiff's mill for a term of five years, and which was terminable by six months' notice on either side. The defendant was dismissed without any good cause and without the stipulated notice. The position taken by the plaintiff was that by the mere fact of his having dismissed the contract for his personal services was terminated, leaving only a claim for damages to the servant, and that the lease came to an end at the same time as the service. The court, however, was of the opinion that the plaintiff, in advancing this theory, had lost sight of the distinction between a contract for the construction of a building or other works, (*"louage d'ouvrage"*), and a contract for personal service, (*"louage de services personnels"*). The Code (Art. 1691) provided for the rescission of the former kind of contract at the will of the employer, but was silent as to the power of rescission in the latter case. Accordingly, the conclusion was arrived at, that, as the employer could not merely by his own will put an end to the contract of service, it was impossible to contend successfully that he could merely by his own will put an end to the lease which was one of the incidents of the contract of service.

[8] *McAlister* v. *Ogle* (1856) 1 Ir. Jur. N.S. 313, (servant held not to be entitled to maintain an action against the master for assault in removing him by force from the premises); *De Briar* v. *Minturn* (1851) 1 Cal. 450, (similar decision); *Scott* v. *McMurdo* (1869) 6 Sc. L.R. 309, Fraser, Mast. & S., p. 8.

[9] *Mayhew* v. *Suttle* (Exch. Ch. 1854) 4 El. & Bl. 347, 1 Jur. N.S. 303, 24 L.J.Q.B. 54; *White* v. *Bayley* (1861) 10 C.B.N.S. 227, per Willes, J. (p. 234); *Doe* v. *Derry* (1840) 9 C. & P. 494; *Young* v. *Paton* (Sc. Ct. of Sess. 1808) Hume 582; *Bigelow* v. *Norton* (1858) 3 Nov. Sc. (Thompson) 283; *Fleming* v. *Hill* (1876) 1 R. & C. (Nov. Sc.) 260; *Doyle* v. *Gibbs* (1871) 6 Lans. 180; *McGee* v. *Gibson* (1840) 1 B. Mon. 105; *People* v. *Kerrains* (1873) 60 N.Y. 225; *Morris Canal & Banking Co.* v. *Mitchell* (1864) 31 N.J.L. 99; *McQuade* v. *Emmons* (1876) 38 N.J.L. 397.

[10] By Iowa Rev. Stat. § 2216, it was provided that any person in possession of real property with the assent of the owner is presumed to be a tenant at will, unless the contrary is shewn. By § 2218 it is provided that thirty days' notice must be given by either party to terminate the tenancy, but that when an express agreement is made, the tenancy shall cease at the time agreed, without notice construing these provisions. The court held that, where a tenant had taken possession of premises under an agreement that he was to occupy them only so long as he should continue in the employment of the owner, he would not be regarded as a tenant at will, but as a tenant for a definite term, who, if he remained in possession, after quitting employment, became a tenant holding over after the termination of his lease, and subject to an action of forcible entry and detainer on the part of his employer after due notice to quit has been given. *Grosvenor* v. *Henry* (1869) 27 Iowa 269.

[11] *White* v. *Bayley* (1861) 10 C.B.N.S. 227, 7 Jur. N.S. 948, 30 L.J.C.P. 263; *Allen* v. *Tryland* (1862) 3 F. & F. 49; *Bowman* v. *Bradley* (1892) 17 L.R.A. 213, 151 Pa. 351, 31 W.N.C. 142, 24 Atl. 162.

[12] *Doe* v. *M'Kaeg* (1830) 10 B. & C. 721.

and cannot maintain an action of trespass against the master for removing them[13]; that the master cannot obtain possession of the premises by means of statutory proceedings of a summary nature which, under the express terms of the enactment, are specifically applicable to the relation of landlord and tenant[14]. But the owner may convert the occupation of the servant into that of a tenant at will by allowing him to remain in possession a sufficient length of time to warrant the implication of intentional acquiescence in the continuance of the occupation[15].

(*e*) The right of the master, or of a person authorized by him, to enter on the premises for the purpose of performing work in respect thereto.

(*f*) The right of the servant to assert an independent title to the premises. The rule that a tenant is estopped from disputing the title of his landlord[16], is applicable also to the case of a person coming in by permission as a servant[17].

(*g*) The right to sublet or transfer the possession of the premises. A person occupying as a tenant, and not as a servant, is entitled, with the permission of the landlord, to sublet the premises, and to collect from the sub-lessee the rent which accrues during the period covered by the sublease[18]. But a person

---

[13] *Lake* v. *Campbell* (1862) 5 L.T.N.S. 582; *Mead* v. *Pollock* (1901) 99 Ill. App. 151; *Haywood* v. *Miller* (1842) 3 Hill, 90.

[14] *People* v. *Annis* (1866) 45 Bart. 304; *McQuade* v. *Emmons* (1876) 38 N.J.L. 397.

It was held in *Hart* v. *O'Brien* (Quebec Ct. of Review, 1870) 15 Lower Can. Jur. 42, that an employé who was allowed the use of a dwelling-house as long as he remained in the employment, as part consideration for his services, was liable to ejectment under the Lessors and Lessees Act, as soon as he ceased to be in the employ of the owner. But as already observed in note 5, supra, the doctrine prevailing in Quebec is not the same as in common law jurisdictions.

[15] *School Distr.* v. *Batsch* (1895) Mich. 29 L.R.A. 576, 64 N.W. 196, (servant held not to have become a tenant at will); *Kerrains* v. *People* (1873) 60 N.Y. 22 (see note 3, supra).

In *Jennings* v. *McCarthy* (1891) 46 N.Y.S.R. 678, this change in the character of the occupation was held to be inferable where the servant, after his employment was ended, was suffered to hold over for a longer period than was necessary to enable him to move conveniently.

The owner of the premises will not be presumed to have acquiesced in the conversion of the occupation into a tenancy at will, merely because he allowed a discharged servant to remain in possession, until his wife had recovered from an illness. *Doyle* v. *Gibbs* (1871) 6 Lans. 180.

[16] Woodfall L. & T. 237; Taylor, L. & T. § 629.

[17] *Doe* v. *Baytup* (1835) 3 Ad. & El. 188; *Doe* v. *Buchmore* (1839) 9 Ad. & E. 662.

[18] *Snedaker* v. *Powell* (1884) 32 Kan. 396.

placed in possession of premises as a mere caretaker has no interest which is capable of being assigned to another person[19].

(*h*) The right of the servant to be let into possession of the premises which he is to occupy.

(*i*) The liability of the servant to have his property distrained as being that of a servant.

(*j*) The question whether the master or the servant is the proper party to bring an action for trespass committed on the premises.

(*k*) Eligibility for office. An employé occupying premises as a servant merely is not a "substantial householder" within the Statute 43 Eliz. c. 2, § 1, so as to be eligible for the office of overseer of the poor[20].

(*l*) The requirements of Stamp Acts. In England it has been held that a lease stamp is not necessary to validate an instrument which provided, among other things, for an employé's occupation of premises as a part of the compensation for his services[21].

(*m*) The correct wording of indictments in prosecutions for the crime of embezzlement.

Whatever may be the character or duration of the title under which a servant occupied his employer's premises, he is entitled to the benefit of those rules of law which enable a rightful occupant or his licensees to recover damages for personal injuries caused by negligent acts committed on adjoining premises[22].

**4. Character of occupation tested with reference to its being ancillary or not to the service performed.**—The doctrine upon which a large number of decisions are based is that an employé should be regarded as occupying the premises of his employer in the character of a servant, or in the character of a tenant, according as his occupation is or is not susceptible of being described by one of the following phrases: "ancillary to the service"; "ancillary

---

[19] *Reynolds* v. *Metcalf* (1863) 13 U.C.C.P. 382.
[20] *Rex* v. *Spurrell* (1865) L.R. 1 Q.B. 72, 35 L.J.M.C. 74.
[21] *Doe* v. *Derry* (1840) 9 C. & P. 494.
[22] *The Defiance Water Co.* v. *Olinger* (1896) 54 Ohio St. 502, holding that an action could be maintained by a guest of a servant for injuries caused by the bursting of a large stamp-pipe on the land of a water company.
[1] *R.* v. *Bishopton* (1839) 9 Ad. & El. 824.

to the performance of the duties which the occupier has engaged to perform"[2]; "auxiliary to the service"[3]; "connected with the service"[4]; "referable to the service"[5]; "incidental to and inseparable from the service"[6]; incidental to the employment"[7]; a "privilege allowed in respect to the principal thing" (viz., the hiring)[8]; "in aid of or necessary to the performance of his service"[9]; "necessary for the performance of the service"[10]; "necessary to the service"[11]; "connected with the service," or "required, expressly or impliedly, by the employer for the necessary or better performance of the service"[12]; "incident to, and

---

[2] *Smith* v. *Seghill* (1875) L.R. 10 Q.B. 422.

[3] *R.* v. *Lynn* (1838) 8 Ad. & El. 397; *Petersfield Case* (1874) 2 O'M. & H. 97.

[4] *R.* v. *Bishopton* (1839) 9 Ad. & El. 824; *R.* v. *Chestnut* (1818) 1 B. & Ald. 473; *R.* v. *Minster* (1814) 3 M. & S. 278. The phrase "necessarily connection with the service" was used by Bayley, J., in *R.* v. *Kelstern* (1816) 5 M. & S. 138.

[5] *R.* v. *Iken* (1834) 2 Ad. & El 147.

[6] *R.* v. *Bishopton* (1839) 9 Ad. & El. 824.

[7] *Bowman* v. *Bradley* (1892) 151 Pa. 351, 24 Atl. 1062.

[8] *R.* v. *Seacroft*, 2 M. & S. 472. According to Taunton, J., in *R.* v. *Iken* (1834) 2 Ad. & El. 147, where the above cited case was distinguished, the rationale of the decision was that the cellar "a privilege attached to the waiter in reference to the principal thing; that is, to his contract as a waiter."

[9] *Snedaker* v. *Powell*, 32 Kan. 396, 4 Pac. 869.

[10] *R.* v. *Kelstern* (1816) 5 M. & S. 136; *Smith* v. *Seghill* (1875) L.R. 10 Q.B. 422.

[11] *R.* v. *Spurrell* (1865) L.R. 1 Q.B. 72.

[12] *Kerrains* v. *People* (1873) 60 N.Y. 221 (225). In another part of the opinion in this case it was remarked that the question, what is the character of the holding under the contract, depends upon "whether it is exclusive and independent of, and in no way connected with the service or whether it is so connected, or is necessary for its performance."

In a case where the question was, whether certain workmen were ratable under the Poor Law Assessment Act of 1869, Mellor, J., said: "Where the occupation is necessary for the performance of services, and the occupier is required to reside in the house in order to perform those services, the occupation being strictly ancillary to the performance of the duties which the occupier has to perform, the occupation is that of a servant. . . . It is quite true that the present appellants, in one sense, were required to reside in the houses of their employers because the owners of the houses, engaging the appellants in their employment and paying them by piecework, desired them to reside in the houses while engaged in their service, and in that sense they were required to reside in the houses, while engaged in their employer's service; but that is not the meaning of the words as used in *Hughes* v. *Overseers of Chatham*, 5 M. & G. 54 (78), [see 5, note, subd. (g), post.] 'Required' means more than the master saying, 'You must reside in one of my houses, if you come into my service.' The residence must be ancillary and necessary to the performance of the servant's duties; and unless he is required for that purpose to reside in the house, and not merely as an arbitrary regulation on the part of the master, I do not think he is prevented from occupying as a tenant. Then it appears

deemed essential for the performance of the duties" of the servant[12]; "for the purpose of performing his duties'"[13]; "for the more convenient performance of the service'"[14]; "with a view, not to the remuneration of the occupier, but to the interest of the employer and to the more effectual performance of the service required'"[15]; "convenient for the purposes of the service" and "obtained by reason of the contract of hiring'"[17], for the purpose of "facilitating the business" of the employer[18].

---

that the appellants and other workmen are only entitled to occupy the houses during the time of their service at the colliery; the occupation terminates at the time the service terminates. Still, the appellants are tenants, though not tenants for any fixed time. They occupy as tenants at will as long as they reside in the houses by the arrangement between themselves and their masters." *Smith* v. *Seghill* (1875) L.R. 10 Q.B. 422 (428, 429). See also the extract quoted in § 5, note 1, subd. (j), post, from the opinion of the same judge.

In *Fox* v. *Dalby* (1874) L.R. 10 C.P. 285 (294) Lord Coleridge, C.J., expressed his approval of the doctrine enounced by Cresswell, J., and Crowder, J., in *Clark* v. *Overseers of Bury St. Edmunds* (1856) 1 C.B. (N.S.) 23, 31, 26 L.J. (C.P.) 12, that "if either ingredient exists—if the occupation be necessary for the better performance of the duties required to be performed by the party, or if, though it be not necessary for their performance, he is required by the authority by which he is appointed to reside there in order to perform them—the occupation is not an occupation as tenant." In the same case (p. 295) Brett, J., considered the effect of the authorities to be, that the occupation is not that of tenant, where the employé "is required to occupy them for the better performance of his duties, though his residence there is not necessary for that purpose" or where his residence there is "necessary for the performance of his duties, though not specifically required." See also *Mead* v. *Pollock* (1901) 99 Ill. App. 151, where the phraseology of *Kerrains* v. *People*, supra, is adopted,

[12] *School Dist. No. 11* v. *Batsche* (1905) 106 Mich. 330, 29 L.R.A. 576, 64 N.W. 196.

[14] *Smith* v. *Seghill* (1875) L.R. 10 Q.B. 422 (428).

[13] *R.* v. *Bardwell* (1823) 2 B. & C. 161; *R.* v. *Minster* (1814) M. & S. 278; *R.* v. *Cheshunt* (1818) 1 B. & Ald. 473.

[16] *Robson* v. *Jones* (1854) 5 Mann. & G. 112. In *Smith* v. *Seghill* (1875) L.R. 10 Q.B. 422, it was observed that the ground of the decision in this case was that the occupation was "for the purpose of enabling him [the employé] the more readily to perform the services required of him."

The situation opposed to that which is expressed by the phrase in the text is indicated by the following remarks of Denman, C.J., in a poor law case: "This settlement, [*i.e.*, that based on 'coming to settle' on a tenement] is usually acquired by renting, because the renting shews the occupation to be independent, and for the convenience of the occupier, and not for that of the landlord; and on this principle, many of the cases, where a distinction has been taken between an occupation as tenant, and an occupation as servant, proceed."

[17] *Bowman* v. *Bradley* (1892) 151 Pa. 351 (361), 24 Atl. 1062 denying it to be indispensable "that occupation of a house, or apartments, should be a necessary incident to the service to be performed, in order that the right to continue in possession should end with the service." It is enough if such occupation is convenient for the purposes of the service and was obtained by reason of the contract of hiring."

[18] *Morris Canal and Bkg. Co.* v. *Mitchell* (1864) 31 N.J.L. 99.

As a matter of ultimate analysis, the test thus indicated may be regarded as the only appropriate one in most of the cases belonging to the class with which we are now concerned[19]. But it is apparent from §§ 964-966, post, that even where this text would, so far as the circumstance indicate, have been not only applicable, but sufficient, the Courts have not infrequently preferred to rely either partially or exclusively upon other elements.

**5. Cases illustrating the application of this test.**—In the subjoined note we have collected under convenient headings the cases in which the doctrine referred to in the preceding section may be said to have furnished the actual ratio decidendi[1].

---

[19] In one instance the real character of the occupation was held to be impossible to determine, for the reason that the statement of facts received from the trial court did not shew whether or not the occupation was "necessary to the service." *R.* v. *Spurrell* (1865) L.R. 1 Q.B. 72 (see § 8, note 2, post).

[1] (*a*) *Employés cultivating land or tending live stock.*—The pauper, a married man, agreed to serve S. for a year as a labourer, and was to have £20 a year, a house and garden, a piece of land for potatoes, the milk of a cow, and feeding of a pig, which were to run on a neighbouring field; and under this agreement the pauper served, and had the exclusive occupation of the house for himself and family, the house being about 100 yards from the house of S., and being necessary for the performance of his service; and if he had not had it he would have had more wages. *Held*, that this was not such "a coming to settle" on a tenement as conferred a settlement. *R.* v. *Kelstern* (1816) 5 M. & S. 136. Lord Ellenborough, C.J., said: "I own I have no doubt in this case that the only occupation of this house was the occupation of the master and not of the servant, whom the master placed there for the mutual convenience of both parties. The master's house was about a hundred yards distant from it, and the servant had it thrown into the bargain in cumulation of wages. This may be compared to rooms allotted to a coachman over the stables of his master, or to an out-house, where being a family man it is more convenient that he should be out of the dwelling house; but that is nothing more than the occupation of the master. So here I cannot see that the occupation goes farther."

The owner of a mansion house and gardens, agreed with the pauper to take care of the garden, and for doing so he was to take the issues and profits of part thereof, and to live in a cottage contiguous thereto, belonging to his master; and he was to continue in the premises for a year, unless some other person before that time should occupy the mansion, in which case the gardens were to be delivered up. The pauper continued in the occupation of the garden on these terms for more than a year, the produce being worth to him £70 per annum. *Held*, that the pauper being only a servant, and the residence not being his own, he did not "come to settle" within the meaning of the statute. *R.* v. *Shipdham* (1823) 3 D. & R. 384.

The pauper was hired for a year as a shepherd. He was to have a house and garden rent-free, 7*s.* a week, and the going of thirty sheep with his master's flock, as wages. He served for two years at those wages in the parish of I., during all which time the sheep went on his master's farm, the whole of which was situated in that parish. The feed of the sheep was

worth £ . per annum. *Held*, that this did not confer a settlement, it not being any part of the bargain that the sheep should be pasture-fed. *R.* v. *Bardwell* (1823) 2 B. & C 161, Bayley, J., said that "the house and garden being merely for the more convenient performance of the pauper's service as shepherd, must be laid out of consideration; he did not occupy them as a tenant, but as a servant. . . . Here the pauper had no residence but in the character of a servant; the house continued the master's, and the pauper was, with respect to this point, in the same situation as if he had lived in a room in his master's house."

In *R.* v. *Snape* (1837) 6 Ad. & E. 278, where a man was hired to take charge of stock, the agreement being that he should have 12*s.* a week wages, and the keep of a cow, and that he was to occupy a house on the marshes, rent free, the court refused to disturb a finding of the sessions that his occupation was in the character of servant, and connected with the hiring.

In the *Petersfield Case* (1874) 2 O'M. & H. 97, 1 Rogers on Elections 74, (decided under the Reform Act of 1867: see § 3, par. (c), ante), Mellor, J., held that the relation of landlord and tenant had been created, where the evidence was that the voter was paid 16*s.* a week wages from which one shilling a week was deducted for rent of the house he lived in; that his duty was to look after the cattle on the farm; and that he could not do this unless he live in the house. It is not surprising to read in the report that the learned judge afterwards admitted that he was a little hasty in rendering this decision. Nor do the authorities entirely bear him out in his general statement of the law, which was as follows: "If the bargain is this. 'You still have so much a week and the use of the house,' it will be inferred that it is in the occupation of the employer, and that it is not an independent occupation. Such is the position of a gamekeeper. On the other hand the occupation is not auxiliary to the service, where an employer requires that all persons who get work from him shall occupy one of the houses attached to his establishment." This statement clashes with the language of Cresswell, J., and Crowder, J., in *Clark* v. *Overseers of Bury St. Edmunds* (1856) 7 C.B.N.S. 23 (31), 26 L.J.C.P. 12, as quoted in § 4, note 12, ante.

In *Young* v. *Paton* (Sc. Ct. of Sess. 1808) Hume, 582, a servant on monthly wages who was allowed to occupy a house belonging to his master, the amount of the rent being deducted from his wages, was held not to be entitled to the notice required in the case of ordinary tenants.

In an action for trespass in forcibly removing the plaintiff and his household effects from his employer's premises, after he had been discharged from the service, a plea was held good on demurrer, where it alleged that the plaintiff was employed by defendant as a farm hand, and, as part of his compensation, was given the occupancy of a house and garden, and that possession of the premises was held by the plaintiff as part of his employment and was connected with his employment. *Heffelfinger* v. *Fulton* (1900 Ind. App.), 56 N.E. 688.

In *Bowman* v. *Bradley* (1892) 151 Pa. 351, 24 Atl. 1062, where it was held that no trespass was committed by the employer in ejecting the employé, the facts were mainly undisputed, and shewed that the defendant owned a farm of twenty-nine acres, and that about four or five acres of this were occupied by a mill and pond operated by the owner. To care for the residue and the stock upon it he hired the plaintiff and his family. The plaintiff was to receive one dollar per day and the use of a house upon the premises to be occupied by himself and family. The only fact in dispute was the duration of the contract. The plaintiff alleged it was terminable at his pleasure, and that he said to the defendant: 'I will try you, and on your terms, and if you don't suit me I will discharge you and expect you to leave the premises on sight. The court, after remarking that the true version was a question of fact for the jury, and that the defendant or the plaintiff would be entitled to a verdict, according as they found that the contract could be terminated without notice, or was intended to subsist for a year, unless the defendant could shew a sufficient reason for terminating it sooner, proceeded thus: "The first question that

presented itself on the trial was over the nature and extent of Bowman's right to the house from which he was ousted by the defendant. Was that right an incident of the hiring and dependent on the continuance of the relation of employer and employé, or had it an independent separate existence, so that he was to be treated as a tenant for years with a right to remain in possession for one whole year whether he remained in the employment of the owner or not? The subject of this contract was labour. Labour was what Bradley needed and undertook to pay for. It was what Bowman offered to furnish him at an agreed price. The labour was to be performed upon the land in its cultivation, in the care of the cows and the delivery of the milk. As Bowman was not a cropper, or a tenant paying rent, his possession of the land and the cows, and the implements of farm labour, was the possession of his employer. The barn was used to stable the cattle and store their feed. The house was a convenient place for the residence of the labourer. The house, the barn, the land, the cattle, the farming tools were turned over into the custody of the man who had been hired to care for the property; but he had no hostile possession, no independent right to possession. His possession was that of the owner whom he represented and for whom he laboured for hire. This is not denied as to the farm, the barn, the stock, or the tools, but an attempt is made to distinguish between the house and everything else that came into the possession of the employé in pursuance of the contract of hiring. There is no solid ground on which such a distinction can rest. If the possession of the house be regarded as an incident of the hiring, the incident must fall with the principal."

A contract was entered into between H., the owner of a farm, and one M., by which the latter agreed that he and his wife should work for H. one year—M. to labour on the farm, and his wife to perform the duties of housekeeper. M. with his wife accordingly moved into a house on the farm, carrying with them their household furniture, and entered upon the performance of the contract. Subsequently H., having become dissatisfied with M.'s conduct, ordered him to quit and leave the house, which he declined to do; whereupon H. entered the house and put the furniture out of it. *Held*, in trespass by M. against H., that the contract between them did not create the relation of landlord and tenant, but only that of master and servant; and that, consequently the remedy, if any, was only by an action of assumpsit for a breach of the contract. *Haywood* v. *Miller* (1842) 3 Hill (N.Y.) 90.

On the authority of this case it was held that the plaintiff occupied as servant merely, where he had agreed with defendant to work for him as labourer, and he was to have toward his wages the use of a cow and pasture for her, the use of a house and other property and privileges, and twenty dollars per month as long as they could agree. *Doyle* v. *Gibbs* (1871) 6 Lans. 180 (replevin suit for goods removed by employer on resuming possession).

When a farmer employs a labourer for a year, at a stipulated price per month, agreeing to furnish him a house at $12 per month, and keep his cow for $1 per month, payable monthly, the occupation of the labourer is merely incident to the contract of hiring, and so soon as he fails to labour, his tenancy is determined. *McGee* v. *Gibson* (1840) 1 B. Mon. 105 (action of the trespass not maintainable against landlord for entering without notice).

Where one person hired another to work for him one year on his farm, for the sum of $270, and agreed to furnish him house room for himself and family and a garden and pasture for a cow, it was held that the relation created was simply that of master and servant, the house room, garden and pasture being a portion of the consideration of the contract. *People* v. *Annis* (1866) 45 Barb. 304 (employer held not to be entitled to assert his right to possession by means of summary statutory proceedings applicable to landlord only).

On the ground that a contract under which one person agreed to do certain work on the vineyard of another, in the way of caring for, pruning,

trellising, staking, and tying up the vines, receiving a reasonable compensation therefor, in pursuance of which he was placed in possession, did not create the relation of landlord and tenant, but was one for employment, the court refused to grant an injunction restraining a contractor from entering the premises to perform certain work for the owner. *Ferris* v. *Hougland* (1898) 121 Ala. 240, 25 So. 834.

A., being owner of a farm let it for seven years to B.; and by a written agreement of the same date it was agreed, that A. should manage the farm for B., B. allowing A. 12*s*. a week, and 'allowing him and his family to reside in and have the use of the dwelling-house and furniture therein, free of rent," and this agreement was to to be put an end to by three months' notice or three months' wages. *Held*, that this agreement did not require a lease stamp, as it did not contain a demise of the house, the occupation of it being a mere remuneration for services. *Doe* v. *Derry* (1840) 9 Car. & P. 494. Parke, B., was of opinion that the words "allowing, etc.," might import a lease, but that taking the whole of the instrument together, they must be taken to indicate a reward for services.

See also cases cited in § 7, post.

*Clerks.*—R., a brewer, engager L. as clerk, at a yearly salary, and agreed to permit him to occupy a certain house as his residence, free from rent rates and taxes, another clerk being also boarded and lodged in the same house if R. should require it, but paying for his board; and such salary and house accommodation were to be in full satisfaction to L. for all perquisities and for his expenses in the service. Either party might give the other three months' notice of determining the service. L. occupied the house for some time, and then, his health being impaired, he removed to another. L. agreed with the landlord for this house, but the latter considered R. his tenant. *R.* v. *Lynn* (1838) 8 Ad. & E. 379 [liability to poor rates]. Lord Denman, C.J., said: "I think that the appellant was an independent holder of the premises. He took them, and agreed to pay the rent; and, by the universal consent of those interested, was assessed to the rates and window duty. He was the party liable to a distress. The cases which have been cited do not come in question. It would be strong, however, to say that an allowance by the master as in this case, in part payment for services, made the occupation of the house auxiliary to the service. Any house he might occupy while he was servant might be so in some sense; but the cases where a party has been held to occupy such premises as a butler's pantry or a coach-house in the character of servant are very different from this."

In *R.* v. *Lower Hayford* (1830) 1 Barn. & Ad. 75, where an attorney, having a cottage and land near his residence, allowed his clerk to occupy them, that he might the more conveniently attend to the business; and suffered him to hold them rent free, as an augmentation of his salary, it was observed by Littledale, J., in the course of his judgment that, if it had been necessary to decide the point, there would have been no difficulty in holding that the occupation was that of a tenant as it was unconnected with, and wholly independent of, the service. But the claim was founded on a statute, (3 W. & M. c. 11, § 6), under which a settlement could be gained by paying rates for a tenement worth £10 a year, and such a claim was not defeasible by proof that the person in question had occupied as a servant, and not as a tenant.

In an Irish case where a book-keeper in a distillery, claiming the right to vote as a "householder" under the first English Reform Act (see § 3 par. (*c*), ante), was shewn to have been given the privilege of occupying an entire house in lieu of a part of his salary, eleven judges held that he was not qualified for the franchise, although it was admitted that the house was not essential to the discharge of his duties. But in this case there were the other significant elements ,viz., that the employer kept the house in repair and paid the taxes, that the house communicated with the distillery yard, and that his possession was entirely dependent upon his remaining in the employment. *Ferar's case* (1836) Alcock R. C. R. 248; 1 Rogers Elections, 81.

(c) *Managers of a Business.*—The provisions of an agreement with reference to which the defendant employer was held not to be guilty of trespass for entering without giving the plaintiff employé a month's notice were as follows: The plaintiff was to carry on the business of selling beer for the defendant, and the place and stead, in the same manner, and with and upon the privileges and terms as one U. had theretofore done, until the agreement should be terminated by the notice provided for, that all the beer to be sold and consumed on the premises should be had and taken by the plaintiff from the defendant, and that the plaintiff should not part with the trade or the occupation of the premises without the license of the defendant; that, whenever either party should be desirous of determining the agreement, the plaintiff should, on receiving a month's notice in writing, without being paid any sum of money or consideration quit and deliver up the trade and possession of the premises; and that the plaintiff should be at liberty to leave the trade and quit the occupation of the premises on giving one month's notice in writing. It was held that agreement did not create any tenancy between the plaintiff and defendant, and that the occupation of the plaintiff was as servant to the defendant. *Mayhew* v. *Suttle* (Exch. Ch. 1854) 4 El. & Bl. 347, 1 Jur. N.S. 303, 24 L.J.Q.B. 54. There Cockburn, C.J., said: "It was properly urged in answer to this view of the case [i.e. that no tenancy was created], that the stipulations that the plaintiff should take beer from no one else, and that he should not part with the trade or business or occupation of the premises without license in writing, are more consistent with an independent occupation by the plaintiff and with his carrying on the business on his own account; but they are not inconsistent with the business being that of the defendant, as expressly stated again and again in the agreement. And the defendant may well have chosen to make it a part of the agreement, that the plaintiff should not sell other parties' beer there, and should not give up the actual occupation, which no doubt he had, although that occupation was a servant, and in law the possession was the master's. So also the fact of the plaintiff having to pay the defendant for the beer as stated in the replication, is not inconsistent with the fact that the possession was really that of the defendant as master. The beer is stated to be the defendant's; and it is quite consistent with the defendant's case that the plaintiff may have had to pay higher prices than what beer is sold for to be sold again at retail. No doubt the prices were to be paid over to the defendant; and the stipulation that he should receive more for the sale on his premises than the wholesale price seems as if he was to receive something as being himself the retailer on the premises, allowing the plaintiff for his services the rest of the excess of the retail over the wholesale price. At all events we must take the sale as stated in the agreement to be for and on account of the defendant." With reference to the effect of the provision with reference to the abandonment of the contract by mutual consent, the learned judge said: "This provision seems well applicable to, and at all events not inconsistent with, the relation of these parties being that of employer and employed. The giving up the occupation is treated as ancillary to and connected with the putting an end to the plaintiff's carrying on and conducting the trade. The notice may be given at any time and not at the end of each month from the commencement; and it was only proper where the relation was not that of menial servant, and where therefore there might be some doubt whether the employment might not be a yearly one, to engage that the relation of the parties may be put an end to by a month's notice. It is well remarked that, supposing there was misconduct on the part of the plaintiff, the defendant might have terminated the contract at once, and on such determination the plaintiff's occupation could not have been intended to be allowed to subsist. It should be observed that either party will have a remedy on the contract, if it be broken by the other determining the engagement without a notice and without reasonable cause."

Where a fishmonger engaged a man to superintend his business in consideration of a salary, a percentage of the profits and lodging on the pre-

mises where the business was carried on, the agreement being terminable on giving a certain specified notice if the employé failed to give satisfaction, it was held that he had been duly discharged in accordance with the terms of the contract and that, as he had no right to remain on the premises after being discharged, he could not maintain an action against the employer for removing him therefrom by force. *McAlister* v. *Ogle* (1856) 1 Ir. Jur. N.S. 313.

See also *White* v. *Bayley* (1861) 10 C.B.N.S. 227, 7 Jur. N.S. 948, 30 L.J.C.P. 253 (§ 86, note 3, post); *Collison* v. *Warren* (C.A. 1898) 17 Times L.R. 362 (§ 3, note 5, ante); and the following subdivision of the note.

(d) *Supervising and other employés on large estates.*—(See also subd. (a), supra). The pauper was hired as bailiff to P. who held a farm, under an agreement that he was to have weekly wages etc., and his master to find him a house, and either to furnish him with two cows, or the pauper was to be at liberty to hire two, and feed them on the farm, and he served three years under the agreement, and lived with his family in his master's house, occupying the kitchen and two rooms, and hired two cows, which fed during the summer in the pastures of his master. *Held*, that by the feeding of the cows, which was above the yearly value of £10, the pauper acquired a settlement. *R.* v. *Minster* (1815) 3 M. & S. 276. Lord Ellenborough distinguished the cases in which the apartments occupied by a servant in his master's house are only "an appendage to the service" allotted to him "for the more convenient performance of his service which is the principal thing." Le Blanc, J., considered that the pauper had a "distinct interest in the pasturage of the two cows, unconnected with his service to the master's dairy." Bayley, J., thought the case was merely "that of a servant who stipulated for a profit out of land of more than that yearly value" which conferred a settlement. According to Bayley, J., this case only decided that "the occupation of a tenement which was wholly unconnected with the service would confer a settlement, but that the occupation of one connected with the service would not." *R.* v. *Cheshunt* (1818) 1 B. & Ald. 473.

A servant put into the occupation of a cottage, with less wages on that account, occupies it in the character of a servant, and his master may properly declare on such occupation as his own, in an action brought for a disturbance of a right of way to the cottage. The character of the occupation is not affected by the fact that the cottage is divided into two parts, only one of which is occupied by the servant, the other being in the possession of a tenant paying rent. *Bertie* v. *Beaumont* (1812) 16 East 33.

Where a person is employed by the owner of land to superintend the land and look after the business of the owner, and while in such employment he occupies a house situated upon said land his occupancy of the house does not create the relation of landlord and tenant between him and the owner, so as to preclude him from acquiring an adverse title to the property. *Davis* v. *Williams* (1901) 30 So. 488, 130 Ala. 530, 54 L.R.A. 749.

In *Hector* v. *Martin* (1866) 5 Sc. Sess. Cas. 3rd Ser. 68, where it was held that the factor of a landed proprietor was entitled to the franchise under the first English Reform Act (see § 3, par. (c) ante), as tenant of a house which he had the right to occupy as a part of the remuneration for his services, and from which, as his hire was a yearly one, he could not be removed except at the end of each year, the case was regarded as being distinguishable from those in which a servant holds house accommodation merely at the will of his employer, and can be turned out at any moment. It was considered that the court was not entitled to assume the defeasibility of the right of occupation with reference to the contingency of the factor's being guilty of misconduct which would warrant his dismissal in the middle of a term. But this decision is in conflict with those cited in subd. (a) of this note, and inconsistent with the doctrine, applied in Scotland itself as well as in England and America (see § 3 ante), that the right of a servant to reside on premises occupied by him as a servant ceases when he is discharged, whether rightfully or wrongfully.

In view of this doctrine, there is no reason why the fact that a servant is engaged for a definite period should be treated as an element in determining the character of the occupancy.

A man who, while he was employed as a servant of a nobleman, received, as part of his salary, the privilege of occupying a house free of taxes, was held not to be qualified to vote as a "householder" in a borough. *Cirencester's case* (1792) 2 Fraser's El. Cases, 453.

In *State* v. *Curtis* (1838) 4 Dev. & B. (N.C.) 222, it was declared by the Court, arguendo, to be clear law and universally received, that a house on a plantation which was occupied by the overseer was as much in the possession of the owner as the plantation itself.

In *R.* v. *Stock* (1810) 2 Taunt. 339, Mansfield, C.J., remarked arguendo: "Many servants have houses given them, as porters at park-gates; if a master turns away his servant, does it follow that he cannot evict him till the end of the year?"

As to the occupation of a Ranger of a Royal park, see § 6, note 2, post.

(c) *Ministers of religious bodies.*—Where a rector appoints a curate, and agrees that, as a return for his services, and instead of a salary, the curate shall be put in possession of the glebe house and lands, to be used for his own benefit, the salary which would have been given to the curate if these privileges had not been conferred is in the nature of rent for the glebe, and the agreement creates a tenancy between the parties, the estate being one which is of an uncertain duration, and which may be determined at a time of which the curate has not had notice. Upon the death of his employer, therefore, the curate is, as against the incoming rector, entitled to the emblements. *O'Connor* v. *Tyndall* (1836) 2 Jones (Ir.) 20.

"A curate licensed by the bishop at a yearly salary, according to the Act of 57 G. 3, c. 99, resided in the rectory house, which was assigned to him pursuant to that Act, and was above the value of £10 a year, for more than forty days before the passing of the Act of 59 G. 3 c. 50. *Held*, that this was a coming to settle within the statute 13 & 14 Car. 2, c. 12, and that a settlement was gained thereby. *R.* v. *St. Mary Newington* (1883) 5 B. & Ad. 540. Parke, J., said: "It is not clear that the curate is not tenant to the rector; but it is not necessary for the purpose of gaining a settlement that he could be so. It is sufficient if he comes to occupy as having an interest of his own, and not as servant to another."

A Wesleyan minister was held not to be the tenant of a house assigned to him as a residence by the circuit stewards, part of whose duties consisted of hiring a house for the accommodation of the minister. Part of the evidence was to the effect that, if the rent and rates due for such a house were paid by the minister, the amount was refunded to him by the circuit stewards. He was deemed to be very much in the position of a servant to the stewards, who could remove him from the house at their pleasure. The legal relation of the parties was held not to be changed by the fact that it was the custom of the church to appoint their ministers to officiate in a given place for one year certain. Such a custom created no obligation. *R.* v. *Tiverton* (1861) 30 L.J.M.C. 79.

A minister of a Nonconformist congregation placed in the possession of a chapel and dwelling-house by certain persons, in whom the legal estate is vested, in trust to permit and suffer the chapel to be used for the purpose of religious worship, is a mere tenant at will to those trustees; and his tenancy is determined instanter by a demand of possession. He is not entitled de jure before the determination of his tenancy, to have a reasonable time allowed him for the removal of his furniture. *Semble*, that he will not be a trespasser, if he enter afterwards to remove his goods, and continue a reasonable time for that purpose. *Doe* v. *M'Kaeg* (1830) 10 B. & C. 721.

Where a religious society employs a pastor under an agreement by which he is to receive for his services as such a certain cash salary, and the use of a parsonage as a residence, the inference is that the occupancy, being connected with his services as pastor, does not create the relation of landlord and tenant. *Trustees, etc.* v. *Froislie* (1887) 37 Minn. 447 (holding

that the agreement was personal to himself, and that his personal representative had no right to the possession of the parsonage after his decease).

A minister who occupies a house merely by virtue of his office is not entitled when he ceases to hold his position, to receive the statutory notice to quit without which a landlord cannot resume possession of rented premises. *Bigelow* v. *Norton* (1858) 3 Nov. Sc. (Thompson) 283.

(*f*) *Professors in colleges and masters in schools.*—Where one who had leased certain college premises with the intention of conducting the institution as its president employed a person as one of the professors, under an agreement by which he was to have a fixed salary, with the privilege of occupying such rooms in the college building as would accommodate himself and family, and there was evidence tending to shew that the president retained a general control over the apartments so occupied, and had the right to enter them at any time for disciplinary purposes, a jury is warranted in finding that the professor was not a subtenant, and that his property was not liable to distress. *Waller* v. *Morgan* (1857) 18 B. Mon. 130, distinguishing *McGee* v. *Gibson*, 1 B. Mon. 105, on the ground that no attempt was made to shew that the plaintiff has reserved a right of general control over the house.

Where the schoolmaster of a burgh had been deposed for incompetency under a provision of the Educational Act, it was held that the school board was entitled to have a summary warrant against him, to remove him from a dwelling-house under the same roof as the class-rooms. The Court did not decide what would have been the rights of the Board if the house had been quite separate from the class-rooms. *Whyte* v. *School Board of Haddington* (1874) 1 Sc. Sess. Cas. 4th Ser. 1124.

The occupancy of a part of a school house as a residence by a teacher for the purpose of enabling him the better to perform his contract to teach does not make him a tenant of the school district employing him, but his occupation is that of the district. *School Dist. No. 11* v. *Batsche* (1895) 29 L.R.A. 576, 64 N.W. 196, 106 Mich. 330 (action to recover possession of the premises).

(*g*) *Persons on the naval and military establishments.*—In a case involving the right of a claimant to vote under the Reform Act of 1867 (see § 3, par (c), ante), it appeared that he was a sergeant on the permanent staff of the W. Militia, and as such occupied a house close to the premises in which the arms, accoutrements, etc., of the corps were stored, which was built expressly for the accommodation of the men employed in looking after the stores, under the provisions of the Militia Act, 1854. The house was assigned to him by the commanding officer as a place to live in; if he left it without the permission of his officer, he would be guilty of a breach of discipline for which he would probably be dismissed from the service; and he was liable to be turned out at any time. He has 2s. 4d. per week deducted out of his pay, as occupier of the house; but he would not receive the 2s. 4d. extra if he resided elsewhere. He could perform the duties required of him equally well if he were living elsewhere, which he might do with his officer's permission. *Held*, that the sergeant did not occupy the premises as tenant, within the meaning of s. 3 of 30 & 31 Vict. c. 102. *Fox* v. *Dalby* (1874) L.R. 10 C.P. 285, (following *Dobson* v. *Jones*, infra). The ground of the decision was that as the sergeant was "required" by his commanding officer to reside in the house, there was a compulsory occupation for the purpose of performing the duties assigned to him. See the extracts from the opinions of Coleridge, C.J., and Brett, J., in 4 note 12, supra.

A pauper employed as a labourer by the Board of Ordinance, having previously occupied a house at an annual rent of £7, which was then purchased by the Board, still continued to reside in part of the premises, at a weekly rent of 2s. which was deducted out of his wages, during such last occupation he also occupied a shop (the shop and house together being of the annual value of £10) and upon his dismissal from his employment he gave up possession of the house as required: *Held*, that his last occupation of the house was not as tenant but as servant, and that

no settlement was thereby gained. *R.* v. *Cheshunt* (1818) 1 B. & Ald. 473. Lord Ellenborough, C.J., said: "In this case it seems to me that the party occupied this house as a servant only, and not in the character of a tenant. It is like the case of a coachman who frequently occupies a room over the stables; but such occupation is not within the meaning of 13 and 14 Car. 2. The pauper here was divested of the tenement as soon as his service terminated. He quitted the possession reluctantly, and was succeeded by the person who succeeded him in his employment under the Board of Ordinance. All this clearly shews that he was only entitled to hold it during and for the more convenient performance of his service."

In a case where the question was whether the master rope-maker in a royal dock-yard "occupied as owner and tenant" so as to be entitled to a vote under the first Reform Act (see §3, par. (c), ante), it was proved that he had been assigned a house in the dock-yard for his residence, of which he had the exclusive use, without paying rent, as part remuneration for his services, no part of it being used for public purposes. The house was stated in the case to belong to the Lords of the Admiralty. If A. had not had it, he would have had an allowance for a house in addition to his salary: *Held*, that A. occupied the house as tenant. A. was rated to the poor-rate as occupier. The rates were paid by the Paymaster General, also in part remuneration for A.'s services. If he had paid the rates the Admiralty would have repaid him: *Held*, that as the payment was of a rate for which A. was liable, and as it was made on his account, and he gave value for it, there was a sufficient payment of rates by him within the same section. *Hughes* v. *Overseers of Chatham* (1843) 5 Mann. & Gr. 54. Tindal, C.J., said: "It may be, that a servant may occupy a tenement of his master's, not by way of payment for his services, but for the purpose of performing them; it may be that he is not *permitted* to occupy, as a reward, in the performance of his master's contract to pay him, but *required* to occupy in the performance of his contract to serve his master. The settlement cases, cited in argument, established, and proceeded on, this distinction. We think it applicable to the present question; and as there is nothing in the facts stated to shew that the claimant was required to occupy the house for the performance of his services, or did occupy it in order to their performance, or that it was conducive to that purpose more than any house which he might have paid for in any other way than by his services; and, as the case expressly finds that he had the house as part remuneration for his services, we cannot say that the conclusion at which the revising barrister has arrived is wrong. The case, indeed, stated that the claimant was master rope-maker, and 'as such' had the house as his residence; but that expression is equally applicable, whether he was made tenant of the house in payment of his services as master rope-maker, or occupied it for the purpose of performing them."

In another case, A., the surgeon at Greenwich Hospital, occupied, as such, a house at the infirmary in the hospital, which was appropriated to the surgeon. Repairs were done by the commissioners of the hospital. The surgeons to the hospital, when not provided with a residence within the hospital, were allowed a weekly sum as lodging money. By the regulations of the commissioners of the hospital, no officer of the hospital was allowed to make any exchange of apartments. *Held*, that A. did not occupied the house "as tenant," inasmuch as he was required to occupy the same with a view to the more efficient performance of his duties as surgeon. *Dobson* v. *Jones* (1854) 5 Mann. & Gr. 112. With reference to the judgment in the *Hughes case*, supra, it was said: "We stated that the relation of landlord and tenant could not be created by the appropriation of a particular house to an officer or servant as his residence, where such appropriation was made—with a view not to the remuneration of the occupier, but to the interest of the employer, and to the more effectual performance of the service required from such officer or servant; upon the same principles as the coachman who is placed in rooms of his master over the stable, the gardener who is put into a house in the garden, or the porter who occupies the lodge at a park gate, cannot be considered to

occupy as tenants, but as servants merely whose possession and occur ion is strictly and properly that of their masters."

See also § 6, notes 2, 3, post.

(*h*) *Civil servants.*—See cases cited in § 6, notes 2, 3, post.

(*i*) *Employés in mills, factories, etc.*—The pauper whose children were engaged to work for three years at a mill, removed with his family to a cottage rented by the mill owner, C., for the convenience of families so employed. The bargain between him and C. was, that a stated weekly payment for the use of the cottage should be deducted from the children's wages. The pauper, who was not himself in the service of C., continued to occupy the cottage for sixteen years, during all which time, and after he quitted it, some one or more of his children continued to work at the mill. He quitted without regular notice, in consequence of the sale of the cottage. *Held*, that the pauper's occupation was as tenant, and not as servant, and was sufficient to gain a settlement. *R.* v. *Bishopton* (1839) 9 Ad. & El. 824. Littledale J., said: "I think the pauper gained a settlement in Bishopton. In the cases cited the other way there was the relation of master and servant between the owner of the tenement and the occupier. Here the pauper engages for the service of his children and arranges with Mrs. Coates for the residence of himself and his family in the cottage. This is clearly a renting of the cottage by him. The renting was indeed connected with the service of the children; for the cottage would probably not have been let to the pauper; or hired by him, but for the service of the children; but he agrees to pay rent for it. This imports the relation of landlord and tenant, and there is nothing in the case to rebut the presumption." Williams, J., said: "In the cases referred to, in which the occupation has been held insufficient, the residence was identical with the service, or was incidental to and inseparable from it. Here there was a renting by one who was not servant; and the deduction from the wages of his children was only a mode of paying the rent."

In a case where the question was whether the voter was the "occupier of a building of the value of £10 yearly," within the meaning of the first Reform Act (see § 3, par. (c), ante) it appeared that a factory consisting of four stories, was let out in separate rooms to a number of persons for cotton-spinning, at different rents, according to the size of each room. Each tenant had his own machine, worked by steam-power supplied by an engine which belonged to and was worked at the expense of, the landlord; it being part of each contract that the landlord should supply such power. Each tenant had the exclusive use of his room and the key to the door thereof. The approach to the rooms was, in some cases, by a common staircase leading from the entrance to the factory (to which there was a door that was never fastened), in others by separate staircases outside the building, and in others by doors opening into the yard. *Held*, that each of these rooms constituted a "building," and that there was sufficient occupation in each tenant. *Wright* v. *Stockport* (C.P. 1843) 1 Barr & Am. App. & El. Cas. 39; *R.* v. *South Kilvington* (1842) 3 Gale & S. 161, note.

In *Kerrains* v. *People* (1873) 60 N.Y. 221, affirming 1 Thomp. & C. 333, so far as that decision related to the character of the occupation, but reversing it on another ground), the prisoner, a workman, was indicted for the use of a deadly weapon in resisting an ejectment by his employer, and the defence was that a tenancy was constituted by the parol contract between them, viz., that the employer should pay the workman for his services thirteen shillings a day, and give him the use of a house to live in throughout the year, or while they agreed, the consequence of this view of their relation being that the workman in holding over would be a tenant at will, and that the employer would not be justified in entering with strong hand. The court said: "Each party relied upon the terms of the contract with only the additional facts that the house was a part of the mill property, and had been occupied for several years previously by the prisoner while engaged as a labourer in the mill. There was no request to submit the facts to the jury to determine whether the house was occupied to enable the prisoner the better to perform the service in which he was engaged; or, in other words, whether it was not occupied as

an appendage to the mill, and really for the benefit of the owner; nor was there any evidence of an allowance for rent, but it was left to the court, upon the contract and facts before stated, to be determined as a question of law, and, in my judgment, the court decided correctly, that the defendant occupied as a servant, and not as tenant. The inference from these facts is reasonable, if not irresistible, in the absence of any provision for an allowance for rent, that the house was intended to be occupied by an employé for the benefit of the owner in carrying on the mill. The case thus presented is analogous to that of a person employing a coachman or gardener, and allowing or requiring him to reside in a house provided for that purpose on the premises; or a farmer who hires a labourer for wages, to work his farm, and live in a house upon the same. In these cases the character of the holding is clearly indicated by the mere statement of facts. It is not impossible that other facts may exist to strengthen or weaken the inference that the prisoner occupied as a servant, and not as a tenant, but from the facts proved there was no error in holding that he occupied as a servant."

(*m*) *Employés working in mines.*—In a case involving liability under the English Poor-rate Assessment Act of 1869, "S. was a collier, and resided in a house belonging to his employers, for which he paid no rent; he was not entitled to any notice to quit, and the occupation of the house would cease at the time when his service ceased. His employers had several houses, and they filled these up with their workmen in their discretion, giving preference to married men. A workman could not go into a house without the owner's concurrence. Some of the workmen were single men, and no house was given to them; these got the same wages as all other workmen, but no allowance for rent. If there were not sufficient houses an allowance was made to the married men to assist them in paying their rent. If a house was vacant the owner would call upon a married man to go into it; if he did not go his allowance would cease. It was not absolutely necessary for a workman to live in one of the houses to perform his work. *Smith* v. *Seghill*, L.R. 10 Q.B. 422. Quain, J., said: "The governing facts of the case were these. The men were paid not day wages, but by piece work, according to the quantity of coal hewn in a certain number of hours; therefore the occupation of the houses had nothing to do with their wages, nor was it in any way taken into consideration in determining the amount of wages they earned. But these houses were offered as an inducement to the married men to live near the works; and an important fact is, that the men were not required to keep these houses as a condition of their service; they were permitted to occupy them as married men, but it was no necessary part of the service that they should live in the houses. That appears to me to be a material circumstance and plainly distinguishes the case from that of the occupation by a gardener or a coachman, or the surgeon's residence in Greenwich Hospital: *Hughes* v. *Overseers of Chatham* (1843) 5 M. & G. 54" (see subd. (g), supra). Mellor, J., said: "It appears that, if there was no house for a married workman, he had an allowance for house rent, but if there was a house empty, and the workmen would not come into it, he had no allowance. An inference might possibly be drawn from this, that, as he was bound to reside if a house was offered him, upon pain of forfeiting his allowance, he resided in it upon compulsion, and therefore his occupation was that of a servant; but I cannot assent to this, and, in my opinion, those workmen who did reside in the houses resided in the character of tenants. The colliery owners desire that the married workmen should reside near the works, but that does not change the relation between the parties; unless the men are required to live in the houses for the better performance of their duties, it does not convert the occupation of a tenant into that of a servant. The governing principle is that, in order to constitute an occupation as a servant, it must be an occupation ancillary to the performance of the duties which the occupier has engaged to perform. Here the occupation is not connected with the performance of the employment, and the appellants, therefore, occupy as tenants."

For other decisions with regard to similar facts, see § 6, post.

(*k*) *Keepers of toll-gates.*—The plaintiff was employed to collect toll, and lived in the toll-house, one shilling per week being deducted from his wages by way of rent. His employers having ceased to collect toll at the particular spot, the plaintiff was dismissed from their employ, and received a notice to leave the house, which he promised to do. *Held*, that the plaintiff was not a tenant of his employers, and therefore that he could not maintain trespass against their agent for pulling down the toll-house. *Hunt* v. *Colson* (1833) 3 Moore & Sc. 790.

(*l*) *Persons employed as tenders of canal locks.*—A servant employed as a lock-tender, who as part compensation for his services is permitted to occupy a dwelling-house belonging to his employers, and who, under one of their standing rules is to leave the house immediately upon his being discharged, is not a tenant at will, and is therefore not entitled to three months' notice to quit which is prescribed by the statute with regard to such tenants. *Morris Canal & Bkg. Co.* v. *Mitchell* (1864) 31 N.J.L. 99.

(*m*) *Persons taking care of premises.*—In a case involving the question whether a person occupied as owner or tenant so as to be entitled to vote under the first English Reform Act (see § 361, par. (c), ante), A. claimed to be registered as the occupier of a house of the requisite yearly value to confer a vote. The revising barrister found that A. was the keeper of the Guildhall at B.; that the house in question was the residence assigned by the corporation to the hall-keeper, and in which he was required to reside; and that it was necessary for the due performance of his duties as hall-keeper that he should reside there. *Held*, that this was an occupation as servant to the corporation, and not an occupation as tenant. *Clark* v. *Bury St. Edmunds* (1856) 1 C.B.N.S. 23, 26 L.J.C.P. 12. Willes, J., said: "I think the proper conclusion from the facts stated is, that it was part of the terms of the hall-keeper's employment that he should reside in the house in question, and that his occupation was not in the character of tenant."

A person put into a house to take care of it and of other adjoining houses belonging to his employer is deemed to occupy the premises as a servant. *Yates* v. *Chorlton Union* (1883) 48 L.T.N.S. 872, (liability to poor rates).

Whether the occupancy was as servant or a tenant was held to be a question for the jury where the agreement was, that he should take care of certain houses, let, repair, and collect rent, and have the use of a floor in one of them. *Jennings* v. *McCarthy* (1891) 40 N.Y.S.R. 678, (right of landlord to resume possession).

Where plaintiff was employed by defendant as a janitress, and received the use of certain rooms as part payment for her services, the relation of master and servant, and not of landlord and tenant, was held to have existed between the parties, and the occupation of the premises was the occupation of a servant. *Anderson* v. *Steinreich* (Sup. Ct. 1900) 66 N.Y.S. 498, 32 Misc. Rep. 680, (damages held to be recoverable for personal injuries caused by the fall of a ceiling in the servant's bedroom).

A person using land as a garden for more than twenty years, under permission from the owner to do so, in order to keep it from trespassers, the owner from time to time coming on the land and giving directions as to cutting of trees, was held had not to have got a title, so as to enable him to sue a claimant under the owner for a forcible entry. *Allen* v. *England* (1862) 3 F. & F. 49 (action for forcible entry), upholding the contention of defendant's counsel that plaintiff's occupation was in fact as bailiff or agent for defendant.

The possession of a man placed on land for the purpose of holding it and of preventing depredation is deemed to be the possession of the owner, notwithstanding the fact that he is given the privilege of cultivating a part of the land for his own benefit. The owner, therefore, may maintain an action for trespass on the land. It was intimated, that the part actually cultivated by the caretaker may, under such circumstances, be considered as being in his exclusive possession. This qualification of the decision seems to be of very dubious correctness. It involves the corollary

that the caretaker would have been at the least a tenant at will as to this portion of the land, a theory which it seems impossible to support by the authorities, as they stand. *Davis* v. *Clancy* (1826) 3 McCord L. (S.C.) 422.

An action for forcible entry cannot be maintained by a person whom a sheriff in pursuance of a writ of restitution has placed in possession as the representative of the party declared to be entitled to restitution. *Mitchell* v. *Davis* (1862) 20 Cal. 45, denying that the action could be prosecuted in the theory that an agent or servant having the care of real estate might be considered as a tenant at will of his principal or master.

In a case where the defendant promised the plaintiff that, in consideration of his services as caretaker of a building, he should have the occupation of certain rooms, and subsequently refused to let him into possession, the court said that, if there was any contract for the letting of the rooms, the remedy for a breach of it was by an action on the contract, not on an account annexed. *Bower* v. *Proprietors of the South Buildings* (1884) 137 Mass. 274.

See also § 6, note 5, post.

(*n*) *Employés in hotels, etc.*—A person engaged himself as waiter at an hotel, and had the tap or privilege of selling malt liquors there, and the use of the cellar for holding the liquors, which had a separate entrance and of which he kept the key, and paid for his situation of waiter and for the tap and cellar the yearly sum of £60. *Held*, that this was not such an occupation of the cellar as to confer a settlement. *R.* v. *Seacroft* (1814) 2 M. & S. 472. In answer to the contention that the servant should be considered as having rented the cellar during the time he was engaged as waiter, the court said that there did not appear to be any taking of the cellar as a tenant, but that the use of it was only a privilege allowed him in respect of the principal thing which was the hiring of himself as a waiter.

The employer of a bar-keeper who has the privilege of occupying a room on the premises is not liable to an action for forcibly ejecting him after his discharge, if no unnecessary violence is used. *De Briar* v. *Menturn* (1851) 1 Cal. 450.

(*o*) *Stewards of clubs, etc.*—In *Williams* v. *Herrick* (1849) 5 U.C.Q.B. 613, the court, without expressly deciding the point, inclined to the opinion that the agreement set out in the pleadings was a hiring of the plaintiff as a steward of a certain club, and that the permissive occupation of the rooms mentioned was not as under a demise thereof, but merely as an incident to the situation, the privilege depending upon the continuation of the service, and ceasing therewith.

Where one part of college buildings, the title of which is vested in the trustees, are partly occupied for the purposes of the institution by the students and teachers, and another part by a steward, who is not given any lease, his occupation is merely that of a servant. *Watson* v. *McEachm* (1855) 2 Jones L. (N.C.) 207, (holding that no indictment lay for expelling the steward).

(*p*) *Domestic servants.*—An action of trespass for the removal of goods after the termination of the employment will not lie, where the clear preponderance of the evidence is, that the plaintiff was employed by a number of students, sometimes spoken of as a club in the statement of facts, to act as housekeeper for them, they taking meals in the premises, she superintending the preparation of the same and receiving as her compensation, board for herself and daughters and if anything was realized over and above the expense of running this boarding house, a small compensation. *Meade* v. *Pollock*, 99 Ill. App. 151, 152).

Where the jury found that there was no engagement of any sort for the servant's occupation of the house assigned to him, and that he "merely used the lodging room in his character as servant," the obvious inference was held to be, that he was put to lodge in the room at the mere will of his master, that this was for the more convenient performance of the services to be rendered by him as a domestic, and for that reason his possession as servant was just as much the possession of his master as if they

**6. Character of occupation tested with reference to its beneficial or non-beneficial quality.**—The circumstance that the occupation of a servant was beneficial as regards him, or as regards the owner, is sometimes adverted to in cases where the actual ground of the decision that he held as a servant was that his occupation was, or was not, ancillary to his service in the sense explained in §§ 4, 5, ante [1]. Such language is readily accounted for by the fact that an occupation which is connected with the service must be one which is principally or wholly for the advantage of the owner, and that an occupation which is disconnected from the service must be one which is principally or wholly for the advantage of the servant. In this point of view the beneficial or non-beneficial quality of the occupation is a circumstance of a merely secondary and derivative character. But there is one particular class of cases in which it has been treated as a primary factor for the purpose of differentiation, viz., those involving the liability of "occupiers" to the Poor-rates assessable under 43 Eliz. c. 2, § 1, and other enactments relating to taxes upon realty. On the one hand the beneficial character of the occupation has been assigned as the ratio decidendi in cases where liability for such taxes has been imposed on persons occupying property belonging to the Crown [2], and on employés of charitable institutions for

---

had occupied separate rooms under the same roof. *State* v. *Curtis* (1830) 4 Dev. & B. (N.C.) 222, (holding that no indictment for forcible entry would be for excluding the servant from the house after he was dismissed).

(*q*) *Servants of charitable institutions.*—See § 6, note 3, post.

(*r*) *Persons employed to effect sales.*—The right to occupy the tenement under a contract by which the tenant is to deliver milk for the landlord at a certain price per week, with the right "to live in the house," for which a dollar a week should be deducted for rent, terminates when the tenant leaves the landlord's service. *Eichengreen* v. *Appel* (1891) 44 Ill. App. 19, (action for trespass, in ejecting plaintiff, after he had voluntarily left the service, held not to be maintainable).

[1] In *R.* v. *St. Mary Newington* (1833) 3 B. & Ad. 540, a case where a tenancy was inferred, it was remarked that the occupation was "independent and for the convenience of the occupier."

In *Kerrains* v. *People* (1873) 60 N.Y. 221, that the occupation was described as being "for the benefit of the owner."

In *Dobson* v. *Jones* (1854) 5 Mann. & Gr. 112, the occupation was held to be that of a servant partly on the ground that it was not "with a view to the remuneration of the occupier."

[2] "The Ranger of a Royal park was held to be rateable, as such, to the poor for inclosed lands in the park, which he cultivated and which yielded certain profits. *Bute* v. *Grindall* (1786) 1 T.R. 338. Lord Mansfield held that it made no difference quo nomine the ranger was "occupier"—whether

whom a house was provided'. On the other hand these taxes have been held not to be leviable upon persons who have "the use

---

by gift of wages. He considered the case to be like the earlier of *R.* v. *Matthews* (1777) Cald. 1, where a servant occupying the lodge and two acres of land, whether he paid for them by a rent or by service was equally liable." Buller, J., said: "It is perfectly immaterial what interest the occupier has in the lands; whether he holds as tenant at will, or any other tenure."

The controller of Chelsea College, who resided in the apartments assigned to the incumbent of the office, was held to be assessable, for the poor-rate in respect to those apartments. *Eyre* v. *Smallpage* (1750) 2 Burr. 1060. Commenting on this case in *R.* v. *St. Luke's Hospital* (1760) 2 Burr. 1053 (1065), Lord Mansfield remarked that such an officer was not charged as a servant of the institution, or as an inhabitant and occupier of the ordinary rooms and lodgings therein; but as having separate and distinct apartments which were considered as their dwelling houses.

Where the sessions had found as a fact that the master gunner at a garrison town was the occupier of the battery-house there, which was the property of the Crown, and from whence he was removable at pleasure, it was held that the fact of his being the occupier precluded any other question, and fixed his liability to be rated to the relief of the poor. *R.* v. *Hurdis* (1789) 3 T.R. 497. "It is not," said Lord Kenyon, "a general position that a servant of the Crown occupying a house in respect to his office is not rateable for it; for I was always rated for the house which I had, as Master of the Rolls; and so are the auditors and tellers of the exchequer. Soldiers indeed cannot be said to be the occupiers of their barracks, in the legal significance of the word; they are no more than mere servants." In *Holford* v. *Copeland* (1802) 3 Bos. & Pul. 129, Lord Alvanley remarked that the ratio decidendi of this case was that the master gunner occupied the house "as his domestic house for his own convenience."

In *Martin* v. *Assessment Committee* (C.A. 1883) 52 L.J.M.C. 66, a superintendent of police was held to be ratable as a tenant in respect to a house occupied by him at some distance from the police station, although it was shewn that it had been specially hired for him, that he was compelled to live in it, and that it was liable to be used for such purposes connected with the police administration as the chief constable might direct, no special part of it, however, being appropriated to this use. It was held, first, that there was a "beneficial occupation" in such a sense as to bring the premises within the Statute of Elizabeth, and, secondly, that he was not exempt from liability, as occupying the house or as servant of the Crown, an exemption being allowed on this ground only in cases where the building occupied belongs to the Crown, or is occupied by a servant of the Crown for the purposes of the Crown. The authority relied upon as regards the latter point was *Gambier* v. *Overseers of Lydford* (1854) 3 El. & Bl. 346, which decided that persons who are occupied about the business of some public building, and connected with it as officers, but who live in houses outside it and separated from it, are ratable.

In *R.* v. *Terrott* (1803) 3 East 605, the court, in summing up the effect of some of the earlier decisions, said: "In these cases each of the persons rated had a degree of personal benefit and accommodation from the property enjoyed by him ultra the mere public use of the thing; and which excess of personal benefit and accommodation ultra the public use may be considered as so much of salary emolument annexed to the office, and enjoyed in respect of it by the officer for the time being."

[1] A master of a free school appointed by the minister and inhabitants of the parish under a charitable trust whereby a house, garden, etc., were assigned "for the habitation and use of the master and his family freely,

of a building or other subject of the rate as a mere servant of the Crown, or of any public body, or in any other respect for the mere exercise of public duty therein," and who derive from such use no "emolument in any personal and private respect"[4].

---

without payment of any rent, income, gift, sum of money or other allowance whatsoever," for the teaching of ten poor boys of the inhabitants, was held to be ratable to the poor for his occupation of the same. *R.* v. *Catt* (1795) 6 T.R. 332.

[4] *R.* v. *Terroth* (1803) 3 East 506, where the court in summing up the effect of the earlier decisions, said: "In all such cases the parties having the immediate use of the property merely for such purposes, are not rateable because the occupation is throughout that of the public, and of which public occupation the individuals are only the means and instruments."

Stables rented by the colonel of a regiment, by order of the Crown, for the use of the regiment, are not liable to be rated to the relief of the poor. *Amherst* v. *Somers* (1788) 2 T.R. 372.

Servants of the defendant hospital were held not to be rateable for the reason that they did not occupy distinct apartments. *R.* v. *St. Luke's Hospital* (1760) 2 Burr. 1063, contrasting *Eyre* v. *Smallpage*, supra, in this note.

A person employed by the philanthropic society to superintend the children at annual wages, under an agreement that she should have a dwelling free from taxes, etc., with certain other perquisites, and who may be dismissed at a minute's warning on receiving three months' wages, was held to be not rateable to the poor as the "occupier" of the house provided by the society, she having no distinct apartments in the house but a bed-chamber, and her family not being allowed to live there. *R.* v. *Field* (1794) 5 T.R. 587. It was considered by Grose, J., that the words of the statute (31 Geo. II., c. 45, as amended by 31 Geo. III., c. 19) shewed that the Legislature intended only the beneficial occupiers to be taxed. Buller, J., said: "The true question is, whether or not the appellant be an occupier? It is said she is, for that an occupier is the person in the possession of, and having control over, the house. Then try this case by that definition. If it be sufficient to live in a house, that equally applies to every servant; then as to the control, the appellant is a mere servant; she was hired as such, and is liable to be dismissed at an hour's notice; for though three months' notice was to be given by either party, the society might have turned out this servant immediately, on giving her three months' wages in advance. The articles of agreement are merely personal, and give the appellant no interest in the house, which was to be applied to certain specific purposes. The society, indeed, agreed to provide her with a dwelling, but that dwelling is a mere lodging. The case states, that she has no distinct apartments in the house but a bed-chamber; and if that were sufficient to constitute her the occupier, every maid servant would be equally the occupier. A person so situated is only a servant, and not an occupier either in the legal or common acceptance of the word."

The trustees of a meeting house who made no profit out of it were held not to be liable for the poor rate in *R.* v. *Woodward*, 5 T.R. 338.

A woman servant placed as superintendent in a house appropriated to the charitable purpose of educating poor girls was held not to be ratable as occupier. *R.* v. *Waldo* (1777) Cald. 358.

The Masters in Chancery are not ratable as occupiers of their respective apartments under the Paving Act 11 Geo. III., c. 22. *Holford* v. *Copeland* (1802) 3 Bos. & P. 129. In a case arising under an earlier Paving Act it has been held that the colonel of a regiment who had rented certain stables for the use of a troup of horses was not ratable in respect to them, as he had occupied them for public purposes. *Sokersall* v. *Briggs*, 4 T.R. 6.

Non-beneficial occupation is also inferred, where a servant is allowed to occupy a house as caretaker, and is ready to leave it at any time, if the owner so orders [5].

The exemption of a public officer who is occupying property of the Crown for the purpose of discharging his public duties extends in respect to such occupation so far as it is reasonably necessary for the performance of his duties, and no farther [6].

7. ———**to the effect of the arrangement as giving or not giving the servant an estate in the land.**—In some cases the character of the occupation has been considered with reference to the question, whether the effect of the arrangement was or was not to give the servant a specific interest in the subject of the occupation [1]. But

---

[5] *Yates* v. *Charlton upon Medlock Union* (1883) 48 L.T.N.S. 872.

Residence in a lighthouse by one as servant to the owner, at an annual salary, to take care of the light, is the occupation of the master, who alone can be rated in respect of such occupation of the toll house. *R.* v. *Tynemouth* (1810) 12 East 46.

[6] *R.* v. *Stewart* (1857) 8 Ell. & Bl. 360.

[1] The following cases may be cited as illustrations, more or less distinct; of this mode of viewing the position of the occupant.

In *R.* v. *Langriville* (1830) 10 B. & C. 899, it was laid down that, in order to constitute the species of settlement which was based upon the occupation of a tenant of the yearly value of £10, "it is necessary that the pauper should have an interest in the subject of the occupation (such subject being of the requisite yearly value), as tenant and occupier; though it is not necessary that he should be under an obligation to pay rent, or that he should have more than an estate at will (*Rex.* v. *Fillongley* (1824) 1 T.R. 458)." In the same case we find it also remarked: "It is essential, whether the subject of occupation be the land itself, or a part of its profits, that the pauper should have an interest as tenant or occupier —a possession by mere license without that interest is not enough. If a person were permitted by the owner of a pasture to feed his cow or sheep upon it for a time, without any valuable consideration, and without reference to any contract between them, but by a mere fact of charity or favour, no settlement would be gained by such a permissive enjoyment of the produce of the land." It was considered that the fact of the master's having given the servant permission to have the milk of a cow, which was to be pastured on the land, must be regarded as betokening a mere act of kindness or favour of the master, not referable to any contract, and that no interest was thereby acquired by the pauper in the profits of the land.

In *R.* v. *South Newton* (1830) 10 B. & C. 838, where a shepherd was allowed the use of a piece of land, while attending to some flocks, Littledale, J., laid it down that a servant could not acquire a settlement by estate unless he was the "substantial owner of the property," and that the arrangement proved did not shew the acquisition of such an interest as would give him such a settlement. Lord Tenterden remarked that "all the interest which he took was in his character of servant from year to year." The question whether the occupation was ancillary to the service was not specifically referred to in the judgments, but the applicability of this test was discussed by counsel.

In *Lake* v. *Campbell* (1862) 5 L.T.N.S. 582, it was held that a person who was engaged to superintend some operations on an estate, at a weekly

if we advert to the fact that all the cases cited might, so far as the facts in evidence were concerned, have been decided with reference to the consideration, that the servant's occupation was or was not ancillary to his employment, there seems to be good reason for saying their essential effect may correctly be stated thus: From the circumstance of a servant's having obtained, during the continuance of his service, the right to reside in a house, or to use a piece of land, belonging to his employer, it will be inferred that he has or has not acquired such an interest or estate in the premises themselves or the things produced thereon as will invest him with the privileges, and subject him to the burdens of a tenant, according as it may appear that he occupied the premises in his own right, or merely for the more convenient performance of his duties.

If the provisions of the agreement are, on the whole, such as to warrant the inference that the servant occupied the premises

---

salary and a house to live in, or so much per annum in lieu of it, acquired no estate in the premises. Neither court nor counsel referred to the question, whether the occupation was ancillary to the service.

By one entire contract, a master agreed to give his servant £20 a year, a cottage to live in, and the agistment of one cow for his own services; and the sum of £28 and the agistment of another cow in consideration of his lodging and maintaining in the cottage two of the master's labourers. The annual value of the lands on which the two cows were depastured exceeded £10, but the annual value of land sufficient to depasture one cow only would have been less than £10. *Held*, that the pauper gained a settlement by the right to agist the two cows. *R.* v. *Cherry Willingham* (1823) 1 B. & C. 626. Abbot, C.J., remarked that whether the consideration be paid in money, or by service, or by any other matter beneficial to the part, was immaterial on a question of settlement, provided the yearly value be £10.

In *R.* v. *Lakenheath* (1823) 1 B. & C. 531, the fact of a schoolmaster's having underlet a part of the house occupied by him to the parish, was held to be conclusive proof that he enjoyed the house as his own, and not as the servant of the lord or the receiver of the manor upon which it was situated.

The six preachers, lay clerks, bell-ringers, and other functionaries of the Cathedral of Canterbury being paid salaries out of the chapter revenues, which were derived wholly or in part from lands and tenements situated in certain parishes in the same division of the county, and which were vested in the dean and chapter, have no such equitable estate in freehold land as will entitle them to vote for a county. *Hall* v. *Lewis* (1861) 11 C.B.N.S. 114; K. & G. 499; 8 Jur. N.S. 646; 31 L.J.C.P. 45; 10 W.R. 151; 5 L.T.N.S. 491. Erle, C.J., said: "There is a mere agreement to pay them certain stipends at the audit room in the Cathedral precinct. I cannot distinguish between the case of these functionaries, and that of any private gentleman's servants. The payment is made out of the general funds of the dean and chapter. There is no vestige of any equitable interest in land."

in the character of a servant, a stipulation that he should not be obliged to leave the premises unless he had notice to quit at a certain date will not of itself convert his occupation into that of a tenant[1]. Nor is the circumstance that the right of occupation terminates with the abrogation of the contract of service, by consent or by the discharge of the servant, deemed to be decisive as to the character of the occupation[2]. But it is undoubtedly a material element for consideration[3].

8. ——**to the fact that the privilege of occupation represents a certain amount of pecuniary compensation.**—From a logical standpoint, the fact that an employé received either a smaller pecuniary compensation than would otherwise have been given, or no pecuniary compensation at all, on account of his having obtained the privilege of occupying the premises in question, is obviously susceptible either of the construction that the arrangement which relieved the employer altogether of the obligation of paying any compensation in money, or diminished to a certain extent the amount payable, was adopted as a convenient mode of discharging the whole or a part of the servant's wages, or of the construction that the sum which would otherwise have been paid as wages was represented by the rent of the premises[4]. Accordingly we find not only that the courts have explicitly recognized the inconclusive quality of this fact[5], but also that it is fre-

---

[1] In a settlement case where the finding of the justices that the pauper occupied as servant was approved, Williams, J., remarked that they appeared "to have thought the stipulation as to notice was an indulgence granted, without any view of conferring such an interest as would make the pauper a tenant." *R.* v. *Snape* (1837) 6 Ad. & El. 278.

[2] *Kerrains* v. *People* (1873) 60 N.Y. 221; *People* v. *Annis*, 45 Barb. 304.

[3] See *R.* v. *Chestunt* (1818) 1 B. & Ald. 473 (§ 5, note 1, subd. (b), ante).

One of the facts which in a case involving the *right of the franchise* was relied upon, as tending to shew that the employé occupied as servant was that, if he had ceased to be employed, he would have had to give up the possession of the house at once. *Ferar's case* (1836) Alcock R.C.R. 248; S.C. Rogers, Elections, 81.

[4] In *Bertie* v. *Beaumont* (1812) 16 East 33, Lord Ellenborough remarked in the course of his judgment: "If the man had been in the occupation before, as a tenant paying rent, I should have thought that he still continued to occupy it in the same character, if no new agreement had been entered into in that respect, when he was taken into the plaintiff's employ, and that he was only to pay his rent in service instead of money."

[5] In a case the fact of which are stated in § 5, note 1, subd. (h) ante, it was remarked: "The fact also of having a lower salary in consequence

quently mentioned among the evidential elements both in cases where the employé was held to have been occupying the premises

---

of being allowed a house, though not immaterial, is by no means decisive; for such a fact might exist in a case in which the house was occupied for the purpose of the service, and not in the character of tenant. It may well happen that something in the service which renders it less onerous or more pleasant may cause a reduction of the salary, without being a part of the salary itself. A master may give lower wages in consequence of lodging his servants in his house, instead of requiring them to find lodgings out of it, without making them his tenants." *Hughes* v. *Overseers of Chatham* (1843) 5 Mann. & Gr. 54 (79).

"While a deduction from wages of a specified sum for the use [of the premises] or the absence of such an arrangement, would be a material circumstance, it would not be in all cases conclusive either way." *Kerrains* v. *People* (1873) 60 N.Y. 221.

In *Fox* v. *Dalby* (1874) L.R. 10 C.P. 285, Brett, L.J., is reported to have said: "The result of those three cases [*i.e.*, of *Hughes*, *Dobson*, and *Clark* as stated in § 5, note 1, subd. (h), (m), ante] seems to be this that, where a person situate like the respondent is permitted, (allowed, if so minded), to occupy premises *by way of reward for his services, or as part payment*, his occupation is that of tenant." This statement, however, appears to be somewhat lacking in precision. By consulting the note specified above, it will be seen that all that is really decided by these cases with regard to the significance of the situation described by the words italicized is that, if a tribunal empowered to draw inference of fact finds that an employé in that situation occupied the premises as a tenant, a court of review should allow the finding to stand, unless there is evidence which goes conclusively to shew that the occupation was ancillary to the service. The real effect of these cases is more correctly indicated by the following passage in a judgment delivered by Cockburn, C.J., in a case where it was held that a man who occupies as servant is not a "householder" in the sense in which that term is used in 43 Eliz., c. 2, § 1: "I think the facts are not sufficiently found, the most essential element in the consideration of that question being omitted, namely, whether this occupation was an occupation for the purpose of the service or not—whether it was necessary to the service or not. If the occupation of the servant be necessary to the service, then I think his occupation is the occupation of the master, although the remuneration which the servant receives is the less on account of his having the advantage of premises or a house of the master for the purpose of his habitation. On the other hand, if the occupation be not necessary to the service, then the fact, that the advantage of the occupation is part of the remuneration for the service, will not render that occupation less an occupation qua tenant, than it would have been if the man had paid rent. It may be that it happens to be convenient both to the master and to the servant, that the servant requiring some place of habitation shall, by agreement with the master, instead of receiving so much for his wages, out of which wages he would have to find himself a separate habitation, inhabit some premises of the master as part of the remuneration for his services; but it is only an equivalent for wages. He would be receiving in the one instance the whole amount of his wages, and out of those wages he would have to find himself a habitation, for which he would have to pay rent; in the other he inhabits premises of his master, and instead of paying the master the rent the master deducts it from the wages. Although, therefore, the relation of master and servant happens to exist between the parties by a subordinate arrangement, and the servant occupies premises of the master rent free, as part of the wages that he would otherwise receive if he paid the rent, it does not follow, from the relation of master and servant happening to exist between the parties, that

as a servant, and in cases where his occupation was held to have been that of a servant[s].

---

the occupation may not be an occupation qua tenant, independent of the master. As I said before the essential element in the determination of the question is, whether or not the servant simply occupies as part remuneration for his services, or whether the occupation is subservient to and necessary to the service." *R.* v. *Spurrell* (1865) L.R. 1 Q.B. 72.

That this element is essentially non-discriminative in its characters is also indicated by the remark of Lord Denman in *R.* v. *Lynn* (1838) 8 Ad. & El. 379, that "it would be strong to say that an allowance by the master, in part payment for services, made the occupation of a house auxiliary to the services."

[s] (*a*) *Occupation as servant inferred.*—In *White* v. *Bayley* (1861) 10 C.B.N.S. 227; 7 Jur. N.S. 948; 30 L.J.C.P. 253, it was held that an employé who was allowed under his agreement to occupy a building rent free, and to have at the same time the privilege of carrying on an independent business, was liable to be turned out of the premises whenever his employment should come to an end, and that he could not maintain an action of trespass against his employer for breaking and entering the premises. Willes, J., said: "Upon the correct construction of the documents, it appears to me—and on the facts there is no dispute—that no interest in the premises even to the extent of a tenancy at will ever did vest in the plaintiff. My reason for thinking so, is, that, looking at the whole of the arrangement between the parties, it resulted in an agreement that the plaintiff was to give his services to the Swedenborg Society as manager for the purpose of selling the Swedenborg publications. The main object and principle of the arrangement was that; and the part upon which my Brother Parry relies for the purpose of shewing that an interest in the premises was vested in the plaintiff was merely accessory to that arrangement, and part of the machinery for carrying it into effect—a mere mode, in short, of paying the plaintiff in part for his services as manager. Taking the agreement to have been that the plaintiff should be employed as manager to be paid a certain salary in moneys numbered, there could have been no doubt whatever that his occupation would have been an occupation merely as a servant of a society. Can it make any difference, that, as part of the remuneration for his services, he was to have liberty to carry on the retail bookselling business on the premises on his own account? Clearly not. Whether the whole amount of his salary was paid to him in money, or part in money and part in the permission to occupy himself and the premises in the carrying on that limited trade, can, as it seems to me, make no difference in the construction of the contract between the parties." See also the following cases, the effect of which has been stated in §§ 5, 7: *R.* v. *Kelstern* (1816) 5 M. & S. 136, (part of the proof was that, if the pauper for whom a settlement was claimed had not obtained the privilege of occupying the house, he would have had more wages); *R.* v. *South Newton* (1830) 10 B. & C. 438 (enjoyment of land "in lieu of wages which would otherwise have been given for his service"); *Bertie* v. *Beaumont* (1812) 16 East 33 (servant was allowed to occupy a cottage with less wages on that account); *Young* v. *Paton* (Sc. Ct. of Sess. 1808) Hume 582 (rent deducted from wages); *Hunt* v. *Colson* (1833) 3 Moore & Sc. 790 (certain sum deducted from wages by way of rent); *R.* v. *Snape* (1837) 6 Ad. & El. 278 (privileges allowed were spoken of as being in part remuneration of the services); *Doe* v. *Derry* (1840) 9 C. & P. 494 (employé allowed to have the use of house free of rent); *Dobson* v. *Jones* (1854) 5 Mann. & Gr. 112 (employé, if he had not lived upon his employer's premises, would have received a certain sum as lodging money); *Lake* v. *Campbell* (1862) 5 L.T.N.S. 582 (servant had a house to live in, or so much per annum in lieu of it); *Fox* v. *Dalby* (1874) L.R. 10 C.P.

**9. Change in the character of the occupation, when inferred.**—(See also § 3, note 12). In a few cases a change in the character of the occupation was held to be inferable from the evidence. Under such circumstances the rights and liabilities arising out of the occupation will, of course, depend upon whether the controversy relates to the period which preceded, or to the period which followed, the change[1].

---

285 (certain sum deducted out of pay of employé, in consideration of the privilege of occupation); *Mead* v. *Pollock* (1901) 99 Ill. App. 151 (one of the facts in evidence was that the employé whose right to retain possession of the premises was disputed received, as her compensation, board for herself and daughter); *People* v. *Annis* (1866) 45 Barb. 304 (house room and pasture for cows furnished); *Doyle* v. *Gilbs* (1871) 76 Lans. 180 (use of house and other property given as part of remuneration); *McGee* v. *Gibson* (1840) 1 B. Mon. 105 (the court remarked that the furnishing of the house was "obviously a mode of paying a part of the wages"); *Bradley* v. *Bowman*, 151 Pa. 351, 24 Atl. 1062 (house to live in was furnished as part of the remuneration); *Heggelginger* v. *Fulton* (Ind. App. 1900) 56 N.E. 688 (occupation allowed as part of remuneration); *Eichengreen* v. *Appeal* (1891) 44 Ill. App. 19 (certain sum was deducted from wages as rent of premises); *Fleming* v. *Hill* (1876) 1 R. & C. (Nor. Sc.) 268 (servant occupied a house rent free, as part of his remuneration).

(b) *Occupation as tenant inferred.*—In *Hughes* v. *Overseers of Chatham* (1843) 5 Mann. & Gr. 54 (right of voting involved), one of the elements mentioned was that the employé was "permitted to reside in the house in part remuneration of his services."

In another case where liability to the poor rate was the point involved it was remarked that the "occupation had nothing to do with their wages, nor was it in any way taken into consideration in determining the amount of wages they earned." *Smith* v. *Seghill* (1875) L.R. 10 Q.B. 422, per Quain, J.

In a case where the occupant was held liable for poor rates on the ground that his occupation was "beneficial," Brett, L.J., remarked that the effect of the arrangement as shewn was that he was to have quarters, as part of his remuneration for his services. *Martin* v. *Assessment Committee* (C.H. 1883) 52 L.J.M.C. 66.

In a case where a man was permitted by certain persons having a right of common, to occupy a tenement of £10 a year, and the case stated by the sessions found that the occupation was allowed as a reward for his services, it was held that he had acquired a settlement. *R.* v. *Melkridge* (1787) 1 T.R. 598.

In a settlement case there was held to be a tenancy in a case where the arrangement was construed as one which enabled the employé to pay his rent by allowing a deduction to be made from the wages of his children. *R.* v. *Bishopton* (1839) 9 Ad. & El. 824.

See also *O'Connor* v. *Tyndall* (1836) 2 Jones (Ir.) 20 (curate allowed, in lieu of salary, to occupy glebe house and lands); *R.* v. *Lower Heyford* (1830) 1 B. & Ad. 75 (premises occupied rent free, as an augmentation of salary).

[1] In a case where the defendant in an action of ejectment occupied a cottage as part of an arrangement, under which, for a certain sum of money annually paid, and for the right to cultivate for his own profit certain garden ground he undertook to do gardening work on the estate it was held (Lord Moncrieff dissenting), that his occupancy was that of a tenant, for the following reasons: that the terms of occupancy might reasonably

**10. Occupancy of a dwelling "by virtue of an office, service, or employment."**—The following provision is contained in § 3 of the English Representation of the People Act, 1884: "Where a man himself inhabits any dwelling house by virtue of any office, service, or employment, and the dwelling house is not inhabited by any person under whom such man serves in such office, service, or employment, he shall be deemed for the purposes of this Act and of the Representation of the People Acts to be an inhabitant occupier of such dwelling house as a tenant" The construction put upon this provision is shewn by the cases collected in the note below. Its importance with relation to the doctrine established

---

be supposed to have undergone a change, when, after having been for some time in the service of the owner of the estate, he obtained the privilege of cultivating the garden for his own benefit, and at his own cost; that, when the new arrangement was entered upon, he took over at a valuation a horse and van, belonging to the landowner, which had been used for conveying produce to the market; that, when the plaintiffs were looking for a person to take the defendant's place, they advertised that the garden was to let; that the plaintiff's local agent returned the defendant's name as "tenant," and that he was so entered on the valuation roll of the county. *Dunbar's Trustees* v. *Bruce* (1900) 3 Sc. Sess. Cas., 5th Ser., 137.

A. employed B. to work for him at $50 per month for a period of eight months agreeing also to furnish him a house free of charge from the expiration of that period to a subsequent date specified. A. subsequently permitted B. to sublet this house to C. *Held*, that after eight months B. occupied the house as tenant and not as servant, and that C. was liable to B. for the rent. *Snedaker* v. *Powell* (1884) 32 Kan. 396. The court said: "Powell had the right to occupy the house of Burnham to March 1, 1884, free of charge. He was to work, for eight months from March 6, 1883. This time expired prior to November 13, 1883. After he moved away, and perhaps quit work, the house belonging to Burnham was not an accessory or aid to the performance of Powell's duties as a servant. Under the contract Powell had paid by his labour and services for the use of house to March 1, 1884; and even if the occupancy of the dwelling during his eight months' service was that of a servant and not of a tenant, yet after he had performed that service, the relation existing between Burnham and Powell was that of landlord and tenant. There is no evidence shewing or tending to shew that after November 13, 1883, the occupancy of the house was for the benefit of Burnham, or as an accessory or aid to the performance of the duties of Powell as a servant. For aught that appears, after the eight months had expired there was no service to be performed by Powell, and yet Powell was entitled to the house for nearly four months thereafter. If the services of Powell had expired, clearly Burnham had no right to enter forcibly and oust him of the possession of the house, for he had expressly agreed with Powell that the latter should have the house until March 1, 1884, although his services as a servant might expire November 6, 1888. As Burnham permitted Powell to transfer his interest or sub-let the house to Snedaker, the latter held under Powell and not under Burnham. Snedaker was therefore liable for the rent which it was adjudged he must pay."

See also the passage quoted in § 8, note 1, ante, from Lord Ellenborough's judgment in *Bertie* v. *Beaumont* (1812) 16 East 33.

by the cases cited in § 5 consists principally in the fact that it has abolished, so far as the qualification for the franchise is concerned, the distinction established by the courts between occupation as a servant and as a tenant[1]

---

[1] A shop assistant occupied exclusively, by virtue of his employment, a furnished bedroom in a dwelling-house belonging to his employers. The house contained other bedrooms similarly inhabited by other persons in the same employment, and a dining room in which the inmates of the house took their meals in common which were provided for them by their employers. The inmates had no keys of their bedrooms. The employers did not inhabit the house, but they had a resident caretaker who exercised general control over it, and a resident servant who was not under the order of the inmates, and by whom the domestic service requisite for the rooms was done. *Held*, that there was sufficient inhabitancy of a dwelling-house, by virtue of service, to confer the franchise, and that this was not affected by the joint user of another part of the house. *Stribling* v. *Halse* (1885) 16 Q.B.D. 246.

H., a servant, occupied exclusively, by virtue of his service, a furnished bedroom in a dwelling-house belonging to his master, and had, in common, with another young man, the use of a sitting room in the same house. All the furniture belonged to the master, who did not reside in the house, but had free access at all times to every portion of it except H.'s bedroom, and had access to that whenever he asked H. for the key, which he had a right to demand whenever he chose. The bedrooms were made up by a charwoman, who was paid by the master, and did not reside on the premises. *Held*, on the authority of *Stribling* v. *Halse*, supra, that H. was entitled to the franchise. *Hasson* v. *Chambers* (1885) 18 L.R. Ir. 68 (two of the Lords Justices dissented).

Each teacher in a college conducted by a religious community had, as such, during the qualifying period, the exclusive use of a separate bedroom in the college by virtue of his office or employment as a teacher in the college, which was managed by a resident principal, under the supreme control of the superior-general of the community, who himself lived in Paris. The revising barrister having found that each bedroom so occupied constituted a "dwelling-house" for the purpose of the franchise, and was not inhabited by the person by whom the teachers were employed, or under whom they served, it was held that the teachers were entitled to the franchise. *Alexander* v. *Burke* (1887) 22 L.R. Ir. 443 (following the above cases).

R. was the foreman of a shop and place of business in which a number of young men were employed. By virtue of that employment he and they lived in a separate house, in which he had a bedroom that he occupied exclusively. He and the other employés took their meals in a common sitting room, and the only other resident in the house was a servant, paid by the employer to attend to the occupants. R. had a latch key for the hall door, and had also charge of the other keys and it was his duty to see that the doors were locked, and the occupants within doors, every night. *Held* (dub. FitzGibbon, L.J.), that R. was entitled to the franchise. *Hasson* v. *Chambers* (1885) 18 L.R. Ir. 68 (69).

C., as his employer's coachman, occupied a room over her stable, and was treated by her as a domestic servant. The stable was in her yard, and was portion of the curtilage of her dwelling-house, the house and yard being all included under the same number in the poor rate book. There was a separate gateway and gate from the yard into a back lane, and also a wicket leading from the yard into the lane. The gate and wicket formed the only access to the yard, except by going through the employer's house,

**11. Character of occupation, viewed as an element determining the correctness of the wording of indictments for burglary.—** It has been laid down that the essential question to be determined in the cases under this head is, whether the dwelling or

---

and were under her control. Another of her servants cleaned out C.'s room. *Held*, that C. was not entitled to the franchise. *Hasson* v. *Chambers* (1885) 18 L.R. Ir. 68.

A non-commissioned officer in the service of the Crown claimed the parliamentary franchise as the inhabitant occupier of a dwelling-house in respect of rooms occupied by him as his quarters in barracks. He had inhabited the rooms, which consisted of a bedroom and sitting-room, during the qualifying period, subject, however, to certain regulations and powers of superior officers incident to military service, such, for instance, as the power of entry by the commanding officer at any time, and by other superior officers for the purpose of preserving order, and by certain officers at stated times for the purpose of inspection of the rooms, the power of the commanding officer to forbid any person to enter or leave the barracks at any time, and the obligation to be in his quarters at a stated hour every evening. The Crown supplied certain necessary articles of furniture for the rooms, the rest of the furniture being the claimant's own. The rooms formed part of one of the blocks of buildings situate within the barrack inclosure the remaining rooms in the block being occupied by other non-commissioned officers, some of whom were superior in rank to the claimant, and the senior of whom was bound to preserve order in the block, and would be entitled to enter the claimant's rooms for that purpose. The colonel commanding lived in a house situate within the walls of the barracks. *Held*, that the claimant was entitled to the franchise on the ground that he had inhabited a dwelling-house and that no person under whom he served had inhabited such dwelling-house. *Atkinson* v. *Collard* (1885) 16 Q.B.D. 254 (254).

In two other cases reported under the same caption, where votes were claimed by persons in military service, the facts with regard to the occupation of the quarters were similar, with the exception that the claimants, non-commissioned officers, had been absent for twenty-one days during the qualifying period from their quarters on duty elsewhere, and could not return without leave, but during such absence, in one case the claimant's wife and family, and in the other his furniture, remained in the quarters which were retained for him. *Held*, that, it not sufficiently appearing in those cases that there had been any constructive inhabitancy of the rooms by the claimants during the twenty-one days when they were in fact absent, they were not qualified.

In *Henry* v. *Collard*, also reported under the same caption, L., a captain occupied rooms in a block in the same barracks, and a major, his superior officer, had rooms in the same block. It was held that the major occupied his own quarters only, and not constructively the whole block; that he was not a person under whom L. served; and that, therefore, L. was to be deemed a tenant under s. 3 of the Act.

The appellant was an industrial trainer in the employment of poor law guardians, and as part of his salary was allowed to have the exclusive occupation of a sitting room and bedroom in the main building of the workhouse. The guardians reserved another room in the workhouse which they used as a boardroom; the master of the workhouse, whom they employed, resided in other rooms of the building. The appellant could not stay out of his rooms after 9 p.m. without the permission of the master; the master, however, had no power to suspend or dismiss him if he did so, but could only report the matter to the guardians. *Held*, that the appellant was an inhabitant occupier of a dwelling-house "by virtue of his

employment," for the workhouse was not in the circumstances inhabited by the guardians and he did not serve under the master of the workhouse so as to disqualify him from voting. *Adams* v. *Ford* (1885) 16 Q.B.D. 239.

The claimants were labourers residing in cottages on the farms of their employers. They were permitted, but not required, to live in the cottages on the terms that they were to give up possession when their employment ceased, and were either charged a reduced rent or had the rent deducted from their wages. The rates were paid by the employers, and the names of the claimants appeared in the rate-book as occupiers. *Held*, that the facts shewed an occupation by the claimants not by virtue of service, but as householders. *Marsh* v. *Estcourt* (1889) 24 Q.B.D. 147.

A policeman had the exclusive occupation, by virtue of his service of a cubicle in a dormitory at a police barrack. The cubicle was separated from the rest of the dormitory, which contained a number of similar cubicles, by a partition seven feet high, but there was a space of five feet between the top of the partition and the ceiling. The policeman kept the key of his cubicle, and was entitled to lock it up at any time. *Held*, that the cubicle was not "part of a house separately occupied as a dwelling" within the Parliamentary and Municipal Registration Act, 1878, s. 5, and that the policeman was not entitled to the franchise in respect of it. *Barnett* v. *Hickmott* (1895) 1 Q.B. 691.

The appellant had by virtue of his service as a policeman the exclusive occupation of a cubicle in a dormitory at a police station. The cubicle was separated from the rest of the dormitory, which contained a number of similar cubicles, by wooden partitions which did not reach the ceiling. The atmosphere of the dormitory was common to all the cubicles, and a gas-light was shared by them in common. A lavatory and mess-room were provided for the policemen who occupied these cubicles in another part of the police station. The policemen occupying these cubicles were subject to the control of a superior officer, who had power to impose restrictions upon their use of the cubicles inconsistent with the rights which a person ordinarily exercises in respect of his own dwelling. *Held* (by Lord Esher, M.R. and Lopes, L.J., Rigby, L.J., dissenting), that the cubicles was not part of a house separately occupied as a dwelling within the meaning of the Parliamentary and Municipal Registration Act, 1878, s. 5, and that the appellant was therefore not entitled to the franchise in respect of it under the Representation of the People Act, 1884, s. 3. *Clutterbuck* v. *Taylor* (1896) 1 Q.B. 395.

The claimants were nuns residing at a convent in the town of E. Each of them occupied a separate bedroom, and was subject to the control of the Lady Superioress, who could at any time change the occupants from one room to another or arrange to have more than one occupant of a single room. She could refuse to allow a nun to receive a visitor in her room, demand admission to the room, and require the nun to give up the keys. The nuns took their meals together in the Refectory, and occupied in common other general rooms in the convent; they received no remuneration, and were under no contract of employment. The premises were vested in the Roman Catholic Bishop of Clogher, the parish priest, and the senior curate of E, all for the time being, upon trust for the benefit of the Roman Catholic inhabitants of E. The convent was governed by rules subject to the supreme authority of the Bishop. *Held*, that the nuns were not "inhabitant occupiers" of separate dwellings. *Semble*, the nuns did not occupy their rooms "by virtue of the office, service, or employment." *Bannon* v. *Hanrahan* (A.C.) (1900) 2 Ir. Rep. 455, (following the *Clutterbuck case*, supra). Fitzgibbon, L.J., said: "Unless I am bound by authority to decide contrary to my own opinion, I should be unable to hold that a Sister of Mercy has an office, service or employment within the meaning of this section. It would be an abuse of language to speak of her membership of a religious congregation as an earthly service or employment, and although it might be termed an office, there is, as far as I can see, no person under whom she serves. No doubt she is under authority—

room which was the subject of the burglary was or was not inhabited by the owner through his servant[1].

A consideration of the facts involved in the decisions cited below in which it was held either that the dwelling in which a burglary had been committed was properly stated in the indictment, or that it should have been stated as the dwelling, not of the master who owned it, but of the servant who occupied it, indicates that the same conclusion as that which was adopted would have been reached if the test explained in § 4, ante, had been specifically applied[2]. The same remark may be made with regard to a case

---

the authority of the Mother Superior, the authority of the Bishop of the Diocese, and the superior authority of the Church; but it would seem to me that except, perhaps, in the case of the Mother Superior, this authority is of a judicial character, and bears no analogy to that of a master over a servant. The Mother Superior probably comes nearer to what this section has in contemplation but even as to her, I can hardly believe that the Legislature intended to describe her as a person under whom a Sister of Mercy serves."

[1] *R.* v. *Stork* (1809) Leach C.C. 1015.

[2] Apartments in the King's palace, or in the houses of noblemen for their stewards and chief servants, must be laid as the mansion-house of the King or nobleman. 1 Hale, 556, 557; 2 East, P.C. c. 15, s. 14, p. 500.

Where three persons were charged with having broken into the lodgings of one H. at Whitehall Palace, it was held that the indictment should be for breaking the King's mansion, called Whitehall. *R.* v. *Williams*, 1 Hale, 522; 11 Russell on Crimes (6th ed.) p. 28.

Where a man was indicted for breaking into a chamber in Somerset House, and the indictment charged it to be the mansion-house of the person who lodged in it, it was agreed that the whole house belonged to the Queen-mother, and therefore that the indictment was bad. *R.* v. *Burgess*, Kel. 27; 2 Russell on Crimes, p. 28.

Where a house at Chelsea was broken into, which was used for an office under government, called the Invalid Office, and the rent and taxes of which were paid by government; it was held that the indictment was defective in laying it to the house of a person who occupied the whole of the upper part of it. *R.* v. *Peyton* (1784) 1 Leach, 324.

An indictment for a burglary in the Custom-house rightly describes it as the dwelling-house of the King, as he occupies it by his servants. *R.* v. *Jordan*, 7 C. & P. 432, per Gaselee, J., and Gurney, B.

The prisoner was indicted for breaking the mansion-house of one S. It appeared that the house belonged to the African Company, of which S. was an officer; that he and many other persons as officers of the company, had separate apartments in the house, and that the apartment of S. was the one which was broken open. It was held that the apartment of S. could not be called his mansion-house, because he and the others inhabited the house merely as officers and servants of the company. *R.* v. *Haskins* (1704) Fost. 38; 2 Russell on Crimes (6th ed.) p. 28.

An indictment for a burglary in the dwelling-house of the East India Company was held to be good, the house being inhabited by the servants of that company. *R.* v. *Picket*, 2 East, P.C. c. 15, s. 14, p. 501. 2 Russell on Crimes (6th ed.) p. 28.

Where the servant of a partnership had three rooms assigned to him for lodging over his employer's banking room, with which these rooms com-

in which the dwelling was held to have been rightly described as that of the servant[*].

---

municated by a trap-door and a ladder, it was held that a burglary committed in the banking room was well laid to be in the dwelling-house of the partners. *R.* v. *Stock* (Exch. Ch. 1810) 2 Taunt. 339. Lord Ellenborough asked: "Could Stevenson [the servant] have maintained trespass against his employers for entering these rooms? Or if a man assigns to his coachman the rooms over his stable does he thereby make him his tenant?"

A burglary committed in a banker's shop, in which no person slept but to which there was a communication by a trap-door, and a ladder from the upper rooms of the house, in which only a weekly workman and his family lived, by the permission of the three partners, who were owners of the whole house, may be laid to have been committed in the dwelling-house of those partners. *R.* v. *Stork* (1809) Leach C.C. 1015.

Where an indictment charged a burglary in breaking into the mansion-house of the master, fellows, and scholars of Benhet College, in Cambridge, the fact being that the prisoner broke into the buttery of the college, all the judges, upon reference to them, held that it was burglary. *R.* v. *Maynard* 2 East P.C. 15, § 14, p. 501; 2 Russell on Crimes (6th ed.) p. 28.

Where upon an indictment for burglary in the dwelling-house of B., it appeared that B. worked for one W. who did business as a carpenter for the N.R. Company, and put him in to take care of the house and flock mills adjoining which belonged to the company, and he received no more wages than he did before he lived there, nor had any agreement for any, it was doubted whether the house was properly laid, and it was thought that there might be some difference between this and *R.* v. *Smith*, as here the man was put in by a person who did the work for the company, and it was thought the safest course to consider the indictment as not properly laying it to be the dwelling-house of B. *R.* v. *Rawlins* (1835) 7 C. & P. 150, per Vaughan and Gaselee, JJ.; 2 Russell on Crimes (6th ed) p. 31.

Where the tenant of a house permitted a servant of a woman who had held it under him to continue occupying it rent free after the subtenant had vacated it, the house is rightly laid as the dwelling-house of the servant, as she was there not as a servant, but as a tenant at will. *R.* v. *Collett* (1823) Russ. & Ry. C.C.R. 498.

Where a farmer's servant resides in a cottage annexed to and under the same roof as, his master's dwelling-house, the arrangement being that he is to pay no rent but that an abatement is to be made in his wages in consideration of the use of the cottage, there is a mere license to lodge in it, and not a letting of it to him. *Brown's Case* (1787), cited in 2 Leach C.C. 1016, note.

When a servant has part of a house for his own occupation, and the rest is reserved by the proprietor for other purposes, the part reserved cannot be deemed part of the servant's dwelling-house; and it will be the same if any other person has part of the house, and the rest is reserved. *R.* v. *Wilson* (1806) Russ. & Ry. C.C. 115.

A. was in the service of B. and lived in a house close to B.'s place of business. B. did not live in the house himself, but he paid the rent and taxes. A. paid nothing for his occupation by deduction from his wages or otherwise. Part of the house was used as storerooms for B.'s goods. *Held*, that this was the dwelling-house of B. and was improperly described in the indictment as the dwelling-house of A. *Reg.* v. *Courtenay* (1850) 5 Cox C.C. 218, per Parke, B.

If a man die in his leasehold house, and his executors put servants in it, and keep them there at board wages, burglary may be committed in breaking into it and it may be laid as the executor's property. 2 East P.C. 499.

[*] *R.* v. *Jobbing* (1823) Russ. & Ry. 525, where the dwelling was a cottage in which the owner allowed one of his workmen live free of rent and taxes, his residence there being principally, if not wholly, for his own benefit.

But certain other decisions in which such a description was pronounced correct cannot, as it would seem, be satisfactorily explained on this footing; and it is only by the aid of extremely subtle distinctions, if at all, that some of them can be reconciled upon the facts with a portion of those decisions in which, as shewn in note (2), the dwelling was viewed as being in the occupation of the master. That the construction put upon evidence similar to that which was presented in the case cited below would have been different, if the civil rights and liabilities of the parties had been in question, seems to be scarcely open to controversy [1].

---

[1] Though a servant live rent free for the purpose of his service in a house provided for that purpose, yet if he has the exclusive possession, and it is not a parcel of any premises which his master occupies, it may be described as the house of his servant. *R.* v. *Canfield* (1824) 1 Moo. C.C. 42 (servant was a toll collector in the employ of the lessee of the tolls).

If a servant lives in a house of his master at a yearly rent, the house cannot be described as the master's house though it is on the premises where the business is carried on, and although the servant has it because of his service. *R.* v. *Jarvis* (1824) 1 Moo. C.C. 7 (servant was a warehouseman occupying a dwelling within the walls which enclosed the warehouseyard).

Though a servant lives as a servant in a house belonging to his master who pays the rent and taxes and whose business is carried on in the house, yet, if the servant and his family are the only persons who sleep in the house, and the part in which the master's business is carried on is at all times open to those parts in which the servant lives, the house may be stated as the servant's house, though the only part entered by the thief was that in which the master's business was carried on. The judge refused to say that the house might not also have been described with propriety as that of the master. *R.* v. *Witt* (1829) 1 Moo. C.C. 248.

The house which was broken in was one in which G. & Co. carried on their trade; M. their servant, lived with his family in the house, and paid £11 per annum for rent and coals, such rent being below the value; M. was allowed to live there because he was a servant; G. & Co. paid the rates and taxes. *Held*, that, as M. stood in the character of tenant, and G. & Co. might have distrained upon him for rent, and could not arbitrarily have removed him, the occupation of M. could not be deemed their occupation and that the house was wrongly described in the indictment as the house of G. & Co. *R.* v. *Jarvis* (1824) 1 Moo. C.C.R. 7; 2 Russell on Crimes (6th ed.) p. 29.

Where a man after leaving his house, continues to use part of it as a shop, and permits a servant and his family to live in another part of it to protect it from robberies, the rest is being let to lodgers, the habitation by his servant is a habitation by him, and the shop may be laid as his dwelling-house. *R.* v. *Gibbons* (1821) Russ. & Ry. C.C.R. 442.

If a burglary be committed in the warehouse of a trading company, in the house belonging to which an agent of the company resides with his family for the purpose of carrying on the business, it may be laid to be the dwelling-house of the agent, although the rent thereof is paid, and the lease is held by the company. *R.* v. *Margett* (1801) 2 Leach, C.C. 930.

Upon an indictment for house-breaking, describing the house in the first count as the dwelling-house of one M., it appeared that M. had been put

into the house by one P. to take care of it till it could be let, and she was to have coals for firing found by P.; she paid no rent for the house; she had been occasionally a servant of P. for thirty or forty years, and done work for him, for which she had always been paid. Littledale, J., said: "I think the evidence is sufficient to support the first count. The prosecutrix has had the exclusive occupation of the house, and although there are very nice distinctions between the cases, I think this was her dwelling-house. She was not put in as a servant, to take care of the furniture or goods, which has generally been the case where such questions have arisen." *R.* v. *George James* (1830) 2 Russell on Crimes (6th ed.) pp. 31, 32.

Where a gardener lived in a house of his master quite separate from the dwelling of his master, and had the entire control of the house, it was held that in an indictment for burglary the gardener's house might be laid, either as his, or as his master's. *R.* v. *Rees* (1836) 7 C. & P. 568.

Where a policeman was allowed to live in a house, in order to take care of it, and a wharf adjoining, it was held that the house was properly described as the dwelling-house of the policeman, on the ground that he must live somewhere, and that he was not otherwise the servant of the owner than in the particular matter. *R.* v. *Smith*, cited in *R.* v. *Rawlins* (1834) 7 C. & P. 150; 2 Russell on Crimes (6th ed.) p. 31.

In *State* v. *Curtis* (1839) 4 Dev. & B. (N.C.) 222 the court remarked, arguendo, that, "even where there is no stipulation for rent, yet the premises occupied by the servant may be so far removed and distinct from those in the personal occupation of the master that they may be deemed and stated to be in the possession of the servant in an indictment for burglary." This observation indicates an element which is plainly not material in any case in which the test discussed in s. 962, would be regarded as controlling.

C. B. LABATT.

## *REVIEW OF CURRENT ENGLISH CASES.*



SALE OF GOODS—"SALE OR RETURN"—SALE FOR CASH ONLY—PROPERTY PASSING—SALE OF GOODS ACT 1893 (56 & 57 VICT. C. 93) S. 18, R. 4.

*Weiner* v. *Gill* (1905) 2 K.B. 172 was an action against two pawnbrokers to recover goods fraudulently pledged with them, under the following circumstances: The plaintiff was a manufacturing jeweller, and had delivered the articles in question to a customer, a retail jeweller named Huhn, on the following terms: "On approbation, on sale for cash or return only. Goods had on approbation or on sale or return remain the property of Weiner (the plaintiff) until such goods are settled or charged." Huhn had dealings with a man named Longman, to whom he in good faith delivered the articles on the representation that he had a customer to whom he could sell them. Longman had, however, no such customer, and got the articles with the intention of misappropriating them, and took them and pledged them with the defendants, who made no inquiry, but dealt with him in good faith, assuming him to be the owner. It was contended that the plaintiffs by parting with the possession of the goods had misled the defendants into the belief that Longman was the owner, or otherwise entitled to pledge them. Under the Sale of Goods Act where goods are parted with on the terms of sale or return, the rules laid down for determining when the property in them passes to the transferee are (1) by his signifying his acceptance to the seller or paying the price; (2) by doing some act indicating that the transferee elects to be purchaser, or inconsistent with his being other than the purchaser; (3) by his retaining the goods beyond the stipulated time, and where no time is stipulated, beyond a reasonable time. And it was contended that by parting with the goods to Longman, Huhn had done an act indicating that he elected to be the purchaser, or inconsistent with his being other than the purchaser; but Bray, J., who tried the case, held that the property had not passed; that the transaction was not for "sale or return" merely, but by the terms of the memorandum there was to be no sale on credit, but for cash only, and therefore the goods remained the property of the plaintiffs, and that they were not estopped by merely having parted with the possession, and were therefore entitled to recover.

INSURANCE—SALE OF GOODS ON TERMS OF SELLER INSURING GOODS—INSURANCE FOR LARGER SUM THAN AGREED.

In *Landauer* v. *Asser* (1905) 2 K.B. 184 the plaintiffs bought goods from the defendants for a price to cover freight and insurance, which were to be paid by the plaintiffs. The contract provided that "Insurance for 5 per cent. over net invoice amount to be effected by sellers for account of buyers." The defendants effected an insurance for a larger amount than 5 per cent. over the net invoice, and handed the policy to the plaintiffs in exchange for the stipulated price. A total loss occurred under the policy, and the underwriters were prepared to pay the plaintiffs the whole amount insured; the defendants, however, claimed that the plaintiffs were trustees for them of the excess of the insurance over and above the amount of the insurance "for 5 per cent. over net invoice." The matter having been referred to arbitration the umpire found that the defendants were entitled to the excess, but on a motion to set aside the award on the ground that it was bad on the face of it, the Divisional Court (Lord Alverstone, C.J., and Kennedy and Ridley, JJ.,) held that the award was bad in law and that the plaintiffs were entitled to the full amount payable on the policies handed over to them.

LIQUOR LICENSE—OPENING PREMISES DURING PROHIBITED HOURS—DELIVERY ON SUNDAY OF LIQUOR BOUGHT ON SATURDAY—APPROPRIATION OF GOODS.

*Noblett* v. *Hopkinson* (1905) 2 K.B. 214 was a case stated by justices. The prosecution was for breach of a liquor license Act —the facts were as follows: Two men went into the defendant's public house on Saturday before closing time and bought a gallon of beer to be delivered to them the next morning at the place where they were working. The beer was drawn and put into a bottle and paid for. It was kept during the night in a building within the curtilage of the licensed premises, and was taken by the defendant's barman on the Sunday morning during prohibited hours and delivered to the purchasers. The Divisional Court (Lord Alverstone, C.J., and Kennedy and Ridley, JJ.,) held that there had been no sufficient appropriation of the beer to the purchasers on the Saturday, and that the defendant ought therefore to be convicted of opening his premises for sale within prohibited hours. The Chief Justice and Kennedy, J., were also of the opinion that even if there had been a complete appropriation of the beer to the purchasers on the Saturday, the defendant was nevertheless liable to be convicted, on the ground that delivery of the beer was an essential condition of the purchase, and by

opening his premises for the carrying out of a material part of the contract during prohibited hours, he had committed a breach of the Act, but Ridley, J., dissented from that view, holding that the delivery of the beer formed no part of the contract for its sale.

CRIMINAL LAW—LARCENY—PRETENDED PURCHASE—PASSING OF PROPERTY.

*The King* v. *Tideswell* (1905) 2 K.B. 273 was a prosecution for larceny under the following circumstances. The prisoner was in the habit of buying accumulations of ashes from a manufacturing concern, which were to be paid for by weight as ascertained by the company's weigher. The company's weigher in collusion with the prisoner fraudulently weighed and delivered to the prisoner 32 tons 13 cwt. of the ashes and entered the weight in the book as being 31 tons 3 cwt. only. The Court for Crown Cases Reserved (Lord Alverstone, C.J., and Lawrence, Kennedy, Channel and Phillimore, JJ.,) held that the prisoner was rightly convicted of stealing 1 ton 10 cwt. The chief point of difficulty in the case was whether the property in the ashes had passed to the prisoner by the terms of sale, and the Court held that it had not, because the ashes had not been sold in bulk, but it was understood that the quantities sold were to be defined by weighing.

THIRD PARTY—INDEMNITY—POLICY OF REINSURANCE—RULE 170 —(ONT. RULE 209).

In *Nelson* v. *Empress Assurance Corporation* (1905) 2 K.B. 281 the defendant was sued on a policy of insurance, and obtained leave to serve a third party notice on one Faber with whom he had reinsured the risk. The third party applied to set aside the notice and Bigham, J., dismissed the application, but the Court of Appeal (Mathew and Cozens, Hardy, L.JJ.), held that the leave should not have been granted, as the claim of the defendant against Faber was not a contract of indemnity. Possibly under the Ont. Rule 209 which extends not only to claims for indemnity or contribution, but also to claims for "other relief over," a third party might be added in respect of such a claim.

# REPORTS AND NOTES OF CASES.

## Dominion of Canada.

### SUPREME COURT.

Yukon.] KIRKPATRICK *v.* MCNAMEE. [May 2.

*New trial—Contradictory evidence—Wilful trespass—Damages —Adding party—Reversal on appeal.*

In an action for damages for entry upon a placer mining claim and removing valuable gold bearing gravel and dirt the trial judge found the defendants guilty of gross carelessness in their work, held that they should be accounted wilful trespassers, and referred the cause to the clerk of the Court to assess the damages. The referee adopted the severer rule applicable in cases of fraud in assessing the damages. The Territorial Court en banc reversed the trial judge in his findings of fact upon the evidence.

*Held*, reversing the judgment appealed from, that the trial judge's findings should be sustained with a slight variation, but that the referee had erred in adopting the severer rule against the defendants in assessing the damages and that his report should be amended in view of such error.

*Semble*, that the record and pleadings should be amended by adding the plaintiff's partner as co-plaintiff.

*Held*, per Taschereau, J., dissenting, that although not convinced that there was error in the judgment of the trial judge which the Court en banc reversed while at the same time it did not appear that there was error in the judgment en banc, yet the latter judgment should stand as the Court en banc should not be reversed unless the Supreme Court, on the appeal, be clearly satisfied that it was wr[illegible]. Appeal allowed with costs.

*Aylesworth*, K.C., and *Walsh*, K.C., for appellants. *Noel*, for respondent.

---

Yukon.] LE SYNDICAT LYONNAIS *v.* BARRETT. [May 2.

*Mines—Vendor and purchaser—Consideration—Lump sum— Separate valuation—Misrepresentation—Fraud—Damages.*

Upon representations made by the vendor the plaintiffs purchased several mining locations the consideration therefor being

stated in a lump sum. In an action for fraud and deceit brought by the purchaser the trial judge, in discussing the total consideration for the properties purchased, found that there was evidence to shew the values placed by the parties upon each of two of these properties as to which false and fraudulent representations had been made, and which had turned out worthless or nearly so.

*Held*, reversing the judgment appealed from, the Chief Justice and Idington, J., dissenting, that the finding of the trial judge as to the consideration ought not to be disturbed upon appeal and that the proper measure of damages, in such a case, was the actual loss sustained by the purchaser by acting upon the misrepresentations of the vendor in respect of the two mining locations in question without regard to the results or values yielded by the other locations purchased at the same time and as to which no false representations had been made. *Peek* v. *Derry*, 37 Ch. D. 541, followed. Appeal allowed with costs.

*Chrysler*, K.C., for appellants. *Aylesworth*, K.C., and *Ridley*, for respondents.

---

Yukon.] LE SYNDICAT LYONNAIS *v.* MCGRADE. [May 2.

*Constitutional law—Imperial Acts in force in Yukon Territory—Fraud—Lis pendens—Land Titles Act, 1894—57 & 58 Vict. c. 26, s. 126 (D.)—61 Vict. c. 32, s. 14 (D.)—Pleading—Rules of Court—Yukon ordinances, 1902, c. 17—Rules 113, 115, 117—Estoppel.*

The provisions of the Imperial Act, 2 & 3 Vict. c. 11, in respect to the registration of notices of lis pendens and for the protection of bona fide purchasers pendente lite, are of a purely local character and do not extend in their application to the Yukon Territory by the introduction of the English law generally as it existed July 15, 1870, under The North-West Territories Act, R.S.C. c. 50, s. 11.

Under the provisions of The Land Titles Act, 1894, s. 126, a bona fide purchaser from the registered owner of land subject to the operation of that statute is not bound nor affected by notice of lis pendens which has been improperly filed and noted upon the folio of the register containing the certificate of title as an incumbrance or charge upon the land. The exception as to fraud referred to in the 126th section of the Act means actual fraudulent transactions in which the purchaser has participated and does not include constructive or equitable frauds. *The Assets Co.* v. *Mere Roihi*, 21 Times L.R. 311, referred to and approved.

In an action to set aside a conveyance as made in fraud of creditors the defendant desiring to meet the action by setting up that there was no debt due and, consequently, that no such fraud could exist, must allege these objections in his pleadings. In the present case the defendant, having failed to plead such defence, was allowed to amend on terms, the Chief Justice dissenting. Appeal dismissed with costs.

*Chrysler*, K.C., for appellants. *Ewart*, K.C., for respondents.

---

Que.] CARRIER *v.* SIRIOR. [May 15.

*Appeal—Jurisdiction—Matter in controversy—Future rights—Hypothec for rent charges—R.S.C. c. 135, s. 29.*

In an action for the price of real estate sold with warranty, a plea alleging troubles and fear of eviction under a prior hypothec to secure rent charges on the land does not raise questions affecting the title nor involving future rights so far as to give the Supreme Court of Canada jurisdiction to entertain an appeal. *Bank of Commerce* v. *Le Curé, etc.*, 12 S.C.R. 25; *Wineberg* v. *Hampson*, 19 S.C.R. 369; *Jermyn* v. *Tew*, 28 S.C.R. 497; *Waters* v. *Manigault*, 30 S.C.R. 304; *Frechette* v. *Simoneau*, 31 S.C.R. 13; *Toussignant* v. *County of Nicolet*, 32 S.C.R. 353; and *Canadian Mutual Loan Co.* v. *Lee*, 34 S.C.R. 224, followed. *L'Association Pharmaceutique* v. *Livernois*, 30 Can. S.C.R. 400, distinguished. Appeal quashed with costs.

*Stuart*, K.C., for the motion. *T. Chase Casgrain*, K.C., contra.

---

Que.] ROULEAU *v.* POULIOT. [May 29.

*Construction of statute — Toll-bridge — Franchise — Exclusive limits—Measurement—Encroachment.*

58 Geo. III. c. 20 (L.C.) authorized the erection of a toll-bridge across the River Etchemin, in the parish of Ste. Claire, "opposite the road leading to Ste. Thérèse, or as near thereto as may be, in the County of Dorchester," and by s. 6 it was provided that no other bridge should be erected or any ferry used "for hire across the said River Etchemin, within half a league above the said bridge and below the said bridge."

*Held*, Nesbitt and Idington, JJ., dissenting, that the statute should be construed as intending that the privileges defined

should be measured up-stream and down-stream from the site of the bridge as constructed.

Per Nesbitt and Idington, JJ., that there was not any expression in the statute shewing a contrary intention and, consequently, that the distance should be measured from a straight line on the horizontal plane; but,

Per Idington, J.—In this case as the location of the bridge was to be "opposite the road leading to Ste. Thérèse," and there was no proof that the new bridge complained of was within half a league of that road, the plaintiff's action should be maintained. Appeal dismissed with costs.

*Belleau*, K.C., for applicant. *L. P. Pelletier*, K.C., for respondent.

---

Que.] MONTREAL STREET RY. CO. v. BOURDEAU. [June 13.

*Nuisance—Machinery—Continuing nuisance—Permanent injury—Damages—Prescription.*

Where injuries caused by the operation of machinery have resulted from the unskilful or negligent exercise of powers conferred by public authority and the nuisance thereby created gives rise to a continuous series of torts, the action accruing in consequence falls within the provisions of art. 2261 C.C. and is prescribed by the lapse of two years from the date of the occurrence of each successive tort. *Wordsworth* v. *Harley*, 1 B. & Ad. 391; *Lord Oakley* v. *Kensington Canal Co.*, 5 B. & Ad. 138; and *Whitehouse* v. *Fellowes*, 10 C.B.N.S. 765, referred to.

In the present case the permanent character of the damages so caused could not be assumed from the manner in which the works had been constructed and, as the nuisance might, at any time, be abated by the improvement of the system of operation or the discontinuance of the negligent acts complained of, prospective damages ought not to be allowed, nor could the assessment in a lump sum of damages past, present and future, in order to prevent successive litigation, be justified upon grounds of equity or public interest. *Fritz* v. *Hobson*, 15 Ch. D. 452, referred to. *Gareau* v. *Montreal Street Ry. Co.*, 31 S.C.R. 463, distinguished. Appeal allowed with costs.

*Campbell*, K.C., and *Hague*, for appellants. *Mignault*, K.C., and *Lamothe*, K.C., for respondents.

Board of Railway Commissioners.] [June 13.

MONTREAL STREET RY. CO. *v.* MONTREAL TERMINAL RY. CO.

*Board of Railway Commissioners—Jurisdiction—Railway Act, 1903, ss. 23, 184—Use of highway—Consent of municipality —By-law.*

In the case of a street railway, or of any railway to be operated as such upon the highways of any city or incorporated town, the consent of the municipal authority required by s. 184 of the Railway Act, 1903, must be by a valid by-law approved and sanctioned in the manner provided by the provincial municipal law, and in the absence of evidence of such consent having been so obtained the Board of Railway Commissioners for Canada have no jurisdiction to enforce an order in respect to the construction and operation of any such railway. Appeal allowed and order of Board set aside.

*Campbell*, K.C., for appellants. *Dandurand*, K.C., and *Belcourt*, K.C., for respondents. *A. G. Blair, jr.*, for the Board.

---

# Province of Manitoba.

## KING'S BENCH.

Richards, J.] PHELAN *v.* FRANKLIN. [July 25.

*Mechanics' lien—Personal remedy against owner.*

Defendant Shinbane employed defendant Franklin to execute certain repairs to a house for a sum payable on completion. Franklin did not complete the work but Shinbane voluntarily paid him $55 on account.

The plaintiff was a workman under Franklin, and his unpaid wages amounted to $25.50.

*Held*, 1, following *Carroll* v. *McVicar*, that, under R.S.M. 1902, c. 110, ss. 9, 12, the plaintiff was entitled to a lien on the building for his claim to the extent of the twenty per cent. of the payments made that the owner should have held back from Franklin.

2. Having brought his action under the above Act, the plaintiff could not in this action avail himself of the personal remedy given by R.S.M. 1902, c. 14, s. 4, against the proprietor for the whole of his claim in cases where pay list is not kept and the proprietor neglects to see that the workmen are paid.

3. The word "claim" in the second paragraph of s. 4 of the first-named Act, providing that no lien shall exist under the Act for any claim under twenty dollars, means the amount actually due to the contractor, sub-contractor or workman, under his contract or employment, and not the amount to which his right or remedy against the land may on enquiry be found to be limited.

*Crichton,* for plaintiff. *Machray,* for defendant Shinbane.

---

Richards, J.] CROSS *v.* TOWN OF GLADSTONE. [July 29.

*Liquor License Act—Local option by-law—Sufficiency of notice of by-law—Costs.*

Application to quash a local option by-law of the town of Gladstone. Section 66 of the Liquor License Act, R.S.M. 1902, c. 101, provides that, after the first and second readings of a by-law of a municipality prohibiting the issue of licenses and before the third reading and passing thereof, the council shall publish . . . a notice stating, among other things, that the proposed by-law, or a true copy thereof, can be seen on file until the day of taking the vote at the office of the clerk of the municipality and that further consideration of the proposed by-law, after taking the said vote, is fixed for the time and place appointed therefor by the council, naming such time and place, etc., etc. The notice published in this case omitted to state that the by-law or a true copy of it could be seen at the office of the clerk and made no reference at all to that point; it did however give the necessary information as to the further consideration of the by-law on May 1, 1905. The by-law was carried by the vote of the electors; but, an application for a recount of the votes having been made, the council, in obedience to s. 73 of the Act, took no action on the by-law at their meeting on the first of May, and did not formally adjourn the further consideration of the by-law to any named day. No other notice of further consideration was ever given and, on June 5, 1905, after the disposal of the application for a recount, the council gave the by-law its third reading and passed it.

*Held,* that the by-law was bad and should be quashed for the defect in the published notice and also because no notice was given of the time and place when the by-law was finally passed.

*Re Mace and Frontenac,* 42 U.C.R. 85, and *Hall* v. *South Norfolk,* 8 M.R. 430, followed.

As to costs, the judge felt bound by the language of s. 427 of The Municipal Act, R.S.M. 1902, c. 116, to award them according to the result of the application, and, as that result was the quashing of the whole by-law for illegality, he could not withhold costs from the applicant.

*Whitla* and *Potts*, for applicant. *Mathers*, for Town of Gladstone.

---

## Province of British Columbia.

### SUPREME COURT.

Irving, J.] [Aug. 8.

WEST KOOTENAY POWER CO. *v.* CITY OF NELSON.

*Water Clauses Consolidation Act, 1897, R.S. B.C. 1897, c. 190 and c. 77. s. 2, B.C. Stats. 1899 and c. 44, 1900—Grants of water for power purposes to municipality and power company—Order in Council—Conflict of rights—Damage by municipality's undertakings—Onus of proof—Injunction—Costs.*

Plaintiffs were a power company with certain rights on the Kootenay river. Defendants were a municipality, and were constructing above the plaintiffs' canal, an electric plant to supply electricity to the City of Nelson. The plan of their operations included the excavation of a quantity of rock. So much of this rock as they did not require for building purposes, they proposed to dump into a pool immediately below, while a portion of the rock would, of necessity, through blasting, be thrown into the river both above and below the falls. This undertaking was authorized by an Order in Council passed c. 44, of the Water Clauses Consolidation Act, 1900.

The plaintiffs alleged that the dumping of the rock would be injurious to them by damming up the river and reducing their head of water, that at high water a large quantity of rock will be carried down to the plant at the lower falls, thereby filling up the canal, injuring the machinery and lessening the supply of water there, and that their power site at the lower falls would be damaged by the deposit of rock and other material brought down at high water. The evidence established that the defendants were throwing the rock and other material excavated on the bank of the river in such a way that the toe of the embank-

ment would be under high water, and they intended unless restrained, to deposit the bulk of the waste in the river bed in the pool just under the upper falls.

*Held*, following *Bickett* v. *Morris* (1886), L.R. 1 H.L. (Sc.) 47, that if there is reasonable prospect that the undertaking of the defendant corporation will produce any damage to the lower riparian owner, then there is a right of action, although no actual injury is shewn to have resulted from it. Injunction continued, and plaintiffs to recover costs of action.

*Macneill*, K.C., for plaintiffs. *Bodwell*, K.C., and *P. E. Wilson*, for defendant.

## Province of Nova Scotia.

### SUPREME COURT.

Full Court.] MUMFORD *v.* ACADIA POWDER CO. [March 4.

*Judgment in former suit—Bar to subsequent suit—Setting aside and re-hearing—Evidence.*

To an action for work done, labour performed, etc., defendant pleaded a previous action by plaintiff in the County Court for the same cause of action, in which, the cause coming on for trial and no one appearing for plaintiff, it was ordered that he take nothing by his action and that the same be dismissed with costs.

*Held*, that the judgment entered was a complete defence to the action and that the judge of the County Court was in error in treating the plea as a preliminary objection merely and in going on and hearing evidence on the merits.

*Semble*, that while the judgment in the first action until set aside operated as an estoppel the proper course for plaintiff to have adopted, as pointed out in *Vint* v. *Hudspeth*, 29 Ch. D. 322, was to have applied to the judge who heard the cause to set aside the judgment and for a re-hearing.

*Held*, that the writ of summons in the previous action, being specially indorsed, was proper evidence for the Court that the previous judgment embraced the same claim as that now sued for.

*Kenny*, for appellant. *J. J. Power*, for respondent.

Full Court.] IN RE MACKINLAY. [Sept. 5

*Will—Construction—Residuary bequest.*

Testator by his last will after providing for his wife during her lifetime and setting apart a sum of money to be invested

after the wife's death for his two daughters left his business and the residue of his estate to his two sons. In case of the death of either or both of the daughters without issue it was provided that her or their shares of the estate should become part of the residue thereof and be divided equally among the survivors and the issue of any child who should then be deceased. One of the daughters having died without leaving issue,

*Held*, that the use of the words "survivors" and "child" in the clause in question excluded the idea that the share of the deceased daughter was to go to the two sons as part of the residue of the estate, and indicated an intention on the part of the testator that this particular part of the residue was to be divided equally among the surviving children of the testator and the issue of any deceased child, and that it was only subject to this disposition that all the rest and residue of the estate was to go to the two sons exclusively.

*W. B. A. Ritchie*, K.C. and *T. R. Robertson*, for appellants. *J. A. McDonald*, for respondents.

---

## *BENCH AND BAR.*

Thomas G. Mathers, of Winnipeg, barrister at law, has been appointed puisnè judge of the Court of King's Bench for the Province of Manitoba, in the room and stead of Hon. John Farquhar Bain, deceased.

William H. P. Clements, of Grand Forks, B.C., barrister at law, has been appointed judge of the County Court of Yale, of the County Court of Kootenay, British Columbia, in the place of the late Judge Sidney.

---

The Middlesex Law Association on the 24th ult. passed a resolution expressing their profound regret at the death of His Honour William Elliott, late judge of the County Court of Middlesex. The resolution says:—

"We who have been associated with him so intimately for so many years while he occupied the bench of this county, look back with pleasure on a long, useful and honourable life which has left its mark in the administration of justice in this section of our Province, and has doubtless borne fruit for good. The late judge was a most accomplished man, besides being a good lawyer, he was gifted with literary talent of a high order, and was a most delightful conversationalist. He was always kind, courteous and patient, not only with older members of the bar, but the juniors received the same kind consideration at his hands, and we all revere and respect his memory."