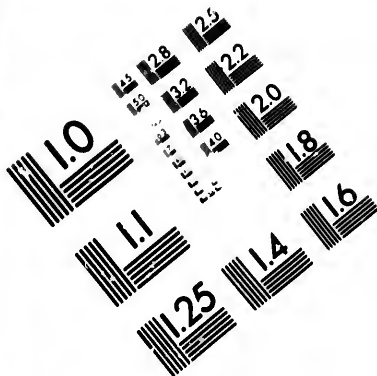
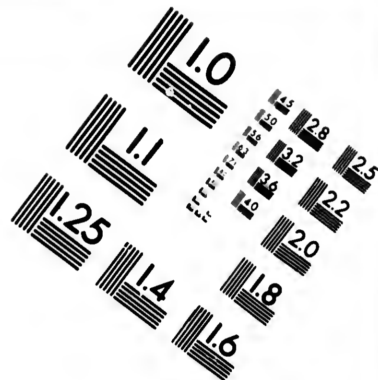

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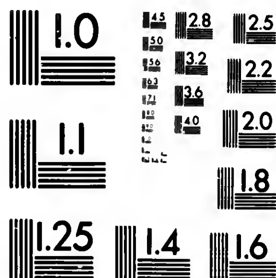
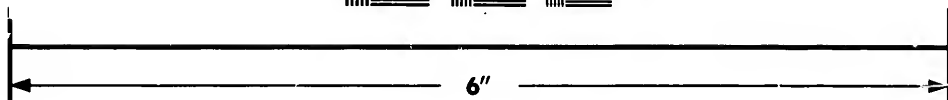

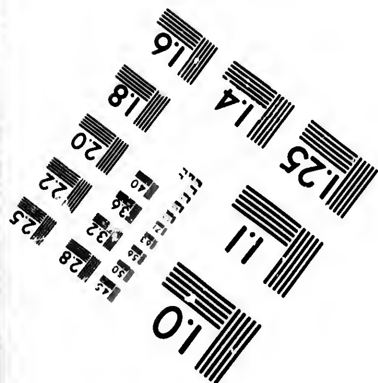
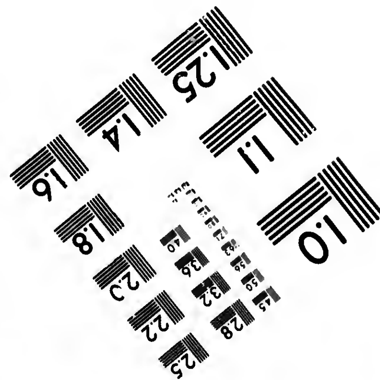

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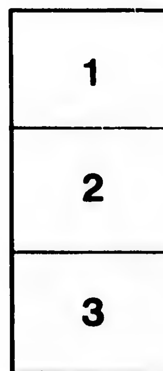

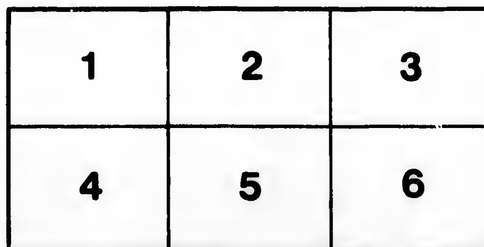

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Leasehold Arbitrations:

HOW THE SYSTEM OF RENEWAL AWARDS RESULTS IN PRACTICAL CONFISCATION.

BY

PHILLIPS THOMPSON.

"Facts are Stubborn Things."
—OLD ADAGE

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1896.

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"LEASEHOLD ARBITRATIONS."

Opinions of the Press.

[TORONTO GLOBE, 22ND APRIL, 1896.]

THE LEASEHOLD PROBLEM.

Mr. Phillips Thompson, in a terse and well-reasoned argument, has brought before the public again the injustice that so often attends upon leasehold arbitrations in this city. The author uses no honeyed words in describing the existing condition of affairs. He points out how formidable the power of the ground landlord has become in the business quarter of Toronto, and how, especially by two or three estates which control large tracts of land, existing statutes and forms of contract " have been wrested from their original purport and have become the instruments of plunder and confiscation." In opening it is pointed out that during the boom land was valued not according to what it would produce if properly used for permanent business, but for what it would sell for to some third party to sell again. "A poker-chip value," Mr. Thompson calls this, and quite independent of the earning capacity. This fictitious value was made the basis of renewals of ground leases during and after the boom. The conservative principle, that land is worth what it will produce in rent, properly used, was laid aside, and the gambling standard was applied by valuators and arbitrators drawn from the ranks of land-boomers, and naturally in favor of keeping up the fictitious values.

Mr. Thompson gives a sketch of what actually occurred in many an arbitration, which resulted in the ground landlord securing an exorbitant rent and the lessee being stripped of his buildings and left penniless, when he speaks thus of "expert" testimony:—

" Arbitrators are under obligation to decide upon the evidence presented to them, and any qualms of conscience were apt to be speedily set at rest by the appearance of a host of 'expert' witnesses summoned on behalf of the landlord. In judicial affairs professional expert testimony has become a by-word and a mockery. It is notoriously the most contradictory, unreliable and generally suspicious class of evidence with which Courts have to deal. It is beyond the reach of perjury penalties, as an expert merely swears to his professional opinion, and, however absurd or erroneous it

may be, there is no possible means of proving that it is not the expert's conviction. The coincidence that the opinion of the expert is invariably, under all circumstances, favorable to the party who calls him and pays his fee has been too striking to escape attention. In justice to a class against whom severe things have been said, it is but fair to remember that there is no ground to charge them with the vice of ingratitude. Drawn from the ranks of real estate boomsters, the lease arbitration expert was instinctively and by habits of thought, as well as by immediate financial obligation, enlisted on the side of landlordism and high valuations."

A number of examples of the wrongs inflicted upon lessees are given, the more notable having reference to a number of the Baldwin leaseholds on King Street west. In almost every case where leases have fallen in, the renewal rental has been fixed at a rate that leaves nothing to the lessee for his improvements, and it is shown that the practice is not infrequent of abandoning the buildings rather than pay the ground rent fixed.

We entirely agree in the conclusion arrived at. It is monstrous that citizens who lease a plot of land, erect buildings upon it, and oftentimes spend twenty years of their lives in building up a profitable business upon the land, should be left entirely at the mercy of the ground landlord, who, although he does nothing to increase the value of the property, can claim at the end of the lease all the product of the lessee's exertions. There are other forms of slavery than the buying and selling of human flesh, and the slavery of the leaseholder is not the least objectionable. The law of contract is held entirely too sacred in cases where justice is on one side and the law on the other. The Legislature could not do a better service to Toronto than—after full inquiry into the evils of the leasehold system—could be done by the framing of a law which shall divide the earnings of land and buildings equitably between the landlord and the lessee. The evil is a growing one, and in another generation, if the power of the ground landlord goes unchecked, we shall have our counterparts of the Westminsters and Bedfords of London and the Astors of New York.

[TORONTO WORLD, 21ST APRIL, 1896.]

LEASEHOLD ARBITRATIONS.

The great surprise is that people have so long endured the injustice of the present system. It would be amusing if it were not so contemptible and dishonest to see the calm and delibrate way certain families who never did an honest day's work in their lives appropriate the earnings of others. I have a case in mind where a large and indolent family have lived like parasites on the earnings of their lessees in a way that would discount the worst Irish landlord that ever was shot.

At renewals they not only want all the revenue derived from the land and buildings, but demand that their lessees should throw in their other

earnings as well f(" '.e honor of being lessees of this or that family, a church or a hospital, it matters little which, it all works the same way.

[TORONTO WORLD, 26TH MAY, 1896.]

ARBITRATION VALUES.

Editor World: You recently had an article commenting on Phillips Thompson's pamphlet on leasehold awards, which are strongly condemned. Two recent occurrences justify the contempt which is felt for expert evidence, as given by hired boomsters. Here they are briefly:

Sir D. Macpherson received $22,418 on expert evidence for a piece of property he had offered the city for $4,000. The city also paid $1,920 costs.

Expert evidence awarded $45 per foot as ground rent on the north side of King Street. The adjoining lot, same size, owned by the same parties that exact $45 per foot, has just been leased for the same business at $4 per foot. Having no lessee to victimize, they were obliged to accept the market value. The same expert whose evidence sustained the $45 per foot award was unable to get more than $4 per foot for the adjoining lot including building.

This expert generally backs up his outrageous valuation with a statement that he is at that moment negotiating a sale at these prices. These negotiations are never heard of again and are spoken of as "The Mythical Case."

The only test of value is the rental, not the extravagant statements of unscrupulous witnesses.

A VICTIM OF THE ARBITRATION SWINDLE.

LEASEHOLD AWARDS.

By Phillips Thompson.

A system of spoliation. The notorious Baldwin awards. The Riddle award. Rapacity of the Hospital trustees. Knox Church ignores the eighth commandment in dealing with tenants.

Copies of the phamphlet for sale at

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LEASEHOLD ARBITRATIONS.

It is one of the fundamental maxims of English jurisprudence that "There is no wrong without a remedy." This adage, like most others, must be taken with considerable allowance. In the inevitable imperfection of human institutions, it is impossible by any code, however wisely framed or impartially administered, to provide for ideal justice or anticipate the abuses and complications which arise in the course of social development. But, making all reasonable deductions on this ground, the purport of the maxim remains that, in any case where changing social conditions or unforeseen developments give rise to any widespread and general abuse, causing loss and hardship in any considerable degree, the existence of such wrong justifies such an interpretation of the law as will meet the exigencies of the case.

Of late there has arisen in this Province—and more especially in the City of Toronto—a formidable abuse, which has been productive of much oppression and spoliation under the forms of law, which calls loudly for redress. Existing statutes and forms of contract, owing to circumstances entirely beyond human prevision when the foundation of the evil was laid, have been wrested from their original purport and become the instruments of plunder and confiscation. Citizens who have, by years of honest industry and legitimate business enterprise, acquired a modest competency or a smaller amount of means, suddenly find themselves stripped of the results of a lifetime of toil and care to enrich a class of wealthy idlers and parasites—the mere "caterpillars upon the leaf"—who do nothing in return for the wealth they are permitted to appropriate. The enormous and wholly unjustifiable increase in ground rents for centrally-situated property is the proximate cause of this injustice.

It is many years since the leasehold system—very general in Great Britain—was introduced here in connection with the class of real estate which, by reason of its situation, was considered as likely continuously to increase in value with the growth of the City. Most of

the leases were drawn for a period of twenty-one years, with stipulations for a renewal at the end of that term upon a rental to be settled by arbitration upon the usual principle, viz.: each of the parties to appoint an arbitrator and the two to nominate a third, the decision of any two to be final. Where the land was either vacant or occupied by old buildings, the lessee frequently covenanted to erect new buildings of a specified value. So far as the terms of the document went, the leases were apparently not unreasonable. It is in the practical working out of the arbitration clauses that the difficulty arises. A brief survey of the situation will show how the system operates to the loss of leaseholders and the enrichment of landlords by legalized fraud.

During the boom, the values—or rather the prices—of real estate increased enormously. Centrally-situated property went up by leaps and bounds; the spirit of speculation seized upon the whole community, and land-dealing became practically land-gambling. The only safe, business-like estimate of the value of any given piece of land, either in city or country, is what it will yield for the most productive use to which it can be permanently put. When this principle is abandoned and land passes from hand to hand, not out of consideration of what it will produce as interest on invested capital but of what it will presumably sell for to some third party to sell again, the line between legitimate business and land-gambling has been passed. When the problematical future is discounted, the so-called value at which it figures away beyond the capitalization of any present or immediately anticipated rental, is a fictitious value, no more representative of its commercial value than is the $10 or $20 represented by the gambler's counter of the intrinsic worth of the article. Thus, land in Toronto in the frenzy of the gambling craze came to possess a poker-chip value, so to speak, quite independent of its earning capacity. Had the City continued to increase in population at the rate of the 1880-90 decade, the one might, in the near future, have overtaken the other. But with the subsidence of the boom came stagnation, arrested development and a gradual lowering of inflated values, more especially in the outer districts.

Now note the effect of these conditions upon the renewals of leases which have expired during and since the boom. Landlords, after the fashion of their kind, naturally strove to fix the renewal rents on the basis of the prevailing high prices, regardless of the only true test—the productive capacity of the property. If the leaseholders objected, they had, of course, their remedy in arbitration, and to arbitration they went, still to be confronted with the factitious poker-chip value.

For who were the arbitrators? In the majority of cases, real estate dealers and experts, the products of the boom, interested in the continuance of the game, accustomed by practice to regard the speculative as the real value and to discount the future. It was suing the devil and trying the case in hell. Landlords were not slow to find out that real estate dealers were instinctively and by interest upon their side, anxious to hold up prices and apply the gambling standard to the problem of value in place of the business test of actual productiveness. The landlord's arbitrator was certain to be a real estate optimist, whose views were carefully ascertained before his appointment; and even if the lessee made a different choice, the casting vote was usually held by an "expert" and given for a high valuation. Present earnings cut little figure in the decision. The conservative principle that land is worth what it will produce in rent, was swept aside for the newer speculative rule that land is worth what it will sell for to somebody who hopes to sell it again.

In many cases, however, the arbitrators, or a majority of them, might have been disposed to give the leaseholder a measure of justice. There are honorable and intelligent men among real estate dealers, who, desirous, as they naturally may be, of keeping up prices, can yet realize the difference between poker-chip and intrinsic values and the injustice of saddling a tenant for twenty-one years with a rental based on the problematical prosperity of the next generation. But arbitrators are under obligation to decide upon the evidence presented to them, and any qualms of conscience were apt to be speedily set at rest by the appearance of a host of "expert" witnesses, summoned on behalf of the landlord. In judicial affairs, professional expert testimony has become a byword and a mockery. It is notoriously the most contradictory, unreliable and generally suspicious class of evidence with which courts have to deal. It is beyond the reach of perjury penalties, as an expert merely swears to his professional opinion, and however absurd or erroneous it may be, there is no possible means of proving that it is not the expert's conviction. The coincidence that the opinion of the expert is invariably, under all circumstances, favorable to the party who calls him and pays his fee has been too striking to escape attention. In justice to a class against whom severe things have been said, it is but fair to remember that there is no ground to charge them with the vice of ingratitude. Drawn from the ranks of real estate boomsters, the lease arbitration expert was instinctively and by habits of thought, as well as by immediate financial obligation, enlisted on the side of landlordism and high valuations. The most conscientious and independent-minded of

arbitrators, confronted by a long array of real estate experts competent, by their knowledge of the market, to swear to the readiness of financial plungers to bet on Toronto's future and Chicago prices in the sweet bye-and-bye, had no choice but reluctantly to accept valuations which they knew to be extortionate. The unhappy leaseholder found himself in the position of either having to assume a higher rental than the property could possibly produce or sacrifice his improvements, and in either case saddled with the expense of a costly arbitration.

The boom has long since departed, but among the unpleasant and oppressive legacies it has left us is the utterly fallacious and misleading practice of estimating property values by the standard of the gamester in place of the legitimate test of actual yield, and the race of professional real estate experts trained in its delusive school and carrying its false ideals and traditions into the business dealings of the present.

The general public, though they may have a vague idea of the extortion practised by the receivers of ground rents, have no adequate conception of the systematic injustice and hardship entailed upon lessees by the system of renewals under arbitration. Abstract denunciations of a class are so easy and frequent, that they hardly excite more than a passing comment. A few specific instances out of a large number that could be given, which can easily be verified, will better illustrate the iniquitous nature of the system and the crying need of a reform than volumes of argument.

A particularly flagrant and disgraceful case, as illustrating the greed and rapacity of professedly "religious" men, transpired in connection with property leased from the trustees of Knox Presbyterian Church, comprising seventy-two feet on Richmond Street West, the lessee being Dr. Campbell, V.S. The original rental, at the rate of two dollars per foot, amounted to $144 per year. Dr. Campbell spent $4,000 in the erection of a building on the property, and about two years ago, when the term expired, an arbitration to determine the rent was entered upon, with the usual result. The rent was fixed at the utterly preposterous figure of $895, which with taxes, $377, made a total annual charge upon the property of $1,272. Dr. Campbell's arbitrator protested in vain against the unjust decision, and refused to sign the award; but his opposition proved of no avail. The finding of the two real estate experts, who formed the majority, was legally sufficient under the terms of the lease. Possibly some innocent people might have supposed that as the landlord in this case was a religious corporation, and the object to which the rents of the

property are specially dedicated is the worship of God and the advancement of His kingdom on earth as represented by the Presbyterian Church, some feeling, if not of scruple at least of shame or consistency, would have prevented them from taking an unjust advantage to despoil the tenant. If Dr. Campbell entertained any such delusive expectation, he was very speedily undeceived. No Shylock could have insisted upon his pound of flesh, according to the bond, with more tenacity and more utter disregard of every principle of justice and fair play than these officials of a Christian church. They stood out for the uttermost farthing, and the tenant was compelled to accept the outrageous decision. The burden proved too heavy for him. He soon fell behind in his rent, when the trustees at once exercised the power conferred upon them by the lease and seized the building, which the tenant had erected at a cost of $4,000, without giving him one penny of compensation. Stripped of his hardly-accumulated property, Dr. Campbell was permitted to occupy as monthly tenant, at $25 per month or $300 a year, the building, the mere ground rent of which had been fixed by the award at three times the sum. Even this scant consideration was not long continued, for another tenant having offered a trifle more than he was paying, he was given summary notice to quit, without even the option of remaining on the terms accepted from the other. Can it be wondered at that men of the world sneer at religious professions, and astute merchants look with suspicion on the customer whose speech savors of the sanctuary, when church officials, chosen presumably for their piety and high moral standing, can thus in the interests of their church commit such actions? No doubt the Decalogue is sometimes read in Knox Church, and one wonders whether the pastor and leading officials of that highly respectable and orthodox body are so case-hardened in hypocrisy—so enswathed in a smug and complacent self-righteousness, as to feel no qualms of conscience at the words—

"THOU SHALT NOT STEAL."

Possibly they quiet any such faint self-accusations with the reflection that it was done for the church, and that no mere moral considerations should stand in the way when it is a question of promoting the cause of religion. Their ethical standard appears to be much on a par with that of the brigands of Italy, many of whom are also very highly religious after their fashion, and never undertake a plundering expedition without asking the aid and protection of the saints and promising them a liberal share of their booty in case of success.

An old and respected citizen of Toronto leased in 1872 a lot comprising thirty-six feet on the South side of King Street, for the usual term of

twenty-one years, from Rev. Edmund Baldwin, Canon of St. James' Cathedral. The rental was fixed at $1,089, and the lessee covenanted to erect new buildings at a value of not less than $8,000. The lease contained the usual covenant for renewal for a further term, at a rent to be fixed by the award of three arbitrators, chosen in the customary manner, in case the parties could not otherwise agree as to the amount. On the expiration of the lease in 1893, an arbitration was undertaken, the result of which stands conspicuous in the list of scandalous leasehold awards for its violation of every principle of justice and commonsense. It has probably—and with reason—excited more adverse comment and done more to direct attention to the wrong and absurdity of the system than any other case of the kind. The arbitrator appointed on behalf of Mrs. Baldwin, who then held the title to the freehold under the will of her deceased husband, was Hon. Samuel Casey Wood, Manager of the Freehold Loan and Savings Company; the lessee was represented by Mr. Robert Jaffray, and the third arbitrator was Mr. T. D. Delamere, Q.C.

As a guide for the action of the arbitrators, the arbitration clause of the lease expressly stipulated that the rent was to be fixed "according to the *then* value of the premises, apart from the buildings thereon erected." Such a provision could only have one meaning. Its clear and manifest intention was that the earning power of the land as a building site at the time of the arbitration—*i.e.*, a due proportion of what the land with buildings suitable to the location would actually yield in rent—should be taken as the standard. So far as the suitability of the buildings was concerned, the lessor had himself laid down the criterion in fixing the value of the buildings which the tenant was bound to erect at $8,000.

Under these circumstances, the duty of the arbitrators was simply to enquire as to the actual receipts of the property—"the then value of the premises"—and to fairly and justly apportion the amount between the land and buildings. What they actually did, however, was to utterly ignore the plain and explicit words of the arbitration clause of the lease, and to base their decision upon the biased statements of a long array of real estate boomsters and professional experts, based upon the speculative values at which property in the neighborhood had changed hands. Testimony in abundance was produced to show the earning value of the property; but, notwithstanding that many who gave such evidence were themselves extensive land-owners, whose interests were all in favor of maintaining high prices, their opinions carried no weight with the arbitrators. In fact, the matter was not considered from the point of view of the earning capacity of the property at all. The whole gist of the claim of the landlord, and the whole force of the expert testimony advanced in favor of an increase, were based upon an assumed value, having no appre-

ciable relation either to present earnings or the possible earnings of the future—a value as purely fictitious as that of the shares in the historic South Sea Bubble, or the non-dividend-paying stocks of the Kaffir craze.

The net average amount received by the lessee for rent per year during the last twelve years of the lease, without making any allowance for depreciation of building, was $1,638. The present total receipts of the property are $2,440 per annum. The award brought in by the majority of the arbitrators fixed the rent for the next twenty-one years at $2,592 and taxes. Had the tenant chosen to continue the lease, his annual statement of profit and loss, supposing the property to have remained occupied without intermission at an undiminished rental—a very unlikely contingency in these days of falling rents and vacant stores—would have stood about as follows:

Ground Rent	$2592 00
Taxes	500 00
Insurance	150 00
Repairs	200 00
Total Expenses	3442 00
Receipts	2440 00
Net loss to Lessee	$1002 00

Mr. Jaffray, throughout the arbitration, took the ground that the express language of the renewal clause constituted the earning value of the property in 1893 the only test, and entirely precluded the consideration of prospective or speculative value He refused to sign the award. Hon. S. C. Wood, Manager of the Freehold Loan and Savings Company—an institution, by the way, considerably interested in the maintenance of high values—and T. D. Delamere, Q.C., are responsible for a decision which practically condemned the unfortunate lessee to pay out of his own pocket one thousand dollars annually to the landlord above and beyond all present or probable earnings of the property. He has, in consequence, thrown up a lease which under such conditions was a good deal worse than valueless, and lost the property upon which he depended for an income in his declining years.

The case of Lots 2, 3 and 4 of the Knox Presbyterian Church property, on the North side of Richmond Street West, is similar in all essentials to that of Dr. Campbell previously detailed. These lots were originally leased at $2.50 per foot and when the leases were renewed about 1890, the rents were increased by the arbitrators to the utterly preposterous figure of $12.50 per foot. This, as in the Campbell case, practically amounted to confiscation of the tenant's improvements. There being

no possibility of carrying the property under such a burden except at an annual loss, the original holders dropped their interests in the leases and forfeited their buildings.

The lessors, with the property thrown upon their hands, found it impossible to secure new tenants insane enough to undertake to assume the load. Two of the lots were finally leased at considerably reduced rentals, while Lot No. 2 is, or was at a very recent date, still in the market.

Among numerous illustrations of the iniquitous nature of the system furnished by the Baldwin property on King Street West, may be mentioned the store occupied by Joseph McCausland. The ground rent was increased some two years ago from $5 to $37.50 per foot. The estate claimed $40 per foot, and the tenant, deterred by the enormous expense attendant upon an arbitration—which, in all probability, would have resulted adversely—effected a compromise, which secured him this slight abatement of the extortionate demand. A store a few doors West, with a frontage of about fifty feet, is occupied by W. J. McGuire, plumber. His ground rent was increased from $4 to $45 per foot, at which rate he paid rent for two years, when he sought legal redress. A greatly-involved and costly struggle ensued, which was terminated by his agreement to pay at the rate of $35 per foot for a term of six years. Mr. McGuire, in purchasing the leasehold under the old rental, paid for the buildings erected by the former tenant of the property. In this locality, a large proportion of the stores are now vacant and likely to remain so. It is sufficiently far from the centre within which retail business is being more and more concentrated by improved methods of communication, to be adversely affected by the great change in business methods which has developed during the last few years. It is not likely to be increased in value by any possible increase in the population of the City.

King Street West is being more and more abandoned to those businesses which do not require a central location or afford profits sufficient to bear the burden of heavy ground rents. In the light of the great change in the retail system, which is effacing so many of the smaller dealers and concentrating business in the great departmental stores, the monstrous and flagrant injustice of the principle accepted as an axiom of arbitration—that probable future increase of population must be taken as a factor in fixing rents—is more than ever apparent.

The Hospital trustees own a property on King Street West, comprising two shops, Nos. 157 and 159, with a total area of twenty-six feet frontage by two hundred and ten in depth. The rental, under a lease which expired in April, 1891, was $4.50 per foot frontage. On April 1st of that year, this was fixed at $18.75 for the ensuing twenty-one years, being an increase of over 416 per cent. over the old rate.

The Hospital trustees, when comparing this increase with some of the figures previously given, may either congratulate or commiserate themselves, as their disposition prompts, on their comparative moderation. They have *only* quadrupled the tribute levied on business and industry in place of multiplying it by eight or ten. The total ground rent was advanced from $117 to $487.50 per annum. Recently the value of the property has depreciated enormously from the causes before referred to, and it is worth little, if anything, more than it was twenty-five years ago, with no prospect of any future increase in value. A detailed statement of receipts and expenditures on the property was made up to June, 1895, which shows the following results:

REVENUE.

No. 157.—Tenant was paying $30 per month	$360 00
No. 159.—Vacant, formerly rented $15 per month	180 00
Rear portion of Lot, $7.50 per month	90 00
Total Receipts	$630 00

EXPENDITURES.

Ground Rent	$487 50	
Insurance	43 12	
Taxes	186 28	
Taxes on Rear Portion	12 20	$729 10
Deficit		$99 10

This allows nothing for interest upon cost of building, erected by the tenant at an outlay of $7,500, repairs, collection of rents, etc. Adding these to the deficit on current expenses, the total loss to the tenant was as follows:

Deficit as above	$ 99 10
Interest at 6 per cent. on cost of buildings	450 00
Repairs	75 00
Collection of Rents	31 50
Gross Deficit	$655 60

The Hospital trustees refused the unfortunate lessee all redress, and on his abandoning such a hopeless and unprofitable position, pushed their legal rights to the utmost and took possession of the $7,500 building without compensation. The law does not characterize this action as robbery, and the dictionary-makers do not seem to have invented any less emphatic word which appropriately describes it.

The enormous expense of arbitrations, swollen by the heavy fees payable to professional experts, has already been alluded to. This injustice is, in some cases, almost as crushing as the usual results of an arbitration in increasing rents. Under the award system, the lessor, even though the lease stipulates that the expense shall be divided between the parties, has every incentive to call a large number of professional experts, who, apart from the fact that their interests are all in favor of high values, have naturally the inevitable professional bias towards the side upon which they are retained. The more experts who are called in to pile up figures as to the value of the property in dispute, the easier it wil' be for the lessor's representative to insist upon a finding in accordance with the mass of accumulated testimony; and however much the lessee's arbitrator and the third man may be desirous of doing impartial justice, they often find themselves practically forced into assenting to an award which they know to be preposterous, simply because of the weight of one-sided—and practically purchased—evidence presented. The expert, moreover, has an additional interest in upholding values, as the more extravagant his figures are, the more he will be sought after in the same capacity in future arbitrations. His professional services will be in frequent requisition, not because of his impartiality and sound judgment, but precisely for opposite reasons. In short, the system has created an illegitimate profession—without any of the safeguards of preliminary training, legislative sanction or corporate or individual responsibility by which the other professions are surrounded—which presents to its followers every incentive to unscrupulousness and disregard of ordinary principles of right and justice.

Daniel M. Defoe is the lessee of the premises Nos. 99 to 111 Adelaide Street West, with a frontage of 131 feet, where he has erected extensive machinery and plant for the supply of power for manufacturing purposes, his investment in buildings, machinery, etc., being about $40,000. The former ground rent was $500, the lessors being the Baldwin Estate. In 1891, an award was entered upon, the arbitrators being H. L. Hime for Mr. Defoe, J. Herbert Mason, of the Canada Permanent Loan and Savings Co., for the Baldwin's, and J. J. Foy as third arbitrator. The arbitration was a tedious and costly one, and resulted disastrously for Mr. Defoe. The ground rent was raised from $500 to $2,400, a sum which absorbs the entire profits of the business and renders the heavy investments of the lessee practically valueless as a source of income to him. Now, as to the cost. The arbitrators' fees amounted to $452, one half of which—$226—was paid by Mr. Defoe, in addition to all the expenses of conducting his

own side of the case. Not satisfied with this, the rapacious landlords insisted that he should pay one-half of the bill of $1,500 incurred by them in experts' fees and other items in presenting their case to the arbitrators. This, as Mr. Defoe had settled his own bill of costs, he successfully resisted.

The figures give some idea of the ordinary expenses of arbitration proceedings. When it is in the power of exacting lessors to run up bills of costs in this fashion, it is no wonder that many tenants, as in several cases heretofore referred to, are ready to compromise upon an extravagantly high basis rather than enter upon the unequal contest. The great merit formerly claimed for arbitration over the procedure of the courts of law was that of comparative cheapness and simplicity; but, in view of the enormous costliness and complication of its modern development in connection with leasehold cases, an old-fashioned Chancery suit would appear to be an inexpensive luxury in comparison.

Henry Langley is the lessor of a lot on the North side of King Street West, near the corner of York Street, belonging to the Baldwin Estate. He sub-leased the property from the late J. D. Irwin, the first lessee, at a ground rent of $300, and erected upon it a first-class three-storey building, in every respect suitable to the locality, at a cost of $4,500. Three years ago, the sub-lease by which he held expired, and an award was entered upon to fix the renewal ground rent. The lessee's arbitrator was Robert Jaffray, the sub-lessor's Mr. Garland and the third arbitrator Mr. Gowanlock. The rental was fixed by the decision of the two latter at $625, with the result of completely wiping out Mr. Langley's investment. Though the increase is by no means so great as in some of the instances previously given, when the unprogressive character of the locality and the low rents obtainable are considered, few, if any, of the already-noted acts of spoliation were of a more outrageous character. The gross annual return of the building is about $900, which is the utmost that can be anticipated for many years, any fluctuation being likely to take the form of a decrease, as the neighborhood abounds in vacant buildings. Out of this have to be paid the renewal ground rent of $625; taxes, amounting to about $370; insurance, repairs and other expenses of maintenance, which annually leave a large deficit in place of any interest on Mr. Langley's investment. The case is a peculiarly flagrant one, as the person profiting by the increase occupied the position of a mere middleman, receiving the ground rent—or rack rent, as it would be termed in Ireland—deducting the landowner's share and putting the remainder in his own pocket, without trouble or

exertion of any kind. This property now stands at a very high rent, even as compared with neighboring leaseholds. The ground rent of a lot a few numbers West, on the opposite side of the street, has recently been reduced to $9 per foot. Mr. Langley pays at the rate of $25 per foot for a much shallower lot.

A very large number of other cases could be given, which would be a substantial repetition of the same story of wrong and injustice with varying details; but the following instance may well conclude the list:

A central property on Adelaide Street East, a short distance from Yonge Street, comprising a frontage of ninety feet, was leased for $1,850 ground rent. The lessee invested at least $50,000 in building, contracting for that purpose a loan of some $28,000. He fancied that the building afforded ample security for the sum, and that when it became necessary, under the terms of the mortgage, to renew the loan, he would have no trouble in doing so. The mortgage fell due; but, on applying to investors and loan corporations, he soon ascertained that the fact that the building was erected upon property held under a lease, the first term of which was drawing near its expiration, was, in their eyes, an insuperable objection. He could not obtain the required advance until a renewal of the lease had been secured, so four years ago—two years in advance of the termination of the lease —he arranged terms for its extension. Like many others, he was deterred from entering upon an arbitration by the numerous examples of the almost invariable result in placing the rent fully as high as any likely to be insisted upon in a compromise, and also by the prospect that the expense of its generally costly proceedings might easily amount to $3,000, which, under the stipulations of the lease, was to be borne entirely by the lessee. Negotiation was resorted to, and the ground rent fixed at $3,200, a sum which, with the interest, etc., entirely absorbed the income of the property. Subsequently, the landowner, Sir David Macpherson, on the circumstances being represented to him, realizing the impossibility of the tenant meeting the additional demand upon a heavily-encumbered property, consented to a reduction of the ground rent to $2,000 for a term of years, and the lessee can now realize some small return for his investment. This property, had the landlord invested his own money in it, would not, under present conditions, yield $1,200 per year ground rent. In fact, he possesses adjoining property which does not pay three per cent. upon the purchase money. Yet, under the lease, his tenant is called upon to pay five per cent. upon a boom valuation.

Apart altogether from the evil of purely speculative values and

extravagant estimates by interested parties, which is likely to cure itself in the near future, the principle often adopted as a basis for awards—that the landlord should be allowed five per cent. on the normal value of the land during the period dealt with, whether the revenue received from the premises will justify it or not—is clearly a wrong and misleading one. It considers only one of the two parties, where both ought to be considered. In fact, should a preference be given to either, surely the most consideration should be extended to the lessee, by whose capital, enterprise and judgment the land has alone been made productive, rather than to the mere receiver of the wealth created by the industry of others. As has been ably pointed out in the statement of the tenant's claim in one notable award, the same error (of considering only the interests of one of the parties) would be committed in the tenant's favor, if his interests in the property were valued and he were allowed an interest rate upon this value, together with his expenses, etc., and the balance—if any —of the annual yield of the land and buildings combined, given to the landlord. The document goes on to say:

"The co-relative rights of the landlord and tenant should both be regarded together, and the amount the tenant should pay, and the amount the landlord should receive from the tenant, should be considered together. The relation between landlord and tenant, where the tenant owns all the permanent improvements, in fixing such rents, is not that of mortgagor and mortgagee, so that the landlord should receive interest on the value of his lands, as was done in the Walsh case. The parties, in addition to being landlord and tenant, are co-owners of the land and buildings, the tenant being sole owner of the building and having a leasehold interest in the land; and the landlord being owner of the land, subject to the leasehold, and a case can readily be imagined where the tenant's buildings would exceed in value the landlord's ground. The tenant being in receipt of all the income from the united interests, the question is, what portion would he pay his co-owner, the landlord, for the use of his share of the interest? In justice between them, it should be a partition of the moneys in proportion to their respective interest, risks, duties, etc.

"Hence the tenant submits that the true guide for the valuator to follow, is to ascertain what ought to be deducted from the ground, when suitably built upon and reasonably applied to good and yielding purposes, and to divide the net yield (that is, the remainder of the income after deducting outgoings, repairs, vacancies, depreciations, contingencies, management, etc.) between the landlord and tenant, in proportion to their interest, after allowing the tenant a per centage for the extra risk he is subject to. For example, consider the landlord's and tenant's interest standing as two to one in value, the annual income from the land and building is $1,000; the outgoings, depreciations, contingencies, risk, trouble, vacancies and repairs, taxes, insurance, etc., $400; the landlord, according to this, should receive from the tenant $400 out of the $600 thus left. If the interests were equal in value, the $600 should be equally divided between them, and so on. The landlord's share is of the most certain and substantial kind and subject to no risk whatever. The tenant's share being destructible, is at all times subject to the

elements and all sources of danger. Even as against fire, the tenant is obliged to assume one-third of the risk, as the insurance companies will not protect him beyond sixty-six per cent. of the value of the buildings. Hence, in considering the rights of the parties, a per centage allowance should be given the tenant for the hazard his share is subject to, the landlord's share being unaffected by danger. It is a fallacy to deal with future values, circumstances or conditions in fixing rentals for twenty-one years, as was done in the Walsh case."

A frequent argument in favor of higher ground rents than can possibly be realized by the property, is that the buildings erected by the lessee are not suitable to the locality or furnished with the most modern appliances. As has been already urged, the best test of the suitability of the erections to the location and character of the lot, is the agreement which most leases contain as to the style and cost of the buildings to be erected. The argument is so forcibly and clearly stated in the document from which the foregoing quotation has been made, that, even at the risk of repetition, another extract, bearing upon this point, may well be given:

"The lease provides what sort of a building shall be erected—or, in other words, shall be suitable—because the parties would not stipulate for buildings inappropriate to the ground upon which they are to be erected. When the tenant satisfied the requirements of the lease as to the buildings, he satisfied the requirements as to erections fitting for the place they are in. A comparison of the lease with the buildings, shows how much better they are than the leases require. * * * Surely it cannot be said that a building is unsuited to the place when it is up to the average of its neighborhood. If it were a better class, the landlord might complain that it was too expensive to pay; if it were inferior to its surroundings, a complaint would be heard from the opposite source. If it is urged that the buildings are old, the answer is that at the time they were erected, they were considered according to the plans and customs of the times, and it cannot be expected that a tenant will tear down his buildings to erect more modern ones before the ordinary life of the building has been exhausted. It should not be expected that a tenant would do more with his buildings, in the way of alterations to follow the improvements of the times, than the ordinary owner, acting reasonably, would do."

The demand that the lessee shall improve the property from time to time, in accordance with inflated ideas of the commercial requirements of a modern progress which has often turned out to be entirely illusory and imaginary, comes with a specially bad grace from the ground landlord, whose calculations in fixing the amount of his exactions usually leave out of sight altogether the depreciation of buildings under the best possible conditions. If the property is to continue productive, buildings must not only be repaired frequently, but in the end replaced.

Mr. Henry Langley, in a pamphlet entitled "An Equitable Consideration of Renewable Leases," places the average life of a building at thirty-two years. On this point he says:

"From very elaborate returns obtained thirteen years ago in the United States (and the conditions are analagous here), the most durable portions of such buildings have a life of sixty-six years, while other portions have to be renewed every six years; but, taken altogether in their proper proportions, the average life is thirty-two years; so that, in addition to ordinary repairs, a yearly sum has to be laid by equal to about a sixty-fifth part of the original cost wherewith to replace the original building when worn out or become effete in style."

The same writer also calls attention to another generally-ignored fact, which has a most important bearing upon the principle which many arbitrators seem to have taken for granted, that, whoever loses, ground landlords have a paramount right to receive, under any circumstances, four or five per cent. upon the assumed value of the land.

"Another consideration in connection with capital," he says, "is the very marked decline in the rate of interest on investments during the last fifteen years, owing to the immense accumulation of capital throughout the world and its rapid attraction to America. Fifteen years ago, eight and one-half to nine per cent. was no uncommon rate for loans in Toronto on good properties, while now they are being made at five per cent., a falling off in that period of nearly one-half. This, it is believed, is likely to go on as capital is accumulating at an accelerating pace, so that, in all probability, permanent investments will before long be made here at three per cent. Moneyed people in the United States are at the present time glad to invest large sums in United States and New York State bonds, bearing not more than two per cent. interest"

If the per-centage principle is to be the basis of determining the landlord's share of the receipts of the joint property, there is certainly no shadow of excuse for maintaining the rate at five per cent., in view of the general decrease in interest on all reasonably secure investments. But, in any case, the principle is—as will be realized from the foregoing considerations—an unfair and one-sided one, characterized by partiality towards the party least entitled to any special consideration.

The abuses to which the arbitration system in the renewal of leases have given rise, call loudly for legislative action. A clearer case, in which it became the duty of the Government to interfere for the protection of a large class of the most enterprising, worthy and public-spirited citizens suffering from a manifest defect in the law, caused by the rapid development of new conditions which our legal system has not as yet taken into account, has never been presented.

The remedy is obvious and easy. An Act of the Legislature should be adopted, recognizing the lessor and lessee as practically partners, and defining the principles upon which their respective shares of the receipts shall be divided. First and foremost, all considerations of selling value, real or assumed, present or prospective, should be ruled out of court with the professional or amateur expert and all his works and ways. Productive capacity should alone be taken into account. After allowance made for all expenses of maintenance—which might justly include a sinking fund to provide for renewal of the building—the remainder should be divided between lessor and lessee, according to their respective interests. In framing such a measure, other matters of detail would present themselves for consideration; but with these as the main outlines, a great, practical and much-needed reform in arbitration methods would have been accomplished, and one which would add in no small measure to the *prestige* of the Ontario Government for abolishing legalized abuses.

It must be remembered that many of the worst cases of injustice suffered by lessees have not resulted from the disposition on the part of the arbitrators to inflict a deliberate wrong or show undue partiality to the landlord, but simply because they felt themselves bound by precedent to follow a certain line of action and admit as a basis for their decision principles and circumstances which ought not properly to have entered into the case. With an Act on the statute-book, clearly defining their duties and the rules that should govern them, future arbitrators will labor under no such difficulty, and the healthy influence of public opinion may be depended upon to prevent any undue leaning to the side of the landowner in the face of an explicit enactment defining his interests.

The reform is one for which public sentiment is fully ripe. There have been loud and repeated protests against the injustice of the renewal awards by which so many of our citizens have been ruined. The burden of heavy rents is felt by a widely extended circle beyond the parties immediately affected. At a time when public-spirited citizens are desirous of bringing Toronto prominently before the people of this Continent as a growing business and industrial centre and a desirable place of residence, with the view of attracting hither capital, and manufactures, and men of enterprise, the reputation which is given to our City abroad by the course of those property-owners who have secured exorbitant ground rents, and thus practically taken a mortgage upon the industry and thrift of the future population, is calculated to thwart and counteract such laudable efforts. It militates in every way against the future prosperity of the City, and tends to perpetuate the period of stagnation through which we are at

present passing. Every consideration, whether of justice to individuals who have honestly endeavored to improve the City by investing their capital and their energies in productive enterprises, or of aiding future development and progress by the establishment of just and equitable laws so that strangers may be induced to cast in their lot with us, urges the speedy adoption of the reform. And it is to be earnestly hoped that a strong, united and determined appeal to the Government to that effect will be made by all who realize the need of a change for the better.

APPENDIX.

The following are extracts from the papers of the dates mentioned:

[Toronto Globe, 18th May, 1894.]

LEASEHOLD AWARDS.

To the Editor of The Globe:

Sir,—An evil has grown up amongst us known as leasehold tenure in lands which has become an instrument of spoliation and oppression only less in extent to that suffered by Irish tenants at the hands of their landlords, and the same remedy is required here that was found necessary to protect the Irish lessees from oppressive and unjust exactions, viz., Government interference. At the initiation of a lease the land is rented at a rate which allows the tenant to put up buildings and receive a fair return for his risk and enterprise, and if the same equitable arrangement were adopted in renewing the lease there would be no ground for complaint. But in recent arbitrations a system has been adopted of hiring professional experts, sometimes to the number of 50 or 60, solicitors and counsel, who place excessive and unreasonable values on the land, ignoring entirely its earning power and inflicting burdensome costs, sometimes on both sides, but always on the lessee, in arriving at a decision.

Within the past ten years I do not know of an arbitration where expert testimony has been called whose award has been fair and just to the lessee. There are honorable exceptions amongst landlords who do not oppress their lessees; a property on King Street East is now on the hands of the third generation of lessors and lessees at a rental fair to both parties, but renewals have been settled without arbitration by mutual arrangement. The majority of ground landlords act as did another family on King Street West. Twenty-five years ago they leased their land at $4 per foot. The lessees erected buildings which were sometimes rented and often vacant, and never paid high interest. Four years ago, after a long and expensive arbitration, the rental for the next 21 years was fixed at $45 per foot per annum by two arbitrators, the representative of the lessee dissenting. This was $1,125 per annum for a store of 25 feet frontage, which produced a total rental of only $900 per annum. Under this award the lessee was compelled not only to give up all his earnings from his investment to satisfy his ground landlord, but he had to add $225 besides out of his other resources. The ground landlord, under this award, receives 400 per cent. per annum on his original investment; the lessee loses everything. Is this fair or equitable? The Legislature has made frequent changes in the law of landlord and tenant, but they only refer to trifling matters, as to protecting certain chattels from seizure. When it comes to seizing the whole building there is no redress. and the time has come when it must be granted.

Toronto, May 17th. J. ENOCH THOMPSON.

[Toronto Globe, 25th May, 1894.]

LEASEHOLD AWARDS.

To the Editor of the Globe:

Sir,—It would be difficult to find outside of criminal annals such barefaced robbery as is sometimes permitted under leasehold arbitration.

Some twenty odd years ago an old and respected merchant leased a certain property on one of our business streets for 21 years, and covenanted to erect substantial brick buildings thereon. He was to insure them for the benefit of the lessor, and the lessor agreed to grant renewals every 21 years; the implied contract being that each should participate in any increase or decrease in value.

For 21 years the lessee faithfully paid the full ground rent, taxes and repairs. The lessor received over 40 per cent. per annum on the original cost of the land all this time. The lessee for three years received 8 per cent. on his outlay; for the remaining eighteen years his annual returns were from 5 to 7 per cent. Then the term expired, and the fatal arbitration commenced. Three arbitrators were appointed, and about fifty witnesses were called to inform the arbitrators what they already knew, or ought to have known, when they undertook to arbitrate. At the time of the arbitration the total revenue of the property was $2,600, and ordinary justice would expect that this amount would be divided between the land and buildings according to their respective interests. If the ground rent had been increased only 100 per cent. it would still have left the lessee 1½ per cent. interest on his building, and a spark of hope for the future; but this would not satisfy the ground landlord. He wanted an increase of 200 per cent., and actually secured 150 per cent. This absorbed more than the whole revenue of the property. The lessee in his old age is deprived of his only means of support, and his building, which cost over twenty thousand dollars, becomes the property of the lessor, pretty much as a burglar makes a haul; he helps himself to everything in sight, without any troublesome legal formalities. There is this difference, however, between a burglar and this lessor. The latter is perfectly within his legal rights, nor does he belong to the class of society which supplies burglars. He probably thinks his lawyers, who worked up the case, should bear the odium. Nevertheless, the bald fact remains that a gross injustice has been done. An old man has been deprived of his property, and the lessor enjoys the spoils; and every Sunday lawyers and clients may be seen and heard unctuously responding to the priest's "Thou shalt not steal. Lord, incline our hearts to keep this law."

Legislation is required to prevent this kind of robbery. An act was introduced two years ago providing that in all renewals of leases the actual revenue should be divided between land and buildings according to their respective values. This would afford the necessary protection, without unduly interfering with the landlord's rights. Why was this act withdrawn?

Toronto, May 23. J. ENOCH THOMPSON.

[Toronto Globe, 29th May, 1894.]

LEASEHOLDS.

To the Editor of the Globe:

Sir,—In a recent issue of your valuable paper I read a strong letter on leasehold awards, signed by Ald. Thompson. I regret to say that his letter does not put the case any too strongly.

These bargains, made between landowners and building owners, were never intended, at their inception, to work out, as they do, such disastrous results for the building owner or lessee.

I have in mind now a Yonge Street lot bought some years ago at $50 a foot. The owner said to a man of enterprise:—"You put up a good building on that property and I will give it to you at $4 a foot, ground rent, for twenty-one years, and I will then renew the lease."

The offer was accepted. The man of enterprise erected a building which cost about $4,000, or over twice as much as the cost of the land. The landowner got 8 per cent. for his investment, and the building owner was successful in having his building occupied by good tenants, and thus the bargain seemed a fair one to both parties.

Some few years ago this lease matured, and, after the usual arbitration proceedings, the rate was fixed at $23.50 per foot, about 47 per cent. on the original cost. The proprietor of the building is not so fortunate now, the position being that his tenants pay less rent now than they did ten years ago. After all these years he does not net 5 per cent. on his $4,000 building, which is actually worth less than when erected, while the land has, without any labor or outlay whatever on the part of its owner, increased about six-fold.

Leaseholds will, no doubt, go on forever, but those who have to do with their renewal should use every effort to see that the interests of the unfortunate lessees are not altogether swallowed up by the lessors. This is only one instance of many I could refer to

Toronto, May 28. EQUITY.

[TORONTO GLOBE, 22nd Sept., 1894.]

ARBITRATION REFORM.

In any well-considered scheme of law reform, there must be provision for the simplification of the arbitration laws relating to land damages, ground rent renewals, expropriations and similar matters. As they are conducted now arbitrations are simply a sort of legal brigandage, by which arbitrators, witnesses, experts and counsel pile up a long bill of costs at the expense, in most cases, of the municipal corporations throughout the Province.

The people of Toronto, individually and collectively, have suffered more from the opportunities of piling up costs afforded by the arbitration laws than those of any other community. There are many large landed estates that hold land upon the ground-rent system, and the tenants are often coerced into paying rents beyond all proportion to the earning power of the land by the knowledge that in an arbitration they would have no chance against the superior resources of the land owner. The corporation of the city has always an arbitration on hand, sometimes three or four, and spends on an average probably $7,000 or $8,000 a year in costs. Take the MacPherson arbitration now going on. For more than twenty days a County Judge, several of the ablest counsel of the city, a host of valuators, experts, practical builders, and all the officers of the court have been engaged in determining the amount of damage done to some ravine land through which the city constructed the Rosedale sewer several years ago. Two practical men, with power to settle the question without calling witnesses or hearing counsel, could have done the work in half an hour. As matters stand, the costs are probably $2,500 a ready, and no man knows what the end will be.

The case is not an isolated one. The expenses are not abnormal. When the Prittie case stirred the people to a temporary interest in the subject, we pointed out the feasibility of the adoption of the French system, under which two valuators in all cases of the sort involved in the MacPherson arbitration act as permanent officers of the court, with power to determine without hearing evidenc^ what damages have been sustained, or what constitutes a reasonable ground rent. Why not give this a place in the Ontario statutes?

Copy of a Bill introduced into the Ontario Legislature in 1892, read a first time and withdrawn.

BILL.

An Act respecting the Renewal of Leases.

WHEREAS it has been found that upon the renewal of leases, certain injustices are suffered by lessees.

NOW THEREFORE:

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

I. The Act may be cited as "An Act for the relief of Lessees."

II. Where in any lease made prior to the passing of this Act, or hereafter of lands which shall have been vacant at the time of the making of such lease, and in which the lessee or his assignee or other person claiming or deriving title under the lease, shall be entitled under the provisions of the said lease on the completion of the term fixed by the said lease to a renewal or renewals thereof, and the price or sum to be paid by the said lessee or his assignee, or by other persons claiming to be entitled to such renewal or renewals as rental during the period of such renewal or renewals, shall be left to be fixed by arbitration or award of any person or persons, or by the judgment or decree of any Court or Judge, no such award, judgment or decree shall be final and binding unless in fixing such price or sum to be so paid by way of rental consideration shall have been given by the person or persons, Court or Judge so fixing the same, to the increased value, if any, which the said lands may possess as a rent-producing property by reason of buildings having been erected or improvements made upon the said lands by the said lessee or his assignee or any person claiming through or under him, apart from the intrinsic value of the said buildings or improvements, and such increased value shall be deducted from the value of the said lands in estimating the rental value of the said lands for the period of renewal, and the sum to be paid by way of renewal then being fixed, shall be based on the value of the said lands after such deduction shall have been made.

III. Notwithstanding anything to the contrary contained in any lease of lands which shall have been vacant at the time of the making of the said lease, made prior to the passing of this Act, or hereafter in which the lessee, his assignee, and other persons claiming under him, shall be liable to accept a renewal or renewals that do or may aggregate in length of time, a period of twenty years or upwards, at a rental to be fixed by arbitration, award or otherwise, based on the value of the land at the time of the renewal, the lessor or other owner or

owners of the freehold in the said lands, shall be compellable at the option of the lessee, his assignee or other person or persons claiming under him, to sell and convey the said lands to such lessee or the person or persons claiming through him, at a price to be fixed in the same manner as the said lease shall provide for the fixing of the rental, payable during the term of renewal.

IV. That no lessee under any lease of lands vacant at the time of the making of the said lease, or his assignee, nor any person claiming under him, by any of whom buildings shall have been erected upon the said lands or improvements made thereon, shall be liable on any renewal or renewals of the said lease to pay a greater rental to the lessor than that which when deducted from the rent, which in the opinion of the arbitrators, the premises, land and building included would produce, will leave a sum for the benefit of the lessee, which shall bear as large a proportion to the value of the buildings and improvements made by the lessees thereon, as the amount to be payable as rent to the lessor bears to the value of the lands.