MANUAL OF THE LAW

OF

LANDLORD AND TENANT

BY

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OF TORONTO, BARRISTER.

SECOND EDITION

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PREFACE TO FIRST EDITION.

THAT persons outside the legal profession often expect to know law by some patent method, which persons inside of that profession have never yet discovered, is very true. That the expectation is not realized is also very true. Therefore, to tell any person that he may expect to become an expert in the law of Landlord and Tenant by reading any synopsis would be to mislead. But there are points of law which every man should learn something about, so that he may know that there are difficulties to be guarded against. This manual is drawn up with the intention of imparting information of that kind. At the same time it is hoped that the book may be of use to the legal profession as a means of ready reference.

I have added to each chapter a selection of notes of cases from our own courts. These cases have been carefully chosen, and the notes are as full as space would allow. The cases are included up to the end of 26 Ontario Reports and 22 Ontario Appeal Reports. Later than those volumes they are taken from the Canadian Law Times.

The statute law referred to includes legislation of last session (1896).

The precedents are taken from sources too numerous to specify.

For the whole book Holdsworth's Landlord and Tenant, published over forty years ago by Routledge, has been a model. But that work, however good in its time, is long out of date, and contains English law never in force here. Still, I feel bound to acknowledge my obligations to that book. It has been of great assistance.

R. E. K.

34 MURRAY STREET,
TORONTO, November, 1896.

PREFACE TO SECOND EDITION

The First Edition of the present work was published in November, 1896. Since that date the Revised Statutes of Ontario, 1897, have been published. The Third Volume of that Revision, which appeared in 1902, is a compilation of Imperial Statutes in force in this Province. Chapter 342, relating to the subject of Landlord and Tenant, includes the Acts which were mentioned in a Schedule which stood at the commencement of the First Edition. This Schedule is no longer necessary. Whenever these enactments are referred to in the present Edition the Imperial Statute and the section of chapter 342 are both stated. The later cases have been incorporated, inclusive of Volume V, Ontario Law Reports. Care has been taken to make the book as complete as possible. The size of the pages has been altered in order to make it uniform with other legal publications. An Index and Table of Cases have been supplied. With these additions it is hoped that the Second Edition will meet with a favourable reception.

R. E. KINGSFORD.

Toronto.

September, 1903.

ABBREVIATIONS

R. S. O.—Revised Statutes of Ontario [1897].
U. C. R.—Upper Canada Queen's Bench Reports.
C. P.—Upper Canada Common Pleas Reports.
Chy.—Upper Canada Chancery Reports.
O. R.—Ontario Reports.
A. R.—Ontario Appeal Reports.
S. C. R.—Canada Supreme Court Reports.
O. L. R.—Ontario Law Reports.

ADDENDUM.

Reference to be added to cases on page 12.

TENANCIES FROM YEAR TO YEAR.

Idington v. *Douglas*, 6 O. L. R. 266.

The reservation or payment of rent in aliquot proportions of a year is no doubt the leading circumstance which turns tenancies from uncertain terms into tenancies from year to year. But this payment does not create a tenancy. It is only evidence from which the court or jury may find the fact, and the circumstances may be shown to repel the implication.

Apart from the express agreement which plaintiff sets up the defendants are in the position of tenants whose lease has expired and who are permitted to continue in possession pending a treaty for a further lease, and so they are not tenants from year to year, but strictly tenants at will.

Note.—This decision was reported after these pages were in press.

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THE LAW OF

LANDLORD AND TENANT.

CHAPTER I.

WHO MAY BECOME LANDLORD OR TENANT.

Object of this book.

1. The object of the following pages is to furnish a short, simple and untechnical statement of the respective and reciprocal rights and liabilities of landlord and tenant. In dealing with any subject relating to any branch of law the use of technical terms is absolutely necessary to some extent. Where such terms occur in these pages they will be as far as possible explained.

2. The law relating to property and civil rights is assigned by the British North America Act to the Provincial Legislatures as distinguished from the Dominion Parliament. The Dominion statutes, therefore, contain nothing relating to the special subject of landlord and tenant, and the statutory law bearing on that relation for the Province of Ontario is contained in the Ontario statutes, and in Imperial statutes in force in Ontario.

"Common Law" explained.

3. These statutes have modified or amended or altered what is known as the common law; this latter term means that body of law which has descended to the inhabitants of Ontario from England. By Act of the Parliament of Upper Canada, 1792, the law of England was declared to be the law of Upper Canada, and by succession is the law of Ontario. It is called common law, because it is common to all the inhabitants of Ontario, just as the book of Common Prayer is so called because it is the prayer book for all people to use in common if they choose. Commonwealth, commonalty, common right are analogous terms. It is necessary to understand

that these two sources of law must be investigated in order to ascertain what the present law on any subject may be. This volume will, therefore, be a succinct statement of the common law as above explained relating to landlord and tenant as adjusted by statutes in force in the Province of Ontario.

'Landlord." "Tenant."

4. A landlord* is one who having an interest in land grants to another (called a tenant) a portion of such interest, either so limited in point of duration or so much burdened by obligations and agreements to be discharged or performed, or by payments of rent to be made by the tenant to the landlord, that the interest remaining to the latter in the land is of appreciable, if not of substantial, value. We would scarcely regard the owner of the fee simple as the "landlord" of another to whom he had leased the land for 999 years at a nominal rental. Such, however, would technically be the case; and important consequences might, under certain circumstances, result from the apparently merely nominal connection thus established between the parties. To trace these, however, is beyond the scope of the present work, which has to deal entirely with the practical and everyday questions arising out of such a relation as is above described.

Who may lease or rent.

5. Before entering into any explanation of the various descriptions of tenancy, it will be best to consider who may become landlord or tenant.

Every person, except those to whom I shall immediately call attention, may grant to another any interest not exceeding in duration that which he himself holds in any land. And even if a person grants a lease for a period not necessarily less than his own estate in land, it will be good, and cannot be set aside so long as his own estate endures. There are, indeed, some cases in which persons may lease or let land for a term longer than their own estate in it, but I will not specify them here, as they are not within the province of these pages.

Married women.

6. Now, as to who may lease. A married woman may now own land and make leases and receive rents, and also may become a tenant exactly as if she were unmarried. Her husband need not execute the conveyance nor the lease, and she

*"Tenant" shall mean and include an occupant, a sub-tenant, under-tenant, and his and their assigns and legal representatives.

"Landlord" shall mean and include the lessor, owner, the person giving or permitting the occupation of the premises in question and the person entitled to possession thereof, and his and their heirs and assigns and legal representatives: *Ontario Overholding Tenants Act*, R. S. O. c. 171, sec. 2.

may, if she is the bona fide tenant of the property, exclude her husband from her premises exactly as she could any stranger. If she makes no will of her estate leaving it away from her husband, he becomes entitled to a share in her property, whether real or personal, dependent on certain conditions.

Husband's right to lease wife's property.

7. With regard to land which has not been made the subject of a marriage settlement, the husband may have at his election, if he has by the wife issue who may succeed to the property, a further estate for his own life in case he is the survivor, and a lease by him would bind his estate as far as it extended.

Infant's guardian.

8. Leases made by the guardian of an infant, if such guardian have been appointed by will, are valid until the heir comes of age, but they may then be confirmed or set aside by him.

Section 12 of the Landlord and Tenant Act (R. S. O. c. 170) is as follows :

"Where any person being under the age of twenty-one years, or a lunatic, or a person of unsound mind, shall be seised of the reversion of land subject to a lease, and such lease shall contain a covenant not to assign or sublet without leave, the guardian of such infant, or the committee of such lunatic, or person of unsound mind, may, with the approbation of the Judge of the Surrogate Court of the county in which the land is situate, consent to any assignment or transfer of such leasehold interest, in the same manner and with the like effect as if the consent were given by a lessor under no disability."

Section 37 of the Judicature Act R. S. O. c. 51, empowers the High Court of Justice to make settlements of infants' estates on marriage, and chapter 71 authorizes the making of leases of settled estates. Sections 4 to 11 inclusive of R. S. O. c. 340, make further provisions as to leases of infants' lands.

Executors and administrators.

9. Executors and administrators are entitled to any leasehold estates possessed by their testator, and may dispose of or sublet them as they please, unless he has bequeathed them to a particular person, and they have assented to the bequest; which they must do if he has left other property not specifically bequeathed sufficient for the payment of his debts. Under the Devolution of Estates Act executors are allowed a year or more to wind up an estate. When they have once assented to a bequest, the lease becomes vested in the person

to whom it is left as a legacy, and, of course, they have no further right to deal with it.*

Assignees

10. The rights of assignees in insolvency require special attention, and as they are specially dealt with by statute of Ontario we will come to them later on. (Chapter XI.)

Idiots.

11. Leases made by idiots or insane persons are binding unless steps are taken to set them aside; but they may be avoided on proof of the idiocy or insanity. A lease made during a lucid interval cannot be impeached on the grounds of previous or subsequent insanity. The committee of a lunatic may make leases under the direction of the High Court of Justice for Ontario.

Infants.

12. If an infant makes a lease he can avoid it when he comes of age, but if he then by any act—such, for instance, as the receipt of rent—recognize it as subsisting, he will be thenceforth bound by it.

Repudiation by infants.

13. Infants may, within a reasonable time after coming of age, repudiate leases made by them during infancy. If, however, circumstances render it necessary for them to reside apart from their family, even during infancy they may be compelled to pay for the actual occupation of any houses or lodgings suitable to their condition in life.

Intoxicated persons.

14. The intoxication either of the lessor or lessee will be a good ground for setting aside a lease, if it appear that the party was so drunk that he did not know what he was doing when he executed it; or if while partially intoxicated fraud was practiced on him.

15. Subject to similar exceptions and qualifications as in the case of landlords, anyone may become a lessee or tenant.

Aliens.

16. I stated that the provincial statutes contained everything relating to the law of landlord and tenant, but I have now to mention the subject of aliens. Under the British North America Act aliens and naturalization are assigned to Dominion jurisdiction, and therefore for laws relating to aliens we must consult the Dominion statutes. Under these statutes

* By R. S. O. c. 129, secs. 36 and 37, where an executor or administrator, who is liable as such on a lease or on a rent charge, assigns the lease, he may, after he has satisfied all liabilities under the lease and set aside any sum required by the lease to be expended on the property, safely distribute the estate.

aliens can hold and dispose of all real and personal property exactly as if they were natural born subjects. There is no contradiction in calling attention to this branch of Dominion jurisdiction, because it is far wider than that of landlord and tenant, and covers all relations which may exist between aliens and natural-born subjects.

Assignee of an insolvent.

17. The assignee of an insolvent cannot take a lease of any part of the insolvent's or bankrupt's property for his own benefit, nor can a trustee of the property of the person for whom he is trustee. If he does, he is compellable to account to the creditors for any profits which he may derive from it, while any loss which it may entail must fall upon himself. A trustee must likewise account to the person for whom he is trustee.

Agent.

18. An agent can bind his principal by making a lease for him or by renting property on his account when the transaction is within the scope of his authority. When the lease is for a long term of years the party dealing with the agent should insist on the registration of the power of attorney under which the agent assumes to act. A principal may become bound by ratification. In fact, any person may adopt, if he chooses, the act of another who has assumed to act for him. Silence does not necessarily mean consent, but as a rule repudiation should always be prompt.*

CASES.

Title—Possession—Attornment—Contract.

The plaintiff proving a legal title to the premises and a mere naked possession by defendant is entitled to a verdict. He need not prove an attornment or contract between himself and defendant:

Price v. *Lloyd*, 3 U. C. R. 120.

A man can not be compelled to lease what does not belong to him.

The owner of an oil well lot, on which was also situate a blacksmith's shop, which was known not to be the property of the owner of the land, agreed to lease the oil well and lot for a term of years, without any express reservation of the blacksmith's shop; the intended lessee insisted on obtaining a lease without any reservation of such shop, and filed a bill for that purpose. Bill dismissed, with costs:

Morris v. *Kemp*, 13 Chy. 487.

Trustees.

Power of trustees to grant lease for twenty-one years, with provision for compensation for improvement or renewal:

Brooke v. *Brown*, 19 O. R. 124.

Result of a lease by guardian.

The guardian of an infant, tenant for life, without the sanction of the Court, executed a lease for years, during the existence of which

* See R. S. O. c. 116 as to acts done under a power of attorney after the death of the constituent.

the infant died, and an application having been made in the cause for an order on the tenant to deliver up possession, he was ordered to do so, and on payment into Court of the amount of rent in arrear, he was permitted to remove the buildings and erections put by him on the property (doing no damage to the realty), but the Court refused to allow him out of such rents for any improvements made by him upon the premises:

Townsley v. *Neil*, 10 Chy. 72.

Infant. An infant cannot during infancy avoid a lease by him reserving rent for his benefit:

Lipsett v. *Perdue*, 18 O. R. 575.

Executor. Under the Devolution of Estates Act an executor of deceased lessor can make a valid renewal of a lease pursuant to the covenant of the testator to renew:

C. P. R. v. *National*, 24 O. R. 205.

Act of tenant does not prejudice landlord's rights. Tenant may redeem. An act of the tenant, without the knowledge or sanction of the landlord, could only affect his interest as tenant, and could not prejudice the reversioner:

Dixon v. *Cross*, 4 O. R. 465.

The right of a tenant for years to redeem a mortgage is absolute, and the Court has no discretion to grant or refuse redemption:

Martin v. *Miles*, 5 O. R. 404.

The elevator boy. Liability of landlord to tenant for injuries occasioned by negligence of employee of landlord in charge of an elevator:

Stephens v. *Chausse*, 15 S. C. R. 379.

Who may re-enter. There can be no reservation of a right of re-entry to a stranger to the legal estate:

Hyndman v. *Williams*, 8 C. P. 293.

How ratification of another person's acts may bind. A person assuming to have an interest in property, though he had none, executed a lease or an agreement for a lease to a tenant; one of the true owners shortly afterwards took an assignment of the instrument and gave to the tenant notice of the assignment; and successive owners demanded and received rent reserved by the instrument, insisted on the building of a barn which the agreement provided for, and otherwise recognized the existence of the agreement. Held, that the agreement was thereby confirmed and adopted, and was binding on the estate:

Simmons v. *Campbell*, 17 Chy. 612.

CHAPTER II.

TENANCIES.

"Tenancies."

19. The "tenancies" recognized by law are various. In one sense, every man is a tenant, because in theory every holder of land holds it as tenant of the Crown. But the tenancies we have to deal with are "leasehold" tenancies. A tenant for life has a larger interest than a leasehold tenancy, so has a tenant in tail or tenant in dower. We have nothing to do with these tenancies. We have only, as just stated, to consider "leasehold" tenancies.

"Leasehold." "Lease." "Lessor." "Lessee."

20. Tenancies for terms of years, or as they are usually called "leaseholds," are created by lease, which is a contract whereby the use and possession of a house or land is granted by the owner (called the lessor) to the hirer or taker (the lessee) for a fixed time (a term) at a stipulated remuneration (generally an annual rent), subject to such conditions or mutual obligations as they may mutually agree upon. The essence of this description of tenancy consists in its being for a term certain. Tenancies from year to year also arise by operation of law. These tenancies, although they may not arise from an executed lease, are also called "leasehold," because the law implies that the relationship of landlord and tenant has been created.

Entry by lessee necessary.

21. It should be remarked that although the lease grants the lands or house for a term to commence immediately, the interest or estate of the lessee (tenant) is not for all purposes complete until he has either by himself or his servants or agents entered upon the premises; for he can bring no action for any trespass previously committed thereon.

Caution as to agreements for leases.

22. Agreements for leases, except in the cases implied by law, are not usual in Ontario. Whenever they are used, great care should be taken.

Preliminary enquiries before leasing.

23. Before entering into a lease the intending tenant should always ascertain whether the person proposing to become his landlord is the owner of the land out and out, or whether he has only a lease of the premises. If the latter should turn out to be the case, this lease must be carefully

"Under-lessee."

examined, otherwise the new tenant, who would then have only what is termed an under-lease, and could of course take no more, nor in any other way, than his immediate landlord had power to give, might eventually find himself harassed and burthened by restrictions which he did not foresee, and which might render the property wholly unsuitable to the purpose for which he desired it. Perhaps also the consent of some person should be obtained before the under-lease is valid.

Rights of a mortgagee.

24. Enquiry should also be made in the registry office whether there is a mortgage on the property. If there is a mortgage in existence the consent to the lease of the person holding the mortgage should be obtained; if not, and default is made in payment of the mortgage, the person claiming under the lease subsequent to the mortgage could be turned out by the mortgagee. If, on the other hand, a lease is made, and after the lease the owner of the land executes a mortgage, the mortgagee can only take subject to the rights of the lessee; that is to say, as to all leases under seven years in length. The registry law of Ontario requires leases over seven years to be registered.* If the person having such a lease does not register it, and the owner of the land executes a mortgage, and the mortgagee registers this mortgage in the registry office without notice or knowledge of the prior lease, then the mortgage would cut out the lease. If the mortgagee had notice of the prior lease, the mortgage might or might not cut out the prior lease, according to the circumstances of the case. Therefore, any person having a lease of over seven years should register it in the same way that he would a deed. If a person proposes to take a lease of property and applies to the mortgagee when a mortgage is on the land for the mortgagee's consent, and it is refused, the proposed lessee then completes the transaction at his peril.

Registration of leases.

Effect of failure to register.

Registration of agreement for lease.

25. The same remarks apply to an agreement for a lease as to a lease. If a man wishes to protect himself under a proposed agreement for a lease he should register it. Otherwise he may be cut out by some person who has acquired an interest subsequent to himself, and has registered the document under which he claims.

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* The Registry Act, R. S. O. c. 136, sec. 39, says: "This Act shall not extend to any lease for a term not exceeding seven years where the actual possession goes along with the lease; but it shall extend to every lease for a longer term than seven years."

26. I explained at the beginning of this chapter that "leasehold" tenancies are all that we have to consider. Such tenancies are either from year to year—for a shorter term than a year—or for a fixed and definite term of years.

Distinction between term certain and indefinite term.

27. Parties renting must carefully bear in mind the distinction between renting for a term certain and for an indefinite period. If a man rents a house for a term certain, he has no right to hold on after the expiration of that time. If he does hold on after the expiration of that time and pays rent, he becomes a tenant from year to year; but many people forget that if a house or other property is rented for one year, or two years, or five years, their occupation is fixed for that time; they remain liable for the rent for that period, and are entitled to occupy the house or premises for the same period; they cannot by abandoning the premises escape their liability for rent, nor can the landlord claim the premises until the time has expired or default made. It is necessary to state these distinctions very clearly, because there is apparently much misconception on this point.

Tenancy from year to year by presumption of law.

1. Entering under agreement for lease.

2. Overholding and paying rent.

28. A tenancy from year to year arises by presumption of law when the tenant coming in under an agreement for lease has made a payment of rent. If the tenant can show that the rent was paid with reference to the agreement, then it is not a tenancy from year to year, but a tenancy according to the agreement. The tenant would be called upon to show in what method the payment was made. If a tenant under a lease for a term of years holds over after the expiration of his term, he is, until he has paid the rent subsequently falling due, merely a tenant by sufferance and may be evicted at any moment, and is liable for rent at the old rate up to the time of his eviction. Directly he has paid the rent to the landlord and the landlord has received any such rent, he is considered a tenant from year to year, and must give, and is entitled to receive, the proper notice to quit.

Tenancy from year to year, how created by agreement

29. If one man, either by word of mouth or by writing, let to another houses or lands at a yearly rental and for an undefined time, a tenancy from year to year will be created unless the letting is accompanied by some stipulation to the contrary. The point about this tenancy is this: that if a tenant enters into possession of premises at a yearly rental and for an undefined time, he is entitled to hold them, and he is liable to pay rent for them for a twelve-month. If the requisite notice to determine the tenancy at the year's end be

Notice to quit.

not given by either the landlord or tenant, another year's tenancy is thereby created, and so on from year to year until such notice (expiring on the anniversary of the day on which the tenancy first commenced) shall have been given by either party. The day on which the tenancy commences is either the day named at the time of letting, or if no day is named, the day on which the tenant enters into possession. In the absence of any other agreement, the requisite notice is one of six months, terminating, as I have already said, on the anniversary on which the tenancy began: but the notice may be by agreement, a quarter's or a month's, or, in fact, any other. (See chapter XIV.)

Length of notice required.

Agreement for yearly tenancy.

30. A yearly tenancy can be created verbally, but it should not be created in this manner, because, until the tenant enters on the premises, it is a mere agreement for an interest in the land, and if not in writing, as we will presently see, is void. Therefore, if the person who wishes to be the tenant refuses to take possession of the premises, the would-be landlord would have no remedy for breach of contract.

Under-tenant.

31. A tenant from year to year sometimes underlets the premises, as he has a perfect right to do, either because he wishes to leave them before the expiration of the proper notice, or for the sake of making something by subletting.

Enquiries to be made.

The person coming in as under-tenant must satisfy himself that the rent to the superior landlord is paid, and if there is a written lease so providing, that the consent of the landlord to the subletting has been obtained. He should also investigate whether the taxes have been paid or not.

Reduction of rent.

32. If the landlord in the middle of the term reduces the rent, or if the rent is reduced without any further change in the tenancy being made, no effect is produced on the tenancy itself.

Case of two years' tenancy at least.

33. If a house is let for one year, and so on from year to year, in that case the tenant must retain the house for two years. He cannot give notice to quit until six months before the expiration of the first year of the tenancy from year to year, which in this case is a tenancy for two years at least.

Constructive tenancy for periods of a year.

34. The next kind of tenancy to consider is that for terms shorter than a year. If premises for the purpose of business houses or apartments are let for an undefined period at a rent collected in reference to any shorter period than a year, as for instance, at so much a quarter, month or week, the hiring

will be construed as quarterly, monthly or weekly, in the absence of any circumstances or agreement to the contrary.

35. There are two other kinds of tenancies which must be mentioned, because they may arise, but when persons find themselves in the situation of being either landlord or tenant under the circumstances which create these tenancies, they had much better consult a solicitor at once.

Tenancy at will.

36. Tenancies at will arise where a party is let into the possession of land on the terms that he is either compellable to leave at the will of his landlord or entitled to go at his own pleasure. It arises by operation of law in the case where a purchaser enters into possession on the execution of a contract of sale and before the execution of the conveyance to him.

37. Courts of law lean as much as possible against construing demises where no certain term is mentioned to be tenancies at will, but rather hold them to be tenancies from year to year, so long as both parties please, especially where an annual rent is reserved.

Tenancy by sufferance.

38. A tenancy by sufferance is that relation which subsists between a landlord and tenant when the latter holds over after the expiration of his term without the assent, but also without the expressed dissent, of the landlord. I have already stated that generally speaking the receipt of rent by a landlord turns this tenancy into a tenancy from year to year.

Servant's occupation of master's premises.

39. A servant in the occupation of premises of his master, and receiving less wages on that account, is not a tenant. A caretaker occupying rooms in a public building, say for purpose of offices, on similar terms, is also not a tenant. If the occupation of the premises or rooms forms a part of the stipulated remuneration of the servant when he entered his employer's service, he will be compellable to leave both premises and employment by the same notice. If, on the other hand, by a subsequent arrangement, it was agreed that the occupation should be equivalent for so much wages, and no time was fixed for the continuance of the arrangement, either party may end it at any time by giving reasonable notice. Reasonable notice depends on the circumstances of each case.

CASES.

A lesser estate merges in a greater.

Defendant granted land in question to S. to hold "to the said S. and the heirs of his body for twenty-one years, or the term of his natural life, from 1st April, 1853, fully to be completed and ended." Held, that S. took a life estate, in which the term merged:

Dalye v. *Robertson*, 19 U. C. R. 411.

Result of an assignment by a tenant of a larger interest than he owned.

Where a lessee of land for five years demised the land for seven years: Held, that the demise in question operated as an assignment of the original term, and conferred upon the original lessor, in respect of the priority of estate thus created, a right of action against the assignee of the term for the arrears of rent due under the original lease:

Selby v. *Robinson*, 15 C. P. 370.

Case decided on the wording of an agreement to give a certain notice of termination of tenancy.

Plaintiff leased to defendant for one year, with the privilege of holding for an indefinite time, on condition that three months' notice in writing should be given prior to leaving the premises, and prior to the termination of a full year by either party so inclined. Held, that defendant was bound to give three months' notice of his intention to quit at the end of the first year:

Counter v. *Morton*, 9 U. C. R. 253.

The defendant's actions did not amount to an actual taking of possession.

The plaintiff's agent offered to lease a house to defendant at £100 a year, payable quarterly, and defendant assented to the terms, but never occupied. Held, that he was not liable for the rent. It was alleged that after the defendant had been told what the rent would be, he got the key by the agent's directions, and went to examine the house, and leaving the key in the door returned and said he would take it. Apparently, this would not have altered the decision:

Bank of U. C. v. *Torrant*, 19 U. C. R. 423.

This case is one where a tenant was held to be liable as such from a date before he actually took possession.

A., living at Collingwood, wrote to B., at Toronto, on the 5th July, 1859, to the effect that he would give £40 a year for his house, and pay taxes, adding, "If you agree, telegraph at once to that effect, and I will take it." On the 6th B. telegraphed, "You may have the store for one year on terms of your letter." A. obtained the key from the former tenant on the 11th and first entered on that day. Held, that there was a perfect demise; that the rent commenced from acceptance by B. of A.'s offer, not from the time when A. entered; and that B. was therefore entitled to distrain for a year's rent on the 7th July, 1860:

Prosser v. *Henderson*, 20 U. C. R. 438.

The term of a lease is exclusive of first day and inclusive of last anniversary.

Under a lease dated 1st October, 1857, habendum for five years from the date thereof, "yielding and paying therefor on every first day of October during the said term"; it was proved that the first year's rent had been paid in advance. Held, that the term included the whole of the 1st October, 1862:

Held, also, that the rent was not payable in advance for the subsequent years:

McCallum v. *Snyder*, 10 C. P. 191.

The lessee had the right of purchase on his desiring to do so within the period of two years after the date of the commencement of the term, the 1st of April, 1852. On the 1st of April, 1854, the desire of purchasing was declared. Held, in time, the day of commencement of the term, 1st of April, 1852, being exclusive:

Sutherland v. *Buchanan*, 9 Chy. 135.

A lease of land for four years with a covenant to renew for four years more, was held not to require registration, actual possession having gone with the lease; and such a lease, though not registered, was held valid as respects the covenanted renewal as between the lessee and subsequent mortgagees of the lessor. Registration of lease.

Latch v. *Bright*, 16 Chy. 653.

A tenant from year to year cannot be ejected without regular notice to quit. Abortive negotiations which fall through do not deprive him of his right: Notice to quit must be given to a tenant from year to year.

Crookshank v. *Crookshank*, M. T. 5 Vict.

Where the tenant enters under a verbal lease void under the statute, a tenancy from year to year may be implied though no rent has been paid. Under the circumstances of this case (a verbal lease followed by enfry and clearance of land): Held, that the plaintiff was a tenant from year to year, and defendant was a trespasser in entering upon him: A tenancy from year to year created though no rent paid.

Gibboney v. *Gibboney*, 36 U. C. R. 236.

Where D., being tenant for life of two lots, gave M. verbal permission to occupy one lot and build upon it on condition that he should pay the taxes on both lots; and M. accordingly went on and built and paid the taxes for several years: Held, that a yearly tenancy had been created, and that D. could not eject M.'s sub-tenant without notice to quit: Yearly tenancy created; notice to quit necessary before premises can be recovered.

Davis v. *McKinnon*, 31 U. C. R. 564.

A defendant not in possession under any concluded agreement regarding the lease, is merely a tenant at will: A tenancy at will.

Lennox v. *Westney*, 17 O. R. 472.

A tenant at will cannot sue his landlord for ousting him from possession: Tenant at will.

Henderson v. *Harper*, 1 U. C. R. 481.

A person put in possession of a brickyard and house thereon was dismissed by his employer, but refused to give up possession until certain accounts were adjusted. Held: that he was an "occupant" overholding without color of right: Servant in occupation of master's premises.

Fowke v. *Turner*, 12 L. J. 140.

Upon the expiry of a parol lease for a term certain, with an option in the lessees to renew for a fixed period, the facts that the keys of the demised premises were not delivered by the lessees to the lessor for two or three days after the expiry of the term, and that a sub-tenant of the lessees continued thereafter in possession of a portion of the premises, are not sufficient to constitute an exercise by the lessees of their option to renew. Such possession of the sub-tenant is, however, sufficient to make the lessees liable for use and occupation, as to which the rent payable under the lease which has expired may be some evidence of the value of the premises, although no particular contract is to be inferred from the mere fact of holding over: Creation of new term by over-holding.

Lindsay v. *Robertson et al.*, 30 O. R. 229.

CHAPTER III.

LEASES.

Precise forms not necessary but safer.

40. No precise words or technical forms of language are requisite to constitute a lease. Whatever words are sufficient to explain the intent of the parties that one shall divest himself of the possession and profits of the land, and the other come into them for a determinate time, are of themselves sufficient, and will in the construction of the law amount to a lease for years as effectually as if the most formal and regular words had been made use of for that purpose. It is, however, hardly necessary to observe that it would be in the highest degree imprudent to depart from the settled and established forms which experience and repeated decisions of the Courts have sanctioned.

Statutes as to form of leases.

41. The statutory requirements as to the form of leases are as follows:

Statute of Frauds* (29 Car. II. c. 3), section 1. All leases and other interests in lands made and created by parol, and not put into writing by the parties making or creating the same, or their agents lawfully authorized in writing, are void and have the effect of estates at will only; except,

Section 2. Leases not exceeding three years from the making whereon is reserved as rent two-thirds of the full improved value.

Section 4. An agreement for a lease or for any interest in lands to be binding on the party to be charged must be signed by him or his agent.

42. Therefore, a lease not exceeding three years at a rental of two-thirds of the full improved value is good by parol. A parol agreement for such a lease is void as against the party making it.

In the case of the agreement, a parol authority to the agent making it will suffice; in the case of the lease, the authority to an agent making it must be in writing.

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* This is the name of a statute passed in the reign of Charles II. in order to prevent fraud. Its chief object is to require "writings" as evidence of certain contracts specified in it.

43. But R. S. O. c. 119, s. 7, says: A lease, required by law to be in writing, of land is void at law unless made by deed (that is, under seal). The authority to an agent must be also by deed, on the general principle that the authority to contract must be of no less a character and nature than the contract.

Verbal leases unadvisable.

44. Verbal leases should never be made for these amongst other reasons. Doubts may arise in respect to the precise words that passed, whether they amounted to the actual letting then and there perfected, and leaving nothing to be done but the taking possession, or merely to an agreement that one party would let and the other would take, the letting and the taking to be carried out at some future meeting, or by some writing to be drawn up. Now, by the Statute of Frauds above quoted, although actual leases for terms not exceeding three years are valid if made orally, yet mere agreements for such leases are void unless reduced to writing. Consequently, even supposing the tenants entered into possession and paid rent, if the jury were to find that words had been used which merely amounted to an agreement for a lease, the tenancy would only be one from year to year, liable to terminate by a notice to quit, and if no rent had been paid it might be that the tenant would be able to leave, or be liable to be turned out at any moment. If, indeed, the tenant had not only entered, but had, in pursuance of and in reliance upon the agreement, laid out money in improving the premises, the Court might then on the tenant's motion compel the landlord to execute a valid lease, but it would be after a law-suit. Further, even if words amounting to a present letting were clearly used (still more if such words had not been clearly used), and the tenant without having entered upon the premises refused to carry out the arrangement, the landlord would have no remedy for the breach of contract.

Agreements for lease.

Contents of a lease.

45. A lease commences with what are generally called the premises. This word does not mean the premises granted in the lease, but means the date of the lease, the names of the lessor and lessee, the consideration for which the lease is granted, and then the subject matter of the lease.

1. Premises.

2. Habendum.

46. (2) The next part is the habendum, which specifies the duration of the lease. Generally speaking, leases last during the whole anniversary of the date from which they are granted. If a lease is granted for an alternative period,

as say, seven, fourteen or twenty-one years, then, if nothing is said as to who is to have the option of determining or continuing the lease at the end of the respective periods, the choice rests with the lessee.

3. Reddendum.

47. (3) The reddendum reserving the rent to be paid by the lessee.

4. Covenants.

48. (4) The covenants. A covenant is a promise or agreement, and any promise or agreement under seal is a covenant; no precise words are requisite to constitute a covenant. It is sufficient if it can be clearly collected that something is to be done or not to be done by one of the parties to the deed.

Implied covenants.

49. There are such things as implied covenants;* for instance, on the part of the lessor, that the lessee shall quietly enjoy the land or house demised; on the part of the lessee, that he will pay the rent; that he will commit no waste; that he will do proper repairs; that he will cultivate in a husband-like manner; that he will not cut down timber. It is evident that the less parties rely upon these implied covenants, the less likely they are to go to law; each man should have put in black and white what he expects the other to do for him, and what he is willing to do for the other.

Where there is no implied covenant as to condition of premises.

50. The fact of granting a lease or letting a house or land on an annual tenancy creates no implied agreement on the part of the landlord that the one is reasonably fit for habitation or the other for cultivation. If it turns out not to be the case it will furnish no excuse to the tenant for refusing to pay his rent.

No implied covenant as to condition in case of unfurnished house.

51. The landlord of an unfurnished house, letting it on a yearly tenancy, does not any more than if granting a lease warrant it as fit for habitation. If a tenant once enters or signs an agreement to take it, no matter whatever state it may be in, he is without redress, unless he has previously obtained the landlord's written agreement to put it in repair. Even if the house were to tumble down he might be compelled to pay rent until he is able to release himself by giving the regular notice. An agreement on the part of a landlord

* For covenants now implied in leasehold transactions, see later chapter on Covenants not included in statutory Short Forms of Leases.

to make repairs should specify the repairs to be made as accurately as possible, and also mention a fixed time by which they will be done. Agreement to repair.

52. Contracts for the hiring of a furnished house, whether for a term or from year to year, or even a less period, and also contracts for letting furnished rooms, are peculiar. They are contracts of a mixed nature, partaking partly of the character of a lease of real property and partly of that of a contract for the letting and hiring of moveable chattels. Contracts for hiring of a furnished house.

53. There is an implied warranty on the part of the lessor that a ready furnished house or lodging is reasonably fit for habitation or occupation by the tenant. If the furniture is not fit for use or encumbered with a nuisance of so serious a nature as to deprive the tenant of all essential enjoyment of it, he is entitled to throw up both house and furniture, and bring action against the landlord for breach of contract. The fact that the beds in a ready furnished house were so overrun with bugs that they could not be slept in, was held to be a nuisance which would entitle the tenant to abandon the premises. Implied covenant as to condition of furnished house.

54. If a person proposes to lease a furnished room or a furnished house, he should satisfy himself that there is no chattel mortgage registered against the furniture. If a chattel mortgage is registered the consent of the chattel mortgagee should be obtained. The rights of a chattel mortgagee with regard to chattels, as far as the tenant or lessor of the chattels is concerned, are as extensive as those of a mortgagee of real property. If a landlord has not mentioned the fact to his proposed tenant that there is a chattel mortgage on the furniture intended to be leased, and the mortgagee claims possession of the goods, the tenant would have the right to bring an action against the landlord. Search for chattel mortgage necessary.

55. Sometimes an agreement for a lease stipulates that the lease shall contain "the usual covenants." This mode of expression is not safe. It is better to say that the lease shall contain the covenants provided by the Short Forms of Leases Act. "The usual covenants."

56. Some covenants are said to be real and to run with the land, while others are merely personal and do not run. The expression "running with the land" is explained later on. (Chapter XI.) Covenants "running with the land."

Oral variations of contracts not permitted.

57. In dealing with the subject of covenants it cannot be too plainly impressed upon the reader that whatever either party requires or expects from the other should be inserted in the lease itself; no verbal addition or understanding will be allowed; the lease must speak for itself and be a complete exposition of the intention of the parties.

Effect of eviction of tenant.

58. If a lease is given without any covenants, then the law implies on the part of the landlord a promise that the tenant shall peacefully enjoy the demised premises free from interruption by himself or anyone claiming to be entitled through him, or even claiming against him. If the tenant is evicted by any one of these, he may not only refuse to pay rent accruing due after the eviction, but may bring an action against his landlord for damages arising over the loss of his holding. If the tenant is evicted or disturbed by a wrongdoer, the remedy is against the wrongdoer and not against the landlord.

59. If a tenant be evicted from any part of the demised premises by the landlord, or anyone claiming through him, the whole rent will be immediately suspended, and nothing will be payable for the interval that elapsed since the last day (quarter-day or otherwise) on which rent was payable.

60. But if the tenant be evicted from a part only of his land by one rightfully claiming by title paramount to or against his landlord, the rent will be apportioned, and so much only as may be considered fairly applicable to the part in question will be suspended.

61. But a mere entry by the landlord, if permitted by a covenant, or even a trespass by a stranger, will not suspend the rent. In the two latter cases the tenant will, of course, have his remedy by action of trespass against the wrongdoer.

5. Exceptions.

62. (5) The exceptions, e.g., trees in a farm lease; a salt bed in a salt district; or a coal oil boring in a coal oil district.

6. Provisos and conditions.

63. (6) Provisos and conditions. In a lease these are generally inserted for the purpose of enforcing due payment of rent or of performance of covenants. This is generally done by declaring the lease void or giving the landlord the right to re-enter upon the premises in case of breach of covenants.

Subsequent alterations or additions.

64. After a lease is executed it is, of course, competent to the parties to alter it or amend it, and any alteration or amendment must be construed according to the intention of the parties. As above pointed out, the lease itself should before execution be made so perfect that nothing else is necessary to ascertain what the parties intend.

Short Forms of Leases Act. Farm leases.

65. In Ontario the Legislature has provided a short form of lease, which is the one generally used for leases of houses or stores. Farm leases are also often drawn on this form, but farm leases require so many special covenants that a further form for farm leases is supplied by stationers.

Alterations in forms.

66. Persons who use these forms must be cautioned that any alteration of the printed words allowed by the Act may defeat the intention of the parties. By the statute the short clauses are declared to stand for the more extended clauses set out in the second column of the Act.

67. These extended clauses confer certain rights on landlords, and provide certain securities for tenants which may be lost if the parties in using short forms do not exactly adhere to the text of the statute. Great care is necessary, therefore, that no alteration be made in the printed forms of covenants. If either the landlord or the tenant desires to alter these covenants in any way, or to add further covenants, they should be added by special clauses relating to the matter in hand.

Employment of professional assistance.

68. If the transaction between the proposed landlord and tenant relates to a long period, or covers valuable property upon which improvements are to be made by either party, or if special covenants are required, it is better for the persons interested to put the matter in the hands of a solicitor, and instruct him to draw the necessary papers. As a general rule, solicitors who are trained for the purpose are safer guides than unlicensed conveyancers, who may or may not understand what they are attempting to do. If the solicitor is guilty of gross negligence or wilful misconduct, he is liable in damages to the party who is damnified by his mistake. An unlicensed conveyancer may or may not be liable according to the circumstances of the case.

CASES.

Sir George Jessel, M.R., in *Walsh* v. *Lonsdale*, 21 Ch. D. 9, says: There is an agreement for a lease under which possession has been

Effect of fusion of Courts of Law and Equity upon tenancies formerly void at law under Statute of Frauds.

given. Now, since the Judicature Act, the possession is held under the agreement. There are not two estates, as there were formerly; one estate at common law by reason of the payment of the rent from year to year, and an estate in equity under the agreement. There is only one Court, and the equity rules prevail in it. The tenant holds under an agreement for a lease. He holds, therefore, under the same terms in equity as if a lease had been granted, it being a case in which both parties admit that relief is capable of being given by specific performance.

Since the Judicature Act, the result of a verbal lease of real property for more than three years, to continue until and to expire upon a day certain, where the tenant has taken possession, is, that he is bound to give up possession at the end of the stipulated period without any notice to quit:

Magee v. *Gilmour*, 17 O. R. 620, 17 A. R. 27.

Effect of verbal lease since Judicature Act.

The plaintiff sued defendant for damages for refusal to admit him into possession of land, which he alleged the defendant had verbally agreed to give him a lease of for sixteen months. Held, that the evidence failed to shew an actual letting, but that if such had been proved the plaintiff must fail under the fourth section of the Statute of Frauds, as the action was brought in respect of an agreement for an interest in land:

Moore v. *Kay*, 5 A. R. 261.

Effect of the Statute of Frauds.

An agreement in writing, whereby A. agreed to rent to B., for three years from date, for £50 per annum, with taxes payable quarterly during occupation, B. to spend £25 in improvements: Held, a lease, and not a mere agreement for a lease.

The Statute of Frauds says: A lease by parol can only be made where it does not exceed three years from the making thereof. If a lease is required to be in writing it must be by deed. This lease was for three years, that is, it was for a term not exceeding three years, and therefore could be by parol. It was in writing. Writing was not necessary, and so the seal was not necessary either:

Grant v. *Lynch*, 14 U. C. R. 148. Same case also reported 6 C. P. 178 on point of surrender.

Verbal negotiations do not complete a lease.

As to a portion of the property, a saw mill, one B. said that on a Saturday he rented it verbally from the plaintiff for a year, and it was intended to have a written lease; but on Monday the defendant put some one else in possession and refused to let him in, after which he had nothing further to do with it. It was not shewn that either the rent or the terms of the tenancy had been agreed upon. Held, not a lease, but an agreement only, and that the defendant could not set it up to defeat the plaintiff's title.

In this case there was no agreement in writing, and the defendant, therefore, could not be compelled to carry out his verbal bargain. If B. had taken possession there would have been a complete agreement, but he did not, so the other party defeated his claim:

Kyle v. *Stocks*, 31 U. C. R. 47.

There was no seal on this agreement.

"M., for the consideration hereinafter named, agrees to demise and lease to H. these premises, etc., for the period of three years certain, at 10s. cy. per day, payable monthly in advance during said

term, and with the privilege to said H. to hold the same for a further period of two years, at the same rent, payable as aforesaid. The said H. agrees to take the said premises from said M. for the price and terms aforesaid, and to pay all taxes upon the said premises, possession to be given whenever the first monthly payment of rent is made." Could the above in writing (not under seal) be in any case construed as more than an agreement for a lease? It could not be regarded as being for a term not exceeding three years from the making, or, in other words, was for a term exceeding three years, and so by the Statute of Frauds would be required to be in writing, and therefore, by our legislation, to be under seal:

A verbal agreement held insufficient under the 4th section of the Statute of Frauds.

Hurley v. *McDonnell*, 11 U. C. R. 208.

A. leased a farm to B., upon condition that B. was to deliver to him one-half of the wheat raised on it. B. was to harvest and thresh and deliver the wheat to defendant's granary. Held, that under this agreement they were not partners in the wheat while it grew in the field, but stood to each other in the relation of landlord and tenant; and that, therefore, no legal property in the wheat could vest in A. until B., his tenant, had threshed it and delivered to him his portion:

Agreement to work a farm on shares—nature of relationship created.

Haydon v. *Crawford*, 3 O. S. 583.

L., by instrument not under seal, dated 31st October, 1857, leased to S. O., one of the defendants, for five years. On 31st March, 1858, he mortgaged the premises to the plaintiffs, and on the 8th June, 1858, by indenture, he again leased the same premises for five years to S. O. The mortgagees brought an action for possession of the property against S. O. Held, that though the indenture of June, 1858, as between the parties to it, extinguished the tenancy from year to year created by the instrument of 31st October, 1857, yet it did not entitle the plaintiffs as mortgagees to succeed, they not being parties to it:

Notice the result of the want of a seal in the first lease in this case S.O. became tenant from year to year for five years, determinable during the term by half a year's notice.

Caverhill v. *Orvis*, 12 C. P. 392.

The word "lease," differing from "grant" or "demise" implies no contract for entry and quiet possession:

"Lease," effect of.

Ross v. *Massingberd*, 12 C. P. 62.
Harvey v. *Ferguson*, 9 U. C. R. 431.
See *Saunders* v. *Roe*, 17 C. P. 344.

The word "demise" in a lease raises an implied covenant to give possession:

"Demise," effect of.

Saunders v. *Roe*, 17 C. P. 344.

The words "agree to let or hire" are words of a present demise where the contrary does not appear to be the intention in the instrument in which they are contained.

Construction of particular instrument.

Cumming v. *Hill*, 6 O. S. 303.

A lease void for the creation of a term (not being executed according to law) may be looked at to ascertain the conditions of occupation:

One use of a lease void in point of form.

Galbraith v. *Fortune*, 10 C. P. 109.
Lyman v. *Snarr*, same vol., 462.

Mining lease considered:

Palmer v. *Wallbridge*, 15 S. C. R. 650.

That premises were uninhabitable, no defence.

In an action for rent: Held, no defence that the house became unfit for habitation in consequence of the roof admitting water, and for want of sufficient drainage, whereby the said house became wet, damp, unwholesome, noisome, and offensive, of which the plaintiff had notice, and defendant thereupon quitted the same before the commencement of the time for which rent was demanded:

Denison v. *Nation*, 21 U. C. R. 57. Compare also *Wilkes* v. *Steele*, 14 U. C. R. 570.

A hard case but unforeseen

Plaintiff leased to defendant land in front of the city of T. with the use of the water adjacent. The corporation, in construction of an esplanade, cut off the access to the water. Held, that defendant was bound to pay rent and fulfil his contract:

Lyman v. *Snarr*, 9 C. P. 104.

Damage by ice.

Damage by ice to a wharf or pier not considered to be damage caused by tempest, so as to bring it within the exception of "reasonable wear and tear, and accidents by fire and tempest excepted:"

Thistle v. *Union Co.*, 29 C. P. 76.

Goods leased burned. Provide for this contingency.

Lessee of goods covenanted to restore them to the lessor, "at the expiration of the term, in as good order as they then were, reasonable wear and tear excepted," and the goods during the term were destroyed by fire without lessee's default. Held, lessee not liable to replace:

Chamberlen v. *Trenouth*, 23 C. P. 497.

Be careful to fix your liability in case of fire.

A. leased to B. a house for fifteen years, and during the term, by agreement, A. therein assented to an assignment by B. to C., and gave C. the option to purchase the fee within one year at a given sum, payable by instalments; and C. at the time of the agreement paid A. £50, to be on account of purchase money in case he elected to purchase, otherwise to go for rent. There was a proviso in the original lease that should the house be burnt the rent should cease. C. did not purchase, and the premises were afterwards burned, at which time, long before the expiration of the lease, the rent due was £12 10s. Held, that notwithstanding the proviso, A. was entitled to rent until the £50 was absorbed.

Pulver v. *Williams*, 3 C. P. 56.

What trouble would have been saved had the whole agreement been put into writing.

Plaintiff sued defendant for trespass, and for cutting and carrying away grain. Defendant set up that the plaintiff was lessee of the defendant under an indenture of lease; that on the negotiation for, and execution of that lease, it was verbally agreed between them, and the true agreement was, that the defendant should have the right to enter and harvest the crop then in the ground sowed by him; that when the lease was executed a reservation of such right was suggested, but was omitted on the plaintiff's assurance that it was unnecessary, as the agreement between them was well understood, and defendant would be allowed to take the crop; and that the entry in pursuance of this agreement is the trespass complained of. Held, to be a good defence, for the independent verbal agreement, made in consideration of the defendant signing the lease, was good as an agreement, though defendant by the fourth section of the Statute of Frauds might be prevented from suing on it:

McGinness v. *Kennedy*, 29 U. C. R. 93.

A party entered into possession and sowed a crop upon the verbal understanding that he should have the product thereof, but no special time for occupation was mentioned. Held, that a sufficient tenancy was created to entitle him to such crop: A verbal arrangement leads to a lawsuit.

Mulherne v. *Fortune*, 8 C. P. 434.

As to the use of short form covenants and the necessity for not altering them: Do not alter forms

See *Emmett* v. *Quinn*, 7 A. R. 306.

Lee v. *Lorsch*, 37 U. C. R. 262.

An informal document which acknowledges the receipt of rent of premises for a future definite term, and under which possession is taken by the person paying the rent, is a contract of letting and hiring and not merely an agreement for a lease. Receipt of rent—Lease or agreement.

In the absence, in a lease, of an express covenant to repair by the lessee, he is not liable for permissive waste, and an accidental fire, by which the leased premises are burnt, is permissive not voluntary waste:

Wolfe v. *McGuire*, 28 O. R. 45.

A lease with habendum for a year contained a subsequent clause that either party might terminate the lease at the end of the year on giving three months written notice prior thereto. Held, that the clause was repugnant to the habendum and must be rejected, and that the lease terminated at the end of the year without any notice. Habendum —Repugnant subsequent clause.

Weller et al. v. *Carnew*, 29 O. R. 400.

CHAPTER IV.

LODGERS.

Lodgers.

69. Lodgers* have in general the same rights and are subject to the same liabilities as other tenants. They are, in fact, tenants of a different kind of holding and for a shorter period than from year to year of a house, but they are not tenants of a different kind. The law as to payment of rent by a lodger, and as to remedies against him for refusing to give up possession, are the same as in the case of a tenant of house or lands.

A lien is given now by statute to lodging-house keepers by the Ontario statutes. R. S. O. c. 187, s. 2.

Lien on baggage for accommodation furnished and power to sell.

2. Every inn-keeper, boarding-house keeper, and lodging-house keeper shall have a lien on the baggage and property of his guest, boarder or lodger for the value or price of any food or accommodation furnished to such guest, boarder or lodger; and in addition to all other remedies provided by law, shall have the right in case the same remains unpaid for three months to sell by public auction the baggage and property of such guest, boarder or lodger, on giving one week's notice by advertisement in a newspaper published in the municipality in which the inn, boarding-house or lodging-house is situate; or in case there is no newspaper published in the municipality, in a newspaper published nearest to such inn, boarding-house or lodging-house of the intended sale, stating the name of the guest, boarder or lodger, the amount of his indebtedness, the time and place of sale and the name of the auctioneer, and giving a description of the baggage or other property to be sold; and after the sale the inn-keeper, the boarding-house keeper, or lodging-house keeper may apply the proceeds of the sale in the payment of the amount due to him, and the costs of such advertising and sale, and shall pay over the surplus, if any, to the person entitled thereto on application being made by him therefor.

It must be borne in mind that each set of rooms in a house with a common outer door does not constitute separate tenements with reference to the landlord's right of distress. He has a perfect right to break down any of his lodger's doors and seize and execute distress on his goods.

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* There is a distinction between a lodger and a boarder. A lodger is a person who engages rooms only. A boarder is one who engages rooms and board, or board only. A boarder in our meaning of the word is scarcely ever found in England. Another term common in Ontario is a "roomer," that is to say, a person who engages rooms, furnished or unfurnished, without board. These persons are strictly lodgers.

What actions amount to taking possession.

70. The mere putting a bill in the window to show that the premises are to let, or lighting fires in the rooms, will not prevent the landlord from recovering the rent from a tenant who has quitted without notice, where such is necessary, but if he let them, no matter for how short a time, he cannot claim any subsequent rent, although the rooms may afterwards have become and remain vacant during a considerable part of the time that would have been included in the proper notice.

I have already stated that the tenant of furnished rooms may quit them without any notice if the furniture is unfit for use.

Use of conveniences.

71. When lodgings are let in a house it is implied, unless agreed to the contrary, that the tenant should have the use of those domestic conveniences which are attached rather to the house itself than to any particular part of it, and which are indispensable to the use of any rooms in it as a residence. Amongst these are the skylights and staircase window, the water closet, door bell and knocker. A distinction is made in the use of these conveniences where the premises are let in flats; only those conveniences which belong to a particular flat are rented therewith; means of access to each particular flat being obtained by a common entrance and staircase.

72. A tenant, if deprived of the use of any of the conveniences appertaining to the premises rented, has an action for breach of contract, but a lodger cannot insist upon having his name painted on the outer door, or affix thereto a door-plate.

Duty of lodging-house keeper.

73. As the keeper of a lodging-house has the general possession and government of it, he is bound, for the protection of the persons and property of the lodgers, to take such precaution against fire and robbery as may reasonably be expected from a prudent householder. He will be liable if they incur loss in consequence of the doors not being properly secured at night, or by improper or doubtful characters being permitted to assemble at late hours, or from any want of care on his part in the selection of honest and competent servants. If, after he has exercised such care, the goods of the lodger have been stolen in consequence of the negligence of the servants, the lodging-house keeper is not liable unless the goods have been specially confided to his custody.

Liability for damage to furniture.

74. If a lodger merely has the use of the furniture in his rooms, the landlord retaining possession of them and looking after and taking care of them by his own servants, the tenant is only bound to use them himself, and to see that his family and guests use them in a reasonable manner. If, as is sometimes the case in apartments, and most frequently where a furnished house is taken, the tenant brings in his own servants, and has not only the use but the possession of the furniture and household utensils, he would be bound also to see that their care and preservation are properly attended to, and to return them at the expiration of his tenancy in good order and condition, deteriorated only by ordinary wear and tear and reasonable use. If such a tenant receives plate, linen, etc., and agree "to leave them as he found them," he must return them clean, if he received them in that state.

Inventory of rented furniture.

75. In cases of taking or letting furnished houses, it is best to affix to the lease an inventory of the articles taken over, which should be checked over and signed by both parties, so as to prevent mistakes. If this inventory is not made disputes are certain to arise.

Contract to let lodgings must be in writing.

76. It must be remembered that an agreement for the letting of lodgings is a contract for an interest in land within the Statute of Frauds, and that unless it is reduced to writing no action can be maintained upon it against the person who has agreed to take apartments, but has never entered and taken possession of them, and has refused to pay the rent agreed upon.

Powers of lodging-house keeper as to recovering premises.

77. A lodging-house keeper has no right to eject by forcible means or with the aid of a policeman, a lodger who insists on remaining after the conclusion of his term, or the expiration of a proper notice to quit. But he will, in such a case, be justified in taking advantage of his tenant's temporary absence to fasten up the doors of his apartments and to prevent his returning to them. He must of course, in that case, be ready to deliver to the tenant on his return any property which he has left there.

Sale of lodger's goods.

78. If a lodger desert his apartments without paying his rent, and leave property there, the landlord will be perfectly safe in selling it, and applying the proceeds to the discharge of the rent, after giving the owner reasonable notice of his intention to do so by public advertisement; but the landlord

must have very good grounds for believing that the lodger has really deserted the premises and left his goods, and that he has no intention to return and claim them.

Seizure of lodger's goods for rent.

79. The provisions of the law now relating to the seizure of lodgers' goods for rent due by their landlord are very clear. The following are the statutory provisions on the subject. They form sections 39 to 42 of the Landlord and Tenant Act (R. S. O. c. 170):

If a superior landlord shall levy, or authorize to be levied, a distress on any furniture, goods or chattels, of any boarder or lodger, for arrears of rent due to the superior landlord by his immediate tenant, the boarder or lodger may serve the superior landlord or the bailiff, or other person employed by him to levy the distress, with a declaration in writing, made by the boarder or lodger, setting forth that the immediate tenant has no right of property or beneficial interest in the furniture, goods or chattels so distrained, or threatened to be distrained upon, and that such furniture, goods or chattels, are the property or in the lawful possession of such boarder or lodger; and also setting forth whether any, and what amount, by way of rent, board, or otherwise, is due from the boarder or lodger to the said immediate tenant; and the boarder or lodger may pay to the superior landlord, or to the bailiff or other person employed by him as aforesaid, the amount, if any, so due as last aforesaid, or so much thereof as shall be sufficient to discharge the claim of the superior landlord; and to such declaration shall be annexed a correct inventory, subscribed by the boarder or lodger, of the furniture, goods and chattels referred to in the declaration.

If a superior landlord or a bailiff, or other person employed by him, after being served with the before-mentioned declaration and inventory, and after the boarder or lodger shall have paid or tendered to the superior landlord, bailiff, or other person, the amount, if any, which by the last preceding section the boarder or lodger is authorized to pay, shall levy or proceed with a distress on the furniture, goods or chattels of the boarder or lodger, the superior landlord, bailiff or other person, shall be deemed guilty of an illegal distress, and the boarder or lodger may replevy such furniture, goods or chattels, in any Court of competent jurisdiction, and the superior landlord shall also be liable to an action at the suit of the boarder or lodger, in which action the truth of the declaration and inventory may likewise be inquired into.

Any payment made by a boarder or lodger pursuant to section 39 of this Act, shall be deemed a valid payment on account of the amount due from him to the immediate tenant mentioned in the said section.

The declaration hereinbefore referred to shall be made under and in accordance with the Canada Evidence Act, 1893.

CHAPTER V.

SHORT FORMS OF LEASES.

80. The statute respecting Short Forms of Leases is R. S. O. c. 125. It consists of three sections and two schedules, A and B. Schedule A is a brief form of lease, Schedule B is divided into two columns. The first column contains the short form covenants. The second column contains the long form to which the corresponding short form is equivalent. The Act provides:

(1) Where words in the short form are used they have the same effect as the long form.

(2) A lease, although it fails to take effect under the Act, may be good as between the parties. That is, the Court is bound, in case of dispute, to try and construe the parties' language so as to make it effectual, if it can.

(3) Covenants not to assign or sublet without leave run with the land, and bind heirs, executors, administrators and assigns of the lessee, whether mentioned or not, unless otherwise expressly provided, and a proviso for re-entry applies to breaches of either an affirmative or negative covenant.

By section 12 of R. S. O. c. 119, every "lease," (which is included in the term "conveyance,") is extended as follows:

12. (1) Every conveyance of land, unless an exception is specially made therein, shall be held and construed to include all houses, outhouses, edifices, barns, stables, yards, gardens, orchards, commons, trees, woods, underwoods, mounds, fences, hedges, ditches, ways, waters, watercourses, lights, liberties, privileges, easements, profits, commodities, emoluments, hereditaments, and appurtenances whatsoever to the lands therein comprised belonging or in any wise appertaining, or with the same demised, held, used, occupied, and enjoyed, or taken or known as part or parcel thereof; and if the same purports to convey an estate in fee, also the reversion or reversions, the remainder and remainders yearly and other rents, issues and profits of the same lands, and of every part and parcel thereof; and all the estate, right, title, interest, inheritance, use, trust, property, profit, possession, claim, and demand whatsoever of the grantor in, to, out of, or upon the same lands, and every part and parcel thereof with their and every of their appurtenances.

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

The lease itself (Schedule A) runs thus:

This Indenture, made the day of in the year of our Lord one thousand eight hundred and , in pursuance of the Act respecting Short Forms of Leases.

Between of the first part; and of the second part.

Witnesseth, that in consideration of the rents, covenants and agreements, hereinafter reserved and contained, on the part of the said party (or parties) of the second part, his (or their) executors, administrators and assigns, to be paid, observed and performed, he (or they) the said party (or parties) of the first part, hath or have demised and leased, and by these presents do (or doth) demise and lease unto the said party (or parties) of the second part, his (or their) executors, administrators and assigns, all that messuage or tenement, situate (or all that parcel or tract of land) situate, lying and being (here insert a description of the premises, with sufficient certainty).

To have and to hold the said demised premises for and during the term of to be computed from the day of one thousand eight hundred and , and from thenceforth next ensuing, and fully to be complete and ended.

Yielding and paying therefor yearly, and every year during the said term hereby granted, unto the said party (or parties) of the first part, his (or their) heirs, executors, administrators or assigns, the sum of to be payable on the following days and times, that is to say, etc., the first of such payments to become due and be made on the day of next.

81. The covenants (Schedule B) are as follows: The short form in large type is followed by its corresponding long form type.

(1) The said (lessee) covenants with the said (lessor) to pay rent:

And the said lessee doth hereby, for himself, his heirs, executors, administrators and assigns, covenant with the said lessor, that he, the said lessee, his executors, administrators and assigns, will during the said term pay unto the said lessor the rent hereby reserved in manner hereinbefore mentioned without any deduction whatsoever.

(See the chapter on Rent.)

(2) And to pay taxes, except for local improvements.

And, also, will pay all taxes, rates, duties and assessments whatsoever, whether municipal, parliamentary, or otherwise, now charged, or hereafter to be charged, upon the said demised premises, or upon the said lessor on account thereof, except municipal taxes for local improvements or works assessed upon the property benefited thereby.

(See chapter on Taxes.)

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

And, also, will during the said term well and sufficiently repair, maintain, amend and keep the said demised premises with the appurtenances in good and substantial repair, and all fixtures and things thereto belonging, or which at any time during the said term shall be erected and made by the lessor, when, where, and so often as need shall be, reasonable wear and tear and damage by fire, lightning and tempest only excepted.

In Holderness v. Lang, 11 U. C. R. 1, it was held that the tenant was bound to keep in repair not only the demised premises, but also impliedly all fixtures and things erected or made during the term which he had a right to erect or make. This decision is embodied in clause (3) as it stands.

In a lease for years of premises made to G., his executors and assigns, and assigned by G. as to the residue of the term to the defendants, was contained after the usual covenants to yield up the same in good repair, the following proviso:

A covenant limiting a general liability to repair (a good precedent.)

"Provided always, that nothing herein contained shall be deemed or taken, or construed to be deemed or taken, in any way to compel the said G., his executors, administrators or assigns, to give up the buildings at the expiration thereof, which are all wooden and liable to decay, in as sound and good a state as they now are; but such buildings are not to be wilfully or negligently wasted or destroyed; necessary repairs, however, for the preservation of the said buildings to be done and performed by the said G., at his own proper cost and charge." Held, that the words recited constituted a covenant, and that such covenant ran with the land and bound the assignees of the lease, though assigns were not expressly mentioned in the instrument: Perry v. Bank of U. C., 16 C. P. 404.

(See chapter on Waste.)

(4) And to keep up fences:

And, also, will from time to time during the said term keep up the fences and walls of or belonging to the said premises, and make anew any parts thereof that may require to be new made in a good and husband-like manner, and at proper seasons of the year.

In this country the removal of a fence on a farm from one place to another is not necessarily a breach of a covenant to repair and keep fences in repair. Whether it would be so or not is a question of fact in each case: Leighton v. Medley, 1 O. R. 207.

(5) And not to cut down timber:

And, also, will not at any time during the said term hew, fell, cut down, or destroy, or cause, or knowingly permit or suffer to be

hewed, felled, cut down or destroyed, without the consent in writing of the lessor, any timber or timber trees, except for necessary repairs, or firewood, or for the purpose of clearance, as herein set forth.

(See as to tapping of trees the chapter on Waste.)

(6) And that the said lessor may enter and view state of repair, and that the said lessee will repair according to notice in writing, reasonable wear and tear and damage by fire, lightning and tempest only excepted.

And it is hereby agreed, that it shall be lawful for the lessor and his agents at all reasonable times during the said term to enter the said demised premises to examine the condition thereof; and further, that all want of reparation that upon such view shall be found, and for the amendment of which notice in writing shall be left at the premises, the said lessee, his executors, administrators and assigns, will, within three calendar months next after such notice, well and sufficiently repair and make good accordingly, reasonable wear and tear and damage by fire, lightning and tempest only excepted.

(See chapter on Waste.)

(7) And will not assign or sublet without leave:

And, also, that the lessee, his executors, administrators and assigns, shall not nor will during the said term assign, transfer or set over, or otherwise by any act or deed procure the said premises, or any of them, to be assigned, transferred, set over, or sublet unto any person or persons whomsoever without the consent in writing of the lessor, his heirs or assigns, first had and obtained.

This covenant runs with the land. (See note at head of chapter, also directions at end.)

Conditions that the tenant shall not assign without the landlord's license, and also that he shall not underlet, are frequently inserted in leases in order to prevent the tenant from parting with his interest in the premises to an insolvent person, or to one of bad character. Unless, however, special words are inserted such a condition will not be broken by an "assignment by operation of the law," that is to say, where the tenant's interest in the lease is sold by the sheriff under an execution, or if he makes a voluntary assignment for the benefit of creditors. If the lease require the landlord's license to be in writing, a license by word of mouth will not bind him. A tenant may, however, still remain liable to an action for damages for breach of the covenant not to assign. Neither a condition that the lessee shall not underlet, nor a covenant to the same effect, are violated by his taking lodgers.

(See Toronto Hospital Trustees v. Denham, 31 C. P. 203; Crawford v. Bugg, 12 O. R. 8.)

When a lease containing a covenant against assignment without the consent of the lessors is so assigned, the assignment containing a covenant by the assignee to pay the rent and indemnify the assignor, and the assignee goes into possession of the demised premises, he is bound by his covenant, and is liable, notwithstanding the non-assent of the lessors, to repay to the assignor rent accruing due after the assignment paid by the assignor to the lessors, under threat of legal proceedings: Brown v. Lennox, 22 A. R. 442.

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

And further, the lessee will, at the expiration or other sooner determination of the said term, peaceably surrender and yield up unto the said lessor the said premises hereby demised, with the appurtenances, together with all buildings, erections and fixtures erected or made by the lessor thereon, in good and substantial repair and condition, reasonable wear and tear, damage by fire, lightning or tempest only, excepted.

(See cases on destruction of property under chapter on Rent.)

(9) Provided that the lessee may remove his fixtures:

Provided always, and it is hereby expressly agreed, that the lessee may, at or prior to the expiration of the term hereby granted, take, remove, and carry away from the premises hereby demised all fixtures, fittings, plant, machinery, utensils, shelving, counters, safes, or other articles upon the said premises in the nature of trade or tenant's fixtures, or other articles belonging to or brought upon the said premises by the said lessee, but the lessee shall in such removal do no damage to the said premises, or shall make good any damage which he may occasion thereto.

(See chapter on Fixtures.)

(10) Provided that in the event of fire, lightning or tempest, rent shall cease until the premises are rebuilt:

Provided, and it is hereby declared and agreed, that in case the premises hereby demised, or any part thereof, shall at any time during the term hereby agreed upon be burned down or damaged by fire, lightning or tempest, so as to render the same unfit for the purposes of the said lessee, then, and so often as the same shall happen, the rent hereby reserved, or a proportionate part thereof according to the nature and extent of the injuries sustained, shall abate, and all or any remedies for recovery of said rent, or such proportionate part thereof, shall be suspended until the said premises shall have been rebuilt or made fit for the purposes of said lessee.

Rent payable in advance

By the proviso in the lease in case of the mill demised being accidentally burned the rent was thenceforth to cease.

The mill was so burned on the 5th March. The rent was payable in advance, and was due on the 1st of March. The tenant had to pay the rent although the premises were burned on the 5th: Ryerse v. Lyons, 22 U. C. R. 12. and destruction of property.

(11) Proviso for re-entry by the said (lessor) on non-payment of rent or non-performance of covenants:

Provided always, and it is hereby expressly agreed, that if and whenever the rent hereby reserved, or any part thereof, shall be unpaid for fifteen days after any of the days on which the same ought to have been paid, although no formal demand shall have been made thereof, or in case of the breach or non-performance of any of the covenants or agreements herein contained, on the part of the lessee, his executors, administrators, or assigns, then, and in either of such cases, it shall be lawful for the lessor at any time hereafter, into and upon the said demised premises, or any part thereof, in the name of the whole to re-enter, and the same to have again, re-possess and enjoy as of his or their former estate, anything hereinafter contained to the contrary notwithstanding.

(See chapter on Forfeiture and Re-entry.)

(See also text at head of this chapter.)

(12) The said lessor covenants with the said lessee for quiet enjoyment:

And the lessor doth hereby, for himself, his heirs, executors, administrators and assigns, covenant with the lessee, his executors, administrators and assigns, that he and they paying the rent hereby reserved, and performing the covenants hereinbefore on his and their part contained, shall and may peaceably possess and enjoy the said demised premises for the term hereby granted, without any interruption or disturbance from the lessor, his heirs, executors, administrators and assigns, or any other person or persons lawfully claiming by, from, or under him, them, or any of them.

Covenants for quiet enjoyment, though apparently directed to the protection of the tenant, really limit the liability of the landlord. For, if there were no such covenant in the lease, the law would imply one on the part of the landlord to protect the tenant from all disturbance in his holding by the landlord, or by those claiming under him, or by those claiming by title paramount to him (that is, by an adverse and better title). But as these covenants are usually framed, the landlord only engages to protect the tenant from being ejected either by himself or by those claiming under him.

Where plaintiff (lessee) was evicted by title paramount to lessor: Held, he could not recover. The above covenant is

limited to acts of lessor and those claiming under him: Davis v. Pitchers, 24 C. P. 516. See Snarr v. Baldwin, 11 C. P. 353.

Defendant having executed a lease of certain premises to plaintiff, containing the ordinary statutory covenant for quiet enjoyment, plaintiff was subsequently ejected by the assignee of mortgages thereon created prior to the lease, and thereupon sued defendant for breach of the covenant; but, held, that he could not recover as the assignee of the mortgages was not a person claiming "by, from or under" the defendant, but under the defendant's predecessor in title; held, also, that the fact that defendant had taken the land subject to the mortgages and was to pay them off, did not extend her liability under the covenant: Bellamy v. Barnes, 44 U. C. R. 315.

The following are the statutory directions for the use of the above short forms. The first column covenants are in large type above the second column in small type:

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

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

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

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

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

CHAPTER VI.

COVENANTS NOT IN THE STATUTORY SHORT FORM OFTEN USED.

Covenant to keep insured.

82. Leases frequently contain covenants on the part of the lessee to keep the premises insured; the name of the office in which the insurance is to be effected and the amount of the policy being also generally stated. Questions on these covenants very often arise in practice, and it may, therefore, be well for the tenant to bear in mind some of the most important points decided in relation to his liabilities. When a lessee has covenanted to insure and keep premises insured, it will be a breach of the covenant to allow them to remain uninsured for ever so short a period, and that, too, although no fire occur or damage be done to the premises in the meantime. It will also be a breach of covenant to insure in the name of the tenant only, when the lease stipulates that the policy shall be in the joint names of the landlord and tenant. And as the breach of this covenant continues so long as a state of things exists inconsistent with the provisions of the lease, any sanction, express or implied (as by receipt of rent), which the landlord may give to a departure from the letter of the covenant, will only apply to what is past. But these matters may be condoned by the Court under section 26 of the Judicature Act, hereafter quoted.

83. In a Canadian Act passed in 1865 the following sections were included (8, 9, 10):

Lessor to have benefit of an informal insurance.

The person entitled to the benefit of a covenant on the part of a lessee or mortgagor to insure against loss or damage by fire shall, on loss or damage by fire happening, have the same advantage from the then subsisting insurance relative to the building or other property covenanted to be insured, effected by the lessee or mortgagor in respect of his interest under the lease or in the property, or by any person claiming under him, but not effected in conformity with the covenant, as he would have from an insurance effected in conformity with the covenant.

Protection of purchaser against forfeiture under covenant

Where on a bona fide purchase, after the passing of this Act, of a leasehold interest containing a covenant on the part of the lessee to insure against loss or damage by fire, the purchaser is furnished with the written receipt of the person entitled to receive the rent, or his agent, for the last payment of the rent accrued due before the completion of the purchase, and there is subsisting at the time of the

for insurance against fire in certain cases.

completion of the purchase an insurance in conformity with the covenant, the purchaser, or any person claiming under him, shall not be subject to any liability by way of forfeiture or damage, or otherwise, in respect of any breach of the covenant committed at any time before the completion of the purchase, of which the purchaser had not notice before the completion of the purchase; but this provision is not to take away any remedy which the lessor or his legal representatives may have against the lessee or his legal representatives for breach of covenant.

To what leases the preceding provisions shall apply

The preceding sections shall be applicable to leases for a term of years, absolute or determinable on a life or lives, or otherwise, and also to a lease for the life of the lessee, or the life or lives of any other person or persons.

Mortgagee may require insurance money.

84. These sections were included in the Landlord and Tenant Act in the revision of 1877. They were repealed by 49 Vict. c. 20, s. 16 (9). The first one was considered of not much value, because the Imperial statute, 14 Geo. III. c. 78, s. 83 (which provided that insurance money might be applied in rebuilding on request of any party interested or on suspicion of arson), was declared to be in force in Ontario. This Imperial statute was repealed by 50 Vict. c. 26, s. 154, and there is no similar section in any of our Ontario Acts providing for the case of lessees, although there is for mortgagees. The only section covering the point, which it will be seen does not extend as widely as the one quoted, is section 4 of the Act respecting Mortgages (R. S. O. c. 121). It is as follows:

> All money payable on an insurance to a mortgagor shall, if the mortgagee so requires, be applied by the mortgagor in making good the loss or damage in respect of which the money is received.
>
> (2) Without prejudice to any obligation to the contrary imposed by law or by special contract, a mortgagee may require that all money received on an insurance be applied in or towards the discharge of the money due under his mortgage.

85. The term "mortgagor" includes any person from time to time deriving title under the original mortgagor, or entitled to redeem a mortgage according to his estate, interest or right in the mortgaged premises. It, therefore, includes a tenant, because a tenant is entitled to redeem a mortgage. If, therefore, there is an insurance on the premises effected by the tenant, loss payable to the landlord, and there is a mortgage on the premises, the holder of the mortgage can call on the tenant under this section to expend the money in making good the loss or paying it on the mortgage.

Unqualified covenant and fire.

86. Suppose there is, on the part of the tenant, an unqualified covenant to pay rent, so that if the premises were destroyed by fire the liability for rent would continue, and

also an insurance effected by the landlord. The latter could not insist on his tenant continuing to pay rent and refuse to expend the insurance money in repairing the premises. The insurance money would represent the property. It will be seen that the Act above quoted refers only to insurance where there is a mortgage on the premises. Dealings between landlord and tenant relating to insurance are not provided for by the Act.

87. Section 8, above quoted, is probably provided for by the next quoted section of the Judicature Act, but section 8 is a positive remedial clause, while the section of the Judicature Act is optional.

Relief against forfeiture for breach of covenant to insure in certain cases.

88. Section 30 of the Judicature Act, R. S. O. s. 51, is as follows:

> The High Court shall have power to relieve against a forfeiture for breach of a covenant or condition in any lease to insure against loss or damage by fire where no loss or damage by fire has happened, and the breach has, in the opinion of the Court, been committed through accident or mistake, or otherwise, without fraud or gross negligence, and there is an insurance on foot at the time of the application to the Court in conformity with the covenant to insure, upon such terms as to the Court may seem fit.

Tenant's right to bring action.

89. Where the landlord covenanted to insure, and the tenant had the option to purchase, and before the time for exercising the option expired the demised premises were burned, the landlord receiving the insurance money, it was held that the tenant, on exercising the option, could not sustain a claim to the insurance money as part of his purchase.

Covenant not to carry on business that may be considered a nuisance.

90. A covenant not to carry on certain specified trades and businesses, or any obnoxious or offensive trades and businesses generally, is very common in leases of the better description of house property. As to the trades enumerated, no difficulty can, of course, arise; but in construing the general words "any offensive trade or business," the Courts will look to the character of the locality. The landlord does not waive his right to forfeit a lease for the breach of such a covenant by accepting rent for however long a time, unless, indeed, he allow the lessee to spend money on the improvement of the premises in the faith that his lease is subsisting and perfectly valid.

Covenants for renewal.

91. Covenants for renewal of leases are considered as real agreements and run with the land, and therefore will affect

even the legal interest of those who take the estate with notice of such leases and covenants. A covenant for perpetual renewal entered into by a person having a limited interest in lands does not bind the estate.

Perpetual renewals not encouraged.

92. The leaning of the Courts is against perpetual renewals; and, therefore, in order to establish this construction the intention must be unequivocally expressed. A proviso in general terms that the lease to be granted shall contain the same covenants and agreements as the lease containing the covenant, has been repeatedly held not to extend to the covenant for renewal.

Specific covenant.

93. But, where a lease contained a covenant to execute a renewed lease at the same rent, and subject to the same covenants, "including this present covenant," it was held that this was a covenant for perpetual renewal, and that the lessee was entitled to have inserted in the renewed lease a covenant for renewal in the same words as that in the original lease.

No perpetual renewal through equivocal acts.

94. Any construing of a covenant for renewal as a perpetual one by equivocal acts of the parties will not now be allowed.

One of two no right.

95. One of two lessees has no single right of renewal.

Forfeiture of right to renew.

96. The right to renew may be forfeited by not applying for renewal in time. It may also be forfeited by non-performance of covenants. If the covenant to renew is to be acted upon "in case the lessee's covenants are duly performed," it is construed strictly against the lessee, and will not be specifically performed if the lessor have a right of action for the breach of covenant to repair, although the repair be but small. 'If there are any repairs wanted at all the lessee should have them done before applying for the renewal.

Executor renewing.

97. A lease renewed by an executor or trustee in his own name, even in the absence of fraud, and upon the refusal of the lessor to grant a new lease to the cestui que trust, will be ordered to be held in trust for the person entitled to the old lease.

Partner renewing.

98. A partner renewing a lease of the partnership premises in his own name will be held a trustee of it for the firm.

Sub-leases

99. In case of sub-leases by 4 Geo. II. c. 28, s. 6, where there are parcels leased out to several sub-tenants, it is not necessary on a renewal for all the sub-tenants to surrender. A new lease may be made without any surrender by them.

Chief leases may be renewed without surrendering all the under-leases.

The clauses of 4 Geo. II. c. 28, above referred to are now contained in R. S. O. c. 342 and are as follows:

Chief leases may be renewed without surrendering all the under-leases.

25. In case any lease shall be duly surrendered in order to be renewed, and a new lease made and executed by the chief landlord, the same new lease shall, without a surrender of all or any of the under-leases, be as good and valid to all intents and purposes as if all the under-leases derived thereout had been likewise surrendered, at or before the time of taking of such new lease; and every person in whom any estate for life, or lives, or for years, shall from time to time be vested by virtue of such new lease shall be entitled to the rents, covenants, and duties, and have like remedy for recovery thereof, and the under-lessees shall hold and enjoy the messuages, lands, and tenements in the respective under-leases comprised, as if the original leases, out of which the respective under-leases are derived, had been still kept on foot and continued, and the chief landlord shall have, and be entitled to, such and the same remedy by distress, or entry, in and upon the messuages, lands, tenements, and hereditaments, comprised in any such under-lease, for the rents and duties reserved by such new lease, so far as the same exceed not the rents and duties reserved in the lease out of which such under-lease was derived, as they would have had in case such former lease had been still continued, or as they would have had in case the respective under-leases had been renewed under such new principal lease, any law, custom, or usage to the contrary hereof notwithstanding. 4 Geo. II. c. 28, s. 6.

(See R. S. O. c. 170, s. 10.)

If persons bound to renew are out of Ontario the renewals may be made by a person appointed by the Court in the name of the person who ought to have renewed.

26. Where any person who, in pursuance of any covenant or agreement in writing, might, if within Ontario and amenable to the process of the High Court of Justice, be compelled to execute any lease by way of renewal, shall not be within Ontario, or not amenable to the process of the said Court, it shall be lawful for the said High Court of Justice, by an order to be made upon the petition or motion of any person entitled to such renewal (whether such person be, or be not, under any disability), to direct such person as the said Court shall think proper to appoint for that purpose, to accept a surrender of the subsisting lease, and make and execute a new lease in the name of the person who ought to have renewed the same; and such deed, executed by the person to be appointed as aforesaid, shall be as valid as if the person in whose name the same shall be made had executed the same, and had been alive, and not under any disability, and had himself executed the same; but in every such case it shall be in the discretion of the said Court, if under the circumstances it shall seem requisite, to direct an action to be brought to establish the right of the party seeking the renewal, and not to make the order for such new lease unless by the judgment to be made in such cause, or until after such judgment shall have been made. Imp. Act, 11 Geo. IV., and 1 Wm. IV. c. 65, s. 18.

Fines to be paid before renewals and counterparts are executed.

27. No renewed lease shall be executed by virtue of section 26, in pursuance of any covenant or agreement, unless the fine (if any), or the sum or sums of money (if any), which ought to be paid on such renewal, and the things (if any) which ought to be performed in pursuance of such covenant or agreement by the lessee or tenant, be first paid, and performed, and counterparts of every renewed lease to be executed by virtue of this Act, shall be duly executed by the lessee. Imp. Act, 11 Geo. IV., and 1 Wm. IV. c. 65, s. 20.

Premiums, how to be paid.

28. All fines, premiums, and sums of money, which shall be had, received, or paid for, or on account of, the renewal of any lease, by any person out of Ontario, or not amenable as aforesaid, after a deduction of all necessary incidental charges and expenses, shall be paid to such person, or in such manner, or into the High Court of Justice to such account, and be applied, and disposed of as the said Court shall direct. Imp. Act, 11 Geo. IV., and 1 Wm. IV. c. 65, s. 21.

Costs may be directed to be paid.

29. The High Court of Justice may order the costs and expenses of, and relating to the petitions, orders, directions, conveyances, and transfers, to be made in pursuance of section 26, or any of them, to be paid and raised out of, or from, the lands, or the rents, in respect of which the same respectively shall be made in such manner as the said Court shall think proper. Imp. Act, 11 Geo. IV., and 1 Wm. IV. c. 65, s. 35.

The following sections, which were passed in order to prevent fraudulent technicalities on the part of troublesome tenants are re-enacted by R. S. O. c. 342.

Attornment to stranger to title void.

23. Every attornment of any tenant of any messuages, lands, tenements, or hereditaments, within Ontario, to any stranger claiming title to the estate of his landlord, shall be absolutely null and void to all intents and purposes whatsoever; and the possession of his landlord or lessor shall not be deemed, or construed to be, anywise changed, altered or affected, by any such attornment; provided always, that nothing herein contained shall extend to vacate, or affect, any attornment made pursuant to, and in consequence of, some judgment or order of a Court, or made with the privity and consent, of the landlord or lessor, or to any mortgagee, after the mortgage is become forfeited. 2 Geo. II. c. 19, s. 11.

Attornment of tenant, in what cases not necessary.

24. (1) All grants or conveyances of any rents, or of the reversion, or remainder, of any messuages or lands, shall be good and effectual to all intents and purposes without any attornment of the tenant of the land out of which such rent shall be issuing, or of the particular tenant upon whose particular estate any such reversion or remainder shall and may be expectant, or depending, as if his attornment had been had, and made. 4 & 5 Anne, c. 3 (or c. 16 in Ruffhead's ed.), s. 9.

Tenant not to be prejudiced.

(2) No tenant shall be prejudiced, or damaged, by payment of any rent, to any grantor, or conusor, or by breach of any condition for non-payment of rent, before notice shall be given to him of such grant by the conusee, or grantee. 4 & 5 Anne, c. 3 (or c. 16 in Ruffhead's ed.), s. 10.

Right to purchase reversion.

100. A lease sometimes contains a clause enabling the tenant, upon giving certain notice to the landlord, to purchase the reversion. Such a clause is always for the interest of the tenant, and binds him to nothing, and allows a trial of the demised premises.

Referring of differences.

101. Leases frequently provide for the referring of differences as to the amount to be paid for improvements, etc., and in farm leases for crops, to two persons, one chosen by the landlord, the other by the tenant. If these persons are arbitrators, the submission can be made a rule of Court. If they are valuers, to decide by the use of their own eyes, skill and knowledge, it is otherwise. Whether they are valuers or arbitrators depends on the language used.

Covenants to be implied.

102. We now come to covenants which, under present legislation, are always to be implied (R. S. O. c. 119, s. 17):

On conveyance for value by beneficial owner.

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

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

Covenants for right to convey;

Quiet enjoyment;

Freedom from incumbrances; and

Further assurance;

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

On conveyance of leasehold for value by beneficial owner.

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

Validity of lease.

That, notwithstanding anything by the person who so conveys, made, done, executed or omitted, or knowingly suffered, the lease or grant creating the term or estate for which the land is conveyed is at the time of conveyance a good, valid, and effectual lease or grant of the property conveyed, and is in full force, unforfeited, unsur-

rendered, and in nowise become void or voidable, and that notwithstanding anything as aforesaid all the rents reserved by, and all the covenants, conditions, and agreements contained in the lease or grant, and on the part of the lessee or grantee and the persons deriving title under him, to be paid, observed, and performed, have been paid, observed, and performed up to the time of conveyance.

On conveyance by trustee.

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

Against incumbrances.

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

On conveyance by beneficial owner.

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

Where covenants are not implied.

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

Enforcing covenants.

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

Variation of covenants.

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

The application of above section to the subject of this volume lies in paragraph (*b*) of the first sub-section. The reader will observe that in this sub-section the word "further" is used. This word shows that the covenants already mentioned in sub-section (*a*) are to be added to that mentioned in sub-section (*b*). The transaction referred to is "a con-

veyance of leasehold property for valuable consideration"—what is equivalent to a transfer by a lessee of his interest, or by a lessor of his reversion.

CASES.

Covenant to insure, extent of.

Covenant by lessee to insure in the name of the lessor, the insurance money to be expended in the erection of new buildings: Held, a covenant running with the land, and that an action would lie on it against the assignee of the lessee:

Douglass v. *Murphy*, 16 U. C. R. 113.

Covenant to pay for buildings not made wide enough.

A covenant by a lessor (not mentioning assigns) to pay for buildings to be erected on the lands demised, does not run with the land, and the lessee or his assigns have no claim as against the land or the devisees of the lessor in respect of the value of buildings so erected:

McClary v. *Jackson*, 13 O. R. 310.

Covenan running with the land—Equitabl lien.

B. demised certain lands to W. by deed of lease, containing an agreement that "at the expiration of the lease the lessor, his heirs or assigns will pay the said lessee, &c., one-half of the then value of any permanent improvements he may place upon the said lands," &c.—Held, that the liability to pay for the said improvements ran with the land and attached as an equitable lien thereon as against the plaintiff to whom B. had conveyed the said land, such lien attaching on the title which B. had at the time of such conveyance to the plaintiff, and that on the expiration of the term the latter could only recover possession of the said land subject to such lien:

Berrie v. *Woods*, 12 O. R. 693.

Carrying on trading affecting the insurance.

A lessor demised property for a term of years, with a stipulation that the lessee would not carry on any business that would affect the insurance. The lessee made an under-lease, omitting any such stipulation, and the under-lessee commenced the business of rectifying highwines. Injunction granted to restrain same:

Arnold v. *White*, 5 Chy. 371.

Liability for nuisances.

If a nuisance exist at the time of letting, both tenant and owner are liable. If it arise after the tenancy is created, the tenant only is responsible:

Reg. v. *Osler*, 32 U. C. R. 324.

Ice on sidewalk—Owner of adjacent building—Tenant.

In an action against a city municipality in which the plaintiff recovered damages for injuries sustained by her slipping on ice which had formed on the sidewalk by water brought by the down pipe from the roof of an adjacent building, which was allowed to flow over the sidewalk and freeze, there being no mode of conveying it to the gutter, the owner of the building and the tenant thereof were, at the instance of the municipality, made party defendants under s. 531 of the Consolidated Municipal Act. The pipe in its condition at the time of the accident discharging the water upon the sidewalk had existed from the commencement of the tenancy. A by-law of the municipality required the occupant of the building, or, if unoccupied, the owner, to remove ice from the front of the building abutting on a

street within a limited time. Held, that the owner was, but the tenant was not, liable over to the municipality for damages recovered.

Organ v. *City of Toronto*, 24 O. R. 318.

Lessor's option to renew or pay for improvements cannot be taken from him.

Where the lessor covenants for a renewal of the term, or in default for payment of improvements, the option rests with the lessor, either to renew or pay for the improvements; and the lessee cannot compel specific performance of the contract to renew:

Hutchinson v. *Boulton*, 3 Chy. 391.

He had *covenanted* to leave.

Where a lessee took a lease of premises for two years, and covenanted to leave the premises without notice at the end of that time: Held, that on ejectment brought by the lessor at the end of the term, the lessee could not set up a former lease to him for a longer period:

Wimburn v. *Kent*, 5 O. S. 437.

Covenant to assign hotel license.

A covenant in the lease of a hotel by the lessee that he will from time to time apply for a license, and at the expiration of the lease assign to the lessor the license, if any, held by him, is not a covenant binding on the assignee of the term as such, being merely personal and having nothing to do with the land or its tenure:

Walsh v. *Walper*, 2 O. R. 158.

Lease—Renewal—Option.

Under a covenant in a lease that the lessors would, at the expiration of the term thereby granted, grant another lease "provided the said lessee should desire to take a further lease of said premises," no notice or demand by the lessee is necessary. The existence in fact of a desire for the further lease is all that is essential, and that desire may be indicated by conduct and circumstances. A lease of land, subject to two mortgages, contained a covenant by the lessor and the second mortgagee with the lessee, that the lessee might, if he desired to do so, redeem the first mortgage, and that in that case the sum paid for redemption should be a first charge on the land. Held, that the second mortgagee's right to redeem the first mortgage after its acquisition by the lessee, was not taken away:

Brewer v. *Conger*, 27 A. R. 10.

Covenant of renewal—Compensation for improvements—Time of election.

Where a covenant in the lease to the effect that if, on the expiration of the term the lessee should be desirous of taking a renewal lease, and should have given to the lessors thirty days' notice in writing of that desire, the lessors would renew at a rental to be fixed as therein directed, went on to provide that if the lessors did not see fit to renew the lessee should receive compensation for his permanent improvements;

Held, that in order to entitle the lessee to claim compensation for his improvements and refuse to accept a renewal lease, the lessors must have elected from the expiration of the existing term not to renew, and if they did not so elect the lessee was bound to accept a renewal lease if and when required so to do:

Ward v. *The Corporation of the City of Toronto*, 29 O. R. 729.

Renewal lease—Buildings erected by tenant—

A renewal lease is a continuation of the old lease, and if rent for buildings erected by the tenant is not provided for under the first lease, neither should it be under the extension in the absence of express provision.

Absence of covenant as to.

An application to refer back an award in a case where a tenant had a renewal lease and had during the original term erected buildings on the premises, there being no provision in the lease as to buildings erected by the tenant, and where the arbitrators in arriving at the rent for the renewed term had fixed a "ground rent" without taking the buildings into consideration, was dismissed with costs:

Re Allen and Nasmith, 31 O. R. 335.

Possession after expiration of lease—Implied obligation.

Where a lessee continues in possession as a yearly tenant after the expiration of a lease containing a covenant by him to repair a similar obligation will be implied.

Hett v. *Janzen*, 22 O. R. 414.

Renewal lease—Construction of renewal clause.

A renewal lease provided that renewals should be at such "increased rent as should be determined by arbitrators, payable in like manner and under and subject to the like covenants, provisions and agreements as are contained in these presents." The lease further provided for the payment of the yearly rent as follows: "For the first ten years of the said term $80 per annum, for the remaining eleven years $100 per annum."

Held, that the proper method of increasing the rent for the new term being an increased rent, might be satisfied by making a merely nominal addition, there being no increase in the rental value of the premises:

In re Geddes and Garde, 32 O. R. 262.

Lease—Renewal—Increased rent—Arbitration.

In a lease of twenty-one years, the rent fixed was—for the first year $106.88, for the next four years $130 a year, for the next five years $145 a year, and for the remaining eleven years $178 a year. The lease contained a covenant by the lessor to renew for a further term of twenty-one years, "at such increased rent as may be determined upon as hereinafter mentioned, payable in like manner, and under and subject to the like covenants as are contained in these presents." The lease provided for the appointment of arbitrators to determine the rent to be paid under the renewal lease. Held, that the arbitrators were bound to award an increased rent under the terms of the reference to them, but they might award a mere nominal increase if they thought proper; the increase was to be based upon the rent reserved for the whole term, and not for any particular year or years of it; and might be upon each year's rent or upon the average of the whole twenty-one years, but so that in the result the average annual rent should be greater for the future term than the past:

In re Geddes and Cochrane, 3 O. L. R. 75.

Way—Mode of user.

The defendant leased to the plaintiff a small knoll or island, standing in a shallow lake, which in the dry season became a muddy marsh. The land surrounding the knoll or island belonged to the defendant, and the lease provided that the plaintiff should have a right of way across it, nothing being said as to the mode of exercising the right. The plaintiff built a trestle bridge from the knoll or island to the main land, and this bridge the defendant pulled down. Held, that the plaintiff's mode of user was reasonable, and that the defendant was not justified in interfering with the bridge:

Butchart v. *Doyle*, 25 A. R. 615.

Lease for term of years—Provision for sale of land—Incoming tenant.

In a lease of a farm for five years containing a covenant by the lessor for quiet enjoyment, the lessee agreed that if the place were sold, and he should receive one month's notice prior to the expiration of any year, he would give up peaceable possession and allow any incoming tenant to plough the land after harvest. Before the expiration of the lease, the place was sold and conveyed to a purchaser and an assignment of the lease made to him. In the fall of the year after the purchase, and before the lessee had harvested his crop, the purchaser entered on the land and ploughed it up, thereby causing injury to the lessee.

Held, that the purchaser was a tenant within the meaning of the covenant as to an incoming tenant, but that he had no right to enter upon the property before the plaintiff had harvested his crop, and was a trespasser and liable for damages caused thereby. Held, that no liability was imposed on the lessor under the covenant for quiet enjoyment:

Newell v. *Magee*, 30 O. R. 550.

Subsequently erected buildings.

The lessor covenanted with the lessee that he would at the expiration of the term pay him, his heirs or assigns, a valuation for his building on the land demised. Held, that the covenant was neither wholly spent in the event of destruction by fire of the building then in existence, or necessarily limited to the then value of the existing building, but that the increased value of subsequently erected buildings could be claimed at the expiration of the term against the landlord.

In re Hansley, 44 U. C. R. 345.

Breach—Measure of damages.

In an action by plaintiff, the lessee of a certain farm, against the defendant, the lessor, for breach of the covenant contained in the lease to dig ditches, &c. Held, that the measure of damages was the difference between the rentable value of the demised premises with the defendant's covenant performed, that is with the improvements made and the value without such improvements. At the trial the Judge directed that if certain improvements were made the damages were to be reduced thereby. On it being shown to the Court that those improvements had subsequently been made the damages were reduced to $200.

McEwan v. *Dillon*, 12 O. R. 411.

Breach—Measure of damages.

In an action by lessor against lessee on a covenant to repair fences on or before a certain day; Held, that such a covenant was not a continuing covenant, and damages must, therefore, be assessed once for all. 2. The proper measure for damages in such a case is the amount by which the beneficial occupation of the premises during the term is lessened. Whether the cost of repairing would also be a correct method of estimating the damages must depend upon the circumstances of each case. Semble, if the cost of repairing would be so large as to be out of proportion to the tenant's interest in the premises, he would not be justified in repairing and treating the cost of such repairs as his damages:

Cole v. *Buckle*, 18 C. P. 286.

CHAPTER VII.

RENT.

103. The word rent signifies a compensation or return, it being in the nature of an acknowledgment given for the possession of some corporeal inheritance. It is defined to be "a certain profit issuing yearly out of lands and tenements corporeal." "Rent" defined.

104. It must be a profit; yet there is no occasion for it to be, as it usually is, a sum of money: for horses, wheat, or other matters, may be, and are frequently, rendered by way of rent. It may also consist in services or manual operations, as to plough so many acres of land; which services in the eye of the law are profits. Requisites.

105. This profit must also be certain; or that which may be reduced to a certainty by either party.

106. It must also issue yearly; though there is no occasion for it to issue every successive year; yet, as it has to be produced out of the profits of lands and tenements, as a recompense for being permitted to hold or enjoy them, it ought to be reserved yearly, because those profits do annually arise and are annually renewed.

107. It must issue out of the thing granted, and not be part of the land or thing itself; wherein it differs from an exception in the grant, which is always part of the thing granted.

108. It must, lastly, issue out of lands and tenements corporeal, that is, from some inheritance whereunto the owner or grantee of the rent may have recourse to distrain.

109. There are at common law three manner of rents— rent-service, rent-charge and rent-seek. Rent-service is so called because it has some corporeal service incident to it, as by the service of ploughing the land and five shillings rent. This pecuniary rent being connected with personal services is, therefore, called rent-service. For such rent, in case it Kinds of rents.

Rent-service.

be behind or in arrear at the day appointed, the landlord may distrain of common right, without reserving any special power of distress; provided he has in himself the reversion, or future estate of the lands and tenements, after the lease or particular estate of the lessee or grantee is expired.

Rent-charge.

110. A rent-charge is where the owner of the land has no future interest or reversion expectant in the land; as, where a man by deed makes over to others his whole estate in fee simple, with certain rent payable thereout, and adds to the deed a covenant or clause of distress, that if the rent be in arrear or behind, it shall be lawful to distrain for the same. In this case the land is liable to the distress, not of common right, but by virtue of the clause in the deed; and therefore it is called a rent-charge, because in this manner the land is charged with a distress for the payment of it.

Rent-seck.

111. Rent-seck (or barren rent) is in effect nothing more than a rent reserved or granted by deed, but without any clause of distress.

Rack-rent.

112. Rack-rent is only a rent of the full value of the tenement, or near it.

No present difference.

113. These are the general divisions of rent; but the difference between them in respect to the remedy for recovering them is now totally abolished, and all persons may have the like remedy by distress for rents-seck as in case of rents reserved upon lease (4 Geo. II. c. 28, R. S. O. c. 342, s. 1).

Rent so much "per annum."

114. If a rent of so much "per annum," or an "annual rent" of so much, is reserved (nothing being said about the time or times of payment) it will be payable once a year, on the anniversary of the commencement of tenancy. But where a rent was reserved "after the rate of £18 per annum," this was held too indefinite, both as to amount and time of payment. It is usual to make the rent payable either quarterly or half-yearly on specified days.

Rent reserved to a stranger.

115. Rent must be reserved to the lessor himself, not to a third party. However, where there is a reservation to a stranger, either in a deed or written agreement, although the sum reserved is not a rent, properly so called, and cannot be distrained for, it may be recovered by an action on the contract.

116. After the death of the original landlord or lessor, the rent will be payable to his executors, or to his administrators, if letters of administration were issued to his estate. Death of landlord.

117. Whatever covenants or provisions a lease or agreement may contain, the tenant incurs no liability to pay rent until he has been put into possession, or has been tendered and afforded the opportunity of taking possession of the demised premises. Tenant must have possession.

118. Should the lease, as is generally the case, contain a proviso enabling the landlord to re-enter and recover possession if the rent is not paid on a specified day, then on that day (according to the language of the proviso) the landlord must demand, or the tenant be prepared to tender, such rent on the premises before sunset. (See chapter X.) Re-entry.

119. To make a tender good there must be actual production of the money due in gold, or in silver if the amount be under ten dollars (copper or bronze, twenty-five cents) or Dominion notes. There must also be an unconditional offer of it to the landlord or the bailiff making the distress. A creditor is not bound to accept a cheque, even a marked cheque, nor is he bound to accept bank notes of any bank. If he does not make objection at the time of the tender of these notes, and refuses the money on that ground, and afterwards raises the defence, the Court, while giving effect to it, would probably deprive him of costs, but in law the tender would not be a good tender. Tender.

120. If there is in the lease a covenant for the payment of the rent at a fixed day, then, if no particular place for the payment is mentioned, it is the duty of the covenantor (the tenant) to seek out the person to whom the rent is to be paid, and to pay or tender it upon the appointed day. If this is not done the landlord may forthwith bring an action for the rent. Tender, where to be made.

121. Where the rent is paid in cash the payment must be made in accordance with, and is subject to, the ordinary rules which prevail between debtor and creditor. It may be made either to the landlord or to his authorized agent. And if the landlord have once authorized the tenant to pay his agent, Payment, to whom to be made.

he cannot by any subsequent revocation of that authority invalidate any payment of rent made by the tenant to the agent before the former has notice of such revocation. A remittance by post would be a sufficient and conclusive payment, whether it came to the landlord's hands or not, if sanctioned expressly by the landlord in that particular instance, or implied by the previous usage of the parties.

Payment by tenant of charges on land.

122. If a tenant, in order to protect himself, pay charges which are, in fact, due from his landlord, but which are fixed upon the premises he holds, and may be distrained for there, he can, in settling with his landlord, claim to have such payments taken as on account of and in deduction of his rent, and may decline to pay any rent until he is fully reimbursed. Amongst such payments are ground rents, rent due from the immediate to a superior landlord, when the tenant actually in possession is only an under-lessee. The tenant, however, must be careful to deduct or set-off these payments against the next rent that becomes due after they are made.

Lease by life tenants.

123. It sometimes happens that a person who has a mere life estate in lands grants a lease for years. Such a lease determines upon the death of the lessor; but his executors are entitled to recover a portion of the annual rent reserved in proportion to the time which elapsed from the last payment of rent till his death. A similar apportionment is made when a lessee, for a term of years determinable on the falling in of lives, makes an under-lease for a term of years certain, which is still subsisting at the expiration of the lease on which it is dependent.

Apportionment of rent.

124. The following are the statutory rules which now regulate the apportionment of rent: Landlord and Tenant Act, R. S. O. c. 170.

Interpretation.

2. Where the words following occur in sections 4, 5, 6, 7 and 8 of this Act, they shall be construed in the manner hereinafter mentioned, unless a contrary intention appears:

"Rents."

(1) "Rents" shall include rent-service, rent-charge, and rent-seck, and all periodical payments or renderings in lieu or in the nature of rent.

(2) "Annuities."
(3) "Dividends."

Omitted (not necessary in this work.)

Rents, etc. to accrue from day to day and be apportionable in respect of time.

4. All rents, annuities, dividends, and other periodical payments in the nature of income (whether reserved or made payable under an instrument in writing or otherwise), shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly.

5. The apportioned part of such rent, annuity, dividend, or other payment, shall be payable or recoverable in the case of a continuing rent, annuity, or other such payment, when the entire portion of which such apportioned part forms part becomes due and payable, and not before; and in the case of a rent, annuity, or other such payment, determined by re-entry, death, or otherwise, when the next entire portion of the same would have been payable if the same had not so determined, and not before. Apportioned part of rent, etc. to be payable when the next entire portion becomes due.

6. (1) All persons and their respective heirs, executors, administrators and assigns, and also the executors, administrators and assigns, respectively, of persons whose interests determine with their own deaths, shall have such, or the same, remedies for recovering such apportioned parts as aforesaid, when payable (allowing proportionate parts of all just allowances), as they respectively would have had for recovering such entire portions as aforesaid, if entitled thereto respectively. Persons shall have the same remedies for recovering apportioned parts as for entire portion.

(2) Provided that persons liable to pay rents reserved out of or charged on lands or other hereditaments of any tenure, and the same lands or other hereditaments shall not be resorted to for any such apportioned part forming part of an entire or continuing rent, as aforesaid specifically, but the entire or continuing rent, including such apportioned part, shall be recovered and received by the heir or other person, who, if the rent had not been apportionable under this Act, or otherwise, would have been entitled to such entire or continuing rent, and such apportioned part shall be recoverable by action from such heir or other person by the executors or other persons entitled under this Act to the same. Proviso as to rents reserved in certain cases.

7. Nothing in the preceding provisions of this Act contained shall render apportionable any annual sums made payable in policies of assurance of any description. Act not to apply to policies of assurance

8. The preceding provisions of this Act shall not extend to any case in which it is expressly stipulated that no apportionment shall take place. nor where stipulation made to the contrary.

125. A tenant from year to year, or a lessee who has covenanted without qualification to pay rent during his term, will not be relieved from liability if the house be wholly destroyed by fire. The same liability has been held to continue in the case of a tenant from year to year of a second floor, occupied under a parol agreement. And the occupant of furnished lodgings let quarterly has been held liable to pay rent, at all events up to the time of the fire. Of course, a tenant from year to year may relieve himself by giving a proper notice to quit, but a lessee for a term certain with a general covenant must pay during the remainder of his term. Even if he have covenanted without any qualification to pay rent, and also have covenanted to repair, except in the case of the premises being burnt down, and the buildings are burned, this will make no difference. The landlord may refuse to rebuild, and the tenant ought to have protected himself by an express proviso in his lease, that in case of fire the Destruction of premises.

landlord should rebuild or repair, and that until he did the rent should be suspended or abated.*

Assignment of interest of lessee.

126. Both a lessee under a lease under seal, containing the usual covenant on his part to pay rent, and a tenant from year to year under an agreement, may, in the absence of any stipulation to the contrary in such deed or agreement, assign their interests thereunder.

When tenant's liability for rent ceases.

127. A tenant will remain liable for rent, unless at a time when he is entitled to do so he deliver up the complete possession of the premises; or (where there is no covenant), the landlord accept another in his stead; or, after the tenant has abandoned the premises, the landlord let them again. In the latter case, however, the former tenant will be liable for rent up to the time of such letting.

CASES.

Apportionment of rent.

Where demised property is sold by a prior mortgagee under power of sale, and the lease is thereby determined between two gale days, the rent is apportionable, and the tenant is liable to pay rent up to the day of such determination:

Kinnear v. *Aspden*, 18 A. R. 468.

Rent.

Rent may be attached, and when it is attached the legal result is that the collateral remedy of the landlord, the judgment debtor, by way of distress, is suspended; and by virtue of R. S. O. c. 143, ss. 2 to 6, a part of such rent may be attached as it accrues de die in diem, though not actually payable till the next gale day:

Patterson v. *King*, 16 C. L. T. 7.

Sureties for payment of rent required.

Defendant leased to the plaintiff for three years from the 1st of May; and the plaintiff covenanted that on or before said 1st of May he would give to defendant two sufficient securities for the performance of his covenants in the lease. Held, that the giving such security was a condition precedent to the plaintiff's right of possession under the lease:

Murphy v. *Scarth*, 16 U. C. R. 48.

In an action of covenant between the original parties to the deed, an eviction from part of the premises is a good defence to the action. There can be no apportionment of the rent as in debt:

Shuttleworth v. *Shaw*, 6 U. C. R. 539.

If there is an adverse holding of part of the premises, and plaintiff is excluded therefrom, no legal term is created by the instrument of lease between the parties, and no right to any rent from such part accrues and the rent cannot be apportioned because the tenant (the plaintiff) had never been subject to the entire rent by virtue of this demise:

Kelly v. *Irwin*, 17 C. P. 351.

* See chapter on Covenants not in Short Form of Leases and Covenant No. (10), Short Form.

This case was not followed in *Holland* v. *Vanstone*, 27 U. C. R. 15, which case was as follows:

When doctors differ, who shall decide?

Defendant leased to the plaintiff by deed for three years, there being another tenant in possession of part as a monthly tenant, who was succeeded by two others holding under defendant: Held, that the lease to the plaintiff, being under seal, operated as a grant of the reversion (with the rent incident thereto) as to the part thus held, and that defendant, therefore, was entitled to distrain for the whole rent in arrear.

Terms of continuing tenancy.

Where a party, who has held over for a term at a certain rent, continues to occupy after the expiration of his term, it is presumed, if there is no evidence to the contrary, that he holds at the former rent:

Hilliard v. *Gemmell*, 10 O. R. 504.

Rent is a "tenement."

Rent issuing out of land is a tenement; it partakes of the nature of land:

Hopkins v. *Hopkins*, 3 O. R. 223.

Rent to accrue due is not a chose in action.

Rent to accrue due is not a chose in action, and a tenant in respect to it may attorn:

Harris v. *Meyers*, 2 Chy. Ch. 121.

Rights of assignee of reversion.

The assignee of a reversion cannot recover rent accrued due before the assignment:

Whittrock v. *Hallinan*, 13 U. C. R. 135.

Mistake of title.

No occupation rent should be charged against one who has been in occupation of land under mistake of title, in respect of the increased value thereof arising from improvements which are not allowed him:

McGregor v. *McGregor*, 5 O. R. 617.

Tenant may, if so stipulated, take out improvements from his rent.

Where the landlord had covenanted to allow the tenant all reasonable improvements made by him in the amount of his rent: Held, that the tenant could deduct the value of the improvements from the rent due:

Wilcoxson v. *Palmer*, T. T. 3 & 4 Vict.

Rent in advance.

A tenant may by parol bind himself to pay rent in advance:

Galbraith v. *Fortune*, 10 C. P. 109.

Tenant in common, how far liable for rent.

A tenant in common, being in actual occupation of the joint estate, is not chargeable with rent. It would be otherwise if he had been in the actual receipt of rent from third parties:

Rice v. *George*, 20 Chy. 221.

Tender—What constitutes.

In order to constitute a legal tender, the money must be either produced and shewn to the creditor, or its production expressly or impliedly dispensed with. Where therefore to prove a tender of a quarter's rent for which the defendant had distrained, the evidence shewed that the tenant after refusing to pay some charges and costs which the landlord claimed in addition to the rent, said to the landlord: "Here is the rent," which he had, and told the landlord he had in his right hand in a desk, but did not produce it or shew it to the landlord, who said nothing, and left the premises;—Held, that there was no evidence of a tender or of a dispensation with a tender:

Matheson v. *Kelly*, 24 C. P. 598.

CHAPTER VIII.

TAXES.

General principle.

128. All taxes charged upon, or with reference to real property, are in the first instance payable by the occupier of land or houses. Any taxes the tenant is wrongfully called upon to pay he may deduct from his rent, and thus throw them ultimately upon the landlord. The short form of lease, as will have been already noticed, contains a covenant relating to the liability for taxes as between landlord and tenant, but it is necessary to consider the law where there are no covenants or express stipulations on this point, as is generally the case where the tenancy is one from year to year.*

(2) As to local improvement rates the Landlord and Tenant Act, R. S. O. c. 170, as amended by section 27 of chapter 12, statutes of 1901, provides:

Covenant to pay taxes not to include local improvements.

17. In the case of leases made on or after the first day of September, 1897, unless it is therein otherwise specifically provided, a covenant by a lessee for payment of taxes shall not be deemed to include an obligation to pay taxes assessed for local improvements.

But a lease for a term not less than seven years when the land only belongs to the lessor and made under the Act respecting Short Forms of Leases, containing the covenant on the part of the lessee to pay taxes, and omitting the words "except for local improvements," shall be deemed a covenant by the lessee for payment of taxes assessed for local improvements within the meaning of this section.

(3) Petitions for Local Improvements, Consolidated Municipal Act, 1903, s. 668 (2).

"Owner" to include certain leaseholders.

(2) Where the word owner occurs in this Act in sections 664 to 686, both inclusive, 689 and 690, it shall be construed and deemed to include a leaseholder, the unexpired term of whose lease including any renewals therein provided, extends over a period which is not less than the duration of the proposed assessment, if the lessee has covenanted in his lease to pay all municipal taxes on the demised property during the term of said lease, and would be liable for the taxes for the proposed improvements, and every such lessee shall have the same right to petition for or against any local improvement proposed to be constructed under this Act as if he were the owner of the property liable to be assessed therefor.

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* Consolidated Assessment Act, s. 26: Any occupant may deduct from his rent any taxes paid by him if the same could also have been recovered from the owner or previous occupant, unless there is a special agreement between the occupant and the owner to the contrary.

(3) In any case where a lessee has the right to petition for or against any proposed improvement under the provisions of the last preceding sub-section the owner of the property in fee shall not have such right. Owner not to petition where lesseemay.

(a) This sub-section and sub-section 2 shall not apply to townships.

Sections 664-686 referred to in above sub-section of section 668, relate to local improvements in townships, cities, towns and villages such as sewers, drainage, etc. Section 689 relates to the improvement of roads. Section 690 relates to the exemption of property specially assessed; but as sections 689 and 690 relate only to townships, the provisions of these two sections do not apply to leaseholders, townships being specially excepted by 3 (a) above.

129. There are two kinds of taxes* which are chargeable on land under the law relating to assessment and taxes in Ontario: (1) taxation for ordinary municipal and school purposes; (2) special rates for local improvements. These latter include drainage improvements. Mode of assessment of real property.

130. The provisions of the Assessment Act relating to collection of rates are as follows: Mode of collection of rates.

(1) The clerk of every local municipality makes a collector's roll containing columns for all the information required by that Act, to be entered by the collectors therein. These rolls must include all rates which are chargeable on the municipality, whether special rates, local rates, public school rates, separate school rates or special rates for school debts, as the case may be. Any provincial taxes authorized by the Provincial Legislature are assessed, levied and collected in the same way as local rates, and are similarly calculated upon the finally revised assessments, and are also entered in the collector's roll. Non-resident landlords are also included in this roll. When completed the clerk of the municipality hands the rolls to the collectors. Collector's roll.

(2) Collectors upon receiving their collection rolls must proceed to collect taxes therein mentioned. In cities and towns a collector must call at least once upon the person taxed, or at his usual residence or place of business, if within the municipality, and must demand payment of the taxes Collector's duty.

* Where lease contained no provision as to the taxes: Held, that the landlord should pay them: *Dore* v. *Dove*, 18 C. P. 424.

payable by that person. Or, he shall leave, or cause to be left, with the person taxed, or at his residence or place of business, or on the premises in respect of which the taxes are payable, a written notice specifying the amount, and must, at the time of that demand or notice, enter the date on his collection roll opposite the name of the person taxed. In places other than cities and towns he must call at least once on the person taxed, or at the place of his usual residence or place of business, if within the local municipality, and must demand payment of the taxes payable by that person. If empowered by the by-law of the municipality he must leave with the person taxed, or at his residence or place of business, a notice specifying the amount claimed, and must enter the date of so doing opposite the name of the person in the collection roll. The notice must have a schedule specifying the different rates and the amount on the dollar to be levied for each rate making up the taxes.

The following provisions of the Assessment Act relating to the enforcement of payment of taxes require special attention: (See also note on page 87).*

Distress and sale by collector for taxes

135. (1) Subject to the provisions of section 60 of this Act, in case a person neglects to pay his taxes for fourteen days after such demand or after notice served pursuant to such by-law as aforesaid, or in the case of cities and towns after such demand or notice as aforesaid, the collector may by himself or by his agent, subject to the exemptions provided for by sub-section 2 of this section, levy the same with costs by distress.

On goods of person assessed.

1. Upon the goods and chattels wherever found within the county in which the local municipality lies belonging to or in the possession of the person who is actually assessed for the premises, and whose name appears upon the collector's roll for the year as liable therefor, and who is hereinafter called the person assessed.

2. Upon the interest of the person assessed in any goods on the premises, including his interest in any goods to the possession of which he is entitled under a contract for purchase or a contract by which he may or is to become the owner thereof upon performance of any condition.

Goods of owner. Certain goods on the premises though claimed adversely to person assessed or the owner.

3. Upon the goods and chattels of the owner of the premises found thereon, whether such owner is assessed in respect of the premises or not.

4. Upon any goods and chattels on the premises where title to the same is claimed in any of the ways following:

(a) By virtue of an execution against the owner or person assessed, or

* This section relates to payment by instalments.

(b) By purchase, gift, transfer or assignment from the owner or person assessed, whether absolute or in trust or by way of mortgage or otherwise, or,

(c) By the wife, husband, daughter, son, daughter-in-law or son-in-law of the owner or person assessed, or by any relative of his in case such relative lives on the premises as a member of the family; or

(d) Where the goods liable for the taxes have been exchanged between two persons by the one borrowing or hiring from the other for the purpose of defeating the claim of or the right of distress for the non-payment of taxes:

Not on goods of third persons where person assessed or owner not in possession.

And subject to the provisions of the preceding clause numbered 4, where the owner or person assessed is not in possession, the goods and chattels on the premises not belonging to the owner or person assessed shall not be subject to seizure, and the possession by the tenant of said goods and chattels on the premises shall be sufficient prima facie evidence that they belong to him:

Evidence of ownership.

Provided nevertheless that no goods which are in the possession of the person liable to pay such taxes for the purpose only of storing or warehousing the same, or of selling the same upon commission or as agent, shall be levied upon or sold for such taxes; and provided further, that goods in the hands of an assignee for the benefit of creditors, or in the hands of a liquidator under a winding-up order, shall be liable only for the taxes of the assignor or of the company which is being wound up, and for the taxes upon the premises in which the said goods were at the time of the assignment or winding-up order, and thereafter while the assignee or liquidator occupies the premises or while the goods remain thereon.

Not on goods in possession of warehouseman.

Not on goods in possession of assignee or liquidator.

(2) The goods and chattels exempt by law from seizure under execution shall not be liable to seizure by distress unless they are the property of the person who is actually assessed for the premises, and whose name also appears upon the collector's roll for the year as liable therefor.

Goods exempt under execution when exempt from distress for taxes.

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

Exemption to be claimed.

(4) If at any time after demand has been made or notice served pursuant to such by-law as aforesaid, or in the case of cities and towns after demand has been made or notice served by the collector as aforesaid, and before the expiry of the time for payment of the taxes, the collector has good reason to believe that any person in whose hands goods and chattels are subject to distress under the preceding provisions is about to remove such goods and chattels out of the municipality before such time has expired, and makes affidavit to that effect before the mayor or reeve of the municipality or before any justice of the peace, such mayor, reeve or justice shall issue a warrant to the collector authorizing him to levy for the taxes and costs in the manner provided by this Act, although the time for payment thereof may not have expired, and such collector may levy accordingly.

Levy of taxes under warrant.

(5) A city shall for the purposes of this section be deemed to be within the county of which it forms judicially a part.

(6) The costs chargeable in respect of any such distress and levy shall be those payable to bailiffs under the Division Courts Act.

R.S.O. c. 60.

(7) No person shall make any charge for anything in connection with any such distress or levy unless such thing has been actually done.

R.S.O. c. 75.

(8) In case any person offends against the provisions of sub-section 7 of this section, or levies any greater sum in respect of such costs than is authorized by sub-section 6 of this section, the like proceedings may be taken against such person by the person aggrieved as may be taken by the party aggrieved in the cases provided for by sections 2 to 7 inclusive, of the Act respecting the costs of distress or seizure of chattels, and all the provisions of the said section shall apply as fully as if enacted mutatis mutandis in this Act.

Non-residents.

(8) Non-residents receive notice by post of the amount of taxes claimed against their property, and entries are made of the transmission of such notices on the collectors' rolls. In the case of non-residents the collector, if the taxes are not paid after fourteen days from the time of the transmission of the demand, may make distress of any goods and chattels which he may find on the land in the same manner, and subject to the same limitations, as in the case of taxes on resident lands.

Procedure by collector for distress.

(9) When distraining for taxes the collector must, by advertisement posted up in at least three public places in the township, village or ward wherein the sale of the distrained goods is to be made, give at least six days' public notice of the sale, and the name of the person whose property is to be sold. At the time named in the notice the collector sells the goods, or so much as may be necessary. If the property distrained is sold for more than the amount of the taxes and costs, and if no claim to the surplus is made by any other person on the ground that the property sold belonged to him, or that he was otherwise entitled to the surplus, such surplus is returned to the person in whose possession the property was when the distress was made. If a claim is made, and the claim is admitted, the surplus is paid to the claimant. If the claim is contested the surplus is paid to the treasurer of the municipality, who retains it until the parties have determined their rights.

Taxes recoverable as a debt.

(10) If taxes cannot be recovered in the above manner, they may be recovered with interest and costs as a debt due to the municipality.

Collector may require pay-

(11) Where taxes are due upon any premises occupied by a tenant, who is not liable to pay them, the collector may

give the tenant notice in writing requiring him to pay the rent on such premises, as it from time to time becomes due, to such collector to the amount of the taxes unpaid and costs. The collector has the same authority to collect rent by distress or otherwise for the amount of these unpaid taxes and costs as the landlord of the premises would have. This right of collecting rent and applying it to taxes does not interfere with the other rights of the municipality to collect after applying any payments so received. Payment of rent to him.

(12) Taxes accruing on any land form a special lien on the land, and have preference over any claim, lien, privilege or incumbrance of any party except the Crown, and this preference does not require registration to preserve it. Taxes lien on land.

131. Lands may be sold for taxes when the taxes have been in arrear for three years. After sale the owner may redeem them if he tenders the amount of taxes, with interest at 10 per cent., at any time within a year. A tax sale is not liable to question after two years. A tax deed must be registered within eighteen months after the sale. Sale for taxes.

132. A point of considerable interest in reference to taxes is as to the responsibility of an incoming tenant for taxes, which should have been discharged by the previous tenant, but which are left unpaid at the time of his entrance. Arrears of taxes are like ground-rent, or rent due to a superior landlord, recoverable by distress upon the premises whoever may be in occupation. Before a furnished house, therefore, is taken from a previous tenant, it is advisable to ask him for the last receipts for taxes, and if it appears that there are any arrears, it should be seen that they are paid before the agreement is signed or possession taken. If the landlord is letting the house, the person who proposes to become the tenant should satisfy himself by enquiry at the collector's whether all taxes have been duly paid, or should require the landlord to indemnify him against arrears. Arrears of taxes.

CASES.

The provision of the Assessment Act (R. S. O. c. 224), requiring a demand for municipal taxes to be made fourteen days prior to distress, is satisfied by a demand made for the first instalment.

The occupant of the premises assessed is not limited to the remedy given him by section 26 of the Act, viz., to deduct from his rent any taxes paid by him, but may bring an action against his landlord to recover damages sustained by reason of a distress for Tenant's right to bring action.

taxes upon the premises. Such damages are restricted to the amount of taxes paid to remove such distress, and do not include consequential damages.

Such distress is not a breach of the covenant for quiet enjoyment in a short form lease, for in distraining the municipality is not claiming from or under the landlord.

Smith v. *Franklin*, 12 C. L. T. 414.

An unlimited covenant to pay rent.

The section of the Assessment Act which, in the absence of an agreement to the contrary, authorizes the tenant to deduct from the rent the taxes paid by him, only does so when he could be compelled to pay the same:

Carson v. *Veitch*, 9 O. R. 706.

Set-off against rent.

By the Assessment Act, R. S. O. 1897 c. 224, s. 26, any occupant may deduct from his rent any taxes paid by him if the same could also have been recovered from the owner or previous occupant unless there is a special agreement to the contrary between the occupant and the owner. Held, that under the above section a tenant is not at liberty to deduct from the rent and to compel his landlord to pay taxes for which the tenant and others were jointly assessed for a year prior to his existing tenancy.

Heyden v. *Castle*, 15 O. R. 257. discussed. *Meehan* v. *Pears*, 30 O. R. 433.

Tenant liable for taxes by reason of full wording of his covenant.

A tenant who covenants to pay rent without any deduction therefrom for or by reason of any matter or thing whatsoever, cannot claim a deduction for the amount of taxes paid by him for the house and premises demised:

Grantham v. *Elliott*, 6 O. S. 192.

Be careful how you pay another man's taxes.

A tenant occupied a house for some six years, during which period he paid his landlord's taxes: Held, that he could not deduct from the last quarter's rent the taxes paid, although there was no agreement as to payment of taxes between him and his landlord:

Wade v. *Thompson*, 8 L. J. 22.

Compare also to the same effect *McAnany* v. *Tickell*, 23 U. C. R. 499.

Covenant to pay taxes, meaning of.

The words "all rates, etc., which now are," refer to the kind or character of the tax assessable against the land, and the words "or which shall at any time," etc., to any other kind of taxes which might thereafter be imposed:

Naughton v. *Wigg*, 35 U. C. R. 111.

These words do not refer to arrears of taxes or taxes due for the year in which the lease is made before its date:

See *Heyden* v. *Castle*, 15 O. R. 257, *contra*.

Payment of taxes not an acknowledgment of title.

A tenant agreed to pay for certain premises $6 a month and taxes, and for some eighteen years remained in possession, paying the taxes and nothing else. The tenant, after the expiration of this period, gave to his landlord an acknowledgment of indebtedness for rent for the whole period. Held, that the payment of taxes was not a payment of rent within the meaning of the Real Property Limitation Act,

and that the tenant, although he had always intended to hold merely as tenant, had acquired title by possession, and could not make himself liable as for rent accruing after he had so acquired possession, by giving to the landlord an acknowledgment of indebtedness in respect of rent:

Finch v. *Gilray*, 16 A. R. 484, followed in *Coffin* v. *N. A. Land Co.*, 21 O. R. 80.

Extent of covenant to pay taxes.

Under this covenant (No. 2 Short Form) defendant held liable for local improvement taxes, and for the additions made under the Assessment Act year by year, to the amount of taxes in arrear, or additions made by the municipality:

Boulton v. *Blake*, 12 O. R. 552.

Tax purchaser.

A tax purchaser could not hold a tax title against his lessors and the plaintiff (a mortgagee), the lessees being liable under their covenant to pay the taxes for which the land was sold:

Heyden v. *Castle*, 15 O. R. 257.

Tenant must pay special rates.

An ordinary lease under the Act, containing the words "and to pay taxes," covers a special rate created by a corporation by-law, as well as all other taxes:

In re Michie and Toronto, 11 C. P. 379. See para. 128 (2).

Lease—License—Building over lane—Covenant to pay taxes—Assessment and taxes.

A lease made in pursuance of the Short Forms Act of specifically described premises contained a provision that the lessee might at any time build or extend any building over a lane described as being "north of the premises hereby demised," the building or extension to be at least nine feet above the ground, and the lessee covenanted to pay all taxes "to be charged upon the demised premises or upon the said lessor on account thereof." The lease also contained a provision that if the lessors elected not to renew the lease, they were to pay for the buildings which should at that time be erected "on the lands and premises hereby demised and over the said lane." Held, that the covenant to pay taxes did not apply to the portion of the buildings afterwards erected over the lane.

Janes v. *O' Keefe*, 23 A. R. 129.

Landlord and tenant—Lessee of city—Liability to pay taxes—Usual covenants—Assessment Act, R. S. O. 1897, ch. 224, sec. 7, sub-sec. 7—Ib. sec. 26.

City property when occupied by a tenant other than a servant or officer of the corporation occupying the premises for the purposes thereof, is subject to taxation (R. S. O. 1897, c. 224, s. 7, s.-s. 7); and such tax is a tenant's tax payable by him and not in any event payable by the landlord as between him and the tenant unless by express agreement.

Section 26 of the Assessment Act (R. S. O. 1897, c. 224) as to tenants deducting taxes from their rent, has no application to such a case, as it applies only to taxes which can be legally recovered from the owner; nor does that section apply to the case of a term held in perpetuity, as here.

Semble, also, that where the tenant, as in this case, holds in perpetuity under a renewable lease, he may be regarded as the owner within the meaning of the Assessment Act, and as such is liable to taxation without recourse to the owner in fee.

Where the municipality had entered into a written agreement with a railway company to grant a lease for successive terms of fifty years each during all time to come for rent specified, but no mention had been made of taxes: Held, that the fixing of the rent payable to the city did not interfere with the right of the latter in its governmental capacity, and exercising its sovereign power to lay tax upon the property when under lease. Taxes and rent are distinct things, and collectible by the corporation in different capacities and the imposition of the yearly tax is not a derogation from or inconsistent with the contract. Prima facie a covenant by a tenant to pay taxes is a usual covenant (so decided in this case, 27 A. R. 54), and it lay upon the tenant here objecting to give it to shew by competent evidence that it was not so in such a case as this or in this country, which the tenant had failed to do. Held, also, that no covenant to repair should be inserted in the lease here, the jurisdiction to keep the railway in effective operation and the like, resting entirely with the Railway Committee of the Privy Council, and it not having been shewn that this was insufficient to protect the city:

In re The Canadian Pacific R. W. Co. and The Corporation of the City of Toronto.

In appeal (5 O. L. R. 717). Held that the agreement was not self-contained, but that the execution of a formal lease was contemplated which should contain the usual covenants, and that covenants to pay taxes and for the right of re-entry for non-payment of rent or taxes were under the circumstances here usual covenants. Where by the agreement a time was fixed for the commencement of the lease and the railway company entered into possession, and had the enjoyment of the demised premises, but the title was not settled until some time afterwards, interest on arrears of rent which accrued due in the meantime was allowed.

CHAPTER IX.

DISTRESS.

133. Distress, so far as we are concerned with it, is the taking by the landlord without any process in Court personal chattels found upon the demised premises for the purpose of obtaining payment of rent due to him and in arrear. "Distress" defined.

Chapter 342 of the Revised Statutes of Ontario provides as follows:

1. Every person may have the like remedy by distress, and by impounding and selling the same in cases of rents seck, as in case of rent reserved upon lease, any law or usage to the contrary notwithstanding. 4 Geo. II. c. 28, s. 5. Rents seck may be distrained for

2. Any person having any rent in arrear, or due, upon any lease for life or lives or for years, or at will, ended or determined, may distrain for such arrears, after the determination of the said lease, in the same manner as he might have done if such lease had not been ended or determined; Provided that such distress be made within the space of six months after the determination of such lease, and during the continuance of such landlord's title or interest, and during the possession of the tenant from whom such arrears became due. 8 Anne, c. 18 (or c. 14 in Ruffhead's ed.), ss. 6, 7. Distress for arrears on leases determined. Limitation of such distress.

3. If any man hath, or shall have, in the right of his wife, any estate in fee simple, fee tail or for term of life, or of or in any rents, or fee ferms, and the same rents, or fee ferms, shall be due behind and unpaid in the said wife's life, then the said husband, after the death of his said wife, his executors and administrators, shall have an action for the said arrearages against the tenant of the demesne that ought to have paid the same, his executors, or administrators, and also the said husband, after the death of his said wife, may distrain for the said arrearages in like manner and form as he might have done if his said wife had been then living, and make avowry upon his said matter as is aforesaid. 32 Hen. VIII. c. 37, s. 3.
(See R. S. O. c. 127, ss. 4 (3), 5, and c. 163, ss. 5, 6, 7). Husband may recover rent due in right of his wife, deceased.

4. Where a person is entitled to any rent or land for the life of another he may sue for, distrain, and recover by action, or distress, the rent due and owing at the time of the death of the person for whose life such rent or land did depend, as he might or could have done if such person by whose death the estate in such rent or land determined had continued in life. 32 Hen. VIII. c. 37, s. 4. Persons entitled to rent during the life of another may recover the same after death of *cestui que vie*.

5. Distresses whether for a debt due to the King, or to any other person, shall be reasonable, and not too great. 52 Hen. III. (St. of Marlbridge), c. 4, part; statute of uncertain date (Imp. Rev. St. 1870, p. 126). Distresses to be reasonable.

Six years' arrears recoverable.

134. No more than six years' arrears of rent are recoverable by distress. The six years count from whichever is latest, the last payment of rent or the time when the tenant gave a written acknowledgment of previous rent being due. Distress may now be made for all kinds of rent. It may even be levied for the rent of furnished apartments, upon such goods and chattels of the tenant as may be found there.

Effect of taking security.

135. A bond, bill of exchange or promissory note given by a tenant, and accepted by a landlord on account of rent, will not suspend the right of the landlord to distrain, unless he obtain judgment upon such instrument. In that case he loses his right to distrain for so much of the rent as he takes judgment for. Hence, although a landlord may take a security by deed or bill or promissory note payable at six months' date, that will not interfere with his right to distrain next day if he chooses.

Tender, when it prevents costs.

136. If, when the landlord or his bailiff goes to distrain, the tenant pays or tenders the arrears, it must be accepted without costs. If, at any subsequent part of the proceedings before impounding, the tenant tenders the rent with the costs incurred up to that time, he will be entitled to an action against the landlord should the latter choose to proceed with the distress.

Bailiff may receive rent.

137. A warrant of distress confers upon the bailiff an authority to receive the rent, and even if the landlord has expressly forbidden him to do so, this would not deprive the tenant of the benefit of the tender to the bailiff.

Set-off.

138. The fact of a tenant having a debt due to him from his landlord to an equal or greater amount than his rent, will not prevent the latter distraining.*

* Section 33 of the Landlord and Tenant Act provides as follows: A tenant may set-off against the rent due a debt due to him by the landlord. The set-off may be by a notice as follows, and may be given before or after the seizure: "Take notice that I wish to set-off against rent due by me to you the debt which you owe to me (stating nature and amount of claim)." Sign the notice, date it, and keep a copy of it, and have proof of its delivery ready. In case of such a notice the landlord is entitled to distrain only for the balance of the rent after deducting any debt justly due by him to the tenant. (R. S. O. c. 170, s. 33).

Requisites to enable a distress to be made.

139. No distress can be made unless there is an actual demise or letting at a fixed rent. If, for instance, the tenant has entered into possession under a mere agreement for a lease, and continues to occupy without having ever paid any rent, or made any admission of a specific sum being due as rent in respect of such occupation, the landlord has no right to distrain, but so soon as, by payment of rent or by such an admission, a tenancy from year to year can be implied, the landlord may distrain for all rent subsequently coming due.

Rent accruing subsequently to notice to quit.

140. When a landlord has given a notice to quit, and the tenant holds on after its expiration, the landlord cannot distrain for rent subsequently accruing due, unless something has been done to show that a new tenancy has been created, e.g., payment and receipt of rent.

Landlord must own reversion.

141. In order that a landlord should without expressed agreement have the right to distrain, he formerly had to be the owner of the immediate reversion in the land—that is, he must be entitled to the land when the tenant's interest has been determined either by the expiration of his term or by notice to quit, but a reversion, however short, is sufficient for this purpose.

142. If a lessor parted with his reversion, though the rent was due before, he could not distrain, for the privity of estate was gone. He might, however, sue for the rent on the covenant to pay, if there was one.

Relation of landlord and tenant does not depend now on tenure.

143. Section 3 of the Landlord and Tenant Act, R. S. O. c. 170, now places the right to distrain on the following basis:

"The relation of landlord and tenant did not, since the 15th day of April, 1895, and shall not hereafter depend on tenure, and a reversion or remainder in the lessor shall not be necessary in order to create the relation of landlord and tenant, or to make applicable the incidents by law belonging to that relation; nor shall any agreement between the parties be necessary to give a landlord the right of distress."

Effect of section.

144. This section does not deprive the landlord of his common law right to distrain. It extends it to any case where there is an agreement on the one part to lease, and on the other to pay rent. As to the point of tenure, the rule was that the distrainor must have in himself the reversion

to warrant a distress. It was argued on a similar statute of 1895 (repealed by the one above quoted) that the relation of landlord and tenant was before the passing of the Act of 1895 feudal in its nature, and rested upon the fact that the tenant held the land of or from his landlord; the right of distress is incident to the reversion, and by reason of the change made by that Act no tenure existed between the parties as between reversioner and tenant, but the relation of landlord and tenant was thereafter to be one of contract. If, therefore, a landlord wished to have a right to distrain he must stipulate for it specially by agreement. This contention was overruled in the case of Harpelle v. Carroll, reported 27 Ontario Reports, 240. The repeal of the 1895 Act renders any further discussion of its particular wording unnecessary. If it was intended to base the right to make a distress upon agreement only, it failed to do so.

Express stipulation may confer right.

145. The new section omits the 1895 words "shall be deemed to be founded on the express or implied contract of the parties." It only says that the relation of landlord and tenant is not to depend on tenure, and that a reversion or remainder is not necessary to create that relation, and therefore, apparently, a landlord who has parted with his reversion ought still to be able to distrain for rent due before he parted with such reversion. But this section does not say he can.

146. The last words of the clause in the Revised Statute, "nor shall any agreement between the parties be necessary to give to a landlord the right of distress," were inserted to make quite clear what the Court had somewhat doubtfully decided in Harpelle v. Carroll.

147. If A. is a landlord, B. his tenant, and C. is B.'s subtenant, the Revised Statute does not extend A.'s rights by way of distress over B.'s goods. It does not expressly extend A.'s right as against C. in case of merger or surrender by B. of his term. It is difficult to see of what value the section is.

Right of assignee of reversion to distrain

148. An assignee of the lessor could not distrain for rent due before the assignment, for there was no privity of estate between him and the lessee. Nor could he sue, because any transfer of the right to sue for the breach of covenant is void on the common law principle of maintenance, and the statute 32 Hen. VIII. c. 34, does not transfer to him such right.

149. It is doubtful whether, under the section of the Revised Statute above quoted, the assignee of the reversion can distrain. If the section meant that he could distrain it is very obscurely drawn.

150. Where there is no reversion in the person entitled to the rent, the right to distrain for it may be created by expressed stipulation. Thus, if a lessee for years grants an under-lease of all but the last day of his term, or if while assigning the whole of his term on a rent, he expressly reserved the right to distrain to himself, he will be able to distrain for any rent which he may reserve. A tenant from year to year who under-lets from year to year has a sufficient reversion to distrain. In the absence of a reversion or an expressed power of distress, the rent can only be recovered by action.

Executor's right to distrain.

151. An executor may distrain before a will is admitted to probate.

152. By sections 13 and 14 of the Revised Statute respecting Trustees and Executors (R. S. O. c. 129), the executors or administrators of any lessor or landlord may distrain upon the lands demised for any term or at will for the arrearages of rent due to such lessor or landlord in his lifetime, in like manner as such lessor or landlord might have done if living.

153. Such arrearages may be distrained for at any time within six months after the determination of the term or lease, and during the continuance of the possession of the tenant from whom the arrears became due; and all statutory provisions relative to distresses for rent are applicable to such distresses.

Mortgagee's right to distrain.

154. If a mortgagee gives notice of a mortgage to a tenant in possession under a lease or letting executed or effected prior to the mortgage, he may distrain for all arrears of rent in the hands of the tenant at the time of the notice, as well as for what accrues subsequently to it. A mortgagee, who has the right to enter on the mortgaged premises after default in payment of his interest, has also the right to evict tenants in possession under leases or lettings subsequent to the mortgage. Such tenants will be justified under an actual threat of eviction in attorning to the mortgagee, that is, acknowledging him as the landlord and paying rent to him as

such, and after that has once been done, the mortgagee may distrain upon them. A mortgagee may insist upon this attornment, but if he is content with the tenant's merely paying over the rent to him without making any acknowledgment, expressed or implied, of his title as landlord, then he would not be entitled to distrain, though he might evict, and the right to distrain would remain to the mortgagor. If a tenant pay rent, or any part of it, to the mortgagee under a threat of eviction, he would be entitled to have it allowed in account with his landlord, the mortgagor, as money paid under constraint on account of the landlord. The latter could not levy any distress or bring any action for rent so long as the amount due did not exceed the payments thus made on his behalf to the mortgagee.

155. These remarks will still further impress upon the reader's mind the necessity for searching as to whether there are any mortgages on premises which he may intend to lease.

What may be distrained.

General rule.

Exceptions at common law.

156. The general rule with regard to the things that might be distrained was that all chattels and personal effects found on the demised premises might be distrained whether they belonged to the tenant or to a stranger. This general rule has been practically reversed by our Legislature, as will be presently seen. With regard to goods the property of the tenant, the goods which at common law cannot be distrained are as follows:

(1) Fixtures, even although they are what are usually called "tenant's fixtures," that is, such as a tenant could remove when he quits the premises.

(2) Things in actual use are also absolutely privileged, for instance, the horse on which a man is actually riding, the tools with which a man is actually working, etc.

(3) Things in the custody of the law, as goods, chattels, etc., in the pound or taken by and remaining in the possession of a sheriff's officer under an execution. But by 8 Anne, c. 14, s. 1,* before goods seized by a sheriff under an execution

Goods taken in execution not to be removed till rent paid.

* Now section 19 of R. S. O. c. 342, as follows:—

19. No goods or chattels whatsoever lying or being in or upon any messuage, lands, or tenements, leased for life or lives, or term of years, at will, or otherwise, shall be liable to be taken by virtue of any execution issued out of the High Court of Justice, or a County Court, on any pretence whatsoever, unless the party at whose suit the execution issued out shall, before the removal of such goods or chattels

put in by any other person than the landlord himself, can be removed, the immediate landlord must be paid, either by the sheriff or the execution creditor, one year's rent, if the property is held on a yearly rental, and so much remains due at the time of the seizure. As soon as a landlord hears that an execution is put in he ought to give notice to the sheriff of his claim on account of rent; otherwise, unless he can prove that the sheriff was aware of the arrears, he will lose advantage of the Act.

If the goods on the premises are not sufficient to satisfy a year's rent, the sheriff cannot execute a writ of execution, but must withdraw.

(4) Money, unless it is in the bank, and articles of a perishable nature, such as fruit, fresh meat, milk, fish, etc.

(5) Animals in a wild state are not liable to distress.

Conditional privilege

157. Besides things which are absolutely privileged from distress, there are others which, in the language of the law, are conditionally privileged; that is to say, that they must not be taken if there are other goods on the premises sufficient to satisfy the distress; such are sheep and beasts that gain the land (that is, by which the land is worked), the instruments of a man's trade or profession, as the axe of a carpenter, the anvil of a smith, the loom of a weaver, etc., over and above the amount of the statutory exemptions.

As to sheep and beasts that gain the plough, R. S. O. c. 342, provides as follows:

Horses and cattle not to be distrained if other sufficient distress.

9. Beasts that gain the land, and sheep, shall not be distrained for the King's debt, nor for the debt of any other man, nor for any other cause, if there be other chattels sufficient to satisfy the debt, or demand; but this provision is not to affect the right to impound beasts which a man findeth in his ground damage feasant. (Stat. of Exchequer, of uncertain date, sometimes styled 51 Hen. III. St. 4; Imp. Rev. St. 1870, p. 126.)

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from off the said premises by virtue of such execution, pay to the landlord of the said premises, or his bailiff, all such sums of money as are due for rent of the premises at the time of the taking of such goods or chattels by virtue of such execution; provided the said arrears of rent do not amount to more than one year's rent, and in case the said arrears shall exceed one year's rent, then the party at whose suit such execution issued out paying the said landlord, or his bailiff, one year's rent, may proceed to execute his judgment as he might have done before the making of this Act, and the sheriff, or other officer, is hereby empowered and required to levy and pay to the execution creditor as well the money so paid for rent as the execution money. 8 Anne, c. 18 (or c. 14 in Ruffhead's ed.) s. 1.

Growing crops.

158. By 11 Geo. II. c. 19, ss. 8 and 9, the landlord is empowered to distrain growing crops of grain and grass, hops, roots, fruits, pulse, or other products, to gather them when ripe, but not before; to place them in a barn on the premises, if possible, and if not, as near as may be, and then, after a week's notice to the tenant of the place of deposit and intended sale, to sell these as distresses are usually sold. Growing crops seized under an execution, unlike those seized under distress, may be sold before they are ripe, but so long as they remain on the land for sale, they are liable to be distrained for rent which comes due after the seizure, and sold, provided there is no other sufficient distress. The landlord has in respect of them the same right to a year's rent due before the seizure and sale, as he has in regard to other chattels under 8 Anne, c. 14. The landlord is not obliged to take them before having resort to the things just mentioned as conditionally privileged.

As to growing crops, R. S. O. c. 342 provides as follows:

Sheaves and cocks of corn loose, etc., hay in barn, etc., may be distrained.

6. Any person having rent arrear and due upon any demise lease, or contract, may seize and secure any sheaves or cocks of corn, or corn loose, or in the straw, or hay, lying or being in any barn or granary, or upon any hovel, stack or rick, or otherwise upon any part of the land, or ground charged with such rent, and may lock up, or detain the same, in the place where the same shall be found, for or in the nature of a distress until the same shall be replevied; and, in default of the same being replevied, may sell the same, after appraisement thereof to be made, so as nevertheless such corn, grain, or hay, so distrained as aforesaid, be not removed by the person distraining, to the damage of the owner thereof, out of the place where the same shall be found and seized, but be kept there (as impounded) until the same shall be replevied, or sold in default of replevying the same. 2 W. & M. Sess. 1, c. 5, s. 2.

Corn, etc. not to be removed by person distraining to the damage of owner from the place where raised.

Cattle on ways belonging to demised premises, and growing crops thereon may be distrained.

7. Every lessor or landlord, or person empowered by him, may take and seize as a distress for arrears of rent, any cattle or stock of his tenant feeding or depasturing upon any common appendant, or appurtenant, or any ways belonging, to all, or any part of, the premises demised, or holden; and may take and seize all sorts of corn, and grass, hops, roots, fruits, pulse, or other product whatsoever, which shall be growing on any part of the estate demised or holden as a distress for arrears of rent; and the same cut, gather, make, cure, carry and lay up, when ripe, in the barns, or other proper place, on the premises so demised or holden; and in case there shall be no barn, or proper place on the premises so demised or holden, then in any other barn or proper place which such lessor or landlord shall hire, or otherwise procure for that purpose, and as near as may be to the premises, and in convenient time to appraise, sell, or otherwise dispose of the same, towards satisfaction for the rent for which such distress shall have been taken, and of the charges of such distress, appraisement, and sale, in the same manner as other goods and chattels may be seized, distrained and disposed of; and the appraisement thereof

shall be taken when cut, gathered, cured and made, and not before. 11 Geo II. c. 19, s. 8.

Tenants to have notice of the place where the distress is lodged.

8. (1) Notice of the place where the goods and chattels so distrained shall be lodged or deposited shall, within the space of one week after the lodging or depositing thereof in such place, be given to such lessee or left at his last place of abode.

Distress of growing crops may be satisfied by payment before crops cut.

(2) If after any distress for arrears of rent so taken of corn, grass, hops, roots, fruits, pulse, or other product, which shall be growing as aforesaid, and at any time before the same shall be ripe and cut, cured, or gathered, the tenant or lessee, his executors, administrators, or assigns, shall pay, or cause to be paid, to the lessor or landlord for whom such distress shall be taken, the whole rent which shall be then in arrear, with the full costs and charges of making such distress, and which shall have been occasioned thereby, then, upon such payment, or lawful tender thereof actually made, whereby the end of such distress will be fully answered, the same, and every part thereof shall cease, and the corn, grass, hops, roots, fruits, pulse, or other product so distrained shall be delivered up to the lessee or tenant, or his executors, administrators, or assigns; anything hereinbefore contained to the contrary notwithstanding. 11 Geo. II. c. 19, s. 9.

159. When growing crops* are seized for rent they may, at the option of the landlord, or upon the request of the tenant, be advertised and sold in the same manner as other goods, and it is not necessary for the landlord to reap, thresh, gather or otherwise market them. (R. S. O. c. 170, s. 36.)

Any person buying a growing crop at a sale under seizure for rent is liable for the rent of the lands upon which the crop is growing at the time of sale and until the crop is removed, unless the rent is otherwise satisfied. The rent is the same as the original tenant would have to have paid. (R. S. O. c. 170, s. 37.)

160. Growing crops, sown by the person in possession, and intended to be reaped at maturity, being fructus indus-

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Sale of growing crops.

*36. When growing or standing crops which may be seized and sold under execution are seized for rent they may at the option of the landlord or upon the request of the tenant be advertised and sold in the same manner as other goods, and it shall not be necessary for the landlord to reap, thresh, gather, or otherwise market the same.

Liability of purchaser of growing crops.

37. Any person purchasing a growing crop at such sale shall be liable for the rent of the lands upon which the same is growing at the time of the sale, and until the crop shall be removed, unless the same has been paid or has been collected by the landlord, or has been otherwise satisfied, and the rent shall, as nearly as may be, be the same as that which the tenant whose goods were sold was to pay, having regard to the quantity of land and to the time during which the purchaser shall occupy it.

triales, are chattels seizable under execution, and the ownership of them is not an interest in land within the 4th section of the Statute of Frauds. They are bound by the delivery to the sheriff of an execution against the owner, and they must equally be bound by the act of the owner. They are not within the Registry Act, because they are chattels. (Cameron v. Gibson, 17 O. R. 238.)

Goods on premises not property of tenant to be exempt.

161. The rule as to exemptions from distress of the property of strangers is now contained in the following statutory provisions, which form section 31 of the Landlord and Tenant Act (R. S. O. c. 170.)

Goods on premises not property of tenant to be exempt. Exceptions.

(1) A landlord shall not distrain for rent on the goods and chattels the property of any person, except the tenant or person who is liable for the rent, although the same are found on the premises. But this restriction shall not apply in favour of a person claiming title under or by virtue of an execution against the tenant, or in favour of any person whose title is derived by purchase, gift, transfer or assignment from the tenant, whether absolute or in trust, or by way of mortgage or otherwise.

Nor to the interest of the tenant in any goods on the premises in the possession of the tenant under a contract for purchase, or by which he may or is to become the owner thereof upon performance of any condition.

Nor where goods have been exchanged between two tenants or persons, by the one borrowing or hiring from the other, for the purpose of defeating the claim of or the right of distress by the landlord.

Nor shall the restriction apply where the property is claimed by the wife, husband, daughter, son, daughter-in-law, or son-in-law of the tenant, or by any other relative of his, in case such other relative lives on the premises as a member of the tenant's family, or by any person whose title is derived by purchase, gift, transfer or assignment from any relative to whom such restriction does not apply.

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

"Tenant," Meaning of in this section.

(3) Subject to sections 39 and 40 of this Act* the word "tenant" in this section shall extend to and include the sub-tenant, and the assigns of the tenant, and any person in actual occupation of the premises under or with the assent of the tenant during the currency of the lease, or while the rent is due or in arrear, whether he has or has not attorned to or become the tenant of the landlord.

162. The exemptions from the tenant's own property are laid down in the following section (30) of the Landlord and Tenant Act (R. S. O. c. 170):

* Relating to lodger's goods.

30. (1) The goods and chattels exempt from seizure under execution shall not be liable to seizure by distress by a landlord for rent in respect of a tenancy created after the 1st day of October, 1887, except as hereinafter provided. Goods exempt from execution to be exempt from distress.

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

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

163. Sections 2, 3 and 5 of the Execution Act (R. S. O. c. 77) specify the exemptions as follows: Exemptions from tenant's own property.

(1) The bed, bedding and bedsteads (including a cradle) in ordinary use by the debtor and his family. Bedding.

(2) The necessary and ordinary wearing apparel of the debtor and his family. Apparel.

(3) One cooking stove, with pipes and furnishings, one other heating stove, with pipes, one crane and its appendages, one pair of andirons, one set of cooking utensils, one pair of tongs and shovel, one coal scuttle, one lamp, one table, six chairs, one washstand with furnishings, six towels, one looking glass, one hair brush, one comb, one bureau, one clothes press, one clock, one carpet, one cupboard, one broom, twelve knives, twelve forks, twelve plates, twelve teacups, twelve saucers, one sugar basin, one milk jug, one tea pot, twelve spoons, two pails, one wash tub, one scrubbing brush, one blacking brush, one washboard, three smoothing irons, all spinning wheels and weaving looms in domestic use, one sewing machine and attachments in domestic use, thirty volumes of books, one axe, one saw, one gun, six traps, and such fishing nets and seines as are in common use, the articles in this subdivision enumerated not exceeding in value the sum of $150. Furniture.

(4) All necessary fuel, meat, fish, flour and vegetables actually provided for family use, not more than sufficient for the ordinary consumption of the debtor and his family for thirty days, and not exceeding in value the sum of $40. Fuel and provisions.

(5) One cow, six sheep, four hogs, and twelve hens, in all not exceeding the value of $75, and food therefor for thirty days, and one dog. Animals.

(6) Tools and implements of, or chattels ordinarily used in the debtor's occupation to the value of $100. Tools.

(7) Bees reared and kept in hives to the extent of fifteen hives. Bees.

* This proviso means, or ought to mean by correct interpretation of its language, that if there is a monthly tenancy, then up to the amount of two months' arrears the exemptions cannot be touched. If there are more than two months' arrears, then for the surplus over the two months the goods which would otherwise be exempted are liable.

Debtor may take proceeds of sale of implements, etc., in money.

3. The debtor may, in lieu of tools and implements of, or chattels ordinarily used in his occupation, referred to in clause six of section 2 of this Act, elect to receive the proceeds of the sale thereof up to $100, in which case the officer executing the writ shall pay the net proceeds of such sale, if the same do not exceed $100; or, if the same exceed $100, shall pay that sum to the debtor in satisfaction of the debtor's right to exemption under said subdivision six, and the sum to which a debtor shall be entitled hereunder shall be exempt from attachment or seizure at the instance of a creditor.

Goods exempted from seizure after death of the debtor to go to widow and family.

4. The chattels so exempt from seizure as against a debtor shall after his death be exempt from the claims of creditors of the deceased, and the widow shall be entitled to retain the exempted goods for the benefit of herself and the family of the debtor, or if there is no widow the family of the debtor shall be entitled to the exempted goods.

Right of selection.

5. The debtor, his widow or family, or in the case of infants, their guardian, may select out of any larger number the several chattels exempt from seizure.

Exception.

6. Nothing herein contained shall exempt any article enumerated in subdivisions 3, 4, 5, 6, and 7, of section 2 of this Act, from seizure in satisfaction of a debt contracted for the identical article.

Procedure on claiming exemptions.

164. The mode of procedure for the claiming of exempted chattels is laid down by section 32 of the Landlord and Tenant Act (R. S. O. c. 170) as follows:

Tenant claiming exemption must surrender premises.

(1) A tenant who is in default for non-payment of rent, and claims the benefit of the exemption from distress to which he is entitled under this Act, must give up possession of the premises forthwith, or be ready and offer to do so.

(2) The offer may be made to the landlord or to his agent, and the person authorized to seize and sell the goods and chattels, or having the custody thereof for the landlord, shall be considered an agent of the landlord for the purpose of the offer and surrender to the landlord of the possession.

Seizure of exempted goods.

(3) Where a landlord desires to seize the exempted goods, he shall, after default has been made in the payment of rent, and before or at the time of seizure, serve the tenant with a notice, which shall inform the tenant what amount is claimed for rent in arrear, and that in default of payment, if he gives up possession of the premises to the landlord after service of the notice, he will be entitled to claim exemption for such of his goods and chattels as are exempt from seizure under execution, but that if he neither pays the rent nor gives up possession, his goods and chattels will be liable to seizure and will be sold to pay the rent in arrear and costs.

(4) The notice may be in the following form, or to the like effect:

Take notice, that I claim $ for rent due to me in respect of the premises which you hold as my tenant, namely (here briefly describe them): and unless the said rent is paid I demand from you immediate possession of the said premises, and I am ready to leave in your possession such of your goods and chattels as in that case only you are entitled to claim exemption for.

Take notice further, that if you neither pay the said rent nor give me up possession of the said premises within three days after the service of this notice, I am by law entitled to seize and sell, and I intend to seize and sell, all your goods and chattels, or such part thereof as may be necessary for the payment of the said rent and costs.

This notice is given under the Act of the Legislature of Ontario respecting the law of Landlord and Tenant.

Dated this day of A.D.

To C. D. (tenant). (Signed) A. B. (landlord).

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

(6) Service of papers under this Act shall be made either personally or by leaving the same with some grown person being in and apparently residing on the premises occupied by the person to be served.

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

(8) No proceeding under this section shall be deemed defective or rendered invalid by any objection of form.

165. No distress can be made until the day after that on which the rent becomes due, nor between sunset and sunrise, nor after tender of the rent. At common law no distress could have been made after the determination of the lease or tenancy; but now, by 8 Anne, c. 14, s. 6, if a lease has been determined by lapse of time or by notice to quit, the landlord may distrain for rent accruing due before within six months after such determination, provided his own title to the property still continues, and the same tenant still remains in possession. When distress can be made.

As to where distress can be made R. S. O. c. 342 provides as follows:

10. Save as provided **by section 7, and as hereinafter provided,** chattels shall not be distrained for rent which are not at the time of the distress upon the premises in respect of which the rent distrained for is due. 52 Hen. III. (St. of Marlbridge, c. 15.) Chattels not to be distrained off the premises.

166. The landlord can only distrain for rent upon the premises in respect of which it is payable. To this rule, however, there are some exceptions. If a landlord coming to distrain sees beasts upon the premises, but before he can distrain the tenant drives them off, the landlord may follow and take them and by 11 Geo. II. c. 19, now contained in Where distress can be made.

R. S. O. c. 342, if a tenant fraudulently or clandestinely removes goods from the demised premises to prevent the lessor from distraining them for rent in arrear, the lessor, or his bailiff or agent, may, within 30 days next after such removal, take and seize them wherever they may be found, unless they have in the meantime been sold bona fide to some person ignorant of the fraud. These provisions are as follows:

Landlords may distrain goods fraudulently carried off the premises.

11. (1) In case any tenant, or lessee for life or lives, term of years, at will, sufferance, or otherwise, of any messuages, lands, tenements, or hereditaments, upon the demise, or holding whereof, any rent is reserved, due, or made payable, shall fraudulently, or clandestinely convey away, or carry off, or from, such premises, his goods or chattels, to prevent the landlord or lessor from distraining the same for arrears of rent so reserved, due, or made payable, the landlord or lessor, or any person by him, for that purpose, lawfully empowered, may, within the space of thirty days next ensuing such conveying away, or carrying off such goods or chattels as aforesaid, take and seize such goods and chattels wherever the same shall be found, as a distress for the said arrears of rent, and the same sell, or otherwise dispose of, in such manner as if the said goods and chattels had actually been distrained by the lessor or landlord in and upon such premises for such arrears of rent; any law, custom, or usage to the contrary, notwithstanding. 11 Geo. II. c. 19, s. 1.

But not goods bona fide sold for value.

(2) No landlord or lessor, or other person entitled to such arrears of rent, shall take, or seize, any such goods or chattels as a distress for the same, which shall be sold bona fide and for a valuable consideration, before such seizure made, to any person not privy to such fraud as aforesaid; anything herein contained to the contrary notwithstanding. 11 Geo. II. c. 19, s. 2.

Landlords may break open houses to seize goods fraudulently secured therein.

12. Where any goods or chattels fraudulently or clandestinely conveyed, or carried away, by any tenant or lessee, his servant or agent, or other person aiding or assisting therein, shall be put, placed, or kept, in any house, barn, stable, outhouse, yard, close, or place, locked up, fastened, or otherwise secured, so as to prevent such goods or chattels from being taken and seized as a distress for arrears of rent, the landlord, or lessor, or his agent, may take and seize, as a distress for rent, such goods and chattels (first calling to his assistance the constable, or other peace officer, of the place where the same shall be suspected to be concealed, who is hereby required to aid and assist therein; and in case of a dwelling house, oath being also first made before a justice of the peace of a reasonable ground to suspect that such goods or chattels are therein), and in the day time break open and enter into such house, barn, stable, outhouse, yard, close, and place, and take and seize such goods and chattels for the said arrears of rent, as he might have done if such goods and chattels had been put in any open field or place upon the premises from which the same have been so conveyed, or carried away. 11 Geo. II. c. 19, s. 7.

Penalty for fraudulently removing or assisting to remove goods.

13. (1) If a tenant or lessee shall fraudulently remove and convey away his goods or chattels as aforesaid, or if any person shall wilfully and knowingly aid or assist any such tenant or lessee in such fraudulent conveying away, or carrying off, of any part of his goods or chattels, or in concealing the same, every person so offending shall forfeit and pay to the landlord or lessor, from whose estate such goods and chattels were fraudulently carried off as aforesaid, double

the value of the goods by him carried off or concealed as aforesaid, to be recovered by action in any Court of competent jurisdiction. 11 Geo. II. c. 19, s. 3.

(2) Where the goods and chattels so fraudulently carried off, or concealed, shall not exceed the value of $200, the landlord from whose estate such goods or chattels were removed, or his agent, may exhibit a complaint in writing against such offender before two or more justices of the peace of the same county, residing near the place whence such goods and chattels were removed, or near the place where the same were found, not being interested in the lands or tenements whence such goods were removed, who may summon the offender, examine the fact, and all proper witnesses upon oath, and in a summary way determine whether such offender be guilty of the offence with which he is charged, and inquire in like manner of the value of the goods and chattels by him so fraudulently carried off, or concealed, as aforesaid; and upon full proof of the offence, by order under their hands and seals, the said justices of the peace may and shall adjudge the offender to pay double the value of the said goods and chattels to the landlord at such time as the said justices shall appoint, and in case the offender, having notice of such order, shall refuse or neglect so to do, may and shall, by warrant under their hands and seals, levy the same by distress and sale of the goods and chattels of the offender; and for want of such distress, may commit the offender to the common gaol, there to be kept to hard labour, without bail or mainprize, for the space of six months, unless the money so ordered to be paid as aforesaid shall be sooner satisfied. 11 Geo. II. c. 19, s. 4.

If the goods removed do not exceed $200 in value complaint may be made to Justices of the Peace.

(3) Any person aggrieved by such order may appeal to the General Sessions in accordance with the provisions of the Ontario Summary Convictions Act. 11 Geo. II. c. 19, s. 5.

Appeal. Rev. Stat., c. 90.

(4) Where the party appealing shall enter into a recognizance with one or two sufficient surety or sureties in double the sum so ordered to be paid, with condition to appear at such General Sessions and to abide the order there to be made, the order of the said justices shall not be executed against him in the meantime. 11 Geo. II. c. 19, s. 6.

Execution of order to be stayed if security given.

167. This statute does not apply to the case of a removal of a stranger's goods from the premises, nor to the removal of the goods of a tenant which are assigned to one of his creditors in satisfaction of a bona fide debt.* It will be remembered that we are only speaking here of the right to distrain. The removal by a creditor might be a breach of the Fraudulent Preferences Act, R. S. O. c. 147, and the landlord might have his claim to a share of the proceeds of these goods like any other creditor. Nor does the statute apply to the removal of a tenant's goods before the day on which the rent becomes due. If removed on the morning of the day on which the rent becomes due they may be followed and seized under the statute.

Fraudulent removal.

When goods are fraudulently removed, and are placed in any house or place, locked up or otherwise secured, the land-

* See *Martin* v. *Hutchinson*, 21 O. R. 388. Tenant liable to prosecution only if goods are his own property.

lord, or his agent, may, with the assistance of a police officer, and in the case of a dwelling-house, on oath being made before a magistrate of a reasonable ground to suspect that the goods are in it, break open the house in the day time and distrain the goods as if they had been in any open place. The constable to be present may be one specially appointed for the occasion.

Chattel mortgagee's claims.

168. In practice it is often found that goods thus removed are liable to a chattel mortgage, and the landlord's priority over such chattel mortgage ceases as soon as the goods are removed from the demised premises. In taking proceedings under this Act, therefore, the landlord must be careful to ascertain before he incurs any expense whether the goods are covered by a chattel mortgage or not. If he chooses to pay off the chattel mortgage, and take an assignment of it or discharge it, he could then seize the goods, because the ownership would be revested in the tenant. If he sold the goods without reference to the chattel mortgage he would be liable in damages to the chattel mortgagee. The tenant, or any person assisting him in carrying away or concealing goods, has to forfeit to the landlord double the value of such goods, to be recovered, where the goods exceed the value of $200, by action or suit, and where the value is below that amount, by summary proceedings before two justices. In the latter case the justices have the power to commit for six months if the money is not paid and no sufficient distress can be found. Police magistrates in cities in Ontario have the same power as two justices of the peace.

Amount of distress.

169. The landlord must, in the first place, be careful not to distrain for more rent than is actually due; and, in the second place, to distrain at one time for the whole of that which is due. If, indeed, there has been some mistake as to the value of the goods, and the landlord having fairly supposed the first distress to be sufficient to realize the whole rent due, afterwards finds that it will only cover a part, he may then distrain again for the remainder; or if, after putting in a distress, he has at the request of the tenant agreed to postpone it and has withdrawn, he may then distrain a second time.

Entry into premises distrained upon.

170. The outer door of a house, except in the case of goods fraudulently removed, cannot be broken open. It is not a breaking to open it by the usual means adopted by persons

having access to the building; but when the outer door has once been passed, the inner doors may be forced, and if the landlord or his agent, having been once lawfully in the house, and have begun to make distress, are forcibly ejected, they may then break open the outer door to re-enter.

Who may make a distress.

171. A distress may be made either by the landlord himself or by an authorized agent, called a bailiff. To justify a landlord in calling in a policeman, it must be shown that his presence was rendered necessary by violence or threats.

Warrant of distress.

172. The authority is usually given to a bailiff in writing by what is called a warrant of distress, but if a landlord's agent distrain without his orders, subsequent ratification of his acts is as effectual as a previous direction.

Mode of making a distress.

173. The usual mode of making a distress is for the landlord or his bailiff, having entered, to lay his hand upon and take hold of some article of furniture or other chattel, and declare that he seizes it as a distress in the name of all the goods in the house; but it will be quite sufficient if, after entry, he announces his intention to take the whole or certain articles named as the distress.

Inventory.

174. When the seizure has been thus made, the next thing is to draw up an inventory of as many goods as are sufficient to cover the rent distrained for, and also the costs of the distress. A copy of the inventory must then be made, and this, with the notice usually written at the foot of the inventory, of the fact of the distress having been made and the goods contained in the inventory having been taken, of the rent distrained for, and of the date on which the rent and costs must be paid or the goods replevied, must be served upon the tenant, either personally or by leaving it for him at his house, or if there is no house on the premises, or if no person is there with whom the notice can be left, then by sticking it up in some prominent place on the fence. A witness should be present to prove the regularity of the proceedings.

Removal of goods.

175. When the distress has been made and the inventory drawn up, the landlord may then remove the goods off the premises to any convenient place of security, of which the tenant must have notice, with the inventory, and where they are impounded.

The provisions of R. S. O. c. 342, as impounding distress are as follows:

Beasts distrained not to be driven out of the municipality as defined by Rev. Stat., c. 223.

14. Beasts or cattle distrained shall not be chased or driven out of the local municipality (as defined by the Municipal Act) in which they are distrained, except it be to a pound overt within the same county not above three miles distant from the place where the distress is taken. 3 Ed. I. (St. of Westminster Prim.), c. 16, and 1 P. & M. c. 12, s. 1, part.

Chattels distrained at the same time not to be impounded in different places.

(2) No cattle or other goods distrained or taken by way of distress for any manner of cause at one time, shall be impounded in several places, whereby the owner of such distress shall be constrained to sue several replevins for the delivery of the said distress so taken at one time; upon pain that every person offending shall forfeit to the party aggrieved $20 and treble damages. 1 P. & M. c. 12, s. 1, part.

(As to sheaves and cocks of corn, or corn loose, or in the straw, or hay, see ante page 70, and as to growing crops, see page 71 ante.)

Goods distrained may be impounded on demised premises.

(3) Any person lawfully taking any distress for any kind of rent may impound or otherwise secure the distress so made of what nature or kind soever it may be, in such place or on such part of the premises chargeable with the rent, as shall be most fit and convenient for the impounding and securing such distress, and may appraise, sell, and dispose of, the same upon the premises, in like manner, and under like directions and restraints to all intents and purposes, as any person taking a distress for rent may now do off the premises, and it shall be lawful for any person whomsoever to come and go to, and from, such place, or part of the said premises, where any distress for rent shall be impounded and secured as aforesaid, in order to view, appraise, and buy, and also in order to carry off or remove the same on account of the purchaser thereof, and if any pound-breach, or rescue, shall be made of any goods and chattels, or stock, distrained for rent, and impounded or otherwise secured by virtue of this Act, the person aggrieved thereby shall have the like remedy as in cases of pound-breach, or rescue. 11 Geo. II. c. 19, s. 10.

Pounding cattle.

176. If, however, cattle are seized, they must not be driven out of the municipality in which they are taken, except to an open pound in the same municipality, not more than three miles from the place of distress. A distress is, however, now hardly ever removed from the premises, because by 11 Geo. II. c. 19, it was enacted that it shall be lawful for any person or persons lawfully making any distress for any kind of rent, to impound it or otherwise secure the distress so made, of whatever nature or kind whatsoever it may be, in such place or in such part of the premises chargeable with the rent as shall be most fit and convenient for the impounding or securing of such distress. Under this statute the landlord may, even without the tenant's consent, take such part of the

premises, or even the whole, as is necessary for securing the goods, and place a man in possession of them there; but it has been held that, if it is not necessary to use the whole of the premises for the purpose, he must place the goods distrained in one or more rooms, according to the space required, unless the tenant, as he usually does, allow them to remain in their ordinary places. No particular form is now required to constitute an impounding. As soon as the distrainor has made out and delivered to the tenant, or has left upon the premises, an inventory of the goods he has taken, they are impounded, and then, even though no one is left in possession, as soon as this is done they are in the custody of the law, and if the tenant retake them he will be liable to indictment, and also to an action for damages.

Landlord must not use impounded things.

177. The landlord must not use or consume any animals or things impounded. If he does, the tenant will have an action for damages. To this there is one exception—a landlord may milk cows which have been distrained, for this is necessary for the preservation of the animals. A distrainor is now bound to feed impounded cattle if the owner does not.

Appraisement.

178. If a tenant, after he has received notice of distress, do not within five days* pay the rent, with the costs of the levying or replevying of his goods, the distrainor may, with the assistance of the sheriff of the county or a constable, cause the same to be appraised by two sworn appraisers, whom the sheriff or constable are authorized to swear, and after such appraisement may sell the same, and apply the proceeds to the satisfaction of the rent and the charges of the distress and appraisement, leaving the surplus, if any, in the hands of the sheriff or constable for the owner's use.

The provisions of R. S. O. c. 342 on this point are as follows:

Sale of distress

16. Where any goods or chattels shall be distrained for any rent reserved and due upon any demise, lease, or contract, whatsoever, and the tenant or owner of the goods so distrained, shall not, within five days next after such distress taken and notice thereof (with the cause of such taking) left at the dwelling house, or other most notorious place on the premises charged with the rent distrained for, replevy the same, with sufficient security to be given to the sheriff according

* The five days are to be calculated inclusive of the last day and exclusive of the date of seizure; thus, if the distress is taken and notice given on the 1st of March, it will not be lawful to sell until the 7th March.

not till expiration of five days and appraisement

to law, then, in such case, after such distress and notice as aforesaid, and expiration of the said five days, the person distraining shall cause the goods and chattels so distrained to be appraised by two appraisers, who shall first be sworn before a justice of the peace, or any other officer or person authorized to administer an oath, to appraise the same truly, according to the best of their understandings (a memorandum of which oath is to be indorsed on the inventory), and after such appraisement, the person so distraining may lawfully sell the goods and chattels so distrained for the best price which can be got for the same, towards satisfaction of the rent for which the said goods and chattels shall be distrained, and of the charges of such distress, appraisement, and sale, and shall hold the overplus (if any) for the owner's use, and pay the same over to him on demand. (See 2 W. & M. Sess. 1, c. 5, s. 1.) 2 Edw. VII. c. 1, s. 22.

Distrainor must not retain possession of the goods.

179. The distrainor cannot retain possession of the goods on the premises of the tenant for more than five days, together with such further reasonable time as may be necessary for appraising and selling the same, unless he has the express consent of the tenant for such further retention of the goods and occupation of the premises. A delay of this kind frequently takes place when the tenant wishes further time to enable him to raise the money to pay his rent. This consent ought to be in writing for the sake of safety, although it may be legally given by word of mouth. If the bailiff or person actually making the distress on behalf of the landlord acts as one of the appraisers, the distress will be rendered irregular. The appraisers need not be professional appraisers, but they must be reasonably competent. They must value every article in the inventory separately, and then indorse the inventory with a signed memorandum of the total valuation.

Sale.

180. The goods may then be put up for auction, but the appraisers may take them at their own valuation, the law presuming that goods sold as appraised are sold at the best prices. The distraining bailiff must sign the receipt for the money realized at the end of the inventory. If the amount received exceeds that of the rent and costs of distress the surplus must be left in the hands of the sheriff or constable for the tenant. Goods followed and distrained after a fraudulent removal are to be sold in the same manner as if they had been seized on the premises.

As to pound-breach R. S. O. c. 342 provides as follows:

Pound breach or rescue damages for.

15. Upon any pound-breach, or rescue, of goods or chattels distrained for rent, the person grieved thereby shall, by action for the wrong thereby sustained, recover treble damages and costs of suit against the offender in any such rescue, or pound-breach, or against the owner of the goods distrained, in case the same be afterwards found to have come to his use or possession. 2 W. & M. Sess. 1, c. 5, s. 3.

Action for rent.

181. Besides the remedy by distress the landlord has also the right to bring an action for his rent. If a tenant, having entered into possession of premises on the understanding that he is to make some compensation for their use without any express stipulation for the payment of a rent certain, then no distress can be made, but the landlord may bring an action for reasonable compensation for the occupation. Even if the occupation were that of a squatter or trespasser the landlord could bring such an action. He might, in such a case, eject the party, but he has also the option of treating him as a tenant, and compelling him to pay for the use of the premises.

Power of re-entry.

182. It is usual in leases to afford the landlord, if not the remedy for the payment of rent, at least protection against the accumulation of arrears, by giving him the power to re-enter and terminate the lease if the rent be not paid within a certain number of days after it has become due.

Costs in respect of seizure of exempted goods.

183. The costs of distress for rent are provided for as follows:

First, as to exempted goods (R. S. O. c. 75, s. 3):

No costs shall be levied for or in respect of the seizure upon exempted goods when they may not be lawfully sold, and when sold no greater sum in all than $2.00 and actual and necessary payments for possession money shall be levied or retained for or in respect of costs and expenses of sale of such exempted goods.

Fees to be charged under $80.

184. Second, as to seizure where distress is for sums under $80 (R. S. O. c. 75):

1. No person making distress for rent or for a penalty, where the sum demanded and due in respect of the rent or penalty does not exceed $80, and no person employed in making the distress or doing any act in the course of the distress, or for carrying the same into effect, shall take or receive from any person, or out of the produce of the chattels distrained and sold, any other costs in respect of the distress than such as are set forth in Schedule A hereunto annexed.

6. If a person offends against any of the provisions of the preceding sections, the party aggrieved may apply to a justice of the peace for the county, city, or town where the offence was committed for the redress of the grievance, whereupon the justice shall summon the person complained of to appear before him at a reasonable time, to be fixed in the summons, and the justice shall examine into and hear the complaint and defence, and if it appears that the person complained of has so offended, the justice shall order and adjudge treble the amount of the money unlawfully taken and full costs to be paid by the offender to the party aggrieved.

Person aggrieved by seizure or distress not barred of his action, etc.

13. No person aggrieved by a seizure or sale of goods under a chattel mortgage or bill of sale, or by a distress for rent or a penalty, or by any proceeding had in the course thereof, or by any costs or charges levied upon him in respect of the same, shall be barred from any action or remedy which he might have had before the passing of this Act, except so far as any complaint preferred under this Act has been determined by the order and judgment of the justice before whom it has been heard and determined, and in case the matter of the complaint is made the subject of an action the order and judgment may be given in evidence under the defence of not guilty.

Schedule A.:

Costs on distress for small rents and penalties:

Levying distresses under $80 ..... $1 00
Man keeping possession per diem 75

Appraisement whether by one appraiser or more, two cents in the dollar on the value of the goods.

If any printed advertisement, not to exceed in all $1,

Catalogues, sale and commission, and delivery of goods—five cents in the dollar on the net produce of the sale.

Fees when over $80.

185. Third, where the seizure is for distress for sums over $80 (R. S. O. c. 75):

2. When the sum to be levied by distress for rent, or for any penalty, exceeds the sum of $80, no further charges shall be made for or in respect of costs or expenses by any person making the distress, or employed in doing any act in the course of such distress, than such as are set forth in Schedule A of this Act, except the following, that is to say:

(*a*) The actual expenses or outlay reasonably incurred in removing the goods distrained, or part thereof, when such removal is necessary.

(*b*) Advertisement when necessarily published in a newspaper $2.00, but not exceeding $5.00.

(*c*) If any printed advertisement otherwise than in a newspaper $1.00, but not to exceed $3.00.

(*d*) The sum of $1.00 per day for man keeping possession in lieu of 75c. per day as allowed in said schedule A.

(*e*) Where the amount due shall be satisfied in whole or in part after seizure and before sale, the bailiff or person seizing shall be entitled to charge and receive but three per cent. on the amount realized in lieu of five per cent. and no more.

Taxation of costs of distress.

16. The person whose goods are distrained, or the person authorizing the distress, or any other person interested, may, upon giving two days' notice in writing, have the costs of the bailiff or other person making the distress, and the disbursements charged, taxed by the clerk of the Division Court within whose division the distress has been made.

Persons making distress to give

17. The bailiff or person so making the said distress shall furnish the clerk with a copy of his costs, charges and disbursements,

for taxation at the time mentioned in the notice, or at such other time as the clerk may direct, and in default of his so doing he shall not be entitled to any costs, charges, or disbursements whatever. Bill of costs to clerk for taxation.

18. The clerk upon such taxation shall, amongst other things, consider the reasonableness of any charges for removal, keeping possession, and for advertising, or any sums alleged to have been paid therefor, and may examine either party on oath touching the same. The person requiring the taxation shall pay the clerk a fee of twenty-five cents therefor. Duty of clerk on taxation.

19. Where that portion of the bill or charges in dispute amounts to the sum of $10, either party may on giving two days' notice have the taxation revised by the clerk of the County Court, who shall be paid a fee of fifty cents for such revision by the person appealing, and such fee may in the discretion of the clerk be deducted from or added to the bill as finally taxed by him. Revision of taxation.

186. Persons overcharging are liable, on proceedings being taken before a justice of the peace, to pay treble the amount of money actually taken and costs. A landlord cannot be so punished unless he personally levied the distress. This proceeding before a justice is in addition to any right of action there may be for damages. Penalty for extortion.

CASES.

The plaintiff as landlord distrained the goods of his tenant on 16th July, and left them in the custody of the tenant, who agreed to hold possession and deliver them up when required. On 10th August a chattel mortgagee seized and removed the goods. General rules as to consequences of delay in selling.

In an action for pound breach under 2 W. & M. c. 5, s. 4, by the landlord against the chattel mortgagee and his bailiff: Held, that the landlord had the right to impound and secure the goods on the premises, and at the expiration of five days to sell them, and had a reasonable time after the expiration of the five days to sell which had elapsed in this case; that there was a good distress and a good impounding, and the agreement bound the tenant, but not the mortgagee, who was entitled to have the provisions of the law carried out; and who could, after the expiry of a reasonable time for sale, say the goods are not in the custody of the law, but of the landlord, under an agreement with the tenant, and in taking them under his chattel mortgage he did not commit a pound breach:

Langtry v. *Clark*, 16 C. L. T. 109.

A bailiff seized certain goods under a landlord's distress warrant for rent in arrear, but did not remain in possession or take any further steps to execute the warrant, except that, as the jury found, the tenant was constituted the landlord's agent to take possession of the goods for him under the warrant. After the lapse of more than a month a chattel mortgagee took possession of the goods under his mortgage and removed them: Held, that the landlord was not entitled to recover them:

Roe v. *Roper*, 23 C. P. 76.

Tenant cannot affect rights of mortgagee.

It is doubtful whether a tenant can waive all statutable formalities as to inventory, etc., as regards the mortgagee:

Whimsell v. *Giffard*, 3 O. R. 1.

A removal of goods distrained held not unlawful.

The plaintiff having remained in possession and paid rent after the expiry of his term, the defendants levied a distress upon plaintiff's goods in the premises situate six miles from Toronto, for two months' arrears of rent, and removed the goods to Toronto to impound and sell. The plaintiff brought an action of trespass, claiming that he was not defendant's tenant: Held

1. That the relationship of landlord and tenant existed at the time of the distress.

2. That the removal to Toronto, unless unnecessary and unreasonable or malicious, was not a good ground of action:

Macgregor v. *Defoe*, 14 O. R. 87.

An illegal distress.

On a distress for rent no notice thereof in writing was given to the lessee, nor a legal appraisement made before sale; and the actual value of the goods sold was much greater than the amount due for rent: Held, that the distress was illegal.

Howell v. *Listowell*, 13 O. R. 476. (See this case also on subject of Tender.)

Third party's right.

Where a landlord has distrained for arrears of rent goods upon the demised premises liable to such distress, belonging in part to the tenant and in part to a third party, such third party has no right to compel the landlord to sell the part belonging to the tenant before selling the part belonging to such third party:

Pegg v. *Starr*, 23 O. R. 83.

Withdrawal of distress.

The withdrawal of a first distress, not being a voluntary one, but under a special arrangement, did not prevent the landlord from making a second distress. The second distress could be supported by reason of the first distress being withdrawn through the tenant's fraud. Section 4 of 58 V. c. 26, does not preclude a right of distress, unless there is an express contract therefor contained in the lease; and the section is not retrospective:

Harpelle v. *Carroll*, 27 O. R. 240. See para. 144.

The effect of a taking a note on the right to distrain

The mere taking of a note for rent will not take away the right to distrain, but it is otherwise where in consideration of receiving it the landlord expressly agrees to wait until it is dishonoured. In this case such an agreement was proved:

Simpson v. *Hewitt*, 39 U. C. R. 610.

Threshing grain.

Where a sheriff, acting in good faith for all concerned, agreed to pay for having grain threshed for the purpose of its better sale, the expenses of such threshing should be allowed him:

Galbraith v. *Fortune*, 10 C. P. 109.

Yearly tenancy, distraining for rent under.

A letting at an annual rent constitutes a yearly tenancy, which continues at the same rate for the second year as the first, if the tenant remain in possession of the premises, and the landlord may distrain for the first year's rent at the end of the second year:

McClenaghan v. *Barker*, 1 U. C. R. 26.

The defendant, who owned the farm, agreed with the plaintiff to work it on shares, each of them supplying one-half of the seed and labour, and to have half the profits, the plaintiff to pay $60 for implements and $160 annually; but the plaintiff was not placed in possession of any distinct portion of the farm, the parties being equally in possession of the whole. Held, that there was no lease created between the parties, and that the $160 was not rent for which the defendant could distrain: To justify a distress there must be a distinct relationship of landlord and tenant of fixed premises.

Oberlin v. *McGregor*, 26 C. P. 460.

In order to constitute a legal tender the money must be produced and shewn to the creditor, or its production expressly or impliedly dispensed with. To divest a landlord of his right to distrain a strict legal tender must be shown: Requisites for a good tender.

Matheson v. *Kelly*, 24 C. P. 598.

The plaintiffs were let into possession of certain demised premises by the agent of the tenants, who afterwards repudiated the agent's authority and refused to recognize the plaintiffs as subtenants. The defendant, who was head landlord, in the meantime distrained the plaintiffs' goods for arrears of rent, and the plaintiffs brought this action to recover damages. Held, that notwithstanding the tenant's repudiation of the agent's authority, the plaintiffs were in possession "under" the tenants: Distress—Goods of stranger—Person in possession "under or with the assent of" the tenant.

Farwell v. *Jameson*, 23 A. R. 517.

Under section 135 (a) (1) added to the Assessment Act, R. S. O. 1897, c. 224 by 62 Vict. c. 24, s. 11, goods which are not in the possession of the person assessed in respect to them cannot be distrained for the taxes assessed against them.* In this case, the goods which had been mortgaged were, when seized, in possession of the bailiff of the mortgagee, who had taken possession upon default. Held that the plaintiff, being a bailiff in possession, had a right to bring action for illegal distress: Personal property—Illegal distress.

Donahue v. *Campbell*, 3 O. R. (1902) 124.

There is nothing in the Assessment Act, R. S. O. c. 224, to warrant a municipal tax collector seizing for arrears of taxes, goods which, being under distraint by a landlord, are in *custodia legis;* and in this case subsequent rent having accrued due during the joint possession of the landlord and collector, the landlord was also held to have priority in respect of another distress made by him for such subsequent rent: Arrears—Landlord and tenant—Distress of rent—Custodia Legis—Seizure of goods—Priorities—R. S. O. c. 224.

Corporation of City of Kingston v. *Rogers*, 31 O. R. 119.

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* This amendment (1899 Ont. Stats.) relates to "Personal Property." By the interpretation section of the Assessment Act "personal property" includes "chattels." A leasehold interest is a chattel and is therefore liable to assessment. I have not printed the amendment. This reference is sufficient.

CHAPTER X.

FORFEITURE AND RE-ENTRY.

Right of entry.

187. The short form of lease, and, in fact, almost all leases, contain a condition or proviso whereby it is declared that the lease shall be forfeited, and that the lessor shall have a right to re-enter and re-possess himself of the premises, if the tenant commits a breach of some or any of the covenants of the lease; for instance, for non-payment of rent, for non-repairing, for waste, for not insuring, for carrying on prohibited trades, etc. In nearly all these cases it is obvious enough when a prohibited act has been committed and a forfeiture incurred.

Former requisites for re-entry.

188. Formerly, if the rent were not paid when due and demanded, a demand of the precise rent due (after all deductions) had to be made by the landlord or his agent on the day on which it was due and payable—before sunset—at the place, if any, fixed for payment, and if no place was fixed, then upon the demised premises. If the tenant did not then pay the rent, the landlord could immediately bring an action of ejectment and turn him out. Very frequently, however, the proviso relieved the landlord from the necessity of demanding the rent, and in that case the tenant incurred a forfeiture if he did not himself go and pay or tender his rent on the appointed day. And however the proviso was worded in this respect, if half a year's rent were in arrear, and no sufficient distress found on the premises, the landlord might forthwith bring ejectment. If the tenant, by fastening the outer door, hindered the landlord from distraining, this rendered it unnecessary to prove that there was no "sufficient distress" on the premises. But the forfeiture could be waived by the landlord's putting a distress into the premises, or by his accepting rent which became due subsequently to the alleged forfeiture.

Right must be reserved.

189. The necessity for the proviso arose from the fact that mere non-payment of rent or breach of covenant by the tenant does not determine the lease, unless there be a right reserved to the landlord to re-enter thereon; and even then,

so much does the law lean against forfeiture, that to determine a lease for forfeiture for non-payment of rent, great nicety, as above stated, formerly existed, unless, as became usual, the proviso for re-entry dispensed therewith. The form of proviso included in the Short Forms Act, it will be seen, does dispense with the demand for rent. So, whenever that form is used, there is not much difficulty. But in cases where the short form of lease was not used the difficulty continued, therefore the Legislature provided as in the two sections now next following.

190. Section 11 of the Landlord and Tenant Act (R. S. O. c. 170):

Right of entry.

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

191. Section 35 of the Landlord and Tenant Act (R. S. O. c. 170):

Common law strict demand of rent dispensed with when landlord entitled to re-enter.

Where a landlord has by law a right to enter for non payment of rent, it shall not be necessary to demand the rent on the day when due, or with the strictness required at common law, and a demand of rent shall suffice notwithstanding more or less than the amount really due is demanded, and notwithstanding other requisites of the common law are not complied with; provided that unless the premises are vacant, the demand be made fifteen days at least before entry, such demand to be made on the tenant personally anywhere, or on his wife, or some other grown up member of his family on the premises.

192. Before these two last sections were passed the strictness of entry required at common law had, as also above stated, been dispensed with in cases where half a year's rent was in arrear, and no sufficient distress was to be found on the premises countervailing the arrears then due, and the lessor had power to re-enter for non-payment. The following are the provisions of the Landlord and Tenant Act relating to this point. They form sections 20 and 25, inclusive, of the Landlord and Tenant Act:

Where half year's rent in arrear.

Landlord having power to re-enter for non-payment

In all cases between landlord and tenant, as often as it happens that one-half year's rent is in arrear and the landlord or lessor to whom the same is due has the right by law to re-enter for non-payment thereof, such landlord or lessor may, without any formal demand or re-entry, serve a writ for the recovery of the demised premises; or in case the same cannot be legally served, or no tenant is in

of rent may recover possession.

actual possession of the premises, then the landlord or lessor may affix a copy thereof upon the door of any demised messuage; or in case the action is not for the recovery of any messuage, then upon some notorious place, of the lands, tenements, or hereditaments, comprised in the writ; and such affixing shall be good service thereof, and shall stand instead of a demand and re-entry.

How such right shall be exercised.

21. In case of judgment against the defendant for non-appearance, if it is shown by affidavit to the Court, or is proved upon the trial, in case the defendant appears, that half a year's rent was due before the writ was served, and that no sufficient distress was to be found on the demised premises countervailing the arrears then due, and that the lessor had power to re-enter, the lessor shall recover judgment, and have execution in the same manner as if the rent in arrear had been demanded and re-entry made.

Consequences of exercising such right.

22. In case the lessee or his assignee, or other person claiming or deriving title under the lease, permits and suffers judgment to be had on such trial and execution to be executed thereon without paying the rent and arrears, together with full costs and without proceeding for equitable relief within six months after execution executed, then and in every such case the lessee and his assignee, and all other persons claiming and deriving under the lease, shall be barred and foreclosed from all relief or remedy, other than by proceedings by way of appeal from the judgment, and the landlord or lessor shall from thenceforth hold the demised premises discharged from the lease.

As to mortgagees of lease.

23. Nothing hereinbefore contained shall bar the right of any mortgagee of such lease, or any part thereof, who is not in possession, if the mortgagee, within six months after such judgment obtained and execution executed, pays all rent in arrear, and all costs and damages sustained by the lessor or person entitled to the remainder or reversion, and performs all covenants and agreements which on the part and behalf of the first lessee are to be or ought to be performed.

Proceedings if the tenant ejected seeks equitable relief.

If such proceedings be after execution executed.

24. In case the lessee, his assignee or other person claiming any right, title or interest of, in or to the lease, proceeds for equitable relief within the time aforesaid, such person shall not be entitled to a stay of the proceedings unless within forty days next after an application for a stay of the proceedings, he brings into Court and lodges with the proper officer such sum of money as the lessor or landlord swears to be due and in arrear, over and above all just allowances, and also the costs taxed in the said action, there to remain until the hearing of the application for equitable relief, or to be paid out to the lessor or landlord on good security, subject to the judgment or order of the Court; and in case such proceedings for equitable relief are taken within the time aforesaid, and after execution has been executed, the lessor or landlord shall be accountable only for so much as he really and bona fide, without fraud, deceit, or wilful neglect, has made of the demised premises from the time of his entering into the actual possession thereof, and if what he has so made is less than the rent reserved on the lease, then the lessee or his assignee, before being restored to his possession, shall pay the lessor or landlord what the money so by him made fell short of the reserved rent for the time the lessor or landlord held the lands.

25. If the tenant or his assignee at any time before the trial in the action pays or tenders to the lessor or landlord, or to his solicitor in the cause, or pays into Court, all the rent and arrears together with the costs, all further proceedings in the action shall cease; and if the lessee or his assigns, upon such proceeding as aforesaid, obtains equitable relief, he and they shall have, hold, and enjoy the demised lands according to the lease thereof made without any new lease. Discontinuance if tenant pays arrears of rent and costs before trial, etc.

193. Besides re-entry or forfeiture for non-payment of rent, there may be also forfeiture for non-performance of covenants, as will be seen by again referring to the form of proviso furnished by the Act.* With reference to such a right of re-entry or forfeiture the Legislature has enacted as follows, being section 13 of the Landlord and Tenant Act (R. S. O. c. 170): Forfeiture for non-performance of covenants.

(1) A right of re-entry or forfeiture under any proviso or stipulation in a lease, for a breach of any covenant or condition in the lease, shall not be enforceable by action or otherwise, unless and until the lessor serves on the lessee a notice specifying the particular breach complained of, and if the breach is capable of remedy, requiring the lessee to remedy the breach, and in any case requiring the lessee to make compensation in money for the breach, and the lessee fails within a reasonable time thereafter to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor for the breach. Restrictions on and relief against forfeiture of leases.

(2) Where a lessor is proceeding by action or otherwise, to enforce such a right of re-entry or forfeiture, the lessee may, in the lessor's action, if any, or in any action brought by himself, apply to the Court for relief, and the Court may grant or refuse relief, as the Court, having regard to the proceedings and conduct of the parties under the foregoing provisions of this section, and to all the other circumstances, thinks fit; and in case of relief may grant it on such terms, if any, as to costs, expenses, damages, compensation, penalty, or otherwise, including the granting of an injunction to restrain any like breach in the future, as the Court in the circumstances of each case thinks fit.

(3) For the purposes of this section a lease includes an original or derivative under-lease, also a grant at a fee farm rent, or securing a rent by condition; and a lessee includes an original or derivative under-lessee, and the heirs, executors, administrators and assigns of a lessee, also a grantee under such a grant as aforesaid, his heirs and assigns; and a lessor includes an original or derivative under-lessor, and the heirs, executors, administrators and assigns of a lessor, also a grantor, as aforesaid, and his heirs and assigns. Meaning of in this section. "Lease." "Lessee." "Lessor."

(4) This section applies, although the proviso or stipulation under which the right of re-entry or forfeiture accrues is inserted in the lease, in pursuance of the directions of any Act of Parliament or of the Legislature of this Province. Where right of entry is under a statute.

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* As to rights of entry where there has been a transmission of interest, see the chapter on Transmission of Interest later.

Lease until breach.

(5) For the purposes of this section, a lease limited to continue as long only as the lessee abstains from committing a breach of covenant shall be and take effect as a lease, to continue for any longer term for which it could subsist, but determinable by a proviso for re-entry on such a breach.

Limitation of section.

(6) This section shall not extend:

(*a*) To a covenant or condition against the assigning, underletting, parting with the possession, or disposing of the land leased, or to a condition for forfeiture on the bankruptcy of the lessee, or on the taking in execution of the lessee's interest; or,

(*b*) To a mining lease;

A "mining lease" is a lease for mining purposes, that is, the searching for, working, getting, making merchantable, carrying away, or disposing of mines and minerals, or purposes connected therewith, and includes a grant or license for mining purposes.

(7) This section shall not affect the law relating to re-entry or forfeiture, or relief in cases of non-payment of rent.

(8) This section shall apply to leases made either before or after the enactment thereof (sic), and shall have effect notwithstanding any stipulation to the contrary.

CASES.

Courts will if possible relieve against a forfeiture.

In actions to re-enter for breach of a covenant in a lease the Court will, since the Judicature Act, dispose of questions in their equitable rather than their legal aspect in all cases where, under the former practice the Court of Chancery would have relieved against the forfeiture. Thus, where the plaintiff claimed to recover possession of certain lands leased by her to the defendant on ground of breach of the covenant for the payment of taxes, which breach the defendant afterwards remedied before statement of claim filed: Held, that the action could not succeed, the breach being no more than the omission of a mere money payment:

Buckley v. *Beigle*, 8 O. R. 85.

Right of re-entry not enforced if covenant doubtful.

Where a covenant, accompanied by a right of re-entry on breach, is so expressed that its meaning is doubtful, and the tenant in good faith has done what he supposed to be a performance of it, forfeiture will not be enforced; the difficulty in construing the covenant is a special circumstance entitling the defendant to relief:

McLaren v. *Kerr*, 39 U. C. R. 507.

Receipt of rent a waiver of right of re-entry.

Plaintiff leased to defendant for twenty-one years with a covenant by defendant to erect within four years a house, etc., which covenant was broken, but the lessor received rent to a period subsequent to the time of the alleged forfeiture: Held, a waiver of the right of entry for breach of the covenant:

Roe v. *Southard*, 10 C. P. 488.

Where a tenant holds over after the expiration of his lease, a landlord has a right to take possession of the premises if he can without a breach of the peace:

It is a dangerous thing to attempt.

Boulton v. *Murphy*, 5 O. S. 731.

Rent under a lease made pursuant to the "Short Forms Act" becoming in arrear, the landlord served the statutory notice of forfeiture, and brought an action against the tenants both for the recovery of the demised premises and for the arrears of rent. Before the action came to trial the defendants paid the arrears and costs: Held, that the bringing of the action was an election on the part of the landlord to forfeit the lease which could not be retracted by him; to enable him to get rid of the forfeiture there must have been a request on the part of the tenants, either express or implied, to be relieved from the forfeiture; and the mere payment, after the forfeitures of rent which accrued due before, would not amount to such a request.

Forfeiture. What will amount to waiver of right to re-enter.

The effect of such a payment depends upon the intention of the party paying; and the payment of the rent and costs in this case could not operate by force of R. S. O. c. 143, ss. 17-22, to permit the landlord to retract his forfeiture, without regard to the intention of the tenants, and without any request on their part to be relieved from the forfeiture.

These sections are applicable simply to an action for the recovery of the demised premises; had the action been brought for that alone, an implication might have arisen from the payment of rent and costs that the tenant intended to seek to be relieved from the forfeiture; more especially as the demised premises were vacant land, the tenants not being in actual possession.

Held, further, that the landlord could not get rid of the forfeiture unless both tenants concurred in seeking relief from it:

Denison v. *Maitland*, 22 O. R. 166.

A notice of forfeiture of a lease under R. S. O. c. 143, s. 11, s.-s. 1, given in the words: "You have broken the covenant as to cutting timber, etc.," without more particularly specifying the breach and claiming compensation, is sufficient. After an action of ejectment was commenced for the forfeiture of the lease, the landlord distrained for and received rent subsequently accruing due: Held, that such course did not per se set up a former tenancy, which ended on the election to forfeit manifested by the issue of the writ, but might be evidence for the jury of a new tenancy on the same terms from year to year:

Form of notice.

McMullen v. *Vannatto*, 24 O. R. 625.

The Court will not make a declaration relieving against forfeiture of a lease for non-payment of rent when the trial of the action for that relief takes place after the term has expired by efflux-ion of time, even though the lease gives the option of purchase, to be exercised during the term which the lessees had attempted to exercise under a forfeiture.

No relief as of right.

The lessee is not entitled as a right to relief against forfeiture for non-payment of rent; that relief may be refused on collateral equitable grounds:

Coventry v. *McLaa*, 21 A. R. 176.

The provisions of s. 11, R. S. O. c. 143, do not extend to a forfeiture of the term under a stipulation in the lease that if the lessees should make any assignment for the benefit of creditors the term should immediately become forfeited, and such forfeiture is, therefore, enforceable without notice served upon the lessees:

Argles v. *McMath*, 26 O. R. 224.

Waiver.

Mere knowledge or acquiescence in an act constituting a forfeiture does not amount to a waiver; there must be some expenditure of money in improvements, or some positive act of waiver, such as receipt of rent:

McLaren v. *Kerr*, 39 U. C. R. 507.

Right to re-enter for continuing breaches of covenants not waived by receipt of rent.

Breaches of a covenant in a farm lease to keep the fences in repair, and to keep eighteen acres in meadow during the term, are continuing breaches, and the right to re-enter for them is not waived by acceptance of rent:

Ainley v. *Balsden*, 14 U. C. R. 535.

Forfeiture by non-payment of rent.

In an action for possession, by reason of a forfeiture for non-payment of rent, the plaintiff must prove, if proceeding under 4 Geo. II. c. 28, that there was not sufficient distress on the premises; and if at common law, that the rent was demanded in proper time by a person duly authorized:

Cubitt v. *McLeod*, M. T. 4 Vict.

Action upon a forfeiture no demand necessary.

No notice or demand is necessary before action upon a forfeiture where there is a power of entry in a lease upon breach of a covenant to repair, or not to under-let:

Connell v. *Power*, 13 C. P. 91.

Lease—Short Forms Act—Covenant not to assign—Breach—Right of entry.

The right of re-entry under the Act respecting Short Forms of Lease applies to the breach of a negative as well as of an affirmative covenant, so that there is a right of re-entry for breach of the covenant not to assign or sub-let without leave:

Toronto General Hospital v. *Denham* (1880), 31 C. P. 207, followed.

The making of an agreement for the assignment of a lease, the settlement of the terms thereof, and the taking of possession by the assignee constitute sufficient evidence of the breach of such covenant, the fact of the document showing the transfer not having been made until after action brought is immaterial:

McMahon v. *Coyle*, 5 O. L. R. 618.

CHAPTER XI.

TRANSMISSION OF INTEREST.

Change in persons who are landlord or tenant.

194. It now becomes necessary briefly to mention some of the principal consequences which result from any change in the parties who, at the granting of a lease, or the commencement of a tenancy, stood towards each other in the relation of landlord and tenant. Such a change may be effected either by the landlord assigning his reversion (i.e., his interest in and ownership of the property subject to the term of years, or other tenancy, held by the tenant), or by the tenant assigning his interest. Such assignments are invalid unless made by deed, but under some circumstances the Courts will treat an invalid assignment as an agreement for a valid one, and compel the assignor to execute a deed. The consequences of an assignment for benefit of creditors and the effect of the death of either party must also be considered. First, of assignments by either party.*

Liability on covenants by lessee.

By landlord.

195. Now, when a lessee assigns the term of years created by the lease under which he holds it, it would be obviously unjust if he could discharge himself from liability upon the covenants into which by that lease he entered with his landlord. He, therefore, remains liable upon all during the whole continuance of the term; and, in addition to that, the person to whom he assigns is also liable—until he in turn assigns to some third party—upon all the covenants in the lease, which according to the technical phrase, "run with the land." The assignee has also a right to insist on the performance of covenants of the same class, which are to be fulfilled by the landlord.

196. It becomes necessary to consider how far the liability on covenants in leases extends.

Termination of lease by agreement

* In order to put an end to a sealed contract for a tenancy and to discharge one of two tenants from his obligation to pay past or future rent thereunder, there must be something more than an agreement between the tenants, though made in the presence of the landlord, that one of them is to pay the amounts overdue and accruing; there must be a consideration and an agreement to discharge:

Donaldson v. *Wherry*, 29 O. R. 552.

Implied covenants.

197. There are, apart from express covenants by the parties, covenants by implication of law. Thus, a covenant would be implied after entry from the words "yielding and paying" on the part of the lessee and his assigns to pay rent to the reversioner.

Express covenants control implied.

198. Covenants implied by law are controlled by express covenants between the parties on the same subject matter. No covenant will arise by implication of law on any matter as to which the parties have themselves expressly provided.

Privity of estate.

199. Implied covenants are binding between the parties by reason of the privity of estate between them, and are binding only so long as that privity of estate exists. Thus, on the implied covenant to pay rent, to farm in a husband-like manner and use the premises in a tenant-like manner, which are covenants the law will imply, the lessee continues liable only so long as his privity of estate continues, that is, so long as he is lessee; for, if he assign, the privity of estate between him and his landlord ceases, and he is no longer liable. The privity of estate after assignment exists between the landlord and the assignee, and the assignee becomes liable in his turn during its continuance to the landlord on the implied covenants. On his assigning, he ceases to be liable, and so on through all assignments. In other words, implied covenants always "run with the land," as the technical expression is, and the party who takes the estate, takes, during the time he holds such estate, the burden and the benefit of the implied covenants which go with the land.

"Running with the land."

Liability of original lessee.

200. The original lessee cannot, by destroying the privity of estate between him and his landlord, escape liability on his implied covenant to pay rent, without his lessor's assent, which assent may be expressed or implied. Receipt of rent from the assignee by the lessor implies assent to the assignment. But no assent of the lessor is requisite to any assignment by an assignee, though such assignee be a pauper.

Liability of lessor.

201. The lessor, on his part, is liable on the implied covenant for quiet enjoyment arising from the word "demise" (in the absence of an express covenant), but his liability ceases on his assigning his reversion, which destroys the privity of estate between him and his lessee. So also, it ceases with the determination of his estate in reversion; as where a tenant for life demises for a term and dies before

its expiry, no action lies against his executors on the implied covenant.

Express covenants.

202. From what has been said as to the cesser of the liability of the lessee, as soon as his estate ceases on his assigning with his lessor's consent, it became important for the lessor to have express covenants under which the lessee should continue liable notwithstanding and after assignment. To these it became usual to add, as additional security, a clause of re-entry by the lessor and his assigns on breach.*

Clause of re-entry.

Liability on express covenants.

203. Express covenants are sometimes termed covenants in deed, as distinguished from implied covenants or covenants in law. The liability on express covenants arises out of privity of contract, as distinguished from the liability on implied contracts arising out of privity of estate.

How far assignee of estate of covenantor bound.

204. Any lawful contract may be the subject of express covenant, but there is sometimes great difficulty in determining how far, and in what particulars, an assignee of the estate of a covenantor is bound by, or entitled to the benefit of, a covenant; and how far covenants run with the land.

How far assignees bound by express covenants running with the land.

205. There are three heads under which the subject can be considered:

(1) Where assigns are within the covenants though not named. In order to make a covenant run strictly with the land, so as to bind the assignee, or give him the benefit without his being named, it must relate directly to the land or to a thing in existence, parcel of the demise. Illustrations: Covenants to pay rent, to keep existing buildings and fences in repair, to observe particular modes of culture on the lessee's part, and the covenant for quiet enjoyment on the lessor's part.

(2) Where assigns are only within the covenants because they are named. Where the covenant respects a thing not in existence at the time, but which, when it comes into existence, will be annexed to the land, the covenant may be made to bind the assigns by naming them, but will not bind them unless named. Illustrations: Covenants to erect buildings or to plant trees on the premises.

* See the chapter on Right of Entry, which deals with that subject as between parties where no assignment intervenes.

(3) Where assigns are not within the covenants though named. When a covenant respects a thing not annexed, nor to be annexed, to the land, or a thing collateral, or in its nature merely personal, the covenant will not run, that is it will not bind the assignee nor pass to him, even though he is named. Illustrations: Covenants to repair or build a house off the premises.

206. As regards both the burden and benefit to assignees on these express covenants running with the land, they depend on the privity of estate, and they continue only so long as that privity continues. If a breach have happened during the existence of the privity of estate, its subsequent determination will not destroy the liability for the breach.

As between lessor and lessee.

207. As between lessor and lessee there is privity both of contract and of estate. The lessee is liable on the demise to him which creates the privity of estate, and he is liable on his covenant to pay rent, which creates the privity of contract.

When lessee assigns.

208. When a lessee, having covenanted to pay rent, assigns his term, his liability on his covenants continues, for the privity of contract is not destroyed by the assignment. The privity of estate exists thenceforth between the lessor and the assignee, and each will be liable to the other on the covenants in the lease. Thus, the lessee will remain liable for rent under his covenant, and the assignee will be liable for such rent as may fall due while (but only while) he is assignee by virtue of the privity of estate.

When lessor assigns.

209. Now, suppose the landlord assign his reversion, what is the consequence?

Right of entry could not formerly be reserved to a stranger.

210. At common law a right of entry for breach of condition subsequent* could only be reserved to the grantor and his heirs, and not to a stranger. When reserved it could not be assigned, the simplicity of the common law requiring that every man should assert his own right of entry or action. The consequence was that in the case of a right of re-entry reserved to a lessor and his heirs for non-payment of rent, or other cause, the assignee of the lessor could take no advantage of the clause of re-entry. This difficulty was remedied,

* Conditions subsequent are such by the failure or non-performance of which an estate already vested may be defeated.

so far as regards grantees of reversions, by 32 Hen. VIII.* c. 34, under which they have the same benefit of a condition in case of a breach subsequent to the grant to them, as their grantors would have had provided it relate to the payment of rent, the restriction of waste or other like object tending to the benefit of the reversionary estate.† Remedied by 32 Hen. VIII. c. 34

211. As regards conditions of re-entry by the reversioner on breach of covenants by the tenant, much caution was formerly requisite in giving assent to the non-observance of the covenants, for, if once assent was given, the right of re-entry was gone forever, and no advantage could be taken of it on a subsequent breach; the principle being that every condition of re-entry was considered entire and indivisible, and if once it was waived it could not again be enforced. To meet this difficulty the following section of the Landlord and Tenant Act (R. S. O. c. 170) was passed (section 16): Effect of assent to non-observance of covenants.

> Where an actual waiver of the benefit of a covenant or condition in a lease, on the part of a lessor or his heirs, executors, administrators or assigns, is proved to have taken place after the 18th day of September, 1865, in any one particular instance, such actual waiver shall not be assumed or deemed to extend to any instance, or any breach of covenant or condition, other than that to which such waiver specially relates, nor to be a general waiver of the benefit of any such covenant or condition, unless an intention to that effect appears. Waiver not to extend further than to the particular instance mentioned

212. The waiver mentioned in this section is an actual or express waiver. There may be also an implied waiver, such as receipt with notice of the forfeiture of after-accrued rent. Such implied waivers are not provided for by this clause. Therefore, a landlord should insist on the forfeiture, or else if he does not insist on it, and afterwards receives subsequent rent, he will lose the right of re-entry on any subsequent breach of the same covenant. Implied waiver.

213. There is a difference between forgiving a man the consequence of an act after he has committed it, which is waiver, and giving him permission or license to do some thing before he commits it. Formerly when in a lease a right of License to do an act.

* Secs. 1 & 2 of 32 Hen. VIII. c. 34, are now secs. 12 & 13 of R. S. O. c. 330.

† By R. S. O. c. 119, s. 8, "a right of entry, whether immediate or future, and whether vested or contingent into or upon land, may be disposed of by deed." The right of entry referred to in this statute is not a right of entry for condition broken, and therefore the right of an assignee to enter for condition broken still rests on the Statute of Henry. Where privity of contract and right of action are thus transferred the correlative rights and liabilities last only during the continuance of the respective assignees' interests.

re-entry was reserved to the lessor on the lessee assigning without license, and the lessor granted a license in any one particular case, that license covered the condition entirely, so that afterwards an assignment might be made without license, and no forfeiture could be incurred. This defect was remedied by the following section of the Landlord and Tenant Act, R. S. O. c. 170 (section 14):

Restriction on effect of license under power contained in lease, etc.

Where a license to do any act which, without such license, would create a forfeiture, or give a right to re-enter, under a condition or power reserved in a lease heretofore granted, or to be hereafter granted, has been, at any time since the 18th day of September, 1865, given to a lessee or his assigns, every such license shall, unless otherwise expressed, extend only to the permission actually given, or to any specific breach of any proviso or covenant made, or to be made, or to the actual assignment, under lease, or other matter thereby specifically authorized to be done, but not so as to prevent a proceeding for any subsequent breach (unless otherwise specified in such license); and all rights under covenants and powers of forfeiture and re-entry, in the lease contained, shall remain in full force and virtue, and shall be available as against any subsequent breach of covenant or condition, assignment, under-lease, or other matter not specifically authorized, or made dispunishable by such license, in the same manner as if no such license had been given; and the condition or right of re-entry shall be, and remain in all respects, as if such license had not been given, except in respect of the particular matter authorized to be done.

License to one of several sub-lessees

214. Further, if a reversioner licensed one of several lessees to assign his interest in whole, this license dispensed with the condition as to all. This anomaly was remedied by the following section, which it will be noticed extends only to a permission to do an act, and not to a license to omit to do an act, the non-performance of which would cause a forfeiture. The section in question is section 15 of the Landlord and Tenant Act, R. S. O. c. 170, and reads as follows:

Restricted operation of partial licenses.

Where in a lease heretofore granted, or to be hereafter granted, there is a power or condition of re-entry on assigning or under-letting, or doing any other specified act, without license, and at any time since the 18th day of September, 1865, a license has been or is given to one of several lessees or co-owners, to assign or under-let his share or interest, or to do any other act prohibited to be done without license, or has been or is given to a lessee or owner, or any one of several lessees or owners, to assign or under-let part only of the property, or to do any other such act as aforesaid in respect of part only of such property, such license shall not operate to destroy or extinguish the right of re-entry, in case of any breach of the covenant or condition by the co-lessee or co-lessees, or owner or owners of the other shares or interests in the property, or by the lessee or owner of the rest of the property (as the case may be) over or in respect of such shares or interests or remaining property, but such right of re-entry shall remain in full force over or in respect of the shares or interests or property not the subject of such license.

If lessee sub-let, result.

215. If a lessee sublet, then, as the sub-lessee has not the whole estate, which the lessee had, there will be no privity of estate between the lessor and sub-lessee, and because there is no privity of contract neither could formerly sue the other.

Former law.

216. Thus, if A., seized in fee, having demised to B. for a term, and B. have sublet to C. for part of the term, here A. at common law could never sue C. for the rent reserved, or on the covenants contained in the sublease. There is neither privity of contract nor estate between A. and C., which subsists only between B. and C.. If B. assigned his reversion to D. the latter (D.) would, as assignee of B.'s reversion, be in privity with C., both as to estate and contract, and so entitled to sue C. both for rent and on the covenants of the sublease, which we have just seen above A. could not do. Now if B., instead of transferring his reversion to D., conveyed it to A. (his own lessor), by the doctrine of merger that reversion would be lost in A.'s greater estate, and would cease to exist. The result was, then, that A. could not, even after getting this assignment from B., sue C. by reason of want of any privity between them. The same consequences followed if B. purchased from A. his (A.'s) reversion, for then A.'s greater estate equally met and merged the lesser estate of B., which thenceforth ceased.

Present law.

217. Both of these inconveniences are now remedied by the following sections (9 and 10) of the Landlord and Tenant Act (R. S. O. c. 170):

Apportionment of condition of re-entry in certain cases.

9. Where the reversion upon a lease is severed, and the rent or other reservation is legally apportioned, the assignee of each part of the reversion shall, in respect of the apportioned rent or other reservation allotted or belonging to him, have and be entitled to the benefit of all conditions or powers of re-entry for non-payment of the original rent, or other reservation, in like manner as if such conditions or powers had been reserved to him as incident to his part of the reversion in respect of the apportioned rent, or other reservation allotted or belonging to him.

Effect of surrender or merger of reversion expectant on a lease in certain cases.

10. Where the reversion expectant on a lease of land merges or is surrendered, the estate which, for the time being, confers as against the tenant under the same lease, the next vested right to the same land shall, to the extent of and for preserving such incidents to and obligations on the same reversion, as but for the surrender or merger thereof would have subsisted, be deemed the reversion expectant on the same lease.

218. Section 9 above quoted, provides for severance of the reversion where the rent or other reservation has been apportioned, and gives the benefit of conditions or powers of re-entry for non-payment of original rent or other reservation,

but does not extend to or provide for re-entry in case of severance of the reversion for condition broken by assigning or subletting without leave, or otherwise than by non-payment of the original rent or other reservation. There is an English Act which covers this point (Conveyancing Act of 1881), but there is no Ontario statute to meet it. Therefore, if in Ontario a reversion is severed there can be no entry for anything except non-payment of rent.

Necessity for caution in assigning lease

219. It will be seen from what we have said above, as to the continuing liability of the original lessee, and of his executors after his death, upon all the covenants contained in a lease to which he is a party, even although he has assigned over, that a lessee should be very cautious not to assign his lease to any but a responsible person, who is likely to perform the conditions of the lease. He should also be certain that he is thoroughly able to indemnify him against any future breaches of covenant which may be committed, and should obtain an indemnity in writing.

Assignment by tenant from year to year.

220. A tenant from year to year may, like a lessee, assign his interest. But he must recollect that he will be liable for the rent; and also for any waste which the person whom he thus substitutes as tenant may commit. Unless he make a profit rent by sub-letting, he had much better, if possible, get the landlord to discharge him from his tenancy, and to accept the new tenant in his place. This arrangement, for the safety of all parties, should be reduced to writing.

Assignment for benefit of creditors.

221. Where there is an assignment for the benefit of creditors the following provisions have been passed (R. S. O. c. 170) as to the liability of the insolvent estate to the landlord:

Lien of landlord for rent after assignment for benefit of creditors

34. In case of an assignment for the general benefit of creditors, the preferential lien of the landlord for rent shall be restricted to the arrears of rent due during the period of one year last previous to and for three months following the execution of such assignment, and from thence so long as the assignee shall retain possession of the premises leased.

Assignee may retain possession for remainder of term

(2) Notwithstanding any provision, stipulation or agreement in any lease or agreement contained, in any case of an assignment for the general benefit of creditors, or in case an order is made for the winding up of an incorporated company being lessees, the assignee or liquidator shall be at liberty, within one month from the execution of such assignment or the making of such winding up order, by notice in writing under his hand given to the lessor, to elect to retain the premises occupied by the assignor or company as aforesaid, at the

time of such assignment or winding up, for the unexpired term of any lease under which the said premises were held, or for such portion of the said term as he shall see fit, upon the terms of such lease, and paying the rent therefor provided by said lease.*

222. Under this section the assignee is given the right to retain the demised premises upon making his election in the prescribed manner, and the question of the right of forfeiture is not of much importance.

Effect of clause forfeiting lease on insolvency

223. Most written leases contain the statutory covenant that the lessee "will not assign or sublet without leave," and the provision that, "if the term hereby granted shall be at any time seized or taken in execution or attachment by any creditor of the lessee or his assigns, or if the lessee or his assigns shall make any assignment for the benefit of creditors, or becoming bankrupt or insolvent, shall take the benefit of any Act that may be in force for bankrupt or insolvent debtors, the then current quarter's rent shall immediately become due and payable, and the term shall immediately become forfeited and void." An assignment for the benefit of creditors by a tenant who holds under a lease with this clause would, except for the above section, give the landlord the right to eject, and this without preliminary notice of the breach; and acceptance of payment of arrears due before the making of an assignment would not be a waiver of the right of forfeiture.

Proviso for acceleration.

224. Such a proviso (called a proviso for acceleration) is not a fraud upon creditors.

Lessor after assignment cannot claim forfeiture by insolvency

225. The lessor, after a valid assignment of the term has been made, cannot take advantage of the fact that the original lessee has become bankrupt; nor can the assignee of part of the reversion enforce the right of forfeiture.

Distrainable effects necessary.

226. The landlord's right to preferential payment depends upon the existence of distrainable effects, and if there is nothing more upon which a distress can be levied, the landlord ranks only as an ordinary creditor.

Distress not required to enforce right.

227. It is not necessary that a distress should, in fact, be made, and making a distress does not give the landlord any higher right, though if before an assignment is made the arrears are recovered by a distress, the landlord cannot be compelled to refund the excess over the statutory allowance.

* See the cases page 109, *et seq.*

Parties may contract themselves out of the Statute.

228. A clause that the section shall not apply is legal.

Breaches of covenant.

229. If a tenant has been guilty of breaches of covenant, it will be difficult for the landlord to recover under the case of Grant v. West, 23 A. R. 533, which decides that claims for damages cannot be made against an assignee under the Assignments and Preferences Act. Where valuable premises are leased, landlords had better require security from tenants, to provide for satisfaction for damage done to the premises in case an assignment should be made.

Effect of death of tenant.

230. On the death of a tenant his interest as such, whether he is a lessee or only a tenant from year to year, passes to his executor or administrator, who may at once be sued in his representative capacity for any rent that is due, or any breaches of covenant that may have been committed. If he has never entered into possession, or dealt with the premises in any way, he can discharge himself of all liability by showing (if such is the case) that the testator's estate did not yield sufficient assets to satisfy the demand. If, however, he have once taken possession, his position is much less favourable. He may then be sued in his personal capacity as an assignee. And if an action is brought against him for rent, he must apply the whole profits of the premises to meet the demand. If, however, they produce no profit, or less than the rent due, and he has no other assets of the testator, he should offer to surrender the lease, and if he do so, he may, it would seem, protect himself. But if he be sued on any of the other covenants, it seems very doubtful whether he can save himself from personal liability, if he have ever taken the premises. Before he does so, therefore, he should make very careful enquiry into their value, and its sufficiency to protect him from all liability.

Marriage no effect on tenancy

231. Marriage of landlord or tenant has no result on their liability as such.

Interpleader by tenant.

232. The Judicature Act (R. S. O. 1897 c. 51, s. 58, s.-s. 6), is as follows:

> In case of an assignment of a debt or other chose in action, if the debtor, trustee, or other person liable in respect of the debt or chose in action, shall have had notice that such assignment is disputed by the assignor, or anyone claiming under him, or of any other opposing or conflicting claims to such debt or chose in action, he shall be entitled, if he thinks fit, to call upon the several persons making claim thereto to interplead concerning the same, or he may, if he

thinks fit, pay the same into the High Court under and in conformity with the provisions of law for the relief of trustees.

Rent to accrue due will not be within this section; rent overdue will be within it. When, therefore, a tenant has to deal with two claimants for overdue rent he can pay it into Court under this section, and let them fight out their respective rights there.

The following provisions relate to conflicting claims made in the Division Court. The sections are taken from the Division Courts Act, R. S. O. c. 60.

Interpretation of "Landlord."

276. (1) In the next six sections, the word landlord shall include the person entitled to the immediate reversion of the land, or if the property be held in joint tenancy, co-parcenary or tenancy in common shall include any one of the persons entitled to the reversion; and

"Agent."

(2) The word agent shall mean any person usually employed by the landlord in the letting of lands or in the collection of the rents thereof, or specially authorized to act in any particular matter by writing under the hand of the landlord.

Claims of landlords, etc., to goods seized in execution, how to be adjusted. R.S.O. c. 79.

277. (1) In case a claim be made to or in respect of any goods or chattels, property or security taken in execution or attached under the process of a Division Court, or in respect of the proceeds or value thereof by a landlord for rent, or by a person not being the party against whom the process issued, then subject to the provisions of the Act respecting Absconding Debtors, the clerk of the Court upon application of the officer charged with the execution of the process, may, whether before or after an action has been brought against such officer, issue a summons calling before the Court out of which the process issued, or before the Court holden for the division in which the seizure under the process was made, as well as the party who issued the process as the party making the claim, and thereupon any action which has been brought in the High Court or in a local or inferior Court in respect of the claim, shall be stayed.

Costs.

(2) The Court in which the action has been brought or a Judge thereof, on proof of the issue of the summons, and that the goods and chattels or property or security were so taken in execution or upon attachment, may order the party bringing the action to pay the costs of all proceedings had upon the action after the issue of the summons out of the Division Court.

County Judges to adjudicate on claims.

(3) The County Judge having jurisdiction in such Division Court shall adjudicate upon the claim and make such order between the parties in respect thereof and of the costs of the proceedings as to him seems fit; and shall also adjudicate between the parties or either of them, and the officer or bailiff in respect of any damage or claim of or to damages arising or capable of arising out of the execution of the process by the officer or bailiff, and make such order in respect thereof and of the costs of any proceedings as to the Judge shall seem fit, and the order shall be enforced in like manner as an order made in an action brought in the Division Court, and shall be final and conclusive between the parties, and as between them and the

officer or bailiff except that upon the application of either the attaching or execution creditor or the claimant or the officer or bailiff within fourteen days after the trial, the Judge may grant a new trial upon good grounds shewn, as in other cases under this Act, upon such terms as he thinks reasonable, and may in the meantime stay proceedings.

Where more than one execution or attachment has issued.

(4) In case the bailiff has more than one execution or attachment at the suit or instance of different persons against the same property claimed as aforesaid, it shall not be necessary for the bailiff to make a separate application on each execution or attachment, but he may use the names of such execution or attaching creditors collectively in such application, and the summons may issue in the name of the creditors as plaintiffs.

Power to award damages.

(5) Under the provisions of sub-section 3 of this section, the Judge shall have power to adjudicate upon and award damages, even though the amount of the damages claimed, found or awarded should be beyond the jurisdiction of a Division Court.

Rights of parties as to defence and as to costs.

(6) In respect of any damages claimed or of any judgment, order or finding under the provisions of sub-sections 3 and 5 of this section, the parties and the bailiff applying shall have the same rights of defence and counterclaim, including in all cases the right and liability to costs, as would exist had an action within the jurisdiction of the Division Court been brought to recover the said damages.

Provisions in relation to rents due to landlords.

278. (1) So much of the Act passed in the eighth year of the reign of Queen Anne, intituled an Act for the better security of rents and to prevent frauds committed by tenants as relates to the liability of goods taken by virtue of any execution, shall not be deemed to apply to goods taken in execution under the process of any Division Court; but the landlord of a tenement in which any such goods are so taken may, by writing under his hand, or under the hand of his agent, stating the terms of holding and the rent payable for the same, and delivered to the bailiff, making the levy claim any rent in arrear then due to him, not exceeding the rent of four weeks, when the tenement has been let by the week, and not exceeding the rent accruing due in two terms of payment where the tenement has been let for any other term less than a year, and not exceeding in any case the rent accruing due in one year.

(2) Notice of the said claim may be given at any time before the return of the execution, notwithstanding that the goods may in the meantime have been removed from the premises upon which they were seized; and when the goods of a tenant are sold within ten days after the seizure, the money realized shall remain in Court until the expiration of the said term of ten days to answer the claim of the landlord; and in cases where the money has been paid into Court, the notice may be directed to the clerk with like effect as if given to the bailiff before the sale of the goods so seized.

How the bailiff is to proceed.

279. In case of any such claim being so made, the bailiff making the levy shall distrain as well for the amount of the rent claimed and the costs of the additional distress as for the amount of money and costs for which the warrant of execution has issued, and shall not sell the same or any part thereof until after the expiration of at least eight days next following after the distress made.

Fees of bailiff in such cases.

280. For every additional distress for rent in arrear, the bailiff of the Court shall be entitled to have as the costs of the distress instead of the fees allowed by this Act, the fees allowed by the Act respecting costs of distress or seizure of chattels.

If replevin made.

281. If a replevin is made of the goods distrained, so much of the goods taken under the warrant of execution shall be sold as will satisfy the money and costs for which the warrant issued, and the costs of the sale and the surplus of the sale and the goods so distrained shall be returned as in other cases of distress for rent and replevin thereof.

When landlord's claim to rent is to be first paid.

282. No execution creditor under this Act shall have his debt satisfied out of the proceeds of the execution and distress, or of the execution only, where the tenant replevies until the landlord who conforms to the provisions of this Act has been paid the rent in arrear for the period hereinbefore mentioned.

CASES.

Assignment of lease.

Where a lease containing a covenant against assignment without the consent of the lessors is so assigned, the assignment containing a covenant by the assignee to pay the rent and indemnify the assignor, and the assignee goes into possession of the mortgaged premises, he is liable, although the consent of the lessors may not have been procured, to pay to the assignor rent accruing due after the assignment, which the latter has been obliged to pay:

Brown v. *Lennox*, 22 A. R. 442.

Severance of the reversion.

Upon a lease made pursuant to the Short Forms Act, containing a condition for re-entry on assigning or subletting without leave, when the lessor gives a license to assign part of the demised premises he may re-enter upon the remainder for breach of covenant not to assign or sublet, notwithstanding that the proviso for re-entry requires the right of re-entry on the whole or a part in the name of the whole.

Sections 12 and 13 of the Landlord and Tenant Act, R. S O. c. 143, are to be read together, the former referring generally to all cases, and making licenses to alien applicable for that particular instance only, the latter referring to specific cases of licensing alienation of a part, and reserving the right of re-entry as to the remainder. Hence, where a lessor gave a license to alien part of the demised premises, it was held that the license applied to the licensed arrangements only, and that upon subsequent alienation without leave he might re-enter.

Assignment of lease.

A tenant in fee simple conveyed land to the use of himself for life, and after his death to such uses as he might by will appoint. He with his grantees to uses then made a lease of the land, containing a covenant not to assign or sublet without leave, and a proviso for re-entry for breach of the covenant, and by will appointed the reversion to his seven children. After his death an assignment was made by the lessee without leave, and subsequently one of the devisees conveyed his undivided one-seventh interest to trustees to sell, lease or mortgage. An action was brought to recover the lands for breach of the covenant against assigning. Held, that by the conveyance of the undivided one-seventh share the reversion was severed and the condition destroyed, and therefore no recovery could be had for breach occurring before or after the severance.

Baldwin v. *Wanzer*, 22 O. R. 612.

Seizure under execution

A mortgage of lease, after reciting the lease, granted and mortgaged to the mortgagees, a loan company, their successors and assigns forever, the lease, and the benefit of all covenants therein contained, and the land to be held for the term (less one day). Held, that the one day excepted might be taken as the last day of the term, and that the mortgagees were not assignees of the term and liable for the rent.

Jamieson v. *L. & C. Co.*, 16 C. L. T. 285.

Mortgagee —Payment of rent to—Evidence of new contract.

Held, that although a new contract of tenancy may be inferred from the fact of a notice by a mortgagee to pay rent to him and acquiescence by the tenant by payment of the rent, still as the circumstances in this case shewed that it was not intended to create such a contract, but rather that the interest being paid the possession of the mortgagor and his tenants was to remain undisturbed, it could not be said that the plaintiff's tenancy had been put an end to by the intervention of the first mortgagee:

Forse v. *Sovereen*, 14 A. R. 482.

Covenant to pay for building.

A condition in a lease, that in case any writ of execution should be issued against the goods of the lessee the then current year's rent should immediately become due and payable and the term forfeited, is personal to the original lessor and lessee, and does not run with the land, and cannot be taken advantage of by the grantee of part of the reversion:

Mitchell v. *McCauley*, 20 A. R. 272.

Held, that a covenant by a lessor (not mentioning assigns) to pay for buildings to be erected on the lands demised, does not run with the lands, and the lessee or his assigns had no claim as against the land or the devisees of the lessor in respect of the value of buildings so erected:

McClary v. *Jackson*, 13 O. R. 310.

Covenant to pay for building on water lot.

A covenant by the lessor in a lease of a parcel of land covered by water to pay at the end of the term for "the buildings and erections that shall or may then be on the demised premises," does not bind him to pay for crib work and earth filling done upon the parcel in question, by which it was raised to the level of the adjoining dry land and made available as a site for warehouses:

Adamson v. *Rogers*, 22 A. R. 415.

Removal of goods from premises.

Under a proviso in a lease on the tenant commencing to remove the goods from the demised premises, the then current year's rent immediately became due and in arrear. On the 31st of October on the tenant proceeding to sell and dispose of all the goods on the demised premises with the intention of finally quitting the place before the 21st November following, when the rent became due and the lease terminated, the landlord entered and distrained:—Held, that under the terms of the proviso the current year's rent became due and in arrear and the distress was therefore legal:

Young v. *Smith*, 29 C. P. 109.

Under 58 V. c. 26, s. 3 (s-ss. 4 and 5), the preferential lien for rent extends not only to a year's rent prior to the assignment for creditors, but to three months' rent thereafter, whether the assignee retains possession or not; and in case the assignee elects to retain possession, the landlord's lien extends for such further time after the three months as the assignee may so retain possession:

Clarke v. *Reid*, 16 C. L. T. 263.

Assignee can be distrained on.

The goods in possession of an assignee, under an assignment for benefit of creditors, are not in the custody of the law so as to protect them from distress:

In this case the clause was as follows: Provided, if the term hereby demised or the goods on the demised premises shall at any time be seized or taken in execution, or in attachment by any creditor of the said lessee, or if the said lessee shall make any assignment for the benefit of his creditors, or being insolvent, shall take the benefit of any Act that may be in force for bankrupt or insolvent debtors, or in case a default be made by the said lessee in any of the covenants or conditions therein, the then current year's rent shall immediately become due and payable, and may be distrained for; but in other respects the said term shall immediately become forfeited and at an end, and the said lessors shall thereupon be entitled into and upon the said premises, or any part thereof, in the name of the whole, to re-enter, and the same to have again, repossess and enjoy, as if these presents had not been executed. And it is hereby declared that the provisions of the Statute of Ontario, 50 V. c. 23, intituled an Act respecting Distress for Rent and Taxes, shall not apply to this lease.

Default was made in the quarterly payments of rent in advance, as also by an assignment, and the landlord then distrained. His action was upheld, because he had only taken steps to claim rent, not to claim possession. Where the term has been determined in consequence of a forfeiture and not by effluxion of time, the Statute of Anne is inapplicable.

If the term is gone, the landlord being unable to distrain as at common law or by virtue of the statute, the power of distress can only be regarded as a personal license to be executed on the tenant's own goods, and not upon property which has passed to the assignee. The clause is divisible, and the lessor may distrain for the rent so long as he has not elected to forfeit the term. If he elects to do that he loses his remedy by distress, and is, perforce, driven to recover the rent in some other manner.

Linton v. *The Imperial Hotel Co.*, 16 A. R. 337.

Assignment with leave—Reassignment without leave.

The words " any person or persons " in the long form of the covenant not to assign or sublet without leave in the Act respecting Short Forms of Leases (R. S. O. 1897, c. 170), include the original lessee, and where an assignment by him has been made with consent a reassignment to him without a fresh consent is a breach of the covenant:

Munro et al. v. *Waller*, 28 O. R. 29.

Assignment for the benefit of creditors—Acceleration clause.

A lease under which the rent was payable quarterly in advance contained a provision that if the lessee should make an assignment for the benefit of creditors, the then current and next ensuing quarter's rent and the current year's taxes should immediately come due and payable as rent in arrear, and recoverable as such. Held, on the lessee making such an assignment, that the lessor was entitled to recover by distress, and had a preferential lien for—in addition to a quarter's rent due in arrear for the quarter preceding the making of the assignment—the rent of the current quarter in which the assignment was made, which was also due and in arrear, as well as a further quarter's rent together with the taxes for the current year.

Tew v. *The Toronto Savings and Loan Co.*, 30 O. R. 76.

Assignments and preferences—Acceleration clause.

By a lease made on the 31st of October, 1895, certain premises were demised for a term of three years from the 1st November, 1895, at a yearly rent of $480 payable in advance, in even portions monthly, on the first day of each month, the first payment to be made on the 1st November, 1895. The lease contained the usual statutory cove-

nants and provisoes, and an express power of entry and distress for rent in arrear, and also the following provision: "If the lessee shall make any assignment for the benefit of creditors, the then quarter's rent shall immediately become due and payable." On the 31st of January, 1896, the lessor, who also held a chattel mortgage on the goods on the demised premises as collateral security for the payment of certain indebtedness of the lessees, took possession both as mortgagee and by way of distress for rent in arrear, only $40 up to that time having been paid to her on account of rent. On the same day the lessee made an assignment for the benefit of creditors, and by consent the goods on the demised premises, which were of far more value than $200, were sold by the lessor, and were removed from the demised premises before the last day of February. The lessor retained out of the proceeds of the goods $200 rent for December, 1895, and January, February, March and April, 1896. Held, that s.-s. 1 of s. 3 of 56 Vict. c. 26 (O.), now R. S. O. c. 170, s. 34, s.-s. 1, is a restrictive provision, and limits the landlord's lien, even though in the lease under which he claims there is an acceleration clause wider in its terms than the statutory provision, and that it does not give to the landlord an absolute right to three months' rent upon an assignment for the benefit of creditors being made.

Per Burton, C.J.O.—That the acceleration clause in the lease in question had no application, though even the words "current quarters" could be read "current three months," the clause would not help the lessor, as the current three months ended on the 31st January, 1896, but that a lessor, apart from an acceleration clause, is entitled to the rent, not exceeding three months' rent in advance, which becomes in arrear while the assignee remains in possession, and while there are sufficient goods on the demised premises subject to distress, so that in this case the lessor was entitled to the rent which fell due on the 1st February, 1896.

Per Osler, J.A.—That the acceleration clause in the lease had no application, but that if it had, then a quarter's rent became in arrear under it within three months after the assignment for the benefit of creditors, and while the assignee was in possession and there were sufficient goods upon the demised premises subject to distress, so that the lessor would be entitled to the amount claimed; but that apart from an acceleration clause a lessor is entitled to the rent which becomes in arrear subsequent to the assignment and for three months thereafter, whether there are goods subject to distress or not, so that in this case the lessor was entitled to the rent which fell due on the 1st February, 1st of March, and 1st April, 1896.

Per Maclennan, J.A.—That "current quarter" in the acceleration clause meant a quarter of a year, or three months, but that the clause did not avail in this case, because the current three months ended on the 1st of February, 1896, but that a lessor, apart from an acceleration clause, is entitled to the rent not exceeding three months rent in advance, which becomes in arrear while the assignee remains in possession, and while there are sufficient goods on the demised premises subject to distress, so that in this case the lessor was entitled to the rent which fell due on the 1st February, 1896. In the result the judgment of Falconbridge, J., allowing the lessor rent for the months of February, March, April, was varied by disallowing rent for March and April:

Langley v. *Meir*, 25 A. R. 372.

Assignment for benefit of creditors—

By the terms of a lease of shop premises, the rent was payable quarterly in advance. There was also a proviso in the lease that if the lessee should make an assignment for the benefit of creditors the then current quarter's rent should immediately become due and pay-

able and the term forfeited and void, but the next succeeding current quarter's rent should also nevertheless be at once due and payable; thirteen days after a quarter's rent in advance had become due, the lessee made an assignment for the benefit of his creditors. Held, that the expression "arrears of rent due for three months following the execution of such assignment," in section 34 of the Landlord and Tenant Act, R. S. O. c. 170, means "arrears of rent becoming due during the three months following the execution of such assignment," and the landlord was, therefore, apart from the proviso in addition to the current quarter's rent, entitled to the quarter's rent payable in advance on the quarter day next after the date of the assignment. Preferential lien—Distress.

Held, also, that the expression "the preferential lien of the landlord for rent" in section 34, has the same meaning that it had under the Insolvent Acts; and the landlord was entitled to be paid the amount found due to him, as a preferred creditor, out of the proceeds of the goods upon the premises at the date of the assignment which were subject to distress, although there was no actual distress.

Lazier v. *Henderson*, 29 O. R. 673.

The lessors to a company in a lease containing the usual provision as to forfeiture in the event of an assignment for the benefit of creditors by the lessees, held all the shares in the company except three. The company made an assignment under the Act, one lessor moving, and the other seconding, the resolution authorizing this to be done, and both executing the assignment as assenting creditors. Held, that the lessors were estopped, under these circumstances, from taking advantage of the forfeiture clause, and that, upon the evidence, they waived the right to forfeit if it had accrued. Company—Assignments and Preferences—Forfeiture.

When the owner of the reversion accepts a surrender of a lease, he becomes liable upon all such covenants in a sub-lease as concern the demised premises; in this case a covenant by the lessees to supply the sub-lessees with heat and power.

Littlejohn v. *Soper*, 1 O. R. 172.

The effect of section 34 R. S. O. 1897, c. 170, "The Landlord and Tenants Act" is to place the assignee, who has elected by notice in writing under his hand to retain the premises occupied by the assignor at the time of the assignment for the unexpired portion of the lease under which said premises were held, in the same position as respects the lease, as the assignor would have been in had the assignment not been made; the landlord in such cases being entitled to the full amount of the rent reserved by the lease, but to nothing more, and where accelerated rent due for the unexpired term of a lease containing the usual forfeiture clause on an assignment for the benefit of creditors being made by the lessor, had been paid by the assignee for creditors, who had elected to retain the premises to the end of the term, he was held entitled to recover back a further sum for rent of the premises for a portion of the same period, which he had paid on demand of the landlord, under protest to avoid distress. Assignment for creditors—Acceleration clause

Rent payable under a lease of land is an incorporeal hereditament, and where the right or title to it comes in question a Division Court has no jurisdiction in an action to recover it.

Kennedy v. *MacDonell*, 1 O. L. R. 250.

A lease of a store was made for five years at the yearly rental of $700, payable by even portions quarterly in advance, with the statutory covenant that the lessee should not assign or sublet without leave, and with a proviso that if the lessee should make an assignment for the benefit of creditors the then current and the next quarter's rent and the taxes for the then current year should immediately Lease—Assignment without leave—Acceleration clause.

come due and payable as rent in arrear, and be recoverable by distress or otherwise. During the term, on the 24th January, 1898, the lessee made an assignment for the benefit of his creditors to the plaintiff, who sold the stock of goods in the store to the defendant. By the terms of the agreement of sale the defendant was to assume the rent and taxes, and to arrange with the landlord of the premises as to tenancy. On the 5th April, 1898, the lessors distrained the goods of the defendant in the store for $644, made up of $175 rent due on the 1st October, 1897; $175 rent due on the 1st January, 1898; $175 "the next quarter's rent" by virtue of the proviso in the lease, and $119 for the taxes of 1898, in respect of which sums they claimed to be preferred creditors on the estate of the lessee. The plaintiff paid the claim and costs under protest, and brought an action against the lessors to recover back $319.32 of it, which action was dismissed on the 14th February, 1898.

On the 17th December, 1898, the lessors made a lease of the store to the defendant's husband to hold for three years from the 14th February, 1898.

In this action the plaintiff alleged that he was entitled to be paid by the defendants $322, being the proportion of the rent from the 14th February to the 1st July, 1898, which the defendant agreed to assume and pay. At the trial it appeared that the lessors never consented in writing to the assignment of the demised premises to the plaintiff, and that the plaintiff never assigned the premises to the defendant, and that the lessors never recognized as rightful the occupation of the premises by the defendant. The plaintiff did not give notice to the lessors under R. S. O. c. 170, s. 34, s.-s. 2, electing to retain the store for the unexpired term, or any portion of it. Held, that the lessors by granting the lease of the 17th December, 1898, elected to avoid their former lease, they having done nothing in the meantime to waive the forfeiture thereof incurred by the assignment to the plaintiff. The distress was no waiver for forfeiture, for it was for rent and taxes which became due by virtue of the provisions of the lease on the date of the assignment. The election to forfeit the original lease referred back to the time when the breach of terms of that lease occasioning the forfeiture took place, that is, the date of the assignment. The plaintiff might have avoided the forfeiture of the lease, and the acceleration of the payment of the rent and taxes by giving within one month of the execution notice in writing to the lessors electing to retain the store for the unexpired term or a portion of it.

Held, also, that the condition in the agreement of sale between the plaintiff and the defendant, that the latter was to assume the rent and taxes and to arrange with the landlord as to tenancy, did not mean that the defendant was to assume any part of the rent and taxes which by virtue of the provision of the lease had become due on the previous 24th January, but rather that the defendant should arrange with the landlord as to tenancy, and assume the rent and taxes payable in virtue of the tenancy so arranged.

Tew v. *Routley*, 31 O. R. 358.

Unliquidated claim —Double value— Overholding tenant —Preferential claim.

A claim for damages against an overholding tenant for double the yearly value of the land under 4 Geo. II. c. 28, s. 1, is an unliquidated claim, and therefore is not provable against an estate in the hands of an assignee for creditors under R. S. O. 1897 c. 147. A landlord has no preferential claim for rent against such an estate if there were no distrainable goods on the premises at the time of the assignment:

Magann v. *Ferguson*, 29 O. R. 235.

CHAPTER XII.

WASTE.

To prevent waste, rights are either implied or founded on covenant.

233. The respective rights and liabilities of landlord and tenant in respect to the repairing of the premises, or to the commission of what the law terms waste, that is, the doing injury or damage, or permitting injury or damage to accrue to the estate, depend either upon the implied obligation which the law casts upon them when there are no covenants or agreements on the subject in the lease or other instrument by which the property is let, or upon the true meaning and construction of such covenants when they exist. I shall, therefore, consider this question with reference to these two states of circumstances, premising that section 22 of R. S. O. c. 342, is as follows:

Waste by tenants.

22. Lessees making or suffering waste on the demised premises, without the license of the lessors, shall be liable for the full damage so occasioned. 52 Hen. III. (St. of Marlbridge), c. 23.

Implied on part of landlord.

234. First, where there is no express covenant or agreement. In such a case the landlord is under no obligation whatever to repair the house, although its state may be such that the tenant can have no beneficial occupation of it, and even if it should fall and destroy the furniture in it, the landlord will not only be irresponsible for the damage thus sustained by the occupier, but will be entitled while the house is down, and whether he repair it or not, to insist upon being paid his rent to the end of the term, if there is a lease; or if there is not, until the tenancy is determined by a proper notice to quit. With respect to lessee or tenant, the question is not quite so simple. The law implies on the part of every tenant promises or engagements (1) to use the property he occupies in a tenant-like and proper manner, (2) to take reasonable care of it. The first of these engagements may be violated by doing actual injury to the premises, and this the law calls voluntary waste, while the second will not be fulfilled if the tenant remains the passive spectator of decay and ruin, although doing nothing to accelerate it; yet, on the

On part of tenant.

other hand, making no effort to retard the decay. Such absence of reasonable care, or, in other words, such neglect to do proper repairs, the law designates permissive waste.

Voluntary waste.

235. (1) As to voluntary waste: It will be voluntary waste if a tenant pulls down any part of the premises which he occupies; destroys any of the walls; removes or injures wainscotting, or destroys chimney-pieces, stoves or bells, or any of the landlord's fixtures; opens new windows or doors, or otherwise changes the form and arrangement of the house without the consent of the owner; nor must he, although it might improve the value of the premises, convert one species of edifice into another, as a dwelling-house into a shop, a watermill into a windmill, etc., etc. If he do these or similar acts he will be liable, whether he holds under a lease for a term of years or from year to year, to an action for damages at the suit of the landlord. He will also be restrained by injunction from proceeding with any such alterations. No alterations, should, therefore, be made by a tenant without the express, and if it can be obtained, the written consent of the landlord.

Permissive waste.

(2) As to permissive waste, or the omission to make proper repairs.

In case of tenants for years.

236. There is in the obligations to be fulfilled under this heading, considerable difference between tenants for years and tenants from year to year. It is not easy to say how far the liability of the first class (tenants for years) extends in the absence of any express agreement on the subject. The better opinion seems to be that such tenants should be obliged to do all the repairs, both substantial and ordinary, which may become necessary during their term.*

Tenant from year to year.

237. A tenant from year to year, on the other hand, is not bound to do more than keep the premises wind and water tight, when that can be done without substantial repairs, and generally to do repairs which fairly come under the head of ordinary. Even with respect to those parts of the premises which are the subject of ordinary repairs, regard must be had to their age and general state and condition when he took

* Substantial repairs are those "to the main walls and other essential parts of edifices and the replacing of beams, girders, roofs and other main constructive timbers." Ordinary repairs are "common reparation to windows, shutters, doors, and the like."

possession, for he is not bound to replace old, wornout materials with new ones, nor to make good inevitable depreciation resulting from time and ordinary wear and tear.

Express covenant.

238. When there is an express covenant or agreement.

Leases of houses generally contain a general covenant to keep and leave the premises in good repair, and there are also, in most cases, according to the agreement of the parties, particular stipulations with respect to the repair or treatment of specific portions of the premises. For instance, as to the painting of the house inside and outside once in so many years, as to the cleansing in the last year of the tenancy of all drains, cesspools, etc. The terms employed in framing these covenants vary according to the intention of the parties or the knowledge of the conveyancer employed. These covenants are nearly always entered into by a tenant, and it must be borne in mind that a covenant is construed most liberally in favour of the person with whom and most strictly against the person by whom it is made.

Liability of lessee on covenant.

239. The liability of the lessee upon a covenant, that he will well and sufficiently repair and maintain the demised premises during his term, and deliver them up at the expiration thereof in good repair and condition, will depend upon the age and general condition of the house at the commencement of the tenancy. The jury must say whether or not the lessee has done what was reasonably to be expected of him, looking to the age of the premises on the one hand, and to the words of the covenants which he has chosen to enter into on the other; but where the tenant covenants to keep the premises in good repair, he is bound to put them into good repair, their age and the class of building being considered, and is not justified in allowing them to remain in bad repair for their age and class, because he has found them in that condition.

Inspection and survey of premises desirable.

240. This state of the law suggests the advisability of having the premises inspected and reported upon by a competent surveyor before the lease is signed, so that the best evidence may be forthcoming at the end of the term, if there is any dispute as to the extent of the dilapidation and the tenant's liability to make it good. If it is possible, it is well to have a joint survey on behalf of the lessor, and then if the result be put into writing, and its correctness assented to by

both parties, the document embodying it may be used in evidence at any subsequent time.

Measure of repair.

241. When the tenant agrees to put or keep premises in habitable repair, he must put and keep them in such a state that they are reasonably fit for the occupation of a class of persons likely to occupy them.

Extent of covenant to repair

242. A covenant to repair applies not only to buildings in existence when the lease was made, but to all erections made upon the premises during the tenancy.

Destruction of premises.

243. Under a general covenant to repair and leave in repair, a lessee, or the person to whom he assigns his interest, will be obliged to rebuild the house in case it should be totally destroyed by fire, flood, or tempest. What is more, he must pay rent, though he has lost the enjoyment of the premises. To avoid this hardship it is usual to introduce into the covenant to repair an express exception with respect to making good damage done by fire, flood or tempest. It is not uncommon also to stipulate for the insurance of the premises by the lessee and to provide for the application of the money received from the insurance office to the rebuilding of the premises, and also for the cession or abatement of the rent until that is completed. In Ontario the lessor generally insures the buildings.

(See on this subject chapter VI. above.)

Liability to action for damages.

244. With regard to remedies in cases of waste or non-repair, a person who fails or neglects his duty is liable to an action for damages. If there is an express covenant to repair by either lessor or lessee, he will be liable to an action, which may be brought if the premises are out of repair at any time during the term.

Right of landlord to inspect.

245. The landlord has no right, however, in the absence of any stipulation, to go upon the premises to inspect them and see their state. Hence, it is usual in leases expressly to give him the power to do so on a limited number of days in the course of the year, or any time on giving reasonable notice. It must be distinctly borne in mind that if the landlord agree to do repairs, his neglect to do them, into whatever state the house may fall, will not entitle the tenant to quit without

notice before the expiration of his term; his only remedy is by action.

246. It is usual to insert in the lease a proviso rendering it void in case the lessee should not perform covenants to repair. Proviso for re-entry.

247. If a tenant is known to be about to commit serious waste, as, for instance, to pull down the house or convert it into a shop, the Court, if notified, will interfere by injunction to restrain him. If the party has already commenced operations, in this case also an injunction will be granted, pending the decision of an action for damages, which the plaintiff may institute at the same time as his application for an injunction. Use of premises.

CASES.

A tenant who, for the purpose of rendering the land more fit for cultivation collects the stones therefrom, has the property in the stones, and the landlord has no interest in them, and is liable for their value if he disposes of them: Collecting stones.

Lewis v. *Godson*, 15 O. R. 252.

A lease was silent as to any right of the lessee to bore for oil. Held, that prima facie the lessee had not the right to bore for oil.

Lancy v. *Johnston*, 29 Ch. 67.

In an action by reversioner against tenant for injury to the reversion caused by cutting down and carrying away trees and underwood, defendant pleaded his tenancy under a demise from D. for 19 years, that it was wild land, and that he cleared it, and thereby improved its value. Held, no defence: You must not clear a man's land without his consent

Drake v. *Wigle*, 22 C. P. 341.

Effect of removal of fence by plaintiff, with defendant's consent or direction: Removal of fence.

Pickard v. *Wixon*, 24 U. C. R. 416.

It is a question for the jury whether the tapping of trees for sugar-making has the effect of destroying the trees, or of shortening their life, or injuring them for timber purposes; and, if so found, a covenant not to cut down timber, except for the lessee's use or for purposes of improvement on the premises, will be broken by such tapping: Tapping of trees.

Campbell v. *Shields*, 44 U. C. R. 449.

By a lease under seal the defendant rented from the plaintiff certain premises for three months. The lease contained a covenant that the lessee was not to use the premises for any purpose but that Injunction to prevent waste.

of a private dwelling and "gents' furnishing store." Held, that the carrying on by the lessee of auction sales of his stock on the premises was a breach of the covenant, restrainable by injunction:

Cockburn v. *Quinn*, 20 O. R. 519

A lessee covenanted to use upon the demised premises all the straw and dung which should be made thereupon. Held, that the lessor was entitled to recover for manure removed from the premises, which was there at the expiry of the term, but not for manure made thereafter while the tenant was overholding:

Elliott v. *Elliott*, 20 O. R. 134.

Use of hay on the premises—Execution—Rights of execution creditor.

Plaintiff leased a farm as a dairy farm and a number of cows, the lease containing the following clause: "All the hay, straw and corn stalks raised on the . . . farm to be fed to the same cows on the . . . farm." Held, that while the property in hay produced on the farm might be legally in the tenant, yet his contract was so to use it that it should be fed to the cattle and consumed on the premises, and that he could not have the beneficial use of it or take it off the farm, and an execution creditor of his had no higher right than he had.

Snetzinger v. *Leitch*, 32 O. R. 440.

Trees.

A landlord may maintain trespass against his tenant for the value of trees cut down and carried away by him and which were not demised to him though growing on the land which the tenant held:

Chestnut v. *Day*, 6 O. S. 637.

Laches—Acquiescence.

Semble, that it was no waiver of the breach of a covenant not to dig beyond the prescribed depth that the landlord, though aware of such breach and threatening to take proceedings in consequence, did not take any steps at the time, but allowed the tenant to remain in possession until his subsequent insolvency:

Kerr v. *Hastings*, 25 C. P. 429.

CHAPTER XIII.

FIXTURES AND EMBLEMENTS.

"Fixtures" explained.

248. Whatever is attached to the freehold (i.e., either to the soil or the fabric of a building) becomes thenceforth part of it, and cannot be removed, unless it is what is called a "fixture." For our present purpose fixtures may be defined to be personal chattels which have been annexed to land or a house, but which may afterwards be severed and removed by the party who has annexed them, or his personal representatives, without the consent of the owner of the freehold. When an article is annexed to the soil or to the building, and is legally irremovable, it ceases to be a "fixture," and becomes part of the freehold.

Requisites for annexation to freehold.

249. The first question that suggests itself is, what is meant by being "annexed"? for, of course, if there is no annexation, the thing, whatever it may be, remains a mere chattel, and can be removed like other goods and effects.

250. Now, the size, weight or character of the thing does not affect the question, for in one case it was held that a granary resting by its mere weight upon pillars built into the land, was not a fixture, but a mere chattel. To constitute a fixture, it is necessary that the substance should be let into the soil or the fabric of the house. A slight fastening will not suffice. Whether there is such an annexation to the freehold as to deprive it of the character of a movable chattel, depends principally on two considerations: first, the mode of annexation to the soil or fabric of the house, the extent to which it is united to them, and whether it can easily be removed without injury to itself or the fabric of the building; and, secondly, on the object and purpose of the annexation, whether it was for the permanent and substantial improvement of the dwelling or merely for a temporary purpose, or the more complete enjoyment and use of it as a chattel.

Tenant's fixtures.

251. But suppose an article has been unquestionably annexed to the freehold by the tenant, under what circumstances

is it removable by him? is it, in fact, a "tenant's fixture"? Tenants' fixtures are of two kinds, namely, irremovable fixtures and removable fixtures. It seems to be a contradiction of terms that a thing can be a fixture and yet be removable, but it is one of those contradictions which are more apparent than real. While it was on the premises it was a fixture, when it is taken away it is a fixture no longer.

Irremovable fixtures.

252. The first class of fixtures comprises all such things as may be affixed to the freehold, the property in which passes to the landlord immediately upon their being affixed, and at the same time the tenant ceases to have any property in them, such, for example, as doors and windows; and all such things as may be placed on the freehold though not affixed to it save by their own weight, the property in which passes to the landlord immediately upon their being so placed, and the tenant at the same time ceases to have any property in them, such, for example, as ordinary rail fences.

Movable fixtures.

253. The latter class comprises all such things as may be affixed to the freehold for the purposes of trade or of domestic convenience or ornament, a qualified property in which remains in the tenant, and which are neither lands under the 4th section nor goods under the 17th section of the Statute of Frauds,* but may be sold under execution, and which the tenant may remove at any time during his term, or, it may be, within a reasonable time after its expiration; and all such things as may be affixed to the freehold for merely a temporary purpose, or for the more complete enjoyment and use of them as chattels, the absolute property in which remains in the tenant, and which remain chattels, and may be removed by the tenant at any time.

254. These two classes are quite distinct, and the term "fixtures" is properly applicable to the first class, for the fixtures in that class are fixtures in the primary sense of the term.

255. The fixtures in the second class are fixtures only in a secondary sense of the term; but they have acquired, though not exclusively, the name of fixtures, although it can hardly be said to be an appropriate name for them.

* *Lee* v. *Gaskell*, 1 Q. B. D. 700.

Fixtures as used in Short Form Covenant.

256. The term "fixtures," as used in the covenants to repair, and to leave the premises in good repair, in the short forms of leases, is used only in the primary sense of the term, and includes, therefore, only fixtures of the first class, and does not include any fixtures of the second class.

257. The Legislature, in prescribing a form of lease for general use, did not intend to provide that where a tenant affixed things to the freehold for the purposes of trade or of domestic convenience or ornament, or for their temporary or more conveninent use, he should keep such fixtures in repair, and should surrender them to the landlord at the end of the term.

258. Any doubt there may have been as to the extent over fixtures of the covenants to repair, and to leave the premises in good repair, has been removed in all leases according to the short form executed after the 16th April, 1895, as will be seen by reference to the statutory form already printed.

259. It will still be necessary to distinguish what articles the term tenant's fixtures includes. A list could be furnished of the articles which have been held to be, or not to be, removable fixtures. But such a list is of doubtful utility, because in many cases the decisions which are applicable to one man's advantage are not so to another.

Shrubs, plants, flowers, become annexed to.

260. Thus, if a private person plant any trees, shrubs, box borders, or flowers in his orchard or garden, they immediately become annexed to the freehold, and are thenceforth irremovable. On the other hand, the same things planted for sale by a nurseryman in the course of his business may be taken and sold. I leave, therefore, the general principles above stated in the reader's hands as sufficient. If there is a dispute worth fighting over, which he cannot satisfactorily and justly settle by appeal to these principles, he must consult a solicitor.

Covenants as to fixtures.

261. We have hitherto considered the respective rights of the landlord and tenant as they stand in the absence of any agreement on the subject of fixtures, but, of course, they may be varied by any implied agreement, and still more by any express agreement, either in a covenant of a lease or otherwise; and this, too, although they are not mentioned by name. For instance, a person who covenants to keep in repair all

erections "built and thereafter to be erected and built," cannot remove even trade fixtures. And where a party covenanted to leave a watermill with "all fixtures, fastenings and improvements," these words were held to include a pair of new mill-stones which he set up during his tenancy, although by custom they might have been removed.

When fixtures must be removed.

262. A tenant must remove his fixtures either during his term, allowing a reasonable extra time for removal if necessary, or during such time as he may hold possession after his term in the capacity of a tenant; for instance, while he holds on after his term under circumstances from which a tenancy from year to year would be implied; but if he quit possession, or if he retain it against the will of his landlord, his right to take away fixtures is gone; and even if the tenant, having erected fixtures which he would be entitled to remove during his term or at its close, renew his lease, he must take care to reserve his right to remove the fixtures which he was entitled to sever during his first tenancy, otherwise, being on the premises previous to the commencement of the second term, they will be irremovable when it expires.

Fixtures purchased.

263. A tenant has, at the end of his occupancy, the right to remove any fixtures which he purchased from the landlord at its commencement.

Fixtures as between outgoing and incoming tenants.

264. The right to remove or to sell the fixtures, as between the outgoing and the incoming tenant, is governed by the same principles as prevail between landlord and tenant. Where, however, fixtures are valued for the purpose of sale, between successive tenants, it is desirable that the landlord should be a party to the bargain. And this for two reasons: In the first place, the old tenant might otherwise overreach the new one by selling fixtures which he had neither erected nor bought, and which were therefore not his; and in the second place, if the transaction took place without the landlord's concurrence it would be open to him afterwards to contend that fixtures which the first tenant had erected, not having been removed before he left, had become part of the premises; that the second tenant had taken them from him (the landlord) as part of such premises, and that he had, therefore, no right to sever them. If the incoming purchase from the outgoing tenant fixtures which are the property of the landlord, he may recover back any money he has paid for them.

Fixtures allowed to remain on premises.

265. When premises are left vacant it sometimes happens that the outgoing tenant obtains permission from the landlord to leave his fixtures in order, if possible, to sell them to the incoming tenant, when such shall be found. Great caution is, however, requisite in such an arrangement, for if the landlord were to let a new tenant into the premises before he had purchased the fixtures the latter might afterwards insist on retaining them, since neither the old tenant nor the landlord would then have the right to enter on the premises in order to remove them.

Damage caused by removal to be made good.

266. Where trade or domestic and ornamental fixtures are removed, the tenant must make good any damage sustained by the premises from the act of removal, and where a fixture has been put up in substitution for an article existing at the time the tenancy commenced, the tenant, on taking down his own fixtures, is bound to restore the former article or replace it by one of the same description.

267. If a tenant mortgages his lease, the right to his fixtures passes to the mortgagee.

Remedy for improper removal.

268. The remedy for the improper removal of fixtures by the tenant, or the improper detention by the landlord, is by action, either in the Superior or County Court, according to the damage claimed.

Emblements.

269. The tenant's right to emblements is the right which the law gives to the tenant if lands let for the purpose of cultivation, either for an uncertain term or for a term which unexpectedly came to an end by the cessation of the interest of his superior landlord, to take away the crops (yielding an annual return, as wheat, barley, etc.), which were growing on the land at the end of his tenancy. Most farm leases are drawn to provide that the tenancy commences either at the end or the beginning of the agricultural season, or, if there is no lease, the doctrine of emblements applies.

What covered by

270. The doctrine of emblements extends not only to corn sown, but to roots planted, or other annual artificial profit; but it is otherwise of fruit trees, grass and the like, which are not planted annually at the expense and labour of the tenant, but are either a permanent or natural profit of the earth. For, when a man plants a tree he cannot be presumed to plant

it in contemplation of any present profit, but merely with a prospect of its being useful to himself in future, and to future successions of tenants.

Term certain.

271. Where the term of tenant for years depends upon a certainty, as if he holds from midsummer for ten years, and in the last year he sows a crop of wheat, and it is not ripe and cut before midsummer, the end of his term, the landlord shall have it, for the tenant knew the expiration of his term, and therefore it was his own folly to sow what he never could reap the profits of.

Term uncertain

272. But where the lease for years depends upon an uncertainty, as upon the death of the lessor, being himself only tenant for life; or if the term of years be determinable on a life or lives; in all these cases the estate for years not being certain to expire at a time foreknown, but merely by the act of God, the tenant or his executors shall have the emblements in the same manner that a tenant for life or his executors shall be entitled thereto. Not so if it determine by the act of the party himself; as if tenant for years does anything that amounts to a forfeiture, in which case the emblements shall go to the lessor and not to the lessee, who hath determined his estate by his own default.

Tenant at will.

273. If a tenant at will sows his land, and the landlord, before the wheat is ripe, or before it is reaped, puts him out, yet the tenant shall have the emblements and free ingress, egress and regress to cut and carry away the profits; and this for the same reason as all emblements turn, viz., the point of uncertainty, since the tenant could not possibly know when his landlord would determine his will, and therefore could make no provision against it; and having sown the land, which is for the good of the public, upon a reasonable presumption the law will not suffer him to be a loser by it. But it is otherwise, and upon reason equally good, where the tenant himself determines the will, for in this case the landlord shall have the profits of the land.

Tenant by sufferance.

274. Tenants by sufferance are not entitled to emblements.

CASES.

Away-going crops.

Where there is a stipulation in a lease for a term certain, that the lessee shall deliver up all the lands at the expiration of the lease.

all questions as to customary right to the away-going crops is excluded. Apparently, there is no custom of the country as to away-going crops in Ontario:

Burrowes v. *Cairns*, 2 U. C. R. 288.
Kaatz v. *White*, 19 C. P. 36.

Trade fixtures.

An engine and boiler put into a carpenter's shop and manufactory of agricultural implements: Held, to be trade fixtures as between land-lord and tenant, and to be removable by the tenant:

Pronguey v. *Gurney*, 37 U. C. R. 347.

Tenant's fixtures.

The right of the tenant to erect fixtures is to this extent, viz.: that they shall not be such as to diminish the value of the demised premises, nor to increase the burden of them as against the landlord, nor to impair the evidence of title.

Where a trade fixture is attached to a freehold it becomes part thereof, subject to the right of the tenant to remove it if he does so in proper time; in the meantime it remains part of the freehold:

Scarth et al. v. *The Ontario Power and Flat Co.*

Fixtures — Short Forms of Leases Act.

A tenant may remove from the demised premises such articles, commonly known as trade fixtures, as are brought on the demised premises by him for the purposes of his business, even though they are fastened to the building, provided the removal can be effected without substantial injury, and the covenant in the Short Forms of Leases Act, R. S. O. c. 106, to leave the premises in repair, does not restrict this right.

Where the determination of a lease depends upon an uncertain event, such as an election to forfeit upon the making of an assignment for the benefit of creditors, a reasonable time for the removal of trade fixtures must be allowed after the election to forfeit:

Argles v. *McMath*, 23 A. R. 44.

Buildings and erections—Payment for—Fixtures and machinery.

A covenant in a lease to pay for "buildings and erections" on the demised premises covers and includes fixtures and machinery which would have been fixtures but for R. S. O. c. 125, Sched. B.:

Re Brantford Electric and Power Company and Draper, 28 O. R. 40.

Fixtures — Shop fittings.

Shop fittings consisting of shelving made in sections, each section being screwed to a bracket fixed to a wall of the building, the whole being readily removable without damage to the fittings or the building, and gas and electric light fittings, consisting of chandeliers which were fastened by being screwed or attached in the ordinary way to the pipes or wires by which the gas and electric currents were respectively conveyed, and were removable by being unscrewed or detached without doing damage either to the chandeliers or the building, were placed in it by the owner of the freehold land on which it stood.

Held, that these articles became part of the land and passed by a conveyance of it to the defendants: Bain v. Brand (1876), 1 App. Cases, 762; Holland v. Hodgson (1872), L. R. 7 C. P. 328; Hobson v. Gorringe (1897), 1 Ch. 182; Haggert v. Town of Brampton (1897), 28 S. C. R. 174, and Argles v. McMath (1895), 26 O. R. 224, 248, followed.

Summary of law as to fixtures:—

1. That articles not otherwise attached to the land than by their own weight are not to be considered as part of the land, unless the circumstances are such as shew that they were intended to be part of the land.

2. That articles affixed to the land, even slightly, are to be considered part of the land unless the circumstances are such as to shew that they were intended to continue chattels.

3. That the circumstances necessary to be shewn to alter the *prima facie* character of the articles are circumstances which shew the degree of annexation and object of such annexation which are patent to all to see.

4. That the intention of the person affixing the article to the soil is material only so far as it can be presumed from the degree and object of the annexation.

5. That even in the case of tenants' fixtures put in for the purposes of trade, they form part of the freehold with the right, however, to the tenant as between him and his landlord to bring them back to the state of chattels again by severing them from the soil, and that they pass by a conveyance of the land as part of it, subject to this right of the tenant:

Stack v. *Eaton*, 4 O. R. (1902), 338.

CHAPTER XIV.

HOW A TENANCY MAY BE DETERMINED AND CONSEQUENCES OF HOLDING OVER.

Premises held for a term certain.

275. If premises are held on lease for a term certain, the tenancy, of course, determines at its expiration without the necessity for any notice to quit or other procedure on either side. And this is also the case where the tenant holds merely under an agreement for a lease. But besides this regular expiration of a tenancy, it may be terminated by some default or misconduct on the part of the tenant; by a voluntary agreement between landlord and tenant; or, if its nature will admit of it, by a regular notice to quit given by either party. We have already seen what is necessary where a power of re-entry for breach of covenant is reserved.

Disclaimer

276. A tenant will incur a forfeiture of his interest, and may be immediately ejected if he denies or "disclaims" the title of his landlord, and asserts that the property belongs either to himself or to strangers. But if the property changes hands, and then rival claimants appear, and the tenant refuses to pay rent to any until it is settled who is entitled, that will not amount to such a "disclaimer" or denial of the title of the true owner as will enable him to eject the tenant. Nor can a lease for a term of years be forfeited by mere spoken words. And a distress put into premises for rent which accrued due after an alleged "disclaimer" is considered to waive it, and to restore the tenant to his former position.

Surrender.

277. "Surrender" is when the tenant yields up the premises to the landlord, and the landlord accepts them back from him. Of course, it is unnecessary to say that the landlord's acceptance is quite optional. A tenancy for a term of more than three years, as it can only be created by a lease under seal (i.e., a deed), so it can only be surrendered either expressly by deed, or impliedly by the lessee's accepting from the landlord a new lease. The rule is less strict as to tenancies not created by deed. But even a tenancy from year to year cannot be surrendered and put an end to so as to bind

either party, merely by the tenant's verbally stating his readiness to quit, and the landlord's verbally giving him leave to go. The surrender and acceptance should be in writing. Where, indeed, there was a verbal agreement between the landlord and a tenant from year to year (under a written agreement), that the tenancy should be determined; this, followed by the departure of the tenant, and by the entry and possession of the landlord, was held to amount to surrender by operation of law. And the same has been also held in a case where, under similar circumstances, there was an agreement between the landlord, the tenant and a third party to substitute such third party as the tenant, and this was carried out by the old tenant quitting and the new one entering. And it may be said generally, that where there is an agreement between the landlord, the tenant and a third party, that the tenant shall leave, and that the third party shall come in as the tenant of the landlord, and then the possession of the premises is immediately changed in pursuance of the agreement; this will amount to a surrender of the original holding, and the first tenant will be discharged from liability on account of rent. But, as it will be necessary to make out, both that there was an agreement of the kind we have mentioned, and that there was a change of possession in consequence and in pursuance of it, and as doubts are very likely to arise as to the precise nature of what passed on the occasion of the alleged agreement, parties cannot be too strongly advised not to trust to such loose and irregular modes of putting an end to tenancies, and to adopt the only regular course, and have a proper written memorandum drawn up and signed whenever a tenant surrenders his tenancy, or one tenant is, with the assent of the landlord, substituted for another. Under no other circumstances can a tenant feel perfectly safe that, on giving up the premises, he is released from responsibility to his landlord.

Notice to quit.

278. No notice to quit is necessary where premises are let for a term certain, expiring on a fixed day. Where there is a tenancy from year to year, in the absence of any special agreement on the subject, it can only be terminated by a notice to quit on either side; such notice being given six months before the expiration of the current year of tenancy. The notice is to be half a year, not six months; it must be a full half year, and thus, not 182 but 183 days.

Notice to quit in case of weekly or monthly tenancies.

279. The law in respect to notices to quit is now as well settled in the case of tenants for periods of less than a year, as in that of yearly tenants. In the latter case the law, in the absence of an agreement to the contrary, as just stated, implies an agreement for six months' notice. In the former case, at common law, it was doubtful whether the law would imply an agreement for any notice at all, but by statute of the Province of Ontario,* if the hiring be from half year to half year, a half year's notice must be given; if from quarter to quarter, a quarter's notice; if from month to month, a month's notice, and if from week to week, a week's notice. If a lodger quits his premises without giving notice, he must pay from six months' to a week's rent, according to his hiring. No notice is required where the tenant or lodger takes the premises for a term certain, and quits at the expiration thereof. On the other hand, there is no question that a party who enters for a month, week, etc., will be bound to remain until the termination of it, or, at any rate, to pay for it.

Tenant holding over.

280. If a tenant holds over after the expiration of his tenancy, paying double rent, under 11 Geo. II. c. 19, no notice to quit is necessary on either side. Nor need a mortgagee give notice to quit to any tenant who became such without his consent subsequently to the mortgage; but he may at once proceed to bring an action for possession of the land. It is not necessary that a notice to quit should be in writing, unless the parties have expressly stipulated that it should be so. A landlord, however, who has given notice to his tenant, will not be able to claim double rent from him unless such notice was a written one. And there can be no doubt that the notice should in all cases be a written one, so that its contents should be readily proved and their sufficiency established.

Agent giving notice to quit.

281. An agent merely employed to receive rents has no implied authority from his principal to give a notice to quit; but an agent entrusted with the general management and letting of the property has. He must have authority at the time the notice was given; for a subsequent ratification by the landlord will not make valid a notice originally given

* In case of tenancies from week to week and from month to month, a week's notice to quit and a month's notice to quit respectively, ending with the week or the month, as the case may be, shall be deemed sufficient notice to determine respectively a weekly or monthly tenancy: R. S. O. c. 170, s. 18.

without authority. A notice to quit signed by one of several partners, who are either landlords or tenants, will be sufficient; but it would be better that it should, if possible, be signed by all.

Requisites for notice.

282. A notice to quit must be clear and peremptory in its terms. If it is optional, giving the tenant the choice of going or of paying an increased rent, as, "I desire you to quit or else that you agree to pay double rent," it would be insufficient. But if the notice holds out the payment of double rent, not as an alternative, but as a penal consequence, which under certain statutes will attend the tenant's holding over, such notice will be good.

Service of notice.

283. A notice to a tenant to "quit all the property you hold of me," is a sufficient description of the demised premises; and any general description applicable to the whole of the property will suffice. Even a description to a certain extent erroneous will not vitiate a notice if it do not mislead the party to whom it is given.

When to be given

284. If a notice is handed to the tenant himself, it is not necessary that it should have a written direction or address; and if a notice is directed to the tenant by a wrong Christian name, and he keep it and do not send it back, he will be held to have waived the misdirection, and the lessor may enforce the notice, if there was no other tenant of the same name. A notice addressed to, and served upon, a tenant in actual possession will be sufficient. But where the person in possession is a mere servant of the true tenant, although the notice may be left with the servant, it must be addressed to the master. And if the notice be given to such servant, or if it be left, as it may, with a servant of the tenant at his dwelling-house, the person must be expressly told that it is a notice to quit, and must be desired to deliver it to his or her master. Notice to quit served upon a wife, on premises held by her husband, is sufficient. And where a notice to quit was put under the door of the house, but it was shewn that it had come to the hands of the tenant before the time at which it was necessary that it should be given, it was held that a sufficient service was proved. If a tenant give his landlord too short a notice to quit, the landlord, although he at first acquiesces in it, may ultimately refuse to accept it.

285. If a tenant's rent is always paid at a quarter, half year or year, the notice to quit must determine on the anniversary of the day on which he entered.

286. If premises are let on an agreement that either party may determine the tenancy by a quarter's notice, such notice must expire at the period of the year when the tenancy commenced; but where it is said that the tenant "is always to quit," or "may always quit" at three months' notice, this may be given so as to expire either on the same day of the year on which the tenancy commenced, or at the expiration of any three months.

When commencement of term doubtful.

287. Sometimes a landlord is doubtful on what day a tenancy ends. In that case if it is known that it must end on one of two or three days, a notice may be given to leave on such a day of the two or three (naming them) as the tenancy ends, taking care that the notice is given six months before the first, and then after the last day named, if the tenant have not quitted, the landlord will be justified in taking steps to eject him. Under these circumstances, or where still more uncertainty prevails, a notice to quit on a day named, or, "at the expiration of the year of the tenancy which will expire next after half a year from the time of the service of this notice," will be perfectly good. But, if nothing is known as to the time at which a tenancy commenced, it will not be safe to take any proceedings to recover possession until the expiration of a year from the day on which the notice is served—for it is obvious that the tenancy might have commenced on the very day of the year on which the notice was served; and upon that supposition—which is the most unfavourable for the landlord that can be made—it would terminate on the anniversary of the service.

Tenant bound by his own replies.

288. If, however, where the commencement of the tenancy is uncertain, the landlord applies to the tenant for information, the latter will be bound by his answer, and if he name a day, and a notice to quit is given accordingly, he cannot afterwards be permitted to show that his holding did, in fact, begin on a different day.

When house and land let from separate dates

289. When a house and land are let together at one rent, but are to be entered upon at various times, then (as different notices cannot be given for separate portions of premises

held at one rent) the notice to quit must (in the absence of any express agreement) expire on the day upon which the tenant entered on that part of the premises which forms the principal subject of the letting; and it is a question for the jury which is the principal subject.

Acceptance of rent.

290. If a landlord should accept rent accruing due after the expiration of his notice to quit, this will be treated as a waiver of the notice, unless the landlord at the time declare, or circumstances then occurring show, that he did not intend it to operate as such, or unless fraud or contrivance were practised upon him by the tenant in making the payment.

Distraining for rent.

291. But if the landlord distrain for rent accruing due subsequently, that will be an absolute waiver of the notice, and set up the tenancy again.

Second notice to quit.

292. A second notice to quit is a waiver of the first; unless, indeed, it is merely a warning given after the expiration of a proper notice, that if the tenant do not quit forthwith, or in so many days, he will be called upon for double value.

Retention of possession.

293. And if a tenant retain possession of the premises after the expiration of a notice to quit given by him, such retention of the possession will in general amount to a waiver of his notice. The landlord may, however, compel him to adhere to his notice, or pay double rent.

Tenant at will or tenant by sufferance

294. In actions for possession of land it is often necessary to determine whether the defendant is tenant at will or by sufferance. When a man is tenant at will he cannot be ejected without a determination of the tenancy by notice to quit, or demand of possession, or other act sufficient for that purpose. If he is a tenant by sufferance there is no necessity for such steps prior to the action.

Peaceable delivery required.

295. At the expiration of a tenancy, or its determination by notice to quit, the tenant must peaceably deliver up to the landlord the premises which had been let or leased to him. If he do not, his full responsibilities as tenant will continue; measures may be taken for his expulsion; and he will also be liable—as a penalty for holding over—to the payment of double value or double rent, so long as he continues in possession.

296. Section 20 of R. S. O. c. 342 is as follows:

Overholding tenant to pay double value.

20. In case any tenant for any term for life, lives, or years, or other person who shall come into possession of any lands, tenements, or hereditaments, by, from, or under or by collusion with such tenant shall wilfully hold over any lands, tenements or hereditaments after the determination of such term or terms, and after demand made and notice in writing given for delivering the possession thereof by his landlord or lessor, or the person to whom the remainder or reversion of such lands, tenements, or hereditaments shall belong, or his agent thereunto lawfully authorized, then, and in such case, such person so holding over shall, for and during the time he shall so hold over or keep the person entitled out of possession of the said lands, tenements, and hereditaments, as aforesaid, pay to the person so kept out of possession, or his assigns, at the rate of double the yearly value of the lands, tenements, and hereditaments, so detained, for so long time as the same are detained, to be recovered by action in any court of competent jurisdiction, against the recovering of which said penalty there shall be no relief in equity. 4 Geo. II. c. 28, s. 1.

Act applies only where notice to quit is given.

297. This Act, as will be seen, applies only where notice to quit is given by the landlord. Now the regular and ordinary notice to quit will, in the case of a tenancy from year to year, operate as a notice and demand under this Act. But a notice is requisite to enable the landlord to avail himself of the Act, even where the tenant holds for a term of years. Such notice may be given at any time either before or after the end of the term (provided that the landlord has not, by receipt of rent or otherwise, recognized a new tenancy from year to year). In the first case it will operate (in case there is any holding over) directly the term expires; in the second from the time it is served on the tenant.

298. The Act does not apply to tenancies for a shorter term than from year to year; nor to instances in which the tenant retains possession under a fair claim of right.

299. The double value cannot be recovered by distress, but it may by an action in the High Court or (if the amount claimed be not too large) in the County Court. The tenant cannot deprive the latter Courts from jurisdiction by merely alleging that he has some claim to the premises, if it can be proved that he has admitted that he was tenant at the time the holding over commenced.

Double rent.

300. Another section applies where the tenant himself gives notice and then holds over.

Tenants overholding after giving no-

21. In case any tenant shall give notice of his intention to quit the premises by him holden at a time mentioned in such notice, and shall not accordingly deliver up the possession thereof at the time in such notice contained, the said tenant, his executors, or adminis-

tice to quit, liable for double rent.

trators, shall from thenceforward pay to the landlord or lessor double the rent or sum which he should otherwise have paid, to be levied, sued for, and recovered, at the same times and in the same manner as the single rent or sum, before the giving such notice, could be levied, sued for, or recovered, and such double rent, or sum shall continue to be paid during all the time such tenant shall continue in possession as aforesaid. 11 Geo. II. c. 19, s. 18.

How recoverable.

301. The double rent payable under this Act may be recovered by distress, as well as by action in the High Court or County Court.

302. A tenant who holds over for a year after the expiration of a notice to quit—paying double rent—may then leave without giving a new notice.

CASES.

Requisites for a surrender.

The surrender of a term must, under the Statute of Frauds, be in writing, signed by the party surrendering, or by operation of law.

Surrender of lease may be implied.

The giving up and cancelling the lease by the tenant, though not of itself a surrender of the term, is yet a strong circumstance to be considered:

Burr v. *Denison*, 8 U. C. R. 185.

An unexpected result of a fraudulent conveyance transaction.

A conveyance in fee from a lessor to his lessee during the term, though made to defraud creditors, is, as between the lessor and lessee, a surrender of the term, and (among other consequences) entitles a purchaser at sheriff's sale of the lessor's estate in the land to immediate possession:

McPherson v. *Hunter*, 4 U. C. R. 449.

Another instance of a surrender in law.

Where a tenant, with the knowledge and consent of his landlord, takes a lease from another to whom the landlord has transferred his reversion, this amounts to a surrender in law, and the right to distrain is gone:

Lewis v. *Brooks*, 8 U. C. R. 576.

No surrender.

For detailed circumstances (even giving up the key) which were held not to be a surrender in law:

See *Carpenter* v. *Hall*, 16 C. P. 90.

No surrender.

Acts relied on as shewing the acceptance by the landlord of the surrender of a lease, and as effecting a surrender by operation of law, must be such as are not consistent with the continuance of the term; and using the key left by the tenant at the landlord's office, putting up a notice that the premises are to let, making some trifling repairs, and cleaning the premises, are ambiguous acts, which are not sufficient for this purpose:

Ontario v. *O'Dea*, 22 A. R. 349.

Surrender.

The doctrine of surrender, by act and operation of law, applies as well to a term created by deed as to one created by parol:

Gault v. *Shepard*, 14 A. R. 203.

A disclaimer by a tenant of his landlord's title at once puts an end to an existing tenancy, and an action for possession of the property may be at once maintained without notice to quit:

A disclaimer by tenant of landlord's title ends his tenancy.

Claus v. *Stewart*, 1 U. C. R. 512; *Nugent* v. *Hessell*, 2 U. C. R. 194.

See *Daniels* v. *Weese*, 5 U. C. R. 589; *Bouter* v. *Fraser*, 4 O. S. 80; *Peers* v. *Byron*, 28 C. P. 250.

But he may dispute title on ground of fraud or misrepresentation:

Lynett v. *Parkinson*, 1 C. P. 144.

In an action for possession by a landlord against a tenant whose term had expired: Held, that the defendant was not precluded from setting up that the plaintiff's title expired, or was put an end to, during the term; and to raise such defence it was not necessary for the tenant to go out of and then resume possession:

Denial of landlord's title.

Kelly v. *Wolff*, 12 P. R. 234.

A lease provided that in the event of the lessor "disposing" of the building, the lessees should give up possession on certain notice; and soon after the lease was made notice was given by the lessor in assumed compliance with this proviso, and possession was given up by the lessees by consent, but under protest, before the expiration of the time limited by the notice. The alleged "disposal" of the building consisted in the making of an agreement by the lessor with a person who was to have the superintendence of the building, to obtain tenants for the lessor, and to collect rents, with the right to take a sub-lease himself in certain events, with an option to purchase.

Notice to quit—"Disposing" of premises—Covenant for quiet enjoyment

Held, that this was not a disposal of the building within the meaning of the proviso, and that the lessor was liable to damages, he having misled the lessee, to the latter's prejudice, in reference to a fact within his own knowledge, and in reference to which there was a legal obligation upon him to state the truth.

That (on the evidence) the plaintiffs were not deceived or misled by the notice and were not entitled to damages.

That there was a disposal of the building within the meaning of the proviso, but that even if there was not, there was no right of action within the nature of an action of deceit, the notice having been given in good faith, and no right of action for breach of the covenant for quiet enjoyment, the notice, if bad, not affecting the lessee's rights:

Gold Medal Furniture Company v. *Lumbers*, 26 A. R. 78.

The defendants leased to the plaintiff certain premises, the lease containing the following clause, "In case the said premises become and remain vacant and unoccupied for the period of ten days without the written consent of the lessors, this lease shall cease and be void, and the term hereby created expire and be at an end, and the lessor may re-enter and take possession of the premises" as in the case of a holding over. The plaintiff entered and occupied about two years, when he moved out and left the premises vacant for over ten days, and claimed that the lease was at an end. Held, that the agreement embodied in the lease was a subsequent condition, a breach of which could only avoid the lease at the instance of the lessors, and that the vacancy created by the lessee did not put an end to the term:

Provision as to vacancy—Breach of condition—Avoidance of lease.

Palmer v. *Mail Printing Co.*, 28 O. R. 656.

CHAPTER XV.

TENANT'S REMEDY FOR WRONGFUL OR IRREGULAR DISTRESS.

Tenant's remedy.

303. If a distress is improperly or wrongfully made a tenant has several remedies. As they vary according to the nature of the wrong committed, it is convenient to discuss them under the three heads:

1. Irregular distress.
2. Excessive distress.
3. Illegal distress.

The Revised Statutes c. 342 provide as follows:

Irregularities not to make distress void ab initio.

17. Where any distress shall be made for any kind of rent justly due, and any irregularity, or unlawful act, shall afterwards be done by the party distraining, or by his agent, or if there has been an omission to make the appraisement under oath, the distress itself shall not be therefore deemed to be unlawful, nor the party making it be deemed a trespasser *ab initio*, but the party aggrieved by such unlawful act, or irregularity, may recover by action full satisfaction for the special damage sustained thereby. 11 Geo. II. c. 19, s. 19.

Tender of amends, effect of.

(2) A tenant or lessee shall not recover in any action for any such unlawful act, or irregularity as aforesaid, if tender of amends hath been made before action. 11 Geo. II. c. 19, s. 20.

Wrongful distress, damages for. Rev. Stat. c. 223.

18. A distrainor who takes an excessive distress, or takes a distress wrongfully, or wrongfully drives a distress out of the local municipality (as defined by the Municipal Act) in which the same was taken, shall be liable in damages to the owner of the chattels distrained. 52 Hen. III. (St. Maribridge) c. 4, in part; and 3 Edw. I. (St. of Westminster Prim.) c. 16.

Where no rent due

(2) In case any distress and sale shall be made for rent pretended to be in arrear and due, when, in truth, no rent is arrear or due to the person distraining, or to him in whose name or right such distress shall be taken, the owner of such goods or chattels distrained and sold, his executors, or administrators, may, by action to be brought against the person so distraining, recover double of the value of the goods or chattels so distrained and sold, together with full costs of suit. 2 W. & M. Sess. 1, c. 5, s. 4.

Irregular distress.

304. Irregular distress. This is where, although the right to distrain exists, the distrainor has been guilty of irregularity in taking such things as are not lawfully subject to distress, or in not conducting himself with propriety in his subsequent disposition of them or conduct respecting them. For instance, if emblements are taken; if growing crops are sold before they are ripe; if goods liable to seizure are sold without appraisement; if a landlord, having distrained sufficient to satisfy the arrears of rent, abandon the distress, and afterwards distrain again for the same rent; if a landlord sells goods after replevin by the claimant, of which he has had

notice; if he turns the tenant or his family out of possession, and retains possession of the premises in which the goods are impounded for an unreasonable time, all these are irregularities for which a tenant who is aggrieved may bring an action in either the County Court or the High Court of Justice, according to the damages claimed. The damages will be confined to the actual injury suffered, and if an action is brought for an irregularity from which no real inconvenience or loss has resulted, not only will the jury be directed to return only nominal damages, but the plaintiff will very probably be refused his costs. Further, if adequate amounts have, in the opinion of the jury, been tendered before action brought, it will not lie at all, and the plaintiff will have to pay the costs.

Landlord's responsibility for acts of bailiff.

305. Even when an irregularity has been committed in levying the distress, it does not follow that an action can be brought against the landlord. He is not responsible for the acts of a bailiff or agent, who has clearly exceeded or departed from his authority, unless the landlord has subsequently ratified the very acts done.

Excessive distress.

306. Excessive distress. This is where the landlord has distrained the goods and chattels of the tenant to an amount beyond what is fairly necessary to cover the rent in arrear and the costs of levying the distress. To make a distress excessive a landlord must have an opportunity of levying on goods, the value of which is about the amount of the rent in arrear, and therefore, if there is only one article on the premises, the landlord may safely take it. However small his demand and however valuable the article, it will not be excessive distress if its value be nearer than that of any other article there to the sum in arrears. Neither will an action for excessive distress lie where the excess is trifling. It must be something substantial and obvious. If there has been, however, such an excessive distress, an action will lie in which the tenant may recover as damages the value of his goods, less the amount of rent due. In considering whether the distress was excessive the jury will be told to consider what the goods seized would have sold for under execution on bailiff's sale. No action will lie merely on the ground of a landlord or bailiff having claimed more rent than was actually due, unless the goods taken and sold in regard to the real value, or unless some specific damage resulted from the exorbitant nature of the claim made, as, for instance, if it

could be proved that it deterred the tenant's friends from joining with him as sureties on a replevin bond.

Illegal distress.

307. Illegal distress. A distress will be illegal if there was no right at all to make any distress whatever; for instance, if there was no tenancy between the distrainor and the person distrained upon; if there was a tenancy, but upon no certain rent; if the tenant was holding over after the expiration of notice to quit on the landlord's part; if the landlord's title had expired before the rent became due; if no rent was in arrear, or if the landlord's title to it had been barred by the Statute of Limitations; if the tenant has paid the rent, either on account of taxes which he was not liable to pay under his covenant, or under compulsion, to a superior landlord or to a mortgagee, for any of these causes, a distress will be wholly and absolutely illegal. If a tender is made after a distress has been taken, but before it is impounded, that makes any subsequent detention illegal. When the goods have once been impounded a tender will have no effect, and a landlord may proceed to sell without rendering himself liable to any action.

Tenant may recover double the value of goods sold.

308. If an illegal distress has been taken and the goods sold, the tenant may either bring an action against the landlord to recover the receipts of the sale, or he may bring an action of trespass, under which, if it is properly brought on the statute 2 W. & M. c. 5, s. 4, he may, if no rent was in arrear or due, recover double the value of the goods sold.

Replevin

309. When an illegal distress has taken place, the remedy most frequently resorted to is an action of replevin, because by having recourse to that the tenant both recovers his own goods or prevents them from being taken away, and also obtains damages for any inconvenience or loss to which he may have been put in consequence of the distress having been levied on his premises, or his goods having been detained from him. Under the common law there was no power to sell the distress—it was a mere pledge in the hands of the landlord to secure his rent, and so long as he had security that his claim, if legal, would be duly paid, he had no right to more. The tenant was, therefore, permitted to take back his goods, on giving security to the sheriff of the county either to prosecute successfully an action against the distrainor for the unlawful taking, or in case the judgment was against him, to pay the rent. This was called replevying the goods, that is, substituting one pledge for another.

Action, procedure in.

310. An action of replevin was formerly special and complicated in its procedure. It is now begun like any other action by a writ of summons. It was formerly confined to cases of recovery of goods wrongfully taken by distress, but is now extended to all cases of wrongful taking. The rules of the Supreme Court of Judicature regulating the procedure in actions of replevin are 1098 to 1111.

Affidavit for order

311. When a party desires to obtain his goods by this method of procedure, he must, after issue of a writ, apply on affidavit for an order of replevin. This order is issued on demand on filing an affidavit stating:

(1) That the person claiming the property is the owner thereof, or that he is lawfully entitled to the possession thereof, describing the property in the affidavit.

(2) The value thereof to the best of his belief.

(3) That the property was taken under colour of a distress for rent.

Order

312. An order is then issued which must state that the defendant has taken and unjustly detains the property under colour of a distress for rent.

313. The order directs the sheriff to take without delay the security required by law, and to cause to be replevied to the plaintiff the property as described and valued by the affidavit, and to return his proceedings to the Court.

Bond.

314. The sheriff then, before acting under the order, must take a bond from the plaintiff with two sufficient sureties in treble the value of the property to be replevied, as stated in the affidavit, which bond is assignable to the defendant.

315. The condition of the bond so taken is that if the plaintiff prosecutes his suit with effect and without delay against the defendant for the taking and unjustly detaining his cattle, goods and chattels, and returns the property, if a return is adjudged, and also pays any damages which the defendant may sustain by the issuing of the writ of replevin; if the plaintiff fails to recover judgment in his suit, and also that if the plaintiff observes, keeps and performs all rules or orders made by the Court in the suit, then the bond is void, otherwise the plaintiff and his bondsmen become liable in

damages to the sheriff or the defendant if the bond is to him assigned by the sheriff.

Costs.

316. In cases of replevin, where the goods have been distrained for rent the bond does not cover costs which are not taxable as between solicitor and client. Only taxable costs are recoverable, that is, those payable as between party and party.

317. The sheriff then takes the goods, delivers them to the plaintiff, and returns the order to the Court on or before the tenth day after its service.

Judgment.

318. If the plaintiff signs judgment by default, he is at liberty to sign final judgment for the sum of five dollars and his costs. He cannot get any larger sum for damages, except when it is granted by a Judge or jury, or upon filing a written consent of the defendant or his solicitor, verified by affidavit of execution.

Action on bond.

319. The suit, if defended, must proceed, the bond being the security of the defendant instead of the goods. An action on this bond will lie (1) for not prosecuting the action with effect, which means not successfully; (2) for delay; (3) for not returning the goods.

CASES.

Action for double value.

Action for double value under 2 W. & M. c. 5, s. 5.

The fifth section of the statute does not extend to a holding of land where there is no rent reserved:

McCaskell v. *Rodd*, 14 O. R. 282.

Distress.

In an action for wrongful distress for rent before it was due, there was no allegation in the statement of claim that the action was brought upon 2 W. & M. c. 5, s. 5, nor that the goods distrained were sold, but merely an allegation that the defendant sold and carried away the same and converted and disposed thereof to his own use, nor was a claim made for double the value of the goods distrained and sold within the terms of the statute.

Damages.

Held, the action was an ordinary action for conversion, and that the value, and not the double value, of the goods distrained was recoverable.

Distress for rent—Set off—Notice—Illegal Distress—Double value.

The service by the tenant, after distress but before sale, of a notice of set off, pursuant to R. S. O. 1887, c. 143, s. 29, of an amount in excess of the rent, to which the tenant is entitled, does not make the distress illegal, and the landlord is not liable for "double value" for selling under 2 W. & M. sess. 1, c. 5, s. 5, which requires both seizure and sale to be unlawful.

Brillinger v. *Ambler*, 28 O. R. 368.

CHAPTER XVI.

THE RECOVERY OF TENEMENTS.

Landlord may make peaceable entry.

320. After the expiration of a term of years, or at the end of a notice to quit in the case of a tenancy thus determinable, a landlord may enter upon, and obtain possession of, the demised premises if they are vacant, or if he can do so peaceably. If at the time they are left locked up, and deserted by the tenant, he may break in. But if anyone opposes him he has no right to make a forcible entry; and even if he gets in peaceably, he must not turn the inmates out forcibly. If he does, he will, unquestionably, be liable to an indictment; and he may also be liable to an action for assault at the suit of the parties. A proviso for re-entry may, indeed, be framed to give the lessor the right of forcible ejectment, and to protect him from an action, as between himself and the lessee; but that will not take away the indictable offence. If the landlord desire to be perfectly safe he must resort to one or the other of the various methods of obtaining possession by legal proceedings.

Modes of recovering possession by law.

321. Where the landlord has a right to enter in consequence of the determination of the tenancy by one of the means to which I have referred in a former chapter, he may proceed, according to circumstances, to recover possession either by application to the County Judge under the Overholding Tenants' Act, or in the County Court if the value of the land does not exceed $200, or in the High Court of Justice. In practice also the effect of the notice mentioned in paragraph 164 is to obtain possession, the tenant preferring not to sacrifice the exemptions.

Overholding Tenants' Act.

322. The first mode of regaining possession is under the Overholding Tenants' Act.

323. Formerly it was very difficult for a landlord to succeed under this statute, because the Judges refused to interfere whenever a tenant could shew a "colour of title." It was often easy for a tenant to set up some defence which the Judge had to take into account and dismiss the application. Now the Act is much wider, and the "colour of right" ground

for resistance to the application will be of no avail. The main clauses of the Act, R. S. O. c. 171:

Application to be made to the County Court Judge against overholding tenant.

3. In case a tenant, after his lease or right of occupation, whether created by writing or by verbal agreement, has expired or been determined either by the landlord or by the tenant by a notice to quit, or notice pursuant to a proviso, in any lease or agreement in that behalf, or has been determined by any other act whereby a tenancy or right of occupancy may be determined or put an end to, wrongfully refuses upon demand made in writing to go out of possession of the land demised to him, or which he has been permitted to occupy, his landlord, or the agent of his landlord, may apply upon affidavit to the Judge of the County Court of the county, or union of counties, in which the land lies, and wherever such Judge then is, to make an inquiry as is hereinafter provided for.

Judge to appoint time and place for determining matter

(2) Such Judge shall, in writing, appoint a time and place at which he will enquire and determine whether the person complained of was tenant to the complainant for a term or period which has expired, or has been determined by a notice to quit, or for default in payment of rent, or otherwise, and whether the tenant holds the possession against the right of the landlord, and whether the tenant does wrongfully refuse to go out of possession, having no right to continue in possession, or how otherwise.

Notice thereof to be served on the tenant.

4. Notice in writing of the time and place so appointed for holding such inquiry, and stating briefly the principal facts alleged by the landlord to entitle him to possession shall be served by the landlord upon the tenant, or left at his place of abode at least three days before the day so appointed, if the place so appointed is not more than twenty miles from the tenant's place of abode; and one day in addition for every twenty miles above the first twenty, reckoning any broken number above the first twenty as twenty miles; to which notice shall be annexed a copy of the Judge's appointment and of the affidavit on which the appointment was obtained and of the papers attached thereto.

Proceedings in default of appearance.

5. If at the time and place appointed as aforesaid, the tenant, having been duly notified as above provided, fails to appear, the Judge, if it appears to him that the tenant wrongfully holds, may order a writ to issue to the sheriff in the Queen's name commanding him forthwith to place the landlord in possession of the premises in question: but if the tenant appears at such time and place, the Judge shall in a summary manner hear the parties and examine into the matter, and shall administer an oath or affirmation to the witnesses called by either party, and shall examine them; and if, after such hearing and examination, it appears to the Judge that the case is clearly one coming under the true intent and meaning of section 3 of this Act, and that the tenant wrongfully holds against the right of the landlord, then he shall order the issue of such writ as aforesaid, otherwise he shall dismiss the case, and the proceedings in any such case shall form part of the records of the County Court; and the said writ may be in the words or to the effect of Form 1 or Form 2 in the schedule to this Act, according as the tenant is ordered to pay costs or otherwise.

In case of appearance.

Proceedings to form part of the records of the Court.

10. The proceedings under this Act shall be entitled in the County Court of the county, or union of counties, in which the premises in question are situate and shall be styled: Proceedings, how entitled.

In the matter of (giving the name of the party complaining), landlord, against (giving the name of the party complained against), tenant.

324. Actions in the County Court for recovery of land are restricted to cases where the value of the land is under $200. County Court jurisdiction.

325. In the High Court of Justice the practice in actions for the recovery of possession of land is now assimilated to that of all other actions. High Court of Justice.

326. Any account of the proceedings in an ordinary action for the recovery of possession of premises is entirely foreign to the object of this book. Solicitors know where to find the necessary information in books on practice. If persons who are not solicitors wish to manage their litigation for themselves they will find in the same books the requisite information. Practice.

327. Perhaps enough has been said to shew that though the law on the subject of landlord and tenant has been simplified on many points, it is still in the main complex. It must always be so, and all that can be done by the Legislature and by the Courts is to reduce, as far as possible, the opportunities for differences.

328. There are a few sections of the Landlord and Tenant Act which require reproduction. They relate to the recovery of premises by landlords where a lease is determined and the tenant refuses to go out. (R. S. O. c. 170, ss. 26-29.) Special provisions.

26. In case (1) the term or interest of any tenant of any land, tenements or hereditaments, holding the same under a lease or agreement in writing for any term or number of years certain, or from year to year, expires, or is determined either by the landlord or tenant by regular notice to quit; and (2) in case a lawful demand of possession in writing, made and signed by the landlord or his agent, is served personally upon the tenant, or any person holding or claiming under him, or is left at the dwelling house or usual place of abode of such tenant or person; and (3) in case such tenant or person refuses to deliver up possession accordingly, and the landlord thereupon proceeds by action for recovery of possession, he may at the foot of the writ of summons address a notice to such tenant or person requiring him to find such security, if ordered by the Court or a Judge, and for such purposes as are hereinafter next specified. Circumstances under which landlord may give notice to tenant to find security.

Court or Judge may order.

27. Upon the appearance of the party, or in case of non-appearance, then, on making and filing an affidavit of service of the writ and notice, and on the landlord's producing the lease or agreement, or some counterpart or duplicate thereof, and proving the execution of the same by affidavit; and upon affidavit that the premises have been actually enjoyed under such lease or agreement, and that the interest of the tenant has expired or been determined by regular notice to quit (as the case may be); and that possession has been lawfully demanded in manner aforesaid, the landlord may apply to the Court or a Judge for a rule or summons for such tenant or person to show cause within a time to be fixed by the Court or Judge, on a consideration of the situation of the premises, why such tenant or person should not enter into a bond by himself and two sufficient sureties in a reasonable sum, conditioned to pay the costs and damages, which may be recovered by the plaintiff in the action, and the Court or Judge, upon cause shown, or upon affidavit of the service of the rule or summons in case no cause is shown, may make the same absolute in whole or in part, and order such tenant or person within a time to be fixed, upon a consideration of all the circumstances, to give such bond to the plaintiff, with such conditions and in such manner as may be specified in the said rule or summons, or the part of the same so made absolute.

If order not obeyed judgment may be signed.

28. In case the party neglects or refuses to comply with such rule or order, and gives no ground to induce the Court or Judge to enlarge the time for obeying the same, then the lessor or landlord, upon filing an affidavit that such rule or order has been made and served and not complied with, may sign judgment for the recovery of possession and costs of suit

Limitation of action upon bond.

29. No action or other proceeding shall be commenced upon the bond after six months from the time when the possession of the premises, or any part thereof, has been actually delivered to the landlord.

329. A very important section of the Landlord and Tenant Act, R. S. O. c. 170 (s. 19), is as follows:

Penalty on tenant receiving writ for recovery of land and not notifying his landlord.

Every tenant to whom a writ in an action for the recovery of land has been delivered, or to whose knowledge it comes, shall forthwith give notice thereof to his landlord, or to his bailiff or receiver, and if he omits so to do he shall forfeit to the person of whom he holds the value of three years' improved or rack-rent of the premises demised or holden in the possession of such tenant, to be recovered by action in any Court having jurisdiction for the amount.

Recovery of deserted premises.

330. Proceedings to be taken for the recovery of premises which the tenant has deserted before the termination of his tenancy, and without giving proper notice to quit, or leaving any goods on which the landlord may distrain for his rent, were founded on 11 Geo. II. c. 19, s. 16, which enact that if any tenant holding any lands, tenements or hereditaments at a rack-rent, or a reserved rent of full three-fourths of the yearly value of the demised premises, who shall be in arrear for half a year's rent, deserted the premises, and left

the same uncultivated and unoccupied, so as no sufficient distress can be had to countervail the arrears of rent, it should be lawful for two or more justices of the peace* for the county, riding, division or place (having no interest in the demised premises), at the request of the lessor or his bailiff, to go upon and view the same, and cause to be affixed on the most notorious part of the premises notice in writing what day (at the distance of fourteen days at least) they would return to take a second view thereof; and if upon such second view the tenant, or some person on his behalf, did not appear and pay the rent in arrear, or there was not sufficient distress upon the premises, then the justices might put the landlord into the possession of the demised premises; and the "lease thereof to such tenants as to any demise therein contained only shall from thenceforth become void."

Appeal from justices.

331. Under section 17 of the above mentioned 11 Geo. II. c. 19, proceedings before the justices under this Act were examinable in a summary way by the Judges of the Courts of Queen's Bench or Common Pleas (in Ontario by the High Court of Justice); and such Judges were empowered, if they think fit, to direct the premises to be restored to the tenant, and to make an order for his costs upon the landlord; or, in case they affirmed the order of the justices, to compel the tenant to pay his landlord a sum not exceeding £5, as the costs of such frivolous appeal.

Result of provisio s.

332. The meaning of these last words "the lease, etc.," which occurred in the Act, was that although by the execution of the warrant a lease or agreement was annulled, so far as it gives the tenant any right to the possession of the premises, no liabilities which he may have incurred under it in respect to payment of rent, repairs, etc., were at all affected, but that he might still be sued in respect thereof if he could be found.

Information on oath not required

333. It will also be observed that by this statute the magistrates were to act "at the request" of the landlord or his agent. No information on oath need, therefore, be laid before them by the landlord; nor need they make any enquiry upon oath; they could act upon the mere statement of the landlord that the rent was due, satisfying themselves upon their own view whether or not the premises were deserted, and whether or not there was sufficient distress upon them to satisfy the rent.

* In cities in Ontario the police magistrate has this authority.

Requisites.

334. If the premises were left entirely unoccupied no difficulty could arise; and, on the other hand, while sufficient property was left to cover any distress for accruing rent, no proceedings could be taken under this Act.

Proceedings a defence in actions of trespass.

335. When the magistrates have given to the landlord possession of property, as deserted and unoccupied, and the Court has, on appeal, made an order for its restitution to the tenant with costs, the record of the proceedings before the magistrates will be a good defence on the part of the landlord, should the tenant afterwards bring an action of trespass against him.

336. These sections of 11 Geo. II. c. 19, are now repealed by R. S. O. 1897, it is supposed because superseded by R. S. O. c. 171. But they were useful as a ready way to obtain possession of deserted premises.

CASES.

Measure of damages.

In an action by the plaintiff (lessee) against lessor for breach of covenants in lease to dig ditches, etc.: Held, that the measure of damages was the difference between the rentable value of the land with the defendant's covenant performed, that is, with the improvements made, and the value without such improvements.

McEwen v. *Dillon*, 12 O. R. 411.

Action by a tenant against his landlord for refusing to give him possession of the demised premises. Held, that the proper measure of damages in such a case is the difference between what the tenant agreed to pay for the premises and what they were really worth:

Marrin v. *Grover*, 8 O. R. 39.

Breach of covenant to repair.

In an action on a lease (having many years to run) for rent and non-repair of the premises: Held, that the reversioner, by reason of the length of lease, was not restricted to nominal damages, but the measure of damages was the amount to which the reversion was injured by want of repair:

Atkinson v. *Beard*, 11 C. P. 245.

Interest on arrears Give notice if you wish to claim it.

As to claims for interest on arrears of rent, see *Crooks* v. *Dickson*, 1 L. J. N. S. 211. It must be demanded.

Lease—Breach by tenant—Repudiation of contract—Damages.

When a tenant leaves the demised premises before the expiration of the term, paying rent up to the time of leaving and notifying the landlord that he does not intend to keep the premises any longer or pay any more rent, the landlord cannot on the principle that there has been a repudiation of the contract, at once recover the whole rent for the unexpired portion of the term. He must either consent to the tenant's departure and treat the term as surrendered, or must treat the term as subsisting and sue for future gales of rent as they fall due:

Connolly v. *Coon*, 23 A. R. 37.

Where a few days prior to the accruing due of a quarter's rent payable in advance, the lessee assigned without the lessor's leave, in breach of a covenant contained in the lease, the lessor was held entitled to recover, as damages for such breach, the rent so payable in advance, without any deduction for rents realized during the said quarter under new leases created by the lessor, who, finding the property vacant, had taken possession:

Rent payable in advance—Breach of covenant not to assign without leave—Damages.

Petching v. *Smith*, 28 O. R. 201.

The questions whether a three months' notice to determine a tenancy required by a lease, should be lunar or calendar months, and whether a notice given by the lessor after conveyance of the reversion, is sufficient, should not, when there is any doubt in the matter, be decided by a County Court Judge on an application under the Overholding Tenants Act and amendments:

Overholding Tenants Act.

Re Magann and Bonner, 28 O. R. 37.

Since the amendment of the Overholding Tenants Act the Judge of the County Court tries the right and finds whether the tenant wrongfully holds. And where the dispute was in reference to the tenancy, the landlord claiming it to be a monthly holding, and the tenant a yearly tenancy.

Overholding Tenants Act.

Held, that the County Court Judge had jurisdiction.

Under the Overholding Tenants Act, R. S. O. 1897, c. 171, two things must concur to justify the summary interference of the County Court Judge: the tenant must wrongfully refuse to go out of possession, and it must appear to the Judge that the case is clearly one coming under the purview of the Act.

It is only the proceedings and the evidence before the Judge sent up pursuant to the certiorari at which the High Court may look for the purpose of determining what is to be decided under section 6 of the Act.

Where there was nothing in the evidence to show that the tenants had violated the provisions of the lease for breach of which the landlord claimed the right to re-enter, the Court set aside the order of the County Court Judge commanding the sheriff to place the landlord in possession.

Moore v. *Gillies*, 28 O. R. 358.

CHAPTER XVII.

MISCELLANEOUS STATUTORY DIRECTIONS.

337. There are to be met with in a few statutes directions specially relating to landlords and tenants. These are here reprinted.

338. 1887.—Act respecting Snow Fences (R. S. O. c. 240):

Councils may require owners or occupants of land to remove fences.

Making compensation therefor.

1. The council of every township, city, town, or incorporated village shall have power to require owners or occupiers of lands bordering upon any public highway to take down, alter or remove any fence found to cause an accumulation of snow or drift, so as to impede or obstruct the travel on the public highway or any part thereof; and where such power is exercised, they shall make such compensation to the owners or occupants for the taking down, alteration or removal of such fence, and for the construction of some other description of fence approved of by the council in lieu of the one so required to be taken down, altered or removed, as may be mutually agreed upon; and if the council and the owners or occupants cannot agree in respect to the compensation to be paid by the council, then the same shall be settled by arbitration in the manner provided by the Municipal Act, and the award so made shall be binding upon all parties.

Power in case of neglect or refusal by owner or occupant to construct fence as directed.

2. In case the owner or occupant refuses or neglects to take down, alter or remove the fence, and to construct such other fence as required by the council, the council may, after the expiration of two months from the time the compensation to be paid by the council has been agreed upon or settled by arbitration, proceed to take down, alter or remove the old fence, and construct the other description of fence which has been approved of by the council; and the amount of all costs and charges thereby incurred by the council, over and above the amount of compensation agreed upon or settled by arbitration, may immediately be recovered from such owner or occupier by action in any Division Court having jurisdiction in the locality; and the amount of the judgment in favour of the municipality obtained in such Court shall, if not sooner paid, be by the clerk of the municipality placed upon the next collector's roll as taxes against the lands upon or along the boundaries of which the fence is situate; and after being placed upon the collector's roll shall be collected and treated in all respects as other taxes imposed by by-laws of the municipality; when a tenant or occupant, other than the owner, is required to pay the aforesaid sum, or any part thereof, the tenant or occupant may deduct the same, and any costs paid by him from the rent payable by him, or may otherwise recover the same, unless the tenant or occupant has agreed with the landlord to pay the same.

339. Ditches and Watercourses Act (R. S. O. c. 285, s. 15):

15. Notices under the provisions of this Act shall be served personally, or by leaving the same at the place of abode of the owner or occupant with a grown-up person residing thereat; and in case of non-residents, then upon the agent of the owner, or by registered letter addressed to the owner at the post office nearest to his last known place of residence; and where that is not known, he may be served in such manner as the Judge may direct. Mode of serving notices.

(2) Any occupant not the owner of the land, notified in the manner provided by this Act, shall immediately notify the owner thereof, and shall, if he neglects to do so, be liable for all damages suffered by such owner by reason of such neglect. Occupant to notify owner.

340. Line Fences (R. S. O. c. 284, s. 5):

5. An occupant, not the owner of land, notified in the manner above mentioned, shall immediately notify the owner, and if he neglects so to do, shall be liable for all damage caused to the owner by such neglect. Duty and liability of occupants as to notifying owners.

The notification referred to is that of intention to bring in fence-viewers.

341. Act respecting Public Health (R. S. O. c. 248, s. 113):

113. Any costs or expenses recoverable from an owner of premises under this Act, or under any provision of law in respect of the abatement of nuisances, may be recovered from the occupier for the time being of such premises; and the owner shall allow such occupier to deduct any moneys which he pays under this enactment, out of the rent from time to time becoming due in respect of said premises, as if the same had actually been paid to such owner as part of said rent. But no such occupier shall be required to pay any further sum than the amount of rent for the time being due from him, or which, after demand of such costs or expenses from such occupier, and after notice not to pay his landlord any rent without first deducting the amount of such costs or expenses, becomes payable by such occupier unless he refuses truly to disclose the amount of his rent and the name and address of the person to whom rent is payable; and the burden of proof that the sum demanded from such occupier is greater than the rent due by him at the time of such notice, or which has since accrued, shall be on such occupier. Recovery of costs and expenses of execution of provisions relating to nuisances. Proviso.

(2) Nothing in this section contained shall affect any contract between any owner or occupier of any house, building or other property, whereby it is or may be agreed that the occupier shall pay or discharge all rates and dues and sums of money payable in respect of such house, building or other property, or affect any contract whatever between landlord and tenant.

See also sec. 69 as to abatement of nuisances.

Municipal Act, 1903. Night Watchmen (s. 548).

548. By-laws may be passed by the councils of the municipalities and for the purposes in this section respectively mentioned, that is to say, by the councils of cities, towns and villages:

Appointment of night-watchmen.

(2) For appointing, employing and paying a night-watchman or watchmen for the purpose of patrolling at night or between certain hours of the night any street or any portion thereof within the municipality to be defined by such by-law, and of guarding and protecting the property, real and personal, within the limits thereby defined.

Special rate to be levied.

(a) For levying in the same manner and at the same time as payment of the other rates or taxes within the municipality is enforced by special rate upon all the real property within the limits defined by the by-law, except vacant lots, all the expenses of or incidental to such employment of such night-watchman or watchmen.

Petition by ratepayers.

(b) No such by-law shall be passed except upon petition therefor by two-thirds of the freeholders and householders who upon the passing thereof would become liable to be charged with the expenses to be incurred thereunder, and who represent in value at least two-thirds of the assessed real property on the street or portion thereof liable to be charged with such expenses.

Proof of signatures.

(c) No such petition shall be received or acted on by the council unless and until all the signatures thereon are proved by the affidavit of a reliable and competent witness to be the genuine signatures of the persons whose signatures they purport to be, and that the contents thereof were made known to each person signing the same before signature.

Liability of tenant.

(d) As between the landlord and tenant of any premises comprised within the limits defined by the by-law, the tenant shall be liable for the expenses to be levied thereunder for the period or time of his occupation, unless there is an express agreement to the contrary.

REVISED STATUTES OF ONTARIO, 1897.

CHAPTER 342.

An Act respecting Landlord and Tenant (2).

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

Rents seck may be distrained for

1. Every person may have the like remedy by distress, and by impounding and selling the same in cases of rents seck, as in case of rent reserved upon lease, any law or usage to the contrary notwithstanding. 4 Geo. II. c. 28, s. 5.

Distress for arrears on leases determined.

2. Any person having any rent in arrear, or due, upon any lease for life or lives or for years, or at will, ended or determined, may distrain for such arrears, after the determination of the said lease, in the same manner as he might have done if such lease had not been ended or determined: Provided that such distress be made within the space of six

Limitation of such distress.

months after the determination of such lease, and during the continuance of such landlord's title or interest, and during the possession of the tenant from whom such arrears became due. 8 Anne, c. 18 (or c. 14 in Ruffhead's Ed.), ss. 6, 7.

Husband may recover rent due in right of his wife deceased.

3. If any man hath or shall have, in the right of his wife, any estate in fee simple, fee tail, or for term of life, of or in any rents, or fee ferms, and the same rents, or fee ferms, shall be due behind and unpaid in the said wife's life, then the said husband, after the death of his said wife, his executors and administrators, shall have an action for the said arrearages against the tenant of the demesne that ought to have paid the same, his executors, or administrators, and also the said husband, after the death of his said wife, may distrain for the said arrearages, in like manner and form as he might have done if his said wife had been then living, and make avowry upon his said matter as is aforesaid. 32 Hen. VIII. c. 37, s. 3.

(*See R. S. O. c. 127, ss. 4 (3), 5, and c. 163, ss. 5, 6, 7.*)

Persons entitled to rent during life of another may recover same after death of *cestui que vie.*

4. Where a person is entitled to any rent or land for the life of another he may sue for, distrain, and recover by action, or distress, the rent due and owing at the time of the death of the person for whose life such rent or land did depend, as he might or could have done if such person by whose death the estate in such rent or land determined had continued in life. 32 Hen. VIII. c. 37, s. 4.

Distresses to be reasonable

5. Distresses whether for a debt due to the King, or to any other person, shall be reasonable, and not too great. 52 Hen. III. (St. of Marlbridge) c. 4, part; statute of uncertain date Imp. Rev. St., 1870, p. 126).

Property Liable to Distress.

Sheaves, and cocks of corn loose, etc., hay in barn, etc. may be distrained.

6. Any person having rent arrear and due upon any demise lease, or contract, may seize and secure any sheaves or cocks of corn, or corn loose, or in the straw, or hay, lying or being in any barn or granary or upon any hovel, stack or rick, or otherwise upon any part of the land, or ground, charged with such rent, and may lock up, or detain the same, in the place where the same shall be found, for or in the nature of a distress until the same shall be replevied; and, in default of the same being replevied, may sell the same,

after appraisement thereof to be made, so as nevertheless such corn, grain, or hay, so distrained as aforesaid, be not removed by the person distraining, to the damage of the owner thereof, out of the place where the same shall be found and seized, but be kept there (as impounded) until the same shall be replevied, or sold in default of replevying the same. 2 W. & M. Sess. 1, c. 5, s. 2.

Corn, etc. not to be removed by person distraining to the damage of owner, from the place where raised.

7. Every lessor or landlord, or person empowered by him, may take and seize as a distress for arrears of rent, any cattle or stock of his tenant feeding or depasturing upon any common appendant, or appurtenant, or any ways belonging, to all, or any part of, the premises demised, or holden; and may take and seize all sorts of corn, and grass, hops, roots, fruits, pulse, or other product whatsoever, which shall be growing on any part of the estate demised, or holden, as a distress for arrears of rent; and the same cut, gather, make, cure, carry and lay up, when ripe, in the barns, or other proper place, on the premises so demised, or holden; and in case there shall be no barn, or proper place, on the premises so demised, or holden, then, in any other barn, or proper place, which such lessor or landlord shall hire, or otherwise procure, for that purpose, and as near as may be to the premises, and in convenient time to appraise, sell, or otherwise dispose of the same, towards satisfaction for the rent for which such distress shall have been taken, and of the charges of such distress, appraisement, and sale, in the same manner as other goods and chattels may be seized, distrained, and disposed of; and the appraisement thereof shall be taken when cut, gathered, cured and made, and not before. 11 Geo. II., c. 19, s. 8.

Cattle on ways belonging to demised premises, and growing crops thereon may be distrained.

8.—(1) Notice of the place where the goods and chattels so distrained shall be lodged or deposited shall, within the space of one week after the lodging or depositing thereof in such place, be given to such lessee or tenant, or left at his last place of abode.

Tenants to have notice of the place where the distress is lodged.

(2) If after any distress for arrears of rent so taken of corn, grass, hops, roots, fruits, pulse, or other product, which shall be growing as aforesaid, and at any time before the same shall be ripe and cut, cured, or gathered, the tenant or lessee, his executors, administrators, or assigns, shall pay, or cause to be paid, to the lessor or landlord for whom such distress shall be taken, the whole rent which shall be then in arrear, with the full costs and charges of making such distress, and

Distress of growing crops may be satisfied by payment, before crops cut.

which shall have been occasioned thereby, then, upon such payment, or lawful tender, thereof actually made, whereby the end of such distress will be fully answered, the same and every part thereof shall cease, and the corn, grass, hops, roots, fruits, pulse, or other product, so distrained shall be delivered up to the lessee or tenant, or his executors, administrators, or assigns; anything hereinbefore contained to the contrary notwithstanding. 11 Geo. II., c. 19, s. 9.

Property Conditionally Exempt from Distress.

Horses and cattle not to be distrained if other sufficient distress.

9. Beasts that gain the land, and sheep, shall not be distrained for the King's debt, nor for the debt of any other man, nor for any other cause, if there be other chattels sufficient to satisfy the debt, or demand: but this provision is not to affect the right to impound beasts which a man findeth in his ground damage feasant. (Stat. of Exchequer, of uncertain date, sometimes styled 51 Hen. III., St. 4; Imp. Rev. St. 1870, p. 126).

Where Distress May be Taken.

Chattels not to be distrained off the premises.

10. Save as provided by section 7 and as hereinafter provided, chattels shall not be distrained for rent which are not at the time of the distress upon the premises in respect of which the rent distrained for is due. 52 Hen. III. (St. of Marlbridge), c. 15.

Landlords may distrain goods fraudulently carried off the premises.

11.—(1) In case any tenant, or lessee for life or lives, term of years, at will, sufferance, or otherwise, of any messuages, lands, tenements, or hereditaments, upon the demise, or holding whereof, any rent is reserved, due, or made payable, shall fraudulently, or clandestinely, convey away, or carry off, or from, such premises, his goods or chattels, to prevent the landlord or lessor from distraining the same for arrears of rent so reserved, due, or made payable, the landlord or lessor, or any person by him, for that purpose, lawfully empowered, may, within the space of thirty days next ensuing such conveying away, or carrying off such goods or chattels as aforesaid, take and seize such goods and chattels wherever the same shall be found, as a distress for the said arrears of rent, and the same sell, or otherwise dispose of, in such manner as if the said goods and chattels had actually been distrained by the lessor or landlord in and upon such premises for such arrears of rent; any law, custom, or usage to the contrary, notwithstanding. 11 Geo. II., c. 19, s. 1.

(2) No landlord or lessor, or other person entitled to such arrears of rent, shall take, or seize, any such goods or chattels as a distress for the same which shall be sold *bona fide* and for a valuable consideration, before such seizure made, to any person not privy to such fraud as aforesaid; anything herein contained to the contrary notwithstanding. 11 Geo. II., c. 19, s. 2. But not goods *bona fide* sold for value.

12. Where any goods or chattels fraudulently or clandestinely conveyed, or carried away, by any tenant or lessee, his servant or agent, or other person aiding or assisting therein, shall be put, placed, or kept, in any house, barn, stable, out-house, yard, close, or place, locked up, fastened, or otherwise secured, so as to prevent such goods or chattels from being taken and seized as a distress for arrears of rent, the landlord, or lessor, or his agent, may take and seize, as a distress for rent, such goods and chattels (first calling to his assistance the constable, or other peace-officer, of the place where the same shall be suspected to be concealed, who is hereby required to aid and assist therein; and in case of a dwelling house, oath being also first made before a justice of the peace of a reasonable ground to suspect that such goods or chattels are therein), and in the daytime break open and enter into such house, barn, stable, out-house, yard, close, and place, and take and seize such goods and chattels for the said arrears of rent, as he might have done if such goods and chattels had been put in any open field or place upon the premises from which the same have been so conveyed, or carried away. 11 Geo. II., c. 19, s. 7. Landlords may break open houses to seize goods fraudulently secured therein.

13.—(1) If a tenant or lessee shall fraudulently remove and convey away his goods or chattels as aforesaid, or if any person shall wilfully and knowingly aid or assist any such tenant or lessee in such fraudulent conveying away, or carrying off, of any part of his goods or chattels, or in concealing the same, every person so offending shall forfeit and pay to the landlord or lessor from whose estate such goods and chattels were fraudulently carried off as aforesaid, double the value of the goods by him carried off or concealed as aforesaid, to be recovered by action in any court of competent jurisdiction. 11 Geo. II., c. 19, s. 3. Penalty for fraudulently removing, or assisting to remove, goods.

(2) Where the goods and chattels so fraudulently carried off, or concealed, shall not exceed the value of $200, the landlord from whose estate such goods or chattels were removed, or his agent, may exhibit a complaint in writing against If the goods removed do not exceed $200 in

value complaint may be made to JJ.P.

such offender before two or more justices of the peace of the same county, residing near the place whence such goods and chattels were removed, or near the place where the same were found, not being interested in the lands or tenements whence such goods were removed, who may summon the offender, examine the fact, and all proper witnesses upon oath, and in a summary way determine whether such offender be guilty of the offence with which he is charged, and inquire in like manner of the value of the goods and chattels by him so fraudulently carried off, or concealed, as aforesaid; and upon full proof of the offence, by order under their hands and seals, the said justices of the peace may and shall adjudge the offender to pay double the value of the said goods and chattels to the landlord at such time as the said justices shall appoint, and in case the offender, having notice of such order, shall refuse or neglect so to do, may and shall, by warrant under their hands and seals, levy the same by distress and sale of the goods and chattels of the offender; and for want of such distress, may commit the offender to the common gaol, there to be kept to hard labour, without bail or mainprize, for the space of six months, unless the money so ordered to be paid as aforesaid shall be sooner satisfied. 11 Geo. II., c. 19, s. 4.

Appeal.

Rev. Stat. c. 90.

(3) Any person aggrieved by such order may appeal to the General Sessions in accordance with the provisions of *The Ontario Summary Convictions Act.* 11 Geo. II., c. 19, s. 5.

Execution of order to be stayed if security given.

(4) Where the party appealing shall enter into a recognizance with one or two sufficient surety or sureties in double the sum so ordered to be paid, with condition to appear at such General Sessions and to abide the order there to be made, the order of the said justices shall not be executed against him in the meantime. 11 Geo. II., c. 19, s. 6.

Impounding Distress.

Beasts distrained not to be driven out of the municipality as defined by Rev. Stat. c. 223.

14. Beasts or cattle distrained shall not be chased or driven out of the local municipality (as defined by *The Municipal Act*) in which they are distrained, except it be to a pound overt within the same county not above three miles distant from the place where the distress is taken. 3 Edw. I. (St. of Westminster Prim.), c. 16, and 1 P. & M. c. 12, s. 1, part.

(2) No cattle, or other goods, distrained or taken by way of distress for any manner of cause at one time, shall be impounded in several places, whereby the owner of such distress shall be constrained to sue several replevins for the delivery of the said distress so taken at one time; upon pain that every person offending shall forfeit to the party aggrieved $20, and treble damages. 1 P. & M. c. 12, s. 1, part. Chattels distrained at the same time not to be impounded in different places.

(As to sheaves and cocks of corn, or corn loose, or in the straw, or hay, see ante, s. 6, and as to growing crops, see s. 7.)

(3) Any person lawfully taking any distress for any kind of rent may impound or otherwise secure the distress so made, of what nature or kind soever it may be, in such place, or on such part of the premises chargeable with the rent, as shall be most fit and convenient for the impounding and securing such distress, and may appraise, sell and dispose of, the same upon the premises, in like manner, and under like directions and restraints to all intents and purposes, as any person taking a distress for rent may now do off the premises, and it shall be lawful for any person whomsoever to come and go to, and from, such place, or part of the said premises, where any distress for rent shall be impounded and secured as aforesaid, in order to view, appraise, and buy, and also in order to carry off or remove the same on account of the purchaser thereof, and if any pound-breach, or rescue, shall be made of any goods and chattels, or stock, distrained for rent, and impounded or otherwise secured by virtue of this Act, the person aggrieved thereby shall have the like remedy as in cases of pound-breach, or rescue. 11 Geo. II., c. 19, s. 10. Goods distrained may be impounded on demised premises.

Pound-Breach, or Rescue.

15. Upon any pound-breach, or rescue, of goods or chattels distrained for rent, the person grieved thereby shall, by action for the wrong thereby sustained, recover treble damages and costs of suit against the offender in any such rescue, or pound-breach, or against the owner of the goods distrained, in case the same be afterwards found to have come to his use or possession. 2 W. & M. Sess. 1, c. 5, s. 3. Pound-breach or rescue, damages for.

Sale of Goods Distrained.

16. Where any goods or chattels shall be distrained for any rent reserved and due upon any demise, lease, or contract whatsoever, and the tenant, or owner of the goods so distrain- Sale of distress,

ed, shall not, within five days next after such distress taken and notice thereof (with the cause of such taking) left at the dwelling house, or other most notorious place on the premises charged with the rent distrained for, replevy the same, with sufficient security to be given to the sheriff according to law, then, in such case, after such distress and notice as aforesaid, and expiration of the said five days, the person distraining shall cause the goods and chattels so distrained to be appraised by two appraisers, who shall first be sworn before a justice of the peace, or any other officer or person authorized to administer an oath, to appraise the same truly, according to the best of their understandings (a memorandum of which oath is to be indorsed on the inventory), and, after such appraisement, the person so distraining may lawfully sell the goods and chattels so distrained for the best price which can be got for the same, towards satisfaction of the rent for which the said goods and chattels shall be distrained, and of the charges of such distress, appraisement, and sale, and shall hold the overplus (if any) for the owner's use, and pay the same over to him on demand. (See 2 W. & M. Sess. 1, c. 5, s. 1.) 2 Edw. VII., c. 1, s. 22.

not till expiration of five days, and appraisement.

Wrongful, or Irregular, Distress.

Irregularities not to make distress void *ab initio.*

17. Where any distress shall be made for any kind of rent justly due, and any irregularity, or unlawful act, shall afterwards be done by the party distraining, or by his agent, or if there has been an omission to make the appraisement under oath, the distress itself shall not be therefore deemed to be unlawful, nor the party making it be deemed a trespasser *ab initio*, but the party aggrieved by such unlawful act, or irregularity, may recover by action full satisfaction for the special damage sustained thereby. 11 Geo. II., c. 19, s. 19.

Tender of amends, effect of.

(2) A tenant or lessee shall not recover in any action for any such unlawful act, or irregularity as aforesaid, if tender of amends hath been made before action. 11 Geo. II., c. 19, s. 20.

Wrongful distress, damages for.

Rev. Stat. c. 223.

18. A distrainor who takes an excessive distress, or takes a distress wrongfully, or wrongfully drives a distress out of the local municipality (as defined by *The Municipal Act*) in which the same was taken, shall be liable in damages to the owner of the chattels distrained. 52 Hen. III. (St. of Marlbridge), c. 4, in part; and 3 Edw. 1. (St. of Westminster Prim.), c. 16.

(2) In case any distress and sale shall be made for rent pretended to be in arrear and due, when, in truth, no rent is arrear or due to the person distraining, or to him in whose name or right such distress shall be taken, the owner of such goods or chattels distrained and sold, his executors, or administrators, may, by action to be brought against the person so distraining, recover double of the value of the goods or chattels so distrained and sold, together with full costs of suit. 2 W. & M. Sess. 1, c. 5, s. 4. Where no rent due.

GOODS TAKEN IN EXECUTION NOT TO BE REMOVED WITHOUT PAYMENT OF RENT.

19. No goods or chattels whatsoever lying or being in or upon any messuage, lands, or tenements, leased for life or lives, or term of years, at will, or otherwise, shall be liable to be taken by virtue of any execution issued out of the High Court of Justice, or a County Court, on any pretence whatsoever, unless the party at whose suit the execution is sued out shall, before the removal of such goods or chattels from off the said premises by virtue of such execution, pay to the landlord of the said premises, or his bailiff, all such sums of money as are due for rent of the premises at the time of the taking of such goods or chattels by virtue of such execution: Provided the said arrears of rent do not amount to more than one year's rent, and in case the said arrears shall exceed one year's rent then the party at whose suit such execution is sued out, paying the said landlord, or his bailiff, one year's rent, may proceed to execute his judgment as he might have done before the making of this Act, and the sheriff, or other officer, is hereby empowered and required to levy and pay to the execution creditor as well the money so paid for rent as the execution money. 8 Anne, c. 18 (or c. 14 in Ruffhead's Ed.), s. 1. Goods taken in execution not to be removed till rent paid.

OVERHOLDING TENANTS.

20. In case any tenant for any term for life, lives, or years, or other person who shall come into possession of any lands, tenements, or hereditaments, by, from, or under, or by collusion with, such tenant, shall wilfully hold over any lands, tenements, or hereditaments, after the determination of such term or terms, and after demand made and notice in writing given for delivering the possession thereof by his landlord or lessor, or the person to whom the remainder or reversion of such lands, tenements, or hereditaments shall Overholding tenant to pay double value.

belong, or his agent thereunto lawfully authorized, then, and in such case, such person so holding over shall, for and during the time he shall so hold over or keep the person entitled out of possession of the said lands, tenements, and hereditaments, as aforesaid, pay to the person so kept out of possession, or his assigns, at the rate of double the yearly value of the lands, tenements, and hereditaments, so detained, for so long time as the same are detained, to be recovered by action in any court of competent jurisdiction, against the recovering of which said penalty there shall be no relief in equity. 4 Geo. II., c. 28, s. 1.

Tenants overholding, after giving notice to quit, liable for double rent.

21. In case any tenant shall give notice of his intention to quit the premises by him holden at the time mentioned in such notice, and shall not accordingly deliver up the possession thereof at the time in such notice contained, the said tenant, his executors, or administrators, shall from thenceforward pay to the landlord or lessor double the rent or sum which he should otherwise have paid, to be levied, sued for, and recovered, at the same times and in the same manner as the single rent or sum, before the giving such notice, could be levied, sued for, or recovered; and such double rent or sum shall continue to be paid during all the time such tenant shall continue in possession as aforesaid. 11 Geo. II., c. 19, s. 18.

WASTE.

Waste by tenants.

22. Lessees making or suffering waste on the demised premises, without the license of the lessors, shall be liable for the full damage so occasioned. 52 Hen. III. (St. of Marlbridge), c. 23.

(*See R. S. O. c. 330, ss. 21-23.*)

ATTORNMENT.

Attornment to stranger to title void.

23. Every attornment of any tenant of any messuages, lands, tenements, or hereditaments, within Ontario, to any stranger claiming title to the estate of his landlord, shall be absolutely null and void to all intents and purposes whatsoever; and the possession of his landlord or lessor shall not be deemed, or construed to be, anywise changed, altered, or affected, by any such attornment; provided always, that nothing herein contained shall extend to vacate, or affect, any attornment made pursuant to, and in consequence of, some judgment or order of a court, or made with the privity and

consent of the landlord or lessor, or to any mortgagee, after the mortgage is become forfeited. 11 Geo. II., c. 19, s. 11.

Attornment of tenant, in what cases not necessary.

24.—(1) All grants or conveyances of any rents, or of the reversion, or remainder, of any messuages or lands, shall be good and effectual to all intents and purposes without any attornment of the tenant of the land out of which such rent shall be issuing, or of the particular tenant upon whose particular estate any such reversion, or remainder, shall and may be expectant, or depending, as if his attornment had been had and made. 4 & 5 Anne, c. 3 (or c. 16 in Ruffhead's Ed.), s. 9.

Tenant not to be prejudiced

(2) No tenant shall be prejudiced, or damaged, by payment of any rent to any grantor, or conusor, or by breach of any condition for non-payment of rent, before notice shall be given to him of such grant by the conusee, or grantee. 4 & 5 Anne, c. 3 (or c. 16 in Ruffhead's Ed.), s. 10.

RENEWALS—CHIEF LEASE MAY BE RENEWED WITHOUT SURRENDER OF UNDER-LEASE.

Chief leases may be renewed without surrendering all the under-leases.

25. In case any lease shall be duly surrendered in order to be renewed, and a new lease made and executed by the chief landlord, the same new lease shall, without a surrender of all or any of the under-leases, be as good and valid to all intents and purposes as if all the under-leases derived thereout had been likewise surrendered, at or before the time of taking of such new lease; and every person in whom any estate for life, or lives, or for years, shall from time to time be vested by virtue of such new lease shall be entitled to the rents, covenants, and duties, and have like remedy for recovery thereof, and the under-lessees shall hold and enjoy the messuages, lands, and tenements in the respective under-leases comprised, as if the original leases, out of which the respective under-leases are derived, had been still kept on foot and continued, and the chief landlord shall have, and be entitled to, such and the same remedy by distress, or entry, in and upon the messuages, lands, tenements, and hereditaments, comprised in any such under-lease, for the rents and duties reserved by such new lease, so far as the same exceed not the rents and duties reserved in the lease out of which such under-lease was derived, as they would have had in case such former lease had been still continued, or as they would have had in case the respective under-leases had been renewed under such

new principal lease, any law, custom, or usage, to the contrary hereof notwithstanding. 4 Geo. II., c. 28, s. 6.

(*See R. S. O. c. 170, s. 10.*)

RENEWAL OF LEASES BY ABSENTEES.

If persons bound to renew are out of Ontario, the renewals may be made by a person appointed by the Court in the name of the person who ought to have been renewed.

26. Where any person who, in pursuance of any covenant or agreement in writing, might, if within Ontario and amenable to the process of the High Court of Justice, be compelled to execute any lease by way of renewal, shall not be within Ontario, or not amenable to the process of the said Court, it shall be lawful for the said High Court of Justice by an order to be made upon the petition or motion of any person entitled to such renewal (whether such person be, or be not under any disability), to direct such person as the said Court shall think proper to appoint for that purpose to accept a surrender of the subsisting lease, and make and execute a new lease in the name of the person who ought to have renewed the same; and such deed executed by the person to be appointed as aforesaid, shall be as valid as if the person in whose name the same shall be made had executed the same, and had been alive, and not under any disability, and had himself executed the same; but in every such case it shall be in the discretion of the said Court, if under the circumstances it shall seem requisite, to direct an action to be brought to establish the right of the party seeking the renewal, and not to make the order for such new lease unless by the judgment to be made in such cause, or until after such judgment shall have been made. Imp. Act, 11 Geo. IV., and 1 Wm. IV., c. 65, s. 18.

Fines to be paid before renewals and counterparts are executed.

27. No renewed lease shall be executed by virtue of section 26, in pursuance of any covenant or agreement, unless the fine (if any), or the sum or sums of money (if any) which ought to be paid on such renewal, and the things (if any) which ought to be performed in pursuance of such covenant or agreement by the lessee or tenant, be first paid and performed, and counterparts of every renewed lease to be executed by virtue of this Act shall be duly executed by the lessee. Imp. Act, 11 Geo. IV., and 1 Wm. IV., c. 65, s. 20.

Premiums how to be paid.

28. All fines, premiums, and sums of money, which shall be had, received, or paid, for, or on account of, the renewal of any lease, by any person out of Ontario, or not amenable as aforesaid, after a deduction of all necessary incidental

charges and expenses, shall be paid, to such person, or in such manner, or into the High Court of Justice to such account, and be applied, and disposed of, as the said Court shall direct. Imp. Act, 11 Geo. IV., and 1 Wm. IV., c. 65, s. 21.

Costs may be directed to be paid.

29. The High Court of Justice may order the costs and expenses of, and relating to, the petitions, orders, directions, conveyances, and transfers, to be made in pursuance of section 26, or any of them, to be paid and raised out of, or from, the lands, or the rents, in respect of which the same respectively shall be made, in such manner as the said Court shall think proper. Imp. Act, 11 Geo. IV., and 1 Wm. IV., c. 65, s. 35.

REVISED STATUTES OF ONTARIO, 1897.

SECTIONS 21 TO 30 INCLUSIVE
OF

CHAPTER 330.

An Act respecting Real Property.

WASTE.

Waste by tenants by curtsey, dowress, etc.

21. A tenant by the curtesy, a dowress, a tenant for life, or for years, and the guardian of the estate of an infant, shall be impeachable for waste, and liable in damages to the person injured. 6 Edw. 1 (St. of Gloucester), c. 5.

(*For other remedies see The Judicature Act, s.* 58 (9).

Waste between joint tenants and tenants in common.

22. Tenants in common, and joint tenants, shall be liable to their co-tenants for waste, or, in the event of a partition, the part wasted may be assigned to the tenant committing such waste, at the value thereof to be estimated as if no such waste had been committed. 13 Edw. I. (Stat. of Westminster, Sec.), c. 22.

Waste by lessees.

23. Lessees making or suffering waste on the demised premises without license of the lessors, shall be liable for the full damage so occasioned. 52 Hen. 3, (St. of Marlbridge) c. 23.

DEFECTS IN LEASES MADE UNDER POWERS OF LEASING.

Leases invalid owing to deviation from terms of the power to be deemed contracts in equity for such leases as might have been granted under the power.

24. Where, in the intended exercise of any power of leasing, whether derived under a statute or under any instrument lawfully creating such power, a lease has been, or shall hereafter be granted, which is, by reason of the non-observance or omission of some condition or restriction, or by reason of any other deviation from the terms of such power, invalid as against the person entitled after the determination of the interest of the person granting such lease, to the reversion, or against other the person who, subject to any lease lawfully granted under such power, would have been entitled to the hereditaments comprised in such lease, such lease, in case the same have been made bona fide, and the lessee named therein, his heirs, executors, administrators, or assigns (as the case may require), have entered thereunder, shall be considered in equity as a contract for a grant, at the request of the lessee, his heirs, executors, administrators, or assigns (as the case may

require), of a valid lease under such power, to the like purport and effect as such invalid lease as aforesaid, save so far as any variation may be necessary in order to comply with the terms of such power; and all persons who would have been bound by a lease lawfully granted under such power shall be bound in equity by such contract: Provided always that no lessee under any such invalid lease as aforesaid, his heirs, executors, administrators, or assigns, shall be entitled, by virtue of any such equitable contract as aforesaid, to obtain any variation of such lease, where the persons who would have been bound by such contract are willing to confirm such lease without variation. Imp. Act, 12 & 13 Vict. c. 26, s. 2.

Proviso where the grantor or reversioner is willing to confirm.

25. Where, upon or before the acceptance of rent, under any such invalid lease, any receipt, memorandum, or note in writing, confirming such lease, is signed by the person accepting such rent, or some other person by him thereunto lawfully authorized, such acceptance shall, as against the person so accepting such rent, be deemed a confirmation of such lease. Imp. Act, 13 Vict. c. 17, s. 2.

Where there is a note in writing showing intent to confirm, acceptance of rent to be deemed a confirmation.

26. Where, during the continuance of such possession taken under any such invalid lease, the person for the time being entitled (subject to such possession as aforesaid) to the hereditaments comprised in such lease, or to the possession or the receipt of the rents and profits thereof, is able to confirm such lease without variation, the lessee, his heirs, executors or administrators (as the case may require), or any person who would have been bound by the lease if the same had been valid, shall, upon the request of the person so able to confirm the same, be bound to accept a confirmation accordingly; and such confirmation may be by memorandum or note in writing, signed by the persons confirming, and accepting, respectively, or by some other persons by them respectively thereunto lawfully authorized; and, after confirmation, and acceptance of confirmation, such lease shall be valid, and shall be deemed to have had, from the granting thereof, the same effect, as if the same had been originally valid. Imp. Act, 13 Vict. c. 17, s. 3.

Where reversioner is able and willing to confirm, lessee to accept confirmation.

27. Where a lease granted in the intended exercise of any power of leasing is invalid by reason that, at the time of the granting thereof, the person granting the same could not lawfully grant such lease, but the estate of such person in the hereditaments comprised in such lease shall have continued after the time when such, or the like lease, might have been

Leases invalid at the granting thereof may become valid if the grantor

continue in the ownership until the time when he might lawfully grant such a lease.

granted by him in the lawful exercise of such power, then, and in every such case, such lease shall take effect, and be as valid, as if the same had been granted at such last mentioned time, and all the provisions herein contained shall apply to every such lease. Imp. Act, 12 & 13 Vict. c. 26, s. 4.

What shall be deemed an intended exercise of a power.

28. Where a valid power of leasing is vested in, or may be exercised by, a person granting a lease, and such lease (by reason of the determination of the estate or interest of such person, or otherwise) cannot have effect or continuance according to the terms thereof, independently of such power, such lease shall, for the purposes of the four preceding sections of this Act, be deemed to be granted in the intended exercise of such power, although such power be not referred to in such lease. Imp. Act, 12 & 13 Vict. c. 26, s. 5.

Saving the rights of the lessees under covenants for title and for quiet enjoyment and the lessor's right of re-entry for breach of covenant, etc.

29. Nothing herein contained shall extend to, or be construed to prejudice, or take away, any right of action, or other right or remedy, to which, but for the five preceding sections of this Act, the lessee named in any such lease as aforesaid, his heirs, executors, administrators, or assigns, would or might have been entitled, under or by virtue of any covenant for title or quiet enjoyment contained in such lease on the part of the person granting the same, or to prejudice, or take away, any right of re-entry, or other right or remedy to which, but for the said five preceding sections, the person granting such lease, his heirs, executors, administrators, or assigns, or other person, for the time being entitled to the reversion expectant on the determination of such lease, would or might have been entitled, for, or by reason of, any breach of the covenants, conditions, or provisoes contained in such lease, and on the part of the lessee, his heirs, executors, administrators, or assigns, to be observed and performed. Imp. Act, 12 & 13 Vict. c. 26, s. 6.

Act not to extend to certain leases.

30. The six preceding sections shall not extend to any lease by an ecclesiastical corporation or spiritual person, or to any lease of the possessions of any college, hospital, or charitable foundation, or to any lease where, before the 10th day of June, 1857, the hereditaments comprised in such lease have been surrendered or relinquished, or recovered adversely by reason of the invalidity thereof, or there has been any judgment or decree in any action or suit concerning the validity of such lease. Imp. Act, 12 & 13 Vict. c. 26, s. 7.

SCHEDULE OF FORMS.

1. SHORT FORM LEASE.

This Indenture, made the day of in the year of our Lord one thousand hundred . In pursuance of the Act respecting Short Forms of Leases:

* This Form is given as it shows the statutory lease complete. The special covenants applicable to particular cases are printed as Forms Nos. 10, 11, 12 and 13, and can be added as required. Forms 15 and 16 must also be inserted. See note, page 177.

Between

hereinafter called the lessor of the first part; and

hereinafter called the lessee of the second part.

Witnesseth, that in consideration of the rents, covenants and agreements hereinafter reserved and contained on the part of the said lessee executors, administrators and assigns, to be respectively paid, observed and performed, he the said lessor ha demised and leased, and by these presents do demise and lease unto the said lessee , executors, administrators and assigns, all that messuage or tenement situate, lying and being

To have and to hold the said demised premises for and during the term of years, to be computed from the day of one thousand hundred and from thenceforth next ensuing, and fully to be complete and ended.

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

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

1. The said lessee covenant with the said lessor to pay rent.

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

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

4. And to keep up fences.

5. And not to cut down timber.

6. And that the said lessor may enter and view state of repair, and that the said lessee will repair according to notice in writing, reasonable wear and tear and damage by fire, lightning and tempest only excepted.

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

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

9. Provided, that the lessee may remove h fixtures.

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

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

12. The said lessor covenant with the said lessee for quiet enjoyment.

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

Signed, sealed and delivered
in the presence of

2. FURNISHED HOUSE LEASE.

This Indenture, made the day of in the year of our Lord 190

In pursuance of the Act respecting Short Forms of Leases.

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

Witnesseth that in consideration of the rents, covenants and agreements reserved and contained on the part of the said lessee , executors, administrators and assigns, to be respectively paid, observed and performed the said lessor ha demised and leased, and by these presents do demise and lease unto the said lessee all that house and premises known as No. in the said , together with the use of all fixtures, furniture and effects therein contained and more particularly set out in the schedule hereto attached, to have and to hold the said hereby demised premises with their appurtenances, unto the said lessee , executors, administrators and assigns for the term of to be computed from the day of 190 , and ending on the day of 190 . Yielding and paying therefor, unto the said lessor , heirs or assigns, the sum of dollars per month in advance, on the days of each and every month during the continuation of the said term, without any deduction, defalcation or abatement whatsoever; the first of such payments to be made on the day of 190 .

And the said lessee , for heirs, executors, administrators and assigns hereby covenant with the said lessor , heirs, and assigns, to pay said rent, water rates, gas and electric light rates; and to keep the plumbing and premises generally and all the articles mentioned in the schedule hereto attached in good repair and condition, ordinary wear and tear and damage by fire or the act of Providence only excepted; and to replace such articles as shall be broken, damaged, or missing, with other articles of like pattern and equal value as near as may be; and to take proper care of the grass, trees, shrubs and flowers contained on the said premises or in the street in front thereof; and that the said lessor or agent, may enter and view state of repair; and that the said lessee will repair according to notice; and will not assign or sub-let the whole or any portion of the said premises, nor make any alteration, nor permit any auction sale to be held therein, without the written consent of the said lessor ; and will not carry on any business that shall be deemed a nuisance on the said premises, or by which the insurance on the said premises will be increased; and that will leave the premises in good repair; and will keep the sidewalks clear of snow and ice; and will permit the said lessor or agent to show the premises to persons wishing to rent or purchase, and allow the usual notice of "To Let" or "For Sale" upon the wall or woodwork of said premises, and to remain thereon without hindrance or molestation.

And also, that if the said premises shall remain unoccupied at any time during the said term, or should the rent not be paid promptly when due, the lessor or agent may re-enter the same,

either by force or otherwise, without being liable to any prosecution therefor, and re-let the said premises as the agent of the said lessee and receive the rent thereof, and apply the same, first, to the payment of such expenses as the lessor may be put to in re-entering, and then to the payment of the rent due by these presents, until the full expiration of the term hereby granted

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

And it is hereby declared and agreed that in case the premises hereby demised, or any part thereof, shall at any time during the term hereby granted be burned down, or damaged by fire, so as to render the same unfit for the purposes of the said lessee then, and so often as the same shall happen, the rent hereby reserved, or a proportionate part thereof according to the nature and extent of the injury sustained, and all remedies for recovering the same, shall be suspended and abated, until the said premises shall have been re-built or made fit for the purposes of the said lessee , but the said lessor shall not be bound to re-build

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

Signed, sealed and delivered
in presence of

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3. MEMORANDUM OF AGREEMENT FOR RENTAL OF FURNISHED ROOMS.

This agreement, made this day of 19 .

I, of the hereby agree to rent by the week (or month as the case may be) from of the same place (owner) the following premises, viz.: commencing on the day of 19 , at a rental of dollars per week (or month), and to pay said rent in advance, on each succeeding of each week (or month) without any previous demand therefor while I am a tenant of said rooms, and to keep the premises in good repair, and keep in good order and repair all the furniture, china, glass, or crockeryware and stuff in said rooms; and to account and pay for anything damaged, destroyed or not delivered up when leaving said rooms; and to leave said rooms and the furniture and things therein clean, and not to allow any business therein that may be deemed a nuisance, and not to assign or sub-let any part of same, or take in any lodgers, boarders or others, except myself and family; and on non-observance or non-performance by me of any of the above covenants, or non-observance or non-performance of them, or any one of them, the said (landlord) may without any previous notice or demand, re-enter and take possession of said premises and furniture.

And should any rent be in arrear at any time during or after said term the said (landlord) may with or without any previous notice or demand distrain therefor any goods and chattels whatsoever or of any kind or description on said premises, or that may have been removed therefrom, to avoid distress, notwithstanding any Act of the Legislature of Ontario to the contrary notwithstanding. Any matter

or thing that may be done by the said owner, under this agreement, may be done by legal representative or representatives, or assigns, or any person authorized to act for or them.

I further certify by my execution of this agreement that I am the bona fide owner of all the goods and chattels, furniture and stuff in and about said rooms, except the furniture and stuff belonging to and rented by me with said rooms.

Witness my hand and seal this
day of 19

Witness.

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4. LEASE OF PART OF A HOUSE.

Agreement made the day of , 19 , Between A. B., of and C. D., of, etc.; whereby the said A. B. agrees to let, and the said C. D. agrees to take, the rooms or apartments following, that is to say: being part of a house and premises in which the said A. B. now resides, situate and being No. , in street, in the of .

To have and to hold the said rooms and apartments for and during the term of half a year, to commence from the day of instant, at and for the yearly rent of lawful money of Canada, payable monthly, by even and equal portions, the first payment to be made on the day of next ensuing the date hereof; and it is further agreed that, at the expiration of the said term of half a year [the said C. D. may hold, occupy and enjoy the said rooms or apartments from month to month for so long a time as the said C. D. and A. B. shall agree, at the rent above specified]; or [that each party be at liberty to quit possession on giving the other a month's notice in writing], or, as the case may be.

If any arrangement is made for further continuation.

And it is also further agreed, that when the said C. D. shall quit the premises, he shall leave them in as good condition and repair as they shall be in on his taking possession thereof, reasonable wear excepted.

In witness, etc.

Signed, sealed, etc.

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5. MINING LEASE.

This Indenture, made (in duplicate) this day of in the year of our Lord one thousand hundred

Between

hereinafter called the party of the first part; and

hereinafter called the party of the second part.

Witnesseth that in consideration of the sum of dollars, now paid by the party of the second part to the party of the first part (the receipt whereof is hereby acknowledged) h the party of the first part agrees to allow the party of the second part

to enter upon the following lands and premises, namely, all and singular that certain parcel or tract of land and premises situate, lying and being

And mine for gold, silver, iron, lead, copper, and all other metals and remove the product thereof, for the term of

Provided the lessee may purchase the entire mineral right of the lands and premises above mentioned with all mines of gold, silver, iron, lead, copper, and metals and minerals of every description found or hereafter to be found in, under or upon the same, with the right to work and remove the same, and all necessary room to pile ore waste and rubbish and to erect buildings and machinery for the purpose of working said mines, and all necessary rights of way over any part of said demised premises for the price or sum of dollars, provided the same be paid at any time during the said term.

The lessor agrees to convey to the lessee by good and sufficient deed free and clear from all encumbrances in case of purchase.

This agreement is binding on the parties hereto, their heirs, executors, administrators and assigns.

In witness whereof the parties hereto have hereunto set their hands and seals the day and year first above written
Signed, sealed and delivered in the presence of

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6. UNDER-LEASE.

This Indenture, made the day of , A.D. 19 , Between C. D., of , of the one part, and E. F., of , of the other part, witnesseth as follows:

1. The said C. D. demises to the said E. F., his executors and administrators, the premises described in the first schedule hereto, with their appurtenances, from the date hereof, for years, except the last three days, at the yearly rent of $, payable, etc. [as in original lease].

Be very careful in using this form.

2. The said E. F., for himself, his heirs, executors and administrators, covenants with the said C. D., his executors, administrators and assigns (hereinafter called "the lessors"), that the said E. F., his executors and administrators (hereinafter called "the lessees") will pay, etc. [follow the terms of the original lease to the end, substituting the assignor for the lessor, and the assignee for the lessee.]

In witness, etc.

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7. FORM OF ASSIGNMENT OF LEASE.

This Indenture, made the day of , one thousand nine hundred and .

Between , hereinafter called the assignor of the first part; and hereinafter called the assignee of the second part.

Whereas, by an indenture of lease, bearing date the day of one thousand nine hundred and made between the said lessor therein named, did demise and lease unto the said

lessee therein named executors, administrators, and assigns, all and singular, th certain parcel or tract of land and premises, situate, lying and being in the, etc. [description]. Description of land must be inserted for registration if necessary.

To hold the same, with the appurtenances, unto the said lessee executors, administrators, and assigns, from the day of one thousand nine hundred and for and during the term of years from thence next ensuing, and fully to be complete and ended, at the yearly rent of dollars, and under and subject to the lessee's covenants and agreements in the said indenture of lease reserved and contained.

Now this indenture witnesseth, that in consideration of the sum of of lawful money of Canada, now paid by the assignee to the assignor (the receipt whereof is hereby acknowledged) the said assignor do hereby grant, bargain, sell, assign, transfer, and set over unto the assignee executors, administrators, and assigns, all and singular, the said parcel or tract of land, and all other the premises comprised in and demised by the said hereinbefore in part recited indenture of lease, together with the said indenture of lease, and all benefit and advantage to be had or derived therefrom; to have and to hold the same, together with all houses and other buildings, easements, privileges and appurtenances thereunto belonging, or in any wise appertaining unto the said assignee executors, administrators, and assigns, from henceforth for and during all the residue of the said term granted by the said indenture of lease, and for all other the estate, term, right of renewal (if any), and other the interests of the assignor therein, subject to the payment of the rent and the observance and performance of the lessee's covenants and agreements in the said indenture of lease contained.

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

Signed, sealed and delivered in the presence of

(*Usual Affidavit of Execution.*)

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8. FORM OF MORTGAGE OF LEASE.

This Indenture, made the day of one thousand nine hundred and

Between hereinafter called the mortgagor of the first part; and hereinafter called the mortgagee of the second part.

Whereas, by an indenture of lease bearing date on or about the day of one thousand nine hundred and made between the lessor and the lessee, the said lessor did demise and lease unto the said lessee executors, administrators and assigns, the lands hereinafter mentioned, with the appurtenances, Recitals.

Covenants 2, 3, 4, 5 of Short Forms of Conveyances Act are implied by this assignment. They are for Right to Convey, Quiet Enjoyment, Free from Incumbrances, Further Assurance, also for Validity of Lease. If by a trustee, a covenant also against such trustee's own acts.

to hold for and during the term of years, from the day of one thousand nine hundred and at the yearly rent of dollars, and under and subject to the lessee's covenants and agreements therein contained.

And whereas the said leasehold lands and term of years have been assigned to the said mortgagor, executors, administrators and assigns.

Now this indenture witnesseth, that in consideration of dollars now paid by the said mortgagee to the said mortgagor (the receipt whereof is hereby acknowledged) he the said mortgagor do hereby grant, bargain, sell, assign, transfer and set over unto the said mortgagee executors, administrators and assigns, all and singular the said leasehold lands, being that certain parcel of land situate with the appurtenances, and all other the premises comprised in and demised by the said lease and the unexpired residue of the said term of years (excepting one day thereof), and all other the estate, term, right of renewal, and other the interest of the said mortgagor therein: to hold unto the said mortgagee executors, administrators and assigns.

Describe land fully.

Provided, that if the said mortgagor executors, or administrators, do pay unto the said mortgagee executors, administrators, or assigns, dollars, with interest at per cent. per annum, as follows: and all rents reserved and payable in respect of the said term of years, and all rates and taxes and charges whatsoever, payable upon or in respect of the said lands, and all premiums of insurance upon the buildings upon the said lands, and all payments which are, or may be, payable in respect of, or in consequence of anything contained in the said lease, then these presents shall cease and be void.

And the said mortgagor for executors and administrators, covenant with the said mortgagee executors, administrators, and assigns.

Covenant to pay.

That the said mortgagor executors and administrators, will well and truly pay or cause to be paid unto the said mortgagee executors, administrators or assigns, the said principal sum and interest at the times and in manner above provided; and also (unless and until upon default the mortgagee executors, administrators or assigns do enter upon, lease or sell the said premises) will well and truly pay the said rents, rates, taxes, charges, premiums of insurance and payments, and perform and observe all the covenants and conditions expressed or implied in or by the said lease, and indemnify and save harmless the said mortgagee executors, administrators and assigns, against payment of any such rents, rates, taxes, charges, premiums of insurance and payments, and against all loss, costs, damages and forfeitures whatsoever occasioned by or by reason of or consequent upon any non-payment, non-performance or non-observance in the premium: and further, that if the mortgagor executors or administrators, do make default in payment of any such rent, rates, taxes, charges, premiums of insurance or payments, and the mortgagee executors, administrators or assigns, do pay the same, or any part thereof, the mortgagor executors and administrators, will pay to him and them the amount so paid with interest at the rate of per cent. per annum, and the said premises shall stand charged therewith upon this security.

Lease a good security.

And that the said lease is at the time of the sealing and delivery of these presents a good, valid and subsisting lease in the law and not surrendered, forfeited or become void or voidable; and that the rents and covenants therein reserved and contained have been duly paid and performed by the said mortgagor up to the day of the date hereof.

Mortgagor has power to assign.

And that the said mortgagor now ha in good right, full power and lawful and absolute authority to grant, bargain and assign the said lands and premises in manner aforesaid and according to the true intent and meaning of these presents.

Right of entry.

And that in case of default in the payment of any of the moneys or interest hereby secured, or any part thereof, the said mortgagee executors, administrators or assigns, may enter into and upon and hold and enjoy the said premises for the residue of the said term of years and the renewal or renewals thereof (if any) for their own use and benefit, without the let, suit, hindrance, interruption or denial of the said mortgagor executors, administrators or assigns, or any other person whomsoever; and that free and clear and freely and clearly acquitted, exonerated and discharged, or otherwise by and at the expense of the said mortgagor executors and administrators, well and effectually saved, defended and kept harmless, of, from and against all former and other gifts, grants, bargains, sales, leases and other incumbrances whatsoever; and that the said mortgagor ha not nor has any other person heretofore made, done, committed or suffered any act, deed, matter or thing whereby or by reason whereof the said premises, or any part thereof, have or has been or may be in anywise charged, affected or encumbered.

Further assurance.

And that the said mortgagor executors, administrators and assigns, and all other persons claiming any interest in the said premises, shall and will from time to time, and at all times hereafter, at the request and costs of the said mortgagee executors, administrators or assigns, make, do and execute, or cause and procure to be made, done and executed, all such further acts, deeds, assignments and assurances in the law for more effectually assigning and according to the true intent and meaning of these presents, as by the said mortgagee executors, administrators and assigns, or his or their counsel in the law, shall be reasonably advised or required.

Insurance.

And also that (unless and until upon default the mortgagee executors, administrators or assigns, do enter upon, or lease or sell the said premises) will from time to time insure, and keep insured, the buildings erected, or to be erected, on the said lands, against loss or damage by fire in some insurance office, or offices, to be approved by the mortgagee executors, administrators, and assigns, in the full amount of dollars, at the least; and at the expense of the said mortgagor executors, and administrators, immediately assign the policy, or policies, of insurance, and all benefits thereof, to the said mortgagee executors, administrators, and assigns, as additional security for the payment of the moneys and interest hereby secured; and that, in default of such insurance, it shall be lawful for the said mortgagee executors, administrators, or assigns, to effect the same; and the moneys so paid, and interest thereon, shall be a charge upon the said lands until repaid.

Relief against forfeiture.

Provided, and it is agreed, that on default of payment of any part of the interest hereby secured, or any part of the said rents, rates, taxes, charges, premiums of insurance, or other payments, the principal money hereby secured shall become payable; but that in

such case at any time within which by law relief could be obtained, the mortgagor executors, administrators and assigns, shall, on payment of all arrears and costs, be relieved from the consequences of non-payment of so much of the moneys as has not become payable by lapse of time.

Mortgagee on default may enter and sell.

It is hereby agreed and declared, that in case of default in payment of any of the moneys or interest hereby secured, or any part thereof, and months shall have elapsed without such payment being made (of which default, as also of the continuance of some part of the said moneys or interest on this security, the production of these presents shall be conclusive evidence), the mortgagee executors, administrators, or assigns, may, without any further consent or concurrence of the mortgagor executors, administrators, or assigns, enter into possession of the said lands and premises, and receive and take the rents, issues and profits thereof, and whether in or out of possession, may make any such lease thereof, or any part thereof, as shall think fit; and also may sell and absolutely dispose of the said lands, and the then unexpired term of years therein, and the right of renewal and premises hereby assigned, or any part or parts thereof, by public auction or private contract, or partly by the one and partly by the other, and may withdraw from sale, or buy in, or re-sell, or vary, or rescind, any contract of sale without being responsible for any loss, costs or deficiency thereby occasioned, and may make such terms and conditions of sale and agreements as to title, price, and all other matters whatsoever, as may deem expedient, and may convey and assure the same when so sold to the purchaser or purchasers, and his, her, or their executors, administrators and assigns; provided, that the mortgagee executors, administrators and assigns, shall stand possessed of the said lands, and the rents and profits thereof, until sale, and then of the proceeds of sale in trust, firstly, to pay all costs of getting and keeping possession of the said lands and premises, and of repairs, and of and about the leasing and selling thereof; secondly, to pay all moneys and interest hereby secured; and, lastly, to pay the surplus, if any, to the said mortgagor executors, administrators and assigns, and to re-convey to them the said premises, or so much (if any) thereof as shall remain unsold.

Re-demise clause.

Provided lastly, that until default in payment of some part of the moneys and interest hereby secured, it shall be lawful for the said mortgagor executors, administrators and assigns, to hold, occupy, possess and enjoy the said lands and premises hereby assigned, with the appurtenances, without any molestation, interruption, or disturbance, of, from, or by the said mortgagee executors, administrators and assigns, or any other person claiming under them.

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

Signed, sealed and delivered in the presence of

(*Usual Affidavit of Execution.*)

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9. SURRENDER OF A TENANCY.

Agreement made this day of 19 , between A. B., of, etc., of the one part, and C. D. of, etc., of the other part.

Whereas the said A. B. has been lately, and up to the date hereof, the occupier of premises, as the tenant of the said C. D., under a lease, dated the day of , 19 [or, as the case may be]).

And whereas it has been agreed by and between the said A. B. and C. D. that such tenancy shall be determined forthwith: Now, it is hereby witnessed, that in consideration of being relieved by the said C. D. from the further payment of rent and performance of the stipulations contained in the said lease of the day of 19 , the said A. B. hereby delivers up and surrenders the said dwelling house, and all his interest therein, under the said agreement, to the said C. D. And the said C. D., in consideration of such surrender, accepts the same, and releases the said A. B. from any further payment of rent for the said dwelling house, and hereby discharges and exonerates the said A. B. from any further fulfilment of, or liability on account of, any of the stipulations or obligations contained in the said agreement, and on the part of the said A. B. to be performed, but without prejudice to the rights and remedies of the said C. D., in respect to any past breaches of such stipulations and obligations. In witness, etc.

NOTE.—This form will easily be adapted to the surrender of a tenancy under a written agreement (not under seal) for three years. If the lease be for a term of more than three years, and by deed, it can only be surrendered by deed.

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10. SPECIAL COVENANTS APPLICABLE TO HOUSE LEASE.*

The said lessee covenants with the said lessor to pay rent and water and gas rates.

And that the said lessee will not make any alteration nor permit an auction sale to be held therein without consent of lessor in writing, and will not carry on any business on said premises that shall be deemed a nuisance. And will keep the house and premises, including the plumbing and water taps, in good repair, and will keep the boulevard and other sodded spaces in good order. And will permit the lessor to place and keep a Notice of Sale or To Let on the house, and when giving up possession will leave the same in a clean state, making good all damages done to windows, doors, walls, or any part of said premises.

And also if the premises shall be unoccupied at any time without the consent of the lessor, he or his agent may re-enter by force or otherwise upon said premises, and retain possession thereof.

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* The forms here given are based on the use, which is almost universal in Ontario, of the short form, as provided by the Short Forms of Leases Act. The covenants printed in this appendix are in addition to those contained in the short form. In drawing a lease it is well to use that form; if any particular covenant requires alteration, strike it out of the short form and write what you consider you require as an additional covenant. The effect of the short form is now well understood by our people, and the covenants it contains fairly carry out the average intentions of lessor and lessee. English conveyancers prefer to use the long covenants although the short form was authorized by Imperial Statute.

11. COVENANTS APPLICABLE TO LEASE OF LAND LET FOR PURPOSES OF BUILDING DWELLINGS.

And the said lessee do hereby, for executors, administrators and assigns, covenant, promise and agree with and to the said lessor heirs, executors, administrators and assigns, that the said lessee executors, administrators, or assigns, shall not nor will erect, or suffer or permit to be erected, put or placed upon the said demised premises any building or buildings whatsoever, other than those hereinbefore mentioned and described, and that if and when, and so often as any such building or buildings, other than those hereinbefore mentioned and described, shall during the said term be erected, put or placed upon the said demised premises, or any part thereof, then the said lessee executors, administrators, or assigns, shall and will, at or costs and charges, upon being notified so to do by the said lessor heirs, executors, administrators or assigns, immediately pull down, demolish, or remove the same, and within months thereafter, at or costs and charges, erect, construct, build and finish fit for habitation other buildings instead thereof, in accordance with the said plans hereunto annexed. And also, that the said lessee executors, administrators, or assigns, shall and will, within the said period of months from the date hereof, at or costs and charges, erect, construct and place a fence in front of the said demised premises, which fence shall be of such materials, and shall be erected in accordance with such plans as the said lessor heirs, executors, administrators, or assigns, shall approve of for that purpose. And also, that he the said executors, administrators, or assigns, or the occupant or occupants, tenant or tenants, of the said demised premises from time to time, shall not nor will, at any time during the said term, carry on, or permit or suffer to be carried on, within the said messuage dwelling house or tenements, so to be erected as aforesaid, or on any part of the same, any trade or business whatsoever, or convert the said dwelling house or tenements, or any part thereof, into a shop or shops, warehouse, or storehouse, or otherwise attempt to carry on any trade or business on the said demised land, or any part thereof, or suffer or permit the said lands or buildings to be occupied or used for any object or purpose whatever, other than for said dwelling house and premises, or for any purpose which shall in any way be deemed a nuisance, or which shall prejudicially affect the value of the same, or that of the surrounding or neighbouring lands and buildings.

Notice plans required.

Nuisance forbidden.

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12. COVENANTS APPLICABLE TO A FARM LEASE.

And the said lessee do hereby, for heirs, executors, administrators and assigns, covenant, promise and agree, to and with the said lessor heirs and assigns, in manner following, that is to say:

And that the said lessee will during the said term cultivate, till, manure, and employ such part of said demised premises as is now,

or shall hereafter be brought under cultivation, in a good husband-like and proper manner, so as not to impoverish or injure the soil, and plough said land in each year during said term inches deep, and at the end of said term will leave the said land so manured as aforesaid. And will crop the same during the said term by a regular rotation of crops in a proper farmer-like manner, so as not to impoverish or injure the soil of the said land, and will at the end of the said term leave said land so manured as aforesaid, and will use his best and earnest endeavours to rid said land of all docks, wild mustard, red roots, Canada thistles, and all other noxious weeds. And will preserve all orchard and fruit trees (if any) on the said premises from waste, damage or destruction; and will spend, use and employ, in a husband-like manner, upon the said premises, all the straw and dung which shall grow, arise, renew, or be made thereupon; and will allow any incoming tenant to plough the said land after harvest in the last year of the said term, and to have stabling for two horses and bed room for one man. And will leave at least acres seeded down with timothy and clover seed.

Good husbandry.

Rotation of crops.

Fruit.

Manure.

Seeding down.

(Instead of Short Form covenant number 5).

And shall not nor will during the said term cut any standing timber upon the said lands, except for rails or for buildings upon the said demised premises, or for firewood upon the premises, and shall not allow any timber to be removed from off the said premises.

(Instead of Short Form covenant number 3).

And also, shall and will at the costs and charges of the said lessee well and sufficiently repair and keep repaired the erections and buildings, fences and gates erected or to be erected upon the said premises.

(Another Form.)

That the said lessee will during the said term cultivate, till, manure and employ such parts of the said premises as are now or shall hereafter be brought under cultivation in a good husbandman-like and proper manner, and will in like manner crop the same by a regular rotation of crops so as not to impoverish, depreciate or injure the soil, and at the end of said term will leave the said land so manured as aforesaid. And will during the continuance of said term keep down all noxious weeds and grasses, and (so far as the same is practicable having regard to the present condition of the premises) will pull up or otherwise destroy all docks, red root, wild mustard, wild oats, wild tares, twitch grass, Canadian thistles and noxious weeds of all kinds which shall grow upon the said premises, or on the side of the roads or highways immediately adjacent thereto, and will not sow, or permit to be sown, any grain containing any foul seeds, and will not suffer or permit any such foul or noxious weeds or grasses to go to seed on the said premises. And will mow the grass along the fences and in the fence corners on said premises. And will spend, use and employ upon said premises, in a proper, husbandman-like manner all the straw and manure which shall grow, arise, renew or be made thereupon, and will not remove or permit to be removed from said premises any straw of any kind, manure, wood or stone, and will carefully stack or house the straw in the last year of said term, and will each and every year of said term turn all the manure thereon into a pile, that it may thoroughly heat and rot so as to kill and destroy any foul seeds which may be therein, and will thereafter, and not before, spread the same on the land. And will not

remove, alter or change the style or position of any buildings or fences on said premises without the consent of the said lessor in writing thereto. And will continuously throughout said term keep and maintain on said premises not less than head of cattle, exclusive of horses, sheep and pigs.

And will in each and every year of said term make naked summer-fallow of, or put in some hoe crop at least acres of said premises, and will plough, hoe and otherwise cultivate the same in a thorough farmer-like manner, so as to kill and destroy all noxious weeds and grasses which may grow thereon.

And will in each and every year of said term seed down with good timothy and clover seed, in a proper manner, at least acres of said premises, and will at the expiration of said term leave at least acres thereof in grass. And will without charge draw upon said premises from any reasonable distant place all materials supplied by the said lessor for the purpose of making alterations, repairs or improvements in or upon said premises during the currency of the said demise, if such alterations, repairs or improvements are made at the request of the said lessee.

And will carefully protect and preserve all orchard, fruit, shade and ornamental trees on said premises from waste, injury or destruction, and will carefully prune and care for all such trees as often as they may require it, and will not suffer or permit any horses, cattle or sheep to have access to the orchard on said premises, and will not allow the manure to be placed or to lie against the buildings on the said premises. And will allow any incoming tenant or purchaser to plough the said lands after harvest in the last year of said term, and to have stabling for one team, and bedroom for one man, and reasonable privileges and rights of way to do said ploughing. And will keep the mouths of all underdrains on said premises open and free from obstruction, and in good running order at all times during said term, and will not suffer or permit such drains, or the watercourses in any open ditches on said premises, to become obstructed, but will constantly keep the same free and clear, for the escape of the water flowing therein.

Provided also and it is hereby agreed that if at any time during said term the said lessee shall neglect to pull up or otherwise destroy or prevent from going to seed on said premises any wild mustard or other noxious weeds growing thereon, and which are reasonably within the power and duty of said lessee so to pull out or otherwise destroy, or prevent from going to seed, the said lessor may, by notice in writing, require the said lessee within 48 hours after the service of such notice, to pull out or otherwise destroy, or prevent the same from going to seed, and on default of the said lessee in so doing, the said lessor may enter upon the said premises with laborers and workmen and do the work by said notice required to be done by said lessee, and all costs, charges and expenses of or incidental thereto shall be added to the rents hereby reserved, and shall be recoverable in like manner as rent reserved, but this provision shall not in any way impair or abridge the right of re-entry by said lessor on non-performance of covenants.

13. SPECIAL COVENANTS APPLICABLE TO BUILDINGS LET FOR OFFICES.

The lessors covenant with the lessee that the lessors will during the term between the fifteenth day of October and the fifteenth day of May provide suitable means for heating and furnish heat for the said premises up to a reasonable temperature for the reasonable use thereof by the lessee between the hours of 9 a.m. and 6 p.m. except on Sundays and public holidays and during the making of repairs; but should the lessors make default in so doing they shall not be liable for indirect or consequential damages, or damages for personal discomfort or illness, and that they will keep in repair and provide power and attendance to work and will work an elevator in said building between the hours of 9 a.m. and 6 p.m. daily, except Sundays and Saturdays after 3 p.m. and public holidays, and during the making of repairs and in case of insufficient supply of power.

The lessors further covenant with the lessee that they will employ a caretaker for the said building who shall attend to, wash, and dust, and keep clean in a reasonable manner the demised premises and all the floors and windows in connection therewith, (but except as to the obligation to cause such work to be done the lessors shall not be responsible for any act of omission or commission on the part of the person or persons employed to perform such work), and that they will cause the halls and stairways leading from the entrance doors of the demised premises to be sufficiently lighted at all times between the hours of 8.30 a.m. and 6.30 p.m.

The lessee for sel clerks and other persons transacting business with the lessee shall be entitled to the use in common with the lessors, their other tenants, subtenants, and other persons with their sanction, to the elevator in the said building during the said term during the times above mentioned, but it is agreed with the lessee that he and his clerks and all other persons hereby permitted the use of said elevator shall do so at his, her and their sole risk, and under no circumstances shall the lessors be held responsible for any damage or injury happening to any person whilst using such elevator or occasioned to any person by such elevator or any other appurtenances, and whether such damage or injury happen by reason of the negligence or otherwise of the lessors or any of their employees, servants, agents or any other persons.

The lessee for sel clerks and other persons as aforesaid shall be entitled (in common as aforesaid) to enter the demised premises by means of the entrances on and the passages therefrom at all reasonable times, subject to the rules and regulations in regard to the said building hereto annexed.

The lessee for sel clerks and other persons as aforesaid shall be entitled (in common as aforesaid) to use water closet number in the flat of the said building, and the lessor will keep at all times said water closet clean and in good working order, and supplied with water from the public mains, save at such times as the general supply of water may be turned off from the public main; and in case the pipes affording the said supply be injured, or become filled up, or otherwise incapable of affording the same, the lessor will forthwith commence repairing or cleaning, and within a reasonable time have the necessary repairs effected, or the said pipes cleaned out so as to enable such supply to be continued.

The lessee covenants with the lessors that he will not at any time during the said term without the consent in writing of the lessors use or permit to be used the demised premises for any purpose other than

The lessors shall not be liable for any damage to any property at any time in the said demised premises or building from steam, waterworks, water, rain, or snow, which may leak into or through from any part of the said building to the premises hereby leased or from the pipes or plumbing of same, and from any other place and quarter.

The lessee shall give to the lessors proper written notice of any accident, or any defect in the water pipes, gas pipes, or heating apparatus, telephone, electric light, or any other wires.

RULES AND REGULATIONS FOR TENANTS.

1. The sidewalk, entry passages, elevators and stairways shall not be obstructed by any of the tenants, or used by them for any other purpose than for ingress and egress from and to their respective apartments.

2. The floors, skylights and windows that reflect or admit light into passage-ways or into any place in the building shall not be covered or obstructed by any of the tenants; and no awning shall be put up over any window without the sanction of the lessor. The water closets and other water apparatus shall not be used for any purpose other than those for which they were constructed, and no sweepings, rubbish, rags, ashes or other substances, shall be thrown therein. Any damage resulting to them from misuse shall be borne by the tenant who or whose servants, clerks, or agents shall cause it.

3. No sign, advertisement or notice shall be inscribed, painted or affixed on any part of the outside of the building whatever, or inside of the building, unless of such color, size and style, and in such places upon or in the building as shall be first designated by the lessor and endorsed hereon.

4. All awnings or shades over and outside of the windows desired by tenants shall be erected at their own expense; they must be of such shape, color, material and make as may be prescribed by the lessor, and shall be put up under the direction of the lessor or his agent.

5. All tenants must observe strict care not to allow their windows to remain open so as to admit rain or snow. For any injury caused to the property of other tenants, or to the property of the lessor, by such carelessness, the tenants neglecting this rule will be held responsible.

6. No additional locks shall be placed upon any door of the building without the written consent of the lessor, which shall be endorsed hereon.

7. No tenant shall do, or permit anything to be done, in the said premises, or bring or keep anything therein, which will in any way increase the risk of fire or the rate of fire insurance on the building, or on property kept therein, or obstruct or interfere with the rights of other tenants, or in any other way injure or annoy them, or conflict with the laws relating to fires, or with the regulations of the Fire Department, or with any insurance policy upon the building or any part thereof, or conflict with any of the rules and ordinances of the Board of Health, or with any statute or municipal by-law.

8. The leased premises shall not be used as sleeping or lodging apartments.

9. Nothing shall be placed on the outside of window sills or projections.

10. The water shall not be left running unless in actual use in the leased premises; spikes, hooks, screws, or nails shall not be put into the walls or woodwork of the building.

11. No freight, furniture or packages will be received in the building or carried up or down in the elevator between the hours of 9 a.m. and 6 p.m.

12. All glass, locks and trimmings in or upon the doors or windows of the leased premises shall be kept whole, and whenever any part thereof shall become broken the same shall be immediately replaced or repaired under the direction, and to the satisfaction, of the lessor or his agent; and such replacements and repairs shall be paid for by the tenant of the said premises.

13. The lessor shall in all cases retain the power to prescribe the weight and proper position of iron safes; and all damage done to the building by taking in or putting out a safe, or by a safe during the time it is in or on the premises, shall be made good and paid for by the tenant who has caused the safe to be taken in or put out.

14. In order that the leased premises may be kept in a good state of preservation and cleanliness, each tenant shall, during the continuance of his lease, permit the janitor or caretaker of the lessor to take charge of and clean the said leased premises; cleaning to be done before 8 a.m. and after 5 p.m.

15. No tenant shall employ any person or persons other than the janitor or caretaker of the lessor for the purpose of such cleaning or of taking charge of said premises, or lighting fires, or storing or moving coal, wood or ashes; it being understood and agreed that the lessor shall be in no wise responsible to any tenant for any loss of property from leased premises, however occurring, or any damage done to the furniture or other effects of any tenant by the janitor or caretaker or any of his employees.

16. The lessor shall have the right to enter any premises at reasonable hours in the day to examine the same, or to make such repairs and alterations as he shall deem necessary for the safety and preservation of said building; and also to exhibit the said premises to be let, and put upon them the usual notice "To Be Let," which said notice shall not be removed by any tenant during the three months previous to the expiration of the lease of the premises.

17. Tenants, their clerks and servants, shall not make or permit any improper noises in the building, or use any musical instrument therein, or smoke tobacco in the elevators, or do anything that will annoy or disturb or interfere in any way with other tenants or those having business with them.

18. Nothing shall be thrown by the tenants, their clerks or servants, out of the windows or doors, or down the passages or skylights of the building.

19. No animals shall be allowed upon or kept in or about the leased premises.

20. If tenants desire telegraphic or telephonic connections, the lessor or his agent will direct the electricians as to where and how the wires are to be introduced, and without such direction no boring or cutting for wires will be permitted. If tenants desire to add to or alter the gas or electric light provided for lighting their premises, they must arrange with the lessor for the necessary connections, and

no gas pipe or electric wire will be permitted which has not been authorized in writing by the lessor or his agent.

21. The lessor may lock the entrance doors at eight o'clock each evening and keep the same locked until a reasonable hour the next morning.

22. It is understood and agreed between the lessor and tenants that no assent or consent to changes in or waiver of any part of this indenture in spirit or letter shall be deemed or taken as made, unless the same be done in writing and attached to or endorsed hereon by the lessor or his agent.

23. The lessor shall have the right to make such other and further reasonable rules and regulations as in his judgment may from time to time be needful for the safety, care and cleanliness of the premises, and for the preservation of good order therein; and the same shall be kept and observed by the tenants, their clerks and servants.

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14. LANDLORD'S INDEMNITY AGAINST RENT AND TAXES.

To C. D.

In consideration of your becoming tenant of my premises, No. , in street, I agree to indemnify you against the payment of any rent, taxes or rates chargeable upon the said premises, or upon any person in respect of the occupation thereof, down to the commencement of your tenancy.

Dated the day of , A.D. 19 .

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15. WAIVER OF EXEMPTIONS.

The said lessee do hereby, for heirs, executors, administrators and assigns, hereby covenant, promise and agree with the said lessor heirs and assigns, as follows: That in consideration of the premises, and of the leasing and letting by the said lessor to the said lessee of the lands and premises above named for the term hereby created (and it is upon that express understanding that these presents are entered into) that, notwithstanding anything contained in section thirty of chapter one hundred and seventy of the Revised Statutes of Ontario, 1897, or any other section of said Act, as amended by statute of the Province of Ontario, that none of the goods or chattels of the said lessee at any time during the continuance of the term hereby created, on said demised premises, shall be exempt from levy by distress for rent in arrear by said lessee as provided for by said section of said Act above named, and that upon any claim being made for such exemption by said lessee or on distress being made by the said lessor this covenant and agreement may be pleaded as an estoppel against said lessee in any action brought to test the right to the levying upon any such goods as are named as exempted in said section. Said lessee waiving, as he hereby does, all and every benefit that could or might have accrued to him under and by virtue of the said Act, but for the above covenant.

Tenant waives exemptions.

16. ACCELERATION CLAUSE.

And also, that if the term hereby granted shall be at any time seized or taken in execution, or in attachment, by any creditor of the said lessee or if the said lessee shall make any assignment for the benefit of creditors, or becoming bankrupt or insolvent, shall take the benefit of any Act that may be in force for bankrupt or insolvent debtors, the then current rent shall immediately become due and payable, and the said term shall immediately become forfeited and void.

Current rent becomes due.

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17. OPTION TO LESSEE TO PURCHASE FREEHOLD.

And it is hereby agreed, on the part of the said part of the first part heirs, executors, administrators and assigns, that if at any time within the said term of the said part of the second part heirs, executors, administrators, or assigns, shall desire to purchase the fee simple of the lands hereby demised, shall be allowed to do so by paying the sum of of lawful money of Canada [set out terms] provided the said rent shall have been regularly paid up to the time when may so desire to purchase; and also, provided that the rent accruing, or to accrue, due for the remainder of the term above created, then unexpired, shall also have been paid, but the said part of the first part shall not be bound to give covenants or assurances for title other than for and in respect to his own acts.

Set out terms of purchase as fully as in any other agreement.

And it is hereby declared and mutually agreed, by and between the parties hereto, that time in the payment by the said part of the second part, heirs, executors, or assigns, to the said part of the first part, heirs, executors, or assigns, of the said sum of under the proviso or agreement above set forth in that behalf, and within the period of above limited therefor, as the purchase money for the premises, shall be strictly the essence of this contract, and that default in payment by the said part of the second part, of the said sum, within the said time or period of from the date hereof above limited, over, above and in addition to all rents above reserved, shall render absolutely null and void so much of these presents as relates to the sale by the part of the first part; or purchase by the part hereto of the second part of the premises above mentioned, and the jurisdiction of the several Courts of this Province in reference thereto shall be wholly barred, and the said part of the first part shall be absolutely released and discharged from the performance or execution of the said agreement, and the said part of the second part shall be deprived of all right to enforce the same, notwithstanding any rule (if such there be) that time can not be made of the essence of a contract, or any other rule or maxim whatsoever.

In witness, etc.

Signed, sealed, etc.

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18. COVENANT TO BUILD.

And the said lessee do hereby, for executors, administrators and assigns, covenant, promise and agree, to and with the said lessor heirs, executors, administrators and assigns, that he

the said lessee executors, administrators, or assigns, shall and will within months after the date of these presents, at and costs and charges, erect, construct, build and finish, fit for habitation, on the said land hereby demised, and upon that part thereof designated on the said plan of building lots now filed in good and substantial messuage or dwelling-house, with suitable out-buildings, all of brick or stone material, to cost at least dollars of lawful money of Canada, which messuage or dwelling house and out-buildings shall be of brick or stone material, and, in so far as the elevations thereof are concerned, be built in accordance with the plans hereunto annexed; and the said elevations of the said messuage or dwelling house shall be faced with stone or white brick, or with red pressed brick, such red pressed brick facing to have also cut stone or white pressed brick dressings, but no common red brick, or field or lake stone, shall be used for facing the walls of any building of any description to be erected on the said demised premises (or, as the case may be).

According to circumstances of case.

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19. COVENANT TO REINSTATE.

Also, that if at any time during the said term the said dwelling house and buildings, or any of them, shall be injured, damaged, or destroyed, whether by fire, wind, tempest, invasion of enemies of the Province, or otherwise, howsoever, the said lessee executors, administrators, or assigns, shall and will at or costs and charges within months after the same shall be so injured, damaged or destroyed, repair, rebuild, or reinstate the said dwelling house and buildings, in accordance with the said plans hereunto annexed, or any improved or substituted plans, which may be approved of by the said lessor, heirs, executors, administrators, or assigns; but it is hereby provided, that the yearly rent hereby reserved, and every part thereof, shall be paid as hereinbefore provided, notwithstanding any such injury or damage to or destruction of the said dwelling house and buildings as aforesaid.

Notice, plans required.

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20. COVENANT FOR PERPETUAL RENEWAL.

Provided always, and it is hereby agreed by and between the said lessor and lessee that at the expiration of the said term of years, the said lessee executors, administrators, or assigns, shall have the privilege of receiving a renewal of this lease for the further period of years longer, and so on for every years perpetually, the rent to be payable for the said demised premises during any such renewal term of years to be such as the said lessor heirs, executors, administrators, or assigns, and the said lessee executors, administrators, or assigns, shall agree upon; but in the event of their not being able to agree upon the amount of such rent, then the same shall be determined by two arbitrators, one to be chosen by each party, who if they cannot agree shall appoint a third arbitrator, and the award in writing of the majority of the said arbitrators (which shall be made and published within one calendar month from the date of the appointment of the arbitrator last appointed), fixing the amount of the said rent for the

then next ensuing period of years, shall be binding and conclusive on all parties, the costs of such arbitration to be borne by both parties in equal shares; and in case either of the said parties shall neglect or refuse for the space of fourteen days after being thereunto required in writing by the other party to nominate an arbitrator, then the arbitrator nominated by the party not so neglecting or refusing shall alone determine the said rent, and his award in writing (to be made and published within two calendar months from the date of his appointment) shall be binding on both parties; but in the valuation and appraisement of the said rent for any such renewal term, the same shall be calculated as ground rent of a block or parcel of land situated as the said demised premises are situated, without reference to any buildings, tenements, houses, or erections thereon.

And the said renewal lease shall be drawn and prepared at the cost and charges of the said lessee executors, administrators, or assigns, and shall contain the like covenants, provisos, and agreements as are herein contained, including this present agreement for renewal, and the plans hereto annexed, or exact copies thereof, or other improved or substituted plans, approved of by the said lessor heirs, executors, administrators or assigns, shall be annexed to the said lease.

Remember the force of these words.

21. COVENANT FOR RENEWAL.

Another Form.

And also that immediately after the expiration of the said term of years, the said part of the first part, heirs and assigns, shall and will grant another lease of the said hereby demised premises, with the appurtenances, containing the like covenants, conditions, provisos, and agreements as are in this lease contained and expressed, and at and under a certain yearly rent, payable in quarterly payments, the amount whereof to be ascertained in manner following, that is to say: To be fixed on, and determined upon, and declared by two appraisers, to be named and appointed, one of them by the said part of the first part, heirs and assigns, the other by the other part of the second part, executors, administrators and assigns, with power to them, the said appraisers, to name and call in a third if they cannot agree; and in such valuation and appraisement the amount of such rent shall be calculated altogether as ground rent of a block or parcel of land situated as the said premises are situated, and the value of any buildings, tenements, houses or erections thereon, is not to be considered in any wise in making such appraisement; such appraisement to be made within fourteen days after the end of the term hereby granted. Such rent to be payable in quarterly payments as aforesaid, and to commence from and immediately after the termination of the term; or, if the said part of the first part, heirs and assigns, decline making such renewal for a second term,—which it shall be optional for him or them to do or make (but of which intention to decline, the said part of the first part, heirs or assigns, shall give to the said part of the second part executors, administrators or assigns), or leave at his or their last known place of abode, a notice, in writing, at least three calendar months before the expiration of the said term of years hereby granted, or any future term to be granted as hereby provided,—then it is hereby expressly covenanted, declared

Valuation by appraisement — not by arbitration

and agreed upon, by and between the parties hereto and their respective representatives, that all the buildings, houses and erections, placed, erected and being on said premises at the expiration of the first term of years, by the said part of the second part, executors, administrators or assigns, shall be duly valued and appraised, by appraisers named and appointed on behalf of each party, as above particularly mentioned, with power to them to name, refer to and call in a third person, should they not agree as above mentioned—such appraisement to be made within fourteen days from and after the determination of the said first term hereby demised—who shall fix on the value under the conditions aforesaid: And the said part of the first part, hereby for heirs, and assigns, covenant, promise and agree, to and with the said part of the second part, executors, administrators and assigns, that he or they, or some one of them, will pay to the said part of the second part, executors, administrators and assigns, the full sum of money so to be fixed by the said appraisers, or their referee, as to the value of or compensation for said houses, buildings and erections, on the said hereby demised premises then standing and being, within one calendar month after such value is ascertained and declared as aforesaid, a renewal for a second term having been declined to be made by him or them as aforesaid: And also, that if any such renewal of a second term be granted as aforesaid, under the terms and conditions herein provided for granting the same, by the said part of the first part, heirs or assigns, to the said part of the second part, executors, administrators and assigns, that at the end of such renewed term, so to be granted as aforesaid, the said part of the first part, heirs and assigns, shall and will grant a further renewed lease to the said part of the second part, executors, administrators and assigns, of a further term of years, precisely on the same terms and conditions as hereinbefore provided for the first renewal thereof, the amount of rent payable quarterly to be ascertained by appraisers in the manner and form above provided and set forth, or shall and will pay for all buildings and erections then being on said premises (should such renewal be refused or declined, and of which notice shall have been given as aforesaid), at a rate to be ascertained by appraisement as aforesaid, and within a time, and according to the terms, conditions and agreements above mentioned and expressed; and so on at the end of every renewed term; it being the true intent and meaning of these presents, and it is hereby expressly covenanted and agreed upon, by and between the said parties thereto, heirs, executors, administrators and assigns, that at the end of the hereby granted term of years, and also at the end of every renewed term of years, so to be granted as aforesaid, the said part of the first part, heirs and assigns, shall grant a renewal term or lease of years of the said hereby demised premises, and so on forever, ascertaining the amount of rent to be paid during such renewed term by appraisement, as hereinbefore provided, and always estimating the amount of said rent as ground rent, and exclusive and independent of all buildings and improvements thereon erected, put, placed and being, until the said part of the first part, heirs or assigns, elect to determine these presents, and all further renewal or renewals of the hereby demised premises, and of which notice shall be given as aforesaid, by paying within the term above limited at the expiration of each term, for all such buildings, erections and improvements as may be put, placed, erected and then being thereon, by the part of the second part, executors, administrators or assigns, at the appraised value, to be ascertained and

Further lease not necessarily perpetual

How rent ascertained.

estimated by referees in manner hereinbefore provided. And it is hereby further covenanted and agreed upon, by and between the said parties of the first and second parts, for themselves and their respective legal representatives, that all dower and all charges and costs arising from the demand of the same, that may hereafter be made, and that may be chargeable on the said premises, and legally and lawfully demanded therefor, shall be deducted from the rent reserved or to be hereafter reserved, as aforesaid, for the said premises, such dower being limited to the ground (and not to apply to the improvements thereon), and the rents, issues and profits thereof, it being hereby clearly admitted and understood that the buildings and improvements to be made and erected on said premises will be made and erected by the said part of the second part, executors, administrators and assigns, and that the said part of the second part, executors, administrators and assigns, shall be answerable only for the balance of such rent, after deducting such dower and the charges accruing from demanding or enforcing the same, anything herein contained to the contrary thereof in anywise notwithstanding. And also that if the said part of the first part, heirs, executors, administrators or assigns, do and shall, at any time hereafter, neglect, decline or refuse to pay to the said part of the second part, executors, administrators or assigns, the full sum of money so to be fixed and determined by the said appraisers, or their referee, as the value or compensation for the said houses, buildings and erections on the said hereby demised premises then standing and being (upon being lawfully demanded), for the space of one calendar month after such value is ascertained, declared and demanded as aforesaid (a renewal for a second, or for any subsequent term, having been declined to be made by him or them, and notice given as aforesaid), or if he or they refuse or neglect to name and appoint an appraiser, for the purpose of ascertaining and determining such value, within the period above fixed and prescribed, then, in either such case, the said part of the second part, executors, administrators and assigns, shall hold and enjoy the said premises for the further term of years, reckoned from the expiration of the preceding term, subject to the same terms, conditions, rents and agreements contained and provided for the term then last expired and ended; nevertheless, subject, after the termination of the term so created, to all the conditions, provisos and agreements contained in and by these presents for the renewal of any term, or for the purchase of the buildings and improvements as aforesaid: It being clearly and fully understood and agreed upon, by and between the said parties to these presents and their legal representatives, that the neglect or refusal to appoint an appraiser, on the part of the lessor, to estimate the value of the improvements as aforesaid, or the neglect or refusal of payment, after notice as aforesaid, for the value thereof, for the space of time above provided and mentioned (after due demand as aforesaid), shall, at all times hereafter, entitle and authorize the said lessee and representatives to hold, own and enjoy the said premises for another term of years, upon the terms and for the rents provided for in the preceding and then expired or expiring term, so often as payment of the purchase money for the buildings and improvements as aforesaid shall be neglected or refused to be made, or the appointment of an appraiser, for the purposes of ascertaining such value, shall be neglected or refused to be made by the said lessor or legal representatives: and that at the expiration of the term hereby created and provided for under the contingencies aforesaid, the original and

Money to be paid, when.

Refusal to appoint appraiser.

first provisions and conditions contained in these presents shall then again operate and be in full force and effect.

In witness, etc.

Signed, sealed, etc.

(*Usual Affidavit of Execution.*)

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22. COVENANT FOR RENEWAL.

ANOTHER FORM.

And the said lessor for heirs, executors, administrators and assigns, covenant with the said lessee, heirs, executors, administrators and assigns, in manner following: That the aid lessee duly and regularly paying the said rent, and performing all and every the covenants, provisions and agreements herein contained, on part to be paid and performed, the said lessor will upon the request and at the cost of the said lessee, six months previous to the determination of the term hereby created, grant to the said lessee a renewed lease of the said hereby demised premises, for a further term of years, at an increased rent to be determined by arbitration (in the same manner as for purchase of the buildings hereinafter mentioned), and so on at the end of each term of years will grant a renewal lease for a like term, under and subject to the same covenants, provisoes and agreements herein contained, but including this covenant: Provided, and it is hereby agreed, that the said lessor on the determination of the term hereby granted, or on any renewal, shall be at liberty to determine and put an end to this lease and all right of renewal, by purchasing the buildings, erections and improvements then standing and being on the said hereby demised premises, at a price to be determined in case of dispute by arbitration (the lessor appointing one person, the lessee appointing one person, and the two thus appointed to appoint a third, with all necessary powers to value and appraise the same and to appoint a time for payment thereof, and the award of a majority of them to be final between the said parties).

NOTICES.

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23. NOTICE TO QUIT FROM LANDLORD TO YEARLY TENANT.

Mr. A. B.,

I hereby give you notice to quit and deliver up the messuage and premises which you now hold of me, situate No. street, in the of on the day of next.

Dated the day of 19 .

Yours, etc.,

C. D.

24. BY AGENT OF THE LANDLORD.

Mr. A. B.,

I do hereby, as the agent for and on behalf of your landlord, Mr. of give you notice to quit and deliver up possession of the premises, situate at, etc., which you now occupy as his tenant, on the day of next.

Dated the day of , 190 .

Yours, etc.,

C. D.

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25. NOTICE BY LANDLORD WHERE THE DATE OF COMMENCEMENT OF TENANCY IS UNCERTAIN.

Mr. A. B.,

I hereby give you notice to quit and deliver up the house and premises which you now hold of me, situate, etc., on the day of next, provided that your tenancy originally commenced on that day of the year and month, or if otherwise, then that you quit and deliver up possession of the premises at the end of the year of your tenancy which shall expire next after the end of one half-year from the time of your being served with this notice.

Dated the day of , 19 .

Yours, etc.,

C. D.

[If the tenancy is determinable at a quarter's notice, then say "quarter" instead of "half-year."]

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26. NOTICE BY TENANT TO DETERMINE A LEASE.

The following is a notice by the lessee; but the form can easily be adapted to the case of a notice by the lessor:

Mr. A. B.,

Sir,—I hereby give you notice that on the day of next, the first seven years of the term of twenty-one years (determinable at the end of seven or fourteen years) in the dwelling house and premises situate, etc., demised by you to me by indenture of lease, dated the day of , 19 , will expire; and on that day I shall, in virtue of the option and power reserved to me by the said indenture, determine the said term, and quit and deliver up to you the possession of the said messuage and premises, and surrender to you all the residue of my interest in the said term so created as aforesaid.

Dated, etc.

Yours truly,

C. D.

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27. NOTICE TO BE AFFIXED ON DESERTED PREMISES.

A. B.,

Take notice, that on the complaint of C. D., of, etc. [insert landlord's residence], made unto us, E. F. and G. H., two of His Majesty's justices of the peace for the said that you, the

said A. B., have deserted the messuage and premises situated at [insert where premises are] unto you demised at rack rent by the said C. D., and that there is in arrear and due from you, the said A. B., unto the said C. D., one-half year's rent for the said demised premises, and that you have left the said premises unoccupied and vacant, so that no sufficient distress can be had to countervail the said arrears of rent, we, the said justices (neither of us having any interest in the said demised premises), on the said complaint as aforesaid, and at the request of the said C. D., have this day come upon and viewed the said demised premises), and do find the said complaint to be true and on the day of this present month of we will return to take a second view thereof; and if, upon such second view, you, or some other person on your behalf, shall not appear and pay the said rent in arrear, or there shall not be sufficient distress on the said premises, that we, the said justices, will put the said C. D. into possession of the said demised premises, according to the form of the statute in such case made and provided. In witness whereof we have put our hands and seals, and have caused this notice to be affixed on the outer door of the dwelling house, the same being the most notorious part of the said premises.

Dated, etc. (Signed) E. F. (seal.)
G. H. (seal.)

NOTE.—See paragraph 335, page 146.

28. NOTICE BY TENANT TO LANDLORD.

Sir,—

I hereby give you notice that on the day of next, I shall quit and deliver up possession of the house and premises which I now hold of you, situate at, etc.

Dated this day of , 19 .

Yours, etc.,

To Mr. A. B. C. D.

FORMS USED IN DISTRESS PROCEEDINGS.

(SEE CHAPTER IX.)

29. DISTRESS WARRANT.

To , my bailiff, Greeting.

Distrain the goods and chattels of the tenant in the house he now dwells in or upon the premises in h possession situated for the sum of being the amount of rent due to me on the same, on the day of 19 , and for your so doing this shall be your sufficient warrant and authority.

Dated the day of A.D. 19 .

UNDERTAKING TO DELIVER GOODS.

We, the undersigned, acknowledge to have received from bailiff, the following property, seized under and by virtue of a for against the goods and chattels of at the instance of which said property we undertake to deliver to him, the said bailiff, whenever demanded, in as good a condition as they now are.

Witness our hands the day of 19 .

Witness

APPRAISEMENT.

Memorandum, that on the day of , A.D. 19 , of sworn appraisers, were sworn upon the Holy Evangelists by me of well and truly to appraise the goods and chattels mentioned in the inventory according to the best of your judgment.

Present at the swearing of the said as above, and witness thereto. } *Constable.*

I, the above named being sworn upon the Holy Evangelists, by the constable above named, well and truly to appraise the goods and chattels mentioned in this inventory, according to the best of my judgment, and having viewed the said goods and chattels, do appraise the same at the sum of .

As witness my hand the day of 19 .

APPRAISEMENT.

ANOTHER FORM.

We, the above named and being duly sworn on the Holy Evangelists by constable, above named, well and truly to appraise the goods and chattels mentioned in this inventory according to the best of our ability, and having viewed the said goods and chattels, do appraise and value the same at the sum of .

As witness our hands this day of 19 .

TENANT'S CONSENT TO LANDLORD CONTINUING IN POSSESSION

To A. B.

I desire you to keep possession of the goods and chattels which on the day of A.D. 19 , you distrained for rent due from me to you in the places where they are now lying for the space of days from the date hereof, on your undertaking to delay the sale for that time to enable me to defray the rent and charges, and I will pay the man for keeping possession.

Dated the day of A.D. 19 .

OATH TO BE ADMINISTERED TO APPRAISERS BY CONSTABLE.

You and each of you shall well and truly appraise the goods and chattels mentioned in this inventory, according to the best of your judgment. So help you God.

MEMORANDUM TO BE INDORSED ON THE INVENTORY.

Memorandum: That on the day of A.D. 19 , of , and of the goods and chattels mentioned in this inventory, were sworn on the Holy Evangelists by me, of constable, truly to appraise according to the best of their judgment. As witness my hand.

Present at the swearing of the said as above, and witness thereto. } *Constable.*

INVENTORY.

An inventory of the several goods and chattels distrained by me the day of , A.D. 19 , in the house, outhouses and lands of situate by authority and on behalf of your landlord, for the sum of being rent due to the said on the day of 19 .

In the dwelling-house:

On the premises:

Mr. Take notice, that as the bailiff to your landlord, I have this day distrained on the premises above mentioned the several goods and chattels specified in the above inventory, for the sum of being rent due to the said the day of 19 , for the said premises; and that unless you pay the said rent, with the charges of distraining for the same, or replevy within five days from the date hereof, the said goods and chattels will be appraised and sold according to law.

Given under my hand, the day of A.D. 19

Witness:

BAILIFF'S SALE.

Notice is hereby given, that the cattle, goods and chattels, distrained for rent on the day of 19 , by me as bailiff to the landlord of the premises of the tenant, will be sold by public auction, on the day of 19 , at o'clock, which cattle, goods and chattels are as follows, that is to say:

(Toronto), day of 19 .

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