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WOODFALL'S

LAW OF

LANDLORD AND TENANT.

The Thirteenth Edition.

BY

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OF THE INNER TEMPLE, BARRISTER-AT-LAW; EDITOR OF "HODGES ON RAILWAYS," ETC.

FIRST AMERICAN, FROM THE THIRTEENTH ENGLISH, EDITION

BY

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PREFACE TO AMERICAN EDITION.

WOODFALL'S "Landlord and Tenant" was first published in 1802, remodelled in 1830, and the thirteenth English edition was issued in January, 1886. The high standing of this treatise in England and America makes any lengthy commendation on the part of the American editor unnecessary.

The thorough, practical, and scientific character of the treatise, with the historical sketch it contains, gives it great value to any one desiring an accurate knowledge of this branch of the law. With the exception of statutory matter, easily distinguishable, the greater part of the principles laid down are law to-day in America. Statutes more or less diverse and other localisms exist in all the states, separating one from another almost as much as from England. It is the province of the American editor, so far as he may, to point them out and to explain, sustain, or qualify the doctrines of the text by the American decisions. This will relieve the practitioner, in part, from the labor of examining the local decisions. He has also added some topics in his notes which have never been adequately treated before; as well as given a full discussion of all the more important points in landlord and tenant law, with a view to making the treatise of the utmost value to the American bar.

W. W.

BOSTON, *December*, 1889.

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LIST AND EXPLANATION OF THE ABBREVIATIONS.

A. & E.	Adolphus & Ellis.
Ambl.	Ambler.
Andr.	Andrews.
Anstr.	Anstruther.
Atk.	Atkyns.
Bac. Abr.	Bacon's Abridgment.
Ball & B.	Ball & Beatty (Irish).
Barnard.	Barnardiston.
Barnes	Barnes's Notes.
B. & A.	Barnewall & Alderson.
B. & Ad.	Barnewall & Adolphus.
B. & C.	Barnewall & Cresswell.
B. & S.	Best & Smith.
Beav.	Beavan.
Bing.	Bingham (Old Series).
Bing., N. C.	Bingham, New Cases.
Blac. Com.	Blackstone's Commentaries.
Blac. H.	Henry Blackstone.
Blac. W.	Sir W. Blackstone.
Bli.	Bligh's House of Lords Cases.
Bli. N. S.	Bligh's New Series.
B. & P.	Bosanquet & Puller.
B. & P., N. R.	Do. — New Reports.
Bradby	Bradby on Distresses (2d ed.).
Bridg.	Bridgman.
B. & B.	Broderip & Bingham.
Bro. Abr.	Brooke's Abridgment.
Bro. C. C.	Brown's Chancery Cases.
Bro. P. C.	Brown's Cases in Parliament.
Bullen	Bullen on Distress.
Bull. N. P.	Bullen's Nisi Prius.
Bulst.	Bulstrode.
Bunb.	Bunbury.
Burr.	Burrow.
Camp.	Campbell.
C. B.	Common Bench Reports (by Manning, Granger & Scott).
C. B., N. S.	Common Bench Reports, New Series (by Scott).
C. & E.	Cababé & Ellis's Nisi Prius Reports.
C. & J.	Crompton & Jervis.
C. & K.	Carrington & Kirwan.
Car. & M.	Carrington & Marshman.
C. & P.	Carrington & Payne.
Carth.	Carthew.
Ch. Cas.	Cases in Chancery.
Chit.	Chitty's Reports.
Chit. Arch.	Chitty's Archbold's Practice.
Chit. Forms	Chitty's Forms (9th ed.).
Chit. Pl.	Chitty on Pleading (7th ed.).
Cl. & Fin.	Clark & Finnelly.
Co. Lit.	Coke upon Littleton.
Co. R.	Lord Coke's Reports.
Cole Ejec.	Cole on Ejectment.
Coll. C. C.	Collyer's Chancery Cases.
Comb.	Comberbach.
Com.	Comyn.
Com. Dig.	Comyn's Digest.
Conn. & Law.	Connor & Lawson (Irish).
Cowp.	Cowper.
Cr. & Ph.	Craig & Phillips.
Cro. Eliz.	Croke's Reports, vol. 1.
Cro. Jac.	Croke's Reports, vol. 2.
Cro. Car.	Croke's Reports, vol. 3.
C. & M.	Crompton & Meeson.
C., M. & R.	Crompton, Meeson & Roscoe.
Dart V. & P.	Dart on Vendors and Purchasers.
D. & M.	Davison & Merivale.
Deac.	Deacon.
Deac. & Chit.	Deacon & Chitty.
De G., F. & J.	De Gex, Fisher & Jones
De G. & J	De Gex & Jones.
De G., J. & S.	De Gex, Jones & Smith
De G., M. & G.	De Gex, Macnaghten & Gordon.
De G. & Sm.	De Gex & Smale.
Dick.	Dickens.
Dougl.	Douglas.
Dow	Dow's Reports in Parliament.

Dow & Cl.	Dow & Clark.
Dowl.	Dowling's Practice Cases.
Dowl. N. S.	Do. — (New Series).
D. & L.	Dowling & Lowndes.
D. & R.	Dowling & Ryland.
Drew.	Drewry.
Drew. & Sm.	Drewry & Smale.
Dru. & W.	Drury & Warren (Irish).
E. & B.	Ellis & Blackburn.
E., B. & E.	Ellis, Blackburn & Ellis.
E. & E.	Ellis & Ellis.
Eq. Cas. Abr.	Equity Cases Abridg'd.
Esp.	Espinasse.
Exch.	Exchequer Reports.
Fitz. N. B.	Fitzherbert's Natura Brevium.
Fort.	Fortescue.
F. & F.	Foster & Finlaison.
Freem.	Freeman.
Fry.	Fry on Specific Performance.
G. & D.	Gale & Davison.
G. & J.	Glyn & Jameson.
G. & M.	Gale & Merivale.
Giff.	Giffard's Reports.
Godb.	Godbolt.
H. & C.	Hurlstone & Coltman.
H. & M.	Hemming & Miller.
H. & N.	Hurlston & Norman.
H. & R.	Harrison & Rutherfurd.
H. & T.	Hall & Twells.
Hard.	Hardres.
Hawk. P. C.	Hawkins's Pleas of the Crown.
Hob.	Hobart.
Holt, N. P. C.	Holt's Nisi Prius Cases.
H. L. Cas.	House of Lords Cases, by Clark & Finnelly — and Clark.
Hud. & B.	Hudson & Brooke (Irish).
Hut.	Hutton.
Inst.	Lord Coke's Institutes.
Ir. Ch.	Irish Chancery.
Ir. Eq. R.	Irish Equity Reports.
Ir. L. R.	Irish Law Reports.
Jac.	Jacob.
J. & W.	Jacob & Walker.
Johns.	Johnson.
J. & H.	Johnson & Hemming.
Jon. & L.	Jones & Latouche (Irish).
Jon. W.	Sir Wm. Jones.
Jon. T.	Sir Thos. Jones.
Jur.	Jurist (Old Series).
Jur., N. S.	Jurist (New Series).
K. & J.	Kay & Johnson.
Keb.	Keble.
Ken., Ld.	Lord Kenyon's Reports.
L. J.	Law Journal Reports, New Series from 1831.
L. J., O. S.	Do. — Old Series, 1822–1831.
L. R., H. L.	The Law Reports (from 1865) — House of Lords Cases.
L. R., H. L. Sc.	Do. — Scotch Appeals.
L. R., P. C.	Do. — Privy Council.
L. R., Ch. Ap.	Do. — Chancery Appeals.
L. R., Eq.	Do. — Equity Cases.
L. R., Q. B.	Do. — Queen's Bench.
L. R., C. P.	Do. — Common Pleas.
L. R., Ex.	Do. — Exchequer.
L. R., C. C.	Do. — Crown Cases Reserved.
L. R., P. & D.	Do. — Probate and Divorce.
L. R., Adm. & Ecc.	Do. — Admiralty and Ecclesiastical.
L. R., App. Cas.	The Law Reports (from 1875) — House of Lords and Privy Council Cases.
L. R., Ch. D.	Do. — Chancery Division and Appeals therefrom.
L. R., Q. B. D.	Do. — Queen's Bench Division and Appeals therefrom.
L. R., C. P. D.	Do. — Common Pleas Division and Appeals therefrom.
L. R., Ex. D.	Do. — Exchequer Division and Appeals therefrom.
L. T.	Law Times (New Series).
L. T., O. S.	Law Times (Old Series).
Leg. Obs.	Legal Observer.
Leon.	Leonard.
Lev.	Levinz.
Lit.	Littleton's Tenures.
L., M. & P.	Lowndes, Maxwell & Pollock.
Lutw.	Lutwyche.
M'Clel.	M'Cleland.
M'Clel. & You.	M'Cleland & Younge.
Mac. & G.	Macnaghten & Gordon.
Macq. H. L. C.	Macqueen's House of Lords Cases (Scotch Appeals).
Madd.	Maddock.
M. & G.	Manning & Granger.
M. & P.	Moore & Payne.

M. & R. . . Manning & Ryland.
M. & S. . . Maule & Selwyn.
M. & W. . . Meeson & Welsby.
Marsh.. . . Marshall.
Mer. . . . Merivale.
Mod. . . . Modern Reports.
Mood. . . . Moody.
Moo. & M. . Moody & Malkin.
Moo. & R. . Moody & Robinson.
Moor . . . Sir F. Moor's Reports (1662).
Moo. . . . J. B. Moore (1815–1827).
Moo. & P. . Moore & Payne.
Moo. & S. . Moore & Scott.
Morrell . . Morrell's Bankruptcy Reports.
Myl. & Cr. . Mylne & Craig.
Myl. & K. . Mylne & Keene.
N. & M. . . Nevile & Manning.
N. & P. . . Nevile & Perry.
New R. . . New Reports of Bosanquet & Puller.
P. Wms. . . Peere Williams.
P. & D. . . Perry & Davison.
Phil. . . . Phillips.
Plow. . . . Plowden.
Pollexf. . . Pollexfen.
Q. B. . . . Queen's Bench Reports (Adolphus & Ellis, New Series, 1834–1857).
Raym., Ld. . Lord Raymond.
Raym., T. . Sir Thomas Raymond.
Roll. Abr. . Lord Rolle's Abridgment.
Ros. Ev. . . Roscoe on Evidence.
R. S. C. . . Rules of Supreme Court.
Russ. . . . Russell.
Russ. & M. . Russell & Mylne.
Ry. & Moo. . Ryan & Moody.
Salk. . . . Salkeld.
Saund. . . Saunders.
Say. . . . Sayer.
Sch. & Lef. . Schoale & Lefroy (Irish).
Scott, N. R. . Scott's New Reports.
Select Ch. Cas. Select Chancery Cases.
Selw. N. P. . Selwyn's Nisi Prius (13th ed.).
Shep. Touch. Sheppard's Touchstone).
Show. . . . Shower.
Sid. . . . . Siderfin.
Sim. . . . Simons.
Sim., N. S. . Simons, New Series.
Sim. & Stu. . Simons & Stuart.
Skin. . . . Skinner.
Sm. & Giff. . Smale & Giffard.
Smith, L. C. . Smith's Leading Cases.
Stark. . . . Starkie.
Stra. . . . Strange.
Sty. . . . Style.
Sug. Pow. . Sugden on Powers.
Sug. V. & P. . Sugden on Vendors and Purchasers.
Swans.. . . Swanston.
Sw. & Tr. . Swabey & Tristram.
Taunt. . . . Taunton.
T. R. . . . Term Reports.
Turn. & Russ. Turner & Russell.
Tyr. . . . Tyrwhitt.
Tyr. & Gr. . Tyrwhitt & Granger.
Vaugh. . . Vaughan.
Vern. . . . Vernon.
Ves. . . . Vesey, junior.
Vez. . . . Vesey, senior.
V. & B. . . Vesey & Beames.
Vin. Abr. . Viner's Abridgment.
W. R. . . . Weekly Reporter.
Wightw. . . Wightwick.
Wilk. Replev. Wilkinson on Replevin.
Wilm. . . . Wilmot's Notes.
Wils. . . . Wilson.
Wms. Saund. Saunder's Reports, with Notes by Serjeant Williams, &c.
Yelv. . . . Yelverton.
You. . . . Younge.
Y. & C. . . Younge & Collyer, Exch.
Y. & C. C. C. Do. — Chancery.
Y. & J. . . Younge & Jervis.

HISTORICAL OUTLINE, WITH ABSTRACT OF LEADING PROPOSITIONS.

It is proposed in this Chapter to set out in a concise and readable form the leading propositions of the law of England affecting the relation of landlord and tenant; but it may perhaps be well to begin with a very brief historical sketch of the statute law. We may omit some early statutes, chiefly concerned with the landlord's peculiar remedy for recovery of rent by distress (*a*), and proceed at once to 32 Hen. 8, c. 34. Most of the statutes which will call for notice, and indeed most of the numerous statutes which have from time to time dealt specifically with the subject, are still unrepealed.

By 32 Hen. 8, c. 34, it is provided that grantees of reversions may take advantage of conditions and covenants in leases; and by another act of even date, 32 Hen. 8, c. 37, that executors may sue or distrain for rent due to their testator in his lifetime.

The statute 1 & 2 Ph. & M. c. 12, enacts that cattle seized for rent may not be driven out of the hundred where they are taken, except to a pound overt within the same shire not above three miles distant.

The effect of the Statute of Frauds was to enact that leases for more than three years, and all agreements for leases, however short, must be in writing.

It was not until 1689 that distress ceased to be merely a pledge in the hands of the landlord. An act passed in that year provides that goods distrained for rent may be sold unless the tenant shall within five days "replevy" them, that is, proceed in due course of law, and in the peculiar manner appropriate to such procedure, to prove that the procedure was wrongful.

At common law an assignment of a reversion was not good against a tenant unless the tenant "attorned to" or recognized his new landlord. An act of Anne did away with the necessity

(*a*) 51 Hen. 3, stat. 4; 52 Hen. 3, stat. 4; 3 Edw. 1, c. 16; 3 Edw. 1, c. 17.

for attornment, but provides that the new landlord cannot take advantage of non-payment of rent, without having given notice of the assignment of the reversion to the tenant.

Another act of Anne, 8 Ann. c. 14, is of great importance. It provides that no goods may be taken in execution without the execution creditor paying the landlord up to one year's arrears of rent; and that a distress may be made at any time within six months after the termination of a lease. A further provision of the same statute — that landlords might follow goods fraudulently removed to avoid a distress — was not long afterwards superseded by a more extensive provision to the same effect.

In the reign of George the Second it was enacted that tenants holding over after a landlord's notice might be sued for double the yearly value of the premises, and in order to remedy inconveniences happening "by reason of the many niceties that attend the re-entries at common law," that landlords entitled by law to re-enter might re-enter in case of half year's rent being in arrear and no sufficient distress being found on the premises, the statute providing at the same time that on the tenant paying all arrears of rent the proceedings should cease. These latter provisions were superseded by enactments to the same effect in the Common Law Procedure Act of 1852.

The statute 11 Geo. 2, c. 19, is a long and important one. It extends to thirty the five days which were allowed by the statute of Anne for following goods fraudulently removed to avoid distress, confers upon the landlord power to break open places of concealment anywhere, and visits with heavy penalties persons in collusion with the tenant. It benefits both landlord and tenant alike by allowing a distress to be impounded on the demised premises. It provides for the recovery by a landlord of compensation for "use and occupation" although the contract of tenancy be written, so long as it is not by deed — thus obviating the nonsuits which might otherwise arise. It allows landlords to recover deserted premises before justices of the peace in cases where one year's rent is in arrear and no sufficient distress is found on the premises, and to recover double rent from tenants holding over after their own notice to quit. This also is the statute which first provided for "apportionment" of rent in the case of a landlord, being himself tenant for life, dying between two rent days; the rule of the common law having been that in such a case the executors of the landlord could recover nothing.

The act 56 Geo. 3, c. 50, provides that sheriffs may not carry off straw or other agricultural produce in cases where the tenant has covenanted with the landlord to consume such produce on his farm; and the act 57 Geo. 3, c. 93, fixes a limit to the expenses of a distress where the sum due does not exceed 20*l*.

By 1 Geo. 4, c. 87, it was first enacted that tenants holding under a contract in writing, and wrongfully holding over, might be compelled in a summary way to give security for the costs of an ejectment and might be ejected. This provision was superseded by a very similar one of the Common Law Procedure Act, 1852.

By 1 & 2 Vict. c. 74, provision is made for the recovery before justices of the peace of small premises wrongfully held over; the statute applying only to tenancies at will, or for not more than seven years, or at a rent of not more than 20*l*. a year.

In 1845 it was enacted, in effect, that leases for more than three years must be by deed, and a concise statutory form of lease was provided. In this form, the proviso for re-entry applies to breaches of covenant generally.

Although it had been laid down in *Elwes* v. *Mawe*, in 1803, that the exceptions gradually introduced into the doctrine of irremovability of fixtures did not extend to agriculture, it was not till 1851 that the agricultural tenant obtained relief. An act passed in that year gives to this class of tenant the right of removing fixtures erected with the written consent of the landlord, this right being subject to an option of purchase by the landlord. The same statute provides for the prolongation till the end of the current year of the term of a tenant determined by the death of a landlord who was himself only a tenant for life, the prolongation being given in lieu of the common law right to the growing crops and other "emblements."

The Common Law Procedure Act, 1852, re-enacted in substance the provisions of 4 Geo. 2, c. 28, and 1 Geo. 4, c. 87, as to recovery of premises in case of non-payment of rent and in case of holding over. The County Courts had not originally jurisdiction in ejectment, but the County Court Act, 1856, adopts with little variation the provisions of the Common Law Procedure Act above referred to.

The act 22 & 23 Vict. c. 35, provided for the relief of a tenant against forfeiture for non-insurance, for the relief of the executors of a tenant, having assets, against certain personal liabilities, and for

the preservation of the right of re-entry in case of a severance of the reversion. The act 23 & 24 Vict. c. 38, enacts that one waiver of a breach of covenant shall not operate as a general waiver.

In 1870 a comprehensive "Apportionment Act" was passed, providing for the apportionment of rent between the heirs and executors of a landlord; but occasion was not taken to repeal the many previous acts *in pari materiâ* or any of them.

In 1871 the goods of lodgers, which at common law are liable to be seized for rent due to a superior landlord, were first rendered exempt from such distress, and a similar protection was extended in 1872 to railway rolling stock.

The Agricultural Holdings Act, 1875, which applied where applicable unless it had been excluded in writing by the landlord or tenant, extended the notice to quit, which was requisite in the case of an implied tenancy from year to year, from half a year to twelve months; gave to agricultural tenants a *primâ facie* property in fixtures; and allowed such tenants compensation for certain improvements therein specified. The statute was applicable only to such holdings of two acres or more, as were either wholly agricultural or wholly pastoral. Statistics show that the operation of the statute was excluded by landlords taking advantage of its permissive clauses in the vast majority of cases, and that from a variety of causes it was unpopular with the vast majority of agricultural tenants. It is repealed by the Agricultural Holdings Act, 1883, but prospectively only, so that, where not excluded by writing, it still applies to tenancies current or created between the 14th February, 1876, and the 31st December, 1883.

It would not be worth while to notice the Settled Estates Act, 1877, were it not that, in sect. 46, it limits the application of the proviso for re-entry to cases of non-payment of rent, whereas both the corresponding section of the Settled Estates Act, 1856, and (as we have seen) the form provided by the Legislature in 1845 had applied such proviso to the breach of covenants generally.

The Ground Game Act, 1880, for the first time in the history of the subject, interferes with the liberty which landlord and tenant have at common law to make what contracts they please. Where the contract of tenancy was silent, game was always the property of the tenant by virtue of his property in the land. Landlords, however, have for a long time been in the habit of "reserving" the game to themselves by special stipulation, and where this is the case the tenant is punishable upon summary conviction, under

the act 1 & 2 Will. 4, c. 31, for taking the game. With respect to hares and rabbits, the Ground Game Act, although it does not interfere with *existing leases*, provides that such reservations shall *in future* only have the effect of giving the landlord a "concurrent right" with the tenant to kill and take them.

The Conveyancing and Law of Property Act, 1881, contains most important provisions respecting "relief against forfeiture" of leases for breach of covenant. It had been for a very long time the practice to insert in the lease a proviso for forfeiture of the lease by the tenant, and re-possession of the premises by the landlord, in case of breach by the tenant of any of his covenants whatever. In the case of a breach of a covenant to pay rent, a court of equity from very early times, and, by the Common Law Procedure Act, 1860, a Court of Law, would interfere to prevent the landlord enforcing this proviso, upon the tenant paying the rent: and in the case of a breach of a covenant to insure, a special and conditional power to relieve against the forfeiture had been created by statute, being given to a Court of Equity by 22 & 23 Vict. c. 35, and to a Court of Law by the Common Law Procedure Act, 1860. But except in these two cases, and in the cases of accident or surprise, no relief could be given, were the breach ever so trivial, or the improved value of the demised premises accruing to the landlord by insisting on the forfeiture ever so great. The Act of 1881 mitigates this hardship on the tenant, by empowering the Chancery Division of the High Court to grant relief against forfeiture for breach of any covenant or condition, except the covenant not to part with the premises without leave of the landlord and the covenant in a mining lease to allow inspection of books, and the condition for forfeiture in case of bankruptcy; and this enactment takes effect, not only notwithstanding any stipulation to the contrary, but also upon leases made either before or after the commencement of the act.

The Settled Land Act, 1882, very greatly extends the powers of tenants for life by authorizing them to make building and mining leases, and to accept surrenders of leases.

The Agricultural Holdings Act, 1883, is a statute of the highest importance to the landlords and tenants of agricultural or pastoral holdings or market gardens. Modelled to a very great extent upon the Agricultural Holdings Act, 1875, it differs from that act in being mainly compulsory, and partly retrospective. The outgoing tenant acquires a right to compensation for certain specified im-

provements, the act requiring, however, in the case of buildings and other improvements of an expensive character, the consent of the landlord to the execution of them, and in the case of drainage, giving the landlord power to execute drainage works himself, charging the tenant with the cost. The tenant also acquires a property in fixtures and buildings subject to the landlord's power to acquire them by purchase. The notice to quit in the case of an implied tenancy from year to year, which is a half-year's notice at common law, becomes a year's notice. Travelling into quite a distinct subject matter, the act also mitigates the hardships of the law of distress by reducing the period within which arrears of rent may be distrained for from six years to one, by exempting from distress agricultural machinery and live stock taken in for breeding or feeding, by limiting the charges upon a distress, by extending the time within which a distress may be redeemed, and by requiring all distresses to be taken by certificated bailiffs.

Lastly, the Housing of the Working Classes Act, 1885, greatly infringes a hitherto leading rule of the law of landlord and tenant by the provision that in every contract for letting a house at a certain low rent there shall be implied a condition that the house is reasonably fit for human habitation. It is noteworthy that in the bill, as originally presented by the Government to the House of Lords by Lord Salisbury, this clause was intended to be of universal application.

These, then, very briefly, are the principal English (*b*) statutes affecting the relation of landlord and tenant. A short collection of the leading propositions of the law of the subject is now submitted.

(*b*) But few of the English statutes relate also to Scotland or Ireland. The following are exceptions: — The Emblements Act, 1851 (14 & 15 Vict. c. 25), and the Lodgers' Goods Protection Act, 1871 (34 & 35 Vict. c. 79), relate to Ireland, while the Apportionment Act, 1870 (33 & 34 Vict. c. 35), and the Railway Rolling Stock Protection Act, 1872 (35 & 36 Vict. c. 50), relate both to Ireland and Scotland. The Scotch common law of the subject is widely different from the English, and the Scotch statutes which specifically relate to the subject are very few. See Hunter's Landlord and Tenant. The Irish common law, on the other hand, is identical with the English, and the Irish statutes very numerous. The principal Irish statutes are: 14 & 15 Vict. c. 57 (remedy by tenant distrained on by superior after paying rent to immediate landlord); 23 & 24 Vict. c. 154 (summary ejectment, prolongation of term in lieu of emblements, distress for one year's rent only); 33 & 34 Vict. c. 45 (legality of tenant right); and 44 & 45 Vict. c. 49, "The Land Law (Ireland) Act, 1881." *See* Furlong's Landlord and Tenant.

Definitions.

Landlord and tenant. — The relation of landlord and tenant is created by the landlord allowing the tenant to enjoy the landlord's house or land for a consideration termed rent, recoverable by distress.

Reversion. — Reversion is the interest remaining in the landlord, who is therefore frequently termed the reversioner.

Tenant for years. — A man is a tenant for years where the landlord lets land or tenements to him for a term of certain years, agreed upon between the landlord and the tenant, and the tenant enters by force of the lease.

Tenant from year to year. — A tenant from year to year is one who, by a contract of tenancy, implied from entry and the payment of rent with reference to a yearly tenancy, is entitled to half (*c*) a year's notice to quit, expiring at that period of the year at which his tenancy commenced.

See Doe *v.* Coates, 7 T. R. 85, and p. 219, *post.*

Tenant at will. — A tenancy at will takes place where the letting is for no certain term, but is to continue for the joint will of both parties, and no longer.

Tenant by sufferance. — A tenant by sufferance is one who comes in by right and holds over without right, as if a tenant for the life of another continue to hold after the death of him for whose life he entered.

See Smith, L. & T. 13, 16, 31.

Lease. — Any contract of tenancy is a lease, but the expression "lease" is commonly restricted to a contract of tenancy for years or lives by deed.

Disabilities of Landlords.

Settled estates, &c. — Infants, lunatics, owners of settled estates and other persons under disability become landlords under certain statutory restrictions, the principal restriction being that owners for life may bind remainder-men by leases for building purposes for 99 years, for mining purposes for 60 years, and for other purposes for 21 years and no longer, and that those who represent landlords under disability make leases under the supervision of the Chancery Division of the High Court of Justice.

Settled Land Act, 1882, s. 6, p. 7, *post.*

Ecclesiastical corporations. — Ecclesiastical corporations may, with the consent of the Ecclesiastical Commissioners, grant building leases for not more than 99 years. Parsons may let glebe for not more than 14

(*c*) If the Agricultural Holdings Act applies (see lxviii., *post*) the notice is a year's notice.

years (or 20 years, if the tenant covenant for improvements), with the consent of bishop and patron.

5 & 6 Vict. c. 27, p. 23, *post;* 21 & 22 Vict. c. 57, s. 2, p. 24, *post.*

Municipal corporations. — Municipal corporations may not let lands for more than 31 years without the consent of the Treasury.

Municipal Corporations Act, 1882, s. 108, p. 17, *post.*

Disabilities of Tenants.

Spiritual persons. — Spiritual persons may not take leases of more than 80 acres of land without the consent in writing of the bishop of the diocese.

1 & 2 Vict. c. 106, s. 28, p. 68, *post.*

Charity trustees. — Trustees for charitable uses can only take leases by deed made 12 months before the death of the landlord.

Mortmain Acts, p. 69, *post.*

Infants. — A lease to an infant is not void, but only voidable on his coming of age.

Baylis *v.* Dyneley, 3 M. & S. 477, and p. 70, *post.*

Agreement for Lease (*d*).

Specific performance. — An agreement for a lease must be in writing and signed, to be sued upon as such; but he who enters and pays, or agrees to pay rent under an oral agreement for a lease, or otherwise partly performs the agreement, may obtain a decree for a lease.

Stat. Frauds, s. 4, p. 85, *post;* Nunn *v.* Fabian, L. R., 1 Ch. 35, p. 100, *post.*

Stamp. — The stamp upon an agreement for a lease not exceeding 35 years is the same as the stamp upon a lease, and the stamp upon a lease made in conformity with an agreement duly stamped is sixpence.

Stamp Act, 1870, s. 96, and p. 94, *post.*

Title of landlord. — Under an agreement for a lease for years, the intended tenant may not call for the title of the intended lessor, whether the premises intended to be leased be freehold or leasehold.

Vendor and Purchaser Act, 1874, s. 2, p. 2, *post;* Conveyancing Act, 1881, s. 13, p. 2, *post.*

(*d*) As to the position of a person entering and paying rent under an agreement for a lease, see Walsh *v.* Lonsdale, 21 Ch. D. 9, and p. 86, *post.*

Lease.

Mode of making. — A lease for three years or less may be written or oral, but a lease for more than three years must be by deed, otherwise it is void.

Stat. Frauds, s. 1; 8 & 9 Vict. c. 106, s. 3, p. 127, *post.*

Entry under void. — He who enters and pays, or agrees to pay, rent under a void lease, is tenant from year to year upon such terms of the void lease as are consistent with a yearly tenancy.

Doe *v.* Bell, 2 Sm. L. C. 96, and p. 221, *post.*

Custom of country. — The custom of the country is incorporated in every lease unless expressly excluded.

Wigglesworth *v.* Dallison, 1 Sm. L. C. 598, and p. 753, *post.*

Discrepancy of lease and counterpart. — The ordinary rule is, that where the lease and the counterpart differ, the lease prevails, but this rule does not apply where there is an evident mistake in the lease.

Burchell *v.* Clark, L. R., 2 C. P. D. 88, and p. 129, *post.*

Implied Contracts of Landlord.

Quiet enjoyment. — The landlord impliedly contracts with the tenant to give him possession, and guarantees the tenant against eviction by any person having a title paramount to that of the landlord, and against the disturbance which would be occasioned by some person enforcing a charge which the landlord ought to have satisfied.

See Coe *v.* Clay, 5 Bing. 440; Bandy *v.* Cartwright, 8 Ex. 913, and p. 674, *post.*

Fitness of premises. — There is an implied contract by the landlord of a furnished house that it is fit for occupation; but with respect to an unfurnished house (unless it be let at a certain low rent) or land there is no such implied contract.

Wilson *v.* Finch Hatton, L. R., 2 Ex. D. 336; Hart *v.* Windsor, 12 M. & W. 68, and p. 1, *post.*

Implied Contracts of Tenant.

To pay rent, &c. — The tenant impliedly contracts with the landlord to pay rent, not to commit or permit waste, and to give up possession at the end of the tenancy.

See 11 Geo. 2, c. 19, s. 14; Morrison *v.* Chadwick, 7 C. B. 266; Henderson *v.* Squire, L. R., 4 Q. B. 1.

Not to deny title. — A tenant is estopped from alleging that his landlord had no title at the period of the demise; but he is not estopped from alleging that the title of the landlord has expired.

Cooke *v.* Loxley, 5 T. R. 4; Delaney *v.* Fox, 2 C. B., N. S. 768, and p. 214, *post.*

Express Contracts of Landlord.

Quiet enjoyment. — The express contract of a landlord for quiet enjoyment as usually worded is less than the implied one (which it excludes), and does not guarantee the tenant against eviction by title paramount.

See Merrill *v.* Frame, 4 Taunt. 329, and p. 676, *post.*

Repair. — Where a landlord contracts to repair, a notice by the tenant that the premises need repair is an implied condition precedent to the right of action on such contract.

Makin *v.* Watkinson, L. R., 6 Ex. 25, and p. 595, *post.*

Express Contract of Tenant.

To pay rent. — The contract for rent must be performed in all events, and notwithstanding the destruction of the premises by fire or other cause, whether preventible or not.

See Belfour *v.* Weston, 1 T. R. 310, and p. 408, *post.*

Insurance. — The contract to insure is broken by a failure to insure for any time, however short, and the breach of such a contract is a continuing breach.

Doe *v.* Shewin, 3 Camp. 134; Doe *v.* Gladwin, 6 Q. B. 953.

To repair. — The contract to repair must be performed in all events, notwithstanding the destruction of the premises by fire or other cause, whether preventible or not.

Bullock *v.* Dommit, 6 T. R. 650, and p. 592, *post.*

Damages for non-repair. — The damages for non-repair are measured by the injury to the reversion.

Mills *v.* East London Union, L. R., 8 C. P. 79, and p. 600, *post.*

Against assignment. — The contract not to assign without licence is not broken by an assignment by operation of law.

Slipper *v.* Tottenham, &c., Rail. Co., L. R., 4 Eq. 112, and p. 660, *post.*

Not to do acts without licence. — Where there is a contract not to assign without licence, or not to do any other act without licence of the landlord, such licence, if given, extends only to the single assignment or other act for which the licence is required.

22 & 23 Vict. c. 35, s. 1, and p. 657, *post.*

Rent.

Where payable. — Rent is payable on the demised premises where there is no covenant to pay it; but in the case of a covenant, it is incumbent on the tenant to seek out the person to whom it is payable.

Haldane *v.* Johnson, 8 Ex. 689, and p. 397, *post.*

Deductions. — The tenant may deduct from rent any payment which he is obliged to make in order to protect himself from a distress by a ground landlord.

See Taylor *v.* Zamira, 6 Taunt. 524.

Apportionment in respect of estate. — Rent is apportioned in respect of estate where part of the demised premises changes hands, *e.g.* where the tenant surrenders or is evicted from part, or where there is a severance of the reversion.

In respect of time. — All rents as between the heirs and executors of the landlord are considered as growing due from day to day, and are apportionable in respect of time accordingly, but the tenant may not be resorted to for an apportioned part.

Apportionment Act, 1870, p. 405, *post.*

Satisfaction by execution creditor. — As against an execution creditor, the landlord has a claim for **1** year's arrears of rent if the tenancy be for a year or more; and if the tenancy be for less than a year, for the arrears of rent accruing during **4** terms of payment.

8 Ann. c. 14, s. 1; 7 & 8 Vict. c. 96, s. 67, p. 490, *post.*

Distress for Rent.

A distress for rent, in the absence of express agreement, can be made on the demised premises only, but an agreement that a distress may be made on other premises than those demised is valid.

Daniel *v.* Stepney, L. R., 9 Ex. 185, and p. 412, *post.*

Subject-matters of distress. — A distress for rent may be made by or on behalf of the landlord upon all goods and animals, whether belonging to the tenant or not, found upon the demised premises, except that —

(1) Fixtures, things in actual use, things in the custody of the law, things perishable, things delivered to the tenant in the way of his trade, animals of a wild nature, the goods of an ambassador, and gas-meters, and if the Agricultural Holdings Act applies (see lxviii., *infra*), hired machinery, and live stock not belonging to the tenant which is on the premises for breeding purposes, are absolutely privileged from distress.

See Simpson *v.* Hartopp, 1 Sm. L. C. 439, and p. 435, *post.*

(2) The goods of a lodger, and railway rolling stock not belonging to the tenant, are absolutely privileged from distress, upon the lodger or owner complying with the terms of the Lodgers' Goods Protection Act, 1871, and Railway Rolling Stock Protection Act, 1872.

34 & 35 Vict. c. 79, p. 445, *post;* 35 & 36 Vict. c. 50, p. 447, *post.*

(3) The tools of the tenant's trade, and his sheep and beasts of the plough, and if the Agricultural Holdings Act applies (see lxviii., *infra*), live stock not belonging to the tenant taken in to be fed at a fair price to be paid by the owner to the tenant, are conditionally privileged from distress — that is, they are privileged if there be other sufficient distress upon the premises, and not otherwise.

See 51 Hen. 3, stat. 4, and p. 449, *post.*

Fraudulent removal. — If any tenant fraudulently, and in order to avoid a distress, remove any goods or chattels from the demised premises, the landlord may, within 30 days, seize and sell them wherever found, except in the hands of a *bonâ fide* purchaser for value.

11 Geo. 2, c. 19, s. 1, p. 467, *post.*

Distress after tenancy. — A distress may be made at any time within 6 months after determination of the tenancy.

8 Ann. c. 14, s. 6, p. 453, *post.*

Amount of rent recoverable. — A distress must be made within 6 years, or if the Agricultural Holdings Act applies, 1 year (see lxviii., *infra*), after the rent distrained for is due or acknowledged in writing to be due.

3 & 4 Will. 4, c. 27, s. 42, p. 454, *post.*

Liability for bailiff. — The landlord is liable for the irregular but not for the wrongful acts of his bailiff making the distress.

Haseler *v.* Lemoyne, 5 C. B , N. S. 530, and p. 459, *post.*

Impounding on premises. — A distress may be impounded on the premises where taken; and when it is so impounded, any person may enter the premises in order to view, appraise and buy it.

11 Geo. 2, c. 19, s. 10, and p. 476, *post*.

Impounding animals. — Persons impounding animals in a pound must supply them with food and water, and may recover the expense from the owner. In default of supply by the impounder, any person may supply food and water, and may recover the expense from the owner, or, after **7** days' impounding, may pay himself by sale of the animal, rendering the overplus to the owner.

12 & 13 Vict. c. 92, s. 5; 17 & 18 Vict. c. 60, p. 473, *post*.

Retainer of distress as pledge. — The landlord may, if he pleases, retain the distress as a pledge until the rent be paid, or be proved not to have been due by action of replevin. For **5** days, or if the Agricultural Holdings Act applies, and the tenant so require in writing, **15** days (see lxviii., *infra*), after seizure, but no longer, the tenant has an absolute right to treat the distress as a pledge, and proceed to recover it by action of replevin. After the **5** or **15** days, the tenant has a conditional right to replevy, exercisable at any time before an actual sale.

See 2 W. & M. sess. 1, c. 5; Jacob *v.* King, 5 Taunt. 451.

Sale of distress. — Unless the tenant replevy, the landlord, at any time after **5** days, or if the Agricultural Holdings Act applies, and the tenant so require in writing, **15** days (see lxviii., *infra*), from the seizure, may sell the distress to satisfy the rent and expenses; but he must first give notice in writing to the tenant, and cause the distress to be appraised. He is not bound to sell.

2 W. & M. sess. 1, c. 5; Philpot *v.* Lehain, 35 L. T. 855, and p. 479, *post*.

Expenses of distress. — Where the distress is for not more than 20*l*., a scale of expenses is limited by statute. If the Agricultural Holdings Act applies (see lxviii., *infra*), and the distress be for more than 20*l*., a scale of expenses is limited by that act. In other cases, there is no limit to the expenses, except that they must be reasonable.

See 57 Geo. 3, c. 93, s. 1, and p. 482, *post*.

Remedies for illegal distress. — In the case of an illegal distress, *e.g.* where no rent is due, or where goods privileged from distress are seized, the tenant may rescue the goods before impounding, or obtain restitution at any time before sale by replevin, or, at his option, he may sue for damages. If no rent be due, and the distress be sold, he recovers double the value.

See 2 W. & M. sess. 1, c. 5, and p. 499, *post*.

Remedies for irregular distress. — In the case of an irregular distress, *e.g.* where the distress is sold without notice, or not for the best price, the tenant may recover full satisfaction for the special damage sustained, and no more.

11 Geo. 2, c. 19, s. 19; Lucas *v.* Tarleton, 3 H. & N. 116.

Remedy for excessive distress. — In the case of an excessive distress, the tenant may recover such damages as a jury may find to be the value of the goods seized, less the rent due. He is entitled to at least nominal damages.

See Chandler *v.* Doulton, 34 L. J., Ex. 89, and p. 524, *post.*

Determination of Tenancy.

Modes of determination. — The principal modes in which a tenancy is determined are notice to quit, surrender, and forfeiture.

Notice to quit. — A tenancy from year to year is, in the absence of an agreement otherwise, determinable by half a year's notice to quit, expiring at the end of some current year of the tenancy. If the Agricultural Holdings Act applies [see lxviii., *infra*], the notice is a year's notice.

The notice to quit need not be in writing, but it must be binding on the noticor, and the noticee must have reason to believe it so to be.

The notice to quit need not be delivered to the tenant personally. It is sufficient to deliver it to a person on the premises whose duty it would be to deliver it to the tenant.

Doe *v.* Crick, 5 Esp. 196; Jones *v.* Phipps, L. R., 3 Q. B. 567; Tanham *v.* Nicholson, L. R., 5 H. L. 561.

Option to determine. — If a terminable lease be granted without saying who is to have the option of determining it, such option is with the tenant, and not with the landlord.

But where a lease provides that it shall become void upon the lessee breaking any of the covenants contained therein, it is at the option of the lessor, not of the lessee, whether the lease shall or shall not be determined.

Dann *v.* Spurrier, 3 B. & P. 399; Doe *v.* Bancks, 4 B. & A. 401.

Surrender. — Every express surrender must be by writing, and every express surrender of a more than 3 years' term must be by deed.

See 8 & 9 Vict. c. 106, s. 3, p. 296, *post.*

A surrender may be implied from anything which amounts to an agreement by the tenant to abandon and by the landlord to resume the

premises, *e.g.* by the delivery of keys, by the entering into a new contract of tenancy, or by the landlord accepting a new tenant.

See Phené *v.* Popplewell, 12 C. B., N. S. 334, p. 302, *post.*

Forfeiture. — A forfeiture is incurred ipso facto by breach of a condition in a lease, but not by a breach of covenant, unless the lease contain a proviso for re-entry applicable to the breach.

If the landlord has a right to re-enter for non-payment of rent (but not otherwise), he may re-enter without formal demand of rent, on proving that half a year's rent is in arrear, and that no sufficient distress be found on the premises.

See C. L. P. Act, 1852, s. 210.

Waiver of forfeiture. — If the landlord at any time, after notice of breach of covenant committed, acknowledges the continuance of the tenancy, *e.g.* if he distrain or sue for rent due after the forfeiture, he waives the forfeiture and loses his right to re-enter.

See Ward *v.* Day, 5 B. & S. 364, and p. 323, *post.*

Continuing breach. — Some covenants, *e.g.* the covenant to insure, are of such a nature that a breach of them is continuing, so that the effect of a waiver is practically nil.

See Doe *v.* Gladwin, 6 Q. B. 953.

Restriction of waiver. — A waiver does not extend to any breach of covenant other than that to which it specially relates.

23 & 24 Vict. c. 38, s. 6, p. 326, *post.*

Relief against forfeiture. — Relief against forfeiture for non-payment of rent can be obtained at any time within 6 months after execution executed upon payment of all arrears of rent and full costs.

See C. L. P. Act, 1852, s. 210, p. 331, *post.*

Relief against forfeiture for any breach of covenant or condition except the covenant against assignment or subletting without licence, or, in a mining lease, to permit inspection of books, or for forfeiture in case of bankruptcy, may be obtained in the High Court by the tenant, either in the landlord's action, if any, to eject him, or in a separate action brought by himself.

Conveyancing Act, 1881, s. 14, p. 328.

Rights of Parties on Determination of Tenancy.

Delivery of possession. — The tenant must deliver up complete possession of the premises, and is answerable for the holding over of a subtenant. Encroachments on a waste are for the benefit of the landlord.

Henderson *v.* Squire, L. R., 4 Q. B. 170, and p. 740, *post;* Whitmore *v.* Humphries, L. R., 7 C. P. 1, and p. 742, *post.*

Rightful holding over. — If a tenant for years hold over, and pays or agrees to pay rent, he may become a tenant from year to year upon such terms of his lease as are consistent with a yearly tenancy, and it is a question for the jury whether he becomes such a tenant or not.

See Hyatt *v.* Griffiths, 17 Q. B. 505, and p. 744, *post.*

Wrongful holding over. — If a tenant for years wilfully hold over after written demand of possession, the landlord may sue him for damages at the rate of double the yearly value of the premises held over so long as held over.

4 Geo. 2, c. 28, s. 1, and p. 745, *post.*

Holding over after own notice to quit. — If any tenant hold over after his own notice to quit, he becomes bound to pay double rent so long as he holds over, recoverable in the same manner as the single rent.

11 Geo. 2, c. 19, s. 18, p. 748, *post.*

Partial occupation. — Where an existing custom for the tenant of a farm to retain possession after the end of his tenancy is proved as a fact, such tenant has a right to retain possession accordingly, unless he hold under a contract of tenancy inconsistent with the custom.

Compensation for improvements. — Where an existing custom for the outgoing tenant of a farm to be paid compensation for improvements is proved as a fact, such tenant has a right to compensation in accordance with such custom unless he hold under a contract of tenancy inconsistent therewith. Valuations between an outgoing and incoming tenant are a matter of convenience only, and if there be no incoming tenant, the landlord is liable to the outgoing tenant under the custom.

See Faviell *v.* Gaskoin, 7 Ex. 273, and p. 753, *post.*

Application of Agricultural Holdings Act, 1883. — The Agricultural Holdings Act, 1883, applies to all holdings, however small, either wholly agricultural or wholly pastoral, or partly agricultural and partly pastoral, or wholly or partly cultivated as market gardens, held under a landlord for a term of years, or for lives, or for lives and years, or from year to year by a tenant holding no employment under such landlord.

Agricultural Holdings Act, 1883, ss. 54 and 61.

In cases where the Agricultural Holdings Act, 1883, applies, the tenant, on quitting his holding on the determination of his tenancy, is entitled to compensation for boning, chalking, clay-burning, claying, liming, and marling, and for the application of purchased manure, and consumption on the holding by cattle, sheep, and pigs, of cake or other feeding stuffs not produced on the holding. He is also entitled to compensation for buildings and other permanent improvements if executed with the written consent of his landlord, and for drainage if executed after notice to a landlord refusing to execute it himself.

Agricultural Holdings Act, 1883, p. 774.

Prolongation of term. — The tenant of a farm at rack rent, in any case where the tenancy determines by the cesser of the estate of a landlord entitled for his life, or for other uncertain interest, may continue to hold the farm till the end of the then current year of the tenancy.

14 & 15 Vict. c. 25, s. 1, and p. 750, *post*.

Fixtures. — The primary rule is that all things attached by the tenant to the demised premises become the property of the landlord, and are not removable by the tenant at any time or under any circumstances; but the exceptions to this rule abrogate it in respect to trade fixtures, domestic fixtures, and agricultural fixtures in a varying degree.

Trade fixtures. — Domestic fixtures. — Trade fixtures, *e.g.* engines for working collieries, and conservatories, and domestic fixtures, *e.g.* ornamental chimney-pieces, but not conservatories, may be removed by the tenant during the tenancy, provided that the removal can be effected without doing substantial injury to the freehold.

See Lawton *v.* Lawton, 3 Atk. 13, and p. 626, *post;* Buckland *v.* Butterfield, 2 B. & B. 54, and p. 629, *post*.

Agricultural fixtures. — Agricultural fixtures erected by the tenant before January 1st, 1884, with the written consent of the landlord become the property of the tenant, and removable by the tenant if the tenant shall have given one month's notice in writing of his intention to remove, and the landlord shall not have exercised an option to purchase them.

14 & 15 Vict. c. 25, s. 3, and p. 632, *post*.

If the Agricultural Holdings Act applies (see lxviii., *supra*), any engine, machinery, fencing, or building (except a building for which compensation is payable), erected by the tenant on or after the 1st January, 1884, becomes the property of the tenant and removable by him before or within a reasonable time after the termination of his tenancy, subject to the tenant having discharged all his obligations to the landlord, doing no avoidable damage, repairing all unavoidable damage, giving notice

of intention to remove, and subject also to the landlord's option of purchase.

Agricultural Holdings Act, 1883, s. 34, and p. 634, *post.*

Removal of fixtures. — The right to remove non-agricultural fixtures can be exercised only during the term or during such period as the tenant holds over with the consent of the landlord.

See Lyde *v.* Russell, 1 B. & Ad. 334, and p. 643, *post.*

Assignment.

Mode of assignment. — Every contract for assignment must be in writing, and every assignment must be by deed.

Stat. Frauds, s. 4; 8 & 9 Vict. c. 106.

What covenants pass to assignee. — The assignee may sue or be sued upon all covenants which concern the premises demised, *e.g.* on a covenant to repair, whether the assignor may have covenanted for his assigns or not.

See Spencer's case, 1 Sm. L. C. 60, and p. 162, *post.*

Assignment of Reversion.

Notice to tenant. — Before suing for rent, the assignee of the reversion must give notice to the tenant of the assignment to him, but he may avail himself of a condition for re-entry on breach of covenants other than the covenant to pay rent without any such notice.

4 Ann. c. 16, s. 10; Scaltock *v.* Harston, L. R., 1 C. P. Div. 106.

Both the assignee of part of the reversion in the premises and the assignee of the reversion of part of the premises may sue and be sued on the covenants in respect of the part assigned or apportioned to him.

See Stevenson *v.* Lambard, 2 East, 375; 22 & 23 Vict. c. 35, s. 3.

Assignment of Term.

Right to assign. — Every tenant, except a tenant by sufferance, may assign or sublet, unless expressly restrained by the contract of tenancy from doing so.

See Church *v.* Brown, 15 Ves. 258.

Sublease. — A sublease for the whole term, or for a period beyond it, is an assignment, and puts the subtenant in the place of the tenant.

See Beardman *v.* Wilson, L. R., 4 C. P. 57, and p. 258, *post.*

Liability of lessee and assignee. — A lessee assigning remains liable on his covenants, but an assignee may assign over to a pauper. By such assignment the assignee frees himself from all liability to the lessor, but his liability to the assignor continues.

See Thursby *v.* Plant, 1 Wms. Saund. 241; Taylor *v.* Shum, 1 B. & P. 21.

Bankruptcy. — Upon the bankruptcy of the tenant the tenant's estate in the premises is assigned by law to his trustee in bankruptcy, who may, within three months after his appointment, disclaim that estate, *with leave of the Bankruptcy Court*, if the tenant has sublet or assigned, or the property leased is let for, and is worth, 20*l.* a year or more, or the tenant's estate is not being summarily administered, or if the landlord, having notice of the trustee's intention to disclaim, requires the matter to be brought before the Court, *and in other cases* without any such leave.

If any person interested requires the trustee to decide whether he will disclaim or not, and he does not decide within 28 days, the option to disclaim is gone, and the tenant's estate is absolutely vested in him with its burdens and benefits.

If no disclaimer is executed, the trustee is personally liable on the covenants of the lease, with a right to be indemnified out of the assets of the bankrupt's estate.

The disclaimer determines the rights and liabilities of the tenant, and of his estate in the lease, as from the date of the disclaimer, and discharges the trustee from personal liability as from the date of his appointment, but does not affect the rights or liabilities of any other person.

Bankruptcy Act, 1883, s. 55; Bankruptcy Rule, 132, and p. 277, *post.*

The covenant not to assign without licence is not broken by an assignment by bankruptcy, but a proviso for re-entry on the tenant's bankruptcy is good.

Doe *v.* Bevan, 3 M. & S. 353; Roe *v.* Galliers, 2 T. R. 133.

Death. — The tenant's estate is personal property, and passes to his personal representatives. In Scotland the tenant's interest passes to his heirs.

An executor cannot waive a term, although it be worth nothing; he must either renounce the executorship in toto or not at all.

Rubery *v.* Stevens, 4 B. & Ad. 244.

Personal liability of executor. — Personal representatives are personally liable for rent only up to the value of the premises.

Personal representatives having satisfied all existing liabilities on a lease, and having set apart a sufficient sum to answer any future liquidated liability, may assign the lease to a purchaser and distribute assets.

Thereupon the personal liability of the personal representatives is extinguished, but the landlord may follow the assets in the hands of the beneficiaries.

22 & 23 Vict. c. 35, s. 27, p. 290, *post.*

In cases to which the above two paragraphs are not applicable, the personal representatives of a tenant are personally liable upon his covenants.

See Tremeere *v.* Morrison, 1 B. N. C. 86, p. 291, *post.*

Recovery of Premises by Landlord.

Notice before proceeding for forfeiture. — A right of re-entry for breach of covenant or condition (except the covenant against alienation, or in a mining lease to allow inspection of books, and the condition for forfeiture on bankruptcy, or taking the lessee's interest in execution) is not enforceable unless the landlord has served on the lessee a notice requiring him to remedy the breach complained of, and the lessee has failed to remedy the breach (if remediable), and also to satisfy the landlord by some pecuniary compensation.

Conveyancing Act, 1881, s. 14, p. 329, *post.*

Summary judgment against tenant holding over. — If the tenant's term has expired or been duly determined by a notice to quit, the landlord may, in an action for the recovery of the premises, obtain final judgment for such recovery from a judge in chambers on affidavit by himself or any other person who can swear positively to the facts, verifying the cause of action and swearing that there is no defence thereto.

R. S. C., 1883, Order XIV. p. 795.

Mesne profits. — The landlord recovers by the verdict of the jury mesne profits from the date of the determination of the tenant's interest down to the date of the verdict.

C. L. P. Act, s. 214, p. 791, *post.*

Action where premises held over. — If neither the value nor the rent of the premises exceed 50*l.* a year, and the tenant refuse to deliver up possession at the end of the tenancy, the landlord may sue the tenant or person holding through him in the County Court of the district in which the premises lie; and the judge of such County Court may, on proof of the landlord's title and other matters, order possession to be given up to the landlord.

County Court Act, 1856, s. 50, p. 811, *post.*

Action where rent in arrear. — If neither the value nor the rent of the premises exceed 50*l.* a year, and the rent be in arrear for one half-year, and the landlord be entitled to re-enter for non-payment of rent, the landlord of any premises may, without any formal demand for re-entry, sue the tenant in the County Court of the district where the premises lie. Thereupon, unless the tenant in **5** days pay the rent, on proof of no sufficient distress being found on the premises and other matters, the judge of such County Court will order possession to be given up to the landlord in not less than **4** weeks, unless the rent and costs be sooner paid.

County Court Act, 1856, s. 52, p. 816, *post.*

Action in county court in ordinary cases. — If neither the value nor the rent of the premises exceed 20*l.* a year, the landlord may, upon any cause of forfeiture whatsoever, eject the tenant by action brought in the County Court of the district where the premises lie. But if the causes of action be either non-payment of rent or holding over, the landlord must follow the special procedure provided for such causes of action.

County Court Act, 1867, s. 11, p. 823.

Recovery before justices of premises held over. — If the tenant occupy at will or for a term of not more than **7** years, or at a rent of not more than **20***l.* a year, and refuse to quit at the end of the tenancy, the landlord may summon the tenant before two justices of the peace, who, upon proof of the landlord's claim and other matters, may issue a warrant to the constables of the district commanding them to give possession within a period not less than **21** nor more than **30** days from the date of the warrant. But the execution of the warrant may be stayed if the tenant will become bound with sureties to sue the landlord for trespass.

1 & 2 Vict. c. 74, p. 829, *post.*

Recovery before justices of deserted premises. — If a tenant at rack rent, or at a rent of three-fourths of the yearly value of the demised premises, be in arrear for one half-year's rent, and desert the demised premises, and leave no sufficient distress thereon, two or more justices of the peace may view the premises at the request of the landlord, and affix thereon a notice stating what day, at the distance of **14** days at least, they will return to take a second view. If upon such second view the tenant do not pay the rent, or if there be no sufficient distress upon the premises, the justices may put the landlord into possession, and the contract of tenancy becomes void.

11 Geo. 2, c. 19, s. 16; 57 Geo. 3, c. 52, and p. 835, *post.*

Criminal Law.

Letting infected house. — If a person let any house or room in which any person has been suffering from an infectious disorder, without having such house or room disinfected, he is liable to a penalty of 20*l.*, and if he falsely answer any question of an intending tenant as to an infected person being, or having been within 6 months, on the premises, he is liable to a penalty of 20*l.*, or a month's imprisonment with hard labour.

Public Health Act, 1875, ss. 128, 129, and p. 841, *post.*

Larceny by tenant. — Any tenant stealing any fixture is guilty of felony, and is liable to two years' imprisonment, with whipping, if a male; and, if the value of the fixture exceed 5*l.*, to penal servitude for 7 years.

24 & 25 Vict. c. 96, s. 74, and p. 842, *post.*

Demolition by tenant. — Any tenant unlawfully demolishing any building demised to him, or severing any fixture from the freehold, is guilty of a misdemeanour.

24 & 25 Vict. c. 97, s. 13, and p. 843, *post.*

THE LAW

OF

LANDLORD AND TENANT.

CHAPTER I.

BY WHOM TERMS MAY BE GRANTED.

SECT. 1. — *Generally.*

ALL persons who are not under any legal disability may grant leases for such terms as are not inconsistent with the nature and quantity of the estates which they have: but if a lease be made for a longer term than the estate of the lessor will warrant, it will generally operate as a valid demise during so much of the term as he has power to grant.

Thus, if a tenant for life demise by deed for a long term (say ninety-nine years), it will operate as a valid lease during his life (*a*).

[*2] * **Leases by estoppel.** — If a person, having no estate whatever in the land, demise it by deed to another, who enters and takes possession under or by virtue of such demise, the law will not allow the latter to deny the title of the person from whom he has accepted the demise, and a tenancy by estoppel and also a reversion in fee by estoppel will be thereby created (*b*);[1] but of course such demise will be inoperative as against the real owner, except so far as it may increase the difficulty of proving his title and right to the possession of the land.

Person having mere right of entry may demise. — At one time it was necessary that the party granting the lease, who is called the lessor, should be in possession of the lands intended to be leased or in receipt of the rents and profits

(*a*) Bragg *v.* Wiseman, Brownlow & G. 22.

(*b*) Sturgeon *v.* Wingfield, 15 M. & W. 224; Cuthbertson *v.* Irving, 4 H. & N. 742; 6 Id. 135.

[1] **Tenancies by estoppel.** — See Stott *v.* Rutherford, 92 U. S. 107. The estoppel is mutual. The lessee cannot dispute the lessor's title, neither can the lessor, if he subsequently acquire one, eject the lessee. If a lessor bring an action of ejectment against the lessee, and prove the existence of the relation of landlord and tenant, he need not prove his title, for he has a title by estoppel and a reversion against the tenant. He must, however, prove the termination of the tenancy, as by notice to quit, for during the tenancy the tenant has a title to the possession by estoppel against his lessor. Doe *d.* Heathcote *v.* Hughes, 3 P. & B. (N. B.) 368, 373. If a lessor demise without having any title and subsequently acquire one, it will enure by estoppel to the benefit of the lessee. McKenzie *v.* Lexington, 4 Dana (Ky.) 129. Hence a grantee under deed from one having no title may sue in trespass one claiming, under his grantor, even though the latter have subsequently acquired a title. Phelps *v.* Blount, 2 Dev. L. (N. C.) 177. Even the title of the lessee of a tenant at will is good by estoppel against his lessor or parties claiming under him. Hilbourn *v.* Fogg, 99 Mass. 11. A lessee of a tenant at will, if he occupy, is estopped to deny his lessor's title. Cook *v.* Cook, 28 Ala. 660. But such a lessee, if he have not occupied, is not estopped. Wright *v.* Graves, 80 Ala. 416. Termination of the tenancy removes the estoppel. Douglass *v.* Geiler, 32 Kans. 499; Turner *v.* Ferguson, 39 Tex. 505; Heath *v.* Williams, 25 Me. 209; Rogers *v.* Joyce, 4 Id. 93. It is only the existence of the lessor's title, or that he had one at the commencement of the tenancy, which the lessee is estopped to deny. He is not estopped to deny that the lessor's title has terminated. Lamson *v.* Clarkson, 113 Mass. 348; O'Brien *v.* Ball, 119 Id. 28.

thereof; for if he had a mere right of entry, he could not grant it to another (*c*).[1] But by 8 & 9 Vict. c. 106, s. 6, not only contingent, executory and future interests, and possibilities coupled with an interest, but also "a right of entry whether immediate or future, and whether vested or contingent, into or upon any tenements or hereditaments in England of any tenure, may be disposed of by deed." This enactment does not relate to a right to re-possess or re-enter for a condition broken, but only to an original right where there has been a disseisin, or where the party has a right to recover lands, and his right of entry and nothing but that remains (*d*).

Lessor's title. — A lease is, both in contemplation of law and in fact, a *conveyance* of the demised premises for the term therein mentioned, subject to the rent, covenants, and conditions.[2] It usually contains a very qualified and restricted covenant for quiet enjoyment, such as any person may safely enter into who never had title to the demised premises (*e*). By the Vendor and Purchaser Act, 1874 (37

(*c*) 32 Hen. 8, c. 9, ss. 2, 4; Doe *d.* Williams *v.* Evans, 1 C. B. 717.

(*d*) Hunt *v.* Bishop, 8 Exch. 675, 680; 22 L. J., Ex. 337; Hunt *v.* Remnant, 9 Exch. 635; 23 L. J., Ex. 135; Bennett *v.* Herring, 3 C. B., N. S. 370.

(*e*) See post, Chap. XVII., sect. 8 (*b*).

[1] **Right of entry, without possession.** — A lessee, before taking possession, can give a valid sub-lease. Chung Yow *v.* Hop Chong, 11 Or. 220. If lessor grant lease to one lessee to commence *in futuro*, and afterward grant lease of same premises to third party, covering the same term, to commence *in præsenti*, and the latter enter and occupy the premises, the first lessee, when the time comes for commencement of his term, may eject the second lessee or sue the lessor for damages. Trull *v.* Granger, 8 N. Y. 115; Whitney *v.* Allaire, 1 Id. 305, 311 (*per* Gardiner, J.).

Leases in futuro. — Under leases to commence *in futuro*, lessee's interest in the term vests presently, but his right to the possession vests *in futuro*.

The right of possession under a lease which does not stipulate otherwise commences immediately. Witthaus *v.* Starin, 12 Daly (N. Y. Com. Pleas) 226.

Delivery. — A lease does not take effect until delivery, and delivery controls the date. Same.

[2] **Nature of a lease.** — There is a material distinction between the common and civil law theories as to the nature of a lease. "The common law regards such a lease" (a lease for years) "as the grant of an estate. . . . The civil law, on the other hand, regards a lease for years as a mere transfer of the use and enjoyment of the property," &c. Gray, J., in Viterbo *v.* Friedlander, 120 U. S. 707, 712, 713.

& 38 Vict. c. 78), s. 2, it is enacted that "under a contract to grant or assign a term of years, whether derived or to be derived out of a freehold or leasehold estate, the intended lessee or assign shall not be entitled to call for the title to the *freehold;*"[1] and by the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), ss. 3 and 13, there are similar enactments as to the title to a *leasehold* reversion; but all these enactments are "subject to any stipulation to the contrary in the contract."

Sect. 2. — *By Tenants in Fee.*[2]

[*3] Tenants in fee may make leases without limit or restraint, for any *number of lives or years, and upon such terms and conditions as they may think

[1] **Giving lease without title; result of it.** — The words "demise," "lease," "let," contain implied covenant for quiet enjoyment. Stott *v.* Rutherford, 92 U. S. 107; Cunningham *v.* Pattee, 99 Mass. 248, 251; Grannis *v.* Delvin, 8 Cow. (N. Y.) 36. Such covenant seems to be implied in every lease (of less than a freehold) containing words of demise. Match *v.* Patchin, 42 N. Y. 167; Mayor of N. Y. *v.* Mabie, 3 Kern. (N. Y.) 160, &c.

The result of giving a lease without title would be that, if lessee should be evicted by one having the title, the lessee could recover damages for breach of the covenant of quiet enjoyment from his lessor. Match *v.* Patchin, *supra;* or he could set up the eviction as a defence to a suit for rent. Fitchburg, &c., *v.* Melven, 15 Mass. 268; Smith *v.* Shepard, 15 Pick. (Mass.) 147.

[2] **Fee simple; definition.** — Tenancy in fee simple, or (as it is sometimes termed) tenancy *in fee*, is an estate to one and his heirs forever without conditions. It is the highest estate known to the law. 2 Blacks. Com. secs. 104, 105; 4 Kent's Com. (13th ed.) sec. 5. All fees, including various determinable ones (base, conditional, and tail), *may* endure forever. 2 Blacks. Com. 109, 110; 4 Kent's Com. 4. But a fee simple or fee (simply), which is not determinable, is the only one that is unqualified (except by the general provisions of the law).

The word "fee" is of feudal origin, signifying an estate held under a service; 2 Blacks. Com. secs. 104, 105. In this country tenures are essentially allodial. 4 Kent's Com. (13th ed.) sec. 487; 2 Cooley's Blackstone, (3d ed.) sec. 102, note. That is, lands are owned as they were prior to the feudal system without any service. 2 Blacks. Com. 104, 105; 3 Kent's Com. 498.

It is still held, however, that the sovereignty (nation, state, or commonwealth) is the source of the title. The right of escheat to the commonwealth and of eminent domain still remains. 2 Cooley's Blackstone (3d ed.) sec. 102, note. Several states have expressly enacted that tenures shall be allodial.

The term "fee simple" is the technical term still used for the highest estate,

fit (*f*).[1] A lease of lands of which the lessor was seized in fee, and of other lands of which he was seized for life (with power of leasing) at one entire rent, but which was not well executed according to the power, was held to be

(*f*) Com. Dig. Estates by Grant (G. 2).

and implies an absolute and perfect title. 4 Kent's Com. 487. Although it was originally used to distinguish lands held under feudal tenures from those which were allodial. 2 Blacks. Com. 104, 105, 106.

The limited or determinable fees are divided by Blackstone and Kent into base or qualified fees, conditional fees, and fees tail. 2 Blacks. Com. 106, 109; 4 Kent's Com. 45.

A base or qualified fee is one having a qualification annexed to it, and is determined when the qualification is at an end. 2 Blacks. Com. 109; 4 Kent's Com. 9.

"A conditional fee at the common law was a fee restrained to some particular heirs exclusive of others." 2 Blacks. Com. 110; 4 Kent's Com. 11.

A fee tail was a conditional fee as qualified by the statute *de donis*. 13 Edw. 1 C. 1. This statute took away the power of alienating the estate which it had been held tenants in tail might do after issue in tail. 2 Blacks. Com. 111, 112, 113. They, however, continued to alienate them by means of recoveries, &c.

Estates tail are either in tail general or tail special. Estates in tail general are where they are limited to one and the heirs generally of his body; and in tail special are where they are limited to certain particular heirs to the exclusion of others. 2 Blacks. Com. 113. An estate might be in tail male or in tail female, or otherwise limited. But these distinctions, so far as America is concerned, are largely historic.

[1] **Leases by tenants in fee; examples.** — A tenant in fee may lease for lives (with an estate at will thereafter), Van Rensselaer's Heirs *v.* Penniman, 6 Wend. (N. Y.) 569; for lives simply, Flagg *v.* Badger, 58 Me. 258; for years with covenant of perpetual renewal, Crowe *v.* Wilson, 65 Md. 479; for years with covenant to renew simply, Syms *v.* Mayor of New York, 105 N. Y. 158; Rutgers *v.* Hunter, 6 Johns. Ch. 215; for years with a renewal option or privilege, Austin *v.* Stevens, 38 Hun (45 N. Y. Supreme Ct.) 41; for years with an extension option, Sweetser *v.* McKenney, 65 Me. 225; Kramer *v.* Cook, 7 Gray, 550; for years with a purchase option, 70 Pa. St. 64; for years with a purchase covenant, Stewart *v.* L. I. R. R. Co., 102 N. Y. 601; for term perpetual determinable only at will of lessor, Folts *v.* Huntley, 7 Wend. 210; for special purpose determinable upon happening of condition subsequent, Horner *v.* Leeds, 25 N. J. L. 106, 115; in fee simple, absolute, or determinable reserving rent charge, Saunders *v.* Hanes, 44 N. Y. 353; Watterson *v.* Reynolds, 95 Pa. St. 474; for years simply, Failing *v.* Schenck, 3 Hill (N. Y.), 344; also for the shorter tenancies (not technically termed leases) as from year to year, Jackson *v.* Rogers, 2 Caines Cas. (N. Y.) 314, 318; from quarter to quarter, Witt *v.* Mayor of N. Y., 6 Robertson (N. Y. Superior Ct.) 441; from month to month, O'Neil *v.* Wells, 2 R. & C. (N. S.) 205; from week to week, Macgregor *v.* Defoe, 14 Ont. 87, 92, *per* Wilson, C. J.; at will merely, Laxton *v.* Rosenberg, 11 Ont. 199, 207; or for a quarter, a month, a week, or any other determinate period.

good after the death of the lessor for the lands held by him in fee, though not for the other lands (*g*).

Sect. 3. — *By Tenants in Tail.*

At common law. — By the common law a tenant in tail could make no lease which would bind his issue in tail, or remaindermen, or the reversioner.[1]

Under the Fine and Recoveries Abolition Act, 1833. — By the Act for the Abolition of Fines and Recoveries (3 & 4 Will. 4, c. 74), s. 15, "every actual tenant in tail" [*i.e.*, every tenant of an estate tail which shall not have been barred], "whether in possession, remainder, contingency, or otherwise, shall have *full power to dispose of*, for an estate in fee simple absolute, *or for any less estate*, the lands entailed," as against the issue in tail, and all persons whose estates are to take effect after the determination or in defeasance of the estate tail. But by sect. 21, this power is not given to expectant heirs or issue in tail.

A lease a "disposition" pro tanto. — A lease for any number of years, or for a life or lives, is a "disposition" *pro tanto* within the meaning of the above act. But by sect. 34, if there be a protector of the settlement, his consent is necessary to make the lease valid, not as against the issue in tail, but as against persons whose estates are to take effect after the determination or in defeasance of the estate tail; and if the tenant in tail making the disposition is a married woman, the concurrence of her husband is necessary to give effect to the same; and any deed which may be executed by her for effecting the disposition must be acknowledged by her be-

(*g*) Doe *d.* Vaughan *v.* Meyler, 2 M. & S. 276.

[1] **Tenancies in tail.** — Estates tail have been abolished or have become obsolete in most parts of the United States. "In others, where they are still retained, they may be barred usually by a simple deed by the tenants." 1 Washburn on Real Property (5th ed.) p. 104; 4 Kent's Com. (13th ed.) sec. 14. The policy of the country is opposed to restraints on alienation. 4 Kent's Com. 17. Entails do, however, under modifications, still exist in the United States. 4 Kent's Com. 19.

fore a judge, or before a perpetual or special commissioner (*h*), or before a county court judge (*i*).

Inrolment, when necessary. — By sect. 41, "no assurance by which any disposition of lands shall be effected under this act by a tenant in tail thereof (*except a lease for any term not exceeding twenty-one years*, to commence from the date of such lease, or from any time not exceeding twelve calendar months from the date of such lease, where a rent shall be thereby reserved, which, at the time of granting such lease, shall be a rack rent or not less than five-sixth parts of a rack rent), shall have any operation under this act unless it be enrolled in his Majesty's High Court * of Chancery (*k*) within six calendar months after the execution thereof." [*4]

It is to be observed that a lease for less than twenty-one years must be enrolled pursuant to this section, if the rent reserved does not amount to at least five-sixth parts of a rack rent, or if the term is not to commence for more than one year from the date thereof. So if the lease is for a longer term than twenty-one years, and in all other cases not within the above exception.

A lease for years by a tenant in tail, not made in pursuance of the Fines and Recoveries Act, was not absolutely determined by his death, but the issue in tail was at liberty either to affirm or avoid it, as he may think fit (*l*). Acceptance by the issue in tail of the rent (*m*), or bringing an action for the recovery thereof, or an action of waste, were considered such acts as amounted to a confirmation of the lease, because they plainly manifested an intent to continue the lessee in possession upon the terms of his lease. A lease at common law by the tenant in tail differs from a rent granted by such tenant; for the last is void by the death of the grantor: whereas the former is only voidable by the

(*h*) Sect. 40; sect. 79, as amended by sect. 7 of the conveyancing Act, 1882, 45 & 46 Vict. c. 39.

(*i*) County Court Act, 1856, 19 & 20 Vict. c. 108, s. 73.

(*k*) Now the Chancery Division of the High Court; Judicature Act, s. 34.

(*l*) Bac. Abr. tit. Leases (D.).

(*m*) Doe *d.* Southouse *v.* Jenkins, 5 Bing. 469; Doe *d.* Phillips *v.* Rollings, 4 C. B. 188.

issue in tail, whose acceptance of rent amounts to a confirmation (*n*).

Settled Land Act. — The power of tenants in tail to grant leases, &c., pursuant to the Fines and Recoveries Act was unaffected by the Settled Estates Act, 1877 (40 & 41 Vict. c. 18), but the Settled Land Act, 1882 (45 & 46 Vict. c. 38, s. 38) confers upon a tenant in tail the same powers under that act as that act confers upon a tenant for life, so that leases made after that act came into operation [*i.e.*, after 31st December, 1882] are not subject to the operation of the Fines and Recoveries Act, but may be made in all ways as a lease by a tenant for life.

Leases after possibility of issue extinct. — The like is the case with a tenant in tail after possibility of issue extinct, that is, where one is tenant in special tail, and the person from whose body the issue was to spring dies without issue, or, having issue, that issue becomes extinct (*o*). See therefore the next section.

SECT. 4. — *Lease by Tenant for Life.*

At common law a tenant for his own life (not having any special power to grant leases) can make no leases to continue longer than his own life (*p*).[1] This inconvenience to the tenant was partially modified *by the right to "emblements" (*q*), for which was substituted by 14 & 15 Vict. c. 25, s. 1, the right of the lessee of "a farm or lands," to hold until the expiration of the year in which the landlord died.[2]

[*5]

Special powers of leasing. — The settlements, however, whether by deed or will, under which a tenant for life holds

(*n*) Cruise's Dig. tit. II. c. 2, s. 8; Bro. Abr. tit. Grant, 145; 2 Ld. Raym. 779; Andrew *v.* Pearce, 1 New R. 158.

(*o*) 2 Blac. Com. 124.

(*p*) Bac. Abr. tit. Leases (I.); Adams *v.* Gibney, 6 Bing. 656.

(*q*) See post, Chap. XX. sect. 3.

[1] Hoagland *v.* Crum, 113 Ill. 365, 369, 370 (*per* Scott, J.); King *v.* Foscue, 91 N. C. 116, 118 (*per* Merrimon, J.); Enright *v.* O'Loghlen, 20 L. R. Ir. 159.

[2] A lessee of a tenant for life is entitled to emblements if lease is terminated by death of lessor. King *v.* Foscue, 91 N. C. 116, 119.

his estate, frequently contain "special powers of leasing," enabling the tenant for life to make leases binding after his death, for a limited period, upon the parties in remainder. Where these powers did not exist, or were found to be insufficient, they were in many cases conferred by private Act of Parliament. In 1856 these private acts were in a great measure rendered unnecessary by s. 32 of the general "Settled Estates Act, 1856," 19 & 20 Vict. c. 120, which empowered tenants for life to make leases for 21 years. The Act of 1856 was repealed but in great part re-enacted by the Settled Estates Act, 1877, 40 Vict. c. 18, s. 46, of which act replaced s. 32 of the act of 1856, in terms which, *although they were entirely superseded* (though not expressly repealed), *as from the commencement of the Settled Land Act*, 1882, by the more comprehensive enactments of that act presently to be referred to, it is still necessary to set out here, inasmuch as leases actually granted by tenants for life, &c., before the commencement of the act of 1882, would be at any rate technically invalid unless made in accordance with such terms.

Settled Estates Act, 1877. — Leases for 21 years. — The terms of s. 40 of the act of 1877 were as follows: — "It shall be lawful for any person entitled to the possession or to the receipt of the rents and profits of any *settled estates* for an estate for any life, or for a term of years determinable with any life or lives, or for any greater estate, either in his own right or in right of his wife, unless the settlement shall contain an express declaration that it shall not be lawful for such person to make such demise, and also for any person entitled to the possession or to the receipt of the rents and profits of any *unsettled estates* as tenant by the curtesy, or in dower, or in right of a wife who is seised in fee, *without any application to the court*, to demise the same or any part thereof, except the principal mansion-house and the demesnes thereof and other lands usually occupied therewith, from time to time for any term *not exceeding* 21 *years*, *to take effect in possession* at or within one year next after the making thereof; provided, that every such demise be made by deed, and the best rent that can reasonably be obtained

be thereby reserved, without any fine or other benefit in the nature of a fine, which rent shall be incident to the immediate reversion; and provided that such demise be not made without impeachment of waste, and do contain a covenant for the payment of the rent and such other usual and proper covenants as the lessor shall think fit; and also a [*6] condition of re-entry on * non-payment of the rent for a period of 28 days after it becomes due, or for some less period to be specified in that behalf; and provided a counterpart of every deed of lease be executed by the lessee" (*r*).

This section did not apply to a case where trustees had the management of an estate, of which they paid the net annual rents to the tenant for life (*s*). In such a case the tenant for life was not even entitled to petition under the act (*t*).

Demise against remaindermen, &c. — By sect. 47, every demise authorized by the last preceding section was made valid against the person granting the same, and all other persons entitled to estates subsequent to the estate of such person under or by virtue of the same settlement, if the estates be settled (*u*), and in the case of unsettled estates against the wife of any husband granting such demise of estates to which he was entitled in right of such wife, and against all persons claiming through or under the wife or husband (as the case might be) of the person granting the same.

By sect. 48, the execution of a lease by the lessor "shall be deemed sufficient evidence" that a counterpart of such lease has been duly executed by the lessee as required by the act.

Concurrence of incumbrancers. — By sect. 54, "for the purposes of this act, a person shall be deemed to be entitled to

(*r*) The only material alteration was the omission of the direction that the condition of re-entry should apply to non-observance of covenants, as well as to non-payment of rent. And as to the act generally, see sect. 17, post.

(*s*) Taylor *v.* Taylor, L. R., 20 Eq. 297; 44 L. J., Ch. 727; 33 L. T. 89; 23 W. R. 947, per Jessel, M. R.

(*t*) Id., L. R., 1 Ch. D. 426.

(*u*) As to concurrence in an application to the court on behalf of lunatics, &c., see sect. 49.

the possession or to the receipt of the rents and profits of estates, although his estate may be charged or incumbered either by himself or by the settlor or otherwise howsoever, to any extent; but the estates or interests of the parties entitled to any such charge or incumbrance shall not be affected by the acts of the person entitled to the possession or to the receipt of the rents and profits as aforesaid, unless they shall concur therein."

Leases of copyholds. — By sect. 56, "nothing in this act shall authorize the granting of a lease of any copyhold or customary hereditaments, not warranted by the custom of the manor, without the consent of the lord, nor otherwise prejudice or affect the rights of any lord of a manor." And by sect. 9, the powers of leasing included powers to lords of settled manors to give licences to their copyhold or customary tenants to grant leases.

By sect. 57, "the provisions in this act contained respecting demises to be made without application to the court, *shall extend only to settlements made after the 1st of November*, 1856" (*x*).

Settled Land Act. — The Settled Land Act, 1882 (45 & 46 Vict. c. 88), not only goes far beyond the Settled Estates Act in the powers which it gives to *a tenant for life, but is retrospective, — that is, it takes effect whether the settlement was made before or after the commencement of the act (sect. 2) and is compulsory, — that is, it takes effect whether the settlor expressed a wish that it should take effect or not (sect. 51). [*7]

General regulations as to lease by tenant for life. — Sect. 6 of the Settled Land Act, 1882, is as follows: —

"A tenant for life may lease the settled land, or any part thereof, or any easement, right, or privilege of any kind over or in relation to the same, for any purpose whatever, whether involving waste or not, for any term not exceeding,

(i.) In case of a building lease, ninety-nine years:

(ii.) In case of a mining lease, sixty years:

(iii.) In case of any other lease, twenty-one years."

(*x*) This being the date of the original Settled Estates Act, 1856 (19 & 20 Vict. c. 120), the 44th section of which contained a similar saving.

And by sect. 7 "(1) every lease shall be by deed, and be made to take effect in possession not later than twelve months after its date.

"(2) Every lease shall reserve the best rent that can reasonably be obtained, regard being had to any fine taken, and to any money laid out, or to be laid out, for the benefit of the settled land, and generally to the circumstances of the case.

"(3) Every lease shall contain a covenant by the lessee for payment of the rent, and a condition of re-entry on the rent not being paid within a time therein specified not exceeding thirty days.

"(4) A counterpart of every lease shall be executed by the lessee and delivered to the tenant for life; of which execution and delivery the execution of the lease by the tenant for life shall be sufficient evidence.

"(5) A statement contained in a lease, or in an indorsement thereon, signed by the tenant for life, respecting any matter of fact or of calculation under this act in relation to the lease, shall, in favour of the lessee and those claiming under him, be sufficient evidence of the matter stated."

By sect. 12, the power of leasing under the act extends to the making of a lease either (1) in pursuance of a contract for lease by a predecessor in title, or (2) for giving effect to a covenant of renewal, or (3) a lease for confirming a previous void or voidable lease.

Mansion-house. — By sect. 15, however, the "principal mansion-house on any settled land, and the demesnes thereof, and other lands usually occupied therewith" may not be leased without the consent of the trustees of the settlement, or an order of the court, *i.e.*, by sects. 2, sub-sect. 9, and 246 of the act, the Chancery Division of the High Court.

Building and mining leases. — Special regulations respecting building and mining leases are provided by sects. 8–11, the more important of which are, that in the case of a building lease, "a peppercorn rent, or a nominal or other rent less than the rent ultimately payable, may be made payable for the first five years, or any less part of the term" (sect. 8, sub-sect. 2), that in the case of a mining lease, the

rent may vary according to the * quantities of min- [*8]
eral gotten (sect. 9), and that, in the case of either kind of lease, the court may authorize, in accordance with the proved circumstances of the district, leases "for any term, or in perpetuity, at fee farm or other rents, secured by condition of re-entry or otherwise, as in the order of the court expressed."

Leases under express powers. — A tenant for life, with express power to grant leases for any limited term, of building, repairing, or mining leases, &c., subject to certain restrictions and conditions, may grant any such lease in accordance with the power (*y*), if such power be larger than the power he would have under the Settled Land Act; but if such power be more limited than his power under the act, then the act prevails, and enlarges such power (*z*).

Notice to trustees. — It is provided by sect. 45 of the Settled Land Act, 1882, as amended by sect. 5 of the Settled Land Act, 1884, that a tenant for life, when intending to make a lease, &c., shall give one month's notice (which may be general, and need not be confined to any particular transaction), to the trustees of his settlement of such intention; but it is provided by sub-sect. 3 of sect. 45 of the act of 1882, that "a person dealing in good faith with the tenant for life is not concerned to inquire respecting the giving of any such notice as is required by the section," and no leave of the court is necessary to enable him to grant any such lease. But where the settlement creates no such power, and it is wished to grant a lease not warranted by the Settled Land Act, the authority of the court must be obtained pursuant to the provisions of that act. Sometimes a private act of parliament may still be necessary.

Confirmation by remainderman. — A lease by a tenant for life, except as authorized by the Settled Estates Act, or by the Settled Land Act, or by some express powers in the settlement or will from which he derives his title, is absolutely void against a remainderman, and cannot be confirmed by such remainderman's acceptance of rent, suffering the tenant

(*y*) See Chap. V., sect. 19. (*z*) Settled Land Act, 1882, ss. 55–57.

to remain in possession (*a*), or even by a grant of the freehold treating the lease as valid (*b*); but in a case where the remainderman lay by, and suffered an assignee of an invalid lease to lay out money in re-building, and might be presumed to have had notice of the fact, Lord Hardwicke directed a new lease, *with proper covenants*, to be granted to the assignee for the remainder of the term (*c*); [*9] and subsequent * acceptance of rent, or other acknowledgment of tenancy, may be evidence of a new demise from year to year by the remainderman (*d*); the lessee being a mere tenant by sufferance in the interval (*e*). It was also held, prior to the Settled Estate Acts, that the lessee was not estopped from showing that the estate had determined by the death of the lessor (*f*); but that if a tenant for life, seised also of the remainder in fee expectant on an intervening estate tail in the premises, made a lease, the demise, though defeated by his death as to his life estate, might ultimately take effect for the residue of the term out of his remainder in fee, by the decease of the tenant in tail without issue, and without his having acquired the fee by a proper mode of assurance (*g*); that if a tenant for life granted a lease for years, and then surrendered or forfeited his estate, the lease would remain good during his life, if the years so long continued (*h*); and that a lease executed by a tenant for life, in which the reversioner, who

(*a*) Doe *d.* Simpson *v.* Butcher, Doug. 50; Jenkins *d.* Yates *v.* Church, Cowp. 482; James *d.* Aubray *v.* Jenkins, Bull. N. P. 96; Doe *d.* Martin *v.* Watts, 7 T. R. 83; 2 Esp. 501; Doe *d.* Collins *v.* Weller, 7 T. R. 478; Jones *d.* Cowper *v.* Verney, Willes, 169.

(*b*) See Smith *v.* Widlake, L. R., 3 C. P. D. 10; 47 L. J., C. P. 282; C. A., 26 W. R. 52, reversing judgment of Cockburn, C. J.

(*c*) Stiles *v.* Cowper, 3 Atk. 692; compare East India Co. *v.* Vincent, 2 Atk. 83; Jackson *v.* Cator, 5 Ves. 688; Dunn *v.* Spurrier, 7 Ves. 231, 235, 236.

(*d*) Doe *d.* Martin *v.* Watts, 2 T. R. 83; Roe *d.* Jordan *v.* Ward, 1 H. Blac. 96; Roe *d.* Brune *v.* Prideaux, 10 East, 187; Doe *d.* Collins *v.* Weller, 7 T. R. 478; Doe *d.* Tucker *v.* Morse, 1 B. & Adol. 365; Doe *d.* Pennington *v.* Taniere, 12 Q. B. 998; Cornish *v.* Stubbs, L. R., 5 C. P. 334.

(*e*) Preston *v.* Love, Noy, 120; Roe *d.* Jordan *v.* Ward, 1 H. Blac. 96.

(*f*) Brudnell *v.* Roberts, 2 Wils. 143; Neave *v.* Moss, 1 Bing. 360; Whittome *v.* Lamb, 12 M. & W. 813; Weld *v.* Baxter, 11 Exch. 816; 1 H. & N. 568.

(*g*) Taylor *v.* Stibbert, 2 Ves. jun. 437, 442; 3 & 4 Will. 4, c. 74, s. 40.

(*h*) Sutton's case, 12 Modd. 557, 558.

was then under age, was named as one of the lessors, but which was not executed by him, was void on the death of the tenant for life, and an execution of it by the reversioner afterwards was no confirmation so as to bind the lessee, for it was not his covenant (*i*).

Covenant to pay for improvements. — Prior to the Settled Land Act, it was held in Oakley *v.* Monck (*j*) that a remainderman was not bound by a covenant in a life tenant's lease to pay the lessee, a nurseryman, at the end of the term for trees planted during the term (there being no evidence that there was a continuing tenancy on the terms of the lease), but it is conceived that the effect of the Settled Land Act would be to bind a remainderman by such a covenant in the same manner as if the lease had been made by himself; and further, that the effect of that act is to bind a remainderman by any covenants made by the life-tenant with a lessee acting in good faith, and by any lease omitting any, however usual, covenants with a lessee so acting (*k*), provided only that s. 6 of the act has been complied with.

Sect. 5. — *Lease by Tenant for Life of another.*

Where a person holds for the term of another's life, he is called * tenant pur autre vie; leases made [*10] by him, of course, determine on the death of the cestui que vie,[1] or person during whose life he holds (*l*), or in the case of a farm, at the end of the then current year of the tenancy (*m*), but not on his own death (*n*); and a lease by

(*i*) Ludford *v.* Barber, 1 T. R. 86.

(*j*) L. R., 1 Ex. 159; 35 L. J., Ex. 87; Ex. Ch.

(*k*) See ss. 20, 53, 54 of the act. As to binding of remainderman by contracts for leases, see s. 31 of the act; and as to powers to agree for improvements under Agricultural Holdings Act, see s. 42 of that act, post, Appendix A.

(*l*) Blake *v.* Foster, 8 T. R. 487; Roe *d.* Jackson *v.* Ramsbottom, 3 M. & S. 516; Fenner *v.* Duplock, 2 Bing. 10; Hill *v.* Saunders, Id. 112; S. C., in error, 4 B. & C. 529; Doe *d.* Strode *v.* Seaton, 2 C. M. & R. 728; Cole Ejec. 217.

(*m*) 14 & 15 Vict. c. 25, s. 1.

(*n*) Com. Dig. tit. Estates (E. 1); 2 Blac. Com. 136.

[1] Perry *v.* Aldrich, 13 N. H. 343.

him may be made to commence after his death (*o*). The cases and statutes affecting the "lease for lives" are considered hereafter (*p*).

Sect. 6. — *By Tenants by the Curtesy, Tenants in Dower or Jointure.*

Tenants by the curtesy or in dower may grant leases pursuant to the Settled Estates Act, in like manner as tenants for life (*q*).[1]

Leases granted by any such tenants, not made in pursuance of the above act, become absolutely void at their death (*r*),[2] or, if the holding be agricultural, at the end of the then current year of the tenancy (*s*). If the lessee then holds over he becomes tenant on sufferance; but a new tenancy at will, or from year to year, may be created with the express or implied assent of the reversioner, or by his acceptance of subsequent rent. That, however, will not confirm the original lease for the term therein expressed to be granted (*t*), but will only create a new tenancy. If a tenant in dower lease for years, and marry, her second husband's executors are entitled to the arrears of rent due at his death (*u*).[3]

Sect. 7. — *By Joint Tenants and Tenants in Common.*

Joint tenants and tenants in common may, according to the interest they have, join or sever in making leases;[4] and

(*o*) Utty Dale's case, Cro. Eliz. 182.
(*p*) Post, Ch. V., sect. 6 (*c*).
(*q*) Ante, Sect. 4.
(*r*) Bac. Abr. tit. Leases (I. 1); Miller *v.* Maynwaring, Cro. Car. 399.
(*s*) 14 & 15 Vict. c. 25, s. 1.
(*t*) Bac. Abr. tit. Leases (I. 1); Miller *v.* Maynwaring, Cro. Car. 399.
(*u*) *Anon.*, Moor, pl. 25.

[1] Seizin of a wife in law is sufficient in this country to entitle her husband to a tenancy by the curtesy, although she is not seized in fact. Wass *v.* Bucknam, 38 Me. 358.

[2] **Lease by guardian of tenant in dower** is terminated by her death. Stockwell *v.* Sargent, 37 Vt. 16.

[3] **Rent in arrears** at death of tenant in dower who has not remarried, goes to her executors and not to her husband's heirs. 2 Scribner on Dower (2d ed.) p. 781.

[4] The common law favored joint tenancies, construing titles to be joint unless otherwise expressed. Joint tenancies are odious in America on account

such leases bind, whether made to commence in præsenti or in futuro (*x*). If joint tenants join in a lease, there is but one lease, and they all make but one lessor, for they have but one freehold; but if tenants in common join in a lease, there are several leases of their several interests (*y*); [1] for although tenants in common cannot make a joint lease of the whole of their * estate (*z*), yet if they join in a lease [*11] for years by indenture of their several lands, it is the lease of each for their respective parts, and the cross confirmation of each for the part of the other, and no estoppel on either part, because an actual interest passes from each respectively (*a*). There is no doubt that a demise by

(*x*) Co. Lit. 186a; Com. Dig. Leases (I. 5); Bac. Abr. tit. Joint Tenants and Tenants in Common (H. 1); Bro. Abr. Grant, 154.

(*y*) 8 Ander. 16; Jurdain *v.* Steere, Cro. Jac. 83; Com. Dig. tit. Estates (G. 6).

(*z*) Heatherly *d.* Worthington *v.* Weston, 2 Wils. 232; Doe *d.* Errington, 1 A. & E. 750; Burne *v.* Cambridge, 1 Moo. & R. 539.

(*a*) Com. Dig. tit. Estates (K. 8); Bac. Abr. tit. Joint Tenants and Tenants in Common (H. 1); Mantle *v.* Wollington, Cro. Jac. 166; Brooks *v.* Foxcroft, Clayton, 136; 1 Roll. Abr. 877, l. 48, 52.

of survivorship, and they have been generally abolished except where expressly created and except as to executors, trustees and mortgagees (what would otherwise be joint tenancies being held to be tenancies in common). 4 Kent's Com. (13th ed.) sec. 361; 1 Washburn on Real Property (5th ed.) pp. 676, 677, and note. Though joint tenants may terminate their tenancies as by conveyance from one to another or to a stranger; yet, if they jointly demise the premises, they cannot sue separately for the rent, their interests being joint. 1 Wash. on Real Prop. pp. 679, 680; 4 Kent's Com. sec. 364. A surviving joint tenant may sue for rent upon a demise made by his co-tenants in name of all, although he himself did not sign the lease. Wall *v.* Hinds, 4 Gray, 256, because the interest and covenants are joint.

[1] **Leases by tenants in common.** — Tenants in common may join in demising the entire estate or each may separately demise his own interest. Sturdee *v.* Merritt, 3 Kerr's (N. B.) 641; Duke *v.* Hague, 107 Pa. St. 57. In order to convey the full title all must join. Tainter *v.* Cole, 120 Mass. 162, 164. A lease by part is valid against everybody except the co-tenant and those claiming under him. Grundy *v.* Martin, 143 Mass. 279; Cunningham *v.* Pattee, 99 Mass. 248; Rising *v.* Stannard, 17 Mass. 282. A lease by one in name of all is (except as above stated) the lease of all. Wenger *v.* Raymond, 104 Pa. St. 33. A lease made by a single tenant may be ratified by his co-tenant, and then the latter will be estopped to deny that it is the lease of all. A demand of rent will constitute such an implied ratification. Keyes *v.* Hill, 30 Vt. 759. A subsequent release made by a tenant to a co-tenant will confirm the validity of a prior lease made by him. Cunningham *v.* Pattee, 99 Mass. 248; Johnson *v.* Stevens, 7 Cush. 431, 433. If they demise jointly they must sue jointly for rent, though it is said they need not join in an avowry.

tenants in common, though joint in its terms, operates as a separate demise by each tenant in common of his undivided share, and a confirmation by each of his companions (*b*). Where joint tenants concur in granting a lease, the interest of the lessee continues, notwithstanding the decease of either of the lessors, and the survivor is entitled to the whole rent (*c*).[1] So, if the lease be at will, the death of one of the lessors does not operate as a countermand of the tenancy even for a moiety; all survives to the other, and if the lessee continue his possession, the survivor may maintain an action for the whole rent (*d*). But though each joint tenant is considered entitled to the whole while the joint tenancy continues, and is said to be seised "per my et per tout" (*e*),[2] yet for the purposes of alienation, each has an exclusive right to and dominion over, his own share or proportion; and, therefore, if one of two joint tenants make a lease of the whole, his moiety only will pass (*f*). So a lease purporting to be made by both, and executed by one only, is a good lease for the moiety of him only who has executed (*g*).

If one joint tenant make a lease of his moiety for years, and die before the lessee's entry, the lease will bind the survivor, and the lessee will retain his interest in the moiety demised until his term expire. And so one joint tenant may make a lease to commence after his death, and his cotenant, if he survive, will be bound by it (*h*).

(*b*) Thompson *v.* Hakewill, 19 C. B., N. S. 713; 35 L. J., C. P. 18; Eccleston *v.* Clipsham, 1 Wms. Saund. 153; 2 Roll. Abr. 64; Shep. Touch. 85; Heatherly *d.* Worthington *v.* Weston, 2 Wils. 232.

(*c*) Henstead's case, 5 Co. R. 10 b; Doe *d.* Aslin *v.* Summersett, 1 B. & Ad. 135.

(*d*) Henstead's case, 5 Co. R. 10 b.

(*e*) Lit. s. 288; Co. Lit. 186 a; 2 Blac. Com. 182.

(*f*) Co. Lit. 186 a; Bellingham *v.* Alsop, Cro. Jac. 52.

(*g*) Cartwright's case, cited 1 Vent. 136.

(*h*) Lit. s. 289; Grute *v.* Locroft, Cro. Eliz. 287; Harbin *v.* Barton Moor. 395; Whitlock *v.* Horton, Cro. Jac. 91; Bellingham *v.* Alsop, Cro. Jac. 52; Clerk *v.* Clerk, 2 Vern. 323.

4 Kent's Com. (13th ed.) sec. 369; LeCain *v.* Hosterman, 2 R. & C. (N. S.) 229. And certainly they may distrain separately where they demise separately. Sturdee *v.* Merritt, 3 Kerr's (N. B.) 641.

[1] Codman *v.* Hall, 9 Allen, 335.

[2] Tenants in common are said "to be seized *per my* but not *per tout*." 4 Kent's Com. 468.

Lessees to each other. — One joint tenant or tenant in common may make a lease for years of his part to his companion;[1] for it only gives the latter a right of taking the whole profits instead of the moiety; and he may contract with his companion for that purpose, as well as he may with a stranger (*i*); and such a lease extinguishes the jointure for the * time (*k*), and gives a right to distrain for the agreed rent (*l*), and also a right of action for use and occupation in case of a holding over (*m*). If there be three or more joint tenants, the lessee would hold the share demised to him as tenant in common with the others (*n*). [*12]

Expense of repairs. — One tenant in common who has expended money on repairs which are ordinary repairs only, has no right of action against his co-tenant for contribution (*o*).[2]

Sect. 8. — *By Copareeners.*

Where a tenant in fee or in tail dies, leaving several daughters and no son; or several sisters and no issue, father

(*i*) Com. Dig. tit. Leases (I. 5); Cowper *v.* Fletcher, 6 B. & S. 464; 34 L. J., Q. B. 187; Leigh *v.* Dickeson, L. R., 12 Q. B. D. 194; 53 L. J., Q. B. 120; 50 L. T. 124; 32 W. R. 339; aff. in C. A., 15 Q. B. D. 60; 54 L. J., Q. B. 18; 33 W. R. 538.

(*k*) Co. Lit. 186 a.

(*l*) Cowper *v.* Fletcher, *supra*.

(*m*) Leigh *v.* Dickeson, *supra* and *infra*.

(*n*) Jurdain *v.* Steere, Cro. Jac. 83; Blackasper's case, Noy, 13.

(*o*) Leigh *v.* Dickeson, *supra*, note (*i*).

[1] A tenant in common may lease to his co-tenant, and after leasing to him he cannot maintain a suit for partition. Eberts *v.* Fisher, 54 Mich. 294. A licensee of a tenant in common holds in submission to his licensor. Bucknam *v.* Bucknam, 30 Me. 494. If one tenant in common is ousted by his co-tenant, he can maintain trespass *quare clausum fregit* against him, Erwin *v.* Olmsted, 7 Cow. 229; and if tenants divide the premises between them, one can maintain trespass against the other if he disturb his possession, Keay *v.* Goodwin, 16 Mass. 1. Trespass *quare clausum*, however, will not lie by one tenant in common against his co-tenant for entering upon the common premises and carrying away the common property, neither will trover lie for conversion of the property carried away, unless there is such a destruction or disposition of it as to preclude the further enjoyment of it by the tenant. *Per* Endicott, J., in Warner *v.* Abbey, 112 Mass. 355, 360.

[2] One tenant cannot recover of his co-tenant for repairs, even though necessary, without a previous request to join in the repairs, and a refusal. Mumford *v.* Brown, 6 Cow. 475; Doane *v.* Badger, 12 Mass. 65.

or brother; or several aunts and no issue, &c.; lands descend among all the daughters, sisters, aunts, &c., equally, who make but one heir, and are called coparceners (*p*).[1] Although they have an unity, they have not an entirety of interest, but are properly entitled each to the whole of a distinct share, and there is no survivorship among them (*q*). Until partition is made (*r*), they may either join in a lease, or each may make a lease of her own share. If they join in a lease, it operates (as with tenants in common) as the separate demise by each of her share, and should be so pleaded (*s*). If they join a lease they hold the rent reserved in common (*t*); the observations, therefore, made as to leases by tenants in common (*u*) apply also to leases by coparceners. One cannot sue separately for her portion of rent accruing to her and her fellows (*v*).

Sect. 9. — *Sublease, by Tenant for Years.*

Sublease. — A lessee or tenant for years, who is not restrained by his lease from subletting, may demise for any less term than he himself has,[2] at such rent, and subject to such covenants, &c., as may be agreed on (*x*).

Rent-charge. — A rent-charge granted for life by a tenant

(*p*) Com. Dig. tit. Parceners (A. 1), (A. 3).

(*q*) Bull, N. P. 107; 2 Blac. Com. 182, 188; Co. Lit. 164 a.

(*r*) See the Partition Acts, 1868 and 1876 (31 & 32 Vict. c. 40, and 39 & 40 Vict. c. 17).

(*s*) Milliner *v.* Robinson, Moor. pl. 939.

(*t*) 2 Prest. Abstr. 74.

(*u*) *Ante*, sect. 7.

(*v*) Decharms *v.* Horwood, 10 Bing. 526.

(*x*) Bac. Abr. tit. Leases; Rex *v.* Wilson, 5 M. & Ry. 157 n. See further Ch. VII., Sect. 7, post, tit. Sub-Lease.

[1] The "technical distinction between coparcenary and estates in common, may be considered as essentially extinguished in the United States." 4 Kent's Com. sec. 367.

[2] **Sublease.** — A transfer by lessee reserving the last day of the term is a sublease. Davis *v.* Morris, 36 N. Y. 569. If the lessee's transfer terminate at midnight of one day, and the principal lease at noon of the next, the lessee's transfer is a sublease. People *v.* Robertson, 39 Barb. 9. It has been held that a transfer of the entire term, but with covenants for re-entry and surrender, was a sublease. Ganson *v.* Tifft, 71 N. Y. 48, &c. As to the power of a lessee for years to resign, see post.

for years is not void, but is good as a chattel interest; and the goods of a stranger not shown to hold the premises by title paramount to the rent-charge (as by a prior demise) may be distrained for the arrears (*y*).

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* Sect. 10. — *Sublease, by Tenant for less than Years.* [*13]

Tenants for less periods than for years, but who are possessed of a certain quantity of interest, may alienate the whole, or any part of it, unless expressly restricted from so doing. In fact every tenant, except a tenant at will or at sufferance, has a right, in the absence of a contract to the contrary, to make a sub-tenancy, as incident to his tenancy.

By tenants from year to year. — A tenant from year to year, therefore, may assign his term, or may underlet part of it, as for three-quarters of a year, or so many months, &c.; but he cannot by underletting grant an interest exceeding his own in point of duration. If he grant a lease by deed for twenty-one years, such term will continue in force during his own yearly tenancy (*z*). If he underlet from year to year, the sub-tenancy will take effect during his own tenancy, and he will have a sufficient reversion to enable him to distrain for the rent (*a*).

A tenant for a less term than one year, as for half a year, a quarter, or a month, or the like, may grant his interest, or any portion of it, to another, unless some agreement subsists between him and his lessor, which expressly restricts him from making such disposition.

By tenants at will. — A tenant at will cannot demise, for that would amount to a determination of his estate at will (*b*);[1] but a demise by a tenant at will, with possession thereunder, will create a tenancy by estoppel as between

(*y*) Saffery *v.* Elgood, 1 A. & E. 191.

(*z*) Mackay *v.* Mackreth, 4 Doug. 213; Oxley *v.* James, 13 M. & W. 209.

(*a*) Pike *v.* Eyre, 9 B. & C. 909; Curtis *v.* Wheeler, Moo. & M. 493.

(*b*) 1 Inst. 57; Moss *v.* Gallimore, 1 Doug. 279; 1 Smith L. C. 629 (7th ed.); Birch *v.* Wright, 1 T. R. 382.

[1] Reckhow *v.* Schanck, 43 N. Y. 448; Campbell *v.* Procter, 6 Greenl. (Me.) 12.

him and his lessee (*e*), and will be as good as against himself (*d*).[1]

By tenants on sufferance. — A tenant on sufferance cannot demise (*e*); but a demise by such tenant, with possession, will create a tenancy by estoppel (*f*).

Sect. 11. — *Lease by the Crown.*

Restrained by statute. — The sovereign is a corporation sole, and at common law might have granted leases for lives or for years to any extent, and have thereby bound the successors (*g*).[2] But by 1 Ann. stat. 1, c. 7, s. 5, every grant and lease by the crown of any lands and tenements thereto belonging (except advowsons and vicarages) shall be void, unless made for a term not exceeding one-and-thirty [*14] years, or three lives, or for some term *of years determinable upon one, two, or three lives, to commence from the date or making thereof; and if made to take effect in reversion or expectancy, the same, together with the estate or estates in possession, not to exceed three lives, or the term of one-and-thirty years in the whole: the tenant to be liable to punishment for waste: the ancient or most usual rent or more, or such other rent as in the said act mentioned, to be reserved and made payable during the whole term. By sect. 6, where the greatest part of the yearly value of any such crown lands consists of buildings thereon which want to be repaired or re-edified, a lease thereof may be granted for any term not exceeding fifty

(*c*) *Ante*, 2.

(*d*) Blunden *v.* Bough, Cro. Car. 302; Doe *d.* Goody *v.* Carter, 9 Q. B. 865; Cole Ejec. 449.

(*e*) Thunder *d.* Weaver *v.* Belcher, 3 East, 499; Cole Ejec. 456.

(*f*) *Ante*, 2.

(*g*) Com. Dig. Grant (G. 3).

[1] **Leases by tenant at will; estoppel.** — Cook *v.* Cook, 28 Ala. 660; Hilbourn *v.* Fogg, 99 Mass. 11. But a tenancy by estoppel will not arise if the lessee do not take possession. Wright *v.* Graves, 80 Ala. 416. The principal lessor may eject the sublessee of his tenant at will without giving him notice to quit, for there is no privity between them, Reckhow *v.* Schanck, 43 N. Y. 448; or he may sue him in trespass, Campbell *v.* Procter, 6 Greenl. (Me.) 12.

[2] The Queen *v.* Miller, 4 R. & G. (N. S.) 361.

years or three lives, subject to similar restrictions and conditions to those above mentioned (*h*).

Leases by the commissioners of woods and forests. — In modern times most of the crown lands have been placed under the management of the Commissioners of Woods, Forests, and Land Revenues, who act under the orders, directions, instructions and rules of the Lords of the Treasury (*i*).

Proviso for re-entry. — They may grant losses for any term not exceeding thirty-one years (*k*), or building leases for any term not exceeding ninety-nine years (*l*), subject in each case to certain restrictions and conditions (*m*), amongst which there is a restriction that "in each such lease there *shall* be contained" a proviso for re-entry on non-payment of rent, or non-observance, or non-performance of the covenants (*n*); a survey and report as to the value, &c., must be previously made (*o*), and the lease must be enrolled in the office of Land Revenues, Records, and Inrolments (*p*).

Dean Forest, mines and quarries. — Leases of mines, minerals, and quarries of the crown in Dean Forest, Gloucestershire, are granted by the Commissioners of Woods and Forests, pursuant to 1 & 2 Vict. c. 43, as amended by 24 & 25 Vict. c. 40 (*q*).

Duchy of Lancaster. — Lands belonging to the crown, in right of the Duchy of Lancaster, may be demised pursuant to 48 Geo. 3, c. 73; 1 & 2 Geo. 4, c. 52; which are not repealed by 10 Geo. 4, c. 50, so far as they relate to the Duchy of Lancaster. As to sales and purchases of lands on behalf of the Duchy, see 18 & 19 Vict. c. 58.

(*h*) See also 1 Geo. 3, c. 1; 34 Geo. 3, c. 75; but none of the restrictions contained in any of these acts apply or extend to the *private* estates of her Majesty, which are regulated by 25 & 26 Vict. c. 37.

(*i*) 10 Geo. 4, c. 50; 2 & 3 Will. 4, cc. 1, 112; 3 & 4 Will. 4, c. 1; 2 & 3 Vict. c. 80; 3 & 4 Vict. c. 87; 4 & 5 Vict. c. 40; 7 & 8 Vict. c. 1; 8 & 9 Vict. c. 99; 14 & 15 Vict. c. 42 (and the numerous acts mentioned in the schedule to that act); 15 & 16 Vict. c. 62; 29 & 30 Vict. c. 62.

(*k*) 10 Geo. 4, c. 50, ss. 22, 26. See Chit. Stat. vol. ii. tit. Crown Lands.

(*l*) Sects. 23, 24, 26.

(*m*) Sects. 27–33.

(*n*) Sect. 27.

(*o*) Sect. 61.

(*p*) 2 Will. 4, c. 1, s. 21.

(*q*) Goold *v.* Great Western Deep Coal Co., 2 De Gex, J. & S. 600; the other Dean Forest Acts are 20 Car. 2, c. 8; 1 & 2 Will. 4, c. 12; 6 & 7 Will. 4, s. 3; 1 & 2 Vict. c. 42; 5 & 6 Vict. cc. 48, 65; 29 & 30 Vict. c. 62, ss. 4, 5; 29 & 30 Vict. c. 70.

Duchy of Cornwall. — Lands belonging to the Duchy [*15] of Cornwall may be demised pursuant * to the Duchy of Cornwall Management Acts, 1863 and 1868 (*r*). When such lands happen to be vested in the crown they may be demised pursuant to 1 & 2 Will. 4, c. 5.

By Admiralty or other board. — When the Admiralty or any other government board are authorized to acquiré land for public purposes, they are generally empowered to sell, exchange, *or demise* such parts thereof as in their opinion will not be required for the public service. In any such case the provisions of the particular statute must of course be strictly complied with (*s*).

SECT. 12. — *By Corporations generally.*

Corporations are either ecclesiastical or lay, the latter being divided into eleemosynary and civil. The universities of Oxford and Cambridge are regarded as civil corporations (*t*).

Lease by deed. — Corporations cannot make any disposition of their property otherwise than by deed sealed with their common seal;[1] thus they cannot, without deed, make

(*r*) 26 & 27 Vict. c. 49; 31 & 32 Vict. c. 35.

(*s*) 5 & 6 Vict. c. 94, s. 12; 18 & 19 Vict. c. 117; 14 & 25 Vict. c. 41, ss. 14, 15, 16.

(*t*) Parkinson's case, Carth. 93; R. *v.* V.-C. of Cambridge, 3 Burr. 1656.

[1] **Can corporations convey property without using the corporation seal?** — In America it is held that they can. Their seal, however, is necessary in conveyances of real estate and in specialty contracts, Sherman *v.* Fitch, 98 Mass. 59, 63, 64; Brinley *v.* Mann, 2 Cush. (Mass.) 337, 340 (*per* Metcalf, J.); Bates *v.* Boston & N. Y. Cent. R. R. Co., 10 Allen (Mass.) 251, though it has been held that if the corporation has not adopted a common seal, any seal may be used instead. Mill Dam *v.* Hovey, 21 Pick. (Mass.) 417.

Justice Story's opinion. — Justice Story (in Fleckner *v.* U. S. Bank, 8 Wheat. 338, 357), in speaking of the former doctrine that corporations can only act under a common seal, said: "Whatever may be the original correctness of this doctrine as applied to corporations existing by the common law, in respect even to which it has certainly been broken in upon in modern times, it has no application to corporations created by statute whose charters contemplate the business of the corporation to be transacted exclusively by a special body or board of directors. And the acts of such body or board evidenced by a written vote are as completely binding upon the corporation and

a lease for years (*u*).[1] But one who enters upon, occupies and pays rent for corporate property under a lease for years which is not sealed, becomes a tenant from year to year on

(*u*) R. *v.* Chipping-Norton, 5 East, 239, 242; Bird *v.* Higginson, 6 A. & E. 284; R. *v.* North Duffield, 3 M. & S. 247; 1 Kyd on Corp. 263.

as complete authority to their agents as the most solemn acts done under the corporate seal."

The modern American theory. — Corporations by the modern American theory derive their powers, express or implied from the act of incorporation and must exercise them in the manner therein prescribed. Head *v.* Prov. Ins. Co., 2 Cranch, 127, 129. If a seal is thereby required it must be affixed, but if not required it is not necessary, except as required in cases of individuals. Fleckner *v.* U. S. Bank, 8 Wheat. 338; Bank of Columbia *v.* Patterson's Adm'r, 7 Cranch, 299; Bank of U. S. *v.* Dandridge, 12 Wheat. 64, 68 (*per* Story, J.); Danforth *v.* Schoharie, 12 Johns. (N. Y), 227, 230; Baptist Church *v.* Mulford, 8 N. J. L. 182; Crawford *v.* Longstreet, 43 N. J. L. 325; Peterborough R. R. Co. *v.* Nashua & L. R. R. Co., 59 N. H. 385; Randall *v.* Van Vechten, 19 Johns. (N. Y.) 60; Canal Bridge *v.* Gordon, 1 Pick. 297, 304; Hayden *v.* Madison, 7 Greenl. (Me.) 76; Abbot *v.* Hermon, 7 Id. 118, 121; Dunn *v.* Rector, 14 Johns. (N. Y.) 118; Mott *v.* Hicks, 1 Cow. (N. Y.) 513; Overseers of North Whitehall *v.* Overseers of South Whitehall, 3 S. & R. (Pa.) 117; Garvey *v.* Colcock, 1 Nott & M'Cord (S. C.) 231; Hayden *v.* Middlesex Turnpike Co., 10 Mass. 397, 403 (*per* Sewall, J.). Angell & Ames on Corporations (11th ed.) sec. 102; 1 Taylor's Private Corporations (2d ed.) 127.

Chief Justice Marshall's opinion. — Said Marshall, C. J., in Head *v.* Prov. Ins. Co., 2 Cranch, 127, 169: "The act of incorporation is to them an enabling act; it gives them all the power they possess; it enables them to contract, and when it prescribes a mode of contracting, they must observe that mode, or the instrument no more creates a contract than if the body had never been incorporated."

Thompson's, Ch. J., Opinion. — Thompson, Ch. J., in Danforth *v.* Schoharie Turnpike Co., 12 Johns. (N. Y.) 227, 230, in speaking of the doctrine that a corporation could not act except under the corporate seal, said: "Such would seem to be the doctrine of some old adjudged cases," but "the law of the present day seems to be otherwise settled."

Knapp's, J., Opinion. — Knapp, J., in Crawford *v.* Longstreet, 43 N. J. L. 325, 329, speaks of it as "the ancient rule of the common law," and says that it was opposed to the "demands of practical business necessity," and has been "practically abrogated in this country."

Change from the old theory. — In Bank of Columbia *v.* Patterson's Adm'rs, 7 Cranch, 299, 305, 306, 307, Justice Story sketches the gradual rise of the law from this ancient doctrine to the modern theory "that whenever a corporation is acting within the scope" of its powers "all parol contracts made by its authorized agents are express promises of the corporation."

[1] **Corporation seal; is it necessary to validity of lease for years?** — Corporations may *take* leases for years not under seal, Crawford *v.* Longstreet, 43 N. J. L. 325; Peterborough R. R. Co. *v.* Nashua & L. R. R. Co., 59 N. H. 385, and there is no doubt (see previous note) may also give them, the only limitations being that the leases must not be *ultra vires* (either as to the corporation or its agents) or within the statute of frauds, and they must conform to the requirements of the charter.

such terms of the lease as are applicable to a yearly tenancy (*x*).

Name of the corporation. — A corporation cannot either take or grant but by its proper name of incorporation;[1]

(*x*) Ecclesiastical Commissioners *v.* Merral, L. R., 4 Ex. 162; 38 L. J. Ex. 93.

[1] **Corporation name.** — The statement of the text is much too broad. Statutory requirements must of course be complied with. In general it may be said the name of the corporation is not essential in gifts and devises, if the corporation is so described that it can be identified. First Parish in Sutton *v.* Cole, 3 Pick. 232; N. Y. Inst. for Blind *v.* How's Ex'rs., 10 N. Y. 84, 88. "It is well settled that a devise or bequest to a corporation need not state its corporate name. It is sufficient that the devisee or legatee is so defined as to be distinguished," *per* Denio, J. Neither is the name essential (*generally*) in contracts; as, for example, cashiers' checks, signed by cashier, individually bind the bank if issued in its business. Mechanics' Bank of Alexandria *v.* Bank of Columbia, 5 Wheat. 326 (parol evidence being admitted to prove them the checks of the bank). Drafts accepted by corporation in name of an individual bind it. Conro *v.* Port Henry Iron Co., 12 Barb. (N. Y. Supreme Ct.) 27, 53. A promissory note running to a corporation under a wrong name is collectible, Medway Cotton Manuf. Co. *v.* Adams, 10 Mass. 360; or under a name varying from true name, Newport Mechanics' Man. Co. *v.* Starbird, 10 N. H. 123; and a contract varying in name materially from true name is enforcible, President &c. of Berks., &c., Road *v.* Myers, 6 S. & R. (Pa.) 12, 17 (the identity here was said by Gibson, J., to be a question for the jury). A lease for years taken by a committee of a corporation duly authorized in their own names is the corporation's lease. Carroll *v.* St. John's Society, 125 Mass. 565. In Conro *v.* Port Henry Iron Co., *supra* (12 Barb. 27, 53), Willard, P. J., said: "To create a liability in the Port Henry Iron Company . . . it is by no means essential that the corporate name should be used in the drafts." And it is held that corporations are liable upon contracts made by their duly authorized agents in their own names in the business of the company. Bank of Columbia *v.* Patterson, 7 Cranch, 299; Randall *v.* Van Vechten, 19 Johns. (N. Y.) 60; Mechanics' Bank of Alexandria *v.* Bank of Columbia, 5 Wheat. 326; Conro *v.* Port Henry Iron Co., 12 Barb. 27, 53. Corporations (in general) can only sue and be sued under the name given them in the act of incorporation, Mauney *v.* Motz, 4 Ired. Eq. (N. C.) 195, 197, because their power to sue, being derived from their charters, must be exercised in the mode therein prescribed. The "corporate name can be changed only by the same power by which the corporate body was created." Angell & Ames on Corp. (11th ed.) sec. 102. In its ordinary business transactions a corporation acts through its board of directors, who of course do not need any power of attorney, sealed or otherwise. Burrill *v.* Nahant Bank, 2 Met. 163; Taylor on Priv. Corp. (2d ed.) 180. Whenever any special agent or attorney is required, he is appointed by vote of the corporators or directors, and the corporation seal is not essential to the validity of his appointment except where it would be necessary in case of individuals. Justice Story says, that "It is now finally established, both in England and America, that a corporation may be bound by a promise of its duly authorized agent, although such authority be only by virtue of a corporate vote unaccompanied by the corporate seal." Bank of U. S. *v.* Dandridge, 12 Wheat. 64, 68. Directors are not agents in the sense that a

though sometimes a minute variation in the name is not so material as to avoid a grant (*y*). As to naming the corporation, it need only be observed that corporations *aggregate*, as dean and chapter, mayor and commonalty, warden and fellows, &c., may make or confirm leases without expressing either the christian or surname of the dean, mayor, warden, &c., because, in their politic capacity as a corporation aggregate, they continue always the same, and are said never to die; but in leases or confirmations by a bishop, dean, or other *sole* corporation, both the christian and surname, or at least the christian name and title, ought to be expressed; as, "John, Bishop of P." (*z*).

Appointment of attorney, when necessary. — Where any personal act is necessary in the case of a corporation, that act must be done by attorney appointed by deed under their common seal (*a*); for however it may be as to ordinary services, *they cannot appoint a person to do [*16] any act which concerns their interest or title in land, unless it be by deed (*b*). A corporation cannot appear in court otherwise than by attorney (*c*), who ought, for his own security, to have a retainer under their common seal (*d*).

A lease to charitable uses by a corporation of lands already in mortmain is not affected by the provisions of 9 Geo. 2, c. 36 (*e*). Where a corporation has by a private act of parliament power to sell and exchange land, a power to lease the

(*y*) 1 Kyd on Corp. 234, 237; Mayor, &c., of Carlisle *v.* Blamire, 8 East, 487.

(*z*) 2 Inst. 666; Bac. Abr. tit. Leases (G. 3).

(*a*) Doe *d.* Bank of England *v.* Chambers, 4 A. & E. 410; 1 Kyd on Corp. 268.

(*b*) Bac. Abr. tit. Corporations (E. 3).

(*c*) 1 Kyd on Corp. 270.

(*d*) Arnold *v.* The Mayor, &c., of Poole, 4 M. & G. 860; 2 Dowl., N. S. 574, cited 5 Q. B. 546; Lewis *v.* The Mayor, &c., of Rochester, 9 C. B., N. S. 401. See form of retainer, Id. 408.

(*e*) Walker *v.* Richardson, 2 M. & W. 882; Att.-Gen. *v.* Glyn, 12 Sim. 84; Ashton *v.* Jones, 28 Beav. 460.

delegated power cannot be delegated, but they have power to appoint agents to execute conveyances, &c. Burrill *v.* Nahant Bank, 2 Met. 163 (and see *per* Shaw, C. J., pp. 166, 167). They derive their powers, however, from the charter and by-laws, and are not necessarily similar in all corporations.

land and give the option of purchase to the lessee is implied (*f*).

Lease by company. — Companies incorporated by act of parliament for the purpose of carrying on any undertaking, may demise lands [1] by their directors or a committee of direc-

(*f*) *In re* Female Orphan Asylum, 15 W. R. 1056; 17 L. T. 59.

[1] **Leases by corporations.** — Corporations in America may demise lands in writing or by parol, with or without the common seal, provided the demises are within the scope of the business for which the company was chartered. Peterborough R. R. Co. *v.* Nashua & L. R. R. Co., 59 N. H. 385; Machias Hotel Co. *v.* Fisher, 56 Me. 321. A railroad company may lease its road and franchise if *specially authorized* by statute. Phila. & Erie R. R. Co. *v.* Catawissa R. R. Co., 53 Pa. St. 20; Black *v.* Delaware & Raritan Canal Co., 22 N. J. Eq. 130; Mahoney *v.* Atl. & St. L. R. R. Co., 63 Me. 68; Murch *v.* Concord R. R. Co., 29 N. H. 35; Pierce *v.* Concord R. R. Co., 51 N. H. 593.

They cannot, however, make such leases *without* special statutory authority, because they are breaches of implied contracts with the state, and generally *ultra vires*. Thomas *v.* Railroad Co., 101 U. S. 71; Shrewsbury & Birmingham R. Co. *v.* Northwest R. Co., 6 H. L. Cas. 113; York & Maryland L. R. R. *v.* Winans, 17 How. 39; Langley *v.* Boston & Maine R. R., 10 Gray, 103; Macon & Augusta R. R. Co. *v.* Mayes, 49 Ga. 355; Abbott *v.* Johnstown, &c., R. R. Co., 80 N. Y. 27; Carleton, &c., R. R. Co. *v.* Grand Southern Ry. Co., 21 N. B. 339, 357. The same principle applies in regard to taking leases of other railroads. There must be special statutory authority. (See *post*, ch. 2, sec. 9, note.)

Whether a corporation lease is *ultra vires* depends upon the objects of the corporation, and the purposes for which it was given. A corporation has power, without special authority, to give its promissory notes to pay legitimate debts, Moss *v.* Oakley, 2 Hill (N. Y.) 265; Kelley *v.* Mayor, 4 Id. 263, 265 (*per* Cowen, J.); Mott *v.* Hicks, 1 Cow. (N. Y.) 513; Barker *v.* Mechanics' Ins. Co., 3 Wend. (N. Y.) 94, 97 (*per* Savage, Ch. J.); may mortgage real estate to secure a debt, Burrill *v.* Nahant Bank, 2 Met. 163; may contract debts for repairs, Bank of Columbia *v.* Patterson's Admrs., 7 Cranch, 299; for services of employees, &c. But a banking corporation cannot take special deposits, Foster *v.* Essex Bank, 17 Mass. 479; neither can it take stock in a railroad, Nassau Bank *v.* Jones, 95 N. Y. 115.

Whatever are the statutory requirements as to the execution of a corporation lease, they must be strictly complied with. For example, where the charter provides that the execution must be by act of the directors, a lease authorized by vote of stockholders is invalid, Conro *v.* Port Henry Iron Co., 12 Barb. (N. Y. Supreme Ct.) 27; and whenever an *ultra vires* lease has been made it is the duty of the company to rescind it at the earliest possible moment, Woodruff *v.* Erie Ry. Co., 93 N. Y. 609; and if a corporation has granted an *ultra vires* lease, and lessee has occupied, he must pay rent, Same *v.* Same. The relation of landlord and tenant by estoppel, exists if a corporation take the benefit of a lease made within the scope of its powers, but by unauthorized agents. Peterborough R. R. Co. *v.* Nashua & L. R. R. Co., 59 N. H. 385. Parties dealing with corporations are charged with notice of the limitations in their charters. *Per* Gray, C. J., in Davis *v.* Old Colony Railroad, 131 Mass. 258, 260.

tors under the common seal of the company if the lease be for more than three years, and by writing or parol if it be for a less period, by virtue of the 79th section of the Companies Clauses Consolidation Act, 1845 (8 Vict. c. 16).

Lease by railway company. — A railway company may not lease their line except by virtue of some special act;[1] and when such lease is authorized, it must, by virtue of the 112th section of the Railways Clauses Consolidation Act, 1845 (8 Vict. c. 20), contain all usual and proper covenants on the part of the lessee for maintaining the railway.

Sect. 13. — *By Municipal Corporations.*

At common law. — At common law there was no restraint on *civil* corporations granting such leases as they pleased, consistently with their own estates, bye-laws and private statutes (*g*).[2]

Leases for 31 years without fine. — By the Municipal Corporations Act, 1882, 45 & 46 Vict. c. 50, s. 108, replacing, without material alteration, the repealed ss. 94–96 of the Municipal Corporations Act, 1835, 5 & 6 Will. 4, c. 76, municipal corporations cannot demise their lands, without the consent of the Lords of the Treasury, for a longer term than thirty-one years, reserving during the whole term such clear yearly rent as to the council of the borough shall appear

(*g*) Smith *v.* Barrett, 1 Sid. 161.

[1] See note 1.

[2] **Municipal corporations.** — Municipal corporations may grant leases when not *ultra vires*. For example, the selectmen of a town, duly authorized by vote of the town, may orally lease at will a town wharf. Inhabitants of Hingham *v.* Sprague, 15 Pick. 102. A municipal corporation, under a grant in its charter to establish permanent ferries, and fix the rates, fees, and rents, has an implied power to lease a ferry. Macdonell *v.* I. & G. N. Ry. Co., 60 Tex. 590.

Implied contracts. — Municipal corporations, like other corporations, are liable upon their implied contracts as well as their express ones, Hayden *v.* Inhabitants of Madison, 7 Greenl. (Me.) 76, and are bound by acts of unauthorized agents, if they accept the benefit of them. Abbott *v.* Hermon, 7 Id. 118, 121. A school district which takes possession of and uses a schoolhouse erected by contract with its agents, is estopped to deny the authority of the agents.

reasonable, without any fine; or in the case of a building lease, or of a lease of buildings as specified below, for a longer term than seventy-five years.

Other leases. — When the council deem it expedient to demise or lease for a longer term, or upon * different terms and conditions to those above mentioned, they must obtain the approbation of the Lords of the Treasury. [*17]

Renewed leases. — By sect. 110, replacing the repealed sect. 95 of the act of 1835, in certain specified cases, leases may be *renewed* by the council of the borough, for such term of years, either absolutely or determinable with any life or lives, for such life or lives, and at such rent, and upon the payment of such fine, and with or without any covenant for future renewal, as might have been permissible in case that act had not passed.

This section is to be construed liberally; but although renewals need not be on precisely the same terms, there must be such an uniformity as to show that the same lease has been renewed. A renewal on a fine, and at an undervalue, with variations in the covenants, and a different rent reserved, is not valid (*h*).

Building leases. — By sect. 108, also replacing without material alteration the repealed sect. 96 of the act of 1835, the council of a borough may make a lease for not exceeding seventy-five years, and either at a reserved rent or on a fine or both, as the council think fit: (i.) of tenements or hereditaments, the greater part of the yearly value of which at the time of making the lease consists of buildings; or (ii.) of land proper for the erection of any houses or other buildings thereupon, with or without gardens, &c.; (iii.) where the lessee agrees to erect a building or buildings thereon of greater yearly value than the land, of land proper for gardens, &c., to be used with any other house or other building erected or to be erected on any such land, belonging either to the borough or to any other proprietor, or proper for any other purpose calculated to afford convenience or accommodation to the occupiers of any such house or building.

(*h*) Att.-Gen. *v.* Great Yarmouth, 21 Beav. 625.

Working men's dwellings. — By sect. 111 of the same act, reproducing the Working Men's Dwellings Act, 1874, the council of a borough may make leases for 999 years, or for any shorter term, of corporate land converted by them into sites for working men's dwellings, with the approval of the Treasury, for the purpose of such dwellings being erected thereon by the lessee.

The Labouring Classes Lodging Houses Act, 1851 (14 & 15 Vict. c. 34), contained provisions (see s. 2), having a similar object; but that act has not been adopted by any single town council. The Housing of the Working Classes Act, 1885 (48 & 49 Vict. c. 72), enlarges (see s. 2) the scope of the Act of 1851, by allowing the erection of separate houses, in the event of that act being adopted, but does not seem to increase the facilities for its adoption.

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* Sect. 14. — *Ecclesiastical Leases.*[1] [*18]

(a) *The "Enabling" and "Disabling" Statutes.*

At common law. — By the common law, all ecclesiastical corporations *aggregate* might make any leases they thought fit, without the confirmation of any person (*i*), and so might eleemosynary corporations, as masters and fellows of colleges, masters of hospitals and their brethren (*i*). But ecclesiastical corporations *sole*, as archbishops, bishops, deans, prebendaries, parsons, and vicars, and others, could not make leases *binding on their successors*, of lands and tenements whereof they were seised in their corporate right, except with the consent, and in some cases with the confirmation, of such persons as the law required (*k*).

(*i*) Co. Lit. 44 a.
(*k*) Co. Lit. 44 a, 67 a; Shep. Touch. 281; Woodf. L. & T. 20–23 (9th ed.).

[1] **Powers of ecclesiastical corporations.** — Ecclesiastical corporations may grant leases. The rector, church-wardens and vestry of a parish may lease a ferry granted them by the crown or other property. Fraser *v.* Drynan, 4 Allen (N. B.) 74; Hughes *v.* Holmes, 1 Allen (N. B.) 12. Ecclesiastical corporations in the American states are very much like private civil corporations. They differ of course as to their implied powers somewhat, owing to the difference in their scope and character of their property.

The exercise of such powers having been much abused by owners for the time being, to the prejudice of their successors, the legislature from time to time interfered and passed various *disabling* or *restraining* statutes (*l*). *Prior to certain acts, such as "The Ecclesiastical Leasing Act*, 1842," *all passed in the reign of Queen Victoria*, which will be presently adverted to, no lease from any ecclesiastical corporation, aggregate or sole, could safely be made otherwise than in pursuance of some or one of these statutes, with such consent (if any) and subject to such restrictions, and containing such covenants and conditions as were prescribed by the act or acts pursuant to which the lease was made. The "disabling" statutes, however, although not repealed (*m*), are almost entirely superseded (*n*) by the statutes of Queen Victoria, and are now of consequence chiefly in relation to the vested interests created under them, as showing the course of legislation on the subject, and as explaining the phraseology of ecclesiastical leases.

The Enabling Act. — By 32 Hen. 8, c. 28 (commonly called the Enabling Act), all persons seised of lands in fee simple *in right of their churches* (*o*) (except parsons and vicars(*p*)) may, by indenture, demise such parts thereof as have been most commonly letten to farm and occupied by the farmers thereof for twenty years next before such demise, for any term not exceeding twenty-one years or three lives, reserving yearly during the whole term the most accustomed rent or more; such lease not to be made without impeachment of waste, nor whilst there is any old lease, unless the same shall expire or be surrendered or ended within one year next after the making of the new lease.

[*19] * It is to be observed that leases made in pursuance of this act do not require any confirmation whatever.

Archbishops, bishops, and other ecclesiastical corporations *sole* (except parsons and vicars) may grant leases pursuant

(*l*) See Chit. Stat. tit. "Leases," vol. iv., Lease (Ecclesiastical, &c.).

(*m*) See Jenkins *v.* Green, 27 Beav. 440.

(*n*) See Phillimore's Ecclesiastical Law, vol. ii. p. 1647.

(*o*) This act has been repealed by 19 & 20 Vict. c. 120, s. 35, "except so far as relates to leases made by persons having an estate in right of their churches."

(*p*) Sect. 4.

to the above act. A prebendary appears to be within the act (*q*); and so does the chancellor of a cathedral church (*r*), but not a perpetual curate, whose curacy has been augmented by a grant of lands under the Queen Anne's Bounty Acts; for either he is not seised in fee in right of his church, or he is a quasi-vicar (*s*). Corporations aggregate, such as deans and chapters, universities, colleges, &c., are not within the statute (*t*); nor are copyhold lands (*u*).

The first Disabling Act. — By the Disabling or Restraining Act (1 Eliz. c. 19), s. 5, all leases *by any archbishop or bishop* of any parcel, &c., for more than twenty-one years or three lives, or whereupon the old accustomed yearly rent or more shall not be reserved and made payable yearly during the whole term, "shall be utterly void" (*x*).

Archbishops and bishops. — It is to be observed that only archbishops and bishops are restrained by this statute. But the act applies to all leases made by them, *although confirmed by the dean and chapter*, except leases made pursuant to 32 Hen. 8, c. 28 (*y*), which are not interfered with. Concurrent leases, if confirmed by the dean and chapter, are valid provided they do not exceed (together with the lease in being) the term permitted by the above act.

Leases of ecclesiastical property for twenty-one years or three lives. — By the Restraining Act (13 Eliz. c. 10), s. 3, all leases by any master and fellows of any college, dean and chapter of any cathedral or collegiate church, master or guardian of any hospital (*z*), parson, vicar, or any other having any spiritual or ecclesiastical living of any parcel, &c., for more than twenty-one years or three lives, or not reserving the accustomed yearly rent or more, "shall be utterly void." Sect. 4 contains a saving of private statutes.

(*q*) Acton *v.* Pritcher, 4 Leon. 51; Watkinson *v.* Man, Cro. Eliz. 349; but see Lit. ss. 644–648; Doe *d.* Richardson *v.* Thomas, 9 A. & E. 556.

(*r*) Bisco *v.* Holte, Lev. 112; Sid. 158; Ensden *v.* Dennis, Palm. 105.

(*s*) Doe *d.* Richardson *v.* Thomas, 9 A. & E. 556.

(*t*) 10 Co. R. 60 a.

(*u*) As to leases of copyholds, see 24 & 25 Vict. c. 105, *post*, 26.

(*x*) The exception in this act of leases to the crown was repealed by 1 Jac. 1, c. 3, which renders all such leases utterly void.

(*y*) *Ante*, 18.

(*z*) Explained, as to hospitals, by 14 Eliz. c. 14; and see 39 Eliz. c. 5, s. 6; *post*, 20.

This act does not enable parsons or vicars to make any leases whatever without the consent of the patron and ordinary (*a*). But it restrains them from making any lease, *even with such consent*, for more than twenty-one years or three lives, or without reserving the accustomed yearly rent or more. A lease by a vicar (with such consent) for three lives of uninclosed waste land not let before is [*20] * void as against his successor, notwithstanding the lessee covenants to inclose the land and pay a rack-rent for it (*b*).

Void means voidable. — Although this statute declares that all leases not made according to its provisions shall be utterly void, it has been frequently held that such leases are good during the life of the lessor (*c*); and even after the lessor's death they are not void, but only voidable by the successor, who may confirm them (*d*). But the Statute of Limitations (3 & 4 Will. 4, c. 27) does not begin to run against such successor until he exercises his option by bringing an action for the recovery of the property. This was decided in a case where the governors of a hospital granted a lease in 1783 for ninety-nine years at a pepper-corn rent, and their successors brought an action to set the lease aside in 1876 (*e*).

Leases by curates. — By 14 Eliz. c. 11, s. 16, "All leases, bonds, promises and covenants of and concerning benefices and ecclesiastical livings with cure, to be made by any curate, shall be of no other or better force, validity or continuance, than if the same had been made by the beneficed person himself that demised or shall demise the same to any such curate" (*f*).

Houses and grounds in towns, &c. — By 14 Eliz. c. 11, s. 17, the 13 Eliz. c. 10, shall not extend to any grant, assurance

(*a*) Bac. Abr. tit. Leases (I. G.).

(*b*) Goodtitle *d.* Clarges *v.* Funucan, 2 Doug. 565; Doe *d.* Tennyson *v.* Lord Yarborough, 1 Bing. 24; Bp. of Hereford *v.* Scory, Cro. Eliz. 874.

(*c*) Doe *d.* Bryan *v.* Bancks, 4 B. & A. 407, Bayley, J.

(*d*) Edwards *v.* Dick, 4 B. & A. 217; Doe *d.* Pennington *v.* Taniere, 12 Q. B. 998; Pennington *v.* Cardale, 3 H. & N. 656, 666.

(*e*) Magdalen Hospital *v.* Knotts, 46 L. J., Ch. 149; L. R., 5 Ch. D. 175.

(*f*) Doe *d.* Richardson *v.* Thomas, 9 A. & E. 556.

or lease of any houses belonging to any the persons, or bodies politic or corporate aforesaid, nor to any ground to such houses appertaining, which houses are situate in any city, borough, town corporate, or market town, or the suburbs of any of them; but all such houses and grounds may be granted, demised and assured as by the laws of this realm, and the several statutes of the said colleges, cathedral churches and hospitals, they lawfully might have been before the making of the said statute, or lawfully might be if the said statute were not, so always that such house be not the capital or dwelling-house used for the habitation of the persons above said, nor have ground to the same belonging above the quantity of ten acres, anything in the said act to the contrary notwithstanding.

Not for more than forty years. — Sect. 19 provides, "That no lease shall be permitted to be made by force of this act, in reversion, nor without reserving the accustomed yearly rent at the least, nor without charging the lessee with the reparations (*g*), nor for longer term than *forty years* at the most."

Covenant to put in lives. — A covenant by the trustees of a charity to put in a new life so often as one of three lives drops, in the case of a lease for more than forty *years, will not be enforced (*h*). But a lease by a [*21] vicar of messuages in the city of London — of which the dwelling-house used for the habitation of the vicar formed no part, and the ground demised was less than ten acres — for twenty-one years from the date of the lease, made at a time when a former lease of the said premises for forty years was in being, but within three years of its expiration, was

(*g*) Crane *v.* Taylor, Hob. 269.

(*h*) Moore *v.* Clench, L. R., 1 Ch. D. 447; 45 L. J., Ch. 80; 34 L. T. 13; 24 W. R. 169. Here the lease was in 1836 for 40 years and a month, with a concurrent term of 99 years for three lives, and a covenant during the 40 years and the month to add a life. In 1857 a new life was put in, but in 1872 the Charity Commissioners having vetoed the lease under 18 & 19 Vict. c. 124, s. 29, the governors refused to put in another life. Jessel, M. R., in refusing specific performance of the covenant to put in the life, expressed an opinion that the Charity Commissioners could not have vetoed the renewal of the lease if it had been originally valid.

held not void under either of the restraining acts of *Elizabeth* (*i*).

Corn rents. — By 18 Eliz. c. 6, s. 1, in college leases one-third part at the least of the old rent must be reserved and paid in corn (wheat or malt) for the said colleges, at certain rates therein mentioned; and see 39 & 40 Geo. 3, c. 41, s. 7.

Concurrent leases. — The 18 Eliz. c. 11, after reciting the 13 Eliz. c. 10, s. 3, enacts (s. 2), that all leases of any ecclesiastical, spiritual or collegiate lands, tenements or hereditaments, whereof any former lease for years is in being, and not to be expired, surrendered or ended within three years next after the making of such new lease, shall be void, as well as all bonds and covenants for the renewal of the same. And by 43 Eliz. c. 9, s. 8, all payments had for the intent to have and enjoy any lease contrary to these statutes shall be void in the same manner as bonds and covenants are appointed to be.

Leases of Fifield Manor. — By 18 Eliz. c. 11, ss. 5, 6, Saint John's College, Oxford, may grant leases of the manor of Fifield, in Oxfordshire, to the kindred of their founder, Sir Thomas White, for ninety-nine years.

Leases by hospitals, &c. — By 39 Eliz. c. 5, s. 6, all leases, grants, &c., made by any corporation founded in pursuance of that act as a hospital, maison de Dieu, abiding place or house of correction, exceeding twenty-one years in possession, or whereupon the accustomed yearly rent or more by the greater part of twenty years next before the making of such lease shall not be reserved and yearly payable, shall be void (*k*).

Ancient offices not within the statutes. — The grants of ancient offices belonging to ecclesiastical persons are not within any of these acts, and therefore stand as at common law (*l*).

By 39 & 40 Geo. 3, c. 41, where any part of the possessions of any archbishop, bishop, master and fellows, dean and chap-

(*i*) Vivian *v.* Blomberg, 3 Bing. N. C. 311; 3 Scott, 681; 7 Sim. 548.

(*k*) And see 13 Eliz. c. 10, s. 3, *ante*, 18, explained by 14 Eliz. c. 11.

(*l*) Bp. of Salisbury's case, 10 Co. R. 61 a.

ter, master or guardian of any hospital, or any other person or persons, or body or bodies politic or corporate, *having any ecclesiastical living*, shall be demised by several leases which was formerly demised by one lease * under one [*22] rent; or where a part shall be demised for less than the ancient rent, and the residue shall be retained in the possession of the lessor; the several rents reserved on the separate demises of the specific parts shall be taken to be the ancient rents within the meaning of the statutes 22 Hen. 8, c. 28; 1 Eliz. c. 19; 13 Eliz. c. 10; and 14 Eliz. c. 11; and are to be equitably apportioned in manner therein provided (*m*).

Land-tax redeemed by a bishop. — By the Land-Tax Redemption Act (42 Geo. 3, c. 116), ss. 69, 83, 88, the land-tax, when redeemed by any bishop, shall be considered as yearly rent, and shall be reserved in all demises. A lease by a bishop in which such land-tax is not expressly reserved as rent is voidable by the successor (*n*).

Renewed leases, &c. — By 6 Will. 4, c. 20, "no archbishop or bishop, ecclesiastical corporation, sole or aggregate, dignitary, canon, or prebendary, or other spiritual person, nor any master or guardian of any hospital, shall grant any new lease of parcel, &c., by way of renewal of any lease which shall have been previously granted of the same *for two or more lives*, until one or more of the persons for whose lives such lease shall have been so made shall die, and then only for the surviving lives or life and for such new life or lives as, together with the life or lives of such survivor or survivors, shall make up the number of lives, not exceeding three in the whole, for which such lease shall have been so made as aforesaid; and where any such lease shall have been granted *for forty years*, no such archbishop, &c., shall grant any new lease by way of renewal of the same until fourteen years of such lease shall have expired; and where any such lease shall have been made as aforesaid *for thirty years*, no such archbishop, &c., shall grant any new lease by way of renewal of the same until ten years of such lease shall have expired;

(*m*) Sect. 2 *et seq.*

(*n*) Doe *d.* Murray *v.* Bridges, 1 B. & A. 847. As to the sale of land for the redemption of land-tax, see Warner *v.* Potchett, 3 B. & Ad. 921.

and where any such lease shall have been granted *for twenty-one years*, no such archbishop, &c., shall grant any new lease by way of renewal of the same or (in the case of archbishops or bishops) concurrently therewith until seven years of such lease shall have expired; and where any such lease shall have been granted for years, no such archbishop, &c., shall grant any lease by way of renewal of the same or otherwise for any life or lives; any law, statute or custom to the contrary notwithstanding."

Previous lease. — By sect. 2, the new lease must contain a recital or statement of the previous lease, &c.; but by 6 & 7 Will. 4, c. 64, no such renewed lease shall be void "by reason only of its not containing such recital or statement."

Short renewal. — By sect. 3, where it has been the [*23] usual practice to renew leases for *forty, thirty or twenty-one years respectively at shorter periods than fourteen, ten or seven years respectively, and that practice is certified as in this section provided, such leases may be renewed at shorter intervals, according to the practice so certified.

Special acts. — Sect. 6 provides, that nothing in this act contained shall prevent any grants or renewal of leases which may have been authorized by acts of parliament specially relating to the particular estates demised by such leases (*o*).

Confirmation only. — By sect. 7, renewed leases, by way of confirmation only for the same life or term, may be granted.

By sect. 8, no lease not authorized by the laws and statutes now in force "shall be rendered valid by anything in this act contained."

By sect. 9, leases "contrary to this act shall be void;" but this was qualified as to sect. 2 by 6 & 7 Will. 4, c. 64, as before mentioned.

(b) *The Acts of Queen Victoria.*

Lease of parsonage. — By 1 & 2 Vict. c. 106, s. 59, "any agreement made for the letting of the house of residence, or

(*o*) See 18 Eliz. c. 11, *ante*, 21.

the building, gardens, orchards, or appurtenances necessary for the convenient occupation of the same, belonging to any benefice, to which house of residence any spiritual person may be required, by order of the bishop as aforesaid, to proceed and to reside therein, or which may be assigned or appointed as a residence to any curate by the bishop, shall be made in writing, and *shall contain a condition for avoiding the same*, upon a copy of such order, assignment or appointment being served upon the occupier thereof or left at the house, and otherwise shall be null and void." And a summary remedy is provided for enforcing such condition.

Leases for 14 years. — By stat. 5 & 6 Vict. c. 27, which applies to farming leases, in cumbents of ecclesiastical benefices (*p*) may, *with the consent of the bishop and patron*, lease lands belonging to their benefices, except the parsonage house and offices and ten acres of glebe situate most convenient to be occupied therewith, for any term *not exceeding fourteen years*, subject to the restrictions and conditions imposed upon them by the said act for the benefit and protection of their successors.

Leases for 20 years. — But it is provided that "the term to be granted by any such lease as aforesaid may be *twenty years* in any case where the lessee shall covenant thereby to adopt and use any mode or system of cultivation more expensive than the usual course, or to drain or subdivide, or embank and warp at his expense any part of the demised premises, * or to erect, at his own expense, on [*24] the said premises any buildings, or to repair in a more expensive manner and at a greater expense than is usually required of lessees of farms any buildings on the demised premises, or in any other manner to improve at his expense the demised premises or any part thereof" (*q*). No lease granted under this act can be surrendered without the consent of the bishop and patron (*r*). The act itself must be referred to for details. At common law a lease granted

(*p*) By s. 15, "the word 'benefice' shall be construed to comprehend every rectory, vicarage, perpetual curacy, donative, endowed public chapel, parochial chapelry, and district chapelry; the incumbent of which in right thereof shall be a corporation sole."

(*q*) Sect. 1.

(*r*) Sect. 5.

by the incumbent of a benefice, in whatever terms it was framed, operated as a demise so long only as he continued incumbent, for he could not pass a greater interest (*s*).

Consents as evidence. — By sect. 4, "the execution by the bishop and patron whose consents are hereby made requisite of any lease to be granted under the authority of this act shall be conclusive evidence that the lease does not comprise any lands which ought not to be leased under the provisions of this act, and that a proper portion of the glebe lands remains unleased, and that the rent reserved by such lease is the best and most improved rent that could be reasonably gotten for the lands and hereditaments comprised therein at the time of granting such lease, and that all the covenants contained in such lease are proper covenants."

Validity of irregular lease. — In consequence of sect. 4, a lease which is executed by the patron and ordinary as well as the incumbent may be valid in favour of the lessee, although it does not strictly comply with all the requisitions of the statute: for instance, where it reverses the rent half-yearly instead of quarterly (*t*). *Quod fieri non debit factum valet.*

The act does not repeal. — The above act does not repeal the 13 Eliz. c. 10: and therefore a rector, with the consent of the patron and bishop, may demise his glebe under the powers of the common law, subject to the provisions of the statute of Elizabeth, though the lease may not be conformable to the restrictions imposed by the statute of Victoria (*u*).

Ecclesiastical Leasing Act. — By "The Ecclesiastical Leasing Act, 1842" (*x*), as amended by "The Ecclesiastical Leasing Act, 1858" (*y*), any ecclesiastical corporation, aggregate or

(*s*) Wheeler *v.* Heydon, Cro. Jac. 328; Price *v.* Williams, 1 M. & W. 6; Doe *d.* Kerby *v.* Carter, Ry. & Moo. 237; Doe *d.* Tennyson *v.* Lord Yarborough, 1 Bing. 24; Cole Ejec. 602.

(*t*) Jenkins *v.* Green, 27 Beav. 440; but the Acts 24 & 25 Vict. c. 105, and 25 & 26 Vict. c. 52, *post*, seem, to a great extent, to get rid of the effect of this decision.

(*u*) Jenkins *v.* Green, 28 Beav. 87.

(*x*) 5 & 6 Vict. c. 108.

(*y*) 21 & 22 Vict. c. 57. The Act 12 & 13 Vict. c. 26, for granting relief against defects in leases under powers, does not (see sect. 7) apply to ecclesiastical leases, or to leases of the possessions of any college, hospital, or charitable foundation.

sole, except any college (*z*) or corporation of vicars choral, priest vicars, senior vicars, custos and vicars or minor canons, and except also any ecclesiastical hospital, or the master thereof, may, *with the consent of the Ecclesiastical Commissioners for England*, and * with such further [*25] consents as in the said acts mentioned, grant building and repairing leases for any term not exceeding ninety-nine years: also leases of running water and way-leaves, and other rights and easements, for any term not exceeding sixty years: also mining leases, for any term not exceeding sixty years: all of which leases must be made subject to certain restrictions and conditions for the protection and benefit of their successors. The acts must be referred to for details, but it may be mentioned here that sect. 1 of the act of 1842 expressly authorizes a lease "with or without a proviso that no breach of covenant (except the covenant for payment of rent and other such covenants, if any, as may agree to be excepted) *shall occasion any forfeiture* unless judgment shall have been obtained in an action for such breach of covenant, nor unless the damages and costs to be recovered in such action shall have remained unpaid for the space of three calendar months after judgment shall have been obtained in such action." The execution of any such lease by the necessary consenting parties is to be conclusive evidence that the requisites of the above acts have been complied with. Under sect. 30 of the first-mentioned act they were prohibited from taking any premium, fine or foregift; but that was repealed by 21 & 22 Vict. c. 57, ss. 1, 2.

Previous powers not interfered with. — By sect. 8 of the first-mentioned act, "nothing in this act contained shall restrain any corporation hereby empowered to grant leases and make grants as aforesaid from granting any leases or making any grants, whether by way of renewal or otherwise, which such corporation might have lawfully and rightfully granted or made either under the provisions of any public (*a*) or private act of parliament, or under any other authority, or in any manner whatsoever, in case this act had not been

(*z*) As to leases by colleges, see *post*, Sect. 15.

(*a*) See 6 Will. 4, c. 20, *ante*, 22.

passed, or from the taking of any fine, premium or foregift from the lessees in any renewed or new leases named or to be named, or from their underlessees, or from any other persons having or claiming an interest in any such renewal, for any such renewed or new leases, save and except that in every lease (other than any lease granted under the powers of this act) which shall be granted by any such corporation as aforesaid, of any lands or houses which shall have been leased for building or repairing purposes under any of the powers of this act, there shall be reserved the best improved rent, payable half-yearly or oftener, which can be obtained for the same, without taking any fine, premium or foregift, or anything in the nature of a fine, premium or foregift, for making or granting the same."

By "The Ecclesiastical Leasing Act, 1858" (21 & 22 Vict. c. 57), s. 1, "in any case in which it shall be [*26] made to appear to the *satisfaction of the ecclesiastical commissioners for England that all or any part of the lands, houses, mines, minerals or other property of or belonging to any ecclesiastical corporation which are by the 5 & 6 Vict. c. 108, authorized to be leased, might to the permanent advantage of the estate or endowments belonging to such corporation be *leased in any manner*, or be sold, exchanged or otherwise disposed of, it shall be lawful for any ecclesiastical corporation, aggregate or sole, *except as in the said act is excepted*, from time to time, with such consents as in the said recited act mentioned, and *with the approval of the said commissioners*, to be testified by deed under their common seal, to lease all or any part or parts of the lands, houses, mines, minerals or other property belonging to such corporation, whether the same shall or shall not have been previously leased or dealt with under the provisions of the said recited act, or of this act, and *either in consideration or partly in consideration of premiums or not*, or for such other considerations, and for such term or terms, and under and subject to such covenants, stipulations, conditions and agreements on the part of the lessee or lessees, and generally in such manner as the said commissioners shall under the circumstances of each case think proper and advisable."

Episcopal and Capitular Estates Acts. — By 14 & 15 Vict. c. 104, intituled "An Act to Facilitate the Management and Improvement of Episcopal and Capitular Estates in England" (*b*), ecclesiastical corporations, sole or aggregate, with the approval in writing of the Church Estate Commissioners, may sell, enfranchise or exchange their church lands, or purchase the interest of their lessees. And by sect. 9, "no lease of any lands purchased or acquired, or in which the estate or interest of a lessee, or of a holder of copyhold or customary land, is purchased or acquired, by any ecclesiastical corporation under this act, shall, except as hereinafter provided, be granted by such ecclesiastical corporation, otherwise than from year to year, or for a term of years in possession *not exceeding fourteen years*, at the best annual rent that can be reasonably gotten, without fine, the lessee not to be made dispunishable for waste, or exempted from liability in respect of waste: provided always, that it shall be lawful for such ecclesiastical corporation, with the approval of the Church Estate Commissioners, from time to time to grant mining or building leases," as therein mentioned (*c*).

Leases by bishops. — By the 23 & 24 Vict. c. 124, s. 8, "no lands assigned or secured as the *endowment of any see under this act* shall be granted by the archbishop or bishop otherwise than from year to year, or for a term of
*years in possession *not exceeding twenty-one years*, [*27]
at the best annual rent that can be reasonably gotten, without fine, the lessee not to be made dispunishable for waste, or exempted from liability in respect of waste; and so that in every such lease such or the like covenants, conditions and reservations be entered into, reserved or contained with or for the benefit of the archbishop or bishop and his successors, as under sect. 1 of the act 5 & 6 Vict. c. 27 (for better enabling the incumbents of ecclesiastical benefices to demise the lands belonging to their benefices on farming

(*b*) A temporary act, amended by 17 & 18 Vict. c. 116; 22 & 23 Vict. c. 46; 23 & 24 Vict. c. 124; 31 & 32 Vict. c. 114, s. 10; and continued by numerous Expiring Laws Continuance Act; and lastly, by the Expiring Laws Continuance Act, 1880 (43 & 44 Vict. c. 48), until the 31st December, 1881.

(*c*) See also the Ecclesiastical Leasing Acts, 1842, 1858, *ante*, 23, 24.

leases), are to be entered into, reserved or contained in a lease granted under that enactment to or for the benefit of the incumbent and his successors, or as near thereto as the circumstances of the case will permit; but where under the said section of the last-mentioned act any consents are provided for or required, the consent only of the archbishop or bishop for the time being shall be requisite: provided always, that it shall be lawful for the archbishop or bishop, with the approval of the estate committee of the ecclesiastical commissioners, testified under the common seal of the said commissioners, which the said committee are hereby empowered to affix to any lease for this purpose, from time to time to grant mining or building or other leases of any such lands for such periods, for such considerations, upon such terms, and generally in such manner as such committee under the circumstances of each case may think fit; and it shall be lawful for such committee to require that any portion of the rent reserved on any such lease shall be payable to the said ecclesiastical commissioners."

Ecclesiastical commissioners. — By sect. 9, "the estates committee shall cause the property assigned as an endowment for any see as aforesaid to be inspected so often as they think fit, and shall cause notice in writing of all dilapidations or want of repair found in such inspection, and of the repairs or works necessary for remedying the same, to be given to the archbishop or bishop of such see, and such archbishop or bishop shall forthwith do or cause to be done at his or their own expense, or at the expense of his or their lessees or tenants (as the case may require), the repairs or works mentioned in such notice; and if any difference arise between such archbishop or bishop and the estates committee with regard to the condition of such property, or the repairs or works required by the estates committee, the matter in difference shall be referred to arbitration as hereinafter provided."

By sect. 11, "the estates committee shall, when required by any archbishop or bishop to whom lands may have been assigned as an endowment under this act, undertake the management of such lands and receive the rents and profits

thereof during the incumbency of the archbishop or bishop; and in every such case as aforesaid the estates *committee, during their management, may grant [*28] all such leases as might have been granted by such archbishop or bishop if the lands had continued under his or their management, and may with the approval of such archbishop or bishop grant such other leases as might have been granted by him or them with the approval of the estates committee; and the commissioners shall, during the time such lands are under the management of the said estates committee, pay to such archbishop or bishop the annual income to secure which the lands may have been assigned."

By sect. 31, rights of renewal and other obligations under special acts, &c., preserved, notwithstanding anything done under sect. 10.

Leases of copyholds. — By 24 & 25 Vict. c. 105, intituled "An Act to Prevent the Future Grant by Copy of Court Roll and certain Leases of Lands and Hereditaments in England belonging to Ecclesiastical Benefices" (*d*), after reciting "that there are in England certain ecclesiastical benefices to which belong manors, lands, tenements and hereditaments, which by custom or otherwise, the rectors, vicars, perpetual curates or incumbents thereof have power to grant and lease out for lives and long terms of years, and such grants have been made by them at nominal annual rents, to the prejudice of their successors, and it is expedient to determine and put an end to the power to make such grants;" it is enacted as follows: —

Fines prohibited. — By sect. 1, "it shall not be lawful for any prebendary of any prebend, not being a prebend of any cathedral or collegiate church, rector, vicar, perpetual curate or incumbent, *who after the passing of this act may become possessed* of or entitled to any manors, lands, tenements or hereditaments belonging to any ecclesiastical benefice in England to make any grant by copy of court roll or lease of any such manors, lands, tenements, or hereditaments in con-

(*d*) Amended by 25 & 26 Vict. c. 52, *post*, 29. None of the previous Disabling or Restraining Acts extended to copyholds except 5 & 6 Vict. c. 27, *ante*, 23.

sideration of any fine, premium or foregift, but the same may, by any rector, vicar, perpetual curate or incumbent appointed after the passing of this act, be *leased*, sold, exchanged or enfranchised, or disposed of under the provisions of 5 & 6 Vict. c. 27; 5 & 6 Vict. c. 106, and 21 & 22 Vict. c. 57, or such of the provisions of such acts respectively as are now in force."

By sect. 2, "nothing herein contained shall interfere with or prevent the right and power of any such present prebendary, rector, vicar, perpetual curate or incumbent, during his incumbency, to make any grant by copy of court roll or lease which he might lawfully have made before the passing of this act, and nothing herein contained shall prejudice or affect any grant heretofore made by such prebendary, rector, * vicar, perpetual curate or incumbent, or any right of renewal or tenant right, if any such there be, in any manors, lands, tenements, or hereditaments held under any such grant or under any lease, nor shall this act prejudice or affect any power of sale, exchange or enfranchisement existing under any statute now in force, or any present or future right of admission of any person to any copyhold tenement according to the custom of the manor of which it is holden, and to which such person may be legally entitled."

[*29]

Powers to incumbents. — By sect. 3, notwithstanding anything contained in the 11th section of an act 14 & 15 Vict. c. 104, any rector, vicar, perpetual curate or incumbent shall have such and the same powers of sale, exchange and enfranchisement as are possessed by an ecclesiastical corporation, sole or aggregate, under any act now in force; and the provisions of an act 23 & 24 Vict. c. 124, shall, so far as the same relate to powers for the raising or application of money by trustees, allowances to lessees, arbitration, valuation, rate of interest, apportionment of rent and substitution of titles on exchange, be applied, *mutatis mutandis*, to sales, exchanges or enfranchisements of any manors, lands, tenements or hereditaments in this act comprised; but the proceeds of any such sales or enfranchisements and any monies received by way of equality of exchange, shall be applied

according to the provisions in that behalf contained in the said act 5 & 6 Vict. c. 108, and in the said act 21 & 22 Vict. c. 57.

By 25 & 26 Vict. c. 52, the prohibition to make any grant by copy of court roll or lease contained in 24 & 25 Vict. c. 105, s. 1, shall not only extend to grants made in consideration of any fine, premium, or foregift; but shall also extend to all grants and leases made for a longer term or in any other way than according to the provisions of the several statutes mentioned in sects. 1, 3 of that act.

Leases by deans and chapters. — By 31 & 32 Vict. c. 114, s. 9, none of the deans and chapters mentioned in the schedule to 31 & 32 Vict. c. 19 [including *York*, *Carlisle*, *Peterborough*, *Chester*, *Gloucester*, *St. Asaph*, *Worcester*, *Chichester*, *Winchester*, *Salisbury*, *Bristol*, *Canterbury*, *Exeter*, *Wells*, *Rochester*, *St. David's*, *Llandaff*, *and Windsor*], *and no dean and chapter after making of any order in council respecting them*, in pursuance of this act, shall demise any land vested in them, otherwise than from year to year, or for a term of years in possession not exceeding twenty-one, at the best annual rent that can be reasonably got without fine; and shall not make the lessee dispunishable for or exempt from liability in respect of waste; and in every such lease such or the like covenants, conditions and reservations shall be entered into, reserved or contained with or for the benefit of the dean and chapter and their successors, as under sect. 1 of 5 & 6 Vict. c. 27, are to be entered into, reserved or contained with or for the benefit of the lessor and his successors in *a lease granted under that section, [*30] or as near thereto as the circumstances admit (*e*).

Sect. 15. — *By Universities and Colleges.*

They are civil corporations. — The universities of Oxford and Cambridge are regarded as civil corporations (*f*); so,

(*e*) This enactment was intended to put an end to the custom which had long prevailed of renewals of leases by deans and chapters at the end of each seven years, or on the dropping of each life, upon payment of a large fine, which was immediately divided between the members for the time being.

(*f*) Parkinson's case, Carth. 93;

of course, are the universities of Durham and London; and the several colleges in all such universities respectively.

Powers of leasing at common law. — Like other corporations aggregate, they had at common law power to make such leases of their lands as they thought fit under their common seal, without the consent or confirmation of any other person (*g*), provided such leases were in conformity with their own private statutes, charters and bye-laws.

Restraining or Disabling Acts. — But as such power was often much abused by the members for the time being, to the great prejudice and impoverishment of their successors, they have been restrained by divers statutes from leasing their lands, *and especially their church property*, except for limited terms and subject to certain covenants and conditions intended for the protection and benefit of their successors (*h*).

Oxford, Cambridge, Durham, Eaton and Winchester. — Now, by the Universities and College Estates Act, 1858 and 1860 (*i*), the universities of *Oxford*, *Cambridge*, and *Durham* and the colleges in those universities respectively (including Christ Church, Oxford), and also the colleges at *Winchester* and *Eaton*, have extensive powers (without the consent or control of the Copyhold Commissioners or of the Church Estates Commissioners, or of any other person or persons whomsoever), to grant leases for any term *not exceeding twenty-one years*, subject to certain restrictions and conditions for the protection and benefit of their successors; also to grant building and repairing leases for ninety-nine years, and to enter into previous contracts for any such leases; also to lease running water and way-leaves, and other rights and easements for sixty years; also to grant mining leases for sixty years, and various other powers. The acts must be referred to for details (*k*), but it may be mentioned here

R. *v.* V.-C. of Cambridge, 3 Burr, 1656.

(*g*) Co. Lit. 44 a.

(*h*) See 13 Eliz. c. 10, s. 3; 14 Eliz. c. 11, s. 17; 18 Eliz. c. 6, s. 1 (corn rents); 18 Eliz. c. 11, s. 2; Id., ss. 5, 6 (manor of Fifield); 39 & 40 Geo. 3, c. 41, *ante*, sect. 14 (*b*); 12 & 13 Vict. c. 26 (defective execution of powers), *ante*, 24, note (*g*).

(*i*) 21 & 22 Vict. c. 44; 23 & 24 Vict. c. 59.

(*k*) See Chit. Stat. vol. iv. tit.

that the act of 1858 authorizes leases containing a proviso against * forfeiture without prior action for [*31] damages similar to that allowed by the Ecclesiastical Leasing Act, 1842, previously referred to.

Previous powers not affected. — By sect. 30 of the first-mentioned act, "nothing in this act contained shall restrain the said universities or colleges respectively from exercising any powers of sale, enfranchisement, exchange, purchase or borrowing monies, *or from granting any leases*, or making any grants, whether by way of renewal or otherwise, which the said universities, or any such college as aforesaid, might have exercised or granted under the provisions of any public or private act of parliament, or under any other authority, or in any other manner whatsoever in case this act had not been passed" (*l*).

By 23 & 24 Vict. c. 59, s. 3, "where any lands belonging to any such university or college as aforesaid shall at any time have been leased at the best and most improved yearly rent, without fine, no fine, premium or foregift, or anything in the nature thereof, shall hereafter be taken by any such university or college for the grant or renewal of any lease of the same lands."

Mortgages by demise. — The above universities and colleges have also power to raise monies for certain purposes, *with the consent of the Copyhold Commissioners*, by way of mortgage for a term of years determinable, &c. (*m*).

Eton. — By 31 & 32 Vict. c. 118, 24, the new governing body of Eton may make a scheme for running out their leases, so that their property may be let at rack-rent instead of on leases renewable on payment of fines.

London University. — The University of London and colleges not within the acts of 1858 and 1860, must lease

"Lease, (Ecclesiastical, College, and Hospital)."

(*l*) See 18 Eliz. c. 11, ss. 5, 6, *ante*, sect. 14 (*b*). Under 19 & 20 Vict. c. 88, s. 48, any college at Cambridge or Eton may, with the consent of the Church Estates Commissioners, sell or exchange any lands or hereditaments vested in such college. So, under 19 & 20 Vict. c. 95, the university of Oxford, and the colleges in the said university, and Winchester College, may, with the like consent, sell or exchange lands, &c.

(*m*) 21 & 22 Vict. c. 44, ss. 27, 28 23 & 24 Vict. c. 59, s. 1.

according to their own private statutes, charters and bye-laws, and on demising any church property must conform to the restrictions and conditions imposed by such of the Disabling or Restraining Statutes as may be applicable (*n*).

Sect. 16. — *By Parish Officers.*

Leases of small pieces of parish land. — The act 59 Geo. 3, s. 13, provides "that for the promotion of industry amongst the poor, it shall be lawful for the church-wardens and overseers of the poor of any parish, *with the consent of* [*32] * *the inhabitants in vestry assembled* (*o*), to let any portion or portions of such parish lands as aforesaid, or of the land to be so purchased or taken on account of the parish (*p*), to any poor and industrious inhabitant of the parish, to be by him or her occupied and cultivated on his or her own account, and for his or her own benefit, and at such reasonable rent and for such terms as shall by the inhabitants in vestry be fixed and determined."

Previous law. — Before this act a person, who held under a lease granted by parish officers, was only a tenant from year to year (*q*).

Leases, how made. — In the making of leases under this act, the terms of it must be strictly observed; therefore a memorandum not signed by all the parish officers, or by their order, is not a lease pursuant to the statute (*r*); not only the churchwardens, but also the overseers, must join in the lease (*s*). An invalid lease made by some of the parish officers, coupled with possession thereunder, will determine a previous tenancy at will, and enable the new lessee to maintain trespass (*t*).

(*n*) *Ante*, 30, note (*h*).

(*o*) The consent of the Local Government Board does not appear to be necessary. See the concluding proviso in 4 & 5 Will. 4, c. 76, s. 21.

(*p*) As mentioned in sect. 12, not exceeding twenty acres.

(*q*) Doe *d.* Higgs *v.* Terry, 4 A. & E. 274; Doe *d.* Hobbs *v.* Cockell, Id. 478.

(*r*) Doe *d.* Landsell *v.* Gower, 17 Q. B. 589; 21 L. J., Q. B. 57.

(*s*) Woodcock *v.* Gibson, 4 B. & C. 462; Phillips *v.* Pearce, 5 B. & C. 433; Doe *d.* Jackson *v.* Hiley, 10 B. & C. 885; Allason *v.* Stark, 9 A. & E. 255; Att.-Gen. *v.* Lewin, 8 Sim. 366; Rumball *v.* Munt, 8 Q. B. 382; St. Nicholas, Deptford *v.* Sketchley, Id. 394.

(*t*) Wallis *v.* Delmar, 29 L. J., Ex. 276.

Copyholds. — The above enactment does not apply to copyhold land (*u*).

Cottage allotments. — Where, in parishes inclosed under acts of parliament, allotments are made for the benefit of the poor, it is provided by 2 & 3 Will. 4, c. 42, and 8 & 9 Vict. c. 118, s. 109, as amended by the Poor Allotment Management Act, 1873 (36 Vict. c. 19), that a committee appointed by the allotment trustees and parish officers, or by the "allotment wardens," as the case may be, may let the allotments to "industrious cottagers" or "poor inhabitants of the parish," as the case may be. A year's rent may be required to be paid in advance. It was provided by 2 & 3 Will. 4, c. 42, that no allotment should be made of less than one quarter of an acre, but this provision is repealed by the 10th section of the act of 1873 above referred to (*x*). The Allotments Extension Act, 1882 (45 & 46 Vict. c. 80), imposes further obligations upon the trustees to let the land in allotments (*y*).

Sect. 17. — *By Trustees of Settled Estates.*[1]

The extensive powers of leasing conferred by the Settled Land Act, 1882, upon tenants for life [ante, sect. 4],

(*u*) Doe *d.* Bailey *v.* Foster, 3 C. B. 215.

(*x*) See further as to these acts, and the power to recover the demised premises by proceedings before justices, Chap. XXII., Sect. 3 (b) *post.*

(*y*) See *post*, Sect. 18.

[1] **Leases by trustees; power depends on quantity of estate and purposes of trust.** — Whether trustees can grant leases depends upon the nature of their estates. If they have unqualified legal fees, they can grant leases upon any terms they please good at law, but subject to be set aside in equity if inconsistent with the purposes of the trust. Greason *v.* Keteltas, 17 N. Y. 491, 494, 495; Newcomb *v.* Ketteltas, 19 Barb. (N. Y. Supreme Ct.) 608, 612, 613, 629 (and see opinions of Mitchell and Clerke, JJ., that if the fee is a determinable one, the trustee has full power so long as it remains undetermined). If a trustee who has a life estate or any other estate less than a fee grant a renewable lease, he cannot renew it after the expiration of his estate. Bergengren *v.* Aldrich, 139 Mass. 259. Whether trustees having less than a fee can grant leases, and if so what kind of leases they can grant, depends upon the construction of the trust instrument and the purposes of the trust. Hedges *v.* Riker, 5 Johns. Ch. (N. Y.) 163. If a trustee has any doubt upon this point, he can apply for instructions, and lease under direction of a court of chancery. Hedges *v.* Riker, 5 Johns. Ch. (N. Y.) 163. Of course

[*33] have rendered almost *unnecessary any resort to the court by trustees under sect. 4 of the Settled

they can grant leases if they have power either expressly or impliedly given them by the trust instrument. Hedges *v.* Riker, 5 Johns. Ch. (N. Y.) 163 (*per* Kent, Chan.); Pleasonton's Appeal, 99 Pa. 362; Black *v.* Ligon, Harper's Eq. (S. C.) 205.

Leases good at law are examinable in equity. — Although leases granted by trustees having unlimited fees are "good at law whatever may be their terms; they are nevertheless subject to the supervisory jurisdiction . . . of equity" (*per* Selden, J., in Greason *v.* Keteltas, 17 N. Y. 491. Whatever may be the legal quantity of trustee's estates, and whether unlimited or qualified, they cannot grant unusual leases, or leases inconsistent with the nature and character of the trust. They will not (at least if their title is limited) ordinarily be justified in granting leases of unopened mines, or for a long term (as building leases). 2 Perry on Trusts (3d ed.) sec. 528. In Greason *v.* Keteltas, 17 N. Y. 491, under a devise in fee in trust to pay expenses, taxes, &c., and to pay residue of rents and profits to testator's children and issue, it was held trustee was impliedly authorized to grant building lease of lots in New York City for twenty-one years, with covenant of renewal or payment of damages upon valuation of building to be erected. In Black *v.* Ligon, Harper's Eq. (S. C.) 205, the trustees of a permanent charity which forbade them to alienate the land, but required them to apply the funds under penalty of a revocation, granted a building lease for ninety-nine years (after several unsuccessful attempts to lease for shorter term), for a very moderate gross sum payable in eight years, and without any annual reservation of rent, and the lease was held under the circumstances valid. Of this case Chancellor Kent says: "This was pushing an implied power to lease very far, and I apprehend it went beyond the established precedents." 4 Kent's Com. (13th ed.) sec. 107. Trustees under trusts of a continuing nature charged with the payment of debts, annuities, &c., but with no power of alienation, usually have not only an implied power (2 Perry on Trusts (3d ed.) sec. 528), but a duty of leasing, and if they do not exercise it, will be liable to removal. Pleasonton's Appeal, 99 Pa. St. 362, 369 (*per* Sharswood, C. J.). Under circumstances, however, they may themselves take charge of the property and operate it, accounting for the profits. Dennis *v.* Dennis, 15 Md. 73. Trustees having power "to sell and dispose of" the property have power to lease it, because the greater power includes the less. Hedges *v.* Riker, 5 Johns. Ch. (N. Y) 163, 167. The trustees of property to pay debts have implied powers to sell. Vallette *v.* Bennett, 69 Ill. 632; Porter *v.* Schofield, 55 Mo. 56; Sharp *v.* Goodwin, 51 Cal. 219. The powers of trustees, when not restrained by the trust instrument, extend to the sale of realty, and cestuis can only interfere by application to equity and showing a violation of the trust. Huckabee *v.* Billingsly, 16 Ala. 414.

Trustees: are joint tenants. — Trustees are joint tenants; they have all equal authority and must all join in conveyances. Sinclair *v.* Jackson, 8 Cow. (N. Y.) 543, 553 (and see *per* Savage, Ch. J.); Van Rensselaer *v.* Akin, 22 Wend. (N. Y.) 549, 552 (*per* Cowen, J.); Wilbur *v.* Almy, 12 How. 180; Learned *v.* Welton, 40 Cal. 349. But a lease made by one with the sanction of the others is the joint act of all. Davis *v.* Lewis, 8 Ont. 1.

Personal liability of trustees. — If a trustee lease with covenants, he will be personally liable. Greason *v.* Keteltas, 17 N. Y. 491, 497. But he need not make covenants (*per* Selden, J.).

Estates Act, 1877; but as that enactment is not repealed, it is apprehended that resort may still be had to it in particular cases, and it may also be sometimes necessary to consider its provisions in connection with leases prior to 1883.

Order of court. — Sect. 4 of the Settled Estates Act, 1877 (*z*), provides that, "it shall be lawful for the court" (*i.e.* the Chancery Division of the High Court), "if it shall deem it proper and consistent with a due regard for the interest of all parties entitled under the settlement (*a*), and subject to the provisions and restrictions in that act contained, to authorize leases of any settled estates (*a*), or of any rights or privileges over or affecting any settled estates, for any purpose whatsoever, whether involving waste or not," provided five specified conditions be observed, viz.: —

Five conditions. — 1. The lease must take effect in possession at or within one year next after the making thereof, and be for a term of years not exceeding for an agricultural or occupation lease, twenty-one years; for a mining lease, or a lease of water mills, wayleaves, water-leaves or other rights or easements, forty years; for a repairing lease, sixty years (*b*); and for a building lease, ninety-nine years: but, except in the case of agricultural leases, where the court shall be satisfied that it is the usual custom in the district, and beneficial to the inheritance to grant leases for longer terms, then for such term as the court shall direct (*c*). 2. The best rent must be reserved that can be reasonably obtained, to be made payable half-yearly or oftener, without taking any fine or other benefit in the nature of a fine. 3. If the lease be of minerals, &c., a certain portion of the rent must be set aside and invested. 4. The felling of trees, except so far as is necessary, must not be authorized. 5. "Every such lease shall be by deed, and the lessee shall execute a counterpart thereof, and every such lease shall contain a condition for re-entry on non-pay-

(*z*) 40 & 41 Vict. c. 18. This act consolidates the original Settled Estates Act, 1856 (19 & 20 Vict. c. 120), with four amending acts, all being repealed by the schedule.

(*a*) The words "settlement" and "settled estates" are defined by sect. 2.

(*b*) Taken from 21 & 22 Vict. c. 77, s. 2.

(*c*) Taken from 21 & 22 Vict. c. 77, s. 4.

ment of the rent for a period of twenty-eight days after it becomes due, or for some less period to be specified in that behalf" (*d*).

With reference to the second condition, that "the best rent shall be reserved," the same 4th section provides, that "in the case of a mining lease, a repairing lease, or a building lease, a peppercorn rent, or any smaller rent than the rent to be ultimately made payable, may, if the court think fit so to direct, be made payable during all or any part of the first five years of the term of the lease" (*e*).

[*34] * **Special covenants.** — The 5th section provides that, "subject and in addition to the conditions hereinbefore mentioned, every such lease shall contain such covenants, conditions and stipulations as the court shall deem expedient with reference to the special circumstances of the demise."

The court cannot authorize a lease under this act, if any one of the parties interested under the settlement opposes the application (*f*). Leases granted by trustees under the provisions of this act must be settled in judge's chambers (*g*). If an act of parliament be necessary, the court will make a declaratory decree that it is proper that an application should be made to parliament to extend the leasing powers (*h*).

Lease of mansion house, &c. — We have already seen (*ante*, p. 7) that the principal mansion house &c. on a settled estate cannot be let without the consent of the trustees of the settlement, or an order of the court.

Leases under powers. — Where any settlement made by deed, will, or otherwise, before or after passing of the Settled Estates Act, 1856, contains powers to the trustees for the time being (with the consent of the tenant for life) to grant leases, such leases may be granted in accordance with such powers, the powers granted by the Settled Land Act, 1882,

(*d*) Note, that the condition for re-entry does not apply to breaches of covenant generally. See p. 114, *post*.

(*e*) Suggested apparently by Cust *v.* Middleton, 3 De G. F. & J. 33.

(*f*) *In re* Merry, 36 L. J., Ch. 168; 15 W. R. 307.

(*g*) *In re* Proctor, 26 L. J., Ch. 464.

(*h*) Savil *v.* Bruce, 29 Beav. 557.

being cumulative. The provisions of that act, however, prevail in case of conflict with the provisions of the settlement, so that the consent of the tenant for life is in every case necessary (*i*).

Where lands are devised to trustees in fee upon trusts or with powers which, in their execution, require the exercise of judgment and discretion, such as granting leases, and the trustees disclaim, so that the estate in fee descends to the testator's heir-at-law, such powers or trusts cannot be exercised or carried into execution by the heir, although he holds the estate subject to the trusts of the will (*k*). Where the heir of a surviving trustee is the proper party to demise, a lease granted by the executors of such trustee is void, and not cured by 12 & 13 Vict. c. 26 (*l*).

Effect of leases under powers. — When an appointment by way of demise is made in pursuance of a power of leasing contained in a settlement, it will take effect in preference and priority to any long term of years limited in the settlement for providing any jointure or portions for younger children or the like. The leasing power is considered as controlling and superseding such term, until it is called into action, after which the leasing power will be put an end to (*m*). The person entitled under the *settlement, whose estate is displaced or superseded *pro tanto* by any such lease, is considered as the immediate reversioner upon such lease, and may sue for any breach of covenant therein contained (*n*), and may sue or distrain for the rent thereby reserved (*o*). [*35]

Leases not in pursuance of Settled Estates Act, &c. — Before the Settled Estates Act, 1856 (19 & 20 Vict. c. 120), a trustee having the legal estate in lands might have made leases which would have been valid, provided they were justified

(*i*) Settled Land Act, 1882, s. 56.

(*k*) Robson *v.* Flight, 34 L. J., Ch. 226; 13 W. R. 393.

(*l*) *Ex parte* Cooper, *Re* North London R. Co., 34 L. J., Ch. 373.

(*m*) Doe *d.* Courtail *v.* Thomas, 9 B. & C. 288, 293; Doe *d.* Rogers *v.* Rogers, 5 B. & Ad. 764; Rogers *v.* Humphreys, 4 A. & E. 299; Maundrell *v.* Maundrell, 10 Ves. 246; 2 Chance on Powers, s. 1410; Carpenter *v.* Parker, 3 C. B., N. S. 231.

(*n*) Isherwood *v.* Oldknow, 3 M. & S. 382.

(*o*) Rogers *v.* Humphreys, 4 A. & E. 299.

by the quantity of his estate although no express power of leasing was vested in him by the settlement. But a party taking a lease from the trustee, with notice of the trust, and without the concurrence of the cestui que trust, was subject to the control of equity (*p*). There was no general rule as to what leases might be granted by trustees, but they were authorized to do what was reasonable in each particular case (*q*). No lease could be safely taken from them without the concurrence of the cestui que trust, or the sanction of the Court of Chancery (*r*).

Trustees need not be parties. — Where a lease is granted under the Settled Land Act, 1882, by the tenant for life, it is neither necessary nor desirable that the trustees should be made formal parties thereto.

Lease by trustees for infant. — If an infant is tenant for life, the trustees of the settlement may act for him (*s*).

Sect. 18. — *By Trustees of Charities.*

The estates of charities are subject to the provisions of "The Charitable Trusts Act, 1853" (16 & 17 Vict. c. 137), as amended by 18 & 19 Vict. c. 124, 23 & 24 Vict. c. 136, and 32 & 33 Vict. c. 110.

Leases, &c., authorized by charity commissioners. — By 16 & 17 Vict. c. 137, s. 26, "the leases, sales, exchanges and other transactions authorized by such board (*t*) under the powers of this act shall have the like effect and validity as if they had been authorized or directed by the express terms of the trust affecting the charity."

Official trustees. — By 18 & 19 Vict. c. 124, s. 15, "the secretary for the time being of the board shall be a corporation sole, by the name of 'The Official Trustee of Charity Lands,' for taking and holding charity lands and by that name (instead of the name of 'Treasurer of Public Chari-

(*p*) Platt on Leases, 345.
(*q*) Att.-Gen. *v.* Owen, 10 Ves. 555.
(*r*) Platt on Leases, 347; Malpas *v.* Ackland, 3 Russ. 373.
(*s*) *Post*, sect. 19.
(*t*) Any two of the Charity Commissioners for England and Wales sitting as a Board; sect. 6.

ties') shall have perpetual succession; and all lands or estates or interests in land now vested in the 'Treasurer of Public Charities' by that name shall become, upon the passing of this act, and by virtue thereof, * vested [*36] in like manner and upon the same trusts in 'The Official Trustee of Charity Lands,' and all provisions of the principal act which have reference to 'The Treasurer of Public Charities' shall operate as if the name of 'The Official Trustee of Charity Lands' had been used therein instead of the name of 'Treasurer of Public Charities.'"

Power to acting trustees. — By sect. 16, "the acting trustees of every charity, or the majority of them, provided that such majority do not consist of less than three persons, shall have at law and in equity power to grant all such leases or tenancies of land belonging thereto, and vested in the official trustee of charity lands, as they would have power to grant in the due administration of the charity if the same land were legally vested in themselves; and all covenants, conditions and remedies contained in or incident to any lease or tenancy so granted shall be enforceable by and against the trustees or persons acting in the administration of the charity for the time being, and their alienees or assigns, in like manner as if such lands had been legally vested in the trustees granting such lease or tenancy at the time of the execution thereof, and had legally remained in or had devolved to such trustees or administrators for the time being, their alienees or assigns, subject to the same lease or tenancy."

By the Charitable Trusts Act, 1860 (23 & 24 Vict. c. 136, s. 16), a majority of *two-thirds* of the trustees of any charity assembled at a meeting of their body duly constituted, and having power to determine on any lease of any property of the charity, was empowered to lease the charity property. A clear majority was substituted for the two-thirds majority by s. 12 of the Charitable Trusts Act, 1869, 32 & 33 Vict. c. 110 (s. 17 of which act repealed s. 16 of the act of 1860).

Power of majority of trustees. — Section 12 of the act of 1869 is as follows: — "Where the trustees or persons acting in the administration of any charity have power to determine on any sale, exchange, partition, mortgage, lease or other

disposition of any property of the charity, a majority of those trustees or persons who are present at a meeting of their body duly constituted and vote on the question shall have and be deemed to have always had full power to execute and do all such assurances, acts and things as may be requisite for carrying any such sale, exchange, partition, mortgage, lease, or disposition into effect, and all such assurances, acts and things shall have the same effect as if they were respectively executed and done by all such trustees or persons for the time being and by the official trustee of charity lands."

Before the act of 1860, trustees of charities might have granted leases of the lands belonging to the charities, provided they were such in all their circumstances as were beneficial to the interests of the charities; but if otherwise, the Court of Chancery would have set *them aside at any distance of time (*u*), until protected by the Statute of Limitations (*x*). Where it was necessary to grant a large number of building leases of charity lands in nearly the same form, under the provisions of an act of parliament, and one lease had been settled in chambers, the Court of Chancery allowed the charity to grant other building leases from time to time in the same form, without reference to chambers, the model lease being appended to the order (*y*). Trustees of a charity have been authorized to grant building leases for 600 years, such being the custom of the neighbourhood, and it appearing beneficial (*z*).

[*37]

Letting of charity land.— We have seen (*ante*, sect. 16) that under various statutes parish officers and others are empowered to let lands in allotments to "industrious cottagers" and the like. The principle of these statutes is applied to charity lands generally by the "Allotments Extension Act, 1882" (45 & 46 Vict. c. 80). By s. 1 of this

(*u*) 4 Jarm. Byth. 259, 3rd ed.; Att.-Gen. *v.* Cross, 3 Mer. 540; Att.-Gen. *v.* Owens, 10 Ves. 555; Att.-Gen. *v.* Brooke, 18 Ves. 320; Att.-Gen. *v.* Lord Hotham, 3 Russ. 415.

(*x*) 3 & 4 Will. 4, c. 27, ss. 24, 25, 26, 27, which extends to charities; Att.-Gen. *v.* Davey, 19 Beav. 521; 4 De Gex & J. 136; Att.-Gen. *v.* Payne, 27 Beav. 168; Att.-Gen. *v.* Magdalen College, Oxford, 6 H. L. Cas. 189, 206; 26 L. J., Ch. 620.

(*y*) Att.-Gen. *v.* Christ Church, Oxford, Giff. 514; 8 Jur., N. S. 989.

(*z*) *In re* Cross, 27 Beav. 592.

act "all trustees in whom lands are vested, or by whom the same are held or managed for the benefit of the poor of any parish or place in or adjoining to that in which such lands are situate, and whereof the rents or produce are distributed in gifts of money doles, fuel, clothing, bread or other articles of sustenance or necessity, *shall,* where such lands are not otherwise used for the benefit of the parish in which it is situate as a recreation ground, or otherwise, for the enjoyment or general benefit of the inhabitants, take proceedings" in manner in the act mentioned "for letting such lands to cottagers, labourers and others." By s. 10, if the trustees neglect to comply with the act, the Charity Commissioners may compel compliance, on the application of not less than four persons who would be entitled to the benefit of the act. By s. 12, rent or possession may be recovered under ss. 110, 111 of the Inclosure Act, 1845, and by s. 13 every allotment shall be let free of all charges "at such rent as land of the same quality is usually let for in the same parish," and "one person shall not hold any allotment exceeding one acre."

Letting to other than cottager. — By subsect. 6 of s. 13, "if at any time the trustees are unable to let any allotment or any portion thereof, they may let the same, or such portion thereof as may be unlet, at the best annual rent which can be obtained for the same, without any premium or fine, and on such terms as may enable them to resume possession thereof within a period not exceeding twelve months, if it should at any time be required to be let for allotments."

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* Sect. 19. — *By Infants.* [*38]

At common law. — At common law leases made by infants are not made absolutely void, but voidable on their attaining their majority (*a*),[1] and that notwithstanding the

(*a*) Ketsey's Case, Cro. Jac. 320; Ashfield *v.* Ashfield, Sir W. Jon. 157; Plowd. 418; Slator *v.* Brady, 14 Ir. Com. L. R. 61; Slator *v.* Trimble, Id. 342; Simpson on Infancy (A. D. 1875), p. 27.

[1] **Contracts of infants voidable.** — Contracts of infants are not void, but voidable merely. Singer Mfg. Co. *v.* Lamb, 81 Mo. 221; Leitensdorfer *v.* Hempstead, 18 Mo. 269; Eagle Fire Ins. Co. *v.* Lent, 6 Paige, 638; Bool *v.*

Mix, 17 Wend. 119, 131; Roberts *v.* Wiggin, 1 N. H. 73; Phillips *v.* Green, 3 A. K. Marsh. (Ky.) 7, 14 (*per* Owsley, J.).

Who may avoid. — No one but the infant or his legal representatives can avoid them; creditors cannot. Roberts *v.* Wiggin, 1 N. H. 73.

When and how may affirm. — When the infant arrives at majority, he may expressly or impliedly affirm them. In Irvine *v.* Irvine, 9 Wall. 617, 627, it was held that an infant's deed may be affirmed by less solemn acts than are required to avoid it. The court left it to the jury to say whether the infant by taking a lease of the property after coming of age, had not affirmed his prior deed. An infant's conveyance may be confirmed in various ways other than by a confirmatory deed. For example, by oral declarations of satisfaction and delay to disaffirm (4 years). Wheaton *v.* East, 5 Yerg. (Tenn.) 41, 62; by receiving part of purchase money, expressing satisfaction and declaring an intention to give confirmatory deed, Ferguson *v.* Bell's Admr., 17 Mo. 347; by recitals in subsequent deed, Phillips *v.* Green, 5 Mon. (Ky.) 344, 355; by receiving additional money, and failing to disaffirm seasonably, knowing that grantee was making valuable improvements, Highley *v.* Barron, 49 Mo. 103, 106, 107. A minor's mortgage may be affirmed after coming of age by his conveying the property expressly subject to the mortgage. Boston Bank *v.* Chamberlin, 15 Mass. 220. A mere contingent promise to give a confirmatory deed is not an affirmance. Clamorgan *v.* Lane, 9 Mo. 446.

Retaining note given for purchase money four years by infant *feme sole*, and afterward by her husband, thirty-one years, including eleven after her death, was held to constitute a ratification in Kline *v.* Beebe, 6 Conn. 494. The promise of an infant after obtaining majority to endeavor to procure money and send it to the payee of a promissory note, made during his infancy by his adult partner in the name of the firm, ratifies the note. Whitney *v.* Dutch, 14 Mass. 457.

Effect of failure to disaffirm. — As to whether mere failure to disaffirm within a reasonable time constitutes an affirmance, is a question upon which there is a conflict of authorities.

It is held in the United States Supreme Court, and by other high authorities, that *mere* failure to disaffirm does not amount to a ratification unless it has continued until the statute of limitations has run. Sims *v.* Everhardt, 102 U. S. 300; Wells *v.* Seixas, 24 Fed. Rep. (U. S. Circ. Ct. S. D. N. Y.) 82; Prout *v.* Wiley, 28 Mich. 164. M. D. Ewell, in note to Wells *v.* Seixas, 24 Fed. Rep. 82, 85, says that the weight of authority agrees with the above decisions, although there are contrary authorities.

A deed to an infant may be impliedly confirmed by his conveying the land to a third party after coming of age. Uecker *v.* Koehn, 21 Neb. 559.

Mere silence alone, for reasonable time of course, would not operate as an affirmance. Wilson *v.* Branch, 77 Va. 65. The time during which a woman is under coverture (at least if under common law disability) or out of the state, would not be reckoned, in computing either the reasonable time or statutory period of limitations, [Wilson *v.* Branch, 77 Va. 65; Birch *v.* Linton, 78 Va. 584,] necessary to bar the right of disaffirmance. Certainly a minor's contract is not voidable after expiration of a reasonable time from majority, though the statutory period of limitations has not expired: if from equitable reasons, other than mere silence, the minor would be estopped from avoiding it. Irvine *v.* Irvine, 9 Wall. 617, 627 (see opinion of Strong, J.); Cresinger *v.* Lessee of Welch, 15 Ohio, 193; Drake *v.* Ramsay, 5 Ohio, 252; Ferguson *v.* Bell, 17 Mo. 347; Bostwick *v.* Atkins, 3 Comstock (N. Y.) 53; Huth *v.* Carondelet Marine Ry. & Dock Co., 56 Mo. 206; Wheaton *v.* East, 5

rent reserved is not the best obtainable (*b*). The lessee can in no case avoid the lease on account of the infancy of the lessor (*c*).[1] The lease is voidable by the infant when he becomes of age (*d*), but not before (*e*);[2] or by his heir if he

(*b*) Slator *v.* Brady, 14 Ir. Com. L. R. 61.

(*c*) Zouch *d.* Abbot *v.* Parsons, 3 Burr. 1806.

(*d*) Slator *v.* Brady, 14 Ir. Com. L. R. 61.

(*e*) Slator *v.* Trimble, 14 Ir. Com. L. R. 342. The doctrine laid down

Yerg. 41, 62; Peterson *v.* Laik, 24 Mo. 544; Boody *v.* McKenney, 23 Me. 523. And see cases previously cited if implied affirmance.

When may he disaffirm. — A minor after reaching majority may (by all authorities) avoid his contracts within a reasonable time.

How may he disaffirm. — He may disaffirm his deed by giving another deed inconsistent therewith. Jackson *v.* Carpenter, 11 Johns. (N. Y.) 539; Jackson *v.* Burchin, 14 Johns. (N. Y.) 124; Bool *v.* Mix, 17 Wend. (N. Y.) 119, 133 (*per* Bronson, J.); Lessee of Tucker *v.* Moreland, 10 Pet. 58; Doe *d.* Hoyle *v.* Stowe, 2 Dev. & Batt. (N. C.) 320; Ill. Land & Loan Co. *v.* Beem, 2 Ill. App. 390, 397 (*per* Bailey, J.); Haynes *v.* Bennett, 53 Mich. 15; Bagley *v.* Fletcher, 44 Ark. 153; Norcum *v.* Sheahan, 21 Mo. 25; Dixon *v.* Merritt, 21 Minn. 196.

A subsequent deed, unless necessarily inconsistent, will not, however, disaffirm the prior deed. For example: a quit claim deed given after majority does not disaffirm a mortgage deed given during minority, because the two deeds are consistent with each other. Singer Manuf. Co. *v.* Lamb, 81 Mo. 221. But a warrantee deed is inconsistent with a prior mortgage, and does disaffirm it. Dixon *v.* Merritt, 21 Minn. 196. A quit claim deed given in minority by a minor, then owning only a part interest, is not disaffirmed by a subsequent quit claim deed, she having subsequently acquired the remaining interest. Leitensdorfer *v.* Hempstead, 18 Mo. 269.

An infant's deed may be avoided also by demand of possession and suit of ejectment. Birch *v.* Linton, 78 Va. 584; Wilson *v.* Branch, 77 Id. 65; Bedinger *v.* Wharton, 27 Gratt. (Va.) 870; Mustard *v.* Wohlford's Heirs, 15 Gratt. (Va.) 329; Sims *v.* Everhardt, 102 U. S. 300.

Entry upon the land accompanied by assertions of disaffirmance and then making contract to convey to third party is a sufficient disaffirmance of a conveyance by an infant. White *v.* Flora, 2 Tenn. 426, 432. And abandonment of possession, etc., with suit to recover back consideration money, is also a sufficient disaffirmance of a conveyance *to* an infant. Kerr *v.* Bell, 44 Mo. 120, 125; Baker *v.* Kennett, 54 Mo. 82.

An infant cannot, however, avoid his contract without refunding the consideration. Bigelow *v.* Kinney, 3 Vt. 353; Kerr *v.* Bell, 44 Mo. 120, 125 (*per* Wagner, J.); Highley *v.* Barron, 49 Mo. 103. And if he would avoid the contract, he must wholly avoid it; he cannot retain the part beneficial to himself. Roberts *v.* Wiggin, 1 N. H. 73.

It has been held that an infant *feme* covert, who has joined with her husband in a mortgage of her property, might plead infancy as a defence in the foreclosure suit, although, ordinarily, an infant cannot avoid her deeds until she reaches majority. Schneider *v.* Staihr, 20 Mo. 269.

[1] A contract of a minor cannot be avoided by the other contracting party. Monaghan *v.* Agricultural Fire Ins. Co., 53 Mich. 238.

[2] **Contracts as to personalty.** — An infant's contracts as to personalty

die under age (*f*). To avoid a lease by an infant under which the lessee is in possession upon the lessor attaining twenty-one,[1] some act of notoriety, ex. gr., ejectment, entry, or demand of possession is requisite: the mere execution of a new lease to another lessee is not sufficient to divest the estate created by the first lease (*g*). If when of age he receives any rent payable after he became of age, he thereby ratifies the lease from the day of its execution (*e*). A mortgage of the land to the lessee by a deed reciting the lease amounts to a ratification (*h*). Subject to the above qualification, all gifts, grants or deeds made by infants, by matter in deed, or in writing, which take effect by delivery of his hand, are voidable by himself, by his heirs, and by those who have his estate (*i*). The words "take effect" are the essential part of the definition, and exclude letters of attorney, or deeds which delegate a mere power and convey no interest (*k*). An infant cannot appoint an agent, and therefore his next friend cannot bind him. An infant appointing an agent to make a lease is not bound by such lease, nor by his ratification of it. The lease of an infant, to be good, must be his own personal act (*l*).

in Maddon *v.* White, 2 T. R. 159, that a lease for the benefit of the infant binds him, seems to be exploded. See Platt on Leases, Vol. I., p. 31.

(*f*) 4 Cruise, 74, s. 67.

(*g*) Slator *v.* Brady, 14 Ir. Com. L. R. 61; Slator *v.* Trimble, Id. 342.

(*h*) Storry *v.* Johnson, 2 Y. & C. 386.

(*i*) Perk. chap. i. sec. 12; Bac. Abr. tit. Leases (B.); Baylis *v.* Dineley, 3 M. & S. 477; 2 Prest. Conv. 248.

(*k*) Zouch *d.* Abbot *v.* Parsons, 3 Burr. 1804.

(*l*) Doe *d.* Thomas *v.* Roberts, 16 M. &. W. 778.

are voidable by him during infancy, Stafford *v.* Roof, 9 Cow. 626; Bool *v.* Mix, 17 Wend. 119, 132 (*per* Bronson, J.); Hoyt *v.* Wilkinson, 57 Vt. 404; McCarthy *v.* Henderson, 138 Mass. 310; Freeman *v.* Nichols, 138 Mass. 313 (holding that a plea of infancy is a disaffirmance). It is held that *he* cannot (ordinarily) avoid his deeds of realty during minority, Schneider *v.* Staihr, 20 Mo. 269, 271 (*per* Scott, J., although he held infancy of *feme covert*, might be set up as defence to suit to foreclose mortgage). Bool *v.* Mix, 17 Wend. (N. Y.) 119, 131 (*per* Bronson, J.); Stafford *v.* Roof, 9 Cow. (N. Y.) 626 (*per* Jones, Chan.). The heirs and other legal representatives of a minor may disaffirm his contracts during minority. Sharp *v.* Robertson, 76 Ala. 343; Ill. Land & Loan Co. *v.* Bonner, 75 Ill. 315, 321, 322.

[1] **The age of majority.** — By the common law twenty-one is the age of majority for both sexes. In some American states women become of age at eighteen, as Illinois, Iowa, Minnesota, Missouri, Nebraska, Nevada, Ohio,

Leases in gavelkind. — By the custom of gavelkind an infant seised of land in socage may at the age of fifteen years make leases for years, which bind him after he comes of age, inasmuch as the custom makes the age of fifteen his full age for that purpose (*m*).

Leases under direction court. — The legal and practical difficulties attaching to leases by infants at common law (*n*) were almost entirely cured by the act 11 Geo. 4 & 1 Will. 4, c. 65, under which (ss. 16 and 17) infants were empowered *to grant renewals of leases under the [*39] direction of the Chancery Division of the High Court, obtained on their own petition or that of their guardians (*o*); and the court was authorized to direct leases of land belonging to infants when it was to the benefit of the estate (*p*). In either case there was no restriction upon the term to be granted to the lessee, which might be such as the court should direct.

By sect. 31 of the act, leases granted under it were as valid as if the infant had been of full age. The court had power under this act to sanction a building lease of an infant's freehold estate when he was seised in fee simple in reversion after a life estate by the courtesy vested in his father (*q*).

This act is not expressly repealed, and is expressly referred to in an Order of Court (R. S. C., 1883, Order LV., rule 2) made after the commencement of the Settled Land Act, 1882. But ss. 59 and 60 of that act appear to impliedly repeal it so far at all events as the term for which the lease may be made. We will presently consider the effect of this and other acts, but must first deal shortly with leases by guardians.

(*m*) Co. Lit. 45 b.

(*n*) See Smith, L. & T., 2d ed., p. 61; Platt on Leases, Vol. I., p. 29.

(*o*) Judicature Act, 1873, s. 34; R. S. C. Ord. LV., r. 2, sub-r. 9.

(*p*) *Re* Spencer, 37 L. J., Ch. 18; 17 L. T., N. S. 200.

(*q*) *Re* Letchford, L. R., 2 Ch. D. 719; 45 L. T., Ch. 530.

Oregon, and Vermont. In some instances it is declared that women shall be deemed of age on being married. Tyler on Infancy and Coverture (2d ed.) sec. 3.

SECT. 20.— *By Guardians.*

Division of subject. — Guardians are either: — 1. Guardians in socage or by the common law;[1] 2. Testamentary guardians under the statute 12 Car. 2, c. 24; 3. Guardians by nature; 4. Guardians for nurture; 5. Guardians by election; 6. Guardians appointed by the Chancery Division of the High Court. Of these the Guardians appointed by the Court are of the first practical importance, and testamentary guardians come next; guardianship of any of the other kinds, so far as regards property, has little more than a historical value.

Leases by guardians in socage. — 1. A guardian *in socage*,[2] or by the common law, is a person appointed by the law, in respect of the freehold lands descended to the infant, so that where no freehold lands descend there can be no such guardian (*r*): and this guardianship devolves upon such of the next of kin to whom the inheritance cannot descend (*s*). It ceases at the age of fourteen years;[3] and the father may also supersede the authority of the guardian by appointing a testamentary guardian under 12 Car. 2, c. 24.[4]

(*r*) Bac. Abr. tit. Leases (I. 9); Shopland *v.* Ryoler, Cro. Jac. 55, 99; 1 Blac. Com. 461.

(*s*) 1 Blac. Com. 461; Cole Ejec. 582.

[1] **Guardians appointed by court.** — "A guardian appointed by the Orphan's Court . . . supplies the place both of a guardian for nurture and a guardian in socage." *Per* Kirkpatrick, C. J., in Van Doren *v.* Everitt, 5 N. J. L. 460, 462.

[2] **Guardians in socage.** — A guardian in socage might sell real estate, and was not obliged to apply for directions in every particular case. Field *v.* Schieffelin, 7 Johns. Ch. (N. Y.) 150, 154 (*per* Kent, Chan.). A guardian in socage may lease the real estate of the infant. Byrne *v.* Van Hoesen, 5 Johns. (N. Y.) 66, 67 (*per Curiam*); Field *v.* Schieffelin, 7 Johns. Ch. (N. Y.) 150, 154 (*per* Kent, Chan.); Holmes *v.* Seely, 17 Wend. (N. Y.) 75, 78. A mother who takes possession of infants' realty was held *prima facie* to do so as guardian in socage. Byrne *v.* Van Hoesen, 5 Johns. 66, 67; Jackson *v.* Vredenburgh, 1 Id. 159, 163 (*per* Tompkins, J.); Beecher *v.* Crouse, 19 Wend. 306; Sylvester *v.* Ralston, 31 Barb. (N. Y. Supreme Ct.) 286, 289 (*per* Pratt, J.).

[3] Chancellor Kent says, that the authority of a guardian in socage continues after the age of fourteen if the infant does not elect a new guardian. Byrne *v.* Van Hoesen, 5 Johns. (N. Y.) 66, 67; Holmes *v.* Seely, 17 Wend. (N. Y.) 75, 78 (*per* Nelson, Ch. J.).

[4] **Testamentary guardians.** — The father has generally in this country statutory power to appoint a testamentary guardian for his children.

To enable guardians in socage to take especial care of the infant and his property, the law has invested them, not with a *bare authority* * only, but also with an [*40] *interest*, till the guardianship ceases (*t*), and to prevent abuse, the law has made them accountable to the infant, either when he comes to the age of fourteen years, at which time the authority of the guardians terminates, or at any time after, as the infant thinks fit;[1] and therefore their authority and interest extend only to such things as may be for the benefit of the infant, and whereof they may give an account. During the time the guardianship exists, a guardian in socage may make leases for years in his own name, as any other who has an interest in lands may do; for he is *quasi dominus pro tempore* and the lessee may maintain ejectment on such leases (*u*). If he makes leases for years to continue beyond the time of his guardianship, such leases seem not to be absolutely void by the infant's coming of age, but only voidable by him if he thinks fit; consequently the infant, when he comes of age, may by acceptance of rent, or other act, make such leases good and unavoidable (*x*). The lease will be determined by the death of the infant, and also by the death of the guardian (*y*).

By testamentary guardians. — 2. A testamentary guardian, or one appointed pursuant to 12 Car. 2, c. 24, ss. 8, 9, 10, 11, is the same in office and interest as a guardian in socage, but his authority continues until the infant attains the age of

(*t*) Co. Lit. 87 b; R. *v.* Oakley, 10 East, 494; Eyre *v.* Countess of Shaftesbury, 2 P. Wms. 108; R. *v.* Sherrington, 3 B. & Ad. 714; R. *v.* Sutton, 3 A. & E. 597.

(*u*) Wade *v.* Baker, 1 Ld. Raym. 131; Hutt. 16; Osborn *v.* Carden, Plowd. 293; Bac. Abr. tit. Leases (I. 9); Willis *v.* Whitewood, 1 Leon. 322; R. *v.* Oakley, 10 East, 494; Keilw. 46 b; Cole Ejec. 582.

(*x*) Bac. Abr. tit. Leases (I. 9).

(*y*) Balder *v.* Blackborn, Brownl. 79.

Robinson *v.* Zollinger, 9 Watts. 169, 171; Jones *v.* Ward, 10 Yerg. (Tenn.) 160, 168; Corrigan *v.* Kiernan, 1 Bradf. (N. Y. Surrogate) 208, 210 (*per Curiam*). One cannot appoint testamentary guardian for his nephews, Brigham *v.* Wheeler, 8 Met. 127, nor for his grandchildren, Hoyt *v.* Hilton, 2 Edw. (N. Y.) 202, even though making bequests or devises to them.

[1] **A lease by a guardian** in socage is voidable after the infant reaches the age of fourteen years by the new guardian if one is then appointed. Snook *v.* Sutton, 10 N. J. L. 133; Emerson *v.* Spicer, 46 N. Y. 594.

twenty-one years (*z*);[1] and it seems clear that a lease by him stands on the same footing as a lease by a guardian in socage, with the additional advantage to the lessor that the period of minority is extended from fourteen to twenty-one years (*a*). Special guardians, by custom of London and other places, do not fall within the statute (*b*).

By guardians by nature. — 3. Guardians by nature are the father, of his heir, heiress, or heiresses, and in some cases the mother, until the age of twenty-one years (*c*).[2] They may perhaps possess the power of leasing at will, but not for a term (*d*).

By guardians for nurture. — 4. The father or mother is guardian of all the children for nurture until they attain the age of fourteen years (*e*). A guardian for nurture cannot make any leases for years, either in his own name, or in the name of the infant, for he has only the care of the person and education of the infant; for there may be such

(*z*) 1 Blac. Com. 462; Bedell *v.* Constable, Vaugh. 179; Roe *d.* Parry *v.* Hodgson, 2 Wils. 129; Cole Ejec. 583.

(*a*) Smith, L. & T. 59; Roe *v.* Hodgson, 2 Wils. 129, so far as it is an authority to the contrary, is not law. See Platt on Leases, Vol. I., p. 376.

(*b*) Sect. 10.

(*c*) 1 Blac. Com. 461; R. *v.* Thorp, Carth. 384.

(*d*) Pigot *v.* Garnish, Cro. Eliz. 678, 734.

(*e*) 1 Blac. Com. 461; Roach *v.* Garvan, 1 Ves. 158; 3 Co. R. 38.

[1] **Termination of guardianship.** — A testamentary guardian continues in authority till full age of male, and full age or marriage of female. Robinson *v.* Zollinger, 9 Watts (Pa.) 169, 171; Jones *v.* Ward, 10 Yerg. (Tenn.) 160, 168. Marriage in some states terminates minority of *feme sole*, Tyler on Infancy and Coverture (2d ed.) sec. 3; and in some states she becomes of age at eighteen years (Illinois, Iowa, Minnesota, Missouri, Nebraska, Nevada, Ohio, Oregon, and Vermont). Marriage (ordinarily) *ipso facto* terminates guardianship of woman, her husband (at common law) becoming thereafter her guardian. Porch *v.* Fries, 18 N. J. Eq. 204, 207; Bartlett *v.* Cowles, 15 Gray, 445.

[2] **Guardians by nature.** — A guardian by nature has the care and custody of the infant's person, but no authority over the realty and personalty. Genet *v.* Tallmadge, 1 Johns. Ch. (N. Y.) 3, 4 (*per* Kent, Chan.); Miles *v.* Boyden, 3 Pick. 213, 217 (*per* Putnam, J.). For example, a father (as such) cannot collect a legacy payable to his child. Miles *v.* Boyden, 3 Pick. 213, 217. He cannot as guardian by nature collect a legacy, but may as guardian appointed by court. Genet *v.* Tallmadge, 1 Johns. Ch. (N. Y.) 3, 4. A mother cannot (as guardian by nature) convey infant's property, Kendall *v.* Miller, 9 Cal. 591, nor discharge a mortgage lien, Perkins *v.* Dyer, 6 Ga. 401.

guardian, though * the infant has no lands at all, [*41] although in such a case there cannot be a guardian in socage: but such guardian, it seems, may make leases at will (*f*).

5. **Guardians by election.** — An infant seised of freehold lands, and being unprovided with a testamentary guardian, may, on attaining fourteen years, elect a guardian to act until he attains twenty-one (*g*).[1] This guardianship, like that of socage, involves a similar power of leasing the estate of the infant (*h*).

Guardians appointed by high court. — From a very early period guardians have been appointed by the Court of Chancery[2] under a power which by the Judicature Act, 1873, s. 34, is exercisable by the Chancery Division of the High Court.[3] Guardians so appointed might, by virtue of 11 Geo.

(*f*) Willis *v.* Whitewood, Owen, 45; 1 Leon. 322; Shopland *v.* Radlen, Owen, 115; Cro. Jac. 55, 98; Godb. 143; 4 Leon. 238; Pigot *v.* Garnish, Cro. Eliz. 678; Bac. Abr. tit. Leases (I. 9).

(*g*) 1 Blac. Com. 462; Co. Lit. 87 b; 2 Atk. 624; 1 Ves. 91.

(*h*) Bac. Abr. tit. Leases (I. 9); Pitcairn *v.* Ogbourne, 2 Ves. 375.

[1] **Choice of guardians.** — The power of an infant to choose a guardian at the age of fourteen is not absolute, but subject to the discretion of the court. A guardian appointed by the court prior to that age will continue till the minor is twenty-one, unless a new one is nominated satisfactory to the court, or he is otherwise removed for good cause shown. Matter of Dyer, 5 Paige (N. Y.) 534; Matter of Nicoll, 1 Johns. Ch. (N. Y.) 25; Dibble *v.* Dibble, 8 Ind. 307; Ham *v.* Ham, 15 Gratt. (Va.) 74; Exp. Graffenreid, Harper's Eq. (S. C.) 107. In Perry *v.* Brainard, 11 Ohio, 442, and Campbell *v.* English, Wright (Ohio) 119, it was held that guardianship of minor female expired in Ohio, by operation of law, when she became twelve years of age. As we have seen (*ante*, p. 40, note 2), the right of electing new guardian at fourteen does not exist if the father has appointed a testamentary guardian.

[2] **Guardians in chancery.** — A guardian in chancery, according to Chancellor Kent, has unlimited power over the personalty, but cannot convey the realty absolutely without special authority of court. Field *v.* Schieffelin, 7 Johns. Ch. (N. Y.) 150, 154.

[3] **Varieties of guardians.** — The principal varieties of guardianship in America, are, guardianship by nature; guardianship by appointment of court (either probate, surrogate, orphans', chancery, etc.), or testamentary guardianship. A guardian by nature (as we have seen) has the care of the person, but virtually no control over the property of the infant, unless also either guardian by appointment of court, Genet *v.* Tallmadge, 1 Johns. Ch. (N. Y.) 3, 4, testamentary guardian, Corrigan *v.* Kiernan, 1 Bradf. (N. Y. Surrogate, 208, 210, or guardian in socage, Byrne *v.* Van Hoesen, 5 Johns. (N. Y.) 66, 67;

4 & 1 Will. 4, c. 65, s. 17, but not otherwise (*i*), make such leases as the court should direct without fine, which leases

(*i*) See Simpson on Infancy, p. 333.

Beecher *v.* Crouse, 19 Wend. (N. Y.) 306; Holmes *v.* Seely, 17 Id. 75, 78; Jackson *v.* Vredenburgh, 1 Johns. (N. Y.) 159, 163; Sylvester *v.* Ralston, 31 Barb. (N. Y. Supreme Ct.) 286, 289.

Guardians by appointment of court. — Guardians by appointment of court are subdivided into guardians appointed before the age of fourteen, without the election of minor, and guardians appointed thereafter by his election. The powers of guardians appointed by the court, and the powers of testamentary guardians (of course), are regulated more or less by the statutes of the different states extending or limiting the common law powers of guardians.

Power to grant leases. — Generally they have full authority over the personalty, Field *v.* Schieffelin, 7 Johns. Ch. (N. Y.) 150, 154 (*per* Kent, Chan.); Chapman *v.* Tibbits, 33 N. Y. 289, 290; and the control of the realty, but not the power to dispose of it absolutely without special authority of court, Field *v.* Schieffelin, 7 Johns. Ch. (N. Y.) 150, 154 (*per* Kent. Chan.); Chapman *v.* Tibbits, 33 N. Y. 289, 290 (*per* Brown, J.); Appeal of Stoughton, 88 Pa. St. 198, 201. Generally a guardian has power to lease the realty during the continuance of his authority as guardian, Jones *v.* Ward, 10 Yerg. (Tenn.) 160, 168; Hughes' Minors' Appeal, 53 Pa. St. 500; Appeal of Stoughton, 88 Pa. St. 198, 201 (*per* Gordon, J., though he cannot without approval of court make an oil lease because that effects the realty); Hicks *v.* Chapman, 10 Allen (Mass.) 463 (oral lease of real estate); Campau *v.* Shaw, 15 Mich. 227, 232 (*per* Christiancy, J.); Palmer *v.* Oakley, 2 Doug. (Mich.) 433, 465 (*per* Whipple, J.), and see *post*.

Termination of guardianship. — Guardianship is terminated by the death of the ward, Norton *v.* Strong, 1 Conn. 65; by the death of the guardian, Johnson *v.* Carter, 16 Mass. 443; by the marriage of infant *feme* (as well as other causes), Brick's Estate, 15 Abb. Pr. (N. Y.) 12; Shutt *v.* Carloss, 1 Ired. Eq. (N. C.) 232; Porch *v.* Fries, 18 N. J. Eq. 204; and the husband then becomes (at common law) guardian of his wife, having power to grant leases of her realty, voidable by her upon his death or by her heirs upon her death, Porch *v.* Fries, 18 N. J. Eq. 204, 207 (*per Curiam*).

Duration of leases. — Guardians cannot make leases extending beyond the period of their authority valid against either the ward or a new guardian. Campau *v.* Shaw, 15 Mich. (cannot lease beyond life of ward) 227; Putnam *v.* Ritchie, 6 Paige (N. Y.) 390, 399 (*per* Walworth, Chan.); Snook *v.* Sutton, 10 N. J. L. 133, and Emerson *v.* Spicer, 46 N. Y. 594 (voidable by new guardian appointed after fourteen); Van Doren *v.* Everitt, 5 N. J. L. 460, 462 (*per* Kirkpatrick, C. J.). A lease extending beyond the period of a guardian's authority is not void, but voidable merely. It may be affirmed by the ward, and the ward can recover rent accruing during the guardianship and subsequently in the same suit. Ross *v.* Gill, 1 Wash. (Va.) 87. A guardian having but a bare power without an interest in the estate, may make a lease which will be valid as between himself and the lessee. Mansur *v.* Pratt, 101 Mass. 60, 62 (*per* Hoar, J.).

Guardians' duty. — Ordinarily, it is not only in the power, but is the guardian's duty to lease his ward's realty. Hughes' Minors' Appeal, 53 Pa. St. 500, 503 (*per* Read, J.); Jones *v.* Ward, 10 Yerg. (Tenn.) 160, 168.

may be made to extend beyond minority (*k*). We have already seen that this statute is not expressly repealed, and it is no doubt in force so far as the Settled Land Act, 1882, is not in conflict with it.

The Settled Estates Act, 1877, s. 44, empowered guardians to exercise on behalf of infants all powers given by the act, and the words would include the leasing powers, as to which see sect. 4, *ante*. This enactment also is unrepealed.

Guardians for purposes of Agricultural Holdings Act. — The 25th section of the Agricultural Holdings Act, 1883, provides that where a landlord is an infant the county court may, on the application of any person interested, appoint a guardian for the purposes of that act.

Sect. 21. — *By Trustee for Infants.*

Conveyancing Act, 1881. — The Conveyancing and Law of Property Act, 1881, 44 & 45 Vict. c. 41, by s. 41 provided that: —

"Where a person in his own right seised of or entitled to land for an estate in fee simple is an infant, the land shall be deemed to be a settled estate within the Settled Estates Act, 1877." We have already seen what powers of leasing were given by that act (*l*), and also that s. 49 of the same act further provided that all powers given by the act might be exercised by *guardians* on behalf of infants.

* The Settled Land Act, 1882, 45 & 46 Vict. c. 38, [*42] though not repealing the above enactments, appears by ss. 59, 60 to supersede them. These sections are: —

(*k*) Anstey *v.* Hobson, 1 Sm. & G. 505.

(*l*) *Ante*, sect. 4.

He will be charged with the estimated rental if he fail to lease his ward's lands when it was his duty to do so. A guardian cannot maintain a writ of entry in his own name to recover the ward's realty, but the ward must sue in his own name by his next friend. Jennings *v.* Collins, 99 Mass. 29, 31.

Guardian's personal liability. — Guardians will be personally liable if they take assignments to themselves upon covenants running with the land, the term "guardian" being regarded as a *descriptio personarum*. Hannen *v.* Ewalt, 18 Pa. St. 9.

Settled Land Act. — Sect. 59, "where a person who is in his own right seised of or entitled in possession to land, is an infant, then for purposes of this act the land is settled land, and the infant shall be deemed tenant for life thereof."

And by sect. 60, "where a tenant for life, or a person having the powers of a tenant for life under the act (*m*), is an infant, or an infant would, if he were of full age, be a tenant for life, or have the powers of a tenant for life under this act, the powers of a tenant for life under this act may be exercised on his behalf by the trustees of the settlement, and if there are none, then by such person and in such manner as the Court, on the application of a testamentary or other guardian or next friend of the infant, either generally or in a particular instance, orders."

Section 60 appears to comprise within its terms the case of an infant tenant in fee simple, and therefore somewhat to abridge the powers of guardians. By the act of 1881 as read with the act of 1877, they might themselves lease without any application to the Court; by the act of 1882, an application to the Court would seem to be necessary if the land proposed to be demised should be unsettled, and although guardians are pointed at as being proper persons to make the application, the leasing power is not to be exercised as a matter of course by them, but only in case of their being directed to exercise it by the Court. In case the land should be settled, and there should be trustees, such trustees could, it is conceived, exercise the leasing powers without any application to the Court.

Management of demised land by trustees. — Trustees acting for infants have special powers of management conferred upon them by s. 42 of the Conveyancing Act, 1881. Amongst these powers is a power "to make allowances to and arrangements with tenants and others, and to determine tenancies, and to accept surrenders of leases and tenancies, and generally to deal with the land in a proper and due course of management."

(*m*) See s. 58 of the act, giving powers of the act to tenants in tail, and other limited owners.

Sect. 22. — *By or for Married Women.*[1]

Married Women's Property Act. — The Married Women's Property Act, 1882, 45 & 46 Vict. c. 75, repealing and with extensive amendments re-enacting the Married * Women's Property Act, 1870 (*n*), places married [*43] women in respect of making leases of land *not subject to marriage settlement* as well as in respect of their separate property generally (leases, however, being nowhere specifically mentioned in the act), in the same position as if they were unmarried.[2] This act has abolished the old common law doctrine that a wife had no legal existence apart from her husband.

(*n*) The act of 1870 appears to have allowed independent demises of unsettled land under the term "property," in ss. 1, 7, and 8.

[1] **Changes in rights of married women.** — Modern American law concurs with the English in modifying materially the status of married women. In some things she has a separate legal existence. The changes have not been uniform. To understand her present status, it is necessary first to understand the common law, and then the special statutory changes in the several states (for the common law still prevails except so far as it has been expressly changed).

Harris, in his treatise on Contracts by Married Women (sec. 5), says that Mississippi was the pioneer state in introducing the changes of the new system.

She passed the first statute Feb. 15, 1839, following it by another, Feb. 28, 1846. New York, Pennsylvania, and other states followed in 1848; Tennessee, Kentucky, New Hampshire, Michigan, and Vermont in 1850. Statutes have since been passed for all the other states, territories, and federal district.

[2] **The present law in Massachusetts.** — In Massachusetts it is provided that "a married woman may make contracts . . . as if she were sole, except . . . with her husband." Pub. Sts. (1882) Ch. 147, sec. 2. She cannot with him. Wilson *v.* Bryant, 134 Mass. 291; Gay *v.* Kingsley, 11 Allen, 345; Bowker *v.* Bradford, 140 Mass. 521; Roby *v.* Phelon, 118 Mass. 541; Woodward *v.* Spurr, 141 Mass. 283.

Marriage in that state nullifies a contract with a husband previously made, Abbott *v.* Winchester, 105 Mass. 115, unless made in contemplation of marriage, Miller *v.* Goodwin, 8 Gray, 542; Pub. Sts. Ch. 147, sec. 2.

Husband and wife cannot transfer property to each other, except that husband may convey personalty to a limited amount, Pub. Sts. Ch. 147, sec. 2, necessary for her own use, etc.; and if he give her a piano, it is a question for the jury whether it is necessary considering her station in life, etc. Hamilton *v.* Lane, 138 Mass. 358. He may make a *donatis causa mortis* to her, Marshall *v.* Jaquith, 134 Mass. 138; or convey realty indirectly to her through a third person, Motte *v.* Alger, 15 Gray, 322, 323.

Marriage no longer operates as a gift of her personalty or use of realty to

Lease by husband and wife. — At common law a lease *by deed* made by the husband and wife of the wife's freeholds, was good during the coverture (*o*).[1] Upon the death of the husband in the wife's lifetime it became *voidable* by her; and might be confirmed by her acceptance of rent becoming due after the husband's death, or the like (*p*), her executors having power to sue for such rent (*q*). If the husband survived his wife and became tenant by the curtesy, the lease was good as against him during his life or until the end of the term, which first happened. But if he did not become tenant by the curtesy (not having ever had any issue by his wife which might by possibility have inherited), the lease, upon the wife's death, became *void* as against her heir at law. When the husband did not become tenant by the curtesy, he

(*o*) Wiscot's case, 2 Co. R. 61 b; Bac. Abr. tit. Leases (C. 1); Toler *v.* Slater, L. R., 3 Q. B. 42; 37 L. J., Q. B. 33.

(*p*) Henstead's case, 5 Co. R. 10; Co. Lit. 55 b; Greenwood *v.* Tyber, Cro. Jac. 563; Doe *d.* Collins *v.* Weller, 7 T. R. 478; Parry *v.* Hindle, 2 Taunt. 180; 2 Wms. Saund. 180, note (9).

(*q*) Toler *v.* Slater, L. R., 3 Q. B. 42; 37 L. J., Q. B. 33.

her husband. Pub. Sts. Ch. 147, sec. 1. Husband and wife since St. 1885, c. 237, are no longer joint tenants (with exclusive rights in husband, Pray *v.* Stebbins, 141 Mass. 219) of realty conveyed to them jointly.

She has the entire control of her own realty and personalty, and can convey it without the joinder or consent of her husband, subject to his right of curtesy if they have had issue born alive. Pub. Sts. Ch. 147, sec. 1; Libby *v.* Chase, 117 Mass. 105.

[1] **Wife's realty at common law.** — At common law the control of the wife's realty and the rents and profits thereof belonged to the husband during coverture. Bartlett *v.* Cowles, 15 Gray, 445, 446; Clapp *v.* Stoughton, 10 Pick. 462. And they might be levied upon for his debts. Litchfield *v.* Cudworth, 15 Pick. 23. For them the husband could sue in his own name or jointly with his wife. Clapp *v.* Stoughton, 10 Pick. 462, 469 (*per* Wilde, J.); Decker *v.* Livingston, 15 Johns. (N. Y.) 479, 482 (*per* Spencer, J.). For rents accruing prior to the coverture, although the husband had right to reduce them to possession, he could only sue jointly with his wife. Decker *v.* Livingstone, *supra*. Ordinarily, uncollected rents accruing during coverture belonged to the personal representative of the deceased husband, and could not be collected by the surviving wife. Clapp *v.* Stoughton, 10 Pick. 462, 469. Uncollected rents of property demised by her before marriage might be collected by her after her husband's death. Daniels *v.* Richardson, 22 Pick. 565, 570. Such rents, until collection, being mere choses in action, (*per* Shaw, C. J.), would remain (like other personal property of the wife, Hayward *v.* Hayward, 20 Pick. 517, not expressly or impliedly reduced to possession by the husband) property of the wife notwithstanding the coverture.

could not distrain or sue for the rent which became due after his wife's death, under a demise made by them both or by him on her behalf (*r*).[1]

Without deed. — A lease by husband and wife *without deed* was void as against the surviving wife, for it could not be said to be her lease (*s*), but it was good during the coverture if the term continued so long (*t*).

By husband alone. — If a husband seised of lands in right of his wife made a lease for years by deed, the term did not become void on his death, but only voidable by the entry of the widow (*u*).[2]

By wife alone. — Leases made by a wife without the concurrence of her husband and not in pursuance of an express power, were at common law, absolutely void,[3] and could not be confirmed (*x*), and a lessee taking a lease from an un-

(*r*) Howe *v.* Scarrott, 4 H. & N. 723; 28 L. J., Ex. 325; Hill *v.* Saunders, 2 Bing. 112; S. C. (in error), 4 B. & C. 529.

(*s*) Walsal *v.* Heath, Cro. Eliz. 656; Greenwood *v.* Tyber, Cro. Jac. 564; Dyer, 91 b, 146 b; 2 Wms. Saund. 180 a, n.

(*t*) Bateman *v.* Allen, Cro. Eliz. 438; 2 Co. R. 61 b.

(*u*) Jordan *v.* Wykes, Cro. Jac. 332; Smallman *v.* Agborow, Id. 417; 3 Bulst. 272; Browning and Beeston's case, Plowd. 65.

(*x*) Goodright *d.* Carter *v.* Straphan, Cowp. 201; Lofft, 763.

[1] And the husband, during coverture, could not distrain in his own name for rent accruing prior to the coverture, without joining his wife, Decker *v.* Livingston, 15 Johns. (N. Y.) 479, 482, although he might for rent accruing subsequently (*per* Spencer, J.).

[2] **Deeds of married women.** — The separate deed of a married woman at common law was not only voidable, but absolutely void. Ela *v.* Card, 2 N. H. 175, 176; Fowler *v.* Shearer, 7 Mass. 14; Concord Bank *v.* Bellis, 10 Cush. 276. And even those statutes which allowed her to join with her husband in deeds of her own property were innovations upon the common law. Whitbeck *v.* Cook, 15 Johns. (N. Y.) 483, 490, 491 (*per* Spencer, J.). Such deeds, while they enabled her to divest herself of her interest in the land, did not enable her to bind herself by the covenants. The covenants bound her husband only. Whitbeck *v.* Cook, 15 Johns. (N. Y.) 483, 490, 491.

In short, prior to the passage of the enabling acts of the several states, a married woman was absolutely incapable of contracting. Parsons *v.* Plaisted, 13 Mass. 189; 1 Story on Contracts (5th ed.) sec. 144.

[3] **Leases by married women.** — Leases by a married woman, without the concurrence of her husband, were, at common law, absolutely void. Murray *v.* Emmons, 19 N. H. 483.

It has been held that a lease by a married woman might be sustained as a lease of the husband made under an implied agency. Doe *d.* Andrews *v.* Taylor, 5 Allen (N. B.) 144, 146. But in Melley *v.* Casey, 99 Mass. 241, where a married woman had made a lease for three years of her separate

married woman became bound, after the marriage, to pay the rent to the husband (*y*).

Before marriage. — But a wife might, before marriage, in exercise of an express power, grant valid leases without the concurrence of her husband.

[*44] * **Lease of wife's leaseholds.** — As to the wife's leaseholds, at common law a husband might dispose of all his wife's interest therein by demise: [1] so he might dispose of the interest in a term which they had jointly (*z*). He might also dispose of part of his wife's interest: thus he might demise for a part of the term rendering rent, and the rent would go to his executor or administrator, though his wife survived (*a*), notwithstanding the reversion survives to the wife (*b*); but as to the residue of the term, whereof the husband made no disposition in his lifetime, the wife, if she survived, was entitled to it: because as to that, the law was left to take effect, as it would have done for the whole, if he had not prevented it by such his disposition of part (*c*). If the husband died before the wife, he could not bequeath her chattels real by will (*d*), but if he survived her they became his own absolute property (*e*). If the husband, having an

(*y*) Tracy *v.* Dalton, Cro. Jac. 617.
(*z*) Com. Dig. tit. Baron and Feme (E. 2).
(*a*) Id.; Co. Lit. 46 b, 351 a; 1 Roll. 343, l. 15; Blaxton *v.* Heath, Poph. 145.
(*b*) Sym's case, Cro. Eliz. 33.
(*c*) Bac. Abr. tit. Baron and Feme (C. 2); Sym's case, Cro. Eliz. 33.
(*d*) Plowd. 418.
(*e*) Co. Lit. 300 a, 351 a, n. (1).

property, and subsequently had joined with her husband in conveying the property expressly subject to the lease, the court held the lease was void, and the grantee's title under the deed was clear from the incumbrance of the lease.

This decision was in 1868, and the law of Massachusetts has since been changed (Sts. 1874, Ch. 184, now Pub. Sts. Ch. 147, secs. 1, 2, 3, 4, 5, &c.), so that a wife has now full power over her own property, except that she cannot contract with her husband, &c.

In Alabama, a married woman, if her disabilities have been removed by chancellor's decree under the code, may now sue in her own name upon leases of her own property. Warren *v.* Wagner, 75 Ala. 188. And in Maine, a lease by a wife to her husband is valid, Freeman *v.* Underwood, 66 Me. 229, there being no disability in that state to prevent her contracting *bonâ fide* with her husband.

[1] **Lease to wife.** — A lease to the wife enured to the husband's benefit unless he dissented to it. In ejectment brought against him by his wife's lessor, he was estopped to deny the lessor's title unless he had disaffirmed the lease. Lucas *v.* Brooks, 18 Wall. 436, 451.

interest in his wife's real estate during their joint lives, created a term out of that interest, the reversion was in him only, and not in his wife also (*f*).

The husband might demise his wife's leaseholds, and thereby confer an immediate interest and possession, or he might underlet for a term to commence even after his death (*g*), and it was good though the wife survived (*h*).

Statute law prior to act of 1882. — The Fines and Recoveries Abolition Act (3 & 4 Will. 4, c. 74, ss. 77–88) allowed leases to be made by wives with their husband's concurrence, by deed acknowledged by the wives in manner directed by that act, and the Settled Estates Act, 1877, 40 & 41 Vict. c. 18, replacing a similar provision of the Settled Estates Act, 1856, allowed a husband seised in right of his wife of any settled estates or entitled to unsettled estates as tenant by the curtesy or in right of a wife seised in fee, without any application to the court to demise such lands for not more than 21 years subject to the restrictions and exceptions in that act mentioned.

Lease by married woman under Settled Land Act, 1882. — We have already seen (*i*) the provisions empowering tenants for life to make leases, which are contained in the important Settled Land Act, 1882. Special provision for the case of a married woman who is a tenant for life is made by s. 61 of that act, the effect of which is that if the married woman be entitled for her separate use or under the Married Women's Property Act, 1882, she may exercise the powers of the act without her husband, but if otherwise, then she and her husband together may exercise those powers, and that a restraint on *anticipation in the settlement [*45] shall not prevent the exercise of that power.

Saving for marriage settlement. — It is provided expressly by s. 19 of the Married Women's Property Act, that nothing in that act shall interfere with any marriage settlement made or

(*f*) Harcourt *v.* Wyman, 3 Exch. 817.

(*g*) Herbin *v.* Chard, Poph. 96; Grute *v.* Locroft, Cro. Eliz. 287.

(*h*) Grute *v.* Locroft, Cro. Eliz. 287; Bac. Abr. tit. Baron and Feme (C. 2); 1 Roll. Abr. 344; Herbin *v.* Chard, Poph. 96.

(*i*) *Ante*, sect. 4.

to be made respecting the property of any married woman; but the effect of the 61st section of the Settled Land Act, 1882, appears to be to allow a husband and wife to demise without the intervention of the trustees of their married settlement, although the settlement may expressly provide for such intervention.

Sect. 23. — *By Lunatics and their Committees.*

By idiots and lunatics. — Leases made by idiots, or persons non compotes mentis, are primâ facie binding, but may be avoided (*k*).[1] Generally speaking, a contract made by a lunatic is binding on him, unless it be proved that the other party knew of his insanity and took some unfair advantage of it (*l*).[2] A lease made during a lucid interval cannot be

(*k*) Co. Lit. 247 a; Beverley's case, 4 Co. R. 123; Yates *v.* Boen, 3 Stra. 1104.

(*l*) Brown *v.* Joddrell, 1 Moo. & M. 105; Molton *v.* Camroux, 2 Exch. 487; 4 Exch. 17; Beavan *v.* M'Donnell, 9 Exch. 309; 10 Exch. 184; 23 L. J., Ex. 94, 326; Elliott *v.* Ince, 7 De G. M. & G. 475.

[1] **Contracts of insane, &c.** — There is no such thing as perfect sanity or perfect insanity. "We can not, therefore, say of any particular party that he is absolutely incapable of contracting." 1 Wharton & Stille's Med. Jur. (4th ed.) sec. 98.

A person is presumed to be sane, unless shown to be insane. Howe *v.* Howe, 99 Mass. 88; Hix *v.* Whittemore, 4 Met. (Mass.) 545. Where the existence of habitual insanity has been once shown to exist, it is presumed to continue; otherwise, if of a temporary character (*per* Dewey, J.), in Hix *v.* Whittemore, 4 Met. (Mass.) 545, 547.

Contracts made by persons while under guardianship, as insane, or as drunkards and spendthrifts, are absolutely void, Griswold *v.* Butler, 3 Conn. 227, 231; Westmoreland *v.* Davis, 1 Ala. 299, 301 (*per* Collier, C. J.); Wait *v.* Maxwell, 5 Pick. (Mass.) 217; Fitzhugh *v.* Wilcox, 12 Barb. (N. Y. Supreme Ct.) 235; Wadsworth *v.* Sherman, 14 Id. 169; Pearl *v.* M'Dowell, 3 J. J. Marsh. (Ky.) 658 (*per* Buckner, J.); Mason *v.* Felton, 13 Pick. (Mass.) 206; because the law has placed their estates in the hands of guardians, and conclusively presumes them incapable of contracting, a presumption which does not arise when they are not under guardianship.

Wharton says, "When there is no capacity to contract, — *i.e.* in cases of idiocy and frenzy, — then there is no contract, for want of a consenting mind." 1 Whart. Law of Contracts, sec. 102.

Contracts for necessaries made by insane persons, like similar contracts made by infants, are not voidable, La Rue *v.* Gilkyson's Ex'r, 4 Pa. St. 375; Van Horn *v.* Hann, 39 N. J. L. 207; even though made while under guardianship, Sawyer *v.* Lufkin, 56 Me. 308.

[2] A contract with an insane person, though *bonâ fide*, if injurious to him,

impeached on the ground of previous or subsequent insanity (*m*).[1]

By committees of lunatics. — By 16 & 17 Vict. c. 70, s. 113, the committee of a lunatic may make, surrender and renew leases in the name and on the behalf of the lunatic, under the direction of the Lord Chancellor.[2] So he may execute conveyances, mortgages and other deeds and contracts in the name and on behalf of the lunatic, as the Lord Chancellor shall order (*n*). So he may in like manner make leases or underleases for years, for the erection of buildings or for repairing existing buildings, or otherwise improving the property, *or for farming or other purposes* (*o*); and "every surrender, lease, agreement, deed, conveyance, mortgage or other disposition granted, accepted, made or executed by

(*m*) 1 Dow, Parl. Cas. 177; Fry, ss. 161, 162.

(*n*) Sects. 116–138.

(*o*) Sect. 129; 18 & 19 Vict. c. 13. General Order in Lunacy, 7th November, 1853, No. 54.

and not made in a lucid interval, is voidable, even though contracting party were not put upon inquiry. Seaver *v.* Phelps, 11 Pick. 304. And surely it is voidable if he was. Lincoln *v.* Buckmaster, 32 Vt. 652.

Imbecility, not amounting to lunacy or idiocy, alone is not sufficient to render a contract voidable. Odell *v.* Buck, 21 Wend. (N. Y.) 142; Jackson *v.* King, 4 Cow. (N. Y.) 207. But imbecility concurring with inadequacy of price may be sufficient to make it so. Tracey *v.* Sacket, 1 Ohio St. 54; Cruise *v.* Christopher's Adm'r, 5 Dana (Ky.) 181; Cadwallader *v.* West, 48 Mo. 483. And surely it will if combined with undue influence. Whitehorn *v.* Hines, 1 Munford (Va.) 557; Buffalow *v.* Buffalow, 2 Dev. & B. Ch. (N. C.) 241.

[1] **Contracts made in lucid intervals** are valid; but if the insanity be of a confirmed or habitual character, the burden is upon the party alleging the lucid interval to prove it. 1 Whart. & Stille's Med. Jur. (4th ed.) sec. 2.

Latent insanity does not avoid contract, if at time of executing it lunatic possessed a contracting mind. 1 Whart. Law of Contracts, sec. 107.

"The question of mental incompetency rarely presents itself detached from that of undue influence." Same, sec. 104.

Wills executed by insane persons under guardianship, if restored or otherwise having a sufficiently sound mind, are valid. Stone *v.* Damon, 12 Mass. 487; Breed *v.* Pratt, 18 Pick. 115, 117; Crowninshield *v.* Crowninshield, 2 Gray, 524, 531 (*per* Thomas, J.). It is otherwise as to contracts.

[2] **Leases by committees, &c.** — Doubtless, a guardian or committee of insane person can grant leases under directions of a court of chancery. Buswell on Insanity, sec. 114. A committee is a bailiff or agent of the court. Matter of Otis, 101 N. Y. 580; Shaffer *v.* List, 114 Pa. St. 486, 489 (*per* Sterrett, J.); Lane *v.* Schermerhorn, 1 Hill (N. Y.) 97, 98 (*per* Bronson, J.). Ordinarily he has power to grant leases (subject to statutory regulations of different states). Hicks *v.* Chapman, 10 Allen, 463, 464. But he cannot if expressly or impliedly restrained by statute. Treat *v.* Peck, 5 Conn. 280, 284.

virtue of this act shall be valid and legal to all intents and purposes, as if the person in whose name or on whose behalf the same was granted, accepted, made, or executed, had been of sound mind, and had granted, accepted, made or executed the same" (*p*). It seems to be the practice in every case, first to obtain the approval of a master in lunacy to the proposed lease, and then an order of the Lords Justices confirming the master's report, and directing the lease, as settled and approved of by the master, to be executed by the [*46] *committee, upon the lessee executing a counterpart.

In *Wynne, In re* (*q*), however, eighteen months' possession under an agreement for a lease with the agent of the committee was held sufficient to entitle the tenant to specific performance, although the sanction of the master in lunacy had not been applied for.

Mode of execution. — The ordinary form of execution would seem to be the execution by the lunatic by his committees, but an execution by the committees themselves is sufficient if the lunatic be made a party to the lease (*r*).

Repairs and allowances. — By 15 & 16 Vict. c. 48, committees of lunatics may direct repairs and improvements of or upon the land of lunatics, or make allowance to the tenant executing the same.

Sect. 24. — *By Persons under Duress or Intoxicated.*

By persons under duress. — All deeds, bonds or grants made by persons under duress are voidable by the parties themselves that make them, or others that have their estates, &c. Duress of imprisonment is defined to be where one is manifestly imprisoned or restrained of his liberty contrary to law, until he executes a bond or deed to another (*s*). The imprisonment must be illegal, otherwise there is no duress (*t*).

(*p*) Sect. 139.

(*q*) L. R., 7 Ch. 229; 26 L. T. 406; W. R. 348.

(*r*) Lawrie *v.* Lees, L. R. 7 App. Cas. 19, affirming the decision of the Court of Appeal, and reversing that of Hall, V. C., L. R., 14 Ch. D. 249; 49 L. J., Ch. 636; 42 L. T. 485; 28 W. R. 779.

(*s*) Knight and Norton's case, 3 Leon. 239.

(*t*) 2 Inst. 482; 11 Q. B. 117.

Duress of goods (especially under a distress) is not sufficient (*u*).

By persons in a state of intoxication. — Intoxication is a good defence in an action on a deed, lease or grant, or an agreement, provided the party was in such a state of intoxication as not to know what he was doing (*x*). But the contract is voidable only and not void, and therefore may be ratified when the party becomes sober (*y*). If through the contrivance and management of the party obtaining the deed the grantor is thrown into intoxication for the purpose of prevailing on him to execute the deed, relief may be administered, on the ground of fraud (*z*), by the Chancery Division of the High Court (*a*).

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* Sect. 25. — *By Convicts.* [*47]

At common law, on a conviction for felony, real estate became forfeited to the crown, but not without attainder (*b*). Under a demise, therefore, by a felon after attainder, the lessee had a good title against all but the crown and the lord of whom the land was held (*c*); and the crown was said to be entitled to hold during the felon's life (*d*). The crown's right of entry might be exercised or enforced without any inquisition being taken or office being found, or actual re-entry (*e*). An assignment by a felon just before trial, without consideration or value, was void as against the crown (*f*). But a bonâ fide assignment made before the day

(*u*) Skeate *v.* Beale, 11 A. & E. 983; Gulliver *v.* Cozens, 1 C. B. 788; Kearns *v.* Durell, 6 C. B. 596; 6 D. & L. 357.

(*x*) Gore *v.* Gibson, 13 M. & W. 623; Pitt *v.* Smith, 3 Camp. 34; Butler *v.* Mulvihill, 1 Bligh, 137.

(*y*) Matthews *v.* Baxter, L. R., 8 Ex. 132; 42 L. J., Ex. 73.

(*z*) Johnson *v.* Medlicott, 3 P. Wms. 139; Cory *v.* Cory, 1 Ves. 19; Nagle *v.* Baylor, 3 Dru. & W. 60; Say *v.* Barwick, 1 V. & B. 195; Butler *v.* Mulvihill, 1 Bligh, 127.

(*a*) Judicature Act, 1873, s. 34, subs. 3.

(*b*) Cole Ejec. 573.

(*c*) Doe *d.* Evans or Griffiths *v.* Pritchard, 5 B. & Ad. 765; Cole Ejec. 573.

(*d*) Chamb. L. & T. 46.

(*e*) 22 & 23 Vict. c. 21, s. 25.

(*f*) Morewood *v.* Wilks, 6 C. & P. 144; Shaw *v.* Bran, 1 Stark. R. 319; *In re* Saunders, 4 Giff. 179; 32 L. J., Ch. 224.

of trial (even after the commission day, in consideration of a pre-existent debt or other good consideration, was valid (*g*).

Regulation of felon's property under 33 & 34 Vict. c. 23. — The property of persons who have been convicted of treason or felony is now entirely regulated by an act passed on the 4th of July, 1870 (33 & 34 Vict. c. 23), by which forfeiture to the crown is abolished. By sect. 1 of this act "no confession, verdict, inquest, conviction or judgment of or for any treason or felony or felo de se, shall cause any attainder or corruption of blood, or any forfeiture or escheat." By sect. 9 the crown may commit the custody and management of the property of any convict, *i.e.* "any person against whom judgment of death or penal servitude shall have been pronounced or recorded upon any charge of treason or felony" (*h*), to an administrator, upon whose appointment "all the real and personal property, including choses in action, to which the convict was at the time of his conviction, or shall afterwards while he shall continue subject to the operation of the act, become or be entitled, shall vest in such administrator for all the estate and interest of such convict therein" (sect. 10). By sect. 8 the convict is disabled to sue or alienate property, and by sect. 12 "the administrator shall have absolute power to let, mortgage, sell, convey and transfer any part of such property as to him shall seem fit." By sect. 18 the property reverts to the convict or his representatives on the completion of his sentence, pardon or death. By sect. 21 an interim curator may, if there be no administrator, be appointed by justices; and by sect. 24 such interim curator may bring and defend actions, and may "receive and give legal discharges for all rents," &c.

[*48] Property acquired by a convict "during the *time which he shall be lawfully at large under licence," is, by sect. 30, exempted from the operation of the act.

Outlaws. — A lease made by an outlaw before an inqui-

(*g*) Perkins *v.* Bradley, 1 Hare, 219; Whitaker *v.* Wisbey, 12 C. B. 44; Chowne *v.* Baylis, 31 Beav. 351.

(*h*) Sect. 6. Persons not comprised within this definition are exempted from forfeiture by the act, but are otherwise unaffected by its provisions relating to the administration of property.

sition taken will prevent the title of the crown, if it be made bonâ fide and upon good consideration, but not if it be in trust for the outlaw only (*i*). The grant of a person outlawed in a personal action was good against all but the crown (*k*); but outlawry in civil proceedings, which had long been obsolete, was abolished by the Civil Procedure Acts Repeal Act, 1879 (42 & 43 Vict. c. 59). The Act of 1870, above mentioned (see sect. 1), does not affect "the law of forfeiture consequent upon outlawry in criminal proceedings."

Sect. 26. — *By Trustees of Bankrupts.*

A trustee of a bankrupt seised in fee may demise to the same extent as the bankrupt could. A trustee of a bankrupt lessee, if he do not disclaim the lease, and if the lease contain no clause of forfeiture on bankruptcy of the lessee has a similar power (*l*).[1]

Sect. 27. — *By Executors and Administrators.*

A lease personal property. — A lease for a term of years, however long, is personal property in the hands of the lessee by the law of England, and as such vests in the executor.[2] In Scotland, however, it is otherwise. By the law of Scotland a lease vests in the heir of the lessee at his death (*m*).

(*i*) Att.-Gen. *v.* Freeman, Hardr. 101; Hammond's case, Id. 176; 2 Roll. Abr. 808, pl. 7; King *d.* Poe *v.* Ball, Ridg. Lap. & Scho. 94.

(*k*) Shep. Touch. 232.

(*l*) See Ch. VII., Sect. 8, *post.*

(*m*) See Bain *v.* Brand, L. R., 1 App. Ca. 762.

[1] **In New Brunswick** an assignee cannot terminate his liability for rent by disclaimer until the close of the current year. Until then the lessor's claim for rent is a privileged debt. McLaughlin *v.* McLeod, 3 P. & B. (N. B.) 539.

[2] **Leases for years are personalty.** — Wiley's Appeal, 90 Pa. St. 173; Green *v.* Green, 2 Redf. (N. Y. Sur.) 408; Murdock *v.* Ratcliff, 7 Ohio, 119; Reynold's Heirs *v.* Commissioners, &c., 5 Ohio, 204; Lewis's Heirs *v.* Ringo, 3 A. K. Marsh. (Ky.) 247; Faler *v.* McRae, 56 Miss. 227; Webster *v.* Parker, 42 Miss. 465; Dillingham *v.* Jenkins, 7 S. & M. (Miss.) 479, 487; Lessee of Bisbee *v.* Hall, 3 Ohio, 449, 465; Pugsley *v.* Aiken, 11 N. Y. 494; Hollenback *v.* McDonald, 112 Mass. 247, 249; Gay, Petitioner, 5 Mass. 419; Chapman *v.* Gray, 15 Mass. 439, 445; Mayor *v.* Mabie, 13 N. Y. 151, 159; People *v.* Westervelt, 17 Wend. (N. Y.) 674. At common law it mattered not how long the term might be: if it was a term for years, it was personalty and

Lease by executor. — Executors and administrators may dispose absolutely of terms of years vested in them in right of their testators or intestates,[1] or may lease the same for any fewer number of years; and the rents reserved on such leases

passed to the executor, or (People *v.* Westervelt, 17 Wend. (N. Y.) 674, and Lessee of Bisbee *v.* Hall, 3 Ohio, 449) might be sold on execution as a chattel without right of redemption, and would not pass as realty by levy on land. Chapman *v.* Gray, 15 Mass. 439, 445.

In Gay, Petitioner, 5 Mass. 419, it was held that a lease for 999 years might be sold by administrator as a chattel without a license. There are many cases where leases for ninety-nine years have been held chattels. Faler *v.* McRae, 56 Miss. 227; Dillingham *v.* Jenkins, 7 S. & M. (Miss.) 479, 487. And even though renewable, Reynold's Heirs *v.* Commissioners, &c., 5 Ohio, 204; or even if renewable forever, Murdock *v.* Rateliff, 7 Ohio, 119. But it has since been held that under the statute a lease for ninety-nine years, in Ohio renewable forever, was for certain purposes realty. Northern Bank *v.* Roosa, 13 Ohio, 334; Loring *v.* Melendy, 11 Ohio, 355.

In Massachusetts the rule has been changed by statute, and there, when land is demised for one hundred years or more, it shall be regarded as an estate in fee simple so long as fifty years remain unexpired. Pub. Sts. Ch. 121, sec. 1.

A life estate may be levied upon as realty. Chapman *v.* Gray, 15 Mass. 439.

In Dillingham *v.* Jenkins, *supra*, p. 487, Sharkey, C. J., said, "A lease for ninety-nine years is of no higher dignity than a lease or term for one year."

The consequence is that widow and heirs cannot bring specific performance upon a renewable lease. Reynold's Heirs *v.* Commissioners, &c., 5 Ohio, 204. Neither can they eject a subtenant of an administrator. Lewis's Heirs *v.* Ringo, 3 A. K. Marsh. (Ky.) 247.

[1] Ordinarily he should do so and let the assignee take the risks as to the value of his purchase. Schouler's Ex'rs & Admr's, sec. 353.

The executor is liable upon the covenants of the deceased lessee, even though beneficial interest have passed to a survivor. Burns *v.* Bryan, 12 App. Cas. 184. If he renew a renewable lease, he will be charged with whole term as assets. Green *v.* Green, 2 Redf. (N. Y. Sur.) 408.

Executors, if they occupy the demised premises, will be personally liable for the rent. Smiley *v.* Van Winkle, 6 Cal. 605, 606 (*per* Murray, C. J.). In England an executor is personally liable if he take possession up to the letting value of the premises (*In re* Bowes, 37 Ch. D. 128), but beyond that he is not liable except so far as he has assets (*per* North, J., p. 132).

An executor is not liable beyond the amount of assets, if he waive the term and refuse to occupy. Martin *v.* Black, 9 Paige (N. Y.) 641, 644 (*per* Walworth, Chan.). In this respect he is like a receiver (*per* Walworth, Chan., *supra*), or a voluntary assignee who, if he declines to accept term, is not personally liable. Lewis *v.* Burr, 8 Bosw. (N. Y. Superior Ct.) 140; Journeay *v.* Brackley, 1 Hilt. (N. Y. Sur.) 447; Pratt *v.* Levan, 1 Miles (Pa.) 358. But if he accept and occupy, is liable. Young *v.* Peyser, 3 Bosw. (N. Y. Superior Ct.) 308; Astor *v.* Lent, 6 Id. 612.

In England a gift in will of lease will not pass a freehold interest though subject to rent charge. *In re* Knight, 34 Ch. D. 518.

are assets in their hands, and go in a course of administration (*n*), but this is an exceptional mode of dealing with the assets, and those who take a title in that way must take it subject to the question whether it was the best mode of administering the assets (*o*). Executors should take care not to enter into any informal agreement for a lease which cannot be enforced; otherwise they may perhaps be charged with any loss, as arising from a wilful default (*p*).

[*49] ***Option of purchase.** — Executors and administrators, it being their duty to realize within a reasonable time, may not grant a sub-lease with option of purchase within a fixed time. If they do, the next-of-kin can prevent the option being exercised. This was held by the Court of Appeal in the very clear but hard case of Oceanic Steam Navigation Co. *v.* Sutherbury (*q*), in which an administrator possessed of a term of 75 years granted a sub-lease for 21 years, with option of purchase within the first 7 years, although the whole transaction was for the benefit of the estate, and the sub-lessees had expended large sums in building in reliance on their supposed power to purchase.

Lease before probate. — An executor may demise before probate, because his appointment, estate, and power are derived from the will, of which the probate is merely evidence (*r*); but an administrator cannot make a lease until he has obtained letters of administration (*s*).

Lease by one of several. — A lease by one of several executors is as efficacious as their joint demise (*t*), although it purport to be the grant of all (*u*); and the same rule applies to administrators (*x*). It seems that if three executors demise

(*n*) Bac. Abr. Leases (I. 7).

(*o*) Per Jessel, M. R., in Oceanic, &c., Co. *v.* Sutherbury, L. R., 16 Ch. D. at p. 243.

(*p*) Connolly *v.* Connolly, 17 Ir. Ch. R. 208, M. R.

(*q*) L. R., 16 Ch. D. 236; 50 L. J. Ch. 308; 43 L. T. 743; 29 W. R. 236.

(*r*) Roe *d.* Bendall *v.* Summerset, 2 W. Blac. 692; Roll. Abr. tit. Executors (A.); 1 Wms. Exors. 291, 595 (6th ed.).

(*s*) Wankford *v.* Wankford, 1 Salk. 301; Hudson *v.* Hudson, 1 Atk. 461; 1 Wms. Exors. 595 (6th ed.).

(*t*) Pannel *v.* Fenn, Cro. Eliz. 347; Doe *d.* Hayes *v.* Sturges, 7 Taunt. 217.

(*u*) Simpson *v.* Gutteridge, 1 Madd. 616.

(*x*) Jacomb *v.* Harwood, 2 Ves. sen. 265.

to one of them at a fixed rent, such rent may be distrained for (*y*).

Assent to bequest of lease. — Previous to a party taking a lease from an executor, he should ascertain whether the property has been specifically bequeathed by the will; and if so, whether the executor has assented to such bequest, for if so his right to grant the lease is gone, and the legal interest in the property is vested in the legatee; and consequently, as the executor has nothing to grant, the lease will be void, and the legatee may maintain ejectment (*z*). It is well settled, however, that assent to a bequest for life of a lease is an assent to the bequest over (*a*).

Assent of executor to bequest to himself. — If a lease be specifically bequeathed to an executor for his own use, his assent to the bequest is still necessary, and if his acts are referable to his character of executor, they are no evidence of assent (*b*), which must be shown by some act referable to his character of beneficial owner, as by a disposition of the lease in his own will (*c*). Where a party possessed of a term as administrator makes a lease and appoints an executor and dies, his executor is entitled to the rent, and not the administrator de bonis non of the intestate (*d*).

[*50] * **Leases by an executrix who is a married woman.** — The husband of a woman who is an executrix has at common law a joint interest with her in all the effects of the deceased; and is enabled to assume the whole administration, and to act in it to all purposes without her consent; but the wife cannot do any act as executrix or administratrix without her husband's concurrence. A demise by her alone, therefore, cannot at common law be supported; and in all leases made in respect of such executorship and administra-

(*y*) Cowper *v.* Fletcher, 6 B. & S. 464; 34 L. J., Q. B. 187.

(*z*) Paramour *v.* Yardley, Plowd. 539; Young *v.* Holmes, 1 Stra. 70; Doe *d.* Lord Say and Sele *v.* Guy, 3 East, 120; 4 Esp. 154; Johnson *v.* Warrick, 17 C. B. 516; Fenton *v.* Clegg, 9 Exch. 680; Doe *d.* Sturgess *v.* Tatchell, 3 B. & Ad. 675.

(*a*) Stevenson *v.* Mayor of Liverpool, L. R., 10 Q. B. at p. 84.

(*b*) Doe *d.* Hayes *v.* Sturges, 7 Taunt. 717.

(*c*) Fenton *v.* Clegg, 9 Exch. 680.

(*d*) Drew *v.* Bayly, 2 Lev. 100; Norton *v.* Harvey, 1 Ventr. 259.

tion, the husband must be the demising party (*e*). By the 18th section of the Married Women's Property Act, 1882, a married woman "who is an executrix or administratrix, alone or jointly with any other person, of the estate of any deceased person, or trustees, alone or jointly, of property subject to any trust, may sue and be sued without her husband, as if she were a feme sole." This section gives no express power to demise alone. Whether it gives such a power impliedly is very doubtful. It is conceived on the whole that it does not, and that the common law rule above stated is in full force.

Sect. 28. — *By Mortgagors and Mortgagees.*

(a) *Generally.*

Leases before the mortgage. — Leases granted by a mortgagor *before* the mortgage are valid as against the mortgagee, who is only an assignee of the reversion and its incidents (*f*).[1] The tenants under such leases may safely continue to pay their rents to the mortgagor until they receive notice of the mortgage, and are requested to pay their rent to the mortgagee (*g*).[2]

(*e*) Cham. on Leases, 35; Arnold *v.* Bidgood, Cro. Jac. 318; Thrustout *d.* Levick *v.* Coppin, 2 W. Blac. 801.

(*f*) Rogers *v.* Humphreys, 4 A. & E. 299, 313; Cole Ejec. 473.

(*g*) 4 Ann. c. 16, s. 10; Cook *v.* Moylan, 1 Exch. 67; 5 D. & L. 701; Trent *v.* Hunt, 9 Exch. 14.

[1] **Mortgages: subsequent, and prior to lease.** — A mortgagee under a mortgage, given subsequently to a lease, is an assignee (or mortgagee) of the reversion, *simply*, Comer *v.* Sheehan, 74 Ala. 452, 457; Joplin *v.* Johnson, 2 Kerrs. (N. B.) 541; Johnston *v.* Riddle, 70 Ala. 219, 225 (*per* Somerville, J.). He certainly has no *greater* rights than the mortgagor or than an ordinary reversioner, and in some respects (under the theory as to the nature of mortgages prevailing in some of the American states) has less.

"A lease," says Mr. Jones, "already existing at the date of the mortgage, is in no way invalidated by the giving of the mortgage. It is then a paramount interest, and the mortgage is subject to it." 1 Jones on Mort. (3 ed.) sec. 772. Otherwise as to leases subsequent, as will appear.

Newall *v.* Wright, 3 Mass. 138, 152.

[2] **Two American theories.** — There are two theories, as to the nature of mortgages, prevailing in America. By either of them, under leases, either prior or subsequent to a mortgage, the lessee must continue to pay rent to the mortgagor until notified to pay it to the mortgagee. Joplin *v.* John-

Ejectment by mortgagor. — Before the Judicature Act, the mortgagor, having assigned his reversion by the mortgage,

son, 2 Kerrs. (N. B.) 541; Johnston *v.* Riddle, 70 Ala. 219; Souders *v.* Vansickle, 8 N. J. L. 313. The mortgagor can eject a stranger, for the mortgagor is owner of the mortgaged property against all the world except the mortgagee. Allen *v.* Kellam, 69 Ala. 442.

At common law, as it prevails in England and some of the American states, a mortgagee, having the legal title to the estate as against a mortgagor, has the right to take the rents and profits before foreclosure (1 Jones on Mort. (3d ed.) sec. 11); and under a mortgage subsequent to the lease, having legally the reversion, may claim them at any time from the lessee, and the lessee will be justified in paying them to him upon his mere demand. (Comer *v.* Sheehan, 74 Ala. 452, 457 (*per* Somerville, J.); Newall *v.* Wright, 3 Mass. 138, 152; Taylor's Land. & Tenant, sec. 119; 1 Jones on Mort. (3 ed.) secs. 773, 776), the effect of demand and notice being to substitute the mortgagee as landlord in place of the mortgagor.

In New York, &c., prior mortgages. — It is, of course, not so in New York and in many other American states, where the mortgagee has a mere lien, and the mortgagor a right to the possession and profits until foreclosure. 1 Jones on Mort. (3d ed.) sec. 771. Neither is it so, even at common law, in case of a mortgage prior to the lease. The mortgagee in such case is not a reversioner, but has a title paramount to the lease, and there is no privity between him and the lessee unless the latter attorn to him. Comer *v.* Sheehan, 74 Ala. 452, 458; Johnston *v.* Riddle, 70 Ala. 219; Newall *v.* Wright, 3 Mass. 138, 152; Drakford *v.* Turk, 75 Ala. 339. Hence a prior mortgagee cannot distrain for rent without an attornment. McKircher *v.* Hawley, 16 Johns. (N. Y.) 289. And payment of rent to him would be no defence to a suit for rent by mortgagor. Souders *v.* Vansickle, 8 N. J. L. 313; Joplin *v.* Johnson, 2 Kerrs. (N. B.) 541. Nor is such rent recoverable by the mortgagee from the mortgagor. Hatch *v.* Sykes, 64 Miss. 307. The mortgagee or his assignee may bring action of ejectment against the lessee without notice to quit, Jackson *v.* Fuller, 4 Johns. (N. Y.) 215; Jackson *v.* Rowland, 6 Wend. (N. Y.) 666; or he may summarily enter and eject tenant, Brewing *v.* Berryman, 2 Pugs. (N. B.) 115. And the lessee would not be entitled to the emblements. Downard *v.* Groff, 40 Iowa, 597; Hecht *v.* Dettman, 56 Iowa, 679; Martin *v.* Knapp, 57 Iowa, 336, 344; Lane *v.* King, 8 Wend. (N. Y.) 584; Jones *v.* Thomas, 8 Blackf. (Ind.) 428.

The relation of landlord and tenant may, however, be created between such prior mortgagee and a subsequent lessee, as by the mortgagee's entry and receipt of rent from the lessee. Conn. Mut. Ins. Co. *v.* U. S., 21 Ct. of Claims, 195. And the lessee will be justified in attorning to the mortgagee, if actually or constructively evicted by him. Such an eviction would be defence to suit for rent by the mortgagor. Underhay *v.* Read, 20 Q. B. D. 209. A prior mortgagee cannot, however (as a subsequent mortgagee can) make the lessee of the mortgagor his tenant by simple notice and demand to pay rent. Drakford *v.* Turk, 75 Ala. 339; Comer *v.* Sheehan, 74 Ala. 452, 458 (*per* Somerville, J.); Johnstone *v.* Riddle, 70 Ala. 219.

Ordinarily, the relation of landlord and tenant does not exist between a mortgagee and the grantee of a mortgagor. Jackson *v.* Chase, 2 Johns. (N. Y.) 84. And, therefore, at common law, notice to quit is not necessary before ejecting the mortgagor.

could not eject the tenant for a forfeiture (*h*); but by sect. 25, sub-sect. 5, of the Judicature Act, 1873:

(*h*) Doe *d.* Marriott *v.* Edwards, 5 B. & Ad. 1065.

A mortgage and lease given by mortgagor to mortgagee upon the same day do not merge. The law presumes that mortgage was executed first, and infers an implied agreement that mortgagor shall not take possession under his mortgage during the lease. If mortgagor subsequently give mortgagee a second mortgage, the mortgagee might take possession under the second mortgage. Newall *v.* Wright, 3 Mass. 138, 152.

A lessee for years has a right to redeem from a prior mortgage, Martin *v.* Miles, 5 Ont. 404; and consequently is a proper party to a foreclosure suit, Can. Perm. Loan & Sav. Soc., 22 Grant's Ch. (Ont.) 461; 2 Jones on Mort. sec. 1066.

Tenancies between mortgagee and mortgagor. — The relation does not exist in the ordinary sense between them (*Ex parte* McBean, 24 N. B. 362), though under circumstances it has been held that the mortgagor was a tenant from year to year, entitled to six months' notice to quit. Jackson *v.* Langhead, 2 Johns. (N. Y.) 75. The mortgagor certainly may become a tenant to the mortgagee. Marden *v.* Jordan, 65 Me. 9; Staples *v.* Emery, 7 Greenl. (Me.) 201. And in such case may set up such tenancy as a defence to ejectment brought by a purchaser of the equity of redemption. Doe *d.* Smith *v.* Snarr, 1 P. & B. (N. B.) 56.

Mortgages are sometimes made with attornment clauses; and if such mortgages contain also re-entry clauses for non-payment of rent without notice to quit, the mortgagee may terminate tenancy by action for possession. Hall *v.* Comfort, 18 Q. B. D. 11, 14, 18. And without notice to quit (*per* Coleridge, C. J.), *supra*, citing Daubuz *v.* Lavington, 13 Q. B. D. 347.

Eviction by mortgagee; damages to lessee. — The damage to the lessee of a mortgagor, if evicted by the mortgagee under a foreclosure or otherwise, is the difference between the value of the use of the premises for the remainder of the term and the rental for the same time. Larkin *v.* Misland, 100 N. Y. 212; Clarkson *v.* Skidmore, 46 N. Y. 297. And the lessee is entitled to be paid such damages out of the proceeds of the foreclosure sale, before any of them are returned to the mortgagor. Larkin *v.* Misland, 100 N. Y. 212, 213 (*per* Finch, J.).

Mortgagee of lessee. — Being an assignee of the term takes all the lessee's rights, and can hold them as against the lessor (Yates *v.* Kinney, 19 Neb. 275), though, of course, his right to possession and profits would not attach in states where the common law doctrine does not prevail till after foreclosure and delivery of foreclosure deed.

Possession of mortgagee. — Possession of mortgagee is essential (generally) in America to the liability of a mortgagee of a term upon the covenants in the lease. Astor *v.* Miller, 2 Paige (N. Y.) 68 (and see *per* Walworth, Chan., pp. 76, 77); Babcock *v.* Scoville, 56 Ill. 461, 464 (*per* Sheldon, J., distinguishing mortgagee assignees from ordinary assignees); Calvert *v.* Bradley, 16 How. 580, 595 (*per* Daniel, J., indicating but not expressly giving his opinion, and limiting Steele *v.* Carroll, 12 Pet. 201, and Van Ness *v.* Hyatt, 13 Pet. 294); Walton *v.* Cronly's Admr., 14 Wend. (N. Y.) 63.

The American courts, following Eaton *v.* Jaques, Doug. 454, which has been overruled by the English courts, hold that the interest of a mortgagee before foreclosure is a chattel interest merely.

"A mortgagor entitled for the time being to the possession or the receipt of the rents and profits of any land, as to which no notice of his intention to take possession or to enter into the receipt of the rents and profits thereof shall have been given by the mortgagee, may sue for such possession, or for the recovery of such rents or profits, or to prevent or recover damages in respect of any trespass or other wrong relative thereto, in his own name only, unless the cause of action arises upon a lease or other contract made by him jointly with any other person."

Two theories of mortgages. — The common law theory (as held in the English courts), that the mortgagee has the legal estate and right of possession before foreclosure and before condition broken unless otherwise stipulated, prevails in Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, New Jersey, Pennsylvania, Maryland, Virginia, West Virginia, North Carolina, Alabama, Kentucky, Tennessee, Ohio, Illinois, and Arkansas. In Delaware, Mississippi, and Missouri it prevails so far modified that mortgagee has no right to possession until condition broken. 1 Jones on Mort. (3d ed.) secs. 17–58.

Theory that mortgage creates a lien merely before foreclosure. — This theory prevails in the states of New York, South Carolina, Georgia, Florida, Louisiana, Texas, Indiana, Michigan, Wisconsin, Minnesota, Nebraska, California, and Oregon. In Dakota, New Mexico, and Utah Territories, and in the states of Iowa, Kansas, and Nevada, with the qualification in the last three states, that parties may agree in the mortgage that mortgagee shall have the right of possession. 1 Jones on Mort. (3d ed.) sec. 58.

This theory originated partly from the civil law as it prevailed in Louisiana, and partly from early decisions in New York, following the views of Lord Mansfield, since repudiated by the English courts. Same, sec. 59.

In the states where it prevails the mortgagor is entitled to the rents and profits until the delivery of the deed under the foreclosure sale (Dewey *v.* Latson, 6 Cal. 609; Syracuse City Bank *v.* Tallman, 31 Barb. (N. Y. Supreme Ct.) 201; Zeiter *v.* Bowman, 6 Id. 133; 1 Jones on Mort. (3d ed.) sec. 771), unless a receiver is appointed. In that case the rents and profits are intercepted, and the mortgagee gets the benefit of them. Howell *v.* Ripley, 10 Paige (N. Y.) 43. Sometimes a junior mortgagee may get some advantage over a senior mortgagee.

As a result of this theory an attornment by a lessee to a purchaser, under a mortgage sale prior to the delivery of the deed, even though the mortgage were prior to the lease, is no defence to a suit for rent by the mortgagor. Whalin *v.* White, 25 N. Y. 462. Neither can the mortgagor's tenant be required to attorn to such purchaser until he produces the foreclosure deed. Same.

Neither can the mortgagee bring ejectment against the tenant of the mortgagor prior to the foreclosure and sale. Simers *v.* Saltus, 3 Denio (N. Y.) 214, 219. But the purchaser at foreclosure sale, after he has received his deed, can maintain trespass against the lessee if the latter carry away crops growing upon the premises at the time of the sale. Lane *v.* King, 8 Wend. (N. Y.) 584.

* Upon giving notice of his mortgage, and requesting the rent to be paid to him, the mortgagee becomes entitled to all the arrears of rent which became due after his mortgage, and which then remained unpaid, and also to all subsequent rent (*i*).[1] [*51]

Mortgagee entitled to rent on notice of mortgage. — Where a mortgagor after execution of an agreement for a lease, under which the tenant has entered, mortgages the premises, the mortgagee may maintain use and occupation for the enjoyment of them subsequently to the mortgage, and notice thereof (*k*). Where a mortgage was made after a letting from year to year, and subsequently the mortgagor, on making some improvements, agreed with the tenant for an increased rent; it was held that the mortgagee, after notice to the tenant of the mortgage, might recover, in an action for use and occupation, arrears of the improved rent due at the time of the notice, as well as subsequent accruing rent (*l*). Where a mortgage was made after a letting, and it was subsequently arranged between the mortgagor, the mortgagee, and the tenant, that the latter should pay the interest to the mortgagee, and the remainder of his rent to the mortgagor; it was held that after this arrangement the tenant was not justified, after a mere notice so to do, in paying the whole rent to the mortgagee (*m*).

Leases after the mortgage; common law rule. — With regard to leases *after* a mortgage, the common law rule was, that neither mortgagor nor mortgagee could make a good lease alone; for the mortgagor's lease was bad in law as against the mortgagee, wherefore the mortgagee could evict the lessee as a trespasser (*n*);[1] and the mortgagee's lease was bad in equity as against the mortgagor, wherefore the

(*i*) Moss *v.* Gallimore, 1 Doug. 279; 1 Smith, L. C. 629 (7th ed.); Pope *v.* Briggs, 9 B. & C. 245; Rogers *v.* Humphreys, 4 A. & E. 299, 313.

(*k*) Rawson *v.* Eicke, 7 A. & E. 451. See Form of Notice, *post*, Appendix C., Nos. 15, 16.

(*l*) Burrowes *v.* Gradin, 1 D. & L. 213.

(*m*) Whitmore *v.* Walker, 2 C. & K. 615.

(*n*) Keech *v.* Hall, 1 Doug. 21; 1 Sm. L. C.; Thunder *d.* Weaver *v.* Belcher, 3 East, 449.

[1] See *ante*, sec. 28 a, note.

mortgagor could, by redeeming the mortgage, avoid the lease (*o*). As, therefore, neither mortgagor nor mortgagee could make a valid lease, it became usual for them both to concur (*p*), and for mortgage deeds to contain special leasing powers by one or other, or both (*q*).[1]

Effect of Conveyancing Act. — The 18th section of the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), has *with regard to leases made after the commencement of that act* [1st of Jan. 1882], and *so far as a contrary intention is not expressed* by both parties in the mortgage deed, abolished the common law rule; has given to either mortgagor or mortgagee, if in possession, ample powers of leasing; and has rendered joint powers of leasing unnecessary for the future. See p. 56, *post*.

[*52] * **Lease after mortgage before Conveyancing Act, &c.** — The 18th section of the Conveyancing Act being neither retrospective nor compulsory, the decisions applicable to mortgages before the act are still of very great importance, especially as it appears to have become usual for mortgagees to insist upon the exclusion of sub-s. (1) which confers the leasing power upon the mortgagor (*r*). These cases therefore must now be stated, so far as they affect the relation of landlord and tenant, the reader being referred to other works for the cases affecting the relations of mortgagor and mortgagee (*s*).

Leases by estoppel. — If then the mortgage bear date before the act, or if the 18th section of the act be excluded, and there be no express leasing power reserved to the mortgagor, the result of a lease by the mortgagor alone is that the

(*o*) Franklinski *v.* Ball, 34 L. J., Ch. 153.

(*p*) See Carpenter *v.* Parker, 3 C. B., N. S. 206.

(*q*) See *post*, 52, 55.

(*r*) Hood and Challis on the Conveyancing Acts, p. 111.

(*s*) See Coote on Mortgages; Fisher on Mortgages.

[1] "The only safety for a lessee in taking a lease of premises subject to a mortgage, is to obtain the concurrent action of the mortgagor and mortgagee in the execution of the lease." 1 Jones on Mort. (3d ed.) sec. 783.

A lease made by the mortgagee, without the concurrence of the mortgagor, is liable to be terminated by the redemption of the mortgage. Willard *v.* Harvey, 5 N. H. 252.

tenant will be thereby estopped (*t*) during his possession under the lease from disputing the mortgagor's right to demise (*u*), and apparently, upon the general principle that an estoppel binds both parties (*x*), the mortgagor landlord will also be liable by estoppel upon his covenant for quiet enjoyment upon his ejectment by the mortgagee (*z*).

Mortgagee cannot distrain, &c. — But although the mortgagee may treat the tenants of the mortgagor as trespassers in the case of a lease made after the mortgage, he cannot distrain or sue for rent, or for use and occupation (*a*), unless a new tenancy has been created as between him and the tenant in possession, by an attornment or otherwise (*b*). A mere notice of the mortgage, with a request to the tenant to pay his rent to the mortgagee (not assented to by the tenant), is insufficient to create between them the relation of landlord and tenant (*c*). If the notice be assented to and complied with by the tenant, he becomes tenant from year to year upon an agreement for a lease with the mortgagor, and can, by giving notice to quit, prevent the mortgagee from enforcing specific performance of the agreement (*d*). Where a tenant, after notice given to him of the mortgage, pays rent to the *mortgagee under a distress, it does [*53] not constitute a tenancy by relation back, so as to entitle the mortgagee to distrain for a previous half-year's

(*t*) See Webb *v.* Austin, 7 M. & G. 701.

(*u*) Alchorne *v.* Gomme, 2 Bing. 54; Morton *v.* Woods, L. R., 3 Q. B. 658; 37 L. J., Q. B. 242; Doe *d.* Leeming *v.* Skirrow, 7 A. & E. 157.

(*x*) Co. Litt. 352 (a).

(*z*) Hartcup *v.* Bell, 1 C. & E. 19, *per* Manisty, J., aff. both by Div. Court and C. A. (*ib.*). This is an exception to the general effect of the *qualified* covenant for quiet enjoyment: see Ch. XVII. Sect. 8, *post*.

(*a*) Rogers *v.* Humphreys, 4 A. & E. 299, 313; Partington *v.* Woodcock, 6 A. & E. 690; Evans *v.* Elliott, 9 A. & E. 342; Turner *v.* Cameron's Coalbrook Steam Canal Co., 5 Exch. 932; Litchfield *v.* Ready, 5 Exch. 939.

(*b*) Brown *v.* Storey, 1 M. & G. 117, 126; Roberts *v.* Hayward, 3 C. & P. 432; Doe *d.* Whitaker *v.* Hales, 7 Bing. 322; Doe *d.* Hughes *v.* Bucknell, 8 C. P. 566; Doe *d.* Higginbotham *v.* Barton, 11 A. & E. 307; Doe *d.* Bowman *v.* Lewis, 13 M. & W. 241.

(*c*) Rogers *v.* Humphreys, 4 A. & E. 299; Partington *v.* Woodcock, 6 A. & E. 690; Evans *v.* Elliott, 9 A. & E. 342; Doe *d.* Higginbotham *v.* Barton, 11 A. & E. 307; Hickman *v.* Machin, 4 H. & N. 716.

(*d*) Corbett *v.* Howden, L. R., 25 Ch. D. 678; 54 L. J., Ch. 109; 50 L. T. 470; 32 W. R. 667, C. A.

rent (*e*). But if the tenant expressly attorns as from a previous day at a fixed rent, all such rent, when in arrear, may be distrained for (*f*). Where a mortgagee gave notice of the mortgage to a tenant of the mortgagor, and required him to pay all rent due and to become due in respect of the premises, and the tenant acquiesced, it was held to be evidence from which a jury might infer a yearly tenancy, as between the mortgagee and the tenant (*g*). The result of the cases seems to be that a bare notice by the mortgagee to a *subsequent* tenant of the mortgagor to pay him the rent (not assented to by the tenant) will not create any new tenancy; but that a notice acquiesced in by payment of rent or otherwise is evidence from which a jury may infer a new contract of tenancy from year to year as between the mortgagee and the tenant in possession (*h*). The mere receipt by the mortgagee from the mortgagor of interest due on the mortgage will not preclude the mortgagee from ejecting the mortgagor's tenant (*i*). The fact of the mortgagee being allowed to see improvements made to the property by the lessee of the mortgagor, does not raise an implied tenancy between the mortgagee and the lessee, and is not a recognition of his holding (*k*). A mortgagee out of possession, who gives notice of the mortgage to the tenant who has become tenant since the mortgage, cannot maintain trespass for mesne profits against the tenant for the rents accrued due since the date of the mortgage, by mere entry upon the land after the notice, the doctrine of relation not applying to such a case (*l*).

Letting of furnished house by mortgagor. — If the mortgagor of a house lets it furnished, and afterwards the tenant receives notice from the mortgagee to pay the rent to him,

(*e*) Evans *v.* Elliott, 9 A. & E. 342.

(*f*) Gladman *v.* Plumer, 15 L. J., Q. B. 80; 10 Jur. 109.

(*g*) Brown *v.* Storey, 1 M. & G. 117; Doe *d.* Hughes *v.* Bucknell, 8 C. & P. 566.

(*h*) Powseley *v.* Blackman, Cro. Jac. 659; Brown *v.* Storey and Doe *d.* Hughes *v.* Bucknell, *supra*; Rogers *v.* Humphreys, 4 A. & E. 299; Doe *d.* Higginbotham *v.* Barton, 11 A. & E. 307; Hickman *v.* Machin, 4 H. & N. 716; 21 L. J., Ex. 310.

(*i*) Doe *d.* Rogers *v.* Cadwallader, 2 B. & Ad. 473.

(*k*) Doe *d.* Parry *v.* Hughes, 11 Jur. 698.

(*l*) Litchfield *v.* Ready, 5 Exch. 939.

which he does, the mortgagor may still recover against the tenant for the use of the furniture, for either the rent may be apportioned, or a new agreement may be inferred to take the house of the mortgagee, and to pay the mortgagor for the use of the furniture (*m*).

Where a mortgagor after mortgage demised part of the land, and then made a second mortgage, and the tenant paid rent to the second mortgagee, who demised another part of the land to a different tenant, and then notice was given to both tenants of the first mortgage, who *accordingly paid their rents to the first mortgagee; it was held in ejectment by the second mortgagee, that the tenants might both show the prior mortgage and the notice (*n*). A., seised, in fee, mortgaged in fee to B., and afterwards leased to the defendant for thirty-one years. The plaintiff bought the legal estate from B., the mortgagee, and also the equitable estate from a party who derived it from A., the mortgagor, which party also joined in the conveyance of the legal estate; it was held, that the plaintiff, although he had received rent from the defendant, was not bound by the mortgagor's lease to him, but might recover in ejectment after the expiration of a notice to quit, or sue him for use and occupation after the payment and receipt of rent (*o*). Where a person who had bought premises which had not been conveyed to him, let his son into possession as tenant at will, paying no rent, afterwards had the property conveyed to him, and then mortgaged it; it was held, that if the mortgage had any operation on the tenancy at will, there was no new tenancy between the son and the mortgagee, so as to prevent the operation of the Statute of Limitations (*p*). Where a mortgagor gave an authority to the mortgagee to receive the rent of a tenant, under a demise subsequent to a mortgage, and the mortgagee received the rent for some time; after which the authority was countermanded, and the tenant refused to pay to either, and the mortgagor distrained, [*54]

(*m*) Salmon *v.* Matthews, 8 M. & W. 827.

(*n*) Doe *d.* Higginbotham *v.* Barton, 11 A. & E. 307.

(*o*) Doe *d.* Ld. Downe *v.* Thompson, 9 Q. B. 1037.

(*p*) Doe *d.* Goody *v.* Carter, 9 Q. B. 863.

it was held that the relation of landlord and tenant was not created between the tenant and the mortgagee (*q*). A tenant holding under the mortgagor may show that the lease was made after the mortgage, and that he, the tenant, was compelled to pay the rent to the mortgagee, and such payment will operate as a discharge of the rent to the mortgagor, and may be proved under a special or common plea of payment (*r*). If a mortgagor sues for rent after notice given to the tenant of the mortgage, the tenant may, at his own expense, obtain relief under the Interpleader Act (*s*).

Leases by mortgagee. — The mortgagee, in the case of a mortgage to which the 18th section of the Conveyancing Act does not apply, cannot before foreclosure of the equity of redemption make a lease for years of property in mortgage which will bind the mortgagor, unless to avoid an apparent loss and merely of necessity (*t*). If a mortgagee accepts a person as a tenant, to whom the mortgagor has granted a lease for years since the mortgage,
[*55] * that makes him only tenant from year to year to the mortgagee (*u*). Such new tenancy will be subject to the terms and conditions of the lease, so far as the same are applicable to and not inconsistent with a yearly tenancy (*x*). But payment of the rent will not relate back to the date or service of the notice of the mortgage, so as to make the new tenancy commence from that time (*y*). For the purpose of a notice to quit, the new tenancy will be deemed to have commenced from the same day in the year as the original term (*z*). Where a tenant attorns expressly as from a previous specified day, at a fixed rent, a distress may

(*q*) Wheeler *v.* Branscombe, 5 Q. B. 373; Wilton *v.* Dunn, 17 Q. B. 294.

(*r*) Johnson *v.* Jones, 9 A. & E. 809; Waddilove *v.* Barnett, 2 Bing. N. C. 538; 4 Dowl. 347; Pope *v.* Biggs, 9 B. & C. 245; Whitmore *v.* Walker, 2 C. & K. 615.

(*s*) 1 & 2 Will. 4, c. 58, s. 1; Murdock *v.* Taylor, 6 Bing. N. C. 293.

(*t*) Hungerford *v.* Clay, 9 Mod. 1; Franklinski *v.* Ball, 34 L. J., Ch. 153; Powell on Mort. 188.

(*u*) Doe *d.* Hughes *v.* Bucknell, 8 C. & P. 566; Doe *d.* Prior *v.* Ongley, 10 C. B. 25 (3d point); Carpenter *v.* Parker, 3 C. B., N. S. 232, 235.

(*x*) Doe *d.* Thomson *v.* Amey, 12 A. & E. 476; Doe *d.* Davenish *v.* Moffatt, 15 Q. B. 257, 265; Cole Ejec. 476.

(*y*) Evans *v.* Elliott, 9 A. & E. 342.

(*z*) Doe *d.* Collins *v.* Weller, 7 T. R. 478; Cole Ejec. 476.

be made for the rent calculated from that day (*a*). When a new tenancy from year to year has been created as between the mortgagee and the tenant, the mortgagee is thenceforth the landlord, and may sue or distrain for the rent (*b*), or maintain an action for use and occupation (*c*). But he cannot maintain an ejectment against the tenant until the new tenancy has been determined by notice to quit, surrender, forfeiture, or otherwise (*d*), although afterwards he may (*e*).

Leases by mortgagor and mortgagee. — Where lands mortgaged before the Conveyancing Act are to be leased, the mortgagor and mortgagee ought to concur in granting the lease (*f*). A joint action of covenant is not maintainable against a mortgagor and a mortgagee on an implied covenant, if the latter has demised, and the former, who had merely an equitable interest, has confirmed the lease (*g*). A mortgagor and mortgagee for a term joined in a deed, by which the former leased and the latter confirmed the premises to a third party for the remainder of the term, at a rent reserved to the mortgagor, his executors, &c. The deed declared that nothing therein should abridge, defeat, alter, &c., the interest of the mortgagee in the premises, which was to remain a security for his principal and interest; the mortgagee was held entitled to the rent (*h*). A mortgagor agreed to sell premises held by a tenant under a lease granted by him after the mortgage, without the concurrence of the mortgagee, who, however, was willing to concur in the sale; it was held that the mortgagor was able to make a good title (*i*).

(*a*) Gladman *v.* Plumer, 15 L. J., Q. B. 80; 10 Jur. 109.

(*b*) Rogers *v.* Humphreys, 4 A. & E. 299; Brown *v.* Storey, 1 M. & G. 117, 126.

(*c*) Doe *d.* Ld. Downe *v.* Thompson, 9 Q. B. 1037.

(*d*) Cole Ejec. 474, 477.

(*e*) Doe *d.* Ld. Downe *v.* Thompson, *supra;* Pole *v.* Davis, 1 F. & F. 284.

(*f*) *Ante*, 51.

(*g*) Smith *v.* Pocklington, 1 C. & J. 445.

(*h*) Edwards *v.* Jones, 1 Coll. 247.

(*i*) Webb *v.* Austin, 7 M. & G. 701; Sturgeon *v.* Wingfield, 15 H. & W. 224.

[*56] * (b) *By Mortgagor and Mortgagee under Conveyancing Act.*

The leasing powers, both of a mortgagor in possession and of a mortgagee in possession, *under a mortgage made on or after Jan. 1st*, 1882, are regulated in the following terms by sect. 18 of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41).

Lease by mortgagor. — "(1.) A mortgagor (*k*) of land (*l*) while in possession shall, as against every incumbrancer (*m*), have, by virtue of this act, power to make, from time to time, any such lease of the mortgaged land, or any part thereof, as is in this section described and authorized.

Lease by mortgagee. — "(2.) A mortgagee (*k*) of land (*l*) while in possession shall, as against all prior incumbrancers, if any, and as against the mortgagor, have, by virtue of this act, power to make, from time to time, any such lease as aforesaid.

What leases. — "(3.) The leases which this section authorizes are: —

(i.) An agricultural or occupation lease for any term not exceeding twenty-one years; and

(ii.) A building lease for any term not exceeding ninety-nine years.

"(4.) Every person making a lease under this section

(*k*) By s. 2, sub-s. (vi.), of the act, "mortgage includes any charge on any property for securing money or money's worth, and 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 property; and mortgagee in possession is, for the purposes of this act, a mortgagee who, in right of the mortgage, has entered into, and is in possession of the mortgaged property."

(*l*) By s. 2, sub-s. (ii.), of the act, "land, unless a contrary intention appears, includes real and personal property, and any estate or interest in any property, real or personal, and any debt, and anything in action, and any other right or interest."

(*m*) By s. 2, sub-s. (vii.), of the act, "incumbrance includes a mortgage in fee, or for a less estate, and a trust for securing money, and a lien, and a charge of a portion, annuity, or other capital or annual sum; and incumbrancer has a meaning corresponding with that of incumbrance, and includes every person entitled to the benefit of an incumbrance, or to require payment or discharge thereof."

may execute and do all assurances and things necessary or proper in that behalf.

"(5.) Every such lease shall be made to take effect in possession not later than twelve months after its date.

Rent. — "(6.) Every such lease shall reserve the best rent that can reasonably be obtained, regard being had to the circumstances of the case, but without any fine being taken.

"(7.) Every such lease shall contain a covenant by the lessee for payment of rent, and a condition of re-entry on the rent not being paid within a time therein specified, not exceeding thirty days.

Counterpart. — "(8.) A counterpart of every such lease shall be executed by the lessee, and delivered to the lessor, of which execution and delivery the execution of the lease by the lessor shall, in favour of the lessee, and all persons deriving title under him, be sufficient evidence.

Building lease. — "(9.) Every such building lease shall be made in consideration of the lessee, or some person by whose direction the lease is granted, having erected, or agreeing to erect, within not more than five years
*from the date of the lease, buildings, new or addi- [*57]
tional, or having improved or repaired buildings, or agreeing to improve or repair buildings within that time, or having executed, or agreeing to execute, within that time, on the land leased, an improvement for or in connection with building purposes.

"(10.) In any such building lease, a peppercorn rent, or a nominal or other rent less than the rent ultimately payable, may be made payable for the first five years, or any less part of the term.

"(11.) **Delivery of counterpart.** — In case of a lease by the mortgagor, he shall, within one month after making the lease, deliver to the mortgagee, or, where there are more than one, to the mortgagee first in priority, a counterpart of the lease, duly executed by the lessee; but the lessee shall not be concerned to see that this provision is complied with.

"(12.) **Specific performance.** — A contract to make or accept a lease under this section may be enforced by or

against every person on whom the lease, if granted, would be binding.

"(13.) This section applies only if, and as far as a contrary intention is not expressed by the mortgagor and mortgagee in the mortgage deed, or otherwise in writing, and shall have effect, subject to the terms of the mortgage deed, or of any such writing, and to the provisions therein contained.

"(14.) Nothing in this act shall prevent the mortgage deed from reserving to or conferring on the mortgagor or the mortgagee, or both, any further or other powers of leasing, or having reference to leasing; and any further or other powers so reserved or conferred shall be exercisable, as far as may be, as if they were conferred by this act, and with all the like incidents, effects, and consequences, unless a contrary intention is expressed in the mortgage deed.

"(15.) Nothing in this act shall be construed to enable a mortgagor or mortgagee to make a lease for any longer term or on any other conditions than such as could have been granted or imposed by the mortgagor, with the concurrence of all the incumbrancers, if this act had not been passed.

"(16.) **Section not retrospective.** — This section applies only in case of a mortgage made after the commencement of this act; but the provisions thereof, or any of them, may, by agreement in writing made after the commencement of this act, between mortgagor and mortgagee, be applied to a mortgage made before the commencement of this act, so, nevertheless, that any such agreement shall not prejudicially affect any right or interest of any mortgagee not joining in or adopting the agreement.

"(17.) **Contract for lease.** — The provisions of this section referring to a lease shall be construed to extend and apply, as far as circumstances admit, to any letting, and to an agreement, whether in writing or not, for leasing or letting."

[*58] * Sect. 29. — *By Tenants by Elegit, &c.*

Leases by tenants under executions, as tenants by elegit, are conditional, and may be determined by payment or satis-

faction of the debt and costs (*n*). Until so determined they remain as valid as any other demises (*o*). Where a fieri facias has issued against the property of a debtor, his term for years remains in him until the sheriff has actually assigned it; therefore until such assignment the purchaser of the term cannot make a valid lease of it (*p*). With respect to leases made by the debtor before the execution of a writ of elegit, the tenant by elegit (*i.e.*, the execution creditor) is a mere assignee of the reversion, and may, without any attornment, sue or distrain for the rent which becomes due after the filing of the writ and the inquisition thereon (*q*), provided the inquisition be valid, but not otherwise (*r*). He cannot eject a previous tenant until after his term expires or becomes forfeited, or is determined by notice to quit or otherwise (*s*).

Sect. 30. — *By Receivers.*

Leases by receivers. — Receivers appointed by the High Court cannot demise without the authority and direction of the court (*t*).[1] They are bound to obtain the best terms (*u*).

(*n*) Price *v.* Varney, 3 B. & C. 733; Cole Ejec. 566.

(*o*) But see Doughty *v.* Stiles, Rep. temp. Finch, 115.

(*p*) Playfair *v.* Musgrove, 14 M. & W. 239; 3 D. & L. 72; Doe *d.* Hughes *v.* Jones, 9 M. & W. 372; 1 Dowl., N. S. 352; Cole Ejec. 569.

(*q*) Ramsbottom *v.* Buckhurst, 2 M. & S. 565; Lloyd *v.* Davies, 2 Exch. 103; Cole Ejec. 566.

(*r*) Arnold *v.* Ridge, 13 C. B. 745.

(*s*) Doe *d.* Da Costa *v.* Wharton, 8 T. R. 2; Cole Ejec. 566.

(*t*) Morris *v.* Elme, 1 Ves. jun. 139. A receiver may be appointed by any Division of the High Court (Judicature Act, 1873, s. 24).

(*u*) Wynne *v.* Ld. Newborough, 1 Ves. jun. 164.

[1] A receiver of a railroad may under direction of the court, prior to foreclosure sale, continue to operate a connecting road leased to the mortgagor road. Miltenberger *v.* Logansport Ry. Co., 106 U. S. 286, 313.

And he may be authorized to take leases of other railway lines, and operate them as a part of the road already in his hands, where the exercise of such power is for the best interest of all parties concerned. Gibert *v.* Wash. City, Virginia Midland, &c., R. R. Co., 33 Gratt. (Va.) 586; Beach on Receivers, sec. 357.

"A court of equity having in charge the mortgaged property . . . is authorized to do all acts that may be necessary within its corporate power to

A lease under seal granted by a receiver in a cause wherein A. B. is plaintiff and C. D. is defendant, for a term of fourteen years, and reserving rent to the receiver and to any future receiver in the cause, would create a tenancy by estoppel as between him and the lessee, and give a right to distrain for rent (*x*).

Effect of attornment to a receiver. — An attornment to a receiver creates a tenancy by estoppel between the tenant and the receiver, which the court applies to the purpose of collecting and securing the rents till a decree can be pronounced, taking care that the tenant shall be protected, both while the receiver continues to act, and when by the authority of the court he is withdrawn (*y*). It does not operate as an attornment to the parties * interested so as to enable any of them to distrain, for thereby the object of the court in appointing the receiver would often be effectually defeated (*z*).

[*59]

It may be mentioned here, that a receiver of rents from sub-tenants may be appointed pending an action by a landlord for recovery of land (*a*).

SECT. 31. — *By Lords of Manors and Copyholders.*

By the lord. — Every one having a lawful interest in a manor may make voluntary grants of copyholds escheated or come to his hands, as well as admittances, according to the custom of the manor, rendering the ancient rents and ser-

(*x*) Dancer *v.* Hastings, 4 Bing. 2; cited in Morton *v.* Woods, L. R., 3 Q. B. 658, 668.

(*y*) Hughes *v.* Hughes, 1 Ves. jun. 161; Evans *v.* Mathias, 7 E. & B. 602; 26 L. J., Q. B. 309; Jolly *v.* Arbuthnot, 4 De G. & J. 224; 28 L. J., Ch. 547; Ames *v.* Birkenhead Docks Trustees, 20 Beav. 332; 24 L. J. Ch. 540.

(*z*) Evans *v.* Mathias, 7 E. & B. 590; see White *v.* Small, 22 Beav. 72; 26 Id. 191; Barton *v.* Rock, 22 Beav. 81.

(*a*) Gwatkin *v.* Bird, 52 L. J., Q. B. 262.

preserve the property and to give it additional value," &c. (*per* Christian, J., in Gibert *v.* Wash., &c., R. R. Co., 33 Gratt. 586).

A receiver of a lessee will not be personally liable if he waive the term, except to the extent of assets in his hands. Martin *v.* Black, 9 Paige (N. Y.) 641, 644 (*per* Walworth, Chan.).

vices, which bind him who has the inheritance (*b*). But voluntary grants of copyhold, by the lord, can only be made according to the custom of the manor (*c*). Where there is no custom for that purpose the lord of a manor cannot make a new grant of copyhold (*d*). The ancient rent and services must be reserved: any alteration therein will make the grant void as against the lord's successor (*e*).

Leases of the wastes.—By 13 Geo. 3, c. 81, s. 15, lords of manors, with the consent of three-fourths of the commoners, may demise for not more than four years any part of the wastes and commons, not exceeding one-twelfth part, for the best rent that can be obtained by auction, the same to be applied in draining, fencing, and improving the residue. So by custom the lord may have power to demise parcels of the waste (*f*), but a custom for the lord to grant leases of the waste, without restriction, is bad, as amounting to a power of destroying the right of common altogether (*g*). A copyhold, to which a right of common was annexed, having by the custom of the manor vested in the lord by forfeiture, and he having regranted it as a copyhold tenement with the appurtenances; it was held, that having always continued demisable whilst in the hands of the lord, it was a customary tenement, and, as such, was entitled to the right of common (*h*).

By copyholders.—A copyholder cannot make a lease for more than one year without a licence or by special custom, without thereby incurring a forfeiture * of [*60] his estate (*i*). In most manors a copyholder may demise for one year or less without any licence of the lord (*k*);

(*b*) Badger *v.* Forde, 3 B. & A. 153.

(*c*) Rex *v.* Welby, 2 M. & S. 504; Cole Ejec. 632.

(*d*) Rex *v.* Hornchurch, 2 B. & A. 189; Cole Ejec. 632.

(*e*) Doe *d.* Rayner *v.* Strickland, 2 Q. B. 792.

(*f*) Ld. Northwick *v.* Stanway, 3 Bos. & P. 346.

(*g*) Badger *v.* Forde, 3 B. & A. 153; Arlett *v.* Ellis, 7 B. & C. 346; but see Lascelles *v.* Lord Onslow, 36 L. T. 459.

(*h*) Badger *v.* Forde, *supra*.

(*i*) Scriven, 329, 330 (5th ed.); Anon., Moor. 184; East *v.* Harding, Cro. Eliz. 498; Jackman *v.* Hoddesden, Id. 351; Cole Ejec. 615, 627.

(*k*) Scriven Cop. 329 (5th ed.); Cole Ejec. 627; Frosel *v.* Welsh, Cro. Jac. 403; Mathews *v.* Whetton, Cro. Car. 233; Goodwin *v.* Longhurst, Cro. Eliz. 535; Erish *v.* Rives, Id. 717.

but this is by custom of the manor (*l*). A lease for one year, and so from year to year during ten years, being in effect a lease for ten years, is a forfeiture but otherwise of a lease for one year, with a covenant for the holding it for a longer time at the will of the lessor (*m*). A lease for one year and so from year to year for the life of the lessee, being a lease for two years at least, is not good (*n*). So if it be for a year except one day, and so on from year to year, excepting one day in every year; for it is a certain lease for two years excepting two days, which is a lease in effect for more than one year; and although there be the intermission of a day, yet there is a mere evasion and not material (*o*). So if a copyholder makes three leases together, each to commence within two days after the expiration of the other, it is a mere evasion of the custom, and therefore not good (*p*). So a lease for more than one year, though intended only as for a collateral security, is bad, if it amounts to a present demise (*q*). A lease for years, without licence from the lord, is not good without a special custom, though the lease be made by parol, or be not in possession, but to commence in futuro; and such lease is a forfeiture if it be a good lease as between the parties (*r*).

Under special custom. — By special custom, a copyholder may make leases for more than one year, or for life, and a certain number of years after, without licence from the lord (*s*). A custom for copyholders in fee to lease for any number of years without licence, on condition of the term ceasing on the lessor's death, is a good custom (*t*). The powers granted by the Settled Estates Act (*u*), includes powers to the lords of settled manors to give licences to their copyhold and customary tenants to grant leases of lands held by them of such manors, to the same extent, and for the same purposes, as leases may be granted of freehold hereditaments

(*l*) Turner *v.* Hodges, Hetley, 126; Lit. Rep. 233; Cole Ejec. 627.

(*m*) Lady Montague's case, Cro. Jac. 301; Cole Ejec. 615.

(*n*) Luttrell *v.* Weston, Cro. Jac. 308; Cole Ejec. 34, 442.

(*o*) Lady Montague's case, Cro. Jac. 301.

(*p*) Mathews *v.* Whetton, Cro. Car. 233.

(*q*) Morris *v.* Twist, 2 Mod. 79.

(*r*) Com. Dig. tit. Copyhold (K. 3).

(*s*) Scriven Cop. 330 (5th ed.).

(*t*) Turner *v.* Hodges, Hutt. 101.

(*u*) *Ante*, 5.

under the act (*x*). The granting of a licence is entirely in the discretion of the lord, and the court will not compel him to grant a licence, even where there is a custom to pay a certain sum for every year of the term (*y*).

Under licence from the lord. — A copyholder having licence to demise, ought not to exceed the *licence, [*61] otherwise the lease is bad (*z*); but he may lease for fewer years than his licence allows (*a*). If the lord licence his copyholder for life, to make a lease for three years, if he so long lives, a lease for three years absolutely is good (*b*); because a lease by a copyholder for life determines by his death. If the lord licence upon condition, the condition is void: for he gives nothing, but only dispenses with the forfeiture (*c*). A tenant at will of a manor cannot grant a copyholder a licence to alien for years; and if a tenant for life of a manor grants a licence to alien for years, it determines at his death (*d*).

What lease is a forfeiture. — A lease without licence, and contrary to the custom, in order to amount to a forfeiture, must be a complete demise; therefore, where a copyholder demised his copyhold for a year, and agreed to grant a further term of twenty-one years, provided he could obtain of his lord a licence for that purpose, the licence was held to be a condition precedent, and therefore that no forfeiture was incurred (*e*). If the interest actually granted be within the period allowed by the custom of the manor, although the lessor covenants that the lessee shall enjoy the land for a longer period, no forfeiture is incurred; the distinction being

(*x*) 40 & 41 Vict. c. 18, s. 9.

(*y*) Reg. *v.* Hale, 9 A. & E. 339.

(*z*) Haddon *v.* Arrowsmith, Owen, 73; Cro. Eliz. 461; Jackson *v.* Neal, Cro. Eliz. 394; Scriven Cop. 332 (5th ed.); Com. Dig. tit. Copyhold (K. 3); Doe *d.* Robinson *v.* Bousfield, 6 Q. B. 422; 1 C. & K. 558.

(*a*) Goodwin *v.* Longhurst, Cro. Eliz. 535; Worledge *v.* Benbury, Cro. Jac. 437; Isherwood *v.* Oldknow, 3 M. & S. 382; Easton *v.* Pratt, 2 H. & C. 676; 33 L. J., Ex. 233; Cole Ejec. 615.

(*b*) Worledge *v.* Benbury, Cro. Jac. 436; Cole Ejec. 615; Scriven Cop. 332, 5th ed.

(*c*) Haddon *v.* Arrowsmith, Cro. Eliz. 461; Doe *d.* Wood *v.* Morris, 2 Taunt. 52; Cole Ejec. 628.

(*d*) Com. Dig. tit. Copyhold (C. 3); Scriven Cop. 331 (5th ed.).

(*e*) Bac. Abr. tit. Leases (1, 6); Price *v.* Birch, 4 M. & G. 1; 1 Dowl. N. S. 720; Lenthall *v.* Thomas, 2 Keb. 267; Pester *v.* Cater, 9 M. & W. 315.

between an interest actually granted and a matter which rests entirely in contract (*f*). No one can take advantage of the forfeiture, except the party who was lord at the time it occurred. The remainderman or reversioner, after the death of the lord without entry or seizure for the forfeiture, has no such right (*g*). The admittance of a copyholder after a forfeiture has been incurred, is a waiver of such forfeiture; and any act equally solemn will operate in the same manner. A waiver does not operate as a new grant, but the tenant is in of his old title (*h*). If a copyholder, after a lease by licence, forfeit his copyhold, the lord cannot avoid the lease (*i*).

Effect of leases by copyholders. — A lease by a copyholder not warranted by the custom, and without the licence of the lord, is good against the parties themselves and against every one but the lord (*k*); and as against the lord it is [*62] only *a ground of forfeiture, which he may waive (*l*).

If a copyholder make a lease by licence, the lessee may assign without licence, or make an under-lease, for the lord by his licence has parted with his interest; so if the lessor after a lease by licence die without heir, the lessee shall have it for his term against the lord, for the licence is a confirmation of the lord (*m*).

Sect. 32. — *By Agents and Bailiffs.*

(a) *Agents.*

Authority of. — An agent having sufficient authority may bind his principal by leases and agreements for leases made

(*f*) Lady Montague's case, Cro. Jac. 301; Lenthall *v.* Thomas, 2 Keb. 267; Doe *d.* Coore *v.* Clare, 2 T. B. 739; Richards *v.* Ceely, 3 Keb. 638; Cole Ejec. 615.

(*g*) Lady Montague's case, *supra*; Eastcourt *v.* Weeks, 1 Salk. 186; Margaret Podger's case, 9 Co. R. 107 a; 1 Brownl. 181; 2 Id. 134, 153; Cole Ejec. 615.

(*h*) Doe *d.* Tarrant *v.* Hellier, 3 T. R. 171.

(*i*) Com. Dig. tit. Copyhold (C. 3); Clarke *v.* Arden, 16 C. B. 227.

(*k*) Salisbury *d.* Cooke *v.* Hurd, Cowp. 481; Wells *v.* Partridge, Cro. Eliz. 469; Ashfield *v.* Ashfield, Sir W. Jon. 157; Doe *d.* Tressider *v.* Tressider, 1 Q. B. 416; Doe *d.* Robinson *v.* Bousfield, 1 C. & K. 558; 6 Q. B. 492; Downingham's case, Owen, 17; Cole Ejec. 627.

(*l*) Doe *d.* Robinson *v.* Bousfield, 6 Q. B. 492; 1 C. & K. 558.

(*m*) Johnson *v.* Smart, 1 Roll. Ab. 508, pl. 14.

for him and in his name and on his behalf (*n*).[1] If the lease or agreement be under seal, the agent's authority to execute it must also be under seal (*o*). But if the lease or agreement be not under seal, the agent's authority need not be under seal, nor even in writing, notwithstanding the 4th section of the Statute of Frauds (*p*). The agent should not exceed his authority, otherwise the principal will not be bound, and the agent will incur a personal liability (*q*). The authority of the agent to sign the particular contract, or such a contract, must be proved, if disputed, in an action or suit against the principal (*r*). A steward or land agent has no authority as such to enter into contracts for leases (*s*); but a power to "manage and superintend estates" gives an authority to contract for the granting of customary leases according to the nature and locality of the property to be demised (*t*). A farm bailiff with authority to let from year to year on the usual terms and to receive rents, has no implied authority to let on unusual terms, or to make any

(*n*) Hamilton *v.* Earl Clanricarde, 1 Bro. P. C. 341; Ridgway *v.* Wharton, 3 De G., M. & G. 677, 688; 6 H. L. Cas. 238.

(*o*) 3 Bac. Abr. 408; Com. Dig. tit. Attorney (C. 1), (C. 5); Harrison *v.* Jackson, 7 T. R. 207; Horsley *v.* Rush, Id. 209.

(*p*) 29 Car. 2, c. 3; Coles *v.* Trecothick, 9 Ves. 234, 250; Clinan *v.* Cooke, 1 Sch. & Lef. 22; Dyas *v.* Cruise, 2 Jon. & Lat. 461; Clarke *v.* Fuller, 16 C. B., N. S. 34; Forster *v.* Rowland, 7 H. & N. 103; Heard *v.* Pilley, L. R., 4 Ch. Ap. 548.

(*q*) Fenn *v.* Harrison, 3 T. R. 758; Hamilton *v.* Earl Clanricarde, 5 Bro. P. C. 547; Speeding *v.* Nevell, L. R., 4 C. P. 212.

(*r*) Blore *v.* Sutton, 3 Mer. 237; Ridgway *v.* Wharton, 3 De G., M. & G. 677, 686; 27 L. J., Ch. 46; 6 H. L. Cas. 238; Firth *v.* Greenwood, 1 Jur., N. S. 806; Turner *v.* Hutchinson, 2 F. & F. 185; Spedding *v.* Nevell, L. R., 4 C. P. 212.

(*s*) Collen *v.* Gardiner, 21 Beav. 540; Mortal *v.* Lyons, 8 Ir. R. Ch. 112; Ridgway *v.* Wharton, *supra*.

(*t*) Peers *v.* Sneyd, 17 Beav. 151.

[1] If the agent of lessor contract in his own name, in behalf of his principal, the lease will bind lessee by estoppel, and agent (in this case a committee) can bring suit for rent in own name. Stott *v.* Rutherford, 92 U. S. 107.

An agent who takes a lease expressly contracting for a foreign principal is not necessarily personally liable. The question is one of intent. The presumptions are stronger against him than if he had a domestic principal, yet, if the contract be in name of foreign principal and upon his credit, agent will not be liable. O'Neil *v.* Wells, 2 Russ. & Ches. (N. S.) 205, 206, 207.

special stipulations without the express authority of his principal (*u*).

Subsequent ratification. — If an agent acts without sufficient authority, his acts may be subsequently adopted and ratified in writing by his principal (*x*), * or even without any writing (*y*). Even where an agent executes a deed on behalf of his principal, but without sufficient authority, the latter may adopt and ratify the deed by re-delivering it, or by anything tantamount to a re-delivery (*z*). An authority created by deed may be revoked without deed (*a*).

[*63]

Agent should sign name of principal. — An agent, who has sufficient authority, whether by deed or otherwise, should execute any lease or agreement in the name of his principal, and not in his own name only (*b*). Thus, "A. B. (seal) by E. F., his attorney," to which may be added, "by power of attorney hereunto annexed *or* a copy whereof is hereunto annexed *or* hereupon indorsed."

Form of signature, &c. — If the writing be not under seal, it should be signed thus, — "A. B. by E. F. his attorney," *or* "Per pro. A. B., E. F., or to that effect" (*c*).

Implied warranty of authority. — If an agent executes a lease or agreement professedly as attorney or agent for another, he thereby impliedly warrants and promises that he has sufficient authority from his principal to execute such contract on his behalf, and an action will lie against him personally or against his representatives, for the breach of such warranty or promise, if he really has no such authority (*d*).

(*u*) Turner *v.* Hutchinson, 2 F. & F. 185. As to House-Agent, see *post*, 64.

(*x*) Fitzmaurice *v.* Bayley, 6 E. & B. 868; reversed in error on another point, 8 E. & B. 664; 9 H. L. Cas. 78.

(*y*) Rodmell *v.* Eden, 1 F. & F. 542.

(*z*) Shep. Touch. 57; Tupper *v.* Foulkes, 9 C. B., N. S. 797; 30 L. J., C. P. 214.

(*a*) Rex *v.* Wait, 11 Price, 508; Manser *v.* Black, 6 Hare, 443.

(*b*) Combe's case, 9 Co. R. 77 a; White *v.* Cuyler, 6 T. R. 177; Wilks *v.* Bach, 2 East, 142; Appleton *v.* Binks, 5 East, 148; Tanner *v.* Christian, 4 E. & B. 591; Parker *v.* Winlow, 7 E. & B. 942, 947; Cooke *v.* Wilson, 1 C. B., N. S. 153; 26 L. J., C. P. 15; Saxon *v.* Blake, 29 Beav. 438; M'Ardle *v.* Irish Iodine Manufacturing Co., 15 Ir. C. L. Rep. 146.

(*c*) Alexander *v.* Sizer, L. R., 4 Ex. 102.

(*d*) Collen *v.* Wright, 7 E. & B. 301; 8 Id. 647; 27 L. J., Q. B. 215;

Agent when personally liable. — If an agent executes a lease or agreement in his own name only, whether under seal (*e*), or not under seal (*f*), he will be personally liable as a principal, although in the body of the instrument he is described as agent for A. B., and is therein stated to make it for and on behalf of A. B.; because an agent may, if he please, contract a personal liability for and on behalf of his principal (*g*). Parol evidence would not be admissible to *exonerate the agent* from such personal liability, for that would contradict the writing (*h*). But it would be admissible *to charge the principal*, and to enable him to sue or be sued on the contract (*i*). To avoid such personal liability the agent should always *sign as agent*, and not with his own name only (*k*).

*** Misrepresentation by agent.** — With respect to mis- [*64] representations made by agents on the sale or letting of property, whereby a person is induced to enter into a disadvantageous contract, which otherwise he would not have done, it is material to ascertain whether such misrepresentations were *fraudulently made*. If not, the contract cannot be avoided for "fraud, covin, and misrepresentation" (*l*). This was expressly held in Cornfoot *v.* Fowke (*m*). There the plaintiff put a furnished house into the hands of an agent to let at a stipulated rent. The plaintiff knew, but the

Simons *v.* Patchett, 7 E. & B. 568; Pow *v.* Davis, 1 B. & S. 220; 30 L. J., Q. B. 257; Spedding *v.* Nevell, L. R., 4 C. P. 212.

(*e*) Appleton *v.* Binks, 5 East, 148.

(*f*) Tanner *v.* Christian, 4 E. & B. 591; Cooke *v.* Wilson, 1 C. B., N. S. 153; 26 L. J., C. P. 15; Parker *v.* Winlow, 7 E. & B. 942, 947; Saxon *v.* Blake, 29 Beav. 438.

(*g*) Norton *v.* Herron, 1 C. & P. 648; Ry. & Moo. 229; Tanner *v.* Christian, 4 E. & B. 591; Cooke *v.* Wilson, 1 C. B., N. S. 153; 26 L. J., C. P. 15; Parker *v.* Winlow, 7 E. & B. 942, 947.

(*h*) Higgins *v.* Senior, 8 M. & W. 844; Humble *v.* Hunter, 12 Q. B. 310; Jones *v.* Littledale, 6 A. & E. 486; Magee *v.* Atkinson, 2 M. & W. 440; Chadwick *v.* Maden, 9 Hare, 191; Pry, s. 153.

(*i*) Higgins *v.* Senior, *supra;* Humfrey *v.* Dale, 7 E. & B. 266; E., B. & E. 1004.

(*k*) Green *v.* Kopke, 18 C. B. 549; Clay *v.* Southern, 7 Exch. 717; 27 L. J., Ex. 202; Parker *v.* Winlow, 7 E. & B. 942; Deslands *v.* Gregory, 2 E. & E. 602; Cooke *v.* Wilson, 1 C. B., N. S. 153; Alexander *v.* Sizer, L. R., 4 Ex. 102.

(*l*) Cornfoot *v.* Fowke, 6 M. & W. 358; Lord Abinger, C. B., diss. See notes to Pasley *v.* Freeman, 2 Sm. L. C., 8th ed., p. 87, where it is said that Cornfoot *v.* Fowke is "by no means universally admitted as law;" Feret *v.* Hill, 15 C. B. 207.

(*m*) 6 M. & W. 358.

agent did not know, that the adjoining house was a bawdy-house. That the defendant had been informed by the agent, in answer to an inquiry, that there was no objection to the house, was held not to be a defence to an action for not taking it (*m*). But if the agent made such representations fraudulently, the principal will be liable, although he did not instruct his agent to make any representations on the subject (*n*). So if the principal authorizes any such false representations, or knowingly employs an agent, ignorant of the particular defect or objection, in order that the latter may innocently, but inaccurately answer questions on the subject, it by no means follows that the party defrauded can repudiate and rescind the whole contract, by reason of the fraud practised upon him (*o*), although sometimes that may be done immediately after the fraud is discovered, provided the parties can be replaced *in statu quo*, but not otherwise (*o*). This can seldom if ever happen where an estate has passed, or possession has been taken.

House-agent. — A house-agent letting a house for his employer seems to be liable if he neglects to make reasonable inquiries as to the solvency of the tenant. In a case where the house-agent introduced a tenant, and charged 5 per cent. commission, it was held to be a question for the jury, in an action brought by his employer in consequence of the tenant's insolvency, whether it was part of the house-agent's duty to make reasonable inquiries into the eligibility of the tenant. The court refused to set aside a verdict for the plaintiff, and the several members of the court expressed strong opinions as to the liability of the house-agent. "What does the house-agent receive his commission for," asked Wightman, J., "except for making inquiries as to the fitness of the tenant?" (*p*). It seems doubtful whether a [*65] *house-agent has implied authority to let persons

(*m*) 6 M. & W. 358.

(*n*) See Barwick *v.* English Joint Stock Bank, L. R., 2 Ex. 259, Ex. Ch.

(*o*) Hunt *v.* Silk, 5 East, 449; Blackburn *v.* Smith, 2 Exch. 783; Feret *v.* Hill, 15 C. B. 207; Clarke *v.* Dickson, E., B. & E. 148.

(*p*) Heys *v.* Tindall, 1 B. & S. 296; 30 L. J., Q. B. 362; 4 L. T. 403; 9 W. R. 664.

into possession; but slight evidence will be sufficient to prove that he had express authority (*q*).

Right of house agent to commission. — No case, so far as the editor is aware, expressly decides what commission, if any, a house-agent finding a person ready to be tenant, but whom his principal without reason declines to accept, is entitled to claim. In *Prickett* v. *Badger* (*r*), it was held that an agent employed to sell a property at 1½ per cent. commission, and who found a purchaser, who made a binding offer, was entitled, on his principal declining the offer, to sue on a *quantum meruit*, and it was said by Wiles, J., to recover the whole of the agreed commission. The principle of this case would, it is conceived, apply to some extent to the case of a house-agent procuring a binding offer to accept a lease from a person to whom as tenant no reasonable objection could be taken.

It is believed, however, to be a common practice for house-agents to agree that "commission is only to be chargeable on a letting being carried out through their instrumentality," and if such an agreement (which is frequently expressed in a printed register, &c.) can be proved, no commission or even a *quantum meruit* would seem to be chargeable till an absolutely binding contract has been concluded.

Amount of commission. — It may be useful to insert here the "Terms of Commission authorized by the Institute of Estate and House-Agents." They are: —

For Letting Unfurnished Houses, or Disposing of Leases, other than Ground Leases.

If let for three years or less, £5 per cent. on one year's rent; if for more than three years, £7½ per cent. on one year's rent, and (in either case) upon the premium or consideration £5 per cent. up to £1,000, and £2½ per cent. on the residue, and the commission on any sum obtained for fixtures, furniture, or effects of any kind, of £5 per cent. up to £500, and £2½ per cent. on the residue.

(*q*) Slacke *v.* Crewe, 2 F. & F. 59. (*r*) 26 L. J. C. P. 33; 1 C. B. N. S. 296.

FOR LETTING FURNISHED HOUSES IN TOWN OR COUNTRY.

When let for a year or less period, £5 per cent. on the rental.

When let for more than a year, £5 per cent. on first year's rent, and £2½ per cent. on rent for remainder of term.

Where a property is let, and the tenant afterwards purchases, the commission for selling will then become chargeable, less the amount previously paid for letting.

[*66] *FOR VALUATIONS OR SALE OF FURNITURE, FIXTURES, AND OTHER EFFECTS.

£5 per cent. up to £500, and £2½ per cent. on the residue.

The commission may be lost by revocations of the instructions to let, but a *quantum meruit* may be recovered for expense and trouble incurred before the revocation (*s*).

House-agent must be licensed. — By 24 & 25 Vict. c. 21, s. 10, "every person who, as an agent for any other person, shall, for or in expectation of fee, gain or reward of any kind, advertise for sale or for letting any furnished house or part of any furnished house, or who shall by any public notice or advertisement, or by any inscription in or upon any house, shop, or place, used or occupied by him, or by any other ways or means, hold himself out to the public as an agent for selling or letting furnished houses, and who shall let or sell, or agree to let or sell, or make, or offer, or receive any proposal, or in any way negotiate for the selling or letting of any furnished house or part of any furnished house, shall be deemed to be a person using and exercising the business, occupation and calling of a house-agent within the meaning of this act and the Schedule (B.) hereto (*t*), and shall be licensed accordingly: provided that no person shall be deemed to be such house-agent by reason of his letting or agreeing or offer-

(*s*) Simpson *v.* Lamb, 25 L. J. C. P. 113; 17 C. B. 603. In this case the instructions were to sell an advowson.

(*t*) Schedule B. is as follows: — "Licence to be taken out yearly after the 5th day of July, 1862, by every person who shall use or exercise the business, occupation or calling of a house agent . . . 2*l.* 0*s.* 0*d.*"

ing to let, or in any way negotiating for the letting of any house not exceeding the annual rent or value of twenty-five pounds: provided also, that any story or flat rated and let as a separate tenement shall be considered to be a house for the purpose of this enactment."

Duration of a licence. — By sect. 11, "The Commissioners of Inland Revenue, and any person authorized by them, shall after the 5th of July, 1861, grant licence to any person who shall apply for the same to use and exercise the business, occupation and calling of a house-agent, which licence shall also authorize the person to whom it is granted to use and exercise the calling or occupation of an appraiser; and any such licence issued between the 5th of July and the 5th of August in any year shall be dated on the 6th of July, and any such licence issued at any other time shall bear the date of the day on which the same shall be issued, and every such licence shall continue in force from the day of the date thereof until and upon the 5th of July then next following and no longer."

Penalty for acting without licence. — By sect. 12, "every person who shall use or exercise the business, occupation or calling of a house-agent, without having a licence in *force under this act so to do, shall forfeit the sum [*67] of twenty pounds."

From the wording of this section it would seem not to be applicable to an isolated letting (although for commission) by an unprofessional person.

Saving for land-agent, &c. — Sect. 13 provides, "that this act shall not extend to require any agent employed in the management of landed estates, or any attorney, solicitor, proctor, writer to the signet, agent or procurator admitted in any court of law, or any conveyancer who shall as such have taken out his annual certificate, or any auctioneer or appraiser, having in force a licence as such, to take out a licence under this act as a house-agent."

(b) *Bailiffs.*

Power of bailiffs to grant leases. — A bailiff of a manor cannot, by virtue of his office, make leases for years; for

his business is only to collect the rents, gather the fines, look after the forfeitures, and such like: he has no estate or interest in the manor itself, and therefore cannot contract for any certain interest thereout: but the lord of the manor may give him a special power to make leases for years as he may do to any stranger; and then such leases, if they are pursuant to the power, and made in the name of the lord, will be as good as leases by the lord himself. A general bailiff of a manor may make leases *at will* without any special authority, because, having to collect an answer for the rents of the manor to his lord, if he could not let leases at will the lord might sustain great prejudice by absence, sickness, or other incapacity to make leases when any of the former leases were expired; and such leases at will are for the benefit of the lord, and can be no ways prejudicial to him, because he may determine his will when he thinks fit. Such, however, must be taken to be strict tenancies at will, and not from year to year (*u*).

(*u*) Shopland *v.* Rydler, Cro. Jac. 55; Gybson *v.* Searls, Cro. Jac. 84, 176.

*CHAPTER II. [*68]

TO WHOM TERMS MAY BE GRANTED.

SECT. 1. — *Generally.*

General rule. — Every person who is not rendered incompetent by some legal disability is capable of being a lessee.[1]

SECT. 2. — *To Ecclesiastical Persons.*[2]

By 1 & 2 Vict. c. 106, s. 28, "it shall not be lawful for any spiritual person, holding any cathedral preferment or bene-

[1] In this miscellaneous class may be named the United States government. Mills *v.* United States, 19 Ct. of Claims, 79; Conn. Mut. Life Ins. Co. *v.* U. S., 21 Ct. of Claims, 195. In the first-named case written leases approved by Generals Augur, Ord, and Sheridan were held void because not approved by the quartermaster-general, but there was held to have arisen an implied tenancy, the government having occupied the premises and erected a fort thereon with the consent of the owner, and vouchers for the payment of several years' rent having, by orders of the Secretary of War, been sent to the treasury for settlement.

An unincorporated society or club may take a lease. Alexander *v.* Tolleston Club, 110 Ill. 65. And a lease "during the existence of said club" will continue notwithstanding it is afterwards incorporated.

The park commissioners or directors of a public park may take a lease. The Queen *v.* Miller, 4 Russ. & Geld. (N. S.) 361.

[2] The civil powers of ecclesiastical corporations are the same as those of secular corporations in America. Whether they can take leases depends upon the extent of their express or implied powers as determined by their charters and the objects of their organization. See *ante*, ch. 1, sec. 12, notes.

fice, or any curacy or lectureship, or who shall be licensed or otherwise allowed to perform the duties of any ecclesiastical office whatever, to take to farm for occupation by himself, by lease, grant, words, or otherwise, for term of life, or of years, or at will, any lands, exceeding eighty acres in the whole, for the purpose of occupying, or using, or cultivating the same, without the permission in writing of the bishop of the diocese, specially given for that purpose under his hand; and every such permission to any spiritual person to take farm, for the purpose aforesaid, any greater quantity of land than eighty acres shall specify the number of years, not exceeding seven, for which such permission is given: and every such spiritual person, who shall, without such permission, so take to farm any greater quantity of land than eighty acres, shall forfeit for every acre of land above eighty acres, so taken to farm, the sum of forty shillings for each year during or in which he shall so occupy, use or cultivate such land, contrary to the provisions aforesaid." By sect. 124, the word "benefice" is explained to mean benefices with cure of souls, and no others; and to comprehend all parishes, perpetual curacies, donatives, endowed public *chapels, parochial chapelries or districts belonging or reputed to belong, or annexed or reputed to be annexed, to any church or chapel.

[*69]

A lease made contrary to the provisions is not void, but voidable merely on an information brought for holding a quantity of land above eighty acres.

Sect. 3. — *To Trustees for Charitable Uses.*[1]

The Mortmain Acts. — Leases of land in England or Wales to trustees *for charitable uses* must (like other conveyances)

[1] Whether trustees in America can take leases depends upon the extent of their express and implied powers.

Trustees under continuing or permanent trusts necessarily have implied power (unless restrained by the trust instrument or by statute) to take leases, so far as necessary, for the purposes of the trust. Likewise, trustees under temporary trusts have power to take short leases or leases at will, if necessary to successfully carry out the objects of the trust. See *ante*, ch. 1, sec. 17, note.

be made according to the Mortmain Acts (*a*). They must be by deed, sealed and delivered in the presence of two or more credible witnesses (*b*), twelve calendar months at least before the death of the grantor, and inrolled in chancery within six calendar months next after the execution thereof, and must be made to take effect in possession for the charitable uses intended immediately from the making thereof, and be without any power of revocation, reservation, trust, condition, limitation, clause, or agreement whatsoever for the benefit of the grantor, or of any person or persons claiming under him, other than and except such as are specially permitted by the above-mentioned acts. By 26 & 27 Vict. c. 106, "Every deed or assurance by which any land shall have been demised for any term of years for any charitable use shall, for all the purposes of the said recited acts, be deemed to have been made to take effect for the charitable use thereby intended, if the term for which such land shall have been thereby demised was thereby made to commence and take effect in possession at any time within one year from the date of such deed or assurance." A deed which is merely colourable as to the consideration, and which is framed to evade the provisions of the Mortmain Acts, is fraudulent and void as against the grantor's heir (*c*). A man demised to his sister lands for twenty years at a peppercorn rent. Three months afterwards he granted the same lands to charitable uses, subject to the lease. Held that such grant was an evasion of the statute and void (*d*).

The Mortmain Acts do not extend to lands in Scotland or Ireland, nor to grants, &c., to the Universities of Oxford or Cambridge, or any colleges or houses of learning therein, or to the Colleges of Eton, Winchester, or Westminster. When lands are already in * mortmain, a [*70]

(*a*) 9 Geo. 2, c. 36; 9 Geo. 4, c. 85; 24 & 25 Vict. c. 9; 25 & 26 Vict. c. 17; 26 & 27 Vict. c. 106; 27 Vict. c. 13; 29 & 30 Vict. c. 57.

(*b*) Wiackmh *v.* Marquis of Bath, 35 L. J., Ch. 5; L. R., 1 Eq. 17; 35 Beav. 59.

(*c*) Doe *d.* Williams *v.* Lloyd, 5 Bing. N. C. 741.

(*d*) Wickham *v.* Marquis of Bath, L. R., 1 Eq. 17; 35 Beav. 59; 35 L. J., Ch. 5.

lease thereof to charitable uses is not within the 9 Geo. 2, c. 36 (*e*).

Exemption of Art Buildings, &c. — By 31 & 32 Vict. c. 44, intituled "An Act for facilitating the acquisition and enjoyment of sites for Buildings for Religious, Educational, Literary, Scientific, and other Charitable purposes," leases, &c., of land not exceeding two acres *bonâ fide* made to trustees of a society for any of the above purposes, for full rent or value, are exempt from the provisions of the Mortmain Acts (9 Geo. 2, c. 36, and 24 & 25 Vict. c. 9, s. 2).

SECT. 4. — *To Infants.*[1]

When void or voidable. — Leases to infants are not absolutely void, but voidable by them upon attaining their majority. And it would seem that an infant who has taken possession under a lease which is disadvantageous to him, is liable if he has not disclaimed on attaining his full age (*f*). Even during infancy he may be liable for the use and occupation of *necessary* lodgings or apartments suitable to his state and degree (*g*). Where an infant rented a house, and exercised his trade as a barber therein, it was held that it was properly left to the jury to decide whether it was as a necessary of life, or a mere incident to his trade (*h*). In the latter case, as an infant is incapable by law of trading, he would not be liable; in the former case he would (*i*).

Election to avoid — when made. — The election to avoid a lease must be made by the infant within a reasonable time after he attains his full age (*j*); and an acquiescence of four months after majority has been held to preclude an infant from afterwards disaffirming a lease (*k*). An acqui-

(*e*) Walker *v.* Richardson, 2 M. & W. 882; Att.-Gen. *v.* Glyn, 12 Sim. 84; Ashton *v.* Jones, 28 Beav. 460.

(*f*) Bull. N. P. 177; Ketsey's case, Cro. Jac. 320; Baylis *v.* Dyneley, 3 M. & S. 477; Holmes *v.* Blogg, 8 Taunt. 35.

(*g*) Hands *v.* Slaney, 8 T. R. 578.

(*h*) Lowe *v.* Griffiths, 1 Scott, 458.

(*i*) See Smith, L. & T. 70.

(*j*) See North Western Rail. Co. *v.* McMichael, 5 Ex. 128.

(*k*) Holmes *v.* Blogg, 8 Taunt. 35.

[1] For American authorities upon validity of infant's contracts, see *ante*, ch. I, sec. 19, notes.

essence for so long a period would be evidence from which a jury might infer an affirmance of the lease.

If the infant lessee elect to annul a lease *under which he has occupied*, he cannot recover the premium paid for it, although subsequent events may effect a complete failure of the object for which the premium was paid (*k*). In such a case there would have been only a partial, not a total failure of consideration; if the failure be total the infant can recover (*l*).

Avoidance for misrepresentation of age. — If a lease be set aside at the instance of the lessor, on the ground that the lessee is an infant, and obtained the lease on the *misrepresentation that he was of full age, the lessor cannot recover for use and occupation (*m*). [*71]

Infant jointly interested. — If a person jointly interested with an infant in a lease obtain a renewal to himself only, and the lease prove beneficial, he is held to have acted as trustee, and the infant may claim his share of the benefit: but if it do not prove beneficial, he must take it upon himself (*n*).

Renewal of leases to infants. — By virtue of 1 Will. 4, c. 65, s. 12, leases to infants may, under the direction of the Chancery Division of the High Court (*o*), be surrendered and renewed. This act applies equally, whether the interest of the infant be legal or equitable (*p*).

Sect. 5. — *To Married Women.*[1]

At common law, a married woman may be a lessee, her husband's express assent to the lease not being necessary, as

(*l*) Corpe *v.* Overton, 10 Bing. 252; and see Everett *v.* Wilkins, 29 L. T. 846.

(*m*) Lempriere *v.* Lange, L. R., 12 Ch. D. 675; 41 L. T. 378; 27 W. R. 879.

(*n*) *Ex parte* Grace, 1 B. & P. 376.

(*o*) Judicature Act, 1873, s. 34.

(*p*) *In re* Griffiths, W. N. for April 4th, 1884.

[1] For American authorities upon the contracts of married women, both at common law and under the enabling statutes, see *ante*, ch. I, sec. 22, notes. At common law a married woman was absolutely incapable of contracting, and, of course, could neither give nor take leases. This disability largely remained until within a very few years. Now, by virtue of various enabling statutes, she has power under certain restrictions to make contracts as if sole.

the estate vests until he signifies his dissent (*q*).[1] She may, however, avoid it after his death (*r*). A married woman living separate from her husband may, at common law, by taking a lease, bind her separate estate for payment of the rent and performance of the covenants (*s*), and it is expressly provided by the Married Women's Property Act, 1882, 45 & 46 Vict. c. 75, sub-s. 3 and 4, not only that "every contract entered into by a married woman shall be deemed to be a contract entered into by her with respect to and to bind her separate estate, unless the contrary be shown:" but also that "every contract entered into by a married woman with respect to and to bind her separate property shall bind not only the separate property which she is possessed of or entitled to at the date of the contract, but also all separate property which she may thereafter acquire."

Leases to husband and wife. — If a lease be made to a husband and wife, the wife cannot disagree to it during the life of her husband, and, if she acquiesce after his death, she will be liable for all arrears of rent which accrued during his lifetime, and may be charged with waste during the coverture (*t*). But it is said, however, that if there be any special covenants inserted in the lease, she is not bound by them after the death of her husband, although she continues tenant by force of the demise (*u*).

Renewal of leases. — By 1 Will. 4, c. 65, s. 12, leases to married women may, under the directions of the Chancery Division of the High Court (*o*), be surrendered and renewed.

(*q*) Swaine *v.* Holman, Hob. 204; Co. Lit. 3 a.

(*r*) Co. Lit. 3 a.

(*s*) Gaston *v.* Frankum, 2 De G. & Sm. 561; Fry, s. 157.

(*t*) 2 Inst. 303; 2 Roll. 827, 1, 10, 25; Com. Dig. tit. Baron and Feme (S. 2).

(*u*) 1 Roll. Abr. 349, pl. 2; Brownl. 31; Dyer, 13 b.

The common law still prevails except so far as expressly changed. The extent of these changes can be accurately ascertained only by consulting the statutes of the several states.

[1] A lease to a wife to which her husband does not dissent being her chattel real, belonged at common law to her husband, and in ejectment brought against him by the wife's lessor, husband is estopped to deny lessor's title. Lucas *v.* Brooks, 18 Wall. 436, 451.

* Sect. 6. — *To Lunatics.*[1] [*72]

Liability of. — Idiots and lunatics may take leases for their benefit (*v*). Use and occupation cannot be maintained on a written agreement entered into by a lunatic to take a house which is unnecessary, if the lessor was aware of it, and took advantage of the lunatic's situation (*x*).

Renewal of leases. — Committees of lunatics may, by 16 & 17 Vict. c. 70 (*y*), under the direction of the Lord Chancellor, surrender leases and take new ones for the benefit of the lunatic.

Sect. 7. — *To Convicts.*

The leaseholds of a convict come under the operation of the act 33 & 34 Vict. c. 23, which was passed in 1870 to abolish forfeitures for treason or felony. At common law the leaseholds of persons attainted of treason or felony became forfeited, with their other property, to the crown (*z*). But by the 1st section of the Act of 1870, it is provided that no conviction for treason or felony, or felo de se, shall cause any forfeiture or escheat (*a*).

Sect. 8. — *To Aliens*[2] *and Denizens.*[3]

Alien Act, 1870. — The rights of aliens to hold property have been regulated by a series of statutes culminating in

(*v*) Co. Lit. 2 b.

(*x*) Dane *v.* Viscountess Kirkwall, 8 C. & P. 679.

(*y*) *Ante*, Ch. I., Sect. 23.

(*z*) Co. Lit. 2 b.

(*a*) See further provisions of this act, *ante*, Chap. I., Sect. 25, p. 47.

[1] For American authorities upon contracts of insane persons, &c., and their committees, see *ante*, ch. 1, sec. 23, notes.

[2] **Alien's rights at common law and under enabling statutes.** — At common law an alien was absolutely incapable of taking real property by descent. Jackson *v.* Lunn, 3 Johns. Cas. (N. Y.) 109, 120 (*per* Kent, J.); Hunt *v.* Warnickes' Heirs, Hardin (Ky.) 61; Fox *v.* Southack, 12 Mass. 143, 148 (*per* Jackson, J.); People *v.* Conklin, 2 Hill (N. Y.) 67; Doe *v.* Horniblea, 2 Hayw. (N. C.) 36; 2 Kent's Com. (13th ed.) sec. 53, 54. Neither could one alien inherit from another. Wilbur *v.* Tobey, 16 Pick. 177. Nor could any one inherit by representation through an alien. Levy *v.*

the Naturalization Act, 1870 (33 Vict. c. 14), which repealed ten previous statutes.

Of the repealed acts, it will be sufficient to refer shortly to two. By 32 Hen. 8, c. 16, s. 13 (*b*), *leases of dwelling-houses or shops* granted to any stranger artificer were made void. That act did not extend to assignments to aliens of leases previously granted to natural-born subjects (*c*). By

(*b*) Repealed, Stat. Law Rev. Act.

(*c*) Wootten *v.* Steffenoni, 12 M. & W. 129.

M'Cartee, 6 Pet. 102; Jackson *v.* Green, 7 Wend. (N. Y.) 333; Jackson *v.* Fitz Simmons, 10 Wend. (N. Y.) 9. In all such cases, if there were no other heirs, the land escheated to the estate at once and without office found.

An alien wife of a citizen was not entitled to dower, Kelly *v.* Harrison, 3 Johns. Cas. (N. Y.) 476; nor an alien husband to tenancy by the curtesy in lands here, Foss *v.* Crisp, 20 Pick. 121.

Aliens might take by devise. Craig *v.* Leslie, 3 Wheat. 568, 589 (except in North Carolina, Trustees of University *v.* ———, 2 Hayw. (N. C.) 104; Gilmour *v.* Admrs. of Kay, &c., 2 Ib. 108). And one alien might devise to a citizen or another alien. Fairfax's Devisee *v.* Hunter's Lessee, 7 Cranch, 603, 630 (*per* Johnson, J.).

An alien might take realty by purchase. Governeur's Heirs *v.* Robertson, 11 Wheat. 332; Wilbur *v.* Tobey, 16 Pick. 177, 179 (*per* Shaw, C. J.); Jackson *v.* Beach, 1 Johns. Cas. (N. Y.) 399; Jackson *v.* Lunn, 3 Id. 109, 112, 120 (*per* Radcliff & Kent, JJ.); Waugh *v.* Riley, 8 Met. 290; Cross *v.* De Valle, 1 Wall. 1, 13 (*per* Grier, J.); Taylor *v.* Benham, 5 How. 233, 270; 2 Kent's Com. (13th ed.) sec. 54. In all cases, however, whether his title was acquired by devise or purchase, the aliens might be divested of it by an inquest of office. If he should die without devising it or otherwise disposing of the realty, it would escheat to the estate, since an alien could not transmit by descent. 2 Kent's Com. sec. 54.

An alien might be a trustee, but the trust would be voidable by the state (2 Kent's Com. sec. 62); Hubbard *v.* Goodwin, 3 Leigh (Va.) 492, 511, 512. And equity would not raise a resulting trust in favor of an alien (*per* Tucker, J., *supra*, pp. 511, 512). They are capable of acquiring, holding, and transmitting personal property in like manner as our own citizens. 2 Kent's Com. sec. 62.

Alien's rights under enabling statutes. — Disabilities as to realty are all removed in Louisiana, Pennsylvania, New Jersey, Maryland, Michigan, Illinois, Massachusetts, Connecticut, Iowa, Wisconsin, Ohio, Maine, and Florida; and in Missouri, Mississippi, California, and New Hampshire from resident aliens; and in Kentucky after they have resided in the state two years, and in North Carolina and Vermont upon complying with certain constitutional provisions. 1 Taylor's Land. & Tenant (8th ed.) sec. 143–145.

[3] **Denizens.** — "The American editor of Wharton's Dict. says that denizens are not known in the United States, and cites Walker's Am. Law; but Bouvier says this condition has been created by statute in South Carolina." Abbott's Law. Dict.

"In South Carolina, and perhaps in other states, this civil condition is well known to the law, having been created by statute." Bouv. Law Dict.

7 & 8 Vict. c. 66, s. 4, aliens were enabled to hold personal property of all kinds, *except chattels real* [*i.e.*, terms of years], as effectually as natural-born subjects; and by sect. 5 of the same act "every alien being the subject of a friendly state" was enabled to hold lands or houses for the purpose of residence or business for any term of years not exceeding twenty-one years.

Alien may take lease. — But all statutory restrictions appear to be done away by the Alien *Act, [*73] 1870 (33 Vict. c. 14), which enacts (sect. 2), that "real and personal property of every description may be taken, acquired, held and disposed of by an alien in the same manner in all respects as by a natural-born British subject;" provided that this section shall not confer any right on an alien to hold real property situate out of the United Kingdom, or to "any right or privilege as a British subject, except such rights and privileges in respect of property as are hereby expressly given to him," and "that this section shall not affect any estate or interest in real or personal property to which any person has or may become entitled, either mediately or immediately, in possession or expectancy, in pursuance of any disposition made before the passing of this act, or in pursuance of any devolution by law on the death of any person dying before the passing of this act."

Alien enemies. — Alien enemies cannot hold leases for the purpose of habitation or commerce, or for any other purpose (*d*), and this restriction does not appear to be done away by the Act of 1870.

Denizens. — A denizen, *i.e.*, an alien born, who has obtained ex donatione regis letters-patent to make him an English subject (*e*), may be a lessee, like a natural-born subject (*f*), independently of the Alien Acts.

Sect. 9. — *To Corporations.*

Leases to corporations. — A corporation aggregate may take any chattel, as a lease, &c., in its corporate capacity,

(*d*) See Alcinous *v.* Negren, 4 E. & B. 217.

(*e*) Co. Lit. 129 a; Cole Ejec. 576.

(*f*) 1 Blac. Com. 374; Bendl. 10, pl. 40; 32 Hen. 8, c. 16, s. 13.

which shall go in succession, because it is always in being (*g*).[1] But regularly no chattel shall go in succession in case of a sole corporation; therefore, if a lease for years be made to a bishop and his successors, and the bishop die, it shall not go to his successors, but to his executors (*h*); by custom, however, it may, as in the instance of the Chamberlain of London (*i*).

Leases to members. — One individual of a corporation aggre-

(*g*) Bac. Abr. tit. Corporations (E. 4).

(*h*) Co. Lit. 46 b.

(*i*) 2 Bac. Abr. 14.

[1] **Leases to corporations.** — Corporations may take leases, not *ultra vires*, of either realty or personalty. Peterborough R. R. Co. *v.* Nashua & L. R. R. Co., 59 N. H. 385; Carroll *v.* St. John's Society, 125 Mass. 565; Crawford *v.* Longstreet, 43 N. J. L. 325, 329, 330, 331.

Under circumstances if they take an *ultra vires* lease, and occupy under it, they must pay rent. Camden & At. R. R. Co. *v.* Mays Landing, &c., R. R. Co., 48 N. J. L. 530. Likewise it has been held that if the receiver of a lessee road, which has taken an *ultra vires* lease, continue to occupy, he must pay rent. Woodruff *v.* Erie Ry. Co., 93 N. Y. 609.

And a corporation must pay rent under a lease in writing (for five years) taken by committee duly authorized by vote in their own names. Carroll *v.* St. Johns Society, 125 Mass. 565.

A corporation cannot ordinarily take a lease of the road and franchises of another company without special statutory authority. Penn. R. R. Co. *v.* St. Louis, Alton, &c., R. R., 118 U. S. 290; Board, &c. *v.* Lafayette, &c., R. R. Co., 50 Ind. 85, 110; Winch *v.* Birk. Lan. & Ches. Junc. R. R. Co., 13 Eng. Law & Eq. 506; Beman *v.* Rufford, 6 Id. 106; Gt. North. Ry. Co. *v.* East. Count. R. Co., 12 Id. 224; East Anglian Ry. Co. *v.* Eastern Counties Ry. Co., 11 C. B. 775; Eastern County Ry. Co. *v.* Hawkes, 5 H. L. Cas. 331; T. & B. R. R. Co. *v.* B., H. T. & W. Ry. Co., 86 N. Y. 107, 117 (*per* Danforth, J.); Wood *v.* B. & B. R. R. Co., 8 Phila. 94.

It may, however, if it have such authority. Black *v.* Delaware & Raritan Canal Co., 22 N. J. Eq. 130; Phila. & Erie R. R. Co. *v.* Catawissa R. R. Co., 53 Pa. St. 20; Durfee *v.* Old Colony, &c., R. R. Co., 5 Allen (Mass.) 230; Railway Co. *v.* Vance, 96 U. S. 450. And the authority may be granted by a general statute. Fisher *v.* N. Y. C. & H. R. R. Co., 46 N. Y. 644; People *v.* Albany & Vt. R. R. Co., 77 N. Y. 232.

A foreign corporation may take lease of domestic property for an office and must pay the rent. Steamboat Co. *v.* McCutcheon, 13 Pa. St. 13.

"A statutory corporation, created by act of Parliament for a particular purpose, is limited, as to all its powers, by the purposes of its incorporation as defined in that act." Lord Selborne in Ashbury Ry. Carriage & Iron Co. *v.* Riche, L. R., 7 H. L. 653.

And persons dealing with corporations are bound at their peril to take notice of the legal limits of those powers, *per* Gray, C. J., in Davis *v.* Old Colony R. R., 131 Mass. 258, 260.

See further as to the methods of acting and doctrine of *ultra vires*, *ante*, ch. I, sec. 12, notes.

gate cannot take a lease from the corporation (*k*). A corporation sole cannot make a lease to himself in his natural capacity (*k*); but there is no objection to such a lease being made in trust for the grantor. One member of a corporation aggregate cannot make a lease of corporate lands to another member; thus, a dean cannot make a lease to his chapter (*k*), nor vice versâ. But a lease may be made by the dean and chapter to one of the prebendaries, as a prebendary is not an integral part of the body politic (*k*). Where land was let to the churchwardens and *overseers of the [*74] poor, jointly with the surveyors of the highways, and their successors, it was held that it was not within 59 Geo. 3, c. 12, s. 12, though let at a vestry meeting and for the purposes of the poor; and that therefore the parties were individually liable (*l*).

Canal companies. — By 21 & 22 Vict. c. 75, s. 3, made perpetual by 23 & 24 Vict. c. 41, canal companies being also railway companies, may not accept a lease of a canal or railway, except under the authority of a special act.

Sect. 10. — *To Parish Officers.*

Leases for workhouses. — The 9 Geo. 4, c. 7, s. 4, and 59 Geo. 3, c. 12, ss. 8, 9, authorize parishes to purchase or hire houses for the purposes of lodging the poor, and to build workhouses thereon: and to resell what may be no longer

(*k*) Salter *v.* Grosvenor, 8 Mod. 303.

(*l*) Uthwatt *v.* Elkins, 13 M. & W. 772.

Leases to members. — Corporations may (in America) make valid contracts with their members the same as with strangers. Angel & Ames on Corporations (11th ed.) sec. 233, citing Worcester Turnpike *v.* Willard, 5 Mass. 85 (*per* Parsons, C. J.); Gilmore *v.* Pope, 5 Id. 491; Berk's Turnpike Co. *v.* Myers, 6 S. & R. (Pa.) 12; Gordon *v.* Preston, 1 Watts (Pa.) 385; Central Railroad *v.* Claghorn, 1 Speers Eq. (S. C.) 545; Ely *v.* Sprague, 1 Clarke Ch. (N. Y.) 351.

The United States Supreme Court held in Bank of Augusta *v.* Earle, 13 Pet. 519, 587, that a corporation was an entirety and (in the language of Taney, C. J.) its contracts were not contracts "of the individual members," but "of the artificial being created by the charter." Upon this broad principle a lease by a corporation to one of its members stands upon the same footing as a lease to a stranger.

wanted. Such assurances, if made for value, are not charitable, nor affected by the Statutes of Mortmain (*m*).

Guardians of unions may, by order of the Local Government Board and with consent of ratepayers, hire buildings for union workhouses, &c., pursuant to 4 & 5 Will. 4, c. 76, s. 23.

Temporary hirings. — By 30 & 31 Vict. c. 106, s. 13, "guardians may, with the approval of the Poor Law Board, hire or take on lease, temporarily, or for a term of years not exceeding five, any land or buildings for the purpose of the relief or employment of the poor and the use of the guardians or their officers, without any order of the said board under seal."

Not more than twenty acres. — By 59 Geo. 3, c. 12, s. 12, churchwardens and overseers may, with the consent of the vestry, purchase, *or hire or take on lease* for and on account of the parish, any suitable portion or portions of land within or near to the parish not exceeding twenty acres in the whole, and employ paupers to cultivate the same (*n*). By sect. 17, all such land is to be conveyed, demised and assured to them and their successors, and they are to take and hold the same "in the nature of a body corporate for and on behalf of the parish." Any such assurance should be made to them "and their successors," not to them, their heirs and assigns (*m*). Where land was let to the churchwardens and overseers of the poor, jointly with the surveyors of the highways, and their successors, it was held that it was not a case within the above act though let at a vestry meeting and for the purposes of the poor, and that therefore the parties were individually liable (*o*). A demise to churchwardens and overseers in their name of office would be good, and [*75] no *acceptance thereof under any common seal need be alleged in pleading (*p*). They are not exactly a corporation, but only a quasi corporate body of a peculiar kind (*q*).

Lease to overseers. — By 24 & 25 Vict. c. 125, "the over-

(*m*) Burnaby *v.* Barsby, 4 H. & N. 326; 28 L. J., Ex. 326.

(*n*) As to letting such land, see *ante*, Chap. I., Sect. 16, p. 31.

(*o*) Uthwatt *v.* Elkins, 13 M. & W. 772.

(*p*) Smith *v.* Adkins, 8 M. & W. 362; 1 Dowl., N. S. 129.

(*q*) Gouldsworth *v.* Knight, 11 M. & W. 337.

seers of any parish in England, the population whereof shall exceed 4,000 persons according to the census for the time being, with the consent of the vestry, called after due notice, and with the consent of the Poor Law Board, signified by an order under their seal, may hire any room, or purchase or *take upon lease* or exchange any land or building, or sell land belonging to such parish, and invest the proceeds of such sale in the purchase of other land and building, or erect a suitable building on any land acquired as aforesaid, for the purpose of an office for the transaction of the business of the parish" (*r*).

Sect. 11. — *To Trustees of Friendly Societies.*

Leases under Friendly Societies Act. — By the Friendly Societies Act, 1875 (38 & 39 Vict. c. 60, s. 16), "a society" [registered under that act, see sect. 8], "or any branch of a society, may, if the rules so provide, hold, purchase or take on lease in the names of the trustees for the time being of such society or branch, in every county where it has an office, any land, and may sell, exchange, mortgage, lease or build upon the same (with power to alter and pull down buildings and again rebuild); and no purchaser, assignee, mortgagee or tenant shall be bound to inquire as to the authority for any sale, exchange, mortgage or lease by the trustees; and the receipt of the trustees shall be a discharge for all moneys arising from or in connection with such sale, exchange, mortgage, or lease; and for the purpose of this section no branch of a registered society need be separately registered.

Not more than one acre. — Provided that nothing herein contained shall authorize any benevolent society" [*i.e.*, a society for any benevolent or charitable purpose, see sect. 8] "to hold land exceeding one acre in extent at any one time." This enactment is considerably wider than the corresponding sect. 63 of the repealed act of 1855 (18 & 19 Vict. c. 63), which allowed land not exceeding one acre to be held for the purpose of building only, the restriction of quantity

(*r*) The Act contains other clauses for carrying the above into effect.

being general, and not confined to benevolent societies. The act of 1875 is a consolidating one (*s*).

[*76] * SECT. 12. — *To Trustees of Public Baths and Wash-houses.*

By 9 & 10 Vict. c. 74, intituled "An Act to encourage the Establishment of Public Baths and Wash-houses," after providing in what manner the act may be adopted by municipal corporations, or (with the approval of one of her Majesty's principal secretaries of state), by any parish in England not within any such incorporated borough, and for the appointment of commissioners for carrying that act into execution in any such parish; sect. 27 enacts, "that the council of any such borough, and the commissioners, with the approval of the vestry of any such parish, may, if they shall think fit, contract for the purchase *or lease* of any baths and wash-houses already or hereafter to be built and provided in any such borough or parish, and appropriate the same to the purposes of this act, with such additions or alterations as they shall respectively deem necessary:" and the trustees of any such public baths and wash-houses, with such consent as therein mentioned, are authorized to sell and lease the same to the said council or commissioners (*t*).

When a municipal corporation provides baths and wash-houses under the provisions of this act, the property becomes vested in the body corporate with all incidental liabilities, and not in the council (*u*).

SECT. 13. — *Of Land for Free Public Libraries, Museums, &c.*

Lease to town council. — By "The Public Libraries Act, 1855" (*x*) (18 & 19 Vict. c. 70, s. 18), "the council of any

(*s*) See Davis on Friendly Societies, A.D. 1876.

(*t*) See also 10 & 11 Vict. c. 34, ss. 136–142.

(*u*) Cowley *v.* Mayor, &c., of Sunderland, 6 H. & N. 565.

(*x*) Amended by 34 & 35 Vict. c. 71, the Public Libraries Act, 1871.

borough and the board of any district respectively may from time to time, with the approval of her Majesty's treasury," for the purposes of that act, "*rent any lands or any suitable buildings;*" and the council and board and commissioners respectively may, upon any lands so rented, "erect any building suitable for public libraries or museums or both, or for schools for science or art, and may apply, take down, alter and extend any buildings for such purposes, and rebuild, repair and improve the same respectively, and fit up, furnish and supply the same respectively with all requisite furniture, fittings and conveniences."

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*Sect. 14. — *To Ratepayers for Public Improvements.* [*77]

Lease to ratepayers. — By 23 & 24 Vict. c. 30, intituled "An Act to enable a Majority of Two-Thirds of the Ratepayers of any Parish or District, duly assembled, to rate their District in aid of Public Improvements for general Benefit within their District" (sect. 1), "it shall be lawful for the ratepayers of any parish maintaining its own poor, the population of which, according to the last account from time to time taken thereof by the authority or parliament, exceeds five hundred persons, to purchase *or lease lands*, and to accept gifts and grants of land, for the purpose of forming any *public walk, exercise or playground*, and to levy rates for maintaining the same, and for the removal of any nuisances, or obstruction to the free use and enjoyment thereof, and *for improving any open walk or footpath*, or placing convenient *seats or shelters from rain*, and for other purposes of a similar nature." By sect. 2, "this act may be adopted for any borough, or for any parish having a population of five hundred or upwards (according to the last account taken by authority of parliament), in the same manner as the act of the 9 & 10 Vict. c. 74, may be adopted in such borough or parish." By sect. 7, any rate under the act may not exceed sixpence in the pound.

To inhabitants. — A lease cannot generally be made to the inhabitants of a parish or township, because they cannot take

as such, not being a corporate body (*y*). But a grant from the crown to the inhabitants of a parish, would in effect incorporate them, though for the purpose of such grant only (*z*).

Sect. 15. — *To Trustees of Renewable Leaseholds.*

Renewal of leases by trustees. — By 23 & 24 Vict. c. 145, s. 8, "it shall be lawful for any trustees of any leaseholds for lives or years which are renewable from time to time, either under any covenant or contract or by custom or usual practice, if they shall in their discretion think fit; and it shall be the duty of such trustees, if thereunto required by any person having any beneficial interest, present or future or contingent, in such leaseholds, to use their best endeavours to obtain from time to time a renewed lease of the same hereditaments on the accustomed and reasonable terms, and for that purpose it shall be lawful for any such trustees from time to time to make [*78] or concur in making such surrender of *the lease for the time being subsisting, and to do all such other acts as shall be requisite in that behalf; but this section is not to apply to any case where by the terms of the settlement or will the person in possession for his life or other limited interest is entitled to enjoy the same without any obligation to renew the lease or to contribute to the expense of renewing the same." By sect. 9, money required for renewal of leases, &c., may be raised by mortgage.

A trustee, whose duty it was to renew leaseholds out of the rents, applied them to his own use: — Held, that the tenant for life, and not those in remainder must bear the loss (*a*).

Sect. 16. — *To Agents and Trustees.*

Leases to agents. — With respect to agents and other persons whose duties are to protect their principals and to pre-

(*y*) Weekly *v.* Wildman, 1 Ld. Raym. 405, 407; Abbot *v.* Weekly, 1 Lev. 176; Lockwood *v.* Wood (in error), 6 Q. B. 62; Constable *v.* Nicholson, 14 C. B., N. S. 230; 32 L. J., C. P. 240. But see Vestry of Bermondsey *v.* Brown, 14 W. R. 213.

(*z*) Willingale *v.* Maitland, L. R., 3 Eq. 103, 106; 36 L. J., Ch. 64.

(*a*) Solley *v.* Wood, 29 Beav. 482.

vent the property from being let at an undervalue, Courts of Equity view with considerable jealousy contracts entered into for leases to them. It is incumbent on a person in the situation of an agent to show that the transaction is perfectly fair and reasonable, and that a just consideration has been given by him for a lease obtained from his principal (*b*). The same observation also applies to persons in the situation of debtor and creditor, solicitor and client, and mortgagor and mortgagee (*c*)

Lease to trustee. — If a lease be made to a trustee, he is personally liable for the rent and covenants (*d*), and the lessor has no remedy at law against the cestui que trust in respect thereof. The trustee, however, where he holds leasehold property for a tenant for life and remaindermen, has a duty to the remaindermen to keep it free from risk of forfeiture, and is entitled to have the rent employed in so keeping it (*e*), and further, except in case of personal default, would seem to have a right to be indemnified out of the trust fund (*f*).

If there be a personal default on the part of the trustee, he would seem to have no right to be indemnified.

A lease by a trustee to himself seems to stand on the same footing as a sale by trustee to himself; *i.e.*, it is a transaction of the greatest nicety, and one which the courts will watch with the greatest jealousy (*g*).

(*b*) Ld. Kingsland *v.* Barnewell, 4 Bro. P. C. 154; Ld. Hardwicke *v.* Vernon, 4 Ves. 411; Lady Ormond *v.* Hutchinson, 16 Ves. 94; Grosvenor *v.* Sherratt, 28 Beav. 659; *post*, Chap. IX., Sect. 4.

(*c*) Gubbins *v.* Creed, 2 Sch. & Lef. 214; Webb *v.* Rorke, Id. 661; Fisher, s. 873; *post*, Ch. IX., Sect. 4.

(*d*) Walters *v.* Northern Coal Mining Co., 5 De G., M. & G. 629; 25 L. J., Ch. 633.

(*e*) Fowler, *In re*, L. R. 16 Ch. D. 723; 44 L. T. 99; 29 W. R. 891, *per* Fry, J.

(*f*) Lewin on Trusts, 7th ed. p. 217.

(*g*) See Lewin on Trusts, 7th ed. pp. 438–451; citing *Ex parte* Hughes, 6 Ves. 617; Att.-Gen. *v.* Earl of Clarendon, 17 Ves. 491.

[*79] * CHAPTER III.

OF WHAT TERMS MAY BE GRANTED.

SECT. 1. — *Corporeal and Incorporeal Hereditaments.*

Leases of corporeal hereditaments. — Leases for life, or for years, or from year to year, may be made of anything corporeal or incorporeal which lies in livery or grant (*a*).[1] Corporeal hereditaments consist wholly of substantial and permanent objects, as land, houses, &c., and were, before the 8 & Vict. c. 106, said to lie in livery: but, by sect. 2 of that act, "all corporeal tenements and hereditaments shall,

(*a*) Shep. Touch. 268.

[1] **Examples of leasable property.** — The following are a few examples of property, corporeal or incorporeal, subject to be leased, viz.: —

A mill with water-power machinery and tools, Dexter *v.* Manley, 4 Cush. 14; land with connected easements, including foot path, Alexander *v.* Tolleston Club, 110 Ill. 65; a water-power, Blanchard *v.* Ames, 60 N. H. 404; a ferry, Macdonell *v.* I. & G. N. Ry. Co., 60 Tex. 590; Fraser *v.* Drynan, 4 Allen (N. B.) 74; right to collect wharfage, Mayor *v.* Mabie, 13 N. Y. 151; a town wharf, Inhbts. of Hingham *v.* Sprague, 15 Pick. 102; a mining and oil privilege, Duke *v.* Hague, 107 Pa. St. 57; the exclusive right to cut ice from a pond, Richards *v.* Gauffret, 145 Mass. 486; motive power to be generated by steam upon adjoining premises, Sharpe *v.* Cuthbert, 4 Q. B. D. (Queb.) 211; a seat in a theatre, 22 Fed. Rep. 380; a wagon, Fairbank *v.* Phelps, 22 Pick. 535. Railroad and franchises may be demised under special statutory authority. See *ante*, ch. 1, sec. 12, notes, and ch. 2, sec. 9, notes, &c.

A lease for years is held not to be a conveyance of real estate. Perkins *v.* Morse, 78 Me. 17; Tone *v.* Brace, 11 Paige (N. Y.) 566. A demise of right to collect wharfage for one year is not a conveyance of real estate. Mayor *v.* Mabie, 13 N. Y. 151.

as regards the conveyance of the immediate freehold thereof, be deemed to lie in grant as well as in livery."

Definition. — An incorporeal hereditament is a right issuing out of a thing corporeal (whether real or personal), or concerning, or annexed to, or exercisable within the same (*b*). Incorporeal hereditaments are principally these: *viz.*, advowsons, tithes, and tolls, commons and estovers, ways, offices, franchises, corrodies and pensions, and annuities (*c*). They are, generally speaking, capable of being demised; but such demise, even for less than three years, must be by deed, for they lie in grant and not in livery (*d*). But a right of way appurtenant to land will pass by a parol demise of the land (*e*), and so will a right to dig turf, or other easement, although not specially mentioned (*f*); so a market, with the right to take the tolls, may be demised without deed (*g*). Where there is a demise of premises, and an entire rent reserved, if any part of the premises cannot be legally demised, the whole is void (*h*).

Sect. 2. — *Advowsons.*

Lease of advowsons. — An advowson (advocatio) is the right of presentation to a church or ecclesiastical benefice. Although it has been said that an advowson * cannot properly be the subject of a demise, on the ground [*80] that as no profit is permitted to accrue, no rent can be reserved, nor any services performed to the proprietor (*i*); yet this does not seem to be quite correct; for a lease may be made not only of lands, but of all other hereditaments (*k*), such as advowsons, tithes, offices not concerning the administration of justice, and the like (*l*); and the lessee of tithes,

(*b*) Co. Lit. 19 b, 20 a.

(*c*) Rex *v.* Alresford, 1 T. R. 358; Musgrave *v.* Cave, Willes, 323; 1 Inst. 9.

(*d*) Mayfield *v.* Robinson, 7 Q. B. 486; Wood *v.* Leadbitter, 13 M. & W. 839.

(*e*) Skull *v.* Glenister, 16 C. B., N. S. 81; 32 L. J., C. P. 185.

(*f*) Dobbyn *v.* Somers, 13 Ir. Com. L. Rep., N. S. 203.

(*g*) Bridgland *v.* Shapter, 5 M. & W. 375.

(*h*) Doe *d.* Griffith *v.* Lloyd, 3 Esp. 78.

(*i*) Com. Dig. tit. Advowson (C. 2).

(*k*) Bac. Abr. tit. Leases (A.).

(*l*) 2 Cruise, ss. 22, 24; Bousher *v.* Morgan, 2 Anstr. 404; Cox *v.* Brain, 3 Taunt. 95.

advowsons, or any incorporeal hereditaments, would be liable to an action for the rent agreed upon (*m*). An advowson is a tenement (*n*). Where a lessee for years of an advowson was presented to the benefice by the lessor, it was adjudged to be a surrender to his term (*o*).

Sect. 3. — *Tithes and Tolls.*

Leases of tithes. — By 5 Geo. 3, c. 17, persons having any spiritual or ecclesiastical promotions are enabled to grant leases of tithes, tolls or other incorporeal inheritances, solely and without any lands or corporeal hereditaments, for one, two or three life or lives, or for any term not exceeding twenty-one years, which shall be "as good and effectual in law against such archbishop, bishop, masters and fellows, or other heads and members of colleges or halls, deans and chapters, precentors, prebendaries, masters and guardians of hospitals, and other persons so granting the same, and their successors and every of them, to all intents and purposes, as any lease or leases already made or to be made by any such archbishop, &c.," by virtue of the stat. 32 Hen. 8, c. 28, or any other statute then in being; and actions of debt may be brought by such lessors for rent in arrear, as in the case of any other landlord or lessor. Leases of tithes must be by instrument under seal, as incorporeal hereditaments only lie in grant (*p*). A parson may grant his tithes for years (*q*), so he may lease them for so long a term as he shall continue parson (*r*); and rent may be reserved on such lease (*s*); or the parson may demise them without any rent, if he pleases (*t*). Under the settlement of an estate with a power to the tenant in possession to let all or any part of the

(*m*) 2 Woodd. 69; Rog. Ecc. L. 17; Co. Lit. 119 b.

(*n*) Kensey *v.* Langham, Cas. temp. Talbot, 144; Co. Lit. 19, 20; 2 Blac. Com. 17; Robinson *v.* Tongue, 3 P. Wms. 461.

(*o*) Gybson *v.* Searls, Cro. Jac. 84, 176.

(*p*) Gardiner *v.* Williamson, 2 B. & Ad. 336.

(*q*) Shep. Touch. 241.

(*r*) Brewer *v.* Hill, 2 Anst. 413.

(*s*) 5 Geo. 3, c. 17.

(*t*) Walker *v.* Wakeman, 1 Ventr. 294; 2 Lev. 150; 3 Keb. 597.

premises, so as the usual rents be reserved, a lease of tithes which had never been let before was held void (*u*).

* By the Tithe Commutation Act (6 & 7 Will. 4, c. 71), the lessees of tithes commuted to rent-charges may surrender and avoid their leases, on certain terms, as to compensation and apportionment of rent, to be settled by the commissioners. Until they do so, they continue liable to pay the rent reserved by their leases (*x*). [*81]

Tolls may be let or mortgaged (*y*).

Leases of tolls. — By 3 Geo. 4, c. 126, s. 57, all contracts or agreements for letting of turnpike tolls, signed by the trustees or their clerk, and the lessee or farmer, and his sureties, shall be valid notwithstanding the same may not be by deed or under seal. It has been held that an agreement for the letting of tolls signed by the clerk of the trustees and by the lessee or farmer of the tolls was valid, and therefore could be enforced by the trustees notwithstanding it had not been signed by the sureties; their execution of the agreement being a formality for the benefit of the trustees, which they might waive without prejudice to their rights against the lessee or farmer of the tolls (*z*). Where a lessee of turnpike tolls compounded with a person using the road for tolls for three years, it was held that such agreement was not prohibited by 3 Geo. 4, c. 126, s. 55 (*a*).

Sect. 4. — *Commons and Estovers.*

Leases of commons. — Rights of common may be demised by deed (*b*). With respect to commons, the 13 Geo. 3, c. 81, s. 15, empowers the lord of any manor, with the consent of three-fourths of the persons having right of common upon the

(*u*) Pomery *v.* Partington, 3 T. R. 665.

(*x*) Tasker *v.* Bullman, 3 Exch. 351.

(*y*) Fairtitle *d.* Mytton *v.* Gilbert, 2 T. R. 169; 3 Geo. 4, c. 126; 4 Geo. 4, c. 95, s. 51; Bell *v.* Nixon, 9 Bing. 393; Pearse *v.* Morrice, 3 B. & Ad. 396; Olroyd *v.* Crampton, 4 Bing., N. C. 24; Shepherd *v.* Hodsman, 18 Q. B. 316; Markham *v.* Stanford, 14 C. B., N. S. 376; Gunning on Tolls, 140.

(*z*) Markham *v.* Stanford, 14 C. B., N. S. 376.

(*a*) Stott *v.* Clegg, 13 C. B., N. S. 619; 32 L. J., C. P. 102.

(*b*) Sury *v.* Brown, Latch, 99.

wastes and commons within the manor, at any time to demise or lease, for any term or number of years not exceeding four years, any part of such waste and commons not exceeding a twelfth part thereof, for the best and most improved yearly rent that can by public auction be got for the same; and directs that the clear net-rent shall be applied to drain, fence and otherwise improve the residue of the waste and commons.

When the lord of the manor conveys away a part of the wastes to a third person, though the right of ownership of the soil changes hands, the right of common still subsists in the commoners as well over that part of the wastes that the lord has conveyed away, as over that part which he retains in his own hands (*c*). A common will not pass without express words (*d*).

[*82] * **Leases of estovers.** — Estovers may be leased; the grantee, therefore, house-bote, or hay-bote, may let it to another (*e*). Estovers to be burned on land demised will not pass without express words (*f*).

Sect. 5. — *Ways.*

Leases of ways. — A right of way legally appurtenant to land is demisable with the land (*g*), and will pass with it without being expressly mentioned (*h*), even by a parol demise (*i*); so will a right to dig turf, or other pre-existing easement (*k*). But after a way or other easement has been extinguished by unity of ownership, it cannot be revived by a grant or lease of the dominant tenement containing general words, such as "rights, members, easements and appurtenances thereunto belonging or appertaining" (*l*). But it

(*c*) Benson *v.* Chester, 8 Tr. 396, 401.

(*d*) Clark *v.* Cogge, Cro. Jac. 170, 190.

(*e*) Shep. Touch. 222; Bac. Abr. tit. Leases (A.).

(*f*) Clark *v.* Cogge, Cro. Jac. 170, 190.

(*g*) Osborne *v.* Wise, 7 C. & P. 761.

(*h*) Clark *v.* Cogge, Cro. Jac. 170, 190; Staple *v.* Heydon, 6 Mod. 1, 3; Howton *v.* Fearson, 8 T. R. 50, 56; Bac. Abr. tit. Offices (H.).

(*i*) Skull *v.* Glenister, 16 C. B., N. S. 81; 32 L. J., C. P. 185.

(*k*) Dobbyn *v.* Somers, 13 Ir. Com. L. Rep., N. S. 293.

(*l*) Barlow *v.* Rhodes, 1 Cr. & M. 439, 448.

may pass by the words "or therewith usually held, occupied or enjoyed" (*m*). And if it be a way of necessity it will pass with the principal subject-matter of the grant or demise, without any mention of ways or appurtenances (*n*). So will a watercourse or other *necessary* easement (*o*).

Sect. 6. — *Franchises and Corrodies.*

Leases of franchises. — Franchises may be demised by deed (*p*), except indeed in some few particular cases (as where the franchise is a personal immunity, &c.); thus a fair or market, either with or without the right of taking toll, either there or at any other public places, as at bridges, wharfs, or the like, may be demised (*q*). A market, with a right to take the tolls, may be demised without deed (*r*). A franchise granted to one cannot be bestowed on another to the prejudice of a former grant (*s*). Every fair is a market, but every market is not a fair (*t*). A market which is held on the wrong day (Saturday instead of Friday) is not a market "legally established" (*u*). The right to a market may be barred by the Statute of Limitations (*x*).

[*83] * A corrody is a right of sustenance, originating in the endowment of lands: in lieu of which, especially when due from ecclesiastical persons, a pension or sum of money was sometimes substituted; and these were chargeable on the person of the owner of the inheritance in respect thereof (*y*). A corrody was either certain or uncertain, and might not only be for life or years, but in fee. If one had a corrody for life, he might let it to another, or to the grantor himself (*z*).

(*m*) James *v.* Plant (in error), 4 A. & E. 749; Kooystra *v.* Lucas, 5 B. & A. 830; Bradshaw *v.* Eyre, Cro. Eliz. 570.

(*n*) Morris *v.* Edgington, 3 Taunt. 24; Davies *v.* Sear, L. R., 7 Eq. 427.

(*o*) Sury *v.* Pigot, Popham, 166.

(*p*) Duke of Somerset *v.* Fogwell, 5 B. & C. 875.

(*q*) 2 Inst. 221, 406.

(*r*) Bridgland *v.* Shapter, 5 M. & W. 375.

(*s*) 2 Roll. Abr. 191.

(*t*) 2 Inst. 221, 406.

(*u*) Benjamin *v.* Andrews, 5 C. B., N. S. 299.

(*x*) Holcroft *v.* Steel, 1 Bos. & P. 400.

(*y*) 2 Blac. Com. 40.

(*z*) Bac. Abr. tit. Leases (A.); R. *v.* Nicholson, 12 East, 330; Peter *v.* Kendal, 6 B. & C. 703; Beere *v.* Windebanke, Sid. 80.

Sect. 7. — *Annuities.*

Leases of annuities. — An annuity is an annual sum of money granted to another in fee, for life, or years, which charges the person of the grantor only; or it may be due by prescription, which always implies a grant. Such annuity may be demised by way of assignment (*a*). Rents may also be granted by way of lease (*b*).

Sect. 8. — *Right of Sporting.*

Right of sporting. — A demise of an incorporeal hereditament can only be valid by deed (*c*), unless granted with some corporeal hereditament as appurtenant thereto (*d*). The right of hunting, shooting, fishing, &c. is an interest in the realty, and a grant of it is a licence of a profit *à prendre* (*e*). Such rights can be granted or demised only by deed. But if the lessee has actually used, occupied and enjoyed such rights under a parol agreement, he must pay for such enjoyment, and may be sued in an action for use and occupation (*f*). A corporation aggregate may maintain an action for use and occupation of tolls, although they did not grant them by any instrument under their common seal (*g*).

Sect. 9. — *Chattels.*

Leases of chattels. — Goods and chattels may be let for years, though the terms "landlord" and "tenant" are [*84] inapplicable to such letting, and the interest * of the

(*a*) Co. Lit. 144 b; Com. Dig. tit. Annuity (A. 1).

(*b*) Bac. Abr. tit. Leases; Thomas *v.* Fredericks, 10 Q. B. 775; Co. Lit. 144 b; Com. Dig. tit. Annuity (A. 1), (E.).

(*c*) Duke of Somerset *v.* Fogwell, 5 B. & C. 875, 882, 886; Bird *v.* Higginson, 2 A. & E. 696; 6 A. & E. 824.

(*d*) See *post*, Chap. XVIII., Sect. 6, "Game."

(*e*) Ewart *v.* Graham, 7 H. L. Cas. 331; 29 L. J., Ex. 88.

(*f*) Thomas *v.* Fredericks, 10 Q. B. 775; Holford *v.* Pritchard, 3 Exch. 793; *post*, Chap. XIV.

(*g*) Mayor, &c., of Carmarthen *v.* Lewis, 6 C. & P. 608; Drury Lane Theatre Co. *v.* Chapman, 1 C. & K. 14.

lessee therein differs from the interest which he has in lands. If a man lease for years a stock of live cattle, such lease is good, and the lessee has the use and profits of them during the term; but he cannot destroy, kill, sell or give them away without, it seems, being liable to an action of trespass (*h*). The lessor, however, has not any reversion in them, as in the case of lands, to grant over to another either during the term or after, till the lessee has re-delivered them to him; for the lessor has only a possibility of property in case they all outlive the term; for if any of them die during the term, the lessor cannot have them replaced after the term; and during the term he has nothing to do with them, and consequently of such as die the property vests absolutely in the lessee. So, whether they live or die, yet all the young ones coming of them, as lambs, calves, &c., belong absolutely to the lessee as profits arising and severed from the principal, since otherwise the lessee would pay his rent for nothing; and therefore this differs from a lease of dead goods and chattels, for there, if anything be added for the repairing, mending or improving thereof, the lessor shall have the improvements and additions, together with the principal, after the lease ended, because they cannot be severed without destroying or spoiling the principal (*i*).

Leases of furniture. — A mixed payment of rent for lands and goods is held to issue out of the land alone, and the rent may be distrained for (*k*).

(*h*) Lit. s. 71; Doe *d.* Griffith *v.* Lloyd, 3 Esp. 78.

(*i*) Bac. Abr. tit. Leases (A.); Collins *v.* Harding, Cro. Eliz. 606.

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

[*85] *CHAPTER IV.

THE AGREEMENT FOR A LEASE.

SECT. 1. — *An Agreement for Lease must be in Writing.*

WE shall see presently (*a*) that, by the combined operation of the Statute of Frauds and 8 & 9 Vict. c. 106, s. 3, a lease for more than three years is void unless made by deed, and that leases for three years or less may be made by parol.[1] But although a lease for three years may be made by parol, an agreement for a lease for however short a term must, in

(*a*) *Post*, Chap. V.

[1] **The Statute of Frauds.** — The Statute of Frauds has been re-enacted with variations in all the American states and provinces. Leases, except for specified limited periods, are required to be in writing, but not in the majority of them, even when exceeding the limited periods, to be by deed. See *post*, Chap. V., note.

order to be sued upon as such, be in writing signed by the party to be sued. For by the 4th section of the Statute of Frauds, it is enacted that "no action shall be brought whereby to charge any person upon any contract or sale of lands, tenements or hereditaments, *or any interest in or concerning them*, or upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, *or some memorandum or note thereof*, shall be in writing and *signed by the party to be charged therewith*, or some other person by him lawfully authorized" (*b*).[1]

An agreement for a lease is a contract for an interest in lands within the meaning of sect. 4, and has always been so treated both at law (*c*) and in equity (*d*). We shall see presently, however, that *effect has been frequently given both at law and in equity to parol agreements. At law a party entering as a tenant, and evidencing his intention to continue such, has always been treated as a tenant from year to year upon the terms of the agreement; while in equity a "part performance" by the one party has frequently entitled him to a specific performance by the other. [*86]

Effect of agreement. — It was said by Jessel, M. R., in Walsh *v.* Lonsdale (*e*), that the effect of the Judicature Acts (see Judicature Act, 1873, s. 25, sub-s. 7) is that a tenant holding under an agreement for a lease of which specific performance

(*b*) Not saying "by writing," as in sects. 1, 3.

(*c*) See especially Edge *v.* Strafford, 1 Tyr. 295; 1 Cr. & J. 391.

(*d*) Story Eq. vol. 1, s. 754. It may be doubted whether the word "action" in the 4th section of the Statute of Frauds included "suit"; but, however this may be, courts of equity, even before the statute, would not execute a parol agreement, not in part performed, and it is said by Story (*ubi supra*) to be obvious that courts of equity are bound as much as courts of law by the provisions of the statute.

(*e*) L. R., 21 Ch. D. 9; 52 L. J., Ch. 2; 40 L. T. 858; 31 W. R. 109; C. A.

[1] By the 4th section of the Statute of Frauds as re-enacted in America the same distinction pointed out in the text between the requirements as to leases and agreements for leases, has been established here, as exists in England.

The *agreement* for a lease, or a memorandum of it, must in all cases be in writing (subject to the doctrine of part performance of course).

would be granted is not a tenant from year to year only, but a tenant holding under the lease itself.[1] In this case the defendant agreed to grant and the plaintiff to accept a lease at a fixed rent payable in advance, and for this rent in advance, after entry by the plaintiff and part payment of rent, the defendant distrained, and the court granted an injunction restraining the distress upon the terms that the rent should be paid into Court. It is to be observed that the plaintiff having entered and paid rent would, even at law as a tenant from year to year, have been liable to distress (*f*) and that if the dictum of Jessel, M. R., be correct, the stat. 8 & 9 Vict. c. 106, whereby leases for more than three years must be by deed, is rendered practically inoperative. The dictum has been twice approved of (*ff*); but it is submitted that it is still doubtful whether the case is one in which before the Judicature Act there was a conflict between the rules of law and the rules of equity in respect to the same matter.

Uselessness of agreement. — However this may be, it is suggested that an agreement for a lease may well be dispensed with in most cases, and that it would be better for both parties that a tenant should be let into possession upon an actual lease. The agreement has no advantage in saving any stamp duty (*g*), but some short binding contract may sometimes be required for the reason that each party wishes to bind the other in a shorter time than would be occupied by the negotiations as to the terms of a lease. In such cases it would frequently suffice that the intending tenant should either enter on an express contract of tenancy from year to year only, leaving the terms of the lease to be settled by after negotiations, or should pay a small deposit in return for the privilege of more prolonged negotiations.

(*f*) See Knight *v.* Bennett, 11 Moore, 222, and 410, *post*.

(*ff*) By Field, J., in Maughan *in re*, L. R. 14 Q. B. D. at p. 958, and by Chitty, J., in Allhusen *v.* Brooking, L. R. 26 Ch. D. at p. 565.

(*g*) See *post*, Sect. 2.

[1] **Lease in equity.** — "An agreement for a lease is a lease in equity," *per* Mowat, V. C., in Simmons *v.* Campbell, 17 Chy. (Ont.) 612, 617.

It is, however, no longer a lease in equity if proposed lessee has broken the intended covenants. Swain *v.* Ayres, 20 Q. B. D. 585.

What is an interest in land. — The words "any interest in land" in the 4th section of the Statute *of [*87] Frauds, are very wide, and include an interest however small for a term however short, provided that the tenant is to have exclusive possession. An early decision to this effect, in which the statute was held to apply to a contract to let lodgings (*h*), was emphatically affirmed by the leading case of Edge *v.* Strafford (*i*), where the defendant had agreed by parol to take the ready-furnished lodgings of the plaintiff for two or three years, and the Court held that no action could be maintained for breach of the agreement. But where the contract was for board and lodging at a boarding-house, but in no specific rooms, it was held that although the contract was unwritten, an action lay for the breach (*k*); and the two cases are clearly distinguishable on the ground that exclusive possession was bargained for in one but not in the other.[1]

Contract to procure lease. — A contract to procure a lease must also be in writing, although it is entered into by a person who has no interest in the lease himself (*l*).

"Collateral" agreement. — If the agreement be to let and

(*h*) Inman *v.* Stamp, 1 Stark. 12.

(*i*) 1 Tyr. 295; 1 Cr. & J. 391.

(*k*) Wright *v.* Stavert, 2 E. & E. 721; 29 L. J., Q. B. 161.

(*l*) Horsey *v.* Graham, L. R., 5 C. P. 191; 39 L. J., C. P. 58; 23 L. T. 495. In this case the contract was to procure the assignment of a lease, but the principle is the same.

[1] **Lodgings; board and lodgings, &c.** — In White *v.* Maynard, 111 Mass. 250, and in Wilson *v.* Martin, 1 Denio (N. Y.) 602, it was held that contracts for board and lodging, though in designated rooms, were not within the statute. Bronson, J., in the last-named case, saying, that the contract "was nothing more than an agreement for board and lodging, with a designation of the particular rooms which the defendant was to occupy," and the relation of landlord and tenant did not arise.

Justice Gray, in the first-named case, distinguishes Inman *v.* Camp and Edge *v.* Strafford (cited by the author), saying it did not appear in those cases that the rooms were in a boarding-house. He cites Wright *v.* Stovert with approval.

In Porter *v.* Merrill, 124 Mass. 534, a contract for letting certain specified rooms in an apartment house, containing a restaurant, with an agreement to serve a private table, was held to create a tenancy. Ames, J., distinguishes it from White *v.* Maynard, as not being case of "a contract between the keeper of a boarding-house and a lodger."

do something else for the intending tenant, it must be in writing, unless the two parts of it are severable. Thus, in Mechelen *v.* Wallace (*m*), the tenant promised to become such in consideration that the landlord would send in more furniture. The landlord did not send in the furniture, but the tenant failed to recover, on the ground that the agreement to send in furniture was an inseparable part of the contract for the lease. Similarly, where the plaintiff agreed to let a house to the defendant, and to sell him the furniture and fixtures, it was held that this was a contract which must be in writing (*n*).

But in Angell *v.* Duke (*o*), the court held that an agreement that the landlord should do repairs and send in furniture was collateral to the main agreement to let, so as not to require to be in writing within the statute, although the tenant ultimately failed to recover upon it on the ground that parol evidence is inadmissible to vary a written agreement (*p*).

"Collateral" agreement. — In Adams *v.* Hagger, the plaintiff agreed to grant to the defendant a lease at a certain rent for 99 years of a piece of land so soon as the defendant should have erected a house upon it, and the defendant undertook until the execution of the lease to "hold the said piece of land and other the premises at the rent and subject to the conditions to be contained" in the lease. It [*88] was held by the Court of Appeal * that the defendant was liable to pay the rent, although he had not entered upon or taken possession of the piece of land (*q*).

An agreement after lease granted that the landlord shall enlarge the premises, and the tenant pay a percentage on the landlord's outlay, is not within the statute (*r*), and therefore need not be in writing. This was held in two cases (*r*),

(*m*) 7 A. & E. 49 (decided on demurrer).

(*n*) Vaughan *v.* Hancock, 3 C. B. 766.

(*o*) L. R., 10 Q. B. 174; 44 L. J., Q. B. 78; 32 L. T. 25. And see Morgan *v.* Griffiths, L. R., 6 Ex. 70; 40 L. J., Ex. 46; 23 L. T. 783; 19 W. R. 957; Erskine *v.* Adeane, L. R., 8 Ch. 756; 42 L. J., Ch. 849; 29 L. T. 234; 21 W. R. 802.

(*p*) Angell *v.* Duke, 32 L. T. 320.

(*q*) Adams *v.* Hagger, L. R., 4 Q. B. D. 480; 27 W. R. 402 — C. A.

(*r*) Holz *v.* Rochuck, 7 Taunt. 157; Donellan *v.* Read, 3 B. & Ad. 899; see also Lambert *v.* Norris, 2 M. & W. 333.

where the landlord having executed improvements recovered the consideration money by action at law, and the principle of such cases would seem to apply to an action for specific performance.

Contract itself need not be in writing. — The 4th section of the Statute of Frauds does not absolutely require the contract itself to be in writing, but allows the alternative of some written "memorandum or note thereof" properly signed; and the memorandum or note need not be prepared at the time, nor be intended as a contract, or even as evidence thereof. A letter written by the defendant to the plaintiff, which mentions all the material terms of the contract, may be sufficient, although the defendant thereby attempts to deny or repudiate his liability (*s*). A correspondence between the defendant and his own agent, which mentions all the material terms of the contract, may be sufficient (*t*). A letter to a third person, mentioning all the material terms of the agreement, may be sufficient (*u*); but if any material terms of the contract be unsettled and disputed the writing will not be sufficient (*x*). The bare entry of a steward in the lord's contract book with his tenants is not an evidence of itself that there is an agreement for a lease between the landlord and tenant (*y*).

(a) *What the Agreement for a Lease must state.*

Writing must state all material terms, *e.g.* names. — The agreement, or the memorandum or note thereof (as the case may be) *must state all the material terms of the contract* (*z*),[1]

(*s*) Bailey *v.* Sweeting, 9 C. B., N. S. 843; Wilkinson *v.* Evans, L. R., 1 C. P. 407; 35 L. J., C. P. 224 (these cases were under sect. 17); Jackson *v.* Oglander, 2 H. & M. 465; 13 W. R. 936.

(*t*) Gibson *v.* Holland, 35 L. J., C. P. 5.

(*u*) Welford *v.* Beazely, 3 Atk. 503; Child *v.* Comber, 3 Swans. 423, n.; Segood *v.* Meale, Prec. Ch. 560; Barkworth *v.* Young, 4 Drew. 1, 13.

(*x*) Forster *v.* Rowland, 7 H. & N. 103; 30 L. J., Ex. 396.

(*y*) Charlewood *v.* Duke of Bedford, 1 Atk. 497.

(*z*) Clarke, app., Fuller, resp., 16 C. B., N. S. 24; 12 W. R. 671. See Fry on Specific Performances, p. 98.

[1] A contract within the statute may be part of an entire contract not within it, and so be held binding. 2 Reed on Statute of Frauds, sec. 560; Wentworth *v.* Buhler, 3 E. D. Smith, 305.

ex. gr.: 1. The name of the lessor or his agent (*a*); and
2. The name of the lessee or his agent (*b*): but
[*89] in each of these cases such a description * of the contracting parties that there cannot be any fair dispute as to their identity is as good as naming them. Such (*c*) seems to be the effect of the numerous cases (*d*) in which a contract for the *sale* of land describing but not naming the vendor, has been held good; and, as a lease is a sale pro tanto, these cases would seem to be equally applicable to an agreement for a lease.

3. **Writing must state description of property.** — The writing must state the name or other description of the property to be demised (*e*); but the property need not be so described as to identify it; parol evidence being always admissible upon the question of "parcel or no parcel" (*f*). "Mr.

(*a*) Warner *v.* Willington, 3 Drew. 523; 25 L. J., Ch. 652; Allen *v.* Bennett, 3 Taunt. 169; Cooper *v.* Smith, 15 East, 103; Hughes *v.* Parker, 8 M. & W. 244; 1 Dowl., N. S. 80; Hood *v.* Lord Barrington, L. R., 6 Eq. 218; Williams *v.* Jordan, L. R., 6 Ch. D. 517; 26 W. R. 230.

(*b*) Squire *v.* Whitton, 1 H. L. Cas. 333; Williams *v.* Lake, 2 E. & E. 349; 29 L. J., Q. B. 1; Skelton *v.* Cole, 1 De Gex & J. 587; Hughes *v.* Parker, 8 M. & W. 244.

(*c*) See Potter *v.* Duffield, L. R. 18 Eq. 4; 43 L. J., Ch. 472; 22 W. R. 585, *per* Jessel, M. R., in which "vendor" was held to be not of itself sufficient.

(*d*) See Rossiter *v.* Miller, L. R., 3 App. Cas. 1124; 48 L. J., Ch. 10; 39 L. T. 173; 26 W. R. 855; ("proprietors" held sufficient description of vendors); Catling *v.* King, L. R., 5 Ch. D. 660; 46 L. J., Ch. 384; 36 L. T. 526; 25 W. R. 550 — C. A.; Commins *v.* Scott, L. R., 20 Eq. 11; 44 L. J., Ch. 563; 32 L. T. 420; 23 W. R. 498; Sale *v.* Lambert, L. R., 18 Eq. 1; 43 L. J., Ch. 740. In Thomas *v.* Brown, L. R., 1 Q. B. D. 714, the point also arose, but was not decided.

(*e*) Stewart *v.* Alliston, 1 Mer. 33; Ogilvie *v.* Foljambe, 3 Mer. 53; Kennedy *v.* Lee, 3 Mer. 441, 451; Daniels *v.* Davison, 16 Ves. 249; Price *v.* Griffith, 1 De Gex, M. & G. 80; Haywood *v.* Cope, 25 Beav. 140.

(*f*) Fry, s. 209; Bleakley *v.* Smith,

The terms of memorandums for leases or other contracts cannot be supplied by parol testimony, Parkhurst *v.* Van Cortlandt, 1 Johns. Ch. (N. Y.) 273; McKibbin *v.* Brown, 14 N. J. Eq. 13; Duffield *v.* Whitlock, Hoff. Ch. (N. Y.) 110 & 26 Wend. (N. Y.) 55; Huff *v.* Shepard, 58 Mo. 242; Morton *v.* Dean, 13 Met. (Mass.) 385; Gill *v.* Bicknell, 2 Cush. (Mass.) 355, 358, 359 (*per* Shaw, C. J.); nor varied by subsequent parol contract, Brooks *v.* Wheelock, 11 Pick. (Mass.) 439.

"Unless the essential terms of the bargain and sale can be ascertained from the writing itself, or by a reference contained in it to something else, the writing is not a compliance with the statute," *per* Kent, Chan., in Parkhurst *v.* Van Cortlandt, *supra*, p. 280.

Ogilvie's house," may be sufficient (*g*). "The property in Cable Street," coupled with parol evidence of identity, may be sufficient (*h*), and so may "the mill property, including cottages in *Esher* village" (*i*), and "the lease and everything" for 60*l*., coupled with parol evidence to show what lease was intended, and with a previous memorandum showing what "everything" meant (*k*). "Two seams of coal, known as the two-feet coal and the three-feet coal, lying under lands hereafter to be defined as the Bank End Estate," has been held sufficient, the latter words being construed to refer only to the boundaries of the estate, and not to the seams of coal agreed to be demised (*l*). But where the agreement was indefinite as to the area over which the ironstone was to be worked, the court (for that and other reasons) refused a specific performance (*m*). An agreement by an incumbent to demise his glebe, containing about 437 acres, "except thirty-seven acres thereof" (which were not specified), was held sufficient, as the lessor, it was said, might elect which thirty-seven acres should be excepted (*n*). A description of the property by reference to preceding deeds, wherein it is described, is sufficient (*o*).

Difference in quantity. — A mere difference in quantity has never been held a bar to specific performance; — the Court of Chancery always drew a distinction between the essential and non-essential terms of a contract, and allowed the incapacity to perform it in non-essential terms, to be *made the subject of compensation. In McKenzie [*90] *v.* Hesketh (*p*), for instance, the plaintiff offered to take a lease of a farm of the defendant at a rent of 500*l*. per annum, specifying in his tender the closes which he wished

11 Sim. 150; Owen *v.* Thomas, 3 Myl. & K. 353; Price *v.* Griffith, 1 De Gex, M. & G. 80.

(*g*) Ogilvie *v.* Foljambe, 3 Mer. 61.

(*h*) Bleakley *v.* Smith, 11 Sim. 150.

(*i*) McMurray *v.* Spicer, L. R., 5 Eq. 527; 37 L. J., Ch. 505.

(*k*) Horsey *v.* Graham, L. R., 5 C. P. 191.

(*l*) Haywood *v.* Cope, 25 Beav. 140; but see Lancaster *v.* De Trafford, 31 L. J., Ch. 554; 8 Jur., N. S. 873.

(*m*) Lancaster *v.* De Trafford, *supra*.

(*n*) Jenkins *v.* Green, 27 Beav. 437; 28 L. J., Ch. 817.

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

(*p*) McKenzie *v.* Hesketh, L. R., 7 Ch. D. 675; 47 L. J., Ch. 231; 38 L. T. 171.

to take, with acreage, amounting to 249 acres. The defendant's agent desired to let only 214 acres with his farm, but he accepted the plaintiff's offer without looking at the acreage, although he had in fact let one of the closes to another person. Another tender had been made by a former tenant for the same farm, as comprising 235 acres, and the defendant's agent admitted that he thought that the plaintiff had tendered for the same quantity as such former tender. The plaintiff sued for specific performance, but was willing to take a lease of 214 acres at a proportionately reduced rent, and Fry, J., held that the defendant was bound to grant a lease of 214 acres, at a rent reduced from 500*l.* in the proportion of 214 to 235 (*p*).

Defective title. — If a party having title to a part only agrees to let a whole property, he will decree to let that part to which he has title, with an abatement of rent (*q*).

Writing must state the term to be granted. — The writing must state the term to be granted (*r*),[1] and particularly the time from which the term is to commence (*s*); but it will be sufficient if such time can be inferred, as for instance, if a day be fixed for the payment of a first rent (*t*). It seems, too, that the court will execute an agreement to grant a lease for three lives unnamed (*u*).

(*q*) Barrow *v.* Scammell, L. R., 19 Ch. D. 175; 51 L. J., Ch. 296; 45 L. T. 606; 30 W. R. 310.

(*r*) Bayley, Bart. *v.* Fitzmaurice (in error), 8 E. & B. 664; 9 H. L. Cas. 78; Clinan *v.* Cooke, 1 Sch. & Lef. 22; Gordon *v.* Trevelyan, 1 Price, 64; Hughes *v.* Parker, 8 M. & W. 244; 1 Dowl., N. S. 80; Clarke, app., Fuller, resp., 16 C. B., N. S. 24; Baumann *v.* James, L. R., 3 Ch. Ap. 508; Dolling *v.* Evans, 36 L. J., Ch. 474; 15 W. R. 394.

(*s*) Marshall *v.* Berridge, L. R., 19 Ch. D. 233 (C. A.); 30 W. R. 93, affirming Blore *v.* Sutton, 3 Mer. 237; and overruling Jaques *v.* Millar, L. R., 6 Ch. D. 153; in which an agreement to let for a term not specifying the date of commencement was held by Fry, J., to be a valid agreement to let for a term commencing on the date of the agreement; Cox *v.* Middleton, 2 Drew. 209; Hersey *v.* Giblett, 18 Beav. 174; Clarke, app., Fuller, resp.; and Dolling *v.* Evans, *supra*. And see Neshem *v.* Selby, L. R., 7 Ch. 406; Cartwright *v.* Miller, 36 L. T. 398.

(*t*) See Wesley *v.* Walker, 38 L. T. 284, *per* Fry, J.

(*u*) Fitzgerald *v.* Vicars, 2 Dru. & W. 298; Dart V. & P. 661.

[1] Hodges *v.* Howard, 5 R. I. 149, 158 (*per* Ames, C. J.); Abeel *v.* Radcliff, 13 Johns. (N. Y.) 297, 300, 301; Myers *v.* Forbes, 24 Md. 598.

Agreement not to disturb tenant. — An agreement by a lessee to grant a sublease (not describing it as a *sub*lease) to an intending tenant at any period he might feel disposed "and not to molest, disturb, or raise the rent" of the intending tenant after he had laid out money on the premises, was held, by the Court of Appeal, to entitle the intending tenant to a sublease for the residue of the term of the lessee, if the intending tenant should so long live (*x*); but it has been held, also, that a somewhat similar * agreement [*91] is merely personal between the parties, and does not bind a subsequent purchaser of the landlord's interest, with or without notice (*y*).

Rent. — The writing must also state the premium or fine (if any) agreed to be paid (*z*), and the rent to be paid (*a*),[1]

(*x*) Kusel *v.* Watson, L. R., 11 Ch. D. 129; 48 L. J., Ch. 413; 27 W. R. 714, C. A. Compare Wood *v.* Davis, 6 L. R., Ir. 50, *post*, Ch. V., Sect. 6. "Construing this agreement," observed Bramwell, L. J., "is mere guess work."

(*y*) Roberts *v.* Tregaskis, 38 L. T. 176, decided shortly before, but not cited in Kuset *v.* Watson, from which, however, it seems to be distinguishable.

(*z*) Martin *v.* Pycroft, 2 De Gex, M. & G. 785; Wood *v.* Scarth, 2 K. & J. 33; Clifford *v.* Turrell, 1 You. & Coll. C. C. 138; Blagden *v.* Bradbear, 12 Ves. 466; Elmore *v.* Kingscote, 5 B. & C. 583.

(*a*) Woolam *v.* Hearn, 7 Ves. 211; Gregory *v.* Mighell, 18 Ves. 328 (agreement for fair annual rent to be settled by arbitration, held sufficient); Powell *v.* Lovegrove, 8 De Gex, M. & G. 80.

[1] **Rent must be definitely fixed.** — Abeel *v.* Radcliff, 13 Johns. (N. Y.) 297, 300, 301 (*per* Van Ness, J.); Robinson *v.* Kettletas, 4 Edw. Ch. (N. Y.) 67, 69; Pray *v.* Clark, 113 Mass. 283 (agreement for "rent to be proportioned to valuation of said premises at said time," but with no way provided for fixing valuation held insufficient); Morrison *v.* Rossignol, 5 Cal. 64 (rent to be according to value of property insufficient); Hopkins *v.* Gilman, 22 Wis. 476 (rent to be determined by arbitration insufficient for specific performance, but injunction granted restraining landlord from taking possession); Kelso *v.* Kelly, 1 Daly (N. Y. Superior Ct.) 419 (rent to be fixed by arbitrators, and court referred to referees to fix it).

These last two cases are consistent with Powell *v.* Lovegrove (cited by the author), and show that, though courts will not specifically enforce agreements to submit to arbitration (Noyes *v.* Marsh, 123 Mass. 286; Pearl *v.* Harris, 121 Id. 390; Tobey *v.* Bristol, 3 Story, 800), they can find a way to enforce the contract. How far they will be followed in other American courts, *quære*.

A contract for sale, providing that the purchase money shall be paid "on such terms as may be agreed upon between said parties," is too indefinite for enforcement. Huff *v.* Shepard, 58 Mo. 242.

and should also, though this is not absolutely essential, state whether the rent is to be paid quarterly (*b*), half-yearly or otherwise. If there be no stipulation on that point, it will be payable only at the end of each year of the term (*c*).

Special covenants. — Any special or unusual covenants or stipulations actually agreed on should be stated (*d*), and accurately expressed (*e*). If the tenant agrees to improve the premises, the particulars of what he is to do (being a material part of the contract) must be sufficiently specified, so that a proper covenant may be inserted in the lease; otherwise the contract will be too uncertain to be specifically enforced (*f*). An agreement, however, for the tenant to do certain specified works and "other works" upon the property, estimated at from 150*l.* to 200*l.*, was held not too uncertain to prevent a decree for specific performance, inasmuch as the specified works would cost nearly that sum (*g*). Vagueness in the language of an agreement may sometimes be cured by evidence of the surrounding circumstances, and of the subsequent conduct of the parties (*h*). Sometimes an "&c." will not render the contract too uncertain to be specifically enforced (*i*); but if the construction of the agreement depends on the meaning of an "&c.," the court can make no decree (*k*).

It seems that the common and usual covenants and provisos need not be mentioned (*l*). They are implied as part of the contract, and may be added at chambers.

(*b*) Pillins *v.* Armitage, 12 Ves. 78.

(*c*) Coomber *v.* Howard, 1 C. B. 440; Collett *v.* Curling, 10 Q. B. 785; Giraud *v.* Richmond, 2 C. B. 835.

(*d*) Fry, ss. 221, 222; Brodie *v.* St. Paul, 1 Ves. jun. 326.

(*e*) Doe *d.* Marquis of Bute *v.* Guest, Bart., 15 M. & W. 160; Doe *d.* Marqnis of Bute *v.* Thompson, 13 M. & W. 494.

(*f*) Gardner *v.* Fooks, 15 W. R. 888, M. R.

(*g*) Baumann *v.* James, L. R., 3 Ch. Ap. 508.

(*h*) Oxford *v.* Provard, L. R., 2 P. C. C. 135; Coupland *v.* Arrowsmith, 18 L. T. 75

(*i*) Parker *v.* Taswell, 2 De G. & J. 559; 27 L. J., Ch. 812; Cooper *v.* Hood, 26 Beav. 299; Powell *v.* Lovegrove, 8 De Gex, M. & G. 357.

(*k*) Price *v.* Griffith, 1 De Gex, M. & G. 80; and see Tatham *v.* Platt, 9 Hare, 660; Stuart *v.* London and North Western R. Co., 1 De Gex, M. & G. 721.

(*l*) Fry, ss. 225, 227; Ricketts *v.* Bell, 1 De Gex & Sm. 335; Cosser *v.* Collinge, 3 Myl. & K. 283; Smith *v.* Capron, 7 Hare, 185; Church *v.* Brown, 15 Ves. at p. 265. See further as to "Usual Covenants," Sect. 7, *post.*

* (b) *How Agreements may be signed.* [*92]

Signature. — An agreement for a lease must, by virtue of the 4th section of the Statute of Frauds above referred to, be signed *by the party to be charged therewith*,[1] or his agent thereunto lawfully authorized. It need not be signed by both parties (*m*).[2] The signature to a contract may be in almost any part of the writing (*n*): provided it is so placed as to govern and authenticate every material and operative part of the instrument; but not where it applies only to the particular part where it is introduced (*o*). A signature in pencil (*p*),[3] or by initials (*q*), or by print (*r*),

(*m*) Boys *v.* Ayerst, 6 Madd. 323; Seton *v.* Slade, 7 Ves. 265; Laythorp *v.* Bryant, 2 Bing. N. C. 735.

(*n*) Fry, ss. 347, 348, 349; Propert *v.* Parker, 1 Russ. & Myl. 625; Bleakley *v.* Smith, 11 Sim. 150.

(*o*) Caton *v.* Caton, L. R., 2 H. L. Cas. 127; 36 L. J., Ch. 886.

(*p*) Lucas *v.* James, 7 Hare, 410.

(*q*) Selby *v.* Selby, 3 Mer. 2; Sug. V. & P., Chap. III., Sect. 4.

(*r*) Scheider *v.* Norris, 2 M. & S. 286.

[1] Jacobs *v.* P. & S. R. R. Co., 8 Cush. (Mass.) 223.

[2] **Mutuality, &c.; signature by one party.** — Douglass *v.* Spears, 2 Nott & M'Cord (S. C.) 207; Penniman *v.* Hartshorn, 13 Mass. 87; Barstow *v.* Gray, 3 Greenl. (Me.) 409; Ballard *v.* Walker, 3 Johns. Cas. (N. Y.) 60; Roget *v.* Merritt, 2 Caines (N. Y.) 117; Clason *v.* Bailey, 14 Johns. (N. Y.) 484, 487 (*per* Kent, Chan.); M'Crea *v.* Purmort, 16 Wend. (N. Y.) 460; Laning *v.* Cole, 4 N. J. Eq. 229; Old Colony R. R. Co. *v.* Evans, 6 Gray (Mass.) 25. But see Geiger *v.* Green, 4 Gill (Md.) 472; German *v.* Machin, 6 Paige (N. Y.) 292; Boucher *v.* Van Buskirk, 2 A. K. Marsh. (Ky.) 346; Benedict *v.* Lynch, 1 Johns. Ch. 370, 373, 374. In Benedict *v.* Lynch, *supra*, Chancellor Kent expressed opposite views to those subsequently expressed by him in Clason *v.* Bailey, *supra*, saying that by the weight of authority contracts signed by only one party were not enforceable by the other, since the obligation was not mutual.

The rule is now, however (as said by him in Clason *v.* Bailey), well settled that covenants, whether based upon covenants or optional conditions, are equally binding when the covenants and conditions have been performed. Matter of Jane Hunter, 1 Edw. Ch. (N. Y.) 1, 5; Frue *v.* Houghton, 6 Col. 318, 324; Cutting *v.* Dana, 25 N. J. Eq. 265.

Vice-Chan. McCoun said, in Matter of Jane Hunter, *supra*, "The court may therefore in a proper case, where there is a covenant on one side and no mutuality, decree a performance"; and Beck, C. J., in Frue *v.* Houghton, said, "The promisee in many instances not being bound at all. . . . Upon performance of the condition, however, the contract is said to become absolute and mutual in its obligations."

[3] Signature with lead pencil sufficient. Clason *v.* Bailey, 14 Johns. (N. Y.) 484.

seems to be sufficient, and so does the signature of a marksman (*s*).

Signature by agent. — A signature by an agent, thereunto "lawfully authorized," is sufficient, by the very terms of the 4th section of the Statute of Frauds,[1] and such authority need not be in writing (*t*). But the authority of the agent to sign such contract must be proved, if disputed (*u*). Such authority is revoked by the death of the principal, although the agent does not know of the death (*x*). Proof of a subsequent ratification will be sufficient evidence of a prior authority (*y*). On the other hand, an oral revocation of any such authority may be proved (*z*): unless the agent was appointed by *deed;* and perhaps even then (*a*). An

(*s*) See Baker *v.* Dening, 8 A. & E. 94.

(*t*) Coles *v.* Trecothick, 9 Ves. 234, 250; Clinan *v.* Cooke, 1 Sch. & Lef. 22; Dyas *v.* Cruise, 2 Jon. & Lat. 461; Heard *v.* Pilley, L. R., 4 Ch. Ap. 548; Smith L. & T. 82, 93 (2nd ed.).

(*u*) Blore *v.* Sutton, 3 Mer. 237; Ridgway *v.* Wharton, 3 De Gex, M. & G. 677; 27 L. J., Ch. 46; 6 H. L. Cas. 238; Firth *v.* Greenwood, 1 Jur., N. S. 866; Forster *v.* Rowland, 7 H. & N. 103; 30 L. J., Ex. 396; Clarke, app., Fuller, resp., 16 C. B., N. S. 24, 36; Baines *v.* Ewing, 35 L. J., Ex. 194.

(*x*) Carr *v.* Levingston, 35 Beav. 41.

(*y*) Fry, s. 355; Maclean *v.* Dunn, 4 Bing. 722; Ridgway *v.* Wharton, 6 H. L. Cas. 238, 296; Bayley, Bart. *v.* Fitzmaurice, 8 E. & B. 664; 9 H. L. Cas. 78.

(*z*) Manser *v.* Back, 6 Hare, 443; Rex *v.* Wait, 11 Price, 508; Venning *v.* Bray, 2 B. & S. 502; 31 L. J., Q. B. 181.

(*a*) Venning *v.* Bray, *supra.*

[1] **Agency for both parties; signature.** — And the same agent may act for both parties; as for example, a broker may sign for both parties in their presence a contract for the sale of goods, Clason *v.* Bailey, 14 Johns. (N. Y.) 484; and an auctioneer, as agent for both buyer and seller, has implied authority to write the bidder's name upon the memorandum of sale; and if the memorandum contains all the essential terms of the contract, it satisfies the statute. Gill *v.* Bicknell, 2 Cush. (Mass.) 355, 358, 359 (*per* Shaw, C. J.); Cleaves *v.* Foss, 4 Greenl. (Me.) 1; Inhbts. of Alna *v.* Plummer, 4 Id. 258; M'Comb *v.* Wright, 4 Johns. Ch. (N. Y.) 659; Gordon *v.* Sims, 2 M'Cord's Ch. (S. C.) 151, 157, 164, 165 (holding that the auctioneer's memorandum may be made on loose paper, and if lost, its contents may be proved by parol).

If auctioneer's memorandum does not contain essential terms, it is insufficient. Morton *v.* Dean, 13 Met. (Mass.) 385, 388. The above cases also decide that the agent's authority need not be in writing.

"Whoever bids does in effect authorize the auctioneer to sign his name, if no other person bids a higher sum" (*per* Weston, J., in Cleaves *v.* Foss, *supra*, p. 10).

agent who contracts in his own name may sometimes be compelled specifically to perform the contract (*b*).[1]

Defects supplied by subsequent writing. — An agreement, note or memorandum, which is defective in some or one of the above particulars, may sometimes be perfected by a prior (*c*) or subsequent letter or other writing, which sufficiently is referred to or refers to it, and supplies the defect (*d*). But where the plaintiff in a suit for specific performance put in two letters of the defendant, the * first showing all the terms of the proposed agree- [*93] ment for a lease but omitting the date at which the occupation was to commence, and the second referring to the first as applying to a term to begin from "Michaelmas next," but adding several terms to which the plaintiff did not assent, the court refused specific performance, although there was undisputed evidence that a complete verbal agreement had been made on the terms of the first letter, with the additional term of "Michaelmas next," and James, L. J., observed that the court "had gone quite far enough in enforcing specific performances upon the evidence of letters when one party is bound and the other not" (*e*). Generally speaking parol evidence is inadmissible to connect two writings which do not of themselves sufficiently refer to each other (*f*); but sometimes it may be admitted to negative the existence of any other writings on the subject, from which their relation to each other may be inferred (*g*). Sometimes when a defective writing cannot be perfected in this manner, it may be taken out of the operation of the Statute of Frauds by a sufficient part performance (*h*). The existence of a signed

(*b*) Saxon *v.* Blake, 29 Beav. 438.

(*c*) Baumann *v.* James, L. R., 3 Ch. App. 508; here the acceptance was "at rent and terms agreed upon."

(*d*) Warner *v.* Willington, 3 Drew. 523; 25 L. J., Ch. 662; Ridgway *v.* Wharton, 6 H. L. Cas. 238; 3 De Gex, M. & G. 677; 27 L. J., Ch. 46; Dobell *v.* Hutchinson, 3 A. & E. 355; Kennedy *v.* Lee, 8 Meriv. 441.

(*e*) Nesham *v.* Selby, 41 L. J., Ch. 551; L. R., 7 Ch. 406.

(*f*) Skelton *v.* Cole, 1 De Gex & J. 587; Clinan *v.* Cooke, 1 Sch. & Lef. 22.

(*g*) Baumann *v.* James, L. R., 3 Ch. Ap. 508; 16 W. R. 877.

(*h*) *Post*, Sect. 4 (a), p. 100.

[1] As it will be against one bidding for another at an auction, and not disclosing that fact. M'Comb *v.* Wright, 4 Johns. Ch. (N. Y.) 659.

but incomplete agreement is no obstacle in the way of proving the additional terms by parol where there has been a part performance; for the whole might have been proved by parol (*i*).

Effect of subsequent alterations by parol. — On the other hand, where there is a sufficient writing to satisfy the statute, but some of the terms of it are *altered afterwards by parol*, a specific performance of the agreement as altered will not be decreed (*k*).[1] The reason is, that contracts within the 4th section of the Statute of Frauds must be wholly proved by writing (*l*). To allow such a contract to be proved partly by writing and partly by oral testimony, would let in all the mischiefs which it was the object of the statute to exclude (*m*). But if the new terms were merely intended to modify the original agreement, and were inoperative for that purpose, it seems that a specific performance of the original agreement may be decreed (*n*). Where a plaintiff alleges a written agreement, with the parol variation in favour of the defendant, and offers to perform the agreement [*94] with * the variation, the court will enforce specific performance, although the defendant insists on the statute (*o*). In such case the court will decree specific performance with the variations, if the defendant elect to take advantage of them; or otherwise of the original agreement (*p*). It is to be observed, that the Statute of Frauds

(*i*) Sutherland *v.* Briggs, 1 Hare, 26, 35; Powell *v.* Lovegrove, 8 De Gex, M. & G. 357; Morphett *v.* Jones, 1 Swans. 172; Fry, s. 420; see, too, Stewart *v.* Eddowes, L. R., 9 C. P. 311, where parol evidence was held admissible to show that certain interlineations had been assented to.

(*k*) Jordan *v.* Sawking, 1 Ves. jun. 402; 3 Bro. C. C. 388; Price *v.* Salusbury, 32 Beav. 446; 32 L. J., Ch. 441; affirmed Dom. Proc., 14 L. T. 110.

(*l*) Foquet *v.* Moor, 7 Exch. 1870; Goss *v.* Lord Nugent, 5 B. & Adol. 58; Harvey *v.* Grabham, 5 A. & E. 61; Stowell *v.* Robinson, 3 Bing. N. C. 928.

(*m*) Stead *v.* Dawber, 10 A. & E. 57.

(*n*) Price *v.* Dyer, 17 Ves. 356; O'Connor *v.* Spaight, 1 Sch. & Lef. 305; Stead *v.* Dawber, 10 A. & E. 57; Marshall *v.* Lynn, 6 M. & W. 109; Moore *v.* Campbell, 10 Exch. 323; Noble *v.* Ward, L. R., 1 Ex. 117; 35 L. J., Ex. 81; but see Clarke *v.* Moore, 1 Jon. & Lat. 723–729; Fry, ss. 685, 690.

(*o*) Martin *v.* Pycroft, 2 De Gex, M. & G. 785; Dart V. & P. 663, 666.

(*p*) Robinson *v.* Page, 3 Russ. 114; Dart V. & P. 728.

[1] Brooks *v.* Wheelock, 11 Pick. (Mass.) 439.

does not say in distinct terms that all contracts or agreements concerning the sale of lands shall be in writing; all that it enacts is, that no action shall be brought unless they are in writing; and as there is no clause in the act which requires the dissolution of such contracts to be in writing, it should seem that a written contract concerning the sale of lands may still be waived and abandoned by a new agreement not in writing, and so as to prevent either party from recovering on the contract which was in writing (*q*).

Sect. 2. — *The Stamping of the Agreement for a Lease.*

It is material to observe that the Stamp Act, 1870, which is a consolidating act, imposes the same stamp upon an agreement for a lease as it imposes upon a lease itself (except in the case where the term exceeds 35 years), and imposes upon a lease made in conformity with an agreement duly stamped, the duty of sixpence only (*r*).

It seems that a written proposal accepted orally need not be stamped as an agreement (*s*). But it is otherwise with respect to a document signed by one party only, but intended either as a contract, or as evidence of a contract, and not as a mere proposal (*t*). When an oral proposal is accepted in writing, such acceptance must be stamped as an agreement (*u*).

Sect. 3. — *Remedies for Breach of Agreement.*

Lease or agreement. — Questions frequently arose before the passing of the act 8 & 9 Vict. c. 124, whether a particu-

(*q*) Goss *v.* Lord Nugent, 5 B. & Adol. 64; but see Carrington *v.* Roots, 2 M. & W. 248; Reade *v.* Lamb, 6 Exch. 130; 2 L., M. & P. 67.

(*r*) 33 & 34 Vict. c. 97, s. 96. See *post*, Appendix A., Sect. 7. The former law, 23 Vict. c. 15, excepted leases for not more than *seven* years from a similar provision.

(*s*) Drant *v.* Brown, 3 B. & C. 665; Edgar *v.* Blick, 1 Stark. 464; Vaughan *v.* Brine, 1 M. & G. 359; Vollans *v.* Fletcher, 1 Exch. 20; Hudspeth *v.* Yarnold, 9 C. B. 625; Smith *v.* Neale, 2 C. B., N. S. 79; Laing *v.* Smith, 3 F. & F. 97.

(*t*) Chanter *v.* Dickinson, 5 M. & G. 253; 2 Dowl., N. S. 838; Hegarty *v.* Milne, 14 C. B. 627.

(*u*) Atherstone *v.* Bostock, 2 M. & G. 511; Chanter *v.* Dickinson, *supra*; Hegarty *v.* Milne, *supra*.

lar instrument is to be construed as an actual lease or as an agreement for a lease. A few of the numerous cases [*95] *upon the subject will be noticed presently (*x*). The general result of them may be taken to be that the intention of the parties, as expressed in the instrument, is to be looked to,[1] and that where a document cannot by law

(*x*) Chap. V., Sect. 4, *post*. And see them discussed in Davidson on Conveyancing, vol. v., pt. I, pp. 1–16.

[1] **Distinction between leases and agreements for leases.** — Where the words used "imply an immediate demise," and "there is no stipulation for a further lease," and "the term, the rent, and the manner of occupying . . . are all explicitly stated, the instrument constitutes a lease." Spencer, J., in Thornton *v.* Payne, 5 Johns. (N. Y.) 74, 77. Though the term commence *in futuro*, yet the demise may operate *in presenti*. Same *v.* Same; Bacon *v.* Bowdoin, 22 Pick. (Mass.) 401.

The words "hath set and to farm let unto . . . during the term of the natural life," &c., create a present demise, even though the instrument contains covenant for further lease. Jackson *v.* Kisselbrack, 10 Johns. (N. Y.) 336.

The words "agree to lease" create a present demise, where, upon the whole instrument, this appears to have been the intention of the parties. Holley *v.* Young, 66 Me. 520. An agreement for a lease will be construed to be a lease if possession is taken, and no future formal lease is contemplated. Jenkins *v.* Eldredge, 3 Story, 325. Even though the instrument contemplates a future more formal lease, yet if it show an intention to create a present tenancy, it operates as a present demise. Buckley *v.* Russell, 24 N. B. 205.

An instrument commencing "We, the undersigned, agree to rent or lease," &c., constitutes itself a lease (whether possession be taken under it or not) if it contain all the terms of a demise, "and there is nothing to show that any more formal document was contemplated."

Kabley *v.* Worcester Gas Light Co., 102 Mass. 392, 394.

The words inserted in lease for term, "We further agree to lease to said Young said premises . . . at the price and conditions named as long as he wishes to occupy the same," creates a demise of future term at option of lessee; and by remaining in possession after expiration of present demise, he does not become a mere tenant at sufferance. Holley *v.* Young, 66 Me. 520.

But instruments containing words of present demise accompanied with qualifying words showing a contrary intention, do not operate as present demises, as, for example, if they contain an agreement for taking a lease after certain improvements have been made. Jackson *v.* Delacroix, 2 Wend. (N. Y.) 433.

Agreements for leases have been held to constitute leases in the following, among other cases, viz.: Hallett *v.* Wylie, 3 Johns. (N. Y.) 47, and Jenkins *v.* Eldredge, 3 Story, 325, 330 (words of present demise with possession); Thornton *v.* Payne, 5 Johns. (N. Y.) 74 (words of present demise without possession; held that lessee could maintain suit for possession); Bacon *v.* Bowdoin, 22 Pick. (Mass.) 401, and Weed *v.* Crocker, 13 Gray (Mass.) 219 (words implying a present demise of a term to commence *in futuro*); Jackson *v.* Kisselbrack, 10 Johns. (N. Y.) 336, and Buckley *v.* Russell, 24 N. B.

operate as a lease, the leaning of the courts is to construe it, if possible, as an agreement (*y*).

Two remedies. — There are two remedies for breach of a *valid* contract or agreement for a lease, either of which, but not both, may generally be adopted by the intended landlord, or by the intended tenant, as the case may require, viz.: — 1. An action to recover damages for the breach (*z*). 2. An action to compel a specific performance of the agreement.

An intended tenant may, in an action for damages, recover

(*y*) Tidey *v.* Mollett, 16 C. B., N. S. 298.

(*z*) By Landlord, &c. — Bond *v.* Rosling, 1 B. & S. 371; 30 L. J., Q. B. 227; Foster *v.* Rowland, 7 H. & N. 103; 30 L. J., Ex. 396; Collins *v.* Willmott, 13 W. R. 204; De Medina *v.* Norman, 9 M. & W. 820; 2 D. & L. 239; Souter *v.* Drake, 5 B. & Adol. 992; Kintrea *v.* Perston, 1 H. & N. 357; 25 L. J., Ex. 287; Cocking *v.* Ward, 1 C. B. 858; Bullen & L. Pl. 245–253 (3d ed.). By Tenant, &c. — Rollason *v.* Leon, 7 H. & N. 73; 31 L. J., Ex. 96; Hayward *v.* Parke, 16 C. B. 295; Jinks *v.* Edwards, 11 Exch. 775; Hall *v.* Betty, 4 M. & G. 410.

205, 209 (words constituted present demise, though the instruments contained covenants for future leases).

In the following cases agreements for leases have been held not to constitute leases, viz.: People *v.* Gillis, 24 Wend. (N. Y.) 201 (because there were no words of present demise); Jackson *v.* Delacroix, 2 Id. 433 (because the words of present demise were qualified by other words, showing that a present demise was not intended); Weld *v.* Traip, 14 Gray, 330 (because the words implied the making of a future lease); McGrath *v.* Boston, 103 Mass. 369 (because notwithstanding present possession was given, the contract showed that a future lease was intended).

If the intended lessee in fact enters upon the premises, that of itself is strong presumptive evidence that the parties intended a present demise. Hallett *v.* Wylie, 3 Johns. (N. Y.) 44, 47, 48.

Ordinarily, possession taken and payment of rent under an agreement for a lease creates a tenancy for the stated term. Cheney *v.* Newberry, 67 Cal. 125; 1 Washburn on Real Prop., pp. 397, 398.

If a party construct a building upon the land of another under an agreement that he is to occupy it until the rent at a stated price shall equal the cost of the building, such an agreement creates a tenancy commencing immediately upon the completion of the building. Billings *v.* Canney, 57 Mich. 425.

An agreement for a lease upon conditions precedent becomes a lease *in equity* after the performance of those conditions. Simmons *v.* Campbell, 17 Ch. (Ont.) 612, 617.

The law recognizes an agreement to make an agreement for a lease as a valid contract; and though the court itself cannot directly enforce it, yet it will give damages against a party refusing to perform it. Foster *v.* Wheeler, 36 Ch. D. 695, 697, Kekewich, J., saying, "This defence rests, I think, upon a confusion, not by any means uncommon, between enforcing a contract and ordering a contract to be specifically enforced."

back any premium paid by him (*a*). Even where the agreement is verbal, money expended by an intending tenant in pursuance of it, ex. gr., money laid out upon alteration of the premises agreed to be demised, is recoverable as upon a failure of consideration (*b*).

Breach by lease to another party; Ford v. Tiley. — If the intending landlord disables himself from granting the lease agreed upon by making an actual and inconsistent lease to another party before the day arrives for the granting of the lease agreed upon, he may be sued at once by the intending tenant for a breach of contract in making the actual lease (*c*).

Insufficiency of title. — At common law the intending lessor, by agreeing to grant a lease, impliedly contracted that he had title to grant the lease, and if he had not, he was liable to an action at the suit of the intended lessee (*d*), although the intended lessee, by a contract for sale of the agreement, was bound by no implied condition that the intended lessor had title (*e*).

Intended lessee may not call for title; V. & P. Act, 1874. — By the Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78), s. 2, it is enacted that "under a contract to grant or assign a term of years, whether derived or to be derived out of a freehold or leasehold estate, the intended lessee or assign shall not be entitled to call for the title to the freehold, &c.;" and by the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), "on a contract to grant a lease for a term of years, to be derived out of a leasehold interest, with a leasehold reversion, the intended lessee shall not have the right to call for the title *to the leasehold reversion." These enactments do away with the common law rule, the first applying to the case where the intended landlord is a

[*96]

(*a*) Wright *v.* Colls, 8 C. B. 150; 19 L. J., C. P. 60.

(*b*) Pulbrook *v.* Lawes, L. R., 1 Q. B. D. 284; 45 L. J., Q. B. 17; 34 L. T. 95; see also Worthington *v.* Warrington, 8 C. B. 134; Robinson *v.* Harman, 1 Ex. 850.

(*c*) Ford *v.* Tiley, 6 B. & C. 325; see, too, Frost *v.* Knight, L. R., 7 Ex. 111.

(*d*) Stranks *v.* St. John, L. R., 2 C. P. 376; 36 L. J., C. P. 118; 16 L. T. 283; 15 W. R. 678.

(*e*) Kintrea *v.* Perston, 1 H. & N. 357; 25 L. J., Ex. 287.

freeholder, and the second to the case where he is a leaseholder.

Defences to action. — It is a good defence to an action for breach of an agreement to let premises that the intending tenant intended to use them for a purpose forbidden by law, ex. gr., for the delivery of lectures in contravention of the Blasphemy Act (*f*).

In what court action. — The action for damages may be brought in any division of the High Court, but if it be tried before a judge with a jury, the trial will be had before a judge of the Queen's Bench Division (*g*). If the plaintiff claim 50*l.* or less as damages, the action may be brought in the County Court (*h*).

Sect. 4. — *The Action for Specific Performance.*[1]

In what court action for specific performance. — Actions for the specific performance of contracts for leases are by sect. 34 of the Judicature Act, 1873, assigned to the Chancery Division of the High Court. If a defendant claim specific performance by way of counter-claim in an action brought in a division other than the Chancery Division, the action will probably be transferred to that division (*i*). If the value of the property agreed to be demised do not exceed 500*l.*, the action for specific performance may be brought in the County Court (*k*).

(*f*) Cowan *v.* Milbourn, L. R., 2 Ex. 230; 36 L. J., Ex. 124.

(*g*) Judicature Act, 1873, ss. 29, 37; Warner *v.* Murdock, L. R., 4 Ch. D. (C. A.) 750.

(*h*) Clarke *v.* Fuller, 16 C. B., N. S. 24.

(*i*) R. S. C., Order LI. And see Id. App. C., Forms of Pleading, No. 24; Hillman *v.* Mayhew, L. R., 1 Ex. D. 132; 45 L. J., Ex. 334; 34 L. T. 256; 24 W. R. 435.

(*k*) County Court Act of 1865 (28 & 29 Vict. c. 99); County Court Act

[1] **Specific performance; how obtained.** — In some of the American states specific performance can only be obtained through a bill in equity, or by an equitable action.

In others, parties entitled thereto may set up that fact as a defence in ejectment, and obtain a decree against the plaintiff in the same suit. Arguello *v.* Edinger, 10 Cal. 150, 160.

In cases where equitable defences may be made in suits at law, a covenant upon which one is entitled to a decree for specific performance may be set up as a defence in trespass. M'Ginness *v.* Kennedy, 29 Q. B. (Ont.) 93, 97.

Combination of damages with specific performance; 21 & 22 Vict. c. 27, s. 2. — Damages may be awarded either in addition to or in substitution for specific performance. For by the Judicature Act, s. 24, sub-s. 7, the High Court has power to grant, and "shall grant," either absolutely or on conditions, "all such remedies whatsoever as any of the parties" to a cause may appear to be entitled to in respect of any and every legal or equitable claim properly brought forward." Prior to this act, it had been enacted by 21 & 22 Vict. c. 27, s. 2 (Lord Cairns' Act), that "in all cases in which the Court of Chancery had jurisdiction to entertain an application for an injunction against a breach of any covenant, contract or agreement, or against the commission or continuance of any wrongful act or for the specific performance [*97] of any *covenant, contract or agreement, it should be lawful for the same court, if it should think fit (*l*), to award damages to the party injured, either in addition to, or in substitution for, such injunction or specific performance (*m*). Under this act it was held that a court of equity could give damages only where it could decree specific performance or grant an injunction (*n*), and that when the plaintiff failed to establish any covenant, contract or agreement, of which specific performance could be directed, the court had no jurisdiction to grant relief in damages (*o*),[2]

of 1867 (30 & 31 Vict. c. 142), ss. 9, 33. The latter act expressly includes an agreement for a lease, which had been held in Wilcox *v.* Marshall, L. R., 3 Eq. 270, to be impliedly included by the former act amongst the matters in which an equitable jurisdiction was given to county courts.

(*l*) See Durell *v.* Pritchard, L. R., 1 Ch. Ap. 244; 35 L. J., Ch. 223.

(*m*) This Act is repealed by the Statute Law Revision and Civil Procedure Act, 1883, 46 & 47 Vict. c. 49, but the jurisdiction thereunder is still in force either by virtue of the Judicature Act or s. 5 of the act itself. *Per* Bagallay, L. J., in Sayers *v.* Collyer, 54 L. J., Ch. 1.

(*n*) Ferguson *v.* Wilson, L. R., 2 Ch. Ap. 77; 15 W. R. 80.

(*o*) Lewers *v.* Earl of Shafteshury, L. R., 2 Eq. 270; but see Howe *v.* Hunt, 31 Beav. 420; 32 L. J., Ch. 36.

[1] **With compensation.** — As, for example, where one covenants to convey with release of dower, but cannot procure such release, the court will decree specific performance with compensation or alternative full performance. Davis *v.* Parker, 14 Allen (Mass.) 94.

[2] **Incomplete remedies.** — In one case where the court held the contract too indefinite to grant specific performance, but yet the lessor was in fault, it enjoined the lessor from taking possession. Hopkins *v.* Gilman, 22 Wis.

but the terms of s. 24, sub-s. 7 of the Judicature Act appear to be more comprehensive; and it is apprehended that in a simple case the Queen's Bench Division would grant specific performance (*p*).

Combination of damages with specific performance. — Where A. agreed to grant a lease to B. (who was to enter at once and expend money on improvements), with a proviso that if he failed within three months to grant a valid lease he would repay to B. the amount of his outlay, and from and after such failure B. should be at liberty to quit, and the agreement should cease, except as to B.'s right to payment, and A. was unable to grant a lease for want of title: it was held, that B. had a lien on A.'s interest in the premises for his outlay and costs of suit (*q*). Where the defendant could not obtain his lessor's consent to an underlease, except upon payment of a reasonable and extra rent, specific performance was decreed, with damages to be assessed against him in the event of his not obtaining such consent (*r*). And where a tenant for life agreed to grant a lease for three lives, but had only power to grant one for his own life, he was decreed to perform his agreement specifically pro tanto, with compensation for the difference in value between the term as granted and the term as agreed (*s*). In one case, the court have decreed specific performance of an agreement to take a lease, but refused to order a specific performance of certain building stipulations, and instead thereof directed an inquiry as to the damages (*t*). But the rule seems to have been that the court would not, in addition to a decree for specific performance, award damages for the mere non-performance of

(*p*) See Mostyn *v.* West Mostyn, &c. Co., L. R., 1 C. P. D. 145; Gathercole *v.* Smith, L. R., 7 Q. B. D. 626.

(*q*) Middleton *v.* Magnay, 2 H. & M. 233; 12 W. R. 706; Hindley *v.* Emery, L. R., 1 Eq. 52; 35 L. J., Ch. 6; Turner *v.* Marriott, L. R., 3 Eq. 744.

(*r*) Hilton *v.* Tipper, 18 L. T. 626; 16 W. R. 888.

(*s*) Leslie *v.* Cromelin, 2 Ir. Eq. R. 134.

(*t*) Kay *v.* Johnson, 2 H. & M. 118.

476. And in a case where lessor covenanted to renew or pay for improvements and brought ejectment, the renewal covenant being indefinite, the court in that suit enforced the lessee's right to be paid for the improvements. Robinson *v.* Kettletas, 4 Edw. Ch. (N. Y.) 67, 69.

a contract, unless special damages were proved (*u*). Even before 21 & 22 Vict. c. 27, the court would in some cases award damages for want of a literal performance of [*98] one * term of a contract of which specific performance was decreed (*x*). Thus it would award compensation for the deterioration of the estate pending the contract; and in so doing it in truth gave damages to the purchaser for the loss which he sustained by the contract not having been literally performed (*y*).[1]

Ground of decree. — Where a contract in writing respecting real property, in conformity with the Statute of Frauds, was entered into between competent parties, and was moreover in its nature and circumstances unobjectionable, it was as much of course for a court of equity to decree a specific performance as it was for a court of common law to give damages for the breach of such a contract (*z*). The original and sole foundation of the jurisdiction to decree the specific performance of contracts was simply this: that an award of damages at law would not give a party the compensation to which he is entitled, that is, would not put him in a situation as beneficial to him as if the agreement were specifically performed (*a*).[2]

(*u*) Chinnock *v.* Marchioness of Ely, 2 H. & M. 221; 34 L. J., Ch. 399.

(*x*) Aubin *v.* Holt, 2 K. & J. 66, 70; Peacock *v.* Penson, 11 Beav. 355; Helling *v.* Lumley, 3 De Gex & J. 493; Phelps *v.* Prothero, 7 De Gex, M. & G. 722.

(*y*) Phelps *v.* Prothero, *supra.* See also Jaques *v.* Millar, L. R., 6 Ch. D. 153, in which the intending tenant recovered damages for loss of profits on trade meant, to the knowledge of the intending landlord, to be carried on upon the premises.

(*z*) Hall *v.* Warren, 9 Ves. 608.

(*a*) Id. 645; Harnett *v.* Yeilding, 1 Sch. & Lef. 553.

[1] And, on the other hand, under exceptional circumstances, the court will decree specific performance in behalf of a party who has not literally performed the contract himself. Colton *v.* Rookledge, 19 Chy. (Ont.) 121; Hunt *v.* Spencer, 13 Id. 235.

[2] **Specific performance not granted if damages adequate remedy.** — A decree for specific performance will not be made in any case where damages are an adequate remedy. Ashton *v.* Pryne, 19 Chy. (Ont.) 56. For example: ordinarily an agreement to take a lease and execute improvements will not be enforced. Dickson *v.* Covert, 17 Chy. (Ont.) 321. Where, however, a lessee has taken possession and made changes, &c., as the parties cannot be restored to their original condition, specific performance will be decreed, damages not being an adequate remedy. Lawrence *v.* Saratoga Lake R. Co., 36 Hun (43 N. Y. Supreme Ct.) 467.

Of tenancy from year to year, &c., refused. — The jurisdiction of the court to grant specific performance is a purely discretionary one.[1] It seems that no decree will be made for the specific performance of an agreement for a tenancy from year to year, the remedy in damages being deemed

[1] **May be granted on terms.** — Willard *v.* Taylor, 8 Wall. 557 (it may enforce a purchase option in favor of lessee, and impose terms upon him if by subsequent changes it has become inequitable to carry out the contract as originally made. Thus, it may require purchase money to be paid in coin, if legal tenders have depreciated largely); Curran *v.* Holyoke Water Power Co., 116 Mass. 90.

When granted; when refused. — The court will not grant specific performance if inequitable. McDonald *v.* Rose, 17 Chy. (Ont.) 657, 659. It will not be granted if the act of renewing will be a nugatory act. Tobey *v.* Bristol, 3 Story, 800, 824.

The court will not compel lessor to grant lease of a shop not belonging to him, Morris *v.* Kemp, 13 Chy. (Ont.) 487; neither will it compel a railroad company to give an *ultra vires* lease. Carleton Branch Ry. Co. *v.* The Grand Southern Ry. Co., 21 N. B. 339, 367 (*per* Allen, C. J.). It will not require trustees who have contracted without knowledge of their co-trustees, to give a lease (trustees being joint tenants). McKelvey *v.* Rourke, 15 Chy. (Ont.) 380.

The court will not compel a trustee to renew a lease after expiration of his trust. Bergengren *v.* Aldrich, 139 Mass. 259.

In case of a lease made in England under a power to lease, the court will enforce a renewal covenant if, at the time renewal is asked for, the rent reserved is the best rent; not otherwise, a renewal for any rent less than the best rent being *ultra vires*. Gas Light & Coke Co. *v.* Towse, 35 Ch. D. 519. Specific performance will not be decreed if it is optional with lessor to renew or pay for improvements, Hutchinson *v.* Boulton, 3 Chy. (Ont.) 391; nor if material changes have taken place in the premises contrary to the agreement, Dunn *v.* Howard, 1 Allen (N. B.) 615; as where the outgoing tenant had removed gas fittings, the use of which the incoming tenant was to have.

Though the court will not specifically enforce a contract in favor of a party who has forfeited his right (as by ejecting the vendee or lessee), yet if he bring a bill for specific performance or rescission against the infant heir of such vendee or lessee, the court will order a reference; and if it appear to be a beneficial contract, will order it performed in behalf of the infant. Farquharson *v.* Williamson, 1 Chy. (Ont.) 93.

The court will not order specific performance of an agreement to convey a specific thing if that thing have been subsequently accidentally destroyed (*per* Gray, J., in Viterbo *v.* Friedlander, 120 U. S. 707, 712).

The court in decreeing specific performance will take note of the rights of third parties which have intervened, and qualify its decree accordingly. Curran *v.* Holyoke Water Power Co., 116 Mass. 90.

An intended lessee will be required to complete his contract, notwithstanding the acts of third parties, as a municipal corporation, in building a bridge near the premises, have somewhat injured the value of the property. Dennison *v.* Kennedy, 7 Chy. (Ont.) 342.

sufficient (*b*);[1] nor where the agreed term has expired or will expire before a decree can be obtained (*c*); nor where the lease is to be granted upon certain specified buildings being erected within a limited time, which has nearly elapsed, and the buildings have not been begun (*d*).

Instrument void as lease, but good as agreement. — A writing purporting to be a lease for more than three years, which is void at law as a lease because not by deed (*e*), may be good in equity as an agreement for a lease, and enforced by a decree for a specific performance, with costs (*f*). And although such contract is *void at law as a lease*, it may nevertheless be valid, even at law, as an agreement for a lease, and also with respect to any express stipulations therein contained so as to support an action for breaches of such stipulations (*g*). And the law would probably be the [*99] same with respect to any *stipulations to be necessarily implied from the terms of the contract; but no action can be maintained for not giving possession at the time appointed for the commencement of the term, because possession under a lease for a certain number of years (exceeding three years) was agreed for, and not a possession as tenant from year to year upon the terms of the intended lease so far as they are applicable to and not inconsistent with a yearly tenancy (*h*).

What Complainant should consider. — Before commencing

(*b*) Clayton *v.* Illingworth, 10 Hare, 451; Mortal *v.* Lyons, 8 Ir. Ch. R. 112; Fry, s. 7; Sug. V. & P. 209 (14th ed.).

(*c*) Nesbit *v.* Meyer, 1 Swans. 226; Walters *v.* Northern Coal Mining Co., 5 De Gex, M. & G. 629; 25 L. J., Ch. 633; De Brassac *v.* Martyn, 11 W. R. 1020; Fry, ss. 603, 606; Dart V. & P. 702.

(*d*) Asylum for Female Orphans *v.* Waterlow, 16 W. R. 1102, M. R.

(*e*) *Post*, Chap. V. Sect. 2.

(*f*) Parker *v.* Taswell, 2 De Gex & J. 557; 27 L. J., Ch. 812.

(*g*) Bond *v.* Rosling, 1 B. & S. 371; 30 L. J., Q. B. 227; Rollason *v.* Leon, 7 H. & N. 73; 31 L. J., Ex. 96; Tidey *v.* Mollett, 16 C. B., N. S. 298; 33 L. J., C. P. 235; Hayne *v.* Cummings, 16 C. B., N. S. 421; Hunt *v.* Harris, 19 C. B., N. S. 13; 34 L. J., C. P. 249.

(*h*) Drury *v.* Macnamara, 5 E. & B. 612; Pitman *v.* Woodbury, 3 Exch. 4; Swatman *v.* Ambler, 80 Exch. 72; 22 L. J., Ex. 81; Jinks *v.* Edwards, 11 Exch. 775; Tress *v.* Savage, E. & B. 36; Cole Ejec. 222, 444.

[1] The court will not decree specific performance of an agreement for a lease for a year. Mara *v.* Fitzgerald, 19 Chy. (Ont.) 52.

an action for the specific performance (*i*) of an agreement to grant, or to take a lease, the complainant should consider: 1. Whether the contract is so complete and unobjectionable in every respect, that a court of equity will enforce it by a decree for specific performance; 2. Whether the proposed evidence is sufficient; 3. Whether any and what notice should be given, or demand made, or draft lease tendered or other act done (*k*) by the complainant before the commencement of the action; 4. Who should be plaintiff or plaintiffs, and who should be made defendant or defendants; 5. On whom the costs of each party will probably fall; 6. Whether any other and what remedy is preferable.

An action for specific performance cannot be maintained after the plaintiff has recovered damages at law for non-performance of the contract (*l*).

Time, whether essence of contract. — Time is not generally considered as of the essence of the contract (*m*).[1] "A court of equity will indeed relieve against, and enforce, specific performance, notwithstanding a failure to keep the dates assigned by the contract, either for completion, or for steps towards completion, if it can do justice between the parties, and if there is nothing in the express stipulations between the parties, the nature of the property or the surrounding of circumstances, which would make it inequitable to interfere

(*i*) The law and practice in actions for specific performance not only with respect to agreements for leases, but generally, is ably stated in Fry on Specific Performance (A.D. 1858); also in Dart on Vendors and Purchasers, Chap. XVIII. (5th ed., A.D. 1876), to each of which works frequent reference will be made. There is also an excellent note on the subject in 2 Tudor L. C. Eq. 441–461, 2nd ed. (note to Seton *v.* Slade). See also 1 Seton on Decrees, 593–626 (3rd ed.).

(*k*) Aubin *v.* Holt, 2 Kay & J. 66, 70; 25 L. J., Ch. 36; Faulkner *v.* Llewellyn, 31 L. J., Ch. 549; Lancaster *v.* De Trafford, 31 L. J., Ch. 554; Forrer *v.* Nash, 35 Beav. 167; 14 W. R. 8. Sometimes the concurrence (in a lease) of a third person having an equitable interest in the property may be necessary; Reeves *v.* Gill, 1 Beav. 375.

(*l*) Sainter *v.* Ferguson, 1 Mac. & Gor. 286; Fry, s. 65; Dart V. & P. 703.

(*m*) Sug. V. & P. 212, 213 (14th ed.); Dart V. & P. Chap. X.; Id. 701; Fry, s. 4; 2 Tudor L. C. Eq. 451 (2nd ed.); Davis *v.* Hone, 2 Sch. & Lef. 341, 347; Cartan *v.* Bury, 10 Ir. Ch. R. 387; Webb *v.* Hughes, L. R., 10 Eq. 281, Malins, V.-C.

[1] See *post*, sec. 5, "Laches."

with and modify the legal right. This is what is meant, and all that is meant, where it is said, that in equity time is not the essence of the contract" (*n*).[1] An underlease [*100] with * compensation will not be decreed where the defendant has contracted for a lease (*o*).

(a) *Oral Agreement with Part Performance.*[2]

Oral agreement with part performance. — Although a mere *oral* agreement for a lease cannot be sued upon as such, an action for a specific performance can be maintained if the terms of such contract be distinctly proved or admitted, and there has been a sufficient part performance of the contract to take it out of the operation of the Statute of Frauds (*p*).[3]

(*n*) Tilley *v.* Thomas, L. R., 3 Ch. Ap. 61, 67; Roberts *v.* Berry, 3 De Gex, M. & G. 284.

(*o*) Madeley *v.* Booth, 2 De G. & Sm. 718; Darlington *v.* Hamilton, 1 Kay, 557, 558; Warren *v.* Richardson, You. 1; Fry, ss. 803, 858; 2 Tudor L. C. Eq. 455 (2nd ed.); Blake *v.* Phinn, 3 C. B. 976; Barnett *v.* Wheeler, 7 M. & W. 364.

(*p*) Fry, ss. 383–407; Price *v.* Salusbury, Bart., 32 Beav. 446; 32 L. J., Ch. 441; affirmed, Dom. Proc., 14 L. T., N. S. 110.

[1] **Time, when of the essence; waiver.** — Time is of the essence of the contract whenever the parties make it so. Benedict *v.* Lynch, 1 Johns. Ch. (N. Y.) 370, 374 (*per* Kent, Chan.). And if they do it either expressly or impliedly, specific performance will not be decreed after the time has expired. Crossfield *v.* Gould, 9 A. R. (Ont.) 218.

Time, though made of the essence, may be waived, as for example, if vendee in possession pay, and vendor receive part of purchase money after the time limited has expired, it is a waiver and justifies specific performance notwithstanding the delay. Potter *v.* Jacobs, 111 Mass. 32.

[2] "One of the most conspicuous exceptions which courts have ever made to the positive directions of a statute." 2 Reed on St. of Frauds, sec. 542.

[3] The doctrine of part performance does not apply at law, being confined to equity. Jackson *v.* Pierce, 2 Johns. (N. Y.) 221.

Reed says the doctrine has been denied in Alabama, qualified in Kentucky, and is not recognized in North Carolina, Tennessee, and Mississippi. 2 Reed on St. of Frauds, secs. 544–549.

It was originally denied in Massachusetts, Kidder *v.* Hunt, 1 Pick. (Mass.) 328; Thompson *v.* Gould, 20 Id. 134; Adams *v.* Townsend, 1 Met. (Mass.) 483; Jacobs *v.* Peterborough, &c., R. R. Co., 8 Cush. (Mass.) 223; Buck *v.* Dowley, 16 Gray, 555; the cases being placed upon two grounds, viz.: that they were within the Statute of Frauds, and that the powers of the court were limited to "specific performance" of "*written*" contracts. Rev. Sts., Ch. 81, sec. 8.

The equity powers were sufficiently enlarged in 1857 (St. 1857, Ch. 214); and full equity powers were granted by St. 1877, Ch. 178, sec. 1, now Pub.

The principle upon which courts of equity exercise their jurisdiction in decreeing specific performance of a parol agreement accompanied by part performance, is the *fraud* and injustice which would result from allowing one party to refuse to perform his part, after part performance by the other upon the faith of the contract (*q*).

What acts are or are not sufficient. — In equity the acts of part performance must be such as are referable to the contract as alleged, and consistent with it (*r*);[1] and such as cannot be referred to any other title than the alleged agreement, nor be considered done with any other view or design than to perform it (*s*). Therefore the mere possession by the tenant is not sufficient, because that may be referred to his character as tenant, under the implied tenancy created by entry (*t*).[2] So the expenditure by the tenant of monies

(*q*) Buckmaster *v.* Harrop, 7 Ves. 346; Munday *v.* Joliffe, 5 Myl. & Cr. 177; Gregory *v.* Wilson, 2 Hare, 690; Fry, s. 338; Dart V. & P. 658, 660; Wilson *v.* West Hartlepool R. Co., 34 L. J., Ch. 241; 13 W. R. 361; L. JJ. Caton *v.* Caton, L. R., 1 Ch. Ap. 137, 148; Addison on Contr. 392 (7th ed.).

(*r*) Fry, s. 386; Tomkinson *v.* Straight, 17 C. B. 697; Faulkner *v.* Llewellyn, 31 L. J., Ch. 549; 11 W. R. 1055; 12 W. R. 193; Powell *v.* Lovegrove, 8 De Gex, M. & G. 357; Price *v.* Salusbury, 32 Beav. 446; 32 L. J., Ch. 441; affirmed, Dom. Proc. 14 L. T., N. S. 110; Nunn *v.* Fabian, L. R., 1 Ch. Ap. 35, 40; 35 L. J., Ch. 140.

(*s*) See Maddison *v.* Alderson, 8 App. Cas. 473; 52 L. J., Q. B. 737; 49 L. T. 303; 31 W. R. 820.

(*t*) Wills *v.* Stradling, 3 Ves. 378; Morphett *v.* Jones, 1 Swans. 181; Faulkner *v.* Llewellyn, 31 L. J., Ch. 549; 12 W. R. 193; 5 Vin. Abr. 323, pl. 41; but see Pain *v.* Coombs, 3 Sm. & Giff. 449; 1 De Gex & J. 24; 3 Jur., N. S. 307, 847; Miller *v.* Finlay, 5 L. T., N. S. 510.

Sts., Ch. 151, sec. 4. And the doctrine of part performance is now in full force in Massachusetts. Potter *v.* Jacobs, 111 Mass. 32; Curran *v.* Holyoke Water Power Co., 116 Mass. 90.

[1] **Part performance, essentials of.** — Payment of the entire purchase money (alone) is not a sufficient part performance. Johnson *v.* The Canada Company, 5 Chy. (Ont.) 558; Barnes *v.* Boston & Maine R. R., 130 Mass. 388.

[2] Acts decisive of the character of the occupation are sufficient.

Examples: possession and payment of rent are sufficient to hold both parties. Walsh *v.* Rundlette, 2 MacArthur (Supreme Ct. D. C.) 114; Clark *v.* Clark, 49 Cal. 586.

Entry and making improvements are sufficient. McFarlane *v.* Dickson, 13 Chy. (Ont.) 263; Lloyd's Law of Building and Buildings, sec. 92. Possession and enjoyment by lessee for part of term are sufficient against his sureties on the rent. County of Huron *v.* Kerr, 15 Chy. (Ont.) 265. Continuance in possession under a contract for a new lease and payment of

on the farm in the ordinary course of husbandry, is no part performance of an agreement for a lease, but attributable to his implied tenancy (*u*). But possession and special expenditure by the tenant, provided that it be such that would be likely to take place only in the pursuance of such a contract as that alleged, and it be with the privity of the other party, is an act of part performance: as where the tenant enters and builds, or causes expensive alterations to be made (*x*).

Outlay by sub-lessee. — And an outlay by a sub-
[*101] lessee, made with the *knowledge and approval of the party agreeing to grant the lease, has been held to be as much part performance as if it had been the outlay of the tenant himself (*y*). The laying out of considerable sums of money by a person who enters under an agreement for a long term, is rationally to be referred to such agreement, rather than to the mere tenancy at will to be implied from

(*u*) Brennan *v.* Bolton, 2 Dru. & W. 349; Fry, ss. 387, 402.

(*x*) Wills *v.* Stradling, 3 Ves. 378; Stockley *v.* Stockley, 1 V. & B. 23; Toole *v.* Medlicott, 1 Ball & B. 393; Sutherland *v.* Briggs, 1 Hare, 26; Mundy *v.* Joliffe, 5 Myl. & Cr. 167; Surcome *v.* Pinniger, 3 De Gex, M. & G. 571; and see Farrell *v.* Davenport, 8 Jur., N. S. 862, 1043.

(*y*) Williams *v.* Evans, L. R., 19 Eq. 547; 44 L. J., Ch. 319.

higher rent are sufficient. Spear *v.* Orendorf, 26 Md. 37; Story's Eq. Jur. Sec. 763.

In case of a vendee, possession and payment of part of purchase money are sufficient, Farquhason *v.* Williamson, 1 Chy. (Ont.) 93; Bomier *v.* Caldwell, 8 Mich. 463; likewise possession and making improvements, Jennings *v.* Robertson, 3 Chy. (Ont.) 513; Rogers *v.* Rogers, 2 Id. 137, 145; Arguello *v.* Edinger, 10 Cal. 150, 160; or possession part payment and valuable improvements, Potter *v.* Jacobs, 111 Mass. 32; and possession with part payment by intended vendee, together with execution without delivery of deed by intended vendor, Dickerson *v.* Chrisman, 28 Mo. 134.

Possession, payment of taxes, and labor under special circumstances are sufficient. McCray *v.* McCray, 30 Barb. (N. Y. Supreme Ct.) 633.

Mere possession by a vendee and payment of interest is not sufficient. Townsley *v.* Charles, 2 Chy. (Ont.) 313.

To transform a tenant into an equitable vendee, it is sufficient for him to remain in possession, and make payments upon the purchase money ceasing to pay rent. Butler *v.* Church, 16 Chy. (Ont.) 205. But if such acts or improvements are equivocal and consistent with the continuance of the tenancy, they are insufficient to change the tenant into a vendee. Rankin *v.* Simpson, 19 Pa. St. 471.

Acts to be a part performance of any contract must be unequivocally referrible to that contract. Barnes *v.* Boston & Maine R. R., 130 Mass. 388.

such entry (*z*). After such expenses have been incurred on the faith of a lease agreed to be granted, it would be fraudulent and inequitable for the landlord to refuse to grant such lease (*a*); but this cannot be said of the ordinary expenditure of a tenant. Where a tenant under a term alleged the rebuilding of a party-wall, which was in a ruinous state during his term, as part performance of an agreement by his landlord to grant a renewed term: it was held, that the act was equivocal, as it might have been done by him as well in respect of his title under the old term, as under the alleged agreement for a renewed term (*b*).

Payment of increased rent. — In Nunn *v.* Fabian, a landlord having verbally agreed with his tenant to grant him a lease for twenty-one years at an increased rent, with the option of purchasing the freehold, died before the execution of the lease. Before his death the tenant had paid one quarter's rent at the increased rate. It was held, that this constituted a sufficient part performance of the agreement to take the case out of the Statute of Frauds, and specific performance was decreed (*c*).

New lease, &c. — Where an agreement in writing for a three years' tenancy reserved to the tenant the option of requiring a twenty-one years' lease at the expiration of the prior term, V.-C. Wigram appears to have considered that the tenant's verbal notice of an intention to take the new lease, accompanied by retention of possession, was binding upon him (*d*). The possession of a tenant after the expiration of his lease, under an agreement for a renewed lease, has been held a sufficient part performance (*e*), and so has the possession of a stranger under an express or implied

(*z*) Fry, s. 402; Farrell *v.* Davenport, 3 Giff. 363; 8 Jur., N. S. 862, 1043.

(*a*) Frame *v.* Dawson, 14 Ves. 386; Lindsay *v.* Lynch, 2 Sch. & Lef. 1; see Williams *v.* Evans, 32 L. T. 360.

(*b*) Frame *v.* Dawson, and Lindsay *v.* Lynch, *supra*.

(*c*) Nunn *v.* Fabian, L. R., 1 Ch. App. 35; 35 L. J., Ch. 140. Compare this with *Re* National Savings Bank Association, *Ex parte* Brady, 15 W. R. 753.

(*d*) Beatson *v.* Nicholson, 6 Jur. 620.

(*e*) Dowell *v.* Dew, 1 You. & Coll. C. C. 345; Dart V. & P. 656.

agreement for a lease (*f*). It has also been held, that the giving up a business, coupled with possession, was part performance, although the tenant agreed to pay nothing but ground rent, rates and taxes (*g*).

Terms must be certain. — But the court will not [*102] decree a specific performance, although * possession has been taken, unless the terms of the contract are clearly proved (*h*); nor if any of the terms are uncertain (*i*); although vagueness of language in a contract may sometimes be cured by evidence of surrounding circumstances, and of the subsequent conduct of the parties (*k*). The doctrine of part performance of a parol agreement is not to be extended by the court, and it is inapplicable in a case where a trustee has a power to lease at the request in writing of a married woman, which has not been made (*l*).

Execution of repairs. — In Shillibeer *v.* Jarvis, after an offer had been made by a plaintiff to take a lease of a farm from the defendant a draft was prepared by the defendant's solicitors, and approved of by the plaintiff with some alterations, and was afterwards altered by the defendant himself, and left by him with his solicitors, for the purpose of its being ascertained whether the plaintiff would agree to the alterations. On their submitting it to him he agreed to the alterations, but no agreement was signed. A part of the terms was, that the plaintiff should execute certain repairs before the lease was granted. The plaintiff was put into possession by the direction of the defendant's solicitors, and executed some repairs. It was held, that although the plaintiff might

(*f*) Fry, ss. 397–400; Gregory *v.* Mighell, 18 Ves. 328; Pain *v.* Coombs, 3 Sm. & Gif. 449; 1 De Gex & J. 34, 46; 3 Jur., N. S. 307, 847.

(*g*) Coles *v.* Pilkington, L. R., 19 Eq. 174; 31 L. T. 422.

(*h*) Mortal *v.* Lyons, 8 Ir. Ch. R. 112.

(*i*) Reynolds *v.* Waring, 1 You. 346; Price *v.* Assheton, 1 Y. & C. 441.

(*k*) Oxford *v.* Proband, L. R., 2 P. C. C. 135; Coupland *v.* Arrowsmith, 18 L. T., N. S. 755.

(*l*) Phillips *v.* Edwards, 33 Beav. 440.

[1] Parkhurst *v.* Van Cortlandt, 1 Johns. Ch. (N. Y.) 273; Morton *v.* Dean, 13 Met. (Mass.) 385, 388; Gill *v.* Bicknell, 2 Cush. (Mass.) 355, 358, 359 (*per* Shaw, C. J.).

An agreement to take a lease does not bind the intended lessee to take one containing unusual covenants. Hayden *v.* Lucas, 18 Mo. App. 325.

have been let into possession without authority from the defendant, there was a concluded agreement for a lease on the part of the defendant, and a sufficient part performance to take the case out of the Statute of Frauds, and specific performance was decreed (*m*). Where the plaintiff and the defendant entered into an agreement, that when a certain house belonging to the plaintiff should be completed and finished fit for habitation, the plaintiff would grant to the defendant a lease of such house for twenty-one years, and the defendant took possession before the house was completed, and occupied it for a year; but refused to pay rent or execute the lease until the house should be completed and finished fit for habitation: whereupon the plaintiff filed a bill for specific performance, and moved that the defendant might be ordered to pay the year's rent into court; the motion was refused with costs (*n*).

Oral agreement must be definite. — Of course the oral agreement, of which the part performance is relied on, must be of such a nature, *i.e.* so definite and unobjectionable, that if it had been in writing, and duly signed, the court would have decreed specific performance of it (*o*).

* (b) *There must be a Complete Contract.* [*103]

Whether the contract be proved by one or more writings (*p*), or by parol evidence, coupled with sufficient acts of part performance (*q*), there must, in each case, be a *complete contract* (*r*).

Escrow. — An escrow or writing, delivered subject to a condition which has not been performed, is not sufficient (*s*).

(*m*) Shillibeer *v.* Jarvis, 8 De Gex, M. & G. 79.

(*n*) Faulkner *v.* Llewellyn, 31 L. J., Ch. 549; 11 W. R. 1055; 12 W. R. 193; and see Modlen *v.* Snowball, 29 Beav. 641; 31 L. J., Ch. 44; 4 De Gex, F. & J. 143.

(*o*) Fry, ss. 392–394; Thynne *v.* Ld. Glengall, 2 H. L. Cas. 158.

(*p*) *Ante*, 92.

(*q*) *Ante*, 100.

(*r*) Dart V. & P. 657; Jackson *v.* Oglander, 2 H. & M. 465; 13 W. R. 936; Lewers *v.* Earl Shaftesbury, L. R., 2 Eq. 270; 16 L. T., N. S. 135; Bankart *v.* Tennant, 39 L. J., Ch. 809; 23 L. T. 137.

(*s*) Wheate *v.* Hall, 17 Ves. 80; Pym *v.* Campbell, 6 E. & B. 370; Gudgen *v.* Bessett, Id. 986; Millership *v.* Brooks, 5 H. & N. 797; 27 L. J., Ex. 369.

Unaccepted proposal. — A mere proposal to offer or take a lease does not, before acceptance thereof, constitute a complete contract.[1]

What acceptance is sufficient. — The acceptance, to be operative, must be unequivocal, unconditional and without variance of any sort between it and the proposal (*t*), and communicated to the other party within a reasonable time (*u*).

Revocation. — The proposal or offer may be revoked at any time before such acceptance (*x*); but not afterwards (*y*).

Effect of acceptance. — Unless the proposal or offer be accepted without unreasonable delay a revocation thereof may be implied; for, in the absence of any special stipulation to the contrary, it is always subject to an implied condition that it be accepted within a reasonable time, what time is reasonable being a question of fact (*z*). An unaccepted offer does not bind the land, nor the trustees of the person making the offer, on his becoming a bankrupt (*zz*).

(*t*) Fry, ss. 167–175; Warner *v.* Willington, 3 Drew. 523; 25 L. J., Ch. 662; (sending of draft lease held not sufficient); Foster *v.* Rowland, 7 H. & N. 103; 30 L. J., Ex. 396.

(*u*) See Brogden *v.* Metropolitan R. Co., 2 App. Cas. 692.

(*x*) Warner *v.* Willington, 3 Drew. 523; 25 L. J., Ch. 662; Jackson *v.* Oglander, 2 H. & M. 465; 13 W. R. 936; Rummens *v.* Robbins, 11 Jur., N. S. 631; 13 W. R. 979, L. JJ.

(*y*) See Baines *v.* Woodfall, 6 C. B., N. S. 657; Cowley *v.* Watts, 17 Jur. 72, M. R.

(*z*) Williams *v.* Williams, 17 Beav. 213.

(*zz*) Meynell *v.* Surtees, 2 Sm. & Giff. 101; 1 Jur., N. S. 737.

[1] **Proposal and acceptance.** — A lessor's written acceptance of lessee's proposal to take a new lease completes the contract, and may be enforced by the lessee. Ryder *v.* Robinson, 109 Mass. 67. Of course such contract (not being signed by the lessee) could not, under the Statute of Frauds, be enforced against *him* unless partly fulfilled. An offer to make any contract is not binding unless accepted according to the terms of the proposal. Eliason *v.* Henshaw, 4 Wheat. 225. It may, however (subject, of course, to the statute), be impliedly accepted, as by taking the benefit of the proposal. Mactier *v.* Frith, 6 Wend. (N. Y.) 103. If the offer is made upon conditions, fulfilment of the conditions by the promisee fixes the liability of the promisor. Cutting *v.* Dana, 25 N. J. Eq. 265.

An offer may be accepted by letter, and will be binding immediately upon transmission. Brisban *v.* Boyd, 4 Paige (N. Y.) 17; Houghwout *v.* Boisaubin, 18 N. J. Eq. 315, 322. It has been held that it is binding immediately the letter of acceptance is deposited in the post-office, though in fact never received. Vassar *v.* Camp, 11 N. Y. 411.

So long as a proposal or offer is an existing one, *i.e.* until it has been accepted or revoked, expressly or by implication, the other party may, by accepting it purely and simply, without any addition or other alteration whatever, make it an agreement (*a*); nor is an acceptance by *writing* necessary (*b*), unless, indeed, by the terms of the proposal, an agreement or contract *in writing* is to be made (*c*).

Counter-proposal. — An acceptance of a proposal or offer, subject to any new term or other variation, amounts only to a counter-proposal, which must be accepted purely and simply before there will be any complete agreement (*d*). Where the proposal or offer is agreed to, but a different day is named for possession to be given that is not sufficient as an acceptance (*e*). The acceptance of a proposal for a lease, adding, "We hope to give you * possession [*104] at half-quarter day," has been held sufficient, the latter words having no legal operation (*f*). But there is no complete contract if terms be offered for a lease and accepted for a sub-lease (*g*), or if a particular covenant, such as not to assign without licence, be not agreed to (*h*), or if even the questions as to the costs of the counterpart, and by whom it should be engrossed, are left open (*i*).

After a counter-proposal. — After a counter-proposal the party making it cannot accept the first proposal, so as thereby to make it binding as an agreement. Therefore, where the owner of a farm offered to sell it to A. for 1,000*l.*; upon which A. wrote offering 950*l.* which was refused, and then

(*a*) Baumann *v.* James, L. R., 3 Ch. Ap. 508; 16 W. R. 877.

(*b*) See Reuss *v.* Pickley, L. R., 1 Ex. 342; Fry, s. 292. The acceptor however cannot himself be sued on the parol acceptance. Fry, s. 294.

(*c*) See London Dock Co. *v.* Sinnott, 8 E. & B. 347; 27 L. J., Q. B. 347.

(*d*) See Honeyman *v.* Marryatt, 21 Beav. 14; 26 L. J., Ch. 619; 6 H. L. Cas. 112.

(*e*) Routledge *v.* Grant, 4 Bing. 653.

(*f*) Clive *v.* Beaumont, 1 De Gex & S. 397; see also Johnson *v.* King, 2 Bing. 270.

(*g*) Holland *v.* Eyre, 2 Sim. & Stu. 194.

(*h*) Lucas *v.* James, 7 Hare, 410.

(*i*) Forster *v.* Rowland, 7 H. & N. 103; 30 L. J., Ex. 396. Compare this with Shillibeer *v.* Jarvis, 8 De Gex, M. & G. 79, *ante*, 94; and see Jackson *v.* Oglander, 2 H. & M. 465; 13 W. R. 936, where the lease had been settled on both sides and engrossed pursuant to an oral agreement: — held, no sufficient contract.

A. signified his acceptance of the original offer: it was held, that there was no contract between the parties, and a specific performance was refused (*k*).

Correspondence after proposal. — It not unfrequently happens that when a proposal or offer is made a correspondence takes place upon the subject, and it is sometimes difficult to say whether the result of such correspondence, the construction of which is for the court, not for a jury, shows a complete contract or merely a series of unaccepted proposals and counter-proposals (*l*). Letters will not constitute an agreement which the court will specifically perform, unless the answer is a simple acceptance, without the introduction of a new term (*m*).

Signed proposal, binding after oral acceptance. — A written proposal or offer *signed by the defendant* and accepted orally by the plaintiff, is sufficient to satisfy the statute (*n*). But a written proposal or offer signed by the plaintiff, must be *assented to in writing by the defendant* to bind him and to satisfy the statute (*o*). The acceptance of a proposal by a corporation must generally be under their common seal, or pursuant to the express provisions of some act of parliament, before there will be any contract (*p*).[1]

Stamp. — A written proposal or offer, which is accepted orally, need not be stamped as an agreement (*q*).

(*k*) Hyde *v.* Wrench, 3 Beav. 334.

(*l*) See Honeyman *v.* Marryatt, 21 Beav. 14; 26 L. J., Ch. 619; 6 H. L. Cas. 112; Ridgway *v.* Wharton, 6 H. L. Cas. 238; 27 L. J. Ch. 46; Beaumann *v.* James, L. R., 3 Ch. Ap. 508; 16 W. R. 877.

(*m*) Wright *v.* St. George, 12 Ir. Ch. R. 226.

(*n*) Reuss *v.* Picksley, L. R. 1 Ex. 342; 4 H. & C. 588; 14 W. R. 924.

(*o*) Felthouse *v.* Bindley, 11 C. B., N. S. 869.

(*p*) London Docks Co. *v.* Sinnott, 8 E. & B. 327; 27 L. J. Q. B. 347; Haigh *v.* North Brierly Union, 1 E., B. & E. 873, 883; 28 L. J. Q. B. 62; Copper Miners of England Co. *v.* Fox, 16 Q. B. 229.

(*q*) Drant *v.* Brown, 3 B. & C. 665.

[1] It is not now so understood in America. (See *ante*, Ch. 1, sec. 12, notes, and Ch. 2, sec. 9, notes.) A corporation may accept a lease (of course one not *ultra vires*), either expressly or impliedly, in the same way that the individual may, unless restrained by its charter. The use of a seal by a corporation in making a contract is unnecessary except where the nature of the contract requires it.

Ordinarily, directors have authority to accept a lease necessary for corporation purposes. It may, however, be provided otherwise.

(c) *Agreement subject to preparation of formal contract.*

There is, of course, no binding agreement when the writing appears only to be terms agreed on *as a basis* for an agreement, and not the * agreement itself (*r*); or [*105] where it provides that any of the terms are to be afterwards settled (*s*); or where it is expressed to be "subject to the preparation and approval of a formal contract" (*t*); or subject to a contract to be settled between the plaintiff's solicitors and the defendant (*u*); or subject to the terms of the draft lease being "reasonable in the estimation" of the defendant (*x*); or where there appears any design of further negotiation (*y*). The court will refuse to act where it only rests reasonably doubtful whether what passed was only treaty, let the progress towards the confines of agreement be more or less (*z*). But the mere fact that the parties have expressly stipulated that there shall afterwards be a formal agreement prepared does not by itself show that they continue merely in negotiation (*a*). Therefore correspondence about the taking of a house was held to constitute a sufficient agreement, though the agent of the lessor accepted the offer thus: — "These terms I have submitted to Mrs. S., and I am authorized to say they are accepted, and that her solicitor will draw up a proper agreement for signature, which I will forward to you" (*b*), and an acceptance by a party merely expressed to be subject to the approval of his solicitor will it seems bind him (*c*). The question in cases of this sort is, whether the writing was

(*r*) Frost *v.* Moulton, 21 Beav. 496.

(*s*) Wood *v.* Midgley, 5 De Gex, M. & G. 41; Honeyman *v.* Marryatt, 21 Beav. 14; 26 L. J., Ch. 619; 6 H. L. Cas. 112.

(*t*) Winn *v.* Bull, L. R., 7 Ch. D. 29; 47 L. J., Ch. 139; 26 W. R. 230; Bonnewell *v.* Jenkins, L. R., 8 Ch. D. 70.

(*u*) Harvey *v.* Barnard's Inn, 45 L. T. 280, *per* Fry, J.

(*x*) Wilcox *v.* Redhead, 49 L. J. Ch. 539; 28 W. R. 795, *per* Hall, V.-C.

(*y*) Tawney *v.* Crowther, 3 Bro. C. C. 318; Stratford *v.* Bosworth, 2 V. & B. 341.

(*z*) Huddlestone *v.* Briscoe, 11 Ves. 592; Jackson *v.* Oglander, 2 H. & M. 465; 13 W. R. 936; Fry, s. 343.

(*a*) Rossiter *v.* Miller, L. R. 3 App. Cas. at p. 1151.

(*b*) Skinner *v.* M'Dowall, 2 De Gex & S. 265.

(*c*) Eadie *v.* Atkinson, 49 L. J., Ch. 80; and see Hussey *v.* Horn-Payne, L. R. 4 App. Cas. 311.

intended to operate as a binding contract until a more formal one should be signed (*d*), and there appears to be no distinction in this respect between a contract for a sale and a contract for a lease.

Sect. 5. — *Grounds for Refusal of Specific Performance.*

Agreement must be definite and unobjectionable. — The agreement must not only be complete as a contract (*e*), and proved by a writing or writings sufficient to satisfy the Statute of Frauds (*f*), or by parol evidence, coupled with sufficient part performance to take it out of the statute (*g*); but it must also be of so definite and specific a nature (*h*), and unobjectionable in other respects, that the court will decree
[*106] a performance of it. Therefore a court of *equity will not decree the specific performance of a contract for the purchase of a lease, where, from pending and threatened litigation, it is impossible to ascertain to whom the ground rent is payable, and the purchaser may be involved in immediate litigation (*i*).[1] In Tildesley *v.* Clarkson (*k*), the Court declined to compel the defendant to take a lease of a new house, which the plaintiff had contracted to "finish and deliver," on the ground that upon a competent survey the house had been found defective and finished in such a manner, that it was likely to subject the defendant,

(*d*) Ridgway *v.* Wharton, 6 H. L. Cas. 238; 27 L. J., Ch. 46.
(*e*) *Ante*, p. 103.
(*f*) *Ante*, p. 85.
(*g*) *Ante*, p. 100.
(*h*) Bernard *v.* Meara, 12 Ir. Ch. R. 389.
(*i*) Pegler *v.* White, 33 Beav. 403; 33 L. J., Ch. 569.
(*k*) Tildesley *v.* Clarkson, 30 Beav. 419; 31 L. J., Ch. 362, *per* Romilly, M. R.

[1] It will not be granted against party out of possession where possession can only be obtained by suit, because a contract for such possession savors of maintenance. Fry on Specific Performance, sec. 213. A covenant of a lessee with sub-lessee to renew sub-lease if principal lease is renewed to him, will be enforced in equity, notwithstanding lessee has given prior lease to party who takes with knowledge of the tenancy. Cunningham *v.* Pattee, 99 Mass. 248.

An agreement for a mining lease will be enforced notwithstanding a dispute as to amount of royalties after the intended lessee has taken coal from the premises, and no option will be allowed him to pay or surrender. Lewis *v.* James, 32 Ch. D. 326.

under the covenant to repair, to an unusually large annual outlay to maintain it (*k*). Where an agreement for a lease of mineral property did not clearly define the mineral area to be comprised in the lease, the court refused, at the instance of the proposed lessee, to decree specific performance of the agreement (*l*). The court will not decree specific performance of a contract for a lease of premises, where one of the stipulations of the contract is, that the lessee shall engage the personal services of the lessors in the business to be carried on upon the premises (*m*). But an agreement for a lease "for seven, fourteen or ——— years," was held to entitle the tenant to a lease for fourteen years, determinable at the tenant's, and not the landlord's option, at the end of seven years, and that notwithstanding that the landlord had given his agent, who entered into the agreement, no authority to grant a lease with such option (*n*).

Inadequacy of consideration. — The discretion of the court is exercised according to fixed and settled rules, and mere inadequacy of consideration, unless it be so gross as to amount to evidence of fraud, is not a ground for exercising such discretion by refusing a specific performance (*o*).[1] Thus, where the defendant agreed to purchase leasehold property at a valuation to be made by A. B., who made a very high and apparently exorbitant valuation, viz. at thirty years' purchase for a mere leasehold, but there did not appear to be any "fraud, mistake, or miscarriage," the court decreed a specific performance with costs (*p*).

Misrepresentations and deceit. — If the plaintiff induced the defendant to enter into a disadvantageous contract by misrepresentations and deceit, his action for specific per-

(*l*) Lancaster *v.* De Trafford, 31 L. J., Ch. 554; 8 Jur., N. S. 873; and see Davis *v.* Shepherd, L. R., 1 Ch. 410. But see *contra*, Haywood *v.* Cope, 25 Beav. 140.

(*m*) Ogden *v.* Fossick, 32 L. J., Ch. 73.

(*n*) Powell *v.* Smith, L. R., 14 Eq. 85; 41 L. J., Ch. 734. The tenant had entered and spent money on the farm.

(*o*) Haywood *v.* Cope, 25 Beav. 141, 151; Callingham *v.* Callingham, 8 Cl. & Fin. 374; Fry, Chap. VII.

(*p*) Collier *v.* Mason, 25 Beav. 200.

[1] Inadequacy of consideration, so gross as to lead to a reasonable conclusion of fraud or mistake, is sufficient to prevent specific performance. Western R. R. *v.* Babcock, 6 Met. (Mass.) 346, 357, 358 (*per* Shaw, C. J.).

formance will be dismissed with costs (*q*). But the [*107] mere existence * of circumstances at the date of the contract which might easily have led to fraud, and the want of any professional adviser on the part of the defendant, are insufficient to defeat the right to specific performance, if no fraud be shown (*r*).[1]

Misrepresentation of matter of law. — A misrepresentation of matter of law will not disentitle the plaintiff. Therefore where A., who was under an agreement to take the lease of a house containing "all usual covenants," agreed to assign all his interest to B. and forwarded him a copy of the original agreement, and afterwards in answer to inquiries by B., stated that the lessee would not have to do substantial repairs: upon a bill filed by A. for a specific performance, it was held, that A.'s statement was a misrepresentation of matter of law, and that he would not be bound or prejudiced by it (*s*).

Concealment of material facts. — A specific performance will not be decreed at the instance of a person who has obtained an advantageous agreement for a renewed lease for lives, by knowingly concealing an important fact, viz., that the last life named in the lease was then *in extremis*, of which he well knew that the lessor was then ignorant (*t*). So where the plaintiff held part of the premises as lessee only, under onerous covenants, but concealed that fact and represented himself to be owner in fee (*u*). So where the vendor of leaseholds had received a notice of re-entry in default of the

(*q*) Dart V. & P. 675; Willingham *v.* Joyce, 3 Ves. 168; Clermont *v.* Tasburgh, 1 Jac. & W. 112; Cadman *v.* Horner, 18 Ves. 10; O'Herlihy *v.* Hedges, 1 Sch. & Lef. 123; Tildesley *v.* Clarkson, 30 Beav. 419; 31 L. J., Ch. 362; Moxey *v.* Bigwood, 12 W. R. 811; 10 Jur., N. S. 597; Higgins *v.* Samels, 2 J. & H. 460; 7 L. T. 240.

(*r*) Lightfoot *v.* Heron, 3 Y. & C. 586; Dart V. & P. 666; see also Johnson *v.* Smart, 2 Giff. 151; Cook *v.* Waugh, Id. 201.

(*s*) Kendall *v.* Hill, 6 Jur., N. S. 968; M. R.; Great Western R. Co. *v.* Cripps, 5 Hare, 91.

(*t*) Ellard *v.* Ld. Llandaff, 1 Ball & B. 241; Pry. ss. 242, 461–464.

(*u*) Bascomb *v.* Phillips, 29 L. J., Ch. 380; 6 Jur., N. S. 363.

[1] Not only are fraud and misrepresentation sufficient objections to specific performance, Walmsley *v.* Griffith, 10 A. R. (Ont.) 327; but false and material representations, though *bona fide*, are also, Thomson *v.* Longard, 1 Eq. R. (N. S.) 181.

premises being repaired as therein mentioned, but concealed such notice from the purchaser, who, however, knew the state of the premises (*x*). So where the vendor conceals from the purchaser that the property is liable to be taken under the powers of a recent railway act (*y*). So where, on an agreement for sale of the lease of a colliery for 8,000*l.* in paid-up shares, there was a private arrangement with the plaintiff, not communicated to the shareholders, that 2,500*l.* of these should be given as a bonus to the directors; specific performance was refused (*z*).

Public nuisance. — The existence of a public nuisance in the immediate neighbourhood of a house agreed to be taken as a residence, and rendering it unfit for that purpose, — its existence, however, being unknown to either party, although easily ascertainable by the lessor, — seems to afford no defence to his suit for a specific performance, although it will induce the court to try the case strictly (*a*).

Illegal contract. — If the agreement is illegal the court will not decree a specific * performance (*b*). [*108] But the agreement must be legal or illegal, and it is not within the discretion of the court to refuse specific performance because an agreement savours of illegality; it must be shown to be illegal (*c*). Where a stipulation is omitted from the written agreement, upon the supposition that it is illegal (*d*), or where a party having bargained for the insertion of a particular term, knowingly, and without being fraudulently induced thereto, executes an agreement from which it is omitted (*e*), equity will hold the omission binding.

Plaintiff no sufficient title. — By the Vendor and Purchaser Act, 1874, sect. 2, rule 1, it is enacted that "under a con-

(*x*) Stevens *v.* Adamson, 2 Stark. R. 422.

(*y*) Ballard *v.* Way, 1 M. & W. 520; Fry, s. 567.

(*z*) Maxwell *v.* Port Tenant, &c., Co., 24 Beav. 495.

(*a*) Lucas *v.* James, 7 Hare, 410, 418; Dart V. & P. 681, 695.

(*b*) Fry, Chap. IX.; Dart V. & P. 671; Dr. Bettesworth *v.* Dean and C. of St. Paul's, Select Cas. Ch. 66.

(*c*) Aubin *v.* Holt, 2 Kay & J. 70.

(*d*) Ld. Irnham *v.* Child, 1 Bro. C. C. 92; 6 Ves. 332; Sug. V. & P. 173 (14th ed.); Dart V. & P. 668.

(*e*) Shelburne *v.* Inchiquin, 1 Bro. C. C. 350; Jackson *v.* Cator, 5 Ves. 688; Rich *v.* Jackson, 4 Bro. C. C. 514, 518; Dart V. & P. 668.

tract to grant a term of years, whether derived or to be derived out of a freehold or leasehold estate, the intended lessee shall not be entitled to call for the title to the *freehold*," and by the Conveyancing and Law of Property Act, 1881, 44 & 45 Vict. c. 41, s. 13, sub-s. (1), that "on a contract to grant a lease for a term of years to be derived out of a leasehold interest, with a *leasehold* reversion, the intended lessee shall not have the right to call for the title to *that reversion;*" but by sub-s. (2), this section applies only "if and so far as a contrary intention is not expressed in the contract, and shall have effect subject to the terms of the contract and to the provisions therein contained," and by sub-s. (3), "to contracts made after the commencement of the act," *i.e.* (by s. 2) on or after the 1st January, 1882. If a party agrees to let an estate, and brings an action for the specific performance of the agreement, it will be dismissed with costs, if, in the course of the action, it should appear that the intended lessor had a defective title, even though the objections on which the refusal to take the lease was grounded were frivolous and untenable (*f*).[1] Where it appears that the plaintiff is unable, from causes which he cannot control, to make a good title, a demurrer will be allowed, and the plaintiff will not be permitted to bring the cause to a hearing on the chance that he may by that time, or before certificate, be enabled to sue the defendant (*g*). A purchaser of leasehold premises will not be compelled to complete his contract if the title to the reversion expectant on the lease is admittedly the subject of contest, so that there is a strong probability of his being involved in litigation in consequence of disputed claims to the ground-rents (*h*).

(*f*) Bascomb *v.* Phillips, 29 L. J., Ch. 380; 6 Jur. N. S. 363.

(*g*) Reeves *v.* Greenwich Tanning Co., 2 H. & M. 54.

(*h*) Pegler *v.* White, 33 Beav. 403; 33 L. J., Ch. 569.

[1] **Defect in title.** — Defect in title is a defence in a suit upon a contract of sale. Richmond *v.* Gray, 3 Allen (Mass.) 25. So is a doubtful title. Jeffries *v.* Jeffries, 117 Mass. 184; Butts *v.* Andrews, 136 Id. 221; Cunningham *v.* Blake, 121 Id. 333. A mere possibility that a defect in title may turn up (as that debts against an estate may be discovered) is not sufficient. Hague *v.* Harmony Grove Cemetery, 108 Mass. 400, 402.

If it appear to the court that the plaintiff as sole acting executrix had power to let * or sell, a specific [*109] performance may be decreed, notwithstanding one of the conveyancing counsel of the court has given a contrary opinion (*i*). An appellate court, notwithstanding its impression in favour of the vendor's title, will not decree specific performance in opposition to the decision of the court below that a good title cannot be made, unless such decision be clearly wrong (*k*). But the purchaser will be compelled to take a title which appears to the court of appeal to be good, although the judge of the court below was of a different opinion, that fact not being sufficient to constitute a doubtful title (*l*). Even at law there was no remedy where the plaintiff's title was so bad or doubtful that a specific performance would not be decreed in equity (*m*).

Unreasonable hardship. — Where a decree for specific performance would impose serious and unreasonable hardship on the defendant the court will sometimes refuse to interfere, and only award the plaintiff damages; but much depends on the nature of the hardship, and when and how it arose (*n*). Thus, in Costigan *v.* Hastler (*n*), where a mortgagor had contracted to grant a lease, but failed to obtain the mortgagee's consent, as he expected to do, and was also shown to be unable to redeem, the intending tenant failed to obtain a decree for specific performance, and only succeeded in getting the contract rescinded. But in Long *v.* Bowring (*n*), where the defendant contracted to grant a sub-lease, and to pay to the intended sub-lessee 1,000*l.* by way of liquidated damages if he should fail to obtain the assent of his landlord to the sub-lease, it was held that he was not entitled to refuse to apply to his landlord for such assent, and by paying the

(*i*) Hamilton *v.* Buckmaster, L. R., 3 Eq. 323, Wood, V.-C.; but see Stevens *v.* Austen, 3 E. & E. 685; 30 L. J., Q. B. 112.

(*k*) Collier *v.* M'Bean, 35 L. J., Ch. 144. But see *contra*, Beioley *v.* Carter, L. R. 4 Ch. Ap. 230, 236.

(*l*) Beioley *v.* Carter, L. R., 4 Ch. Ap. 230; Sheppard *v.* Doolan, 3 Dru. & W. 8; and see Hamilton *v.* Buckmaster, *supra*.

(*m*) Simmons *v.* Heseltine, 5 C. B., N. S. 554; 28 L. J., C. P. 129; Stevens *v.* Austen, 3 E. & E. 685; 30 L. J., Q. B. 212; Jeakes *v.* White, 6 Ex. Ch. 173.

(*n*) Costigan *v.* Hastler, 1 Sch. & Lef. 166; Long *v.* Bowring, 33 Beav. 585; Fry, Chap. VI.

1,000*l.* to escape a decree for specific performance. And the general rule is, that a hardship which arises subsequently to, or independently of, the contract will not be taken into consideration (*o*).

Injury to property by fire, &c. — The accidental destruction by fire or tempest of any of the property agreed to be demised would seem to afford no defence to an action for specific performance. The rule of Paine *v.* Meller (*p*), and similar cases, that a party who enters into a binding contract for the purchase of an estate, becomes in equity the owner of it, and is entitled to any profit and subject to any loss which may afterwards occur, is applicable to a contract for a lease. This was clearly recognized in a case [*110] * heard before the Judicial Committee of the Privy Council in 1845 (*q*), although the plaintiff (the intended landlord) failed to obtain specific performance on the ground of non-performance on his part of an agreement to put the premises in repair.

Failure to give possession. — Where the intended could not give possession on the appointed day, and time was of the essence of the contract, his bill for a specific performance was dismissed (*r*). Where the intended tenant, knowing that the premises were greatly out of repair, stipulated for certain specific repairs, which were done accordingly, and he took possession after being warned that much more expensive repairs were required, and it turned out on a subsequent examination that it was necessary to take down and rebuild a wall at great expense, specific performance was decreed (*s*).

Breach of trust. — Where trustees have inadvertently en-

(*o*) Evans *v.* Walshe, 2 Sch. & Lef. 419; Revell *v.* Hussey, 2 Ball & B. 280; Lawder *v.* Blackford, Beat. 522; Fry, s. 255; Helling *v.* Lumley, 3 De Gex & J. 493.

(*p*) 6 Ves. 349.

(*q*) Counter *v.* Macpherson, 5 Moore, P. C. 83; Taylor *v.* Caldwell, 3 B. & S. 826, where the plaintiff agreed to let a music hall for four days, and, the music hall having been burnt down between agreement and time for performance, failed to recover damages, is distinguishable on the ground that the existence of the music hall was an implied essential condition of the agreement.

(*r*) Tilley *v.* Thomas, L. R., 3 Ch. Ap. 61; 16 W. R. 166.

(*s*) Cook *v.* Waugh, 2 Giff. 201; 6 Jur., N. S. 596; compare this case with Tildesley *v.* Clarkson, 30 Beav. 419; 31 L. J., Ch. 362.

tered into a contract to grant or to renew a lease, in excess of their power, and which if performed would amount to a breach of trust, specific performance will not be decreed (*t*). In Sneesby *v.* Thorne, one of two executors, erroneously believing that he was acting with the authority of the other, contracted to sell a leasehold house, part of the testator's estate: it was held that the purchaser could not enforce a specific performance, and it seems doubtful whether he could have done so if the executor had been under no misapprehension (*u*). A feme covert, being one of several devisees for sale, cannot bind herself by a contract (*x*). A contract for a lease by a mortgagor cannot be enforced by him unless he procure a reconveyance of the mortgage, or procure the mortgagee to join in or confirm the lease (*y*), but in such case the court may decree the damages sustained and cause them to be assessed (*z*). Where a mortgagee agreed with the plaintiff to grant him a lease, upon the mutual understanding that the mortgagor should concur, but the mortgagor refused concurrence, the court held, that the plaintiff was not entitled to insist on having a lease from the mortgagee alone: and, further, that he was not entitled to damages (*a*).

Forfeiture. — The possibility of a forfeiture being incurred if the intended lessor *perform his agreement [*111] is no defence to an action for specific performance (*b*).

But where a lessee sold certain lots of building ground, and agreed to make a road, which it was afterwards found he could not do without incurring the risk of forfeiting a piece of leasehold land through which it was to pass, or of being sued by the lessor, the court granting the purchaser specific performance of the agreement for sale refused to enforce the stipulation, but gave him compensation as to that (*c*).

(*t*) Byron *v.* Acton, 1 Bro. P. C. 186; Hartnell *v.* Yielding, 2 Sch. & Lef. 549; Bellringer *v.* Blagrave, 1 De Gex & S. 63; Haywood *v.* Cope, 25 Beav. 153; Phillips *v.* Edwards, 33 Beav. 449; Fry, s. 247; Dart V. & P. 640.

(*u*) Sneesby *v.* Thorne, 7 De Gex, M. & G. 399.

(*x*) Avery *v.* Griffin, L. R., 6 Eq. 606.

(*y*) Costigan *v.* Hastler, 1 Sch. & Lef. 160.

(*z*) Howe *v.* Hunt, 31 Beav. 420; 32 L. J., Ch. 36.

(*a*) Franklinski *v.* Ball, 33 Beav. 560; 34 L. J., Ch. 153.

(*b*) Helling *v.* Lumley, 3 De Gex & J. 493.

(*c*) Peacock *v.* Penson, 11 Beav. 355; Helling *v.* Lumley, *supra*: Fry, s. 261. See also Wilmott *v.* Barber, L. R., 15 Ch. D. 96.

Where a tenant for life contracts to grant a lease for a longer period than he has power to grant, the court will decree him to grant such lease as he is able to make (*d*), with compensation for the residue of the agreed term (*e*). If a copyholder were to agree to grant a lease for a longer term than the custom allowed, he would, it seems, be compelled to effectuate his contract in substance, by from time to time executing leases for such terms as he could, till he had made up the term contracted for (*f*).

Impossibility. — The court never decrees performance of that which is impossible to be done (*g*).

Fraud; surprise; mistake. — The contract must not only be legal, but it must not be hard or unreasonable (*h*); it must be free from fraud and surprise (*i*) and from mistake (*k*).[1] In Jeffreys *v.* Fairs (*l*), the plaintiff agreed to grant the defendants a lease of a vein of coal, called the Shenkin vein, "about two feet thick, with the overlying and underlying beds of clay," at a certain dead rent and royalties; it was held that this agreement could be enforced against the defendants, whether the Shenkin vein existed or not. But this was said to be "because the defendants had in fact got all they bargained for, which was the chance of finding the vein of coal under the particular property," so that it would have been "against reason, against justice, and against the

(*d*) As to lease by tenant for life, see Ch. I., Sect. 4, *ante*.

(*e*) Cleaton *v.* Gower, Finch, 164; Dale *v.* Lister, cited 16 Ves. 7; Hanbury *v.* Litchfield, 2 Myl. & K. 629; Fry, s. 299; Dart V. & P. 682, 683, 685; Painter *v.* Newby, 11 Hare, 20; 21 & 22 Vict. c. 27, s. 2.

(*f*) Paxton *v.* Newton, 2 Sm. & Giff. 437; Fry, s. 669.

(*g*) Green *v.* Smith, 1 Atk. 572.

(*h*) Tildesley *v.* Clarkson, 30 Beav. 419; 31 L. J., Ch. 362.

(*i*) Fry, s. 475; Dart V. & P. 674; Walters *v.* Morgan, 3 De Gex, F. & J. 718.

(*k*) Fry, Chap. XIV.; Dart V. & P. 665, 674; Wood *v.* Scarth, 2 Kay & J. 33; Brown *v.* Marquis of Sligo, 10 Ir. Ch. R. 1.

(*l*) L. R., 4 Ch. D. 448, *per* Bacon, V.-C.

[1] **Mistake.** — Mistake made by vendor in his calculations, from miscarriage of expectations which he had reason to believe were liable to miscarry, is not sufficient, Western R. R. *v.* Babcock, 6 Met. 346, 357, 358; neither is a mistake by him as to the quantity of his land, made by his own fault, Davis *v.* Parker, 14 Allen (Mass.) 94.

"He must show an honest mistake, not imputable to his own gross negligence," *per* Shaw, C. J., in Western R. R. *v.* Babcock, *supra*, p. 352.

whole chain of authorities, to let the defendants off their bargain." A mistake of law is not sufficient (*m*), nor a mistake as to the legal consequences of an act (*n*). A substantial misdescription in the particulars of sale will entitle the purchaser to avoid the contract even at law (*o*): but he must do so immediately (*p*). In equity such a contract will not be enforced *against him (*q*). Where there has [*112] been a misrepresentation made by the vendor, the court applies the rule caveat emptor with great caution (*r*). If the written contract omits any material term, or inaccurately expresses the real intentions of the parties, the court will not enforce, with a variation to correct the mistake, at the instance of the party in whose favour such correction would operate (*s*). Thus, where a person has contracted for the assignment of a lease he will not be decreed to take the assignment of an underlease even with compensation (*t*). If he has contracted for an estate in possession, he will not be decreed to take a reversionary lease with compensation (*u*). If he has contracted for a specific term, ex. gr. sixteen years, he will not be decreed to take a considerably less term, ex. gr. six years with compensation (*x*). By an agreement in writing, A. agreed to demise to B. premises which were then in lease to C., and B. undertook to procure a surrender from C. of the existing lease and to accept a new lease. C. having afterwards refused to surrender, A. filed a bill

(*m*) Fry, s. 508; Croombe *v.* Lediard, 2 Myl. & K. 251.

(*n*) Great Western R. Co. *v.* Cripps, 5 Hare, 91.

(*o*) Flight *v.* Booth, 1 Bing. N. C. 376; Wood *v.* Keep, 1 F. & F. 331.

(*p*) Selway *v.* Fogg, 5 M. & W. 83.

(*q*) Dimmock *v.* Hallett, L. R., 2 Ch. Ap. 21; 36 L. J., Ch. 146.

(*r*) Colby *v.* Gadsden, 15 W. R. 1185; 17 L. T. 97.

(*s*) Fry, ss. 519–535; Dart V. & P. 663, 689; Rich *v.* Jackson, 2 Bro. C. C. 514; 6 Ves. 334; Roberts *v.* Collins, 7 Ves. 130, 133; Woolam *v.* Hearn, 7 Ves. 211; Winch *v.* Winchester, 1 V. & B. 375, 378; Higginson *v.* Clowes, 15 Ves. 516, 523; Clinan *v.* Cooke, 1 Sch. & Lef. 22, 38; Manser *v.* Back, 6 Hare, 447; Squire *v.* Campell, 1 Myl. & Cr. 480; Emmet *v.* Dewhurst, 3 Myl. & Cr. 587; Davies *v.* Fitton, 2 Dru. & W. 225; Nurse *v.* Lord Seymour, 13 Beav. 254.

(*t*) Madeley *v.* Booth, 2 De Gex & S. 718; Darlington *v.* Hamilton, 1 Kay, 550; Warren *v.* Richardson, You. 1; Fry, ss. 803, 858; Anon., Sug. V. & P. 300 (14th ed.); Dart V. & P. 90, 689.

(*u*) Lineham *v.* Cotter, 7 Ir. Eq. 176; Sug. V. & P. 304 (14th ed.); Dart V. & P. 689.

(*x*) Long *v.* Fletcher, 2 Eq. Cas. Abr. 5; Dart V. & P. 690.

against B. for a specific performance, *with a modification*. It was held, upon demurrer, that the bill could not be sustained (*y*). On the other hand, if the opposite party files the bill, the court will not decree a specific performance unless he submits to such alterations or compensation as the court thinks ought to be made upon a consideration of the parol evidence (*z*). Where a plaintiff alleges a written agreement with a parol variation *in favour of the defendant*, and offers to perform the agreement with the variation, the court will enforce specific performance, although the defendant insists on the statute (*a*). In one case, A. agreed to grant the lease of a public-house to B., "the lessor to make certain alterations suggested and to make and form a spirit-vault, and put in plate-glass windows, and to do everything therewith necessary at his own expense, and paint new the outside of all wood-work, as well as put the slates, chimney-pots and roofing in thorough repair." B., by his bill, offered to waive the performance of the agreement so
[*113] * far as regarded any alterations not specially mentioned therein. It was held, that he was entitled to a decree for specific performance, minus the waiver (*b*). Where the defendant relies on a parol variation of a written contract, as a defence, he must prove such part performance of the agreement as altered as would induce the court to enforce it as an original independent agreement (*c*).

Where anything remains to be decided by third persons. — If the amount of premium or rent to be paid, or any other material point, is by the agreement left to be determined by third persons, ex. gr. arbitrators or surveyors, and that has not been done before suit, the court will not decree specific performance, having no power to compel such third persons

(*y*) Beeston *v.* Stutley, 26 L. J., Ch. 156, Wood, V.-C.

(*z*) Joynes *v.* Statham, 3 Atk. 388; Barnard *v.* Cave, 26 Beav. 253; Clarke *v.* Moore, 1 Jon. & Lat. 723; Browne *v.* Marquis of Sligo, 10 Ir. Ch. R. 1; London and Birmingham R. Co. *v.* Winter, Cr. & Ph. 57, 62; James *v.* Lichfield, L. R., 9 Eq. 51; Fry, s. 493; Dart V. & P. 664, 669, 686.

(*a*) Martin *v.* Pycroft, 2 De Gex, M. & G. 785; Dart V. & P. 663, 666.

(*b*) Middleton *v.* Greenwood, 2 De Gex, J. & S. 142.

(*c*) Legal *v.* Miller, 2 Ves. 299; Price *v.* Dyer, 17 Ves. 356, 364; Robinson *v.* Page, 3 Russ. 121; Sug. V. & P. 165 (14th ed.); Dart V. & P. 669.

to perform their duty: it therefore treats the contract as too imperfect to be specifically enforced (*d*). But after such matter has been so determined, the contract may be enforced by decree even where the sum fixed appears to be exorbitant, no fraud, mistake or miscarriage being proved (*e*). B. agreed to grant a lease to W. as soon as W. should have built a house with the necessary outbuildings on the land, of the value of £1,400 at the least, "according to a plan to be submitted to and approved by B." W. agreed to build such house and take the lease; no plan was submitted to or approved by B., but he was ready and willing to approve of any reasonable plan; under such circumstances, a bill filed by B. for a specific performance, was dismissed, with costs (*f*).

When contract conditional. — If a contract for a lease be made conditional on the lessor's ability to grant it, an action for specific performance cannot be supported without proof of the lessor's ability; or that he has received part of the agreed premium, and interest on the balance, and so in effect estopped himself from relying on the condition (*g*). But the plaintiff may be entitled to an equitable lien on the land for the sums expended on the faith of the agreement, with interest thereon, and to consequential relief (*h*). Where the lessor's consent or licence is necessary to an assignment of a lease, it is the vendor's duty to obtain it, and if he cannot do so before the commencement of an action for specific performance he cannot maintain such action (*i*). The same rule * applies on the sale of a [*114]

(*d*) Milnes *v.* Grey, 14 Ves. 450; Darby *v.* Whittaker, 4 Drew. 134; Tillett *v.* Charing Cross Bridge Co., 26 Beav. 419; 28 L. J., Ch. 863; Fry, ss. 215, 216, 218; see also Collins *v.* Collins, 26 Beav. 306; 28 L. J., Ch. 184; Jackson *v.* Jackson, 1 Sm. & Giff. 184; Vickers *v.* Vickers, L. R., 4 Eq. 529; 36 L. J., Ch. 946.

(*e*) Collier *v.* Mason, 25 Beav. 200; Ormes *v.* Beadel, 2 Giff. 166; 30 L. J., Ch. 1; Blackett *v.* Bates, 34 L. J., Ch. 515; 2 H. & M. 270, 610; L. R., 1 Ch. Ap. 117.

(*f*) Brace *v.* Wehnert, 25 Beav. 348. But see Mayor, &c., of London *v.* Southgate, 38 L. J., Ch. 141.

(*g*) Abbot *v.* Blair, 8 W. R. 672; Bauman *v.* Matthews, 4 L. T., N. S. 783, L. C.

(*h*) Middleton *v.* Magnay, 2 H. & M. 233; 12 W. R. 706; Hindley *v.* Emery, L. R., 1 Eq. 52; 35 L. J., Ch. 6; Turner *v.* Marriott, L. R., 3 Eq. 744; 15 W. R. 420.

(*i*) Forrer *v.* Nash, 35 Beav. 167; 14 W. R. 8; and see *post*, Ch. XVII., Sect. 2.

public house as a going concern, when the plaintiff is not in a condition to obtain a transfer of the licences at or before the time fixed for completion of the sale (*k*).

Agreement not enforcement for uncertainty. — An agreement to take a lease of a house, if put into thorough repair, and the drawing-room "handsomely decorated according to the present style," is too uncertain to be enforced by a decree for a specific performance (*l*);[1] but where a lessor agreed to let a house, and to put it into decorative repair, and afterwards refused to fulfil his contract, the court, at the instance of the lessee, who had entered into possession, decreed specific performance of the agreement, with an inquiry whether the agreement as to decorative repair had been performed; and if not, decreed that the lessor should compensate the lessee in damages (*m*). In Faulkner *v.* Llewellyn, B. agreed with C. to take a lease of a house which C. was building, when it was "complete, finished, and fit for habitation:" B. took possession, but afterwards found various objections to it, contending that it was not properly finished. The matter being referred to an expert, he reported that, although there might be some objections, yet the house was "complete, fin-

(*k*) Day *v.* Luhke, L. R., 5 Eq. 336; 37 L. J., Ch. 330; Claydon *v.* Green, L. R., 3 C. P. 511; 37 L. J., C. P. 511; Modlen *v.* Snowball, 4 De Gex, F. & J. 143.

(*l*) Taylor *v.* Portington, 7 De Gex, M. & G. 328; and see Jeffery *v.* Stephens, 6 Jur., N. S. 947; 8 W. R. 427, M. R.

(*m*) Samuda *v.* Lawford, 4 Giff. 42; 8 Jur., N. S. 739.

[1] **Uncertainty** is a fatal objection to specific performance, even though there has been part performance. Parkhurst *v.* Van Cortlandt, 1 Johns. Ch. (N. Y.) 273, 283, 286.

Alternative covenants to renew or pay for improvement cannot be enforced absolutely. Hutchinson *v.* Boulton, 3 Chy. (Ont.) 391.

Lessor cannot compel lessee having simple purchase option to purchase. M'Calmont *v.* Mulhall, 4 Allen (N. B.) 200.

Lessee having conditional option cannot compel lessor to sell unless he first fulfil the conditions on his own part, Forbes *v.* Connolly, 5 Chy. (Ont.) 657, the conditions in this case being covenants to pay rent, &c., and not having been kept, bill was dismissed.

The following agreement was held to constitute an unconditional purchase option, viz.: "And the said lessor hereby agrees to give to the said lessee the first privilege of purchasing the said premises at any time within at the price of payable in five yearly instalments," Casey *v.* Hanlon, 22 Chy. (Ont.) 445; and breach of covenants of lessee were no defence to suit for performance.

ished, and fit for habitation." A decree for a specific performance of the agreement was granted (*n*). Where terms for letting farms provided that all materials required for buildings proposed to be built, or that might thereafter be built, should be led at the expense of the tenant; that the landlord should drain, the tenant leading tiles; that gates, buildings, "&c." should be left in repair by the tenant, the landlord finding new gates when required; and the landlord reserved to himself all customary rights and reservations, such as liberty to cut and plant timber, search for and work mines or minerals, "&c." allowing the tenant for any reasonable damages: — It was held, that these stipulations did not render the agreement uncertain, so as to be incapable of being enforced specifically (*o*).

No decree for performance of part exceptions. — The court will not decree specific performance of part of a contract (*p*), unless the residue has been already performed (*q*), or the unperformed part is separable and divisible from the rest, and does of itself form a complete contract. Thus, in Green *v.* Low, the owner of a plot of ground agreed to grant a lease of it to A. as soon as the *latter had [*115] erected a villa thereon, but it was stipulated that if A. should not perform the agreement on his part, the agreement for a lease was to be void, and that the owner might re-enter. A. was to insure in a particular way, and he was to have the option of purchasing the fee within two years, upon certain terms. A. erected the villa, but insured in a wrong office, and in a wrong name. It was held that the contract for a lease was independent of the option to purchase, and that notwithstanding the forfeiture of the first, the latter still subsisted, and a specific performance of the contract for sale was decreed (*r*). And where a landlord agreed to give a builder leases of successive plots of land as

(*n*) Faulkner *v.* Llewellyn, 31 L. J., Ch. 549; 11 W. R. 1055; 12 W. R. 193.

(*o*) Parker *v.* Taswell, 2 De G. & J. 559; 27 L. J., Ch. 812; and see Norris *v.* Jackson, 3 Giff. 396; 8 Jur., N. S. 930.

(*p*) Fry, Chap. XV.; Dart V. & P. 680; Ogden *v.* Fossick, 32 L. J., Ch. 73; 11 W. R. 128; Scottish North-Eastern R. Co. *v.* Stewart, 3 Macq. H. L. Cas. 382.

(*q*) Hope *v.* Hope, 22 Beav. 351.

(*r*) Green *v.* Low, 22 Beav. 625.

the houses upon each of them should be built up to a successive stage, it was held that the agreement was in its nature separable, and could be enforced as to some of the plots by an assignee of the builder (*s*). A tenant for years, with an option of purchasing the fee, must not only give due notice but also on the proper day pay or tender the purchase-money; that being a condition precedent (*t*). Such a notice may be given to the infant heir of the lessor, and will constitute a valid contract, which may be enforced in equity notwithstanding the infant cannot give a discharge for the purchase-money (*u*).

After unnecessary delay. — Where one party to an agreement trifles, or shows backwardness in performing his part of it, equity will not decree a specific performance in his favour,[1] especially if the circumstances and situation of the other party are materially altered in the meantime (*x*), or if

(*s*) Wilkinson *v.* Clements, L. R., 8 Ch. 95; 42 L. J., Ch. 38; 27 L. T. 834.

(*t*) Weston *v.* Collins, 34 L. J., Ch. 353; 13 W. R. 510; Ld. Ranelagh *v.* Melton, 2 Dr. & Sm. 278; 34 L. J., Ch. 227.

(*u*) Woods *v.* Hyde, 31 L. J., Ch. 295; 10 W. R. 339.

(*x*) Hays *v.* Caryll, 1 Bro. P. C.

[1] **For example.** — The court will not enforce a purchase option (though unconditional) in favor of lessee who has abandoned the premises without paying rent, and left for parts unknown, &c., if he afterward return. Young *v.* Bown, 6 Chy. (Ont.) 402.

Laches is not made out by simple delay, as where one in possession under an agreement to convey fails seasonably to call for the deed. Western R. R. *v.* Babcock, 6 Met. (Mass.) 346, 357, 358.

An agreement for a lease will not be enforced in favor of a lessee upon payment of arrearages four years after the limited time (twelve months) had expired. Purvis *v.* Hume, 3 Allen (N. B.) 299.

But an agreement to renew a lease after expiration of subsisting lease is not barred simply by lessee's waiting till expiration of subsisting lease (four years) and death of lessor and service of notice to quit upon him by executor of lessor before bringing his bill for specific performance. Ryder *v.* Robinson, 109 Mass. 67.

The court will not decree execution of a covenant of perpetual renewal, twelve years after expiration of former lease, the lessee having meantime set up an adverse title. Myers *v.* Silljacks, 58 Md. 319. A covenant for perpetual renewal was said, in Morrison *v.* Rossignol, 5 Cal. 64, to be contrary to the policy of the law.

A sealed agreement to surrender February 1, and pay rent until surrender, is not broken by failure to surrender until February 28, Dainty *v.* Vidal, 13 A. R. (Ont.) 47, 51, Hagarty, C. J., saying, "If . . . the tenant had been actively refusing to give possession when requested, a different question might arise."

the contract be in anywise unilateral, as where there is an option to purchase, or a right of renewal, or any other condition in favour of one party and not of another (*y*). As a general rule, a party cannot call upon a court of equity for a specific performance, unless he has shown himself ready, desirous, prompt and eager (*z*). "It would be dangerous to permit parties to lie by, with a view to see whether the contract will prove a gaining or losing bargain, and according to the event either to abandon it, or, considering time as nothing, to claim a specific performance, which is always the subject of discretion" (*a*). But it is otherwise where the defendant has entered into possession, and paid the rent regularly for fourteen or *fifteen years (*b*), [*116] although the mere payment of rent is not enough (*c*).

In other cases the rule will be relaxed where the strict application of it would work injustice (*d*), as where a landlord has sent a draft lease to a tenant who fails to return it (*e*), or where any objection on the ground of delay has been waived (*f*). If a vendor of leaseholds makes time the essence of the contract, and on the day specified for the completion of the purchase insists upon the money being paid, he may, in the event of the purchaser's neglect, omission or refusal to comply with such request, avail himself of a power in the contract to annul the sale (*g*). So where the

126; Norris *v.* Jackson, 1 Johns. & H. 319; 7 Jur., N. S. 540; Dart V. & P. 701, 702; Heaphy *v.* Hill, 2 Sim. & Stu. 29; Southcomb *v.* Bp. of Exeter, 6 Hare, 213, 218; Chesterman *v.* Mann, 9 Hare, 206; Eads *v.* Williams, 4 De Gex, M. & G. 691; Walters *v.* Northern Coal Mining Co., 5 De Gex, M. & G. 629; Sneesby *v.* Thorne, 1 Jur., N. S. 1058; Fry, s. 736.

(*y*) Fry, s. 733, citing Brooke *v.* Garrod, 27 L. J., Ch. 226.

(*z*) Milward *v.* Earl of Thanet, 5 Ves. 720, n.; 2 Tudor, L. C. Eq. 443 (2nd ed.).

(*a*) Alley *v.* Deschamps, 13 Ves. 225; South-Eastern R. Co. *v.* Knott, 10 Hare, 122; Firth *v.* Greenwood, 1 Jur., N. S. 866.

(*b*) Sharp *v.* Milligan, 22 Beav. 606; 23 Beav. 419; Clarke *v.* Moore, 1 Jon. & L. 723; Cartan *v.* Bury, 10 Ir. Ch. R. 387; Fry, s. 738.

(*c*) Davenport *v.* Walker, 34 L. T. 168; Powis *v.* Ld. Dynevor, 35 L. T. 940.

(*d*) Walker *v.* Jefferys, 1 Hare, 353; Jones *v.* Jones, 12 Ves. 188; 2 Tudor, L. C. Eq. 443 (2nd ed.).

(*e*) Shepheard *v.* Walker, L. R., 20 Eq. 659; 33 L. T. 17.

(*f*) Fry, ss. 745, 750; Hudson *v.* Bartram, 3 Mad. 440; King *v.* Wilson, 6 Beav. 124; *Ex parte* Gardner, 4 Y. & C. Ex. 503.

(*g*) Hudson *v.* Temple, 29 Beav. 536; 30 L. J., Ch. 251; 2 Tudor, L. C. Eq. 452 (2nd ed.).

purchaser stipulates for possession (which includes a good title) on or before a certain day, of a leasehold house for his own residence, if the vendor fail to make out a good title by the day named, the purchaser may refuse to take possession, and rescind the contract (*h*).

Urgency. — In contracts for the lease of working mines, the time for completion, whether specified or not, is, from the fluctuating nature of the property, considered as of the essence of the contract, and the intended lessor is bound to use his utmost diligence to complete, and in default thereof the proposed lessee may, by notice, fix a reasonable time for completion, and, in case of noncompliance therewith, may rescind the contract (*i*).

Time will be considered of the essence of the contract in contracts with ecclesiastical corporations for leases, because every day changes the value and nature of the thing to be granted, and also the persons who are to participate in the fine or premium to be paid (*k*): also in other cases where the property is of fluctuating value (*l*), or the property is wanted for commercial purposes (*m*).

When tenant has committed acts of forfeiture. — Specific performance will not be decreed at the instance of a tenant who, having entered into possession under an agreement for a lease, has committed waste, or omitted to repair, or done other acts which would *clearly* amount to breaches of the covenants to be contained in the lease, and for which the lessor would have been entitled to re-enter and determine the lease, pursuant to a proviso for re-entry to be therein contained (*n*).[1] But if such breaches are disputed, and

(*h*) Tilley *v.* Thomas, L. R., 3 Ch. Ap. 61; 16 W. R. 661.

(*i*) Macbryde *v.* Weekes, 22 Beav. 533; Sharp *v.* Wright, 28 Beav. 150.

(*k*) Carter *v.* Dean of Ely, 7 Sim. 211.

(*l*) Doloret *v.* Rothschild, 1 Sim. & Stu. 590

(*m*) 2 Tudor, L. C. Eq. 453 (2nd ed.).

(*n*) Weatherall *v.* Geering, 12 Ves. 504; Hill *v.* Barclay, 18 Ves. 63; Nesbitt *v.* Meyer, 1 Swans. 223; Lewis *v.* Bond, 18 Beav. 85; Gregory *v.* Wilson, 9 Hare, 683; Nunn *v.* Truscott, 3 De Gex & Sm. 304; Dart V. & P. 703; Fry, s. 642.

[1] **Breach of covenants, effect of.** — See Fry on Spec. Perf. of Cont. sec. 940.

the *evidence thereof is not clear and cogent, or [*117] if it appears doubtful whether such breaches have not been waived by the receipt of subsequent rent or otherwise, the court will decree a specific performance, and direct the lease to be ante-dated, with liberty for the landlord to proceed by ejectment, action of covenant, or otherwise, for such alleged breaches, the tenant undertaking to admit in any such action that the lease was executed on the day it bears date (*o*). In such case the tenant must insure *immediately* after the execution of the lease, if it contain a covenant to insure, &c. (*p*). Acts creating a nuisance to the landlord, for which a remedy may be had in damages, but which do not occasion a forfeiture, are no ground for refusing a specific performance (*q*).

Proviso against assignment. — A proviso against assignment to be contained in the lease will prevent an assignment of

(*o*) Fry, s. 646; Pain *v.* Coombs, 3 Sm. & Giff. 449; 1 De Gex & J. 34; 3 Jur., N. S. 307, 847; Lilley *v.* Leigh, 3 De Gex & J. 204; Rankin *v.* Lay, 2 De Gex, F. & J. 65; 29 L. J., Ch. 734; Rogers *v.* Tudor, 6 Jur., N. S. 692; Poyntz *v.* Fortune, 27 Beav. 393; Browne *v.* Marquis of Sligo, 10 Ir. Ch. R. 1; Blackett *v.* Bates, 2 H. & M. 270; 34 L. J., Ch. 515.

(*p*) Doe *d.* Darlington *v.* Ulph, 13 Q. B. 204.

(*q*) Gordon *v.* Smart, 1 Sim. & Stu. 66.

An agreement for a lease does not constitute a lease in equity after the intended lessee being in possession has broken the intended covenants to repair and pay rent, they being accompanied with a re-entry clause. Swain *v.* Ayres, 21 Q. B. D. 289; Same *v.* Same, 20 Id. 585, 588 (*per* Charles, J.). "In the present case specific performance of the agreement to grant a lease would not be given against the landlord when the tenant had broken his covenant to repair" (*per* Charles, J., *supra*, p. 588).

[2] Renewal covenant may be enforced by continuing partner in name of firm if covenant providing for renewal by continuing partner. Floyd *v.* Storrs, 144 Mass. 56.

An agreement for lease may be enforced against vendee of intended lessor where such vendee has taken premises with knowledge and promised vendor to carry out the lease. Simmons *v.* Campbell, 17 Chy. (Ont.) 612, 617. Such an agreement for a lease is a lease in equity (*per* Mowat, V.-C., p. 617); and in such a case the vendee would be estopped to set up the Statute of Frauds as a defence. Hodges *v.* Howard, 5 R. I. 149, 150. (And see whole opinion of Ames, C. J., declining to rest the decision upon possession which was equivocal, but placing it upon the equity of the case.)

the agreement itself (*r*). But the benefit of such proviso may be waived (*s*).

Sect. 6. — *Specific Performance by or against particular Persons.*

Who may sue for specific performance. — The person to maintain an action for specific performance must be either, 1st, the lessor himself or his representatives in interest; or, 2ndly, the lessee himself or his representatives in interest. If, however, the contract be entered into by a tenant for life in due exercise of a power, specific performance will, it is conceived, be decreed at the suit of a remainderman (*t*), except where there is an undue exercise of the power (*u*). Where A. agreed to grant B. a lease, and before he had done so mortgaged the property to C. with notice, who in no way contested B.'s right to the lease: — Held, that C. was not a proper party to a suit for a specific performance (*x*).

Against executors of lessee. — Where a person who has agreed to take a lease dies, the executors admitting assets may be compelled to take a lease, the covenants being so qualified as that the executors shall be no further liable therein than they would have been on the covenants which ought to have been entered into by their testator (*y*).

[*118] * **Where action necessary.** — The court in one case refused to enforce performance of an agreement by a person out of possession to grant a present lease to a person who was at the time apprised that he could not obtain possession except by a suit (*z*). It seems, too, that a lessee will not be compelled to assign his lease (containing a covenant not to assign without licence) where the agreement to assign

(*r*) Weatherall *v.* Geering, 12 Ves. 504.

(*s*) Dowell *v.* Dew, 1 You. & Coll. C. C. 345; Fry, s. 129.

(*t*) Shannon *v.* Bradshed, 1 Sch. & Lef. 52, 65; Lowe *v.* Swift, 2 Ball & B. 529.

(*u*) Ricketts *v.* Bell, 1 De Gex & S. 335.

(*x*) Long *v.* Bowring, 33 Beav. 585.

(*y*) Phillips *v.* Everard, 5 Sim. 102; Stephens *v.* Hotham, 1 K. & J. 571; Page *v.* Broom, 3 Beav. 36; Fry, s. 121; Sug. V. & P. 209 (14th ed.).

(*z*) Bayly *v.* Tyrrell, 2 Ball & B. 358; Fry, s. 132; but now see 8 & 9 Vict. c. 106, s. 6; *ante*, 3.

is made "subject to the landlord's approval," although the landlord unreasonably holds his licence, contrary to his covenant not to do so, contained in the lease (*a*).

Infants. — An infant cannot sue or be sued for a specific performance (*b*).

Married women. — A married woman may bind her separate estate, and by s. 1, sub-s. (2), of the Married Women's Property Act, 1882, is presumed to bind such estate, unless the contrary be shown. She may also sue or be sued alone, by sub-s. (2) of the same section on a contract for a lease. Prior to that act she sued or was sued with her trustees (*c*).

Lunatics. — A contract to grant or take a lease may be enforced against a lunatic, if made during a lucid interval (*d*).

Felons. — The court has refused to execute an agreement to grant a lease to a man who has committed felony (*e*); but the terms of the statute 33 & 34 Vict. c. 23, by which forfeiture for felony is abolished, seem to point to such an agreement being enforceable by and against the trustees of the felon's property.

Insolvents. — The insolvency of the intended tenant is a valid ground for resisting the specific performance of an agreement for a lease (*f*).

Bankrupts. — The bankruptcy of the intended tenant does not determine the contract for a lease (*g*): but it vests in his trustee in bankruptcy, who may disclaim it (*h*). If the trustee elect to take a lease, he must enter into such cove-

(*a*) Lehmann *v.* M'Arthur, L. R., 3 Ch. Ap. 496; 37 L. J., Ch. 625.

(*b*) Flight *v.* Bolland, 4 Russ. 298; Hoggart *v.* Scott, 1 Russ. & Myl. 293; Dart V. & P. 670; but see Woods *v.* Hyde, 31 L. J., Ch. 295.

(*c*) Johnson *v.* Gallagher, 3 De Gex, F. & J. 494, 519; 30 L. J., Ch. 298; Picard *v.* Hine, L. R., 5 Ch. Ap. 274.

(*d*) Fry, s. 161; 1 Ves. jun. 82; but see Hall *v.* Warren, 9 Ves. 605. As to contract for lease with committee of lunatic, see 16 & 17 Vict. c. 70; Re Wynne, L. R., 7 Ch. 229.

(*e*) Willingham *v.* Joyce, 3 Ves. 169.

(*f*) Buckland *v.* Hall, 8 Ves. 92; Neale *v.* Mackenzie, 1 Keen, 474; Price *v.* Assheton, 1 Y. & C. 441; O'Herlihy *v.* Hedges, 1 Sch. & Lef. 123; M'Nally *v.* Gradwell, 16 Ir. Ch. R. 512.

(*g*) Buckland *v.* Papillon, L. R., 1 Eq. 477; 35 L. J., Ch. 387; 36 Id. 81; L. R. 2 Ch. Ap. 67; and see Kell *v.* Nokes, 14 W. R. 908; Mackley *v.* Pettenden, 1 B. & S. 178; 30 L. J., Q. B. 225.

(*h*) *Post*, Chap. VII., Sect. 7.

nants as the bankrupt himself would have had to enter into (*i*): or he may assign the agreement for a lease to a purchaser, who may enforce a specific performance, unless indeed the agreement contains a proviso against alienation (*k*). If the trustee elect not to take a lease, the court will not enforce the agreement at the instance of the bank-
[*119] rupt (*l*). Where a person agreed to grant a *lease to A., his executors, administrators and assigns, upon certain conditions, and A. assigned his interest in the contract to B., and afterwards became bankrupt, it was held that B., on performing the conditions, had a right to enforce the agreement specifically (*m*).

Corporations. — If there has been a part performance of the contract for a lease by a corporation, the court will decree a specific performance of it, though the contract was not under the common seal of the corporation (*n*).

It has been held, that the commissioners of woods and forests are neither entitled to sue nor liable to be sued for the specific performance of contracts entered into with or by them (*o*).

Sect. 7. — *Form of Lease, and how settled after a Decree.*

Form of lease — how settled. — Questions as to the validity of the contract, and as to whether it is inequitable to enforce its specific performance, must be determined at the hearing; questions of title are referred to chambers (*p*). The court, on pronouncing a decree for specific performance of an agreement to take a lease, will not usually enter into the question as to what covenants the lease shall contain. But it will do so where the nature of the decree to be made depends upon that question (*q*). In ordinary cases any such question

(*i*) Powell *v.* Lloyd, 2 Y. & J. 372.

(*k*) Crosbie *v.* Tooke, 1 Myl. & K. 431; Morgan *v.* Rhodes, Id. 495; Buckland *v.* Papillon, *supra*.

(*l*) Brook *v.* Hewett, 3 Ves. 255; Weatherall *v.* Geering, 12 Ves. 504.

(*m*) Morgan *v.* Rhodes, 1 Myl. & K. 435.

(*n*) Steeven's Hospital *v.* Dyas, 15 Ir. Ch. R. 405; Wilson *v.* West Hartlepool R. Co., 34 L. J., Ch. 241.

(*o*) Nurse *v.* Ld. Seymour, 13 Beav. 254.

(*p*) Hood *v.* Oglander, 34 Beav. 513.

(*q*) Blakesley *v.* Wheildon, 1 Hare, 176, 183 (where see form of minutes

must, if necessary, be settled in chambers: and for that purpose one party must prepare the draft of a lease, and hand a copy to the other, that such alterations may be made as may be deemed necessary: and when the parties cannot agree upon any point, it may be brought before the judge's chief clerk, who will settle the draft lease in such manner as he thinks fit (*r*). Either party may appeal to the judge, and apply to him to vary the terms of the draft lease as settled by the chief clerk: but at the peril of costs (*s*).

Enforcement of decree. — If the defendant refuse or neglect to comply with the decree, the court may, on such terms and conditions (if any) as may be just, "order that the lease be executed by such person as the court may nominate for that purpose," and in such case the lease so executed "shall operate and be for all purposes available as if it had been executed by the person originally directed to execute it" (*t*).

"Usual covenants." — * The question what cove- [*120] nants the parties to an agreement for a lease are entitled to have inserted in the lease itself is of great importance (*u*), but it seems clear, that whether the agreement for the lease stipulates for usual covenants or not, the law implies that usual covenants shall be inserted (*x*). The

giving such directions); Reeves *v.* Greenwich Tanning Co., 2 H. & M. 54; Onions *v.* Cohen, 2 H. & M. 354; 34 L. J., Ch. 338; Beadel *v.* Pitt, 11 Jur., N. S. 152; 13 W. R. 287.

(*r*) Jenkins *v.* Green, 27 Beav. 440; 28 L. J., Ch. 817, 820; Parish *v.* Sleeman, 1 De Gex, F. & J. 326; 29 L. J., Ch. 53.

(*s*) Parish *v.* Sleeman, *supra*; Sharp *v.* Milligan, 23 Beav. 419.

(*t*) Jud. Act, 1884, 47 & 48 Vict. c. 61, s. 14. See Hall *v.* Hall, 51 L. T. 226, in which Kay appointed a person in place of a defaulting defendant to execute a lease, under the somewhat similar section 30 of the Trustee Act, 1850, and Edwards, *In re*, 33 W. R. 578, in which Pearson, J., appointed his chief clerk to execute a mortgage.

(*u*) See the question carefully discussed, Dav. Prec. vol. 5, pt. 1. p. 51 (ed. 3, A.D. 1876), where it is said that the result of the authorities is that the only covenants which the lessor can insist on as "usual covenants" are covenants to pay rent and taxes, and to repair and to allow the lessor to enter and view the state of repair, with a proviso for re-entry on breach of the covenant to pay rent; and that the only covenant which the lessee can insist on is the usual qualified covenant for quiet enjoyment; a passage cited with approval by Jessel, M. R., in Hampshire *v.* Wickens, L. R., 7 Ch. D. 555, and *infra*, p. 121.

(*x*) Church *v.* Brown, 15 Ves. at p. 265; Propert *v.* Parker, 3 My. & K. 280.

question what are usual covenants appears to be one of fact, not of law, in a case where the parties stipulate for usual covenants (*y*), but to be a question of law where the contract for the lease is silent as to covenants (*z*).

What are "usual" covenants depends, in some measure, on the practice of conveyancers, which vary from time to time, so that what was a usual covenant in Lord Eldon's time would not necessarily be held to be a usual covenant now; and also depends upon the character of the property agreed to be demised, so that what would be a usual covenant in a contract for a mining, would not necessarily be held to be so in a contract for an agriculture lease.

Rent. — The covenant to pay rent has been held to be a usual covenant in the construction of a lease under a power (*a*), and seems indeed to be in all cases a usual covenant.

Repair. — The covenant to repair seems clearly usual (*b*), and it has been twice held on the construction of a contract for a lease (*c*), that the exception which has for some time been commonly inserted in leases, in case of destruction of the premises by fire, is not "usual."

To pay taxes. — A covenant by the tenant to pay rates and taxes ought clearly to be inserted, if the contract for the lease stipulate for a *net* rent (*d*); but this is not so much because the covenant is usual, as because the words "net rent" imply it; and the better opinion seems to be — though there is no express decision to that effect — that amongst "usual covenants" must be reckoned a covenant by the tenant "to pay taxes, except such as are usually payable by the landlord" (*e*).

Not to assign or underlet. — The covenant not to [*121] assign or underlet, without the leave of the *lessor,

(*y*) In Bennett *v.* Womack, 7 B. & C. 627, and in Brookes *v.* Drysdale, L. R., 3 C. P. D. 52, *post*, it was assumed to be a question of fact.

(*z*) Church *v.* Brown, *ubi supra*.

(*a*) Taylor *v.* Horde, 1 Burr. 60.

(*b*) Kendall *v.* Hill, 6 Jur., N. S. 968.

(*c*) Id.; Sharp *v.* Milligan, 23 Beav 419.

(*d*) Bennett *v.* Womack, 3 C. & P 96; 7 B. & C. 627.

(*e*) Hampshire *v.* Wickens, *infra*.

is not a usual covenant (*f*), whether it be restricted by such words as "such leave not to be withheld to a respectable and responsible tenant," or not. (*g*)

To trade. — A covenant not to carry on a particular trade, without the leave of the lessor, is not a usual covenant (*h*), and a contract for a lease of a house to contain usual covenants between landlord and tenant, and a covenant not to convert the house into a school, does not imply a restrictive covenant upon trading generally (*i*).

To use for particular purpose. — In Bennett *v.* Womack (*k*), the defendant contracted for the purchase of the lease of a public-house described as held "upon usual and common covenants." In an action for not completing, the judge directed the jury to find for the plaintiff upon evidence that six out of ten public-house leases contained the proviso for re-entry if the lessee should carry on any other business than that of a victualler, which proviso had been objected to by the defendant as uncommon (*k*); and the court refused to enter a non-suit.

A contract for a lease (to contain usual covenants) of land on which the lessee was to build and not to use the premises for any other purpose than a glass manufactory, was held not to entitle the lessor to an affirmative covenant by the lessee to use the premises for such purpose (*l*).

Registration of sublease. — Where there was an agreement to take an assignment of a public-house lease subject to covenants "common and usual in leases of public-houses," and the lease was found to contain a condition that every underlease, &c., should be left with the ground landlord's solicitor, it was held, the jury having found as a fact that the condition was not usual, that the condition was a covenant within

(*f*) Church *v.* Brown, 15 Ves. 258; Henderson *v.* Hay, 3 Bro. C. C. 632; Vere *v.* Loveden, 12 Ves. 179; Buckland *v.* Papillon, 30 L. R., 2 Ch. 67; 36 L. J., Ch. 83.

(*g*) Hampshire *v.* Wickens, L. R., 7 Ch. D. 555; 47 L. J., Ch. 243; 26 W. R. 491, *per* Jessel, M. R.

(*h*) Propert *v.* Parker, 3 Myl. & K. 280.

(*i*) Van *v.* Corpe, 3 Myl. & K. 269.

(*k*) 7 B. & C. 627.

(*l*) Doe *d.* Marquis of Bute *v.* Guest, 15 M. & W. 160.

the contemplation of the agreement, and that the purchaser was not bound to complete (*m*).

List of "usual covenants." — The whole question was considered in 1878 by Jessel, M. R., in Hampshire *v.* Wickens (*g*). In that case the defendant agreed to accept a lease of a dwelling-house in London "on all usual covenants and provisos," but declined to accept the lease proposed to be granted on the ground that such lease contained a covenant by the lessee "that he would not, without the previous consent of the lessor, assign, underlet, or part with the possession of the said premises, but such consent not to be withheld to a respectable and responsible tenant," &c. Jessel, M. R., after ruling that "if no objection can be made to an [*122] * unrestricted covenant against assignment, none can be made to a covenant that is restricted," held, that the agreement could not be specifically enforced, and cited with approval the passage from Davidson's Precedents in Conveyancing, of which an abstract has already been given (*n*). Subsequently, in Eadie *v.* Addison (*o*), where the defendant had agreed to grant to the plaintiff, a brewer, a "proper" lease of a public-house, "to be drawn up with all proper clauses," and approved of by the defendant and his solicitor, and the defendant refused to grant a lease unless it contained a clause against underletting, it was held, that such a clause was not a "proper clause," and the defendant was decreed to grant the lease without it.

Proviso for re-entry. — In Hodgkinson *v.* Crowe (*p*), it was laid down that, as a "usual" term, the proviso for re-entry is applicable to the breach of the covenant to pay rent, and to the breach of no other covenant. In that case there was an agreement for a lease of mines to contain numerous terms succinctly stated, and amongst them "all usual and customary mining clauses." Bacon, V.-C., held that the intending landlord was entitled to have inserted in the lease a proviso for re-entry on non-payment of rents and royalties,

(*m*) Brookes *v.* Drysdale, L. R., 3 C. P. D. 52; 37 L. T. 467; 26 W. R. 331.

(*n*) *Ante*, 120 (*u*).

(*o*) Eadie *v.* Addison, 52 L. J., Ch. 80; 47 L. T. 533; 31 W. R. 320.

(*p*) L. R., 10 Ch. 622; 44 L. J., Ch. 680; 33 L. T. 388; 23 W. R. 885.

"or if and whenever there should be any breach of the covenants and agreements in the lease contained." But this ruling was reversed on appeal; and James, L. J., expressed the opinion that the clause of forfeiture for breach of covenant generally was "a most odious stipulation, offensive, and oppressive beyond measure" (*q*).

Re-entry on bankruptcy. — A proviso for re-entry on the bankruptcy of the lessee has been held to be usual in the case of a contract for a lease of a hotel (*r*), but not of a contract for a mining lease (*s*), or for a farming lease (*t*). There is strong authority for saying that it is not "usual" (*u*).

Concluding remarks on "usual covenants." — It is to be observed that in the majority of the cases (*x*) the question was decided by an equity judge without a jury. Was it so decided as a question of fact or of law? Is evidence admissible? Would a judge be bound to direct a jury to find in accordance with the equity decisions? These are open questions upon the authorities, but it is submitted that what is usual must in every case be a question of fact to be decided upon evidence if either party so require, that *upon an action for specific performance in the [*123] Chancery Division there would be some reason for applying for a jury under Order XXXVI., Rule 6, and that such a jury might find independently of the equity decisions.

Sect. 8. — *Solicitor's Charges.*

The Solicitors' Remuneration Order, 1882 (*y*), prescribes a scale of remuneration to solicitors for agreements for

(*q*) As to "Relief against Forfeiture," see Conveyancing Act, 1881, s. 14, Ch. VIII., Sect. 6.

(*r*) Haines *v.* Burnett, 27 Beav. 500; 29 L. J., Ch. 289.

(*s*) Hodgkinson *v.* Crowe, L. R., 19 Eq. 591; 44 L. J., Ch. 238; 33 L. T. 122.

(*t*) Hyde *v.* Warden, L. R., 3 Ex. D. 72; 47 L. J., Ch. 121 — C. A.

(*u*) Hyde *v.* Warden, *supra*; Hampshire *v.* Wickens, *supra*, where it is said that Haines *v.* Burnett, *supra*, "must be treated as distinctly overruled" by Hodgkinson *v.* Crowe, *supra*. But note, that in Haines *v.* Burnett the words were, "such covenants as are usually inserted in leases of property of a similar description."

(*x*) Only in Bennett *v.* Womack, 7 B. & C. 627, and Brookes *v.* Drysdale, L. R., 3 C. P. D. 52, was the question submitted to a jury.

(*y*) See so much of the Order as applies to agreements for leases and leases, *post*, Appendix A., sect. 13.

leases and leases varying in proportion to the rent, and accordingly as the transaction is completed or not, but not including stamps, counsel's fees, and other disbursements "reasonably and properly paid" (Rule 4). The scale, which is set out in full hereafter (*y*), may be generally described here as a 7½ per cent. scale on the rental for the intending lessor's solicitor, and half that amount for the intending lessee's solicitor. A solicitor concerned for both parties is to charge the lessor's solicitor's charges, and one-half the lessee's solicitor's charges.

Charges for negotiations preparatory to an agreement which resulted in a lease have been, under the order, disallowed on taxation (*z*).

(*z*) Field, *In re*, W. N. for May 2d, 1885 — C. A., affirming Chitty, J.

*CHAPTER V. [*124]

THE LEASE

SECT. 1. — *Definition of "Lease."*

Definition. — A lease is a conveyance (*a*) by way of demise of lands or tenements, for life or lives,[1] for years,[2] or at

(*a*) In the Conveyancing Act, 1881, the word "conveyance" includes "lease" unless a contrary intention appears.

[1] Kenney *v.* Wentworth, 77 Me. 203. A lease with covenant of perpetual renewal is not a conveyance of a fee. Page *v.* Esty, 54 Me. 319, 326. But a rent charge may be reserved in a grant of a fee. Farley *v.* Craig, 11 N. J. L. 262.

[2] Berridge *v.* Glassey, 112 Pa. St. 442.

will,[1] but always for a less term than the party conveying himself has in the premises; for if it be for the whole interest, it is an assignment and not a lease (*b*).[2] A lease is usually made in consideration of rent, or some other annual recompense rendered to the party conveying the premises[3] — who is called the lessor or landlord — by the party to whom they are conveyed or let, who is called the lessee or tenant (*c*).

Distinction between lease and licence to use. — A lease is also a contract for the *exclusive*[4] possession of lands or tene-

(*b*) Beardman *v.* Wilson, L. R., 4 C. P. 57; 17 W. R. 54; and see the cases cited, *post*, Ch. VII., Sect. 5.

(*c*) Shep. Touch. 266.

[1] Laxton *v.* Rosenberg, 11 Ont. 199, 207.

[2] As, for example, where a lessee grants a sublease equal to or greater than his own term. Stewart *v.* L. I. R. R. Co., 102 N. Y. 601; Langford *v.* Selmes, 3 Kay & Johns. 220. A tenant for life cannot grant a valid lease to continue longer than his own life. Wright *v.* Graves, 80 Ala. 416, 420 (*per* Clopton, J.). And a lease for lives made by a tenant for life (not complying with leasing power) expires with the death of the life tenant. Enright *v.* O'Loghlen, 20 L. R. (Ir.) 159.

[3] **A reservation of rent is not essential to the character of a lease.** — Though usually made in consideration of rent, a reservation of rent is not essential to the character of a lease. Failing *v.* Schenck, 3 Hill (N. Y.) 344; State *v.* Page, 1 Speers (S. C.) 408, 429 (*per* O'Neall, J.); Jackson *v.* Wheeler, 6 Johns. (N. Y.) 272; McKissack *v.* Bullington, 37 Miss. 535, 538 (*per* Harris, J.).

"The proposition that rent is not essential to the existence of a leasehold estate is entirely obvious" (*per* Cowan, J., in Failing *v.* Schenck, *supra*, p. 347).

In Fiske *v.* Framingham Man. Co., 14 Pick. (Mass.) 491, there was no direct reservation of rent for the demised premises (a factory), but the lessor derived benefit from the contract of the lessee to manufacture goods for him at a stipulated price. Even this benefit, however, is not necessary to constitute a lease.

[4] **Exclusive possession essential.** — Exclusive possession is essential to the character of a lease.

Examples: the use of premises by permission of the owner and in common with him does not constitute a tenancy, but simply a license. Central Mills *v.* Hart, 124 Mass. 123.

Joint occupancy with the lessor as his servant is not sufficient to create a tenancy. West *v.* Atherton, 2 Allen (N. B.) 653.

A contract for exclusive occupation of rooms in an apartment house is sufficent, Porter *v.* Merrill, 124 Mass. 534, though it has been held that a contract for board and lodging in a boarding-house is not. White *v.* Maynard, 111 Mass. 250; Wilson *v.* Martin, 1 Denio (N. Y.) 602.

Leave or permission to a circle of ladies connected with a religious society to use a hall in a church, but not to the exclusion of the society, does not

ments for some certain number of years or other determinate period (*d*).[1] An instrument is not a demise or lease,

(*d*) Reg. *v.* Morrish, 32 L. J., M. C. 245.

constitute a lease, but a mere revocable license. Hamblett *v.* Bennett, 6 Allen (Mass.) 140, 145.

Where a father gives up possession and control of his farm to his son, upon condition of supporting him, and continues to reside with him on the farm, the arrangement creates a tenancy. Ferguson *v.* Savoy, 4 Allen (N. B.) 263.

A conveyance of an exclusive privilege to mine iron ore for a term of years, paying royalties and with various covenants, was held to be a lease in Seymour *v.* Lynch, 7 Ont. 471, affirmed by evenly divided court in 13 A. R. (Ont.) 525.

In United States *v.* Gratiot, 14 Pet. 534, the United States Supreme Court held that a license for one year to smelt lead ore at United States lead mines, paying rent in percentage of lead and with right of cultivating as much land as might be required for the teams, was a lease for years.

In Freeman *v.* Underwood, 66 Me. 229, an executory sale of blueberries, grass, and timber for ten years, with possession so far as necessary for the sake of securing them, was a lease. Freeman *v.* Underwood, 66 Me. 229.

[1] **Cultivation on shares; does the cultivation of land on shares create a tenancy?** — This question has been little considered in England. It has given rise to much discussion in America. Generally it is held that the contract may or may not create a tenancy according to circumstances. The courts, however, differ widely in construction of the same circumstances. Hare *v.* Celey.

The *dicta* in the famous case of Hare *v.* Celey, Cro. Eliz. 143, is sometimes followed in this country, sometimes limited, and frequently rejected. That was a case of a contract for the cultivation of land for a single season, under which the owner and cultivator were each to furnish half the seed, and were to share the crop. The court said that the relation of landlord and tenant did not exist, because the contract was for a single season, otherwise if it had been for more than one. It was held that the owner had sole right of possession, and could alone maintain trespass, *quare clausum*.

The court said they were tenants in common of the crop, and might have joined for an injury to it. This case was meagrely reported, and it is hard to tell exactly how far its doctrine extends. If it decides that a contract for the cultivation of land on shares for a single season, *but under which the actual possession and sole control of the premises are delivered* to the cultivator, does not create a tenancy; it is opposed to the weight of American authorities, as it is also upon the point of tenancy in common in the crop.

How far followed. — The case has been followed, among other cases, by Bradish *v.* Schenck, 8 Johns. (N. Y.) 151, 152 (a contract for one year), and by Foote *v.* Colvin, 3 Id. 216, and DeMott *v.* Hagerman, 8 Cow. (N. Y.) 220.

Cropping contracts. — The last-named case and possibly the next to the last were mere contracts to work upon the land of another, receiving pay in a share of the crop (sometimes called cropping contracts). All authorities admit that such contracts do not create tenancies, but that the entire possession of the land and ownership of the crop is in the owner until division. McNeely *v.* Hart, 10 Ired. L. (N. C.) 63; Brazier *v.* Ansley, 11 Id. 12; Hare

[*125] although it * contains the usual words of demise, if its contents show that such was not the intention of

v. Pearson, 4 Id. 76 (*per* Daniel, J.); State *v.* Jones, 2 Dev. & Batt. (N. C.) 544; Harrison *v.* Ricks, 71 N. C. (*per* Rodman, J.); Adams *v.* McKesson, 53 Pa. St. 81; Chase *v.* McDonnell, 24 Ill. 236; Kelley *v.* Weston, 20 Me. 232; Endicott, J., in Warner *v.* Abbey, 112 Mass. 355.

Classification of contracts. — Contracts for the cultivation of land on shares may (under the conflicting decisions) be divided into four classes, viz.: —

1. Simple unqualified tenancies (lessee having exclusive possession of land and legal title to the entire crop until division). Stewart *v.* Doughty, 9 John. (N. Y.) 108, and a host of cases cited later.

2. Qualified tenancies (the lessee having exclusive possession of the land, but the owner being a tenant in common of the crop). Walls *v.* Preston, 25 Cal. 59, 64, and other cases cited later.

3. Pure cropping contracts (under which owner has entire possession and ownership of crop until division. See cases cited *supra*).

4. Qualified cropping contracts or *quasi* tenancies (under which cropper has a qualified but not exclusive possession of the land, and is tenant in common with the owner of the crop). Hare *v.* Celey, *supra;* Delaney *v.* Root, 99 Mass. 546, 549; Foote *v.* Colvin, and Bradish *v.* Schenck, *supra;* Walker *v.* Fitts, 24 Pick. (Mass.) 191; Aiken *v.* Smith, 21 Vt. 172; Guest *v.* Opdyke, 31 N. J. L. 552; Harrower *v.* Heath, 19 Barb. (N. Y.) 331; DeMott *v.* Hagerman, 8 Cow. (N. Y.) 220; Putnam *v.* Wise, 1 Hill (N. Y.) 234; Caswell *v.* Districh, 15 Wend. (N. Y.) 379; Bishop *v.* Doty, 1 Vt. 37; Smyth *v.* Tankersley, 20 Ala. 212. The question whether the letting was for one or more seasons is now little regarded.

Concurrence of authority. — It may be regarded as settled in America, that the relation of landlord and tenant may be created by contracts to cultivate land on shares. Such contracts will always create tenancies whenever the exclusive possession and control is given to the cultivator, the difficulty being that the courts in different jurisdictions find differently upon the same facts. Whether a tenancy is created or not, is a question of intention to be ascertained by construction of the contract. Caton, C. J., in Alwood *v.* Ruckman, 21 Ill. 200; Rhodes, J., in Walls *v.* Preston, 25 Cal. 59, 64, 65; Rodman, J., in Harrison *v.* Ricks, 71 N. C. 7, 11; Bell, J., in Moulton *v.* Robinson, 27 N. H. 550, 551; Johnson *v.* Hoffman, 53 Mo. 504; Hoar, J., in Delaney *v.* Root, 99 Mass. 546, 549; Endicott, J., in Warner *v.* Abbey, 112 Mass. 355, 359, 360; Woodruff, J., in Taylor *v.* Bradley, 39 N. Y. 129, 138, 139.

Mixed question of law and fact. — When the contract is an oral one, the question is a mixed question of law and fact, to be determined by the jury under instructions from the court. Facts which constitute a simple tenancy in one state create qualified ones, or *quasi* tenancies, or mere cropping contract, in others.

Qualified tenancies. — The following cases are cases of qualified tenancies, in which it was held that a tenancy existed, but that the owner and cultivator were tenants in common of the crop. Walls *v.* Preston, 25 Cal. 59, 64, 65; Sunol *v.* Molloy, 63 Id. 369; Schell *v.* Simon, 66 Id. 264; Cooper *v.* McGrew, 8 Or. 327, 330; Ferrall *v.* Kent, 4 Gill (Md.) 209; State *v.* Jewell, 34 N. J. L. 259; Johnson *v.* Hoffman, 53 Mo. 508; Kamerick *v.* Castleman, 23 Mo. App. 481.

In several cases the owner has been held entitled to an interest in the crop

by virtue of a special reservation in the contract, or to have obtained an interest by delivery or other expiration of the contract. Smith *v.* Atkins, 18 Vt. 461; Esdon *v.* Colburn, 28 Id. 631; Willmarth *v.* Pratt, 56 Id. 474; Heald *v.* Build. Ins. Co., 111 Mass. 38; Hart *v.* Baker, 29 Ind. 200; Lindley *v.* Kelley, 42 Id. 294.

In some cases the courts have simply decided that the owner and cultivator were tenants in common of the crop, without deciding whether they were landlord and tenant. Schmitt *v.* Cassilius, 31 Minn. 7; Fiquet *v.* Allison, 12 Mich. 328; Lewis *v.* Lyman, 22 Pick. (Mass.) 437.

Unqualified tenancies. — In the vast majority of cases where the courts have held the relation of landlord and tenant *did* exist, they have also decided that the owner and cultivator were not tenants in common of the crop, and that the entire crop belonged to the cultivator until delivery or other equivalent act. Stewart *v.* Doughty, 9 Johns. (N. Y.) 108; Warner *v.* Abbey, 112 Mass. 355; Orcutt *v.* Moore, 134 Id 48; Alwood *v.* Ruckman, 21 Ill. 200; Overseers *v.* Overseers, 14 Johns. (N. Y.) 365; Jackson *v.* Brownell, 1 Id. 267; Deaver *v.* Rice, 4 Dev. & Bat. (N. C.) 431; Waltson *v.* Bryan, 64 N. C. 764; Harrison *v.* Ricks, 71 Id. 7; Woodruff *v.* Adams, 5 Blackf. (Ind.) 317; Dixon *v.* Niccolls, 39 Ill. 372; Hoskins *v.* Rhodes, 1 Gill & Johns. (Md.) 266; Ream *v.* Harnish, 45 Pa. St. 376; Rinehart *v.* Olwine, 5 Watts & Serg. (Pa.) 157; Frout *v.* Hardin, 56 Ind. 165; Lacy *v.* Weaver, 49 Id. 373; Williams *v.* Smith, 7 Id. 559; Chissom *v.* Hawkins, 11 Id. 316; Fowler *v.* Hawkins, 17 Id. 211; Chicago, &c., R. R. Co. *v.* Linard, 94 Id. 319; Cunningham *v.* Baker, 84 Id. 597; Gordon *v.* Stockdale, 89 Id. 240; Ross *v.* Swaringer, 9 Ired. L. (N. C.) 481; Symonds *v.* Hall, 37 Me. 354 (*per* Howard, J.); Sargent *v.* Courrier, 66 Ill. 245; Burns *v.* Cooper, 31 Pa. St. 426 (*per* Strong, J., but in this case a sufficient division and delivery had been made); Townsend *v.* Isenberger, 45 Iowa, 670; Blake *v.* Coats, 3 G. Greene (Iowa) 548; Rees *v.* Baker, 4 Id. 461; Merrit *v.* Fisher, 19 Iowa, 354. This case decides, as virtually all the others do, that the share of crop reserved to the owner was rent; it also decides that the rent might be secured by the lessor under a special Iowa statute designed to take the place of common law distress. Larkin *v.* Taylor, 5 Kans. 433, 441; Fry *v.* Jones, 2 Rawle (Pa.) 11; Strain *v* Gardner, 61 Wis. 174; Manwell *v.* Manwell, 14 Vt. 14, 24; Hurd *v.* Darling, 16 Vt. 377; Koob *v.* Ammann, 6 Bradw. (Ill.) 160; Redmon *v.* Bedford, 80 Ky. 13; Lamberton *v.* Stouffer, 55 Pa. St. 284; Brown *v.* Jaquette, 94 Pa. St. 113; Texas & Pac. Ry. Co. *v.* Bayliss, 62 Tex. 570; Walworth *v.* Jenness, 58 Vt. 670.

Besides the foregoing, it has been held in many other cases that such contracts created tenancies. Darling *v.* Kelly, 113 Mass. 29; Geer *v.* Fleming, 110 Id. 39; Cornell *v.* Dean, 105 Id. 435; Yates *v.* Kinney, 19 Neb. 275; Dworak *v.* Graves, 16 Neb. 706; Hatchell *v.* Kimbrough, 4 Jones (N. C.) 163, (trespass maintained against owner); Birmingham *v.* Rogers, 46 Ark. 254; and that it might exist was said in Moulton *v.* Robinson, 27 N. H. 550, 557; Hansen *v.* Dennison, 7 Bradw. (Ill.) 73. (In this case it was said that if the cultivator did not have exclusive possession, the owner and cultivator might be tenants in common of the crop; and the court said that in case of an oral lease it was a question of fact for the jury), Taylor *v.* Bradley, 39 N. Y. 129, 138, 139 (*per* Woodruff, J.).

Held not to be tenancies. — In the following cases, in addition to others previously cited, it was held that the contract did not create tenancies, Bernal *v.* Havious, 17 Cal. 542; Lowe *v.* Miller, 3 Gratt. (Va.) 205; Maverick *v.* Gibbs, 3 McCord (S. C.) 211; Taylor *v.* Bradley, 39 N. Y. 129; Chase *v.* McDonnell, 24 Ill. 236; Adams *v.* McKesson, 53 Pa. St. 81, several of them

the parties. Thus where A. agreed with B. to let him have the use of the Surrey Gardens and Music Hall, Newington,

being cases of contracts such as are admitted to be nothing but cropping contracts everywhere.

Cropping contracts. — It is everywhere admitted (see cases previously cited) that under a pure or unqualified cropping contract the entire legal ownership of the crop is in the owner of the land until division.

As was said by Rodman, J., in Harrison *v.* Ricks, 71 N. C. 7, 11, "A cropper has no estate in the land; that remains in the landlord; consequently, although he has in some sense the possession of the crop, it is only the possession of a servant, and is in law that of the landlord. The landlord must divide to the cropper his share. In short he is a laborer receiving pay in a share of the crop."

Leases on shares; Kent's opinion. — In contrast to this is the relation of a lessee on shares, as stated by Kent, Ch. J., in Stewart *v.* Doughty, 9 Johns. (N. Y.) 108, 113: "They were not tenants in common in the crops and productions raised. The interest and property in the crop was exclusively in the tenant until he had separated and delivered to the lessor his proportion. It might as well be said that the lessor would have been tenant in common in the crop, though he was to receive only every tenth bushel of grain as a rent," &c. As applied to the facts of that case, the language of Justice Kent, although *supposed* to be overruled in New York, is sustained by the weight of American authority. The contract in that case was an indenture of lease for six years, and the cultivator was "to render, yield and pay to" (the owner) "the one-half of all the wheat," &c., and it does not appear that the owner was to furnish any portion of the seed, &c. Stewart *v.* Doughty is sustained in New York by Jackson *v.* Brownell, 1 Johns. 267, and Overseers *v.* Overseers, 14 Id. 365.

The law in New York. — Notwithstanding the later New York cases, as, Caswell *v.* Districh, 15 Wend. 379; Putnam *v.* Wise, 1 Hill, 234; De Mott *v.* Hagerman, 8 Cow. 220; Dinehart *v.* Wilson, 15 Barb. 595; Harrower *v.* Heath, 19 Id. 331, supposed to overrule Stewart *v.* Doughty, it is still believed that a tenancy on shares may be created in New York. See opinion of Woodruff, J., in Taylor *v.* Bradley, 39 N. Y. 129, 138, 139. The presumption, however, will ordinarily be in that state, that if the contract is not a pure cropping contract, it is a qualified one, in which the cultivator is a tenant in common in the crop, but has no legal possession in the land.

The law in majority of American states. — In the majority of American states, it is believed, the law is, as it was laid down by Caton, C. J., in Alwood *v.* Ruckman, 21 Ill. 200, 201, viz.:

"The law is too well settled to admit of dispute" that contracts to cultivate land, though for a single year, may or may not constitute tenancies according to the intentions of the parties as expressed in the contract or explained by the circumstances.

If the relation of landlord and tenant exists, "the parties are not tenants in common of the crop raised, but the title to the whole is in the tenant until the rent stipulated is paid."

Tenancy in common in the land. — There may possibly be held to exist another relation between the parties in some states and under some circumstances, to wit: a tenancy in common in the land (see Endicott, J., in Warner *v.* Abbey, 112 Mass. 355, and Hare *v.* Celey, Cro. Eliz. 143).

for four days at 100*l.* per day, for the purpose of giving a series of four grand concerts and day and night fêtes; but from the terms of the agreement it was evident that A. was not to part with the possession of the premises during those four days: this was held no demise (*e*). So where A., an owner of lace machines, paid 12*s.* a week to B. for permission to place the machines in a room in B.'s factory, and for free ingress and egress to the room for himself and workmen for the purpose of working and inspecting the machines; B. supplied the necessary steam power for working the machines, payment for which was included in the above sum: it was held that there was no demise to A. of any part of the room, and no relation of landlord and tenant created between him and B. (*f*). Where an incorporated canal company by deed granted to the plaintiff the sole and exclusive right or liberty of putting or using pleasure boats for hire on their canal, it was held that the grant did not create such an interest or estate in the plaintiff as to enable him to maintain an action in his own name against a person who disturbed his right of putting and using pleasure boats for hire on the canal (*g*). A licence to fasten a coal-barge to moorings fixed in a river, until determined by a month's notice — the licensee to pay 30*l.* annually towards the expense of the moorings — does not amount to a demise nor give the licensee an exclusive right to the use of the moorings, nor render him liable to be rated as the occupier of part of the bed of the river (*h*). The grant by a riparian proprietor of a right to take water from a natural stream on which his land abuts, operates as a licence in gross, and not as a demise, and will not enable the grantee to maintain an action in his own name against a wrongdoer (*i*). The

(*e*) Taylor *v.* Caldwell, 3 B. & S. 826; 32 L. J., Q. B. 164.

(*f*) Hancock *v.* Austin, 14 C. B., N. S. 634; 32 L. J., C. P. 252.

(*g*) Hill *v.* Tupper, 2 H. & C. 121; 32 L. J., Ex. 217.

(*h*) Watkins *v.* Overseers of Milton next Gravesend, L. R., 3 Q. B. 350; 37 L. J., M. C. 73; Grant *v.* Oxford Local Board, L. R., 4 Q. B. 9; 17 W. R. 76; see also London and North-Western R. Co. *v.* Buckmaster, L. R., 10 Q. B. 444; 44 L. J., M. C. 180; 33 L. T. 329; Cory *v.* Bristow, L. R., 2 App. Cas. 262.

(*i*) Stockport Waterworks Co. *v.* Potter, 3 H. & C. 300.

gratuitous loan of a shed for a particular purpose operates as a mere licence revocable at any time (*k*). A licence to get all the copperas stone which may be found in part of a manor, for twenty-one years, at the yearly rental of 25*l.* is not a demise, and will not support a distress for the rent (*l*). A demise of a fire-brick manufactory, for twenty-one years, with powers during such term to dig fire-clay from under certain adjoining land, does not amount to a [*126] * lease, but only to a licence as to the fire-clay, and will not prevent the licensor from digging parts of such fire-clay, or authorizing others to do so, or otherwise dealing with such adjoining land in a manner not inconsistent with the licence (*m*).

Right of shooting, &c. — A licence to hunt or shoot over land, although it does not give the licensee any estate in the land (*n*), amounts to the grant of an incorporeal hereditament; and an assignee of the reversion may sue for breaches of any covenant which touches or relates to the land and runs with it (*o*). But the licence to convey an estate must be by deed; for a parol licence to exercise a right of way or other easement over land of the licensor, whether anything was paid for such licence or not, may be revoked at any time, either expressly or by doing some act inconsistent with such licence (*p*). Any such licence is determined by the death of the licensor or of the licensee, or by an assignment of the land over which, or of the subject-matter in respect of which, the easement or privilege is to be enjoyed (*q*). But an action lies for a breach of contract to grant an incorporeal hereditament, although the contract be not under seal (*r*).

(*k*) Williams *v.* Jones, 3 H. & C. 256; 33 L. J., Ex. 297.

(*l*) Ward *v.* Day, 4 B. & S. 337; 5 Id. 359; 33 L. J., Q. B. 3, 254.

(*m*) Carr *v.* Benson, L. R., 3 Ch. Ap. 524.

(*n*) Bird *v.* Great Eastern R. Co., 19 C. B., N. S. 268.

(*o*) Hooper *v.* Clark, 8 B. & S. 150; L. R., 2 Q. B. 200; 36 L. J., Q. B. 79.

(*p*) Wood *v.* Leadbitter, 13 M. & W. 838; Hyde *v.* Graham, 1 H. & C. 593; Wakley *v.* Froggatt, 2 H. & C. 669; Waterflow *v.* Bacon, L. R., 2 Eq. 514; Gale, 74, 75.

(*q*) Coleman *v.* Foster, Bart., 1 H. & C. 37; Roberts *v.* Rose, 3 H. & C. 162; 33 L. J., Ex. 1, 241; 35 Id. 62; Wallis *v.* Harrison, 4 M. & W. 538; 5 Id. 142; Roffey *v.* Henderson, 17 Q. B. 575.

(*r*) Smart *v.* Jones, 33 L. J., C. P. 154.

General requisites of a good lease. — These things must concur in the making of every good lease: 1. There must be a lessor, who is able to make the lease. 2. There must be a lessee, who is capable of taking the thing demised. 3. There must be a thing demised which is demisable. 4. If the thing demised or the term expressed to be granted be not grantable without a deed, or the party demising be not able to grant without a deed, the lease must be made by deed, containing a sufficient description of the lessor, the lessee, the thing demised, the term granted, and the rent and covenants: and all necessary circumstances, as sealing, delivery, &c., must be observed. 5. If it be a lease for years, it must have a certain commencement, at least when it takes effect in interest or possession, and a certain determination, either by an express enumeration of years, or by reference to a certainty that is expressed, or by reducing it to a certainty upon some contingent event, which must happen before the death of the lessor or lessee. 6. There must be an acceptance of the thing demised, and of the estate by the lessee (*s*).

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* Sect. 2. — *What Leases must be by Deed.* [*127]

A lease for three years or less may be in writing or parol as the parties please (*t*), but a lease for more than three years must be by deed.[1] Such is the effect of 8 & 9 Vict. c. 106, s. 3, taken in conjunction with sects. 1, 2 of the Statute of Frauds. By 8 & 9 Vict. c. 106, s. 3, "a lease required by law to be in writing, of any tenements or hereditaments made after the 1st October, 1845, shall be void at law unless made by deed." And by the Statute of Frauds, 29 Car. 2, c. 3, s. 1, "all leases, estates, interests

(*s*) Shep. Touch. 267.
(*t*) See Ryley *v.* Hicks, 1 Stra. 651; Lord Bolton *v.* Tomlin, 5 A. & E. 856.

[1] **Leases: when by deed in America.** — In Canada, leases of property which are required by law to be in writing must also be by deed. 2 Reed on St. of Frauds, sec. 797, citing C. S. U. C. c. 90, sec. 4; 32 Vict. c. 33, sec. 2; Rev. Sts. 1877 (Ont.) c. 98, sec. 4, and Hurley *v.* M'Donell, 11 U. C. Q. B. 208; Lewis *v.* Brooks, 8 U. C. Q. B. 576. See also Caverhill *v.* Orvis, 12 C. P. (Ont.) 392.

In the majority of American states, leases are not required to be by deed unless for terms of years declared freeholds by statute.

of freehold, or terms of years, or any uncertain interest of, in, to or out of any messuages, manors, lands, tenements or hereditaments, made or created by livery and seisin only, or by parol and not put in writing and signed by the parties so making or creating the same, or their agents thereunto lawfully authorized by writing (*u*), shall have the force and effect of leases or estates at will only; and shall not, either in law or equity, be deemed or taken to have any other or greater force or effect, any consideration for making any such parol leases or estates to the contrary notwithstanding" (*x*): excepting, nevertheless, sect. 2, "all leases not exceeding the term of three years from the making thereof, whereupon the rent reserved to the landlord during such term shall amount unto two-third parts at the least of the full improved value of the thing demised." [1] A lease for a

(*u*) Smith L. & T. 82 (2nd ed.).

(*x*) But such estates at will may change into tenancies from year to year, when any of the agreed rent is paid and received. Clayton *v.* Blakey, 8 T. R. 3; Doe *d.* Rigge *v.* Bell, 5 T. R. 471; 2 Smith L. C. 96, 102 (7th ed.); Smith L. & T. 23, 82 (2nd ed.).

[1] **When valid by parol in America.** — "The excepted term for which leases not in writing may be valid is, in the American states, usually one year instead of three. It is so limited in Arizona, Alabama, California, Colorado, Dakota, Delaware, Idaho, Illinois, Iowa, Kansas, Kentucky, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New York, Oregon, Rhode Island, Texas, Utah, Virginia, West Virginia, Wisconsin, and Wyoming.

In Connecticut there is the additional proviso that the parol agreement must be followed up by actual occupancy of the leased premises by the lessee or some one claiming under him. In Florida, the exception is in favor of leases for not more than two years, while in Indiana, North Carolina, and Tennessee, the term is increased to three years. In New Jersey and Pennsylvania, the qualification of the English statute "from the making thereof" has been added to the three years' limitation. The English statute was re-enacted in but few states, — Georgia, Maryland, South Carolina, Massachusetts, Michigan, Missouri, New Jersey, Vermont. There is no exception whatever made in the statute in Ohio. In Arkansas, a lease by parol has the force and effect of a lease at will only, and "shall not, either in law or equity, be deemed or taken to have any greater effect or force than a lease not exceeding the term of one year.

. . . In Louisiana, leases may be made either by written or verbal contract, while the transfer of *title* of immovable property must be reduced to writing, and no parol evidence thereof is admissible." See *post*, Ch. 6, note "Tenancies from year to year," &c., as to the distinctions in tenancies in the different states.

2 Reed on the Statute of Frauds, sec. 795. Nearly all the American states

term of less than three years, with the right in the lessee, at his option, to prolong it to a period exceeding three years from the date of the lease, is within this exception (*y*). Sect. 4 enacts "that no action shall be brought whereby to charge any person upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized (*z*).

Void lease may operate as agreement. — The effect of 8 & 9

(*y*) Hand *v.* Hall, L. R., 2 Ex. D. 355; 46 L. J., Ex. 603; 36 L. T. 765; 25 W. R. 734 — C. A., reversing decision below, 2 Ex. D. 318; 46 L. J., Ex. 242.

(*z*) This extends to all mere agreements for leases (even for less than three years); but the agent need not be authorized *by writing* as under sect. 1; Smith L. & T. 93 (2nd ed.); Clarke *v.* Fuller, 16 C. B., N. S. 24; Foster *v.* Rowland, 7 H. & N. 103; Heard *v.* Pilley, L. R., 4 Ch. Ap. 548. For the effect of sect. 4 upon an agreement for a lease, see *ante*, p. 85.

have refused to add the additional requirement, in the second section of the Statute of Frauds, "as to the amount of rent to be reserved." Same.

Three years, &c., computed from when in England, United States, and Canada. — "As the English statute expressly limits parol leases to those not exceeding three years *from the making thereof*, it has always been held that the three years must be computed from the making of the agreement, . . . have been followed without question in those states in which the Statute of Frauds contains the clause from the making thereof. In Pennsylvania, accordingly, and New Jersey, the English rule has been followed." 2 Reed on St. of Frauds, sec. 813.

Also in Ontario and New Brunswick same citing. Kaatz *v.* White, 19 U. C. C. P. 36; Brewing *v.* Berryman, 2 Pugs. (N. B.) 115; Hurley *v.* McDonnell, 11 U. C. Q. B. 208.

Where the clause "from the making thereof" is omitted from Statute of Frauds, the number of years is generally considered "solely with reference to the duration of the term." 2 Reed on St. of Frauds, sec. 814, citing Sears *v.* Smith, 3 Col. 290 (*per* Thatcher, C. J.); Sobey *v.* Brisbee, 20 Iowa, 105; Jones *v.* Marcy, 49 Id. 188; Steininger *v.* Williams, 63 Ga. 475; Taggard *v.* Roosevelt, 2 E. D. Smith (N. Y.) 100; Young *v.* Dake, 5 N. Y. 465; Bear *v.* Flues, 64 N. Y. 518.

In England, it was decided by Bolton *v.* Tomlin, 5 A. & E. 856, that parol leases valid as being within limited period (three years), provided by the second section of the Statute of Frauds, are not within the provisions of the fourth section requiring all agreements concerning an interest in land or not to be performed in one year, &c., to be in writing, and hence not affected by it. 2 Reed on St. of Frauds, sec. 815, and that doctrine has been followed as a rule in America; but there are a number of states where a contrary doctrine has been held. Same, and see cases cited.

Vict. c. 106, s. 3, is, that an instrument not under seal which purports to demise or let premises for more than three years from the making thereof, or even for a less term, if [*128] the * rent reserved does not amount unto two-third parts at the least of the full value of the thing demised, is *void at law as a lease;*[1] but it may operate as an agreement for a lease (*a*), even at law. Since the above act courts of law will construe a writing rather as a valid agreement for a lease than as a void lease (*b*).

Tenant entering under void lease. — If the tenant enter into possession under a void lease he thereupon becomes tenant from year to year[2] upon the terms of the writing, so far as they are applicable to and not inconsistent with a yearly tenancy (*c*).[3] Such tenancy may be determined by the usual

(*a*) Parker *v.* Taswell, 2 De G. & J. 559; 27 L. J., Ch. 812; Cowen *v.* Phillips, 33 Beav. 18.

(*b*) Bond *v.* Rosling, 1 B. & S. 371; 30 L. J., Q. B. 227; Rollason *v.* Leon, 7 H. & N. 73; 31 L. J., Ex. 96; Tidey *v.* Mollett, 16 C. B., N. S. 298; 33 L. J., C. P. 235; Hayne *v.* Cummings, 16 C. B., N. S. 421.

(*c*) Doe *d.* Rigge *v.* Bell, 5 T. R. 472; 2 Sm. L. C. 96; Richardson *v.* Gifford, 1 A. & E. 52; Doe *d.* Thompson *v.* Amey, 12 A. & E. 479; Berrey *v.* Lindley, 3 M. & Gr. 498; Lee *v.* Smith, 9 Exch. 662; Beale *v.* Saunders, 3 B. N. C. 850 (assignee under void lease); Doe *d.* Pennington *v.* Taniere, 12 Q. B. 998, 1013; Tress *v.* Savage, 4 E. & B. 36; Pistor *v.* Cater, 9 M. & W. 315; Doe *v.* Browne, 8 East, 165; Cooch *v.* Goodman, 2 Q. B. 580.

[1] **Parol leases.** — "In some states, it is declared that *no action* shall be maintained upon a parol lease which exceeds the statutory limitation; in others, the lease itself is declared void." 2 Reed on St. of Frauds, sec. 804.

[2] **Leases void by Statute of Frauds, or by other statutes. Effect of occupation under them.** — In the majority of American states, as well as in England, the tenant entering under a void lease for years becomes a tenant from year to year. Reed on St. of Frauds, secs. 804–5. Reeder *v.* Sayre, 70 N. Y. 180; Lounsbery *v.* Snyder, 31 Id. 514; Blumenthal *v.* Bloomingdale, 100 Id. 558, 561; People *v.* Rickert, 8 Cow. 226.

In Maine, New Hampshire, and Massachusetts he becomes simply a tenant at will; see cases cited later. In Missouri, where the statute is similar to that of Massachusetts, the general rule is followed. Same citing Kerr *v.* Clark, 19 Mo. 132; Hammon *v.* Douglas, 50 Id. 434.

If a lessee enter under void lease and suspend payment of rent, and disclaim by conveying in fee, the Statute of Limitations will run from the suspension and bar claims of reversioner. Webster *v.* Southey, 36 Ch. D. 9 (so held in case of lease for charitable use not complying with Mortmain Act).

[3] **Illegal leases.** — A lease executed on Sunday is absolutely void and incapable of subsequent ratification, and if an implied tenancy subsequently arises from entry and possession, the lease cannot be resorted to, to prove the terms of the tenancy. Vinz *v.* Beatty, 61 Wis. 645, 649.

notice to quit at the end of the first or any subsequent year thereof (*d*); and it will determine, without any notice to quit, at the end of the term mentioned in the writing (*e*). But if the lessee do not enter, he will not be liable to an action for not taking possession (*f*); nor, on the other hand, will an action lie against the lessor for not giving possession at the time appointed for the commencement of the term but before the lease is executed (*g*). The effect of the act 8 & 9 Vict. c. 106 is not to put an end to oral leases, but merely to superadd to such leases as are required by the Statute of Frauds to be in writing, the necessity of their being *by deed*.

Leases by indenture. — First, then, of leases by deed. A deed is a writing sealed and delivered by the parties, and is either an indenture or a deed-poll. If a deed be made by more parties than one, there ought regularly to be as many copies of it as there are parties, and each formerly was cut or indented (instar dentium) on the top or side, to tally or correspond with the other, which deed so made is called an indenture (*h*). Formerly, if a deed began "This indenture" made, &c. and the parchment or paper was not indented, it was not an indenture, because the words could not make it indented; but if the deed was actually indented, though there were no words of indenture in the deed, yet it was an indenture in law; for it might be an indenture without words, but not by words without indenting (*i*). But now by 8 & 9 Vict. c. 106, s. 5, "a deed executed after the 1st October, 1845, purporting to be an indenture, shall have the effect of an indenture * although not actually in- [*129] dented." All the parts of an indenture make but one deed, and each part is of as great force and effect as all the parts together; so they are esteemed the mutual acts of the respective parties, each of whom may be bound by either part

(*d*) Cole Ejec. 26, 222.

(*e*) Tress *v.* Savage, 4 E. & B. 36; Cole Ejec. 223, 444.

(*f*) Inman *v.* Stamp, 1 Stark. 12; Edge *v.* Strafford, 1 C. & J. 391; 1 Tyr. 295.

(*g*) Drury *v.* Macnamara, 5 E. & B. 612; Jinks *v.* Edwards, 11 Exch. 775.

(*h*) Style, 459; 1 Inst. 171; 2 Blac. Com. 295.

(*i*) Co. Lit. 229.

of the same, for the words of the indenture are the words of each party (*k*).[1] When the several parts of an indenture are interchangeably executed by the several parties, that part or copy which is executed by the grantor is usually called the *original*, and the rest are *duplicates or counterparts* (*l*).

Counterpart. — A lessee who executes the counterpart of a lease or any person claiming under him, cannot dispute its admissibility in evidence, or impeach its validity on the ground of the original lease not being properly stamped (*m*). A counterpart is primary evidence against the lessee, and all the persons claiming under him, of the contents of the lease and of the execution thereof by the lessor (*n*).

Discrepancy between counterpart and lease. — The ordinary rule is, that where the lease and the counterpart conflict, the lease prevails; but this rule does not apply where the mistake is clearly in the lease. So it was held by the Court of Appeal in Burchell *v.* Clark (*o*). There, by lease dated in 1784, the lessor demised the premises to the lessee for 94¼ years, "yielding during the said term of" 91¼ years a certain rent. The counterpart spoke of the term as 91¼ years in both instances. The court (Kelly, C. B., diss.), reversing the

(*k*) Plowd. 134, 421; Lit. s. 370.

(*l*) 2 Blac. Com. 296.

(*m*) Paul *v.* Meek, 2 Y. & J. 116.

(*n*) Burleigh *v.* Stibbs, 5 T. R. 465; Roe *d.* West *v.* Davis, 7 East, 363; Hughes *v.* Clark, 10 C. B. 905; Houghton *v.* Kœnig, 18 C. B. 235; Homes *v.* Pearce, 1 F. & F. 283; Cole Ejec. 170, 253.

(*o*) Burchell *v.* Clark, L. R., 2 C. P. D. 88; 46 L. J., C. P. 115; 35 L. T. 690; 25 W. R. 334.

[1] **Execution of lease.** — Examples: Where the covenants are mutual and dependent a party who has performed his covenants, but not sealed the indenture, may sue the other in covenant. Jennings *v.* McComb, 112 Pa. St. 518, 522 (*per* Trunkey, J.).

A title will pass by an indenture, sealed only by the grantor, if accepted by the grantee. Both will be bound by the covenants, the remedy against one being assumpsit and against the other covenant. Grove *v.* Hodges, 55 Pa. St. 504.

An indenture of lease with independent covenants signed only by the lessor is an effectual demise if the lessee occupy under it, Libbey *v.* Staples, 39 Me. 166; but if the lessee only execute and do not occupy the lessor cannot enforce it, Cleves *v.* Willoughby, 7 Hill (N. Y.) 83 (*per* Beardsley, J.).

A simple contract on one side is a sufficient consideration for a covenant on the other. School Directors *v.* McBride, 22 Pa. St. 215.

A lessee, who by mistake has signed a lease drawn by lessor admitted not to contain the agreement of the parties and has not taken possession, is not liable for rent. Wyman *v.* Sperbeck, 66 Wis. 495.

decision below, held that as it was clear that there was some clerical error in the lease, the counterpart might be used to correct it, and that the premises were recoverable by action brought at the end of the 91¼ years.

General requisites. — A lease by deed must be written or printed: it may be in any character or language: it cannot be exemplified upon wood, leather, cloth, or the like, but only upon parchment or paper: for the writing or printing upon them can be least vitiated, altered, or corrupted. It must also have the regular stamps imposed upon it by statute for the increase of the public revenue (*p*).

Effect of loss of lease. — The estate of the lessee is not determined by the loss or cancellation of the lease, so that the existence of the term can be proved; for the estate is derived from the lessor, and not from the lease otherwise than as it shows the intention of the parties, which is not altered by the loss or cancellation of the instrument of demise (*q*). Where no counterpart can be found, the landlord is entitled to inspect and take *a copy of [*130] the lease (*r*). So, on the other hand, in a proper case, the tenant may obtain an inspection of the duplicate or counterpart lease (*s*). Under an agreement that the lessor would, at the request and costs of the lessee, grant a lease, the lessor is not entitled to charge the tenant with the expense of a counterpart (*t*).

Sect. 3. — *Form of Lease.*

Statutory form. — An attempt has been made by the legislature to shorten leases, and accordingly the 8 & 9 Vict. c. 124, gives a concise form, which may be adopted if parties desire it (*u*). But this form is somewhat inaccurate, and is, it is believed, seldom used (*x*).

(*p*) See the Stamp Act, 1870, a consolidating Act, *post*, Appendix A., Sect. 7; and see also Sect. 13 of this chapter.

(*q*) Read *v.* Brookman, 3 T. R. 151; Lord Ward *v.* Lumley, 5 H. & N. 87, 656; 29 L. J., Ex. 322.

(*r*) Doe *v.* Slight, 1 Dowl. 163; Doe *d.* Morris *v.* Roe, 1 M. & W. 207.

(*s*) Doe *d.* Child *v.* Roe, 1 E. & B. 279; Cole Ejec. 120, 200.

(*t*) Jennings *v.* Major, 8 C. & P. 61; see *post*, Sect. 13.

(*u*) See *post*, Appendix A., Sect. 1.

(*x*) Numerous precedents of leases, &c. are given in Appendix B., *post*.

Usual words of demise. — The usual words by which a lease is made are, "demise and lease," *or*, "demise, grant, and to farm let;" but any words which amount to a grant are sufficient to make a lease (*y*); and it may be laid down for a rule, that whatever words are sufficient to explain the intent of the parties, that the one shall divest himself of the possession and the other come into it, for any determinate time, whether they run in the form of a licence, covenant or agreement, are of themselves sufficient, and will in construction of law amount to a lease for years as effectually as if the most proper and pertinent words had been made use of for that purpose; for a lease of years being no other than a contract for the *exclusive* possession and profits of the land on the one side, and a recompense of rent or other income on the other, — if the words made use of are sufficient to prove such a contract, in whatsoever form they are introduced, or howsoever variously applicable, — the law calls in the intent of the parties, and moulds and governs the words accordingly (*z*).[1] Where the owner in fee of premises demised them for a term of 999 years, and afterwards released to the lessee the reversion in fee; and the latter, by indenture reciting the demise, did "grant, bargain, sell, assign, and set over" the premises for the residue of the term of 999 years: — held, that there was a resuscitation of the term by virtue of these words (*a*). In Cottee *v.* Richardson, the plaintiff in consid-

(*y*) Co. Lit. 45; 2 Blac. Com. 318.

(*z*) Bac. Abr. tit. Leases (K); Smith L. & T. 84, 85 (2nd ed.). For distinction between lease and licence, see *ante*, 124.

(*a*) Denn *d.* Wilkins *v.* Kemeys, 9 East, 366.

[1] **Leases combined with other contracts.** — An agreement by one to convey and other to buy in five years and to occupy and pay interest on purchase-money meantime creates tenancy from year to year. Doe *d.* Cliff *v.* Connaway, Ber. (N. B.) 574.

A contract of sale with delivery of possession conditioned if not completed to pay for use creates a tenancy. Fairbank *v.* Phelps, 22 Pick. 535.

Mortgages are sometimes made in England with attornment clauses giving power to distrain. They are held to constitute bills of sale of the seized property under Bills of Sale Act, 1878, 41 & 42 Vict. c. 31, s. 6, and unless as within exception the power to distrain is consequent upon mortgagee's taking possession and demising to mortgagor. *Re* Willis, *ex parte* Kennedy, 21 Q. B. D. 384. Under a mortgage demise trade fixtures will pass if conveyed by words sufficient to convey them in mortgage. Southport & W. Lancashire Banking Co. *v.* Thompson, 37 Ch. D. 64.

eration of 530*l.* to be paid by A. demised to him premises for 55 years at the yearly rent of 84*l.*, and subject to * covenants to repair, &c. The consideration not *[131] having been paid, A. assigned to the plaintiff the residue of the term then unexpired, subject to the rents and covenants, and with a power of sale. In pursuance of that power the plaintiff, in consideration of 500*l.* "bargained, sold, assigned, and transferred, and set over" to the defendant the said premises, to hold "for the residue of the *term* of 55 years," subject to the yearly rent of 84*l.*, and the covenants contained in the lease to A.; and the defendant covenanted to pay the rent and perform the covenants. The defendant having entered, it was held, that although the mortgage by A. to the plaintiff operated as a merger of the term originally granted, yet the assignment by the plaintiff to the defendant created a new lease for the residue of the unexpired term, and consequently the defendant was liable on the covenants (*b*).

Lease must show intention to demise. — Although no specific words are necessary to create a lease, yet there must be words used which show an intention to demise: therefore, where a lessee of tithes agreed with the owner of lands, for certain collateral considerations, not to take tithes in kind from the tenants of the lands for twelve years, but to accept a reasonable composition not exceeding 3*s.* 6*d.* per acre, it was adjudged to be no lease (*c*). Where, on the letting of land to a tenant, a memorandum was drawn up, the terms of which were, that he should on a future day bring a surety and sign the agreement, neither of which he ever did; it was held, that the memorandum was a mere unaccepted proposal, and did not operate as a lease (*d*). An agreement bearing even date with a lease, by which it was agreed that the lessor should manage the farm leased for the lessee: the lessee giving 12*s.* a week to the lessor, and "allowing him and his family to reside and have the use of the dwelling-house and

(*b*) Cottee *v.* Richardson, 7 Exch. 148.

(*c*) Brewer *v.* Hill, 2 Anstr. 413.

(*d*) Doe *d.* Bingham *v.* Cartwright, 3 B. & A. 326.

furniture free of rent: " has been held not to be a lease (*e*). Where a contract was made between A. and B., that B. should receive certain sums of money from A., and should build certain houses on A.'s land, and procure responsible tenants for the same at a given rate, and himself pay the rent from a certain day till he procured such tenants: it was held that no tenancy was created between A. and B. (*f*).

Particular words which have been decided upon. — The word "*dedi*" is said to be a sufficient word to make a lease for years (*g*), and even a "licence" to inhabit or enjoy (*h*), if it give an *exclusive* right to occupy (*i*), may have the same effect. The words "covenant, grant, and agree" [*132] that A. shall have the lands for so many *years, enure as a lease for years (*k*); so the word "covenant" will make a lease, though the words "grant and agree" be omitted (*l*). So a covenant "to stand seized," if made by the owner, or a covenant for quiet enjoyment (*m*) is a lease (*n*): for a covenant together with an entry amounts to a lease; but a covenant merely does not vest the estate in the lessee, but only gives him a right to enter and possess it; and therefore the estate is not vested in him till actual entry (*o*).

Interesse termini. — A lease, however formal (not being a bargain and sale under the Statute of Uses), creates only an *interesse termini* before entry (*p*).[1]

(*e*) Doe *d.* Hughes *v.* Derry, 9 C. & P. 494; Mayhew *v.* Suttle, 4 E. & B. 347.

(*f*) Taylor *v.* Jackson, 2 C. & K. 22.

(*g*) Co. Lit. 301 b; Right *d.* Green *v.* Proctor, 4 Burr. 2209.

(*h*) Hall *v.* Seabright, 1 Mod. 14.

(*i*) Reg. *v.* Morrish, 32 L. J., M. C. 245.

(*k*) Whitlock *v.* Horton, Cro. Jac. 91.

(*l*) Richards *v.* Sely, 2 Mod. 80.

(*m*) Doe *d.* Pritchard *v.* Dodd, 5 B. & Adol. 689.

(*n*) Right *d.* Bassett *v.* Thomas, 3 Burr. 1441, 1446; 1 W. Blac. 446.

(*o*) Copley *v.* Hepworth, 12 Mod. 1; Co. Lit. 37.

(*p*) Cole Ejec. 459; Barnett *v.* Earl of Guildford, 11 Exch. 19 Anderson *v.* Radcliff, E. B. & E. 806.

[1] See 4 Kent's Com. (13th ed.) sec. 97. It has been held that a lessee under a valid subsisting lease had power to sublet, Chung Yow *v.* Hop Chong 11 Ore. 220, and that under an oral lease he could not sue for possession. Moore *v.* Kay, 5 A. R. (Ont.) 261; Marrin *v.* Graver, 8 Ont. 39, 40.

A lessee under oral lease for term of years commencing *in futuro*, after entry, is tenant from year to year. Brewing *v.* Berryman, 2 Pugs. (N. B.) 115 (*per* Allen, J.).

Sect. 4. — *Construction of Lease.*

Whether lease or agreement. — Before the Act of 1845 (8 & 9 Vict. c. 106), s. 3 required all leases for more than three years to be by deed, questions very frequently arose whether a particular instrument was intended to operate as an actual lease, or merely as an agreement to grant one.[1] The decisions were numerous and conflicting (*q*), but as the Act of 1845 has very considerably diminished their importance, it is sufficient to state here that their general effect may be taken to be that the intention of the parties was considered, and that the courts would construe the document very liberally in order to effectuate that intention (*r*).

Effect of void lease. — A written contract not under seal made since the Act of 1845 for a longer term than three years, or for three years to begin from a subsequent day, or even for a less term if the rent reserved is less than two-thirds of the full improved value of the thing demised, cannot operate as a lease, or create any term, it being "void at law."[1] But it may operate as an agreement for a lease (*s*), and so be enforced in equity by a decree for a specific performance (*t*), or even treated as an actual lease (*u*). An action at law may be maintained upon it for not granting, or not accepting, as the case may be, a lease pursuant to such contract (*v*); but not an action for not giving possession at the time * appointed for the commence- [*133] ment of such lease, because the possession bargained for is not a possession as tenant at will or from year to year, but a possession for a term of years to be created by the

(*q*) See Chapman *v.* Bluck, 4 B. N. C. 187; Chapman *v.* Turner, 6 M. & W. 100; Rawson *v.* Eicke, 7 A. & E. 451.

(*r*) See Poole *v.* Bentley, 12 East, 168.

(*s*) Tidey *v.* Mollett, 16 C. B., N. S. 298; 33 L. J., C. P. 235; Hayne *v.* Cummings, 16 C. B., N. S. 421; overruling Stratton *v.* Pettitt, 16 C. B. 420.

(*t*) Parker *v.* Taswell, 2 De G. & J. 559; 27 L. J., Ch. 812; Cowen *v.* Phillips, 33 Beav. 18.

(*u*) See Walsh *v.* Lonsdale, 21 Ch. D. 9, and p. 86, *ante*; but that case has no application to a void lease not capable of being construed as an agreement for a lease.

(*v*) Bond *v.* Rosling, 1 B. & S. 371; 30 L. J., Q. B. 227.

[1] See *ante*, sec. 2, notes.

lease (*x*). Such last-mentioned action lies, however, upon a contract for less term than three years (*y*).

Effect of entry under void lease. — Even when the contract is for more than three years, if the tenant be allowed to enter and take possession under such contract, and pays any of the rent therein expressed to be reserved, a tenancy from year to year will be thereby created upon the terms of such contract, so far as they are applicable to and not inconsistent with a yearly tenancy (*z*).[1] Actual payment of rent is not always essential; if the payment be allowed to stand over by mutual consent, that is sufficient (*a*); payment of the rent does not of itself create a tenancy from year to year, but is *only evidence* from which a jury may find the fact (*b*). Where payment of rent unexplained would ordinarily imply a yearly tenancy, it is open to the payer or receiver of such rent to prove the circumstances under which such payment was made for the purpose of repelling such implication (*c*). Until there has been a payment of rent, or something equivalent to such payment, a distress cannot be made for the rent expressed to be reserved, no *actual tenancy at an agreed rent*

(*x*) Drury *v.* Macnamara, 5 E. & B. 612.

(*y*) Jinks *v.* Edwards, 11 Exch. 775.

(*z*) Clayton *v.* Blakey, 8 T. R. 3; 2 Smith L. C. 102 (7th ed.); Tress *v.* Savage, 4 E. & B. 36; Doe *d.* Pennington *v.* Taniere, 12 Q. B. 998, 1013; Lee *v.* Smith, 9 Exch. 662; Beale *v.* Sanders, 3 Bing. N. C. 850; Richardson *v.* Gifford, 1 A. & E. 52; Smith L. & T. 80, 81 (2nd ed.).

(*a*) Cox *v.* Bent, 5 Bing 185; Vincent *v.* Godson, 24 L. J., Ch. 122.

(*b*) Jones *v.* Shears, 4 A. & E. 832; Finlay *v.* Bristol and Exeter R. Co., 7 Exch. 415, 420.

(*c*) Doe *d.* Lord *v.* Crago, 6 C. B. 90.

[1] **Leases void as imperfectly executed; effect of occupation under them.** — Occupation under an imperfectly executed lease for years will, in the majority of the American states, create a tenancy from year to year upon the terms specified in the written lease. Fougera *v.* Cohn, 43 Hun (N. Y.) 454; Laughran *v.* Smith, 75 N. Y. 209. (And see cases of occupancy under parol leases, *ante*, sec. 2, notes.) Though lease be signed by neither party, if accepted and acted upon by both it will be binding upon both. Farmers' Loan, &c., Co. *v.* St. Jo. & Den. City R. R. Co., 2 Fed. Rep. 117; 1 McCrary, 247.

Under circumstances, mere temporary possession under void lease will not render one liable as tenant, as where, in a void coal-mining lease, one entered and prospected for coal, but did not mine. Capper *v.* Sibley, 65 Iowa, 754.

It has been held that a parol lease for years (with entry), even though it create tenancy from year to year, yet will expire without notice at the end of the term. Doe *d.* Parkinson *v.* Hauhtman, Bert. (N. B.) 645.

having been created (*d*). But it is otherwise with respect to an agreement for a lease which contains an express stipulation for an intermediate tenancy at the rent and subject to the covenants and conditions therein mentioned until the lease shall be prepared (*e*). A yearly tenancy created by entry under the contract, and payment of any of the rent therein mentioned (or anything equivalent to such payment), may be determined at the end of the first or any subsequent year of the term mentioned in the contract, by the usual notice to quit (*f*); and at the end of the term mentioned in the contract the tenancy will expire without any notice to quit (*g*).[1] When the contract is for a lease for twenty-one years, determinable at the end of the first seven or fourteen years, the tenant cannot quit at the end of the first seven or fourteen years, *without any previous notice* (*h*).

Lease or agreement. — It is very seldom, if ever, that any question now arises whether a *contract for [*134] less than three years amounts to a lease or only to an agreement. It depends upon the *intention* of the parties, to be collected from the writing, and from collateral circumstances. If it contains words of present demise ("doth agree to let," &c.), although to hold from a subsequent day, it will amount to a lease, notwithstanding a more formal lease is stipulated for, that being considered only as a further assurance (*i*). The question in such cases is, whether the parties intended to create a tenancy before the execution of any further instrument (*k*). An instrument containing an express proviso that it shall not operate as a lease but only as an agreement, will be construed to be a mere agreement, notwithstanding it contains words of present demise (*l*). But

(*d*) Hegan *v.* Johnson, 2 Taunt. 148; Dunk *v.* Hunter, 5 B. & A. 322.

(*e*) Pinero *v.* Judson, 6 Bing. 206; Rollason *v.* Leon, 7 H. & N. 73; 31 L. J., Ex. 96; Anderson *v.* Midland R. Co., 3 E. & E. 614; 30 L. J., Q. B. 94.

(*f*) Doe *d.* Thomson *v.* Amey, 12 A. & E. 476; Cole Ejec. 36, 222, 444.

(*g*) Tress *v.* Savage, 4 E. & B. 36.

(*h*) Chapman *v.* Towner, 6 M. & W. 100.

(*i*) Poole *v.* Bentley, 12 East, 168; Pinero *v.* Judson, 6 Bing. 206; Anderson *v.* Midland R. Co., 3 E. & E. 614; 30 L. J., Q. B. 94.

(*k*) Smith L. & T. 85.

(*l*) Perring *v.* Brook, 1 Moo. & R. 510; 7 C. & P. 360.

[1] See Note 1.

if it contains a clause to the following effect, viz.: "And it is hereby mutually agreed that these presents shall operate as an agreement only, and that until a lease shall be executed, the rents, covenants, and agreements agreed to be therein reserved and contained shall be paid and observed, and the several rights and remedies shall be enforced, in the same manner as if the same had been actually executed;" and the tenant enters into possession under such agreement, the concluding stipulation will create an actual tenancy at a fixed rent, for which a distress may be made (*m*). So where an agreement for a lease, to contain certain specified covenants, concluded thus: "And in the meantime and until such lease shall be executed, to pay the said yearly rent, and to hold the same premises, subject to the covenants above mentioned:" it was held that the latter words amounted to an actual demise (*n*).[1]

General rules for construction. — Deeds — including, of course, leases by deed — being the highest description of private written documents are themselves the best evidence of the facts which they contain, the circumstances which they relate, and their makers' intentions. In their construction, regard must be had to all their parts; and general words may be restrained by particular recitals (*o*). Where the recitals in a lease stated that a sum of money which was in part to be given for fixtures was part of the consideration for the lease, it was held, that, whether the lessee would or would not be estopped by it, he was not bound to execute such a lease (*p*). If a deed may operate in two ways, the one consistent with the intent of the parties, and the [*135] other repugnant to it, the courts * will put such a construction on it as to give effect to the intent (*q*);

(*m*) Anderson *v.* Midland R. Co., 3 E. & E. 614; 30 L. J., Q. B. 94.

(*n*) Pinero *v.* Judson, 6 Bing. 206; Rollason *v.* Leon, 7 H. & N. 73; 31 L. J., Ex. 96. Compare these cases with Holland *v.* Kensington Vestry, L. R., 2 C. P. 565; 36 L. J., M. C. 105.

(*o*) Payler *v.* Homersham, 4 M. & S. 423; Simons *v.* Johnson, 3 B. & Adol. 175; Bain *v.* Cooper, 9 M. & W. 701; Major *v.* Salisbury, 2 D. & L. 763, 768; Doe *d.* White *v.* Osborne, 4 Jur., O. S. 941, C. P.

(*p*) Vonhollen *v.* Knowles, 12 M. & W. 602.

(*q*) Solly *v.* Forbes, 4 Moo. 448; Hotham *v.* East India Co., 1 T. R. 638.

[1] See *ante*, Ch. 4, sec. 3, notes.

for deeds must be constructed so as to operate according to the intention of the parties, if by law they may; and if they cannot operate in one form they will in another (*r*). Where a material word appears to have been omitted in a lease by mistake, and other words cannot have their proper effect unless it be introduced, such lease must be construed as if that word were inserted, although the particular passage where it ought to stand conveys a sufficiently distinct meaning without it (*s*). An instrument of demise was produced in evidence, by which the plaintiff agreed to let for the term of one year fully to be complete and ended; most of the subsequent stipulations in the leases were wholly inapplicable to a tenancy determinable by a notice to quit; the document appeared on the face of it to have originally contained words creating a tenancy from year to year, which were struck out, and the above words as to the term only remained; it was held, that the words struck out might be looked at to show what the intention of the parties was; that the tenancy was for a single year only; and that the terms inapplicable to such a tenancy must be considered as expunged, or as only applicable in case the tenancy should continue (*t*). General words at the end of a particular specification will not pass any property of a different nature from that particularly mentioned (*u*).

Parol evidence inadmissible.—The general rule with regard to the admission of parol evidence to explain the meaning, or to add to, vary or alter, the express terms of a deed, is, that it shall not be admitted (*x*).[1] Thus where property has

(*r*) Goodtitle *d.* Edwards *v.* Bailey, Cowp. 600; Shep. Touch. 81 (sec. 13).

(*s*) Wright *v.* Dickson, 1 Dow, 114, 147.

(*t*) Strickland *v.* Maxwell, 2 C. & M. 539.

(*u*) Anon., Lofft, 398; Sandiman *v.* Breach, 7 B. & C. 96; Hare *v.* Horton, 5 B. & Adol. 715; Reg. *v.* Nevill, 8 Q. B. 452, 463; East London W. W. Co. *v.* Trustees of Mile End Old Town, 17 Q. B. 512; Lyndon *v.* Stanbridge, 2 H. & N. 51.

(*x*) Ros. Ev. 17 (13th ed.).

[1] **Parol evidence when not admissible to vary.**—McKenzie *v.* McGlaughlin, 8 Ont. 111 (oral evidence inadmissible to prove reservation in lease of right to put show cases in part of demised premises); Ala. Gold Life Ins. Co. *v.* Oliver, 78 Ala. 158; Jungerman *v.* Bovee, 19 Cal. 354 (parol evidence of reservation to lessee of right to remove buildings erected by him inadmissi-

been conveyed by a deed, parol evidence of an agreement to apportion the rent of the current quarter, contrary to the terms of the deed is inadmissible (*y*).[1] So parol evidence is inadmissible to show that a particular close was intended to be included in or to be excluded from the deed (*z*).

Exceptions. — The exceptions to such rule are[2] — 1, where, although the deed is clearly enough expressed, some ambiguity arises from extrinsic circumstances; 2, where the language of a charter or deed has become obscure, and the construction doubtful from antiquity; 3, where the grant appears uncertain, owing to a want of acquaintance with the grantor's estate; 4, where it is important to show a different consideration consistent with but not repugnant to that stated in the deed itself; 5, where it becomes neces- [*136] sary to show * a different time of delivery from that at which the deed purports to have been made; 6, where it is sought to prove a customary right not expressed in the deed, but which is not inconsistent with any of its stipulations; 7, where fraud or illegality in the formation of

(*y*) Flinn *v.* Calow, 1 M. & G. 589. (*z*) Meres *v.* Ansell, 3 Wils. 275; Hope *v.* Atkins, 1 Price, 143; Doe *d.* Norton *v.* Webster, 12 A. & E. 442; Barton *v.* Dawes, 10 C. B. 261. And see Minton *v.* Geiger, 28 L. T. 449.

ble); Taylor *v.* Soldati, 68 Cal. 28 (oral permission to pasture more cattle than written lease allows is not valid against assignee of the reversion).

[1] **Subsequent oral promises, when nudum pactum.** — A *subsequent* oral additional agreement, not founded on new consideration, is void as *nudum pactum*. Libbey *v.* Tolford, 48 Me. 316 (subsequent promise to repair); Gill *v.* Middleton, 105 Mass. 477, 478 (*per* Ames, J.); Bowditch *v.* Chickering, 139 Mass. 283 (subsequent agreement of lessor to pay taxes which lessee had covenanted to pay, void); Proctor *v.* Keith, 12 B. Mon. (Ky.) 252 (agreement of lessor to repair fencing which lessee had covenanted to repair, void).

[2] **Subsequent qualifying agreements, when valid.** — It has been held that a sealed lease cannot be changed by a subsequent executory parol agreement. Breher *v.* Reese, 17 Ill. App. 515.

A subsequent oral agreement, however, if executed or founded on new consideration may, however, effectually qualify the relations of the parties.

For example: a lessee may relinquish or lease back to the lessor a part of the demised premises, in consideration of lessee's failure to keep his covenants. Blumenthal *v.* Bloomingdale, 100 N. Y. 558. The efficacy of the new arrangement as an independent transaction is, of course, qualified by the provisions of the Statute of Frauds.

A lessee may orally sublet or assign part of the premises to the lessor. Lounsbery *v.* Snyder, 31 N. Y. 514.

the deed is relied on to avoid it.[1] If a clause in a deed be so ambiguously or defectively expressed, that a court of justice cannot, even by reference to the context, collect the meaning of the parties, it will be void on account of uncertainty (*a*). But this is the last rule of construction ever resorted to.[2]

Cases illustrative. — Where a party granted a manor by a particular name, and he had two manors of that name, parol evidence was admitted to show which of them he meant;[3] and where there was a demise of premises in Westminster, late in the occupation of A., particularly describing them, part of which was a yard, parol evidence was received to show that a cellar situated under that yard, but which was then in the occupation of B., another tenant of the lessor, was not intended to pass (*b*). Evidence of usage was received to show that a room which had not been occupied with a certain messuage did not pass under a demise of that messuage, together with all the rooms, chambers, and appurtenances thereunto belonging (*c*). Where a lease grants a right of way, evidence may be received of the state of the premises at the time of granting the lease, and then the judge will put a construction on the lease as to the line along which the way granted runs; but if it is uncertain on the words which

(*a*) Anon., 1 Mod. 180; Doe *d.* Wyndham *v.* Carew, 2 Q. B. 317.

(*b*) Doe *d.* Freeland *v.* Burt, 1 T. R. 701; Paddock *v.* Fradley, 1 C. & J. 90.

(*c*) Kerslake *v.* White, 2 Stark. 508.

[1] **Rights of third party.** — Parol evidence is admissible in behalf of third party (a prior mortgagee, for example) to disprove statements in lease. He may prove the true consideration was not stated. Roth *v.* Williams, 45 Ark. 447, 449.

[2] **Collateral written agreements.** — A lease may be qualified by a collateral written agreement. The collateral agreement may consist of representations contained in letters from lessor, and may be enforced by lessee. Martin *v.* Spicer, 34 Ch. D. 1 (an injunction issued to restrain lessor from granting any leases which did not contain restrictive covenants).

Lindley, L. J., said: "It was urged, 'Why did you not put the collateral contract into the lease?' No doubt it would have been better, but it does not follow that you cannot make a collateral contract at the same time that you make a lease."

[3] An ambiguous written contract may sometimes be explained by evidence of the understanding at the time. Selden *v.* Williams, 9 Watts, 9.

of two ways is intended, parol evidence may be given to show which the grantor meant (*d*).

Expression of technical meaning. — Where an expression used in a written instrument has technical meaning, parol evidence is admissible to show that it has been used in that sense, and not in its ordinary meaning in common parlance, although that may be perfectly clear and unambiguous in itself; therefore, where a lessee of a coal mine covenanted to get the whole of the coals "not deeper than or below the *level* of the bottom of the mine," at a particular point, it was held, that parol evidence of the understanding amongst miners was admissible, to show that the word "level" had a particular technical meaning different from its ordinary signification of "horizontal line." It might be questionable whether a previous agreement between the parties for a lease of the same mine, and for which the lease in question was substituted, was also admissible in evidence for the same purpose (*e*). Again, where in a lease of a rabbit warren, &c., the lessee covenanted that on the expiration of the term he would leave on the warren 10,000 rabbits, the lessor [*137] paying * for them 60*l.* per thousand, it was held, that parol evidence was admissible to show that, by the custom of the country where the lease was made, the word "thousand," as it applied to rabbits, denoted twelve hundred (*f*). Where the lessee of a coal mine covenanted to pay a certain share of all such sums of money as the coals should sell for at the pit's mouth, evidence of the lessee's having accounted with the lessor, and paid him the share of the money produced by the sale of coals elsewhere, was not considered admissible to explain the intention of the parties (*g*). Where a lessee made an agreement for a lease, and the under-lessee contracted to erect a shop-front to the house; in ejectment for a forfeiture for not erecting the shop-front, it was held, that the original lease by which a

(*d*) Osborne *v.* Wise, 7 C. & P. 761.

(*e*) Clayton *v.* Gregson, 5 A. & E. 302; 4 N. & M. 602; 6 Id. 694; Shore *v.* Wilson, 9 Cl. & F. 365.

(*f*) Smith *v.* Wilson, 3 B. & Adol. 728.

(*g*) Clifton *v.* Walmsley, 5 T. R. 564; Gerrard *v.* Clifton, 7 T. R. 676; 1 B. & P. 524.

penalty was imposed, if the lessee allowed a trade to be carried on upon the premises, was not admissible in evidence for the defendant to explain the meaning of the words "shop-front" in the agreement (*h*). Since the passing of the 24 Geo. 2, c. 23, for altering the style, a lease of lands by *deed*, to hold from the feast of *St. Michael*, must, unless there be a custom to the contrary, as in Kent (*i*), be taken to mean *New Michaelmas*, and cannot be shown by extrinsic evidence to refer to a holding from *Old Michaelmas*, unless there be a custom, or a reference in the lease to a prior holding from Old Michaelmas (*k*). But this rule has been held to relate only to leases by deed; for in a lease by parol made to commence at Lady-Day, evidence is admissible to prove that by the custom of the country Old Lady-Day was intended (*l*). If there be any ambiguity or contradiction in expressing the time of the commencement of a lease, the lease is construed beneficially for the lessee, on the principle that every man's grant shall be taken most strongly against himself (*m*).

Where a man granted an estate for life, without saying whether it was for his own life or for that of the grantee, parol evidence was received to show what interest he had in the estate: for if he was tenant in fee, it was considered that the grantee should take an estate for his own life; but that if the grantor himself was a tenant for life only, the grantee would take an estate for the grantor's life only (*n*).

Evidence of custom. — The express terms of a lease cannot be controlled by the custom of the * country; [*138] but if the lease be entirely silent as to the time of quitting, evidence of the custom of the country may be given

(*h*) Doe *d.* Nash *v.* Birch, 1 M. & W. 402.

(*i*) Furley *d* Mayor, &c., of Canterbury *v.* Wood, 1 Esp. 198.

(*k*) Doe *d.* Spicer *v.* Lee, 11 East, 312; Doe *d.* Hall *v.* Benson, 4 B. & A. 588; Denn *d.* Peters *v.* Hopkinson, 3 D. & R. 507; Smith *v.* Walton, 8 Bing. 235.

(*l*) Doe *d.* Hall *v.* Benson, 4 B. & A. 588; Furley *d.* Mayor, &c., of Canterbury *v.* Wood, *supra*; Denn *d.* Peters *v.* Hopkinson, *supra*.

(*m*) Anon., Dyer 261 b., pl. 28; Lilley *v.* Whitney, Dyer, 272 a; Seamen's case, Godb. 166; Doe *d.* Davies *v.* Williams, 1 H. Blac. 25; Shep. Touch. 88, s. 6.

(*n*) Smith *v.* Doe *d.* Earl of Jersey, 2 Brod. & B. 551; 3 Moo. 339; 7 Price, 281; 2 Bligh, 290.

to fix the time (*o*). Although no right to an away-going crop is reserved in a lease, if there are no covenants which either in express terms or by implication of law *exclude* such right, the lessee may produce parol evidence to show that he is entitled to such away-going crop by the custom of the country (*p*). So evidence of custom for an away-going tenant to provide work and labour, tillage and sowing, and all materials for the same in his away-going year, the landlord making him a reasonable compensation, has been received, although there was an express written agreement between the parties, when that agreement was not *inconsistent* with such custom (*q*).

SECT. 5. — *Description of the Demised Premises.*

(a.) *Generally.*

Parts of lease by deed. — A lease by deed usually consists of the following parts: viz., 1. What is usually called the *Premises*, which contain a statement of the date; the names, addresses, and additions of the parties; the recitals (if any); the operative words; the description of the parcels demised and the appurtenances; also any exceptions or reservations thereout: 2. The *Habendum*, or that part which fixes the duration of the term: 3. The *Reddendum*, or reservation of rent: 4. The covenants: 5. A proviso or condition for re-entry for non-payment of rent or non-observance of covenants; or, for the determination of the term by notice before the expiration thereof; *e.g.*, at the end of the first seven or fourteen years.

The premises. — The PREMISES in a lease are all the parts which precede the *habendum*. The office of this part of the lease is rightly to name and describe the lessor and lessee;

(*o*) Webb *v.* Plummer, 2 B. & A. 746.

(*p*) Caldecott *v.* Smythies, 7 C. & P. 808; Wiggleworth *v.* Dallison, 1 Doug. 201; 1 Smith's L. C. 598 (7th ed.); Wilkins *v.* Wood, 17 L. J., Q. B. 319; Hutton *v.* Warren, 1 M. & W. 466; Faviell *v.* Gaskoin, 7 Exch. 273; 21 L. J., Ex. 85; Muncey *v.* Dennis, 1 H. & N. 216; Holding *v.* Pigott, 7 Bing. 465.

(*q*) Senior *v.* Armytage, Holt, 197; Hutton *v.* Warren, 1 M. & W. 466, 476.

to state the consideration (*r*); to set forth with certainty the thing demised, either by express words, or by that which by reference may be reduced to a certainty; and to state the exceptions or things reserved, if any.

Description of the property. — With respect to the proper mode of describing the property to be demised, it may be remarked, "that corporeal hereditaments consist wholly of substantial and permanent objects; all which may be *comprehended under the general denomination of [*139] land only; for *land* comprehends, in its legal signification, any ground, soil or earth whatsoever; so the word 'land' includes, not only the face of the earth, but everything under it or over it;[1] and therefore if a man grant all his lands, he grants thereby all his mines of metal and other fossils, his woods, his waters, and his houses, as well as his fields and meadows;[2] not but that the particular names of the things are equally sufficient to pass them, except in the instance of water, by a grant of which nothing passes but a right of fishing; and to recover the land at the bottom of which, it must be called so many 'acres of land covered with water.' But the capital distinction is this, that by the name of a castle, messuage, toft, croft, or the like, nothing else will pass, except what falls with the utmost propriety under the term made use of (though, indeed, by the name of a castle one or more manors may be conveyed; and è converso, by the name of the manor a castle may pass); but by the name of land, which is nomen generalissimum, everything terrestrial will pass" (*s*).[3] The expressions "arable land,

(*r*) The premium or fine, if any, is generally expressed in words at length.

(*s*) 2 Blac. Com. 18.

[1] *A dwelling-house* is ordinarily realty, Smith *v.* Grant, 56 Me. 255, 259. It may be personalty, if built upon the land of another, with his consent (*per* Kent, J., *supra*).

[2] If a man do not grant, but simply demise his land, things beneath the surface do not pass. Elwes *v.* Brigg Gas Co., 33 Ch. D. 562 (*held*, that a prehistoric boat found beneath the surface belonged to the lessor).

[3] **Growing crops.** — These will pass by a devise of land, and do not belong to the executor, Pratte *v.* Coffman's Ex'r, 27 Mo. 424, and they will pass by a deed without reserve. Crews *v.* Mountcastle, 1 Leigh (Va.) 297, 305 (a mortgage); Steele *v.* Farber, 37 Mo. 71 (a mortgage); Baird *v.* Brown, 28 La. An. 842.

meadow or pasture land," are specific descriptions of land, and are confined to land of that particular species; and in general, where meadow or pasture land is named, it must be understood of ancient meadow or pasture (*t*). The words "more or less" must be confined to a reasonable quantity (*u*).

Where the description is untrue in part. — If the thing described be sufficiently ascertained, it is sufficient, though all the particulars are not true; as if a man demise his meadows in B. and D., containing ten acres, whereas they contain twenty acres, all the meadows pass (*x*). Whatever

(*t*) Tresham *v.* Lamb, 2 Brownl. 46; Gunning *v.* Gunning, 2 Show. 8.

(*u*) Day *v.* Fynn, Owen, 133; 1 Esp. 229; Cross *v.* Elgin, 2 B. & Adol. 106.

(*x*) Com. Dig. tit. *Fait* (E. 4).

If the crop, being *fructus industriales*, has been separately sold (though orally) prior to a sale of the land, it will not pass by the subsequent deed. Austin *v.* Sawyer, 9 Cow. (N. Y.) 39; Newcomb *v.* Ramer, 2 Johns. (N. Y.) 421.

In theory of the law, such crops are personalty even when growing in the soil. See Benjamin on Sales, Kerr's Ed., p. 116, 117, notes. It has been held that a crop of winter wheat might be seized on execution in December, and held as against subsequent seizure in August. Whipple *v.* Foot, 2 Johns. (N. Y.) 418; though in Noble *v.* Smith, 2 Id. 52, a parol gift of growing corn was held invalid for want of an actual delivery, and Kent, Ch. J., expressed a doubt if any sufficient delivery could be made other than by placing the vendee in possession of the land.

Some of the cases distinguish between sales of mature and sales of immature crops. By the majority of cases this distinction is now disregarded. Benjamin on Sales, Kerr's Edition, p. 117, note. As to parol or other reservations of growing crops, see *post*, Ch. V., sec. 10, notes.

Distinction between fructus industriales and fructus naturales. — There is a distinction between such fruits as are the products of man's annual labor, and such as are natural (timber, grass, &c.). Generally the legal title to the latter will not pass except by an instrument sufficient to pass an interest in the land.

It has been held in England, however, that even in case of such products as standing timber, &c., a sale of the property to be immediately or seasonably removed was valid, though not executed as a conveyance of realty. Marshall *v.* Green, 1 C. P. Div. 35. The doctrine of this case is supported by some American cases and denied by many others, the latter holding that standing timber until severed is realty. Benjamin on Sales, Kerr's Edition, pp. 116, 117, notes, and Austin's Am. Farm Law, p. 70.

Manure. — Manure made on farm will pass by deed as part of the realty. Kittredge *v.* Woods, 3 N. H. 503; Vehue *v.* Mosher, 76 Me. 469; Chase *v.* Wingate, 68 Id. 204; Norton *v.* Craig, 68 Id. 275; Parsons *v.* Camp, 11 Conn. 525, 529, 530; and an away-going tenant cannot remove it, though made with his own fodder, Lassell *v.* Reed, 6 Greenl. (Me.) 222, though it has been held that it might be seized on execution by his creditor during the term. Staples *v.* Emery, 7 Id. 201.

constitutes the essence of the thing granted, or is parcel of it, will pass with it, although it be accidentally severed at the time of the lease; therefore, by the lease of a mill, the millstone passes, though severed at the time; so by the lease of a house, the doors, window sashes, locks, keys, &c., pass as parcel of it, although by accident they may not be in their proper places when the lease is made. A man may demise his farm, which may comprehend a messuage and much land, meadow, pasture, wood, &c., thereunto belonging, or therewith used; for the word "farm" properly signifies a capital or principal messuage, and a quantity of land thereunto appertaining (*y*). So by the name of a messuage, he may pass a house, a curtilage, a garden, an orchard, a dove-house, a shop, or a mill, as parcel of the same (*z*); so the word "house" includes everything that would ordinarily [*140] pass by that name (*a*), the like of a cottage, a toft, a chamber, a cellar, &c. (*b*). Under a lease of all that part of the park called B. situate and being in the county of O., and now in the occupation of S., lying within certain specified abuttals, with all houses, &c., belonging thereto, and which are now in the occupation of S., a house on a part which is within the abuttals, but not in the occupation of S., will pass (*c*).[1] By a lease of all that part of the townland of B., containing 509 acres, arable, meadow, and pasture, bounded by certain boundaries, it was held that 400 acres of bog and

(*y*) Shep. Touch. 93; Lord Portman *v.* Mill, 3 Jur. 356, L. C.; Goodtitle *v.* Paul, 2 Burr. 1089; Goodtitle *v.* Southern, 1 M. & S. 298.

(*z*) Shep. Touch. 94; Doe *d.* Norton *v.* Webster, 12 A. & E. 442; Cole *v.* West London and Crystal Palace R. Co., 27 Beav. 242; 28 L. J., Ch. 767.

(*a*) Grosvenor *v.* Hampstead Junction R. Co., 1 De Gex & J. 446; 26 L. J., Ch. 731; Hewson *v.* South-Western R. Co., 8 W. R. 467; Steele *v.* Midland R. Co., L. R. 1 Ch. Ap. 275.

(*b*) Shep. Touch. 94.

(*c*) Doe *d.* Smith *v.* Galloway, 5 B. & Ad. 43; compare this with Martyr *v.* Lawrence, 2 De Gex, J. & S. 261.

[1] **Discrepancies.** — In case of a discrepancy between distances and boundaries there is no breach of the covenant of seizin. The boundaries will control. Almon *v.* Woodill, 6 Russ. & Geld. (N. S.) 13. If a building is divided into two tenements, one only of which fronts on Endicott Street, a lease of a building on Endicott Street will pass only that part. Houghton *v.* Moore, 141 Mass. 437.

land reclaimed from bog within the boundaries, also passed (*d*). If garden ground be let for years, and the lessee demise part of the term to an under-tenant, who builds on it, by a grant of the garden ground, the buildings thereon will pass (*e*). It would appear that a lease of "the issues and profits" of land would pass the land itself; for to have the issues and profits is the same thing as to have the land itself (*f*); and it has been held, that if a grant be made of a boilery of salt, the land passes, for that is the whole profit (*g*). If in a lease the demised land be mentioned and described as meadow land, no other evidence is necessary to prove that it was meadow land at the commencement of the term (*h*). By the grant of a forest, park, chase or warren in the soil of the grantor, the soil as well as the privilege passes; but it is otherwise if the soil be another's (*i*); and a sheep walk or a foldcourse may include the soil by the custom of the country (*k*).

Fishery. — In a parish settlement case, it was held that the lease of a fishery of a pond, with the spear sedge and the flags and rushes growing in and about the same, passed the soil (*l*).

Ferry. — If a lease of a ferry describes it as a ferry both ways across a river, whereas it is but one way only, yet it will pass (*m*). In the recent Irish case of Dwyer *v.* Rich (*n*), the lease described the lands demised as "bounded on the west by the river Shannon," and as containing 31½ acres or thereabouts: it was held that half the soil of the bed of the river passed under these words, although a map annexed to the lease showed no boundary either on the bank or the middle of the river.

Way. — Where an annual sum was payable as tenants' damages, besides a way-leave rent for a coal railway passing

(*d*) Jack *v.* McIntyre, 12 Cl. & Fin. 151.

(*e*) Burton *v.* Brown, Cro. Jac. 648.

(*f*) Parker *v.* Plumber, Cro. Eliz. 190.

(*g*) Co. Lit. 4 b.

(*h*) Birch *v.* Stephenson, 3 Taunt. 469; Shipwith *v.* Green, 1 Stra. 610.

(*i*) Cromwell's case, Dyer, 169 b.

(*k*) Huddlestone Woodroffe, 2 Roll. R. 61.

(*l*) Rex *v.* Old Alresford, 1 T. R. 358.

(*m*) Pim *v.* Curell, 6 M. & W. 234.

(*n*) Ir. R., 6 C. L. 144, Exch.

through a farm, it was left to the jury to say whether *the land covered by the railway passed by the [*141] agreement of letting to the tenant, because if it did the tenant, and not the landlord, was entitled to the sum payable as tenants' damages (*o*). A demise of a house and garden described the premises by boundaries which strictly would include a portion of a piece of ground at the back and adjoining the garden, which was laid out as a common walk for a row of houses; it was held, that this portion of the common walk was included in the premises demised, though by the lease a right was granted to the lessee of the use of the whole of the common walk (*p*).

Effect of word "appurtenances." — The demise of a house "with the appurtenances" will pass the house, with the orchards, yards and curtilage and gardens, but not the land;[1] especially if it be at a distance, though occupied with the house; so the demise of a house "and the appurtenances" will not pass an adjoining building not accounted parcel of the house, although held with it for thirty years (*q*). So a demise of premises in Westminster, late in the occupation of A. (particularly describing them), part of which was a yard, was held not to pass a cellar situate under that yard, which was then occupied by B., another tenant of the lessor; for though prima facie the property in the cellar would pass by the demise, yet that might be regulated and explained by circumstances (*r*). Under a demise of a messuage, with all rooms and chambers, and the appurtenances thereto belong-

(*o*) Wilson *v.* Anderson, 1 C. & K. 544.

(*p*) Curling *v.* Mills, 6 M. & G. 173.

(*q*) Fryan *v.* Wetherhead, Cro. Car. 17.

(*r*) Doe *d.* Freeland *v.* Burt, 1 T. R. 701; Press *v.* Parker, 2 Bing. 456

[1] A demise of a dwelling-house will pass a small lot of land used with it. Ammidown *v.* Ball, 8 Allen (Mass.) 293. Generally land will not pass as appurtenant to land. Oliver *v.* Dickinson, 100 Mass. 114; Ogden *v.* Jennings, 62 N. Y. 526.

A water right will pass as appurtenant to a mill. Pickering *v.* Stapler, 5 S. & R. 107.

A lease of part of a building will not pass by implication, other parts not necessary to its use. Hill *v.* Shultz, 40 N. J. Eq. 164. A way of necessity will pass as appurtenant to land, but not the soil over which the way passes. Leonard *v.* White, 7 Mass. 6.

ing, is to be understood all that is occupied together as an entire messuage at one and the same time; therefore, such a demise will not comprehend a room which had once formed part of the messuage, but which had been separated from it by means of a wooden partition, and had not been occupied with it for many years previously to the demise (*s*). So a stable will not pass under the renewed lease of a messuage with the appurtenances, which was not originally demised therewith and actually forms no part thereof (*t*). Generally speaking, land will not pass as appurtenant to a house, but it may sometimes do so, to effectuate the obvious intention of the parties (*u*). Land cannot be appurtenant to a messuage in the proper sense of the word; nor can one species of land be appurtenant to another, because the term is only properly applied to the annexation of incorporeal to corporeal hereditaments, in those cases in which the law permits such an union; but land may be appurtenant to a [*142] messuage in common parlance, as *being usually occupied with it (*x*). Whether the thing claimed as appurtenant be parcel or not must be gathered from evidence: thus where there is a conveyance in general terms of all that acre called Blackacre, everything which belongs to Blackacre passes with it; but whether parcel or not of the thing demised is always matter of evidence (*y*). Under a lease of premises, "together with all ways appertaining, or with any parts thereof used or enjoyed," a right of way was held to pass, although not expressly mentioned, upon proof that it was used with the premises at the time the lease was granted (*z*); but where an under-lease described the road demised and the ways granted by the words "all ways thereunto appertaining," it was held that a right of

(*s*) Kerslake *v.* White, 2 Stark. 508.

(*t*) Maitland *v.* Mackinnin, 1 H. & C. 607; 32 L. J., Ex. 49.

(*u*) Hill *v.* Grange, Dyer, 130 b; Plow. 170, S. C.; Baudeley *v.* Brook, Cro. Jac. 189; Hearn *v.* Allen, Cro. Car. 57; Roe *d.* Walker *v.* Walker, 3 Bos. & P. 375; Buck *d.* Whalley *v.* Nurton, 1 Bos. & P. 53; cited 5 C. B., N. S. 463. There are cases both ways, *per* V. Williams, J., 7 C. B. 714.

(*x*) Wilmore *v.* Cain, Cro. Eliz. 918; *Anon.*, Moor. 221; Cro. Eliz. 16.

(*y*) Cole Ejec. 240.

(*z*) Koopstra *v.* Lucas, 5 B. & A. 830; James *v.* Plant (in error), 4 A. & E. 749; *ante*, Ch. III., Sect. 5.

way over the original lessor's soil would not pass by these words (*a*). A grant of a close, "together with all ways, easements, and appurtenances thereto appertaining, and with the same now or heretofore used, occupied or enjoyed," will not pass a right of way over an adjoining close used by the grantor as owner of both closes, no such way having existed before the unity of possession became vested in him (*b*). Generally speaking, a right of way cannot pass under the word "appurtenances" (*c*). But a way of necessity may so pass (*d*).[1] There is a distinction between easements which are in their nature continuous and apparent, such as drains &c., and other easements, such as ordinary rights of way, or the right to use a pump in adjoining land — the former pass by a devise or conveyance of the messuage without any general words; but the others must be created by an express grant (*e*).[2] According to the current of the most recent decisions it would seem that nothing will pass under the

(*a*) Harding *v.* Wilson, 2 B. & C. 96.

(*b*) Thomson *v.* Waterlow, L. R., 6 Eq. 36; 37 L. J., Ch. 495; Langley *v.* Hammond, L. R., 3 Ex. 161, 169; *ante*, Ch. III., Sect. 5.

(*c*) Worthington *v.* Gimson, 2 E. & E. 618; 29 L. J., Q. B. 116; Clements *v.* Lambert, 1 Taunt. 205; Plant *v.* James, 5 B. & Adol. 791; 4 A. & E. 749, 761; Ackroyd *v.* Smith, 9 C. B. 689; 10 C. B. 164; Dodd *v.* Burchell, 1 H. & C. 113; 121; 31 L. J., Ex. 364; Thomson *v.* Waterlow, L. R., 6 Eq. 36; 37 L. J., Ch. 495; Langley *v.* Hammond, L. R., 3 Exch. 161, 169.

(*d*) Pinnington *v.* Galland, 9 Exch. 1; 22 L. J., Ex. 348; Pheysey *v.* Vicary, 16 M. & W. 484; Hinchcliffe *v.* Earl of Kinnoul, 5 Bing. N. C. 1; Davies *v.* Sear, L. R., 7 Eq. 427.

(*e*) Pyer *v.* Carter, 1 H. & N. 916; Worthington *v.* Gimson, 2 E. & E. 618; 29 L. J., Q. B. 116, 120; Pearson *v.* Spenser, 1 B. & S. 571, 583; 3 B. & S. 761; S. C., Polden *v.* Bastard, 4 B. & S. 258, 263; 32 L. J., Q. B. 372; S. C. (in error), L. R., 1 Q. B. 156; 7 B. & S. 130; 35 L. J., Q. B. 92.

[1] Leonard *v.* White, 7 Mass. 6.

[2] **What easements pass by implication.** — Necessary easements to which grantor has title will pass by implication. Examples: A right to take water from a spring, Hollenbeck *v.* McDonald, 112 Mass. 247; a necessary right of way, Kent *v.* White, 10 Pick. (Mass.) 138; Voorhees *v.* Burchard, 55 N. Y. 98; even though it be not the only possible way, Pettingill *v.* Porter, 8 Allen (Mass.) 1. A right to use adjoining land may, Voorhees *v.* Burchard, 55 N. Y. 98, besides others stated in text.

If a lessor orally lease certain premises agreeing to furnish steam power from adjoining or servient premises and then convey the latter, the easement is terminated. Brewing *v.* Berryman, 2 Pugs. (N. B.) 115. Demises of incorporeal hereditaments must be by deed. Reed on St. of Frauds, sec. 801.

word "appurtenances" which would not equally pass by a conveyance of the principal subject-matter, without the word "appurtenances" (*f*).

[*143] * (b) "*General Words*" *implied by Conveyancing Act.*

If the lease be by deed, and bear date on or after 1st Jan., 1882, certain "general words" are implied by virtue of that act, by s. 2, subs. (v.), of which "conveyance" includes a lease made by deed; for s. 6 of that act enacts as follows: —

Lease of land. — "(1) A conveyance of land shall be deemed to include and shall by virtue of this act operate to convey, with the land, all buildings, erections, fixtures, commons, hedges, ditches, fences, ways, waters, water-courses, liberties, privileges, easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land, or any part thereof, or at the time of the conveyance demised, occupied, or enjoyed with, or reputed or known as part or parcel of or appurtenant to the land or any part thereof.

Lease of buildings. — "(2) A conveyance of land, having houses or other buildings thereon, shall be deemed to include and shall by virtue of this act operate to convey, with the land, houses, or other buildings, all outhouses, erections, fixtures, cellars, areas, courts, courtyards, cisterns, sewers, gutters, drains, ways, passages, lights, water-courses, liberties, privileges, easements, rights and advantages whatsoever, appertaining or reputed to appertain to the land, houses, or other buildings conveyed, or any of them, or any part thereof, or at the time of the conveyance demised, occupied, or enjoyed with, or reputed or known as part or parcel of or appurtenant to, the land, houses, or other buildings conveyed, or any of them, or any part thereof.

Lease of manor. — "(3) A conveyance of a manor shall be deemed to include and shall by virtue of this act operate to convey, with the manor, all pastures, feedings, wastes, warrens, commons, mines, minerals, quarries, furzes, trees, woods, underwoods, coppices, and the ground and soil there-

(*f*) Cases *supra*; and see Shep. Touch. 89; 6 M. & W. 189.

of, fishings, fisheries, fowlings, courts leet, courts baron, and other courts, view of frankpledge and all that to view of frankpledge doth belong, mills, multures, customs, tolls, duties, reliefs, heriots, fines, sums of money, amerciaments, waifs, estrays, chief rents, quit rents, rents charge, rents seck, rents of assize, fee farm rents, services, royalties, jurisdictions, franchises, liberties, privileges, easements, profits, advantages, rights, emoluments, and hereditaments whatsoever, to the manor appertaining or reputed to appertain, or at the time of conveyance demised, occupied or enjoyed with the same, or reputed or known as part, parcel, or member thereof.

Application of section. — "(4) This section applies only if and as far as a contrary intention is not expressed in the conveyance, and shall have effect subject to the terms of conveyance and to the provisions therein contained.

"(5) This section shall not be construed as giving to any person a better title to any property, right, or thing in this section mentioned * than the title which the [*144] conveyance gives to him to the land or manor expressed to be conveyed, or as conveying to him any property, right, or thing in this section mentioned, further or otherwise than as the same could have been conveyed to him by the conveying parties.

"(6) This section applies only to conveyances made after the commencement of this act."

Sect. 6. — *Term granted.*

(a) *The Habendum.*

Office of habendum. — The habendum is that part of the lease which begins with "to have and to hold," and properly succeeds the premises: its office is to limit with certainty the estate: it may also abridge or alter the generality of the premises (*g*); in short, it fixes the quality and quantity of the estate, and ascertains the meaning of the premises, but

(*g*) Shep. Touch. 75; Com. Dig. tit. *Fait* (E. 9); 2 Prest. Conv. 439, 442.

cannot contradict or destroy them (*h*). Its operation as a grant is merely prospective from the time of the execution of the lease: the term is then first created (*i*); but the duration of it is to be computed from the day in that behalf mentioned in the habendum (*k*). By indenture dated and made on 19th July, 1851, A. demised to B., to hold from 25th December, 1849, for the term of fourteen years thence next ensuing, determinable as therein mentioned; provided, that either party might determine the demise at the expiration of the first seven years thereof by six months' notice: held that the seven years were to be reckoned from the 25th December, 1849, and that the lease might be determined on 25th December, 1856 (*k*). The word "term" in a covenant in a lease may signify either the time or the estate granted (*l*). Where a lease was made on the 10th of October, habendum from the 20th day of November (not saying in what year) for five years, the court held that the lease was void for uncertainty (*m*). But where a lease was made for years, to begin at the feast of our Lady Mary (without expressing what feast, whether of the Annunciation, Purification, &c.), the court held the lease to be good, and that the lessee by his entry might determine at which of the said feasts [*145] * the term should begin (*n*). A lease to one for life, habendum to his three sons successively, but omitting to mention the sons in the premises of the deed, was held to be for the life of the father only, and that the sons should not take in possession, or by way of remainder; for it being limited to the father for his life, that was a greater estate than for the lives of others; and the three sons were

(*h*) Plowden, 153; Cocking *v.* Heatheote, Lofft, 190; Doe *d.* Timmis *v.* Steele, 4 Q. B. 663; Bird *v.* Baker, 1 E. & E. 12; 28 L. J., Q. B. 7; Smith L. & T. 104 (2nd ed.).

(*i*) Jervis *v.* Tomkinson, 1 H. & N. 195, 206; Shaw *v.* Kay, 1 Exch. 412; Lewis *v.* Hilliard, 1 Sid. 374; Wyburd *v.* Tuck, 1 B. & P. 464; Dinsdale *v.* Isles, 3 Keb. 207; 2 Lev. 88.

(*k*) Bird *v.* Baker, 1 E. & E. 12; 28 L. J., Q. B. 7.

(*l*) Evans *v.* Vaughan, 4 B. & C. 261; Wright *d.* Plowden *v.* Cartwright, 1 Burr. 282; 1 Ld. Ken. 529; Green *v.* Edwards, Cro. Eliz. 216; Cottee *v.* Richardson, 7 Exch. 151; 2 Blac. Com. 143; Shep. Touch. 267.

(*m*) Anon., 1 Mod. 180.

(*n*) Anon., 1 Leon. 227.

named as persons to have an estate, and not to make a limitation of an estate (*o*).

Discrepancy between habendum and reddendum. — The ordinary rule is, that where there is a discrepancy between the habendum and the reddendum, the habendum must prevail (*p*); but this rule does not apply where on the face of the lease the habendum is wrong (*q*).

(b) *Lease for Life of the Lessee.*

Lease for life of the lessee. — An estate for life may be created by deed, either by express limitation or by a grant in general terms. Thus a grant by A. to B. of the manor of Dale gives to B. an estate for his life (*r*). This, however, would be otherwise if a contrary intention could be collected from the terms of the deed (*s*). Where A. demises to B. for the term of *his* natural life, the demise is prima facie for the life of B.; but where A. demised to B., his executors and administrators, for the term of *his* natural life, and the lease contained a covenant by A. for the quiet enjoyment of the premises by B., his executors, &c., during the natural life of A., it was held that the word "his" in the demising clause must be referred to A., the grantor, and not to B., though his name was the last antecedent (*t*).

Absolute or conditional. — Estates for life granted absolutely will, generally speaking, endure as long as the life for which they are granted (*u*): but there are some estates for life which may determine upon future contingencies, before the life for which they are granted expires: as where a lease is to a man quamdiu se bene gesserit; to a woman durante viduitate or dum sola; to husband and wife during coverture; to A., as long as he inhabits or pays such rent, or till he be preferred to such a benefice, or till out of the profits he has paid £100 or other sum: — in these and the like

(*o*) Windsmore *v.* Hubbard, Cro. Eliz. 57.

(*p*) Shep. Touch. 52.

(*q*) Burchell *v.* Clark, L. R., 2 C. P. D. 88; and see *ante*, p. 120.

(*r*) Co. Lit. 42 a, 183 a.

(*s*) Doe *d.* Pritchard *v.* Dodd, 5 B. & Ad. 689; Co. Lit. 42 a.

(*t*) Doe *d.* Pritchard *v.* Dodd, *supra*.

(*u*) 2 Blac. Com. 121.

cases, the duration of the estate depends merely upon the condition (*x*). But the estate is as perfect an estate for life until the event take place, as if it had been granted absolutely. A lease for years, if the lessee so long live, [*146] with a remainder to * another for the residue of the term, must be construed to give the remainder-man a power to enjoy during all the residue of the years to come (*y*).

(c) *Lease for Lives.*

Origin of the lease for lives. — The lease for the lives of persons other than the lessee, or as it is commonly called, the "lease for lives" has, notwithstanding its speculative character, been common from very ancient times in many parts of England (*z*), chiefly in the west, or where the landlords have been ecclesiastical corporations. Such a lease confers a freehold interest upon the lessee, whereas a lessee for years has a chattel interest only (*a*), and this is why the lease for lives has so long continued in favour, continuing, by mere force of habit, long after the causes for its retention have ceased to operate. It is, however, believed to be gradually falling into desuetude, and, indeed, the objections to it in modern times are too obvious to dwell upon.

Commencement of leases of lives. — A lease for lives, to begin from the day of the date thereof, is good and will not be said to convey a freehold to commence in futuro (*b*): so a lease to hold the lessee for his life, which term shall begin after the determination of a previous term for three lives, is good (*c*). But, although the above rule prevails at common

(*x*) Co. Lit. 42 a.

(*y*) Wright *d.* Plowden *v.* Cartwright, 1 Burr. 282; 1 Ld. Ken. 529; Shep. Touch. 272.

(*z*) The lease for lives is also very common in Ireland. See Furlong's Landlord and Tenant, bk. ii., ch. 4.

(*a*) From the lease for lives giving the lessee an estate of freehold, whereas the lessee for years had no freehold, but only a chattel interest, it resulted (1) that the lessee for lives had the right to reinstatement after eviction, whereas the lessee for years had only a right to damages; (2) that the lessee for lives had the parliamentary franchise (not obtained by the lessee for years until 1832); and (3) that the lessee for lives had an estate descendible free from debts.

(*b*) Freeman *d.* Vernon *v.* West, 2 Wils. 165.

(*c*) Underhay *v.* Underhay, Cro. Eliz. 296.

law as to leases in futuro, a very different rule of law prevails in cases of limitations taking effect under the Statute of Uses, or as devises or trusts (*d*). And now, by 8 & 9 Vict. c. 106, s. 2, "all corporeal tenements and hereditaments shall, as regards the conveyance of the immediate freehold thereof, be deemed to lie in grant as well as in livery."

Construction of the grant for lives. — The grant of a lease for several lives of which one is not in existence at the date of the grant is good only for the lives which are in existence at such date (*e*).

It was held by a Court of Appeal, in Coates *v.* Collins (*f*), that a covenant in a lease for lives, that the lease is good for the lives for which it is granted, does not warrant the subsistence of the lives. * Therefore, where the [*147] defendant assigned a lease for the lives of W., J., and H., and the survivors and survivor of them, and covenanted that the lease was "a good and valid lease" for such lives, and was "not forfeited, surrendered, or become void or voidable," and J. had died before the making of the assignment, the plaintiff failed to recover as for a breach of covenant.

Dissolution on death of lessee. — At common law a lease for lives to the lessee only without naming a successor, entitled any person whatever, upon the death of the lessee, to enter upon the demised premises, as "general occupant," and to continue in possession till the last of the lives dropped (*h*), but such a lease to the lessee, his heirs and assigns, entitled the heir to enter as "special occupant," and perhaps also the executor (*i*). The 12th section of the Statute of Frauds made the estate pur autre vie devisable by will, and provided that it should be chargeable as assets either in the hands of the heir or executor, if no devise should be made. The present law is contained in s. 6 of the Wills Act, 1 Vict.

(*d*) Rivis *v.* Watson, 5 M. & W. 255; Gilbertson *v.* Richards, 4 H. & N. 277; 5 Id. 453.

(*e*) Doe *d.* Pemberton *v.* Edwards, 1 M. & W. 553.

(*f*) L. R., 7 Q. B. 144; 41 L. J., Q. B. 90; 26 L. T. 134. Lush, J., dissented in the court below. The Exchequer Chamber was unanimous, both on principle and on the authority of Basket *v.* Scot, Roll. Abr. vol. ii. p. 249.

(*h*) Co. Litt. 41 b.

(*i*) See Platt on Leases, vol. i. p. 689, and the cases there cited.

c. 26, which, after giving an absolute disposing power by will and repealing s. 12 of the Statute of Frauds, provides that:

"If no disposition by will shall be made of any estate pur autre vie of a freehold nature the same shall be chargeable in the hands of the heir, if it shall come to him by reason of special occupancy, as assets by descent, as in the case of freehold land in fee-simple; and in case there shall be no special occupant of any estate pur autre vie, whether freehold or customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether a corporeal or incorporeal hereditament, it shall go to the executor or administrator of the party that had the estate thereof by virtue of the grant; and if the same shall come to the executor or administrator either by reason of a special occupancy or by virtue of this act, it shall be assets in his hands, and shall go and be applied and distributed in the same manner as the personal estate of the testator or intestate."

Proof of death of cestui que vie. — It is of the essence of the estate pur autre vie that one of the lives should be in existence, and at common law the burden of proof of death lay upon the party seeking to take advantage of it, who would in all ordinary cases, unless the covenants should be very onerous, be the reversioner.

Presumption of death after 7 years. — To remedy this inconvenience the statute 19 Car. 2, c. 6, was passed, which shifted the burden of proof in many cases by the enactment that if persons for whose lives estates have been granted shall remain beyond the seas, or elsewhere absent themselves in this realm by the space of seven years together, and no sufficient and evident proof be made of the lives of such persons, in any action for the recovery of the tenements, "the [*148] persons upon whose * lives the estate depended shall be accounted as naturally dead, and the judges before whom such action shall be brought shall direct the jury to give their verdict as if the person so remaining beyond the seas, or otherwise absenting himself, were dead." The 3rd section of the same act allows the plaintiff in any such action to challenge any juror the greatest part of whose real estate

is held by lease or copy for lives, and the 4th section provides for the reinstatement, with damages against the lessor for mesne profits, of any lessee evicted by virtue of the act who shall afterwards be able to prove that the cestui que vie, whose death was presumed, was in fact alive.

There is no legal presumption as to the time of the death of a cestui que vie (*k*); the fact of his having been alive or dead at any time during the seven years must be proved by the party relying on it (*l*), and it will be seen from 6 Ann. c. 18, s. 5, which will be presently referred to, that the lessor can recover mesne profits from a lessee holding over after the dropping of the last life. Where a lease for lives contained a covenant that the lessee would produce a cestui que vie, or make it appear, if he should be abroad, that he was living, it was held that it was not enough for the lessee to depose to circumstances from which one jury might infer that the cestui que vie was living, and another not (*m*).

Production of cestui que vie. — A further and very stringent act in favour of lessors, but chiefly applicable only in the case of fraud, was passed in the reign of Queen Anne. This was 6 Ann. c. 18, whereby a lessor for lives upon affidavit made that he has cause to believe that the cestui que vie is dead, and that his death is concealed by any person, may, once a year, move the High Court for an order upon the person concealing the death to produce the cestui que vie to one or two persons named in the order. Upon a failure to obey such order, the court is "authorized and required" (*n*) to make a further order for the production of the cestui que vie before the court itself or before Commissioners to be appointed by the court (two of them upon the nomination of the party prosecuting the order) (*o*). Upon failure to comply with such further order, the cestui que vie is to be

(*k*) Nepean *v.* Doe, 2 M. & W. 894 (in error); 5 B. & Ad. 86.

(*l*) Ib. Holman *v.* Exton, Prec. Ch. 246.

(*m*) Randle *v.* Long, 6 Ad. & E. 218.

(*n*) The court has no discretion, but is bound to make this order. See *re* Isaac, 4 M. & C. 11.

(*o*) For instances of orders made under this act, see *re* Lingen, 12 Sim. 194; *re* Clossy, 2 Sm. & G. 46; *re* Dennis, 8 W. R. 649; 7 Jur., N. S. 230; *re* St. John's Hospital, 18 L. T. 12; 16 W. R. 556.

taken to be dead, and the lessor is empowered to enter upon the demised premises. By s. 2 of the act, on affidavit that the cestui que vie "is or lately was at some certain place beyond the seas," the party prosecuting the order may send over persons to procure a personal view of him, and if such view cannot be had, to make a return to the Court to [*149] that effect, whereupon the lessor *may enter as if he were dead; by s. 3 the lessee for lives may re-enter if after order made it should turn out that the cestui que vie was in fact alive, and by s. 4 if the lessee for lives prove that he has used all endeavours to produce the cestui que vie, and also that such cestui que vie is in fact alive, he may continue in possession.

Lessee for lives holding over a trespasser. — The fifth section is a very important one, inasmuch as it constitutes a trespasser any lessee for lives holding over after the determination of the last life, whether he knew of such determination or not. The section is as follows: —

"Every person who, as guardian or trustee for any infant, and every husband seised in right of his wife only, and every other person having any estate determinable upon any life or lives, who after the determination of such particular estates or interests, without the express consent of him, her, or them, who are or shall be next and immediately entitled upon and after the determination of such particular estates or interests, shall hold over and continue in possession of any manors, messuages, lands, tenements, or hereditaments, shall be and are hereby adjudged to be trespassers, and every person or persons, his, her, and their executors or administrators, who are or shall be entitled to any such manors, messuages, lands, tenements, and hereditaments, upon or after the determination of such particular estates or interests, shall and may recover in damages against every such person or persons so holding over as aforesaid, and against his, her, or their executors or administrators the full value of the profits received during such wrongful possession as aforesaid."

Renewal. — Leases for lives frequently contain a covenant for renewal. The effect of such covenants is considered hereafter (Ch. IX.).

(c) *Commencement of Terms for Years.*

Certainty in commencement. — As a lease *for years* is a mere chattel, it may be made to commence either presently or at a future period, at a date to come, as at *Michaelmas* next, or at three or ten years after, or after the death of the lessor, or of J. S. (*p*).[1] A lease to commence upon the expiration of a previous lease conveys only an interesse termini until the expiration of the previous lease, and does not amount to an assignment of the reversion expectant on such lease (*q*). After the day appointed for the commencement of the term, an interesse termini is sufficient to support an entry or ejectment (*r*). All leases for years, whether they begin in præsenti or in futuro, must be certain: that is, they must have a certain beginning and a certain ending, and so the continuance of *the term must be certain: other- [*150] wise they are not good (*s*). Unless the time of the commencement of the lease be stated it cannot be known when the rent is to become due or when the landlord is entitled to distrain for it.[2] But though the commencement of a term must be fixed with certainty, it will be sufficient if it be so fixed when the lease is to take effect in interest or possession; for until that time it may depend upon an uncertainty, viz., either a possible contingency, which is to precede the interest or possession, or upon

(*p*) Shep. Touch. 273.

(*q*) Smith *v.* Day, 2 M. & W. 684; Blatchford, app., Cole, resp., 5 C. B., N. S. 514; Lock *v.* Furze, 19 C. B., N. S. 96, 103, 105; L. R., 1 C. P. 441; 34 L. J., C. P. 201; 35 Id. 141.

(*r*) Cole Ejec. 72, 287, 459.

(*s*) 2 Blac. Com. 144; Shep. Touch. 267, 272.

[1] **Commencement of term.** — A lease, like a deed, Jackson *v.* Phipps, 12 Johns. (N. Y.) 418; Jackson *v.* Dunlap, 1 Johns. Cas. (N. Y.) 114, takes effect upon delivery and acceptance. Witthaus *v.* Starin, 12 Daly (N. Y. Super. Ct.) 226.

If the term commence *in futuro*, yet the interest vests presently. Whitney *v.* Allaire, 1 N. Y. 305. If lessor meantime let premises to third party, lessee, when time arrives, can eject him or sue lessor for damages. Trull *v.* Granger, 8 N. Y. 115.

The date of the lease is *primâ facie*, but not conclusive evidence of the time of delivery. Meagher *v.* Coleman, 1 Russ. & Geld. (N. S.) 271.

[2] The time of commencement of a tenancy may be impliedly fixed, without any date being stated. Billings *v.* Canney, 57 Mich. 425.

a limitation or condition subsequent; but where it is to be reduced to a certainty upon a precedent contingency, such contingency must happen in the lives of the parties (*t*).

Commencement after prior lease. — A lease to commence after the determination of a prior lease begins at once, if the previous lease be void at law: so a lease intended to commence in future, which misrecites the prior lease on which it depends in a material point, begins immediately (*u*). But if the new lease had misrecited a lease to A., and had then been made for twenty-one years, to commence after the expiration of the term of A., the misrecital would be unimportant, and the new lease would begin from the determination of A.'s term (*x*).

Lease commences from date ordinarily. — If no date is fixed for the commencement of the tenancy, it is usually taken to commence at the date of the lease.[1] This, however, may be negatived by internal evidence, as where a lease dated on the 20th of December was held, from the fact that the first payment of a quarterly rent was to be on the 25th of March, to commence on 25th of December (*y*). The words "from the day of the date" mean either *inclusive* or *exclusive*, according to the context and subject-matter; and the court will construe them so as to effectuate the intention of the parties (*z*).[2] Generally speaking, a lease from the 25th March

(*t*) Shep. Touch. 272, 273; Doe *d.* Hall *v.* Richardson, 3 T. R. 462.

(*u*) Co. Lit. 46 b.

(*x*) Foote *v.* Berkeley, 1 Lev. 235; Woodhouse's case, Dyer, 93 b.

(*y*) Sandill *v.* Franklin, L. R., 10 C. P. 377; 44 L. J., C. P. 216; 32 L. T. 309; 23 W. R. 473.

(*z*) Pugh *v.* Duke of Leeds, Cowp. 714; Ackland *v.* Lutley, 9 A. & E. 879; Bac. Abr. tit. Leases (L. 1); Smith L. & T. 104, 105 (2nd ed.).

[1] **Day of date; indivisible.** — In computing time from the date of the lease, the day of the date is ordinarily to be regarded as indivisible.

"The day on which the event happened may be regarded as an entirety, or a point of time, and so be excluded from the computation," *per* Bronson, Ch. J., in Cornell *v.* Moulton, 3 Denio, 12, 16; and Wilde, J., in Bigelow *v.* Willson, 1 Pick. (Mass.) 485, 494.

[2] "**From the day of the date.**" — Generally in America, these words are exclusive of the date. For example: A lease from first day of July begins July 2nd, 1 Washb. on Real Prop. sec. 292; Atkins *v.* Sleeper, 7 Allen (Mass.) 487; or from April 1st commences April 2nd, Thornton *v.* Payne, 5 Johns. (N. Y.) 74. There may be a local custom varying it, as for instance, the custom in Albany that a lease from May 1st shall commence at noon May

commences the next day and ends on 25th March, otherwise the day on which the last quarter's rent is usually reserved would be subsequent to the expiration of the lease (*a*). A lease "from the day of the date," and "from henceforth," is the same thing (*b*). Sometimes a lease "from the day of the date" will be construed to mean "from the day of the execution of the deed" (*c*), but the more literal construction is usually adopted (*d*).

* **Impossible or uncertain date.** — As to an impossi- [*151] ble or uncertain date, there appears to have been this distinction taken in the books, viz. that if a lease be made to begin from an impossible date, as from the 30th of February, or the like, it takes effect from the delivery (*e*). So if the lease be dated and is to commence from the "making thereof," or "from henceforth" (*e*), or from the executing of a former lease, and no such lease in fact exist, or if the

(*a*) Ackland *v.* Lutley, *supra;* Wilkinson *v.* Gaston, 9 Q. B. 137.

(*b*) Llewellyn *v.* Williams, Cro. Jac. 258; Clayton's case, 5 Rep. 1.

(*c*) Underwood *v.* Horwood, 10 Ves. 209.

(*d*) Shep. Touch. 108; Doe *d.* Cox *v.* Day, 10 East, 427; Steele *v.* Mart, 4 B. & C. 272; Styles *v.* Wardle, Id. 908; Cooper *v.* Robinson, 10 M. & W. 694; Doe *d.* Darlington *v.* Ulph, 13 Q. B. 204; Bird *v.* Baker, 1 E. & E. 12.

(*e*) Co. Lit. 46 b.; Styles *v.* Wardle, 4 B. & C. 908.

1st, Wilcox *v.* Wood, 9 Wend. 346, 348, 350; but the general rule in New York, as elsewhere, excludes the terminus *a quo* (*per* Savage, Ch. J.).

This rule has been generally adopted in America whenever time is to be computed from the happening of any event. Cornell *v.* Moulton, 3 Denio (N. Y.) 12, 16 (*per* Bronson, Ch. J.); Sims *v.* Hampton, 1 S. & R. (Pa.) 411; Windsor *v.* China, 4 Greenl. (Me.) 298; Pease *v.* Norton, 6 Id. 229, 233; Brown *v.* Maine Bank, 11 Mass. 153; Snyder *v.* Warren, 2 Cow. (N. Y.) 518, *Ex parte* Dean, 2 Id. 605; Homan *v.* Liswell, 6 Id. 659; Sheets *v.* Selden's Lessee, 2 Wall. 177, 190; Henry *v.* Jones, 8 Mass. 453, 455 (promissory note); Avery *v.* Stewart, 2 Conn. 69 (promissory note); Rand *v.* Rand, 4 N. H. 267; Bigelow *v.* Willson, 1 Pick. (Mass.) 485, 489; State *v.* Jackson, 4 N. J. L. 323 (time after act); Pyle *v.* Maulding, 7 J. J. Marsh. (Ky.) 202; Williamson *v.* Farrow, 1 Bailey (S. C. Ct. of App.) 611; *contra,* Priest *v.* Tarlton, 3 N. H. 93; Wheeler *v.* Bent, 4 Pick. (Mass.) 167.

In Presbrey *v.* Williams, 15 Mass. 193, it was held that the Statute of Limitations bars suit brought Nov. 1, 1817, on new promise made Nov. 1, 1811, but this was disapproved of by Bronson, C. J., in Cornell *v.* Moulton, 9 Wend. (N. Y.) 12, 15, 16.

In People *v.* Robertson, 39 Barb. (N. Y. Supreme Ct.) 9, it was held that a lease to first day of May would expire at midnight April 30th, but a lease to end May 1st would expire at noon that day.

prior lease be void in law (*f*); but where the limitation is uncertain, as a lease made the 10th day of October, to hold from the 20th day of November, without saying what November is meant, the lease is thereby vitiated, because the limitation is part of the agreement and the court cannot determine it, not knowing the terms of the contract (*g*). Where a deed has no date, or an impossible date, as the 30th of February, and in the deed reference is made to the date, that word must be construed "delivery;" but if it have a sensible date, the word *date* occurring in other parts of the deed means the day of the date and not of the delivery; and, therefore, in covenant on an indenture of lease dated the 24th day of December, 1822, whereby the defendant agreed, within twenty-four calendar months then next after the date of the indenture, to procure a certain thing to be done: it was held, that the deed took effect from the day of the date, and that the twenty-four calendar months reckoned from the date (*h*). Where an ease was dated 25th March, 1783, habendum "from the 13th March *now last past*," and it was proved that the deed was not executed until some time after the date, it was held, that the term commenced on the 25th March, 1783, and not in 1782 (*i*). A deed having been made in the month of August in a leap year, the words "the 29th February then next ensuing" were construed to mean the 29th February in the next leap year (*k*). A lease operates as a grant only from the time of its execution, and the tenant is not liable for previous breaches of covenant, although committed after the date of the deed (*l*). But the duration of the term is to be computed from the day in that behalf mentioned in the lease (*m*).

Commencement with reference to entry. — In general a letting by parol will be considered to commence from the day of the tenant's entering, and not with reference to any par-

(*f*) Miller *v.* Maynwaring, Cro. Car. 397; Bassett *v.* Lewis, 1 Lev. 77.

(*g*) Bac. Abr. tit. Leases (L. 1); Anon., 1 Mod. 180; Foote *v.* Berkley, 1 Sid. 461.

(*h*) Styles *v.* Wardle, 4 B. & C. 908.

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

(*k*) Chapman *v.* Beecham, 3 Q. B. 723.

(*l*) Shaw *v.* Kay, 1 Exch. 412; Jervis *v.* Tompkinson, 1 H. & N. 195, 206.

(*m*) Bird *v.* Baker, 1 E. & E. 12; 28 L. J., Q. B. 7.

ticular quarter day (*n*). But where a tenant entered in the middle of a quarter, and afterwards paid for that time to the beginning of a succeeding regular quarter, from which time he paid half-yearly, his tenancy was held to commence from the quarter succeeding his * entering (*o*). [*152] Where, however, the tenant entered in the middle of a quarter, upon an agreement to pay rent "quarterly and for the half-quarter," the jury, under the judge's direction, found that the tenancy commenced from the quarter day preceding the entry (*p*). A party having taken possession on the 1st of August, and at the Michaelmas following paid the half-quarter's rent, and continued afterwards to pay quarterly on the usual feast days, it was held, that a notice to quit at Michaelmas was sufficient; and that although the landlord had at first given notice expiring with the half-quarter, it was not necessarily to be inferred from that circumstance that the tenancy from year to year commenced on that day (*q*). Where a tenant under a lease continued to hold after the expiration of it as a tenant at will, and assigned it to another, the tenancy of the assignee was held to commence at the day on which the original tenancy commenced under the lease, notwithstanding the assignee came in on a different day (*r*).

Different computations. — A lease may commence at one day in point of computation, and at another in point of interest (*s*), and it may commence from a day that is past; therefore, a lease "to hold from a day past for fifty years then next ensuing, the said term to commence and begin immediately after the determination of an existing lease in the same premises," was not esteemed uncertain as to its commencement (*t*).

Leases commencing on happening of contingencies. — If when

(*n*) Kemp *v.* Derret, 3 Camp. 510.

(*o*) Doe *d.* Holcomb *v.* Johnson, 6 Esp. 10.

(*p*) Doe *d.* Wadmore *v.* Selwyn, Hil. T. 1807; Adams Ejec. 107 (4th ed.).

(*q*) Doe *d.* Savage *v.* Stapleton, 3 C. & P. 275.

(*r*) Doe *d.* Castleton *v.* Samuel, 5 Esp. 173.

(*s*) Smith L. & T. 106 (2nd ed.).

(*t*) Enys *v.* Donnithorne, 2 Burr. 1190; Moore *v.* Musgrove, Hob. 18; 2 Roll. Abr. 850.

the lease is to take effect in interest or possession the years be certain, it is sufficient, for until that time it may depend upon an uncertainty; either upon a possible contingency precedent to its beginning in possession or interest, or upon a limitation or condition subsequent; but if it is to be reduced to a certainty upon a contingency precedent, the contingency must have happened in the lives of the parties (*u*).

Reference to certainty may cure uncertainty. — Though there appear no certainty of years in the lease, yet if by reference to a certainty it may be made certain, it is sufficient (*x*). Thus if a lease be granted for years after lives in being, though it is uncertain at first when that term will commence, because those lives are in being, yet when they die it is reduced to a certainty, and that is certain which can be rendered so (*y*). So a lease may be granted for a term of years to commence at the determination of a previous term for years which is still subsisting (*z*). If the [*153] lease be made to * commence from the end and expiration of the previous term, then, if the previous term be surrendered or forfeited, &c., the second term commences immediately; but if made to commence after the end and expiration of the twenty-one years aforesaid, then the second term would not commence until after the expiration of the twenty-one years (*a*). Where a lessor let Whiteacre to A. for twenty years, and Blackacre to B. for forty years, and then demised both to C. for a term of years, habendum from the end or determination of the said several demises to A. and B., it was held, that as to Whiteacre the term granted to C. commenced immediately upon the expiration of that granted to A., and was not to be deferred until the expiration of the demise to B. (*b*). Where a lease is thus made to

(*u*) Shep. Touch. 272.

(*x*) Id.

(*y*) Goodright *v.* Richardson, 3 T. R. 463; Bac. Abr. tit. Leases (K.); Bro. Abr. tit. Leases, 71; Clarke *v.* Sydenham, Yelve. 85; S. C., 1 Brownl. & G. 136.

(*z*) 1 Roll. Abr. 849; Dyer, 261 b, pl. 28; Lord Paget's case, 1 Leon. 199; Smith *v.* Day, 2 M. & W. 684; Blatchford, app., Cole, resp., 5 C. B., N. S. 514; Doe *d.* Agar *v.* Brown, 2 E. & B. 331.

(*a*) Co. Lit. 45 b; Wrotesley *v.* Adams, Dyer, 177, pl. 35; Plowd. 198.

(*b*) Windham's case, 5 Co. R. 7, Moor. 191; Cro. Eliz. 199; 2 Leon. 105.

A., reciting a former one to B., and demising for a term of years to commence at the determination of B.'s lease, if in fact no such lease had been made to B., then A.'s term will commence at once (*c*); and the same if the lease be void (*d*). But if there be such a former lease, and it be misrecited in a material part in the second, then the new lease can commence presently only in the enumeration of years, but not in interest until the expiration of the first lease (*e*). If A. seised of lands in fee grant to B. that, when B. shall pay to A. twenty shillings, from thenceforth he shall hold the lands for twenty-one years, and afterwards B. pay the twenty shillings: in this case B. has a good lease for twenty-one years from the date of the payment (*f*). If one make a lease to another for so many years as J. S. shall name, this at the beginning is uncertain; but when J. S. has named the years (in the lifetime of the lessor) this ascertains the commencement and continuance of the lease accordingly: but if the lease had been made for so many years as the executors of the lessor should name, this could not be made good by any nomination (*g*). A lease made to another, until a child en ventre sa mère shall come to the age of twenty-one years, is not good as a lease for years but at will only (*h*).

(d) *Duration of Terms for Years.*

What certainty is requisite generally. — The duration of leases for years ought to be ascertained either by the express limitation of the parties at the time of making, or by * a reference to some collateral act, which may with [*154] equal certainty measure the continuance thereof,[1]

(*c*) Bac. Abr. tit. Leases (L. 1).

(*d*) Id.; Co. Lit. 46 b.

(*e*) Bac. Abr. tit. Leases (L. 1); Co. Lit. 46 b. As to misrecital of date, see Rowe *v.* Huntingdon, Vaugh. 73; Bac. Abr. tit. Leases (L. 1); Palmer's case, 4 Co. R. 74.

(*f*) Shep. Touch. 273; Co. Lit. 45 b; 6 Co. R. 35 a; 1 Roll. Abr. 849.

(*g*) Bac. Abr. tit. Leases (L. 2); Co. Lit. 45 b; 1 Leon. 86; Plowd. 6, 373, 524.

(*h*) Say *v.* Smith, Plowd. 271; Bishop of Bath's case, 6 Co. R. 35 b; Bac. Abr. tit. Leases (L. 3).

[1] **Certainty in duration of tenancies; not for years.** — Examples: "During the existence of said club," is sufficiently definite, Alexander *v.* Tolleston Club, 110 Ill. 65; for the season of 1855 is sufficient in lease of a

otherwise they will be void (*i*). So an agreement for a lease, or for an underlease, must mention the term, and from what day it is to commence, otherwise it will not be sufficient to satisfy the Statute of Frauds (*k*). A demise may be made for "one year certain, and so on from year to year," and such demise will create a tenancy for two years at the least (*l*). So a demise may be made "for six months, and so on from six months to six months until determined by either party," and such demise will create a tenancy for one year at the least (*m*). So a demise may be made from two years to two years, or from three years to three years, or the like (*n*). So a lease may be made for seven years, and afterwards from year to year (*o*), but an agreement to let from year to year, and for so long as the tenant pays rent, and the landlord has power to let, confers no particular estate beyond a tenancy from year to year (*p*). An instrument, by which A. agreed to let and B. to take certain premises, on the terms that B. should pay certain specified sums varying in amount at the end of every three years up to a specified date, and which provided that from and after that date "*he should pay the clear annual rental of 9l. till the end of the lease*," without mentioning any period at which the lease was to terminate,

(*i*) Bac. Abr. tit. Leases (L. 3).

(*k*) Bayley *v.* Fitzmaurice, 9 H. L. Cas. 78; and *ante*.

(*l*) Doe *d.* Chadborn *v.* Green, 9 A. & E. 658; Doe *d.* Monck *v.* Geeckie, 5 Q. B. 841; 1 C. & K. 307.

(*m*) Reg. *v.* Chawton, 1 Q. B. 247.

(*n*) Hennings *v.* Brabason, 2 Lev. 45; Roe *d.* Bree *v.* Lees, 2 W. Blac. 1171; 3 Prest. Conv. 76. And see Richards *v.* Sely, 2 Mod. 80; 3 Keb. 638.

(*o*) Brown *v.* Trumper, 26 Beav. 11.

(*p*) Wood *v.* Beard, L. R., 2 Ex. D. 30; 46 L. J., Q. B. 100; 35 L. T. 866.

ferry, on Miramichi River, and lease terminates when the river freezes, Fraser *v.* Drynan, 4 Allen (N. B.) 74; lease for "so long as the lessee, his heirs, and assigns shall keep the furnace and buildings on the premises" continues till lessee abandons, and he may rebuild after a fire, Cook *v.* Bisbee, 18 Pick. (Mass.) 527; lease for whole time that lessee remains postmaster terminates with expiration of his commission as postmaster, Easton *v.* Mitchell, 21 Ill. App. 189; lease until premises are sold, and ninety days notice given, expires upon sale and notice, Dunn *v.* Jaffray, 36 Kan. 408; lease of premises for so long as they shall be used for particular purpose terminates when they are no longer used for such purpose, Horner *v.* Leeds, 25 N. J. L. 106, 115; Hurd *v.* Cushing, 7 Pick. (Mass.) 169, 170, 174; during the continuance of a partnership expires with close of partnership, Russell *v.* McCartney, 21 Mo. App. 544.

was held good only for the time previous to the date at which the 9*l.* was to commence (*q*).

Certainty with reference to collateral matters. — If a man grant another a lease of land for ten years, and that if at the end of every ten years he shall pay the lessor a certain quantity of tiles, then he shall have a perpetual demise of the land from ten years to ten years continually following:[1] this is a good lease for ten years only, and bad as to the rest for uncertainty (*r*). If a man make a lease for years, without saying how many, it is a good lease for two years certain; because for more there is no certainty, and for less there can be no sense in the words (*s*); but if a man lease lands for such a term as both parties shall please, it is but a lease at will (*t*). A tenancy from year to year is determinable at the end of the first as well as of any subsequent year, unless in creating such tenancy the parties use words showing that they contemplate a tenancy for two * years [*155] at least (*u*). If premises are taken "for twelve months certain, and six months' notice to quit afterwards," the tenancy may be determined at the end of the first year by a six months' previous notice to quit (*x*). A lease for one year and so on from year to year until the tenancy thereby created should be determined as after mentioned, with a provision that either party might determine the

(*q*) Gwynne *v.* Maynestone, 8 C. & P. 302.

(*r*) Say *v.* Smith, Plowd. 271.

(*s*) Bishop of Bath's case, 6 Co. R. 35; Bac. Abr. tit. Leases (L. 3).

(*t*) Bac. Abr. tit. Leases (L. 3); Bishop of Bath's case, *supra*; Com. Dig. Estates (H. 1); Richardson *v.* Langridge, 4 Taunt. 128; Cole Ejec. 448.

(*u*) Doe *d.* Clarke *v.* Smaridge, 7 Q. B. 957; Doe *d.* Plumer *v.* Nainby, 10 Q. B. 473; Bac. Abr. tit. Leases (L. 3); Agard *v.* King, Cro. Eliz. 775; Legg *v.* Strudwick, 2 Salk. 414; Denn *d.* Jacklin *v.* Cartwright, 4 East, 29, 32; Harris *v.* Evans, 1 Wils. 262, Birch *v.* Wright, 1 T. R. 380.

(*x*) Thompson *v.* Maberly, 2 Camp. 573.

[1] **Perpetual leases.** — A perpetual lease is a fee. Effinger *v.* Lewis, 32 Pa. St. 367 (*per* Lowrie, C. J.). A lease for a hundred years to one and his heirs and assigns, and as much longer as he and they think proper, at annual rent of 3£ with leave to surrender, is a fee determinable at will of lessee only. Effinger *v.* Lewis, *supra*.

A lease for such term as lessee pays rent with covenant to pay every year, no limit being given, is a perpetual lease determinable at will of lessor only upon forfeiture. Folts *v.* Huntley, 7 Wend. (N. Y.) 210.

tenancy by three months' notice, creates a tenancy for two years certain (*y*). A demise for a year, and so from year to year, is a lease for two years certain at least (*y*); so if a parson make a lease for a year, and so from year to year as long as he shall continue parson, or as long as he shall live; this is a lease for two years at least, if he live or continue parson so long (*z*). So a lease for "the term of six months from the 1st of January, and so on for six months to six months," until six calendar months' notice is given, the first payment of rent to be on the 1st of July, is a tenancy for twelve calendar months at least (*a*).

Lease until premises required to be pulled down. — Where a railway company let premises on a weekly tenancy, with a collateral agreement that the tenant might have them until the company required to pull them down, it was held that the company, on requiring the premises for their own occupation, and not to pull them down, might determine the tenancy at a week's notice (*b*).

Lease so long as rent paid, and landlord in possession. — An agreement that the tenant shall not be disturbed so long as the rent is paid and the landlord remains in possession creates a tenancy during the joint continuance of the life of the tenant and the estate of the landlord (*c*).

Where there is an optional number of years fixed. — A lease "for seven, fourteen or twenty-one years, as the lessee shall think proper," is a good lease for at least seven years, and not void for uncertainty (*d*). A lease made in 1775, for "three, six or nine years, determinable in 1788, 1791 or 1794," is a good lease for nine years, determinable at the end of three or six years (*e*). But the lessee alone has the option to determine such lease at the earlier periods, on the ground that every doubtful grant must be construed in

(*y*) Doe *d.* Chadborn *v.* Green, 9 A. & E. 658; Doe *d.* Monk *v.* Geeckie, 5 Q. B. 841; 1 C. & K. 307.

(*z*) Bac. Abr. tit. Leases (L. 3).

(*a*) Reg. *v.* Chawton, 1 Q. B. 247; Simpson *v.* Margitson, 11 Q. B. 23.

(*b*) Cheshire Lines Committee *v.* Lewis, 50 L. J., Q. B. 121; 44 L. T. 293.

(*c*) Wood *v.* Davis, 6 L. R., Ir. 50.

(*d*) Ferguson *v.* Cornish, 2 Burr. 1032.

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

favour of the grantee (*f*). The usual form of making such leases at present is to insert the full term in the habendum, and add a proviso at the end for one or either of the parties to put an end to the *term at the shorter [*156] periods. If the option be given expressly to each party, the lease may be determined by either, or by his representative entitled to the reversion or term (*g*); and where the option was given to the respective parties, their executors and administrators, it was held that the devisee of the lessor might determine the lease (*h*). But where the lease contained a proviso that if either of the parties, their respective heirs or executors, should wish to put an end to the term at the end of seven or fourteen years, six months' notice in writing should be given under "his or their respective hands," and the lessor died, leaving three executors; it was held, that a notice signed by two of them only, although given on behalf of themselves and the other executor, was not a good notice within the terms of the proviso (*i*). A lease for twenty-one years expressed to "be determinable nevertheless in seven or fourteen years if the said parties hereto shall so think fit," is determinable only by consent of *both* the parties, although it may have been their intention to give the option to either of them (*k*). The notice must end with the first seven or fourteen years (or other stipulated period), according to the terms of the proviso, and not at any other time (*l*). It must not end *at noon* on the right day (*m*). Sometimes it is made a condition precedent that the tenant shall not only give the above notice, but also duly pay all the rent, and perform all the covenants on his part, to the termination of the notice (*n*). Such a condition is unrea-

(*f*) Dann *v.* Spurrier, 3 B. & P. 399; Doe *d.* Webb *v.* Dixon, 9 East, 15; Price *v.* Dyer, 17 Ves. 356; Cole Ejec. 398.

(*g*) Goodright *v.* Mark, 4 M. & S. 30; Bird *v.* Baker, 1 E. & E. 12.

(*h*) Roe *d.* Bumford *v.* Hayley, 12 East, 464.

(*i*) Right *d.* Fisher *v.* Cuthell, 5 East, 491; Doe *d.* Aslin *v.* Summersett, 1 B. & Ad. 135, 141.

(*k*) Fowell *v.* Frank, 3 H. & C. 458; 34 L. J., Ex. 6.

(*l*) Cadby *v.* Martinez, 11 A. & E. 720; Bird *v.* Raker, 1 E. & E. 12; 28 L. J., Q. B. 7; Cole Ejec. 398.

(*m*) Page *v.* More, 15 Q. B. 684.

(*n*) See, for instance, Parker *v.* Shepard, 6 L. T. 665.

sonable, and ought to be objected to in the first instance (*o*). A lease for three, seven or ten years, determinable on notice, stipulated that a quarter's rent should be paid by the tenant on taking possession, the same to be allowed him for the last quarter's rent "on the determination of the said tenancy;" after a notice to determine the lease at the expiration of the third year had been given, and before its expiration, the parties verbally agreed that the party should continue tenant for another year, no express mention being made of the terms of the tenancy; it was held, that the tenant continued to hold subject to the terms of the original lease, and consequently that the payment on taking possession was applicable to the last quarter of the fourth year (*p*).

Where there is a recurring number of years. — If a lease be made for twenty-one years, with a further covenant by the lessor, "that the lessee shall have the same for twenty-one years more after the expiration of the said term, and so from twenty-one * years to twenty-one years, until ninety-nine years thence next ensuing shall be complete and ended," the first twenty-one years are not to be reckoned part of the ninety-nine years (*q*). Where one made a lease for three years, and so from three years to three years until ten years should be expired, it was held to be a lease but for nine years, and that the odd year should be rejected, because that could not come to fall within any three entire years, according to the limitation (*r*). Where there was a demise of freehold and copyhold lands at an entire rent, to hold so much as was freehold for twenty-one years and so much as was copyhold for three years, and there was a covenant for renewal of the lease of the copyhold every three years toties quoties during the twenty-one years under the like covenants; and that in the meantime, and until such new leases should be executed, the lessee should hold the said lands, as well copyhold as freehold, &c.; it was held, that this was only a lease of the copyhold for three years,

[*157]

(*o*) Cole Ejec. 397.
(*p*) Finch *v.* Miller, 5 C. B. 428.
(*q*) Manchester College *v.* Trafford, 2 Show. 31.
(*r*) Bac. Abr. tit. Leases (L. 3); Plowd. 272, 522 a.

and that the lessor, after the three years, might recover the premises in ejectment against the lessee, there not having been any fresh lease granted (*s*).

Where the term depends on a contingency. — Sometimes a term is limited conditionally, ex. gr. for ninety-nine years if the lessee or some other persons therein named shall so long live (*t*). Where one made a lease for forty years, "if his wife *or* any of their issue should so long live;" it was adjudged that the lease was not determined by the death of one of them, but should continue till all were dead, by reason of the disjunctive *or*, which goes to and governs the whole limitation; but if the words had been "if his wife *and* issue should so long live," there clearly, by the death of any of them within the forty years, the term had been at an end, by reason of the copulative *and*, which conjoins all together, and makes all their lives jointly the measure of the estate (*u*). If a lease be made to two for years, if they should so long live, it would determine by the death of one of them, because their life is but a collateral condition and limitation of the estate, which therefore is broken when one dies: this differs therefore from a lease to two persons for their lives, for that gives an estate to both for their lives, and both have an estate of freehold therein in their own right; which consequently cannot determine by the death of one of them, for then the other could not be said to have an estate for his life, as the lessor at first gave it (*x*). A lease made for twenty-one years if the lessee should live so long and continue in the lessor's service, has been held not to determine on the * lessor's death (*y*). If a lease be made for a [*158] certain number of years, providing the lessee shall so long continue to occupy the premises personally, it will cease and determine whenever he parts with the possession, even by compulsion of law (*z*). If a lease be made to J. S.

(*s*) Fenny *d.* Eastham *v.* Child, 2 M. & S. 255.

(*t*) Hughes and Crowther's case, 13 Co. R. 66; Brudnell's case, 5 Co. R. 9 a; Cole Ejec. 402.

(*u*) Co. Lit. 225 a; Ld. Vaux's case, Cro. Eliz. 269.

(*x*) Bac. Abr. tit. Leases (L. 4); Roll. Rep. 309.

(*y*) Wrenford *v.* Gyles, Cro. Eliz. 643; Noy, 70; Cole Ejec. 402.

(*z*) Doe *d.* Lockwood *v.* Clarke, 8 East, 185.

for twenty years, if the coverture between A. and B. shall so long continue; this is a good lease for twenty years although the dissolution of the coverture may determine it sooner (*a*). But a lease to one generally during the coverture of A. and B. would create but a tenancy at will, by reason of the uncertainty of the duration of the coverture (*b*). Where a lease for years is made to A. and B., if they should so long live; or to A., if he and B. should so long live; or if the lessor and lessee, or the lessor and J. S. should so long live: in any of these cases, if one die the lease is determined (*c*). If a lease be made during the minority of J. S., or until J. S. shall come to the age of twenty-one years, these are good leases (*d*); and if J. S. die before he come to his full age the lease is ended: so, if a man make a lease for twenty-one years, if J. S. live so long (*e*), or if J. S. shall continue to be parson of Dale so long; these and such like leases are good (*f*). If A. makes a lease to B. for so many years as A. and B. or either of them shall live, not naming any certain number of years: or, if the parson of Dale make a lease of his glebe for so many years as he shall be parson there; this is not certain, neither can it be made so by any means; and yet if a parson shall make a lease from three years to three years, so long as he shall be parson, this is a good lease for six years, if he continue parson so long, and for the residue is void for uncertainty (*g*).

A covenant in a lease for lives that the lease is good for the lives mentioned therein has been held not to warrant the subsistence of such lives (*h*).

Sect. 7. — *Reddendum.*

What things are requisite in a reservation. — The reddendum or reservation of rent is a clause in the lease, whereby the

(*a*) Say *v.* Smith, Plowd. 273.

(*b*) Bac. Abr. tit. Leases (L. 3).

(*c*) Brudnell's case, 5 Co. R. 9 b; Daniel *v.* Hill, Cro. Jac. 377; 1 Roll. R. 197; Bailes *v.* Wenman, 2 Ventr. 74.

(*d*) Bishop of Bath's case, 6 Co. R. 35; Boraston's case, 3 Co. R. 19; Whittome *v.* Lamb, 12 M. & W. 813.

(*e*) Wright *v.* Cartwright, 1 Burr. 2.

(*f*) Bac. Abr. tit. Leases (L. 2, 3).

(*g*) Bac. Abr. tit. Leases (L. 3).

(*h*) Coates *v.* Collins, L. R., 7 Q. B. 144; 40 L. J., Q. B. 157. See 136, *ante.*

lessor reserves some new thing to himself out of that which he granted before; and this commonly and properly succeeds the habendum, and is usually made by the words "yielding and paying," or similar expressions. In every good reservation these *things must always occur: — 1. [*159] It must be by certain and apt words (*i*). 2. It must be of some other thing issuing or coming out of the thing granted, and not a part of the thing itself, nor of something issuing out of another thing (*k*). 3. It must be of such a thing whereunto the grantor may have resort to distrain. 4. It must be made to one of the grantors, and not to a stranger to the deed (*l*). But the usual formal reddendum in a lease is not essential. This subject is more fully treated of hereafter (*m*).

Sect. 8. — *Express Covenants and Agreements.*

(b) *Generally.*

What a covenant is generally. — A covenant is either expressed or implied — it subsists either in fact or in law. An express covenant is a stipulation in a *deed* that something has or has not been done, or that something shall or shall not be done, or that some right or power then exists, or the like. An implied covenant, or a covenant in law, is that which the law implies, though not expressed by words (*n*). He who makes the covenant is called the covenantor, and he to whom it is made the covenantee (*o*). By 8 & 9 Vict. c. 106, s. 5, "the benefit of a condition or covenant respecting any tenements or hereditaments may be taken, although the taker thereof be not named as a party to the same indenture" (*p*). Before this enactment, when a deed was made inter partes, no one who was not expressed to be a

(*i*) Parker *v.* Harris, 4 Mod. 76; 1 Salk. 262.

(*k*) Doe *d.* Douglas *v.* Lock, 2 A. & E. 705.

(*l*) Doe *d.* Barber *v.* Lawrence, 4 Taunt. 23.

(*m*) Chap. X., Sect. 2, and see Smith L. & T. 111 — 121 (2nd ed.).

(*n*) *Post*, Sect. 9.

(*o*) Shep. Touch. 160; 2 Blac. Com. 304.

(*p*) *Ex parte* Cockburn, *re* Smith, 12 W. R. 184.

party could sue on a covenant contained in it; and this was not a mere rule of construction but a rule of positive law (*q*). A covenant is valid and binding although indorsed on the deed after the signing, but before the sealing and delivery (*r*).

By what words covenants may be made. — No particular technical words are requisite towards making a covenant (*s*); for any words or form of expression which import an agreement, or show the party's concurrence in the performance of a future act, or the intention of the parties mutually to contract, will suffice for that purpose (*t*). Thus, "yielding and paying," &c. [*160] * amount to a covenant, on which an action lies for non-payment (*u*); so yielding and paying such a rent "free and clear of all manner of taxes, charges, and impositions whatsoever, is a covenant to pay the whole rent discharged of all taxes before or afterwards imposed (*x*). The words "provided always, and it is hereby agreed and declared that," &c. create a covenant (*y*), and so do the words "provided always, and these presents are upon the express condition that," &c. (*z*).

Construction of covenants. — All contracts are to be construed according to the intent of the parties, as expressed by their own words (*a*); and if there be any doubt upon the sense of the words, such construction shall be made as is most strong against the covenantor, lest by the obscure wording of his contract he should find means to evade and elude it (*b*). There is, however, a distinction between im-

(*q*) Chesterfield and Midland Silkstone Colliery Co. *v.* Hawkins, 3 H. & C. 677; 11 Jur., N. S. 468.

(*r*) Lyburn *v.* Warrington, 1 Stark. 162; Reg. *v.* Aldborough, 13 Q. B. 196; Broke *v.* Smith, Moor. 679.

(*s*) Stephenson's case, 1 Leon. 324; 12 East, 182, n.; Smith L. & T. 121 (2nd ed.).

(*t*) Bush *v.* Coles, Carth. 232; Duke of St. Albans *v.* Ellis, 16 East, 352; Sampson *v.* Easterby, 9 B. & C. 505; Cannock *v.* Jones, 3 Exch. 233; Wood *v.* Copper Miners' Co., 7 C. B. 906.

(*u*) Hellier *v.* Casbard, 1 Sid. 266; Porter *v.* Swetnam, Styles, 406; Smith L. & T. 96 (2nd ed.).

(*x*) Giles *v.* Hooper, Carth. 135.

(*y*) Bac. Abr. tit. Covenant (A.).

(*z*) Brooks *v.* Drysdale, L. R., 3 C. P. D. 52; *ante*, p. 113 (*e*).

(*a*) Com. Dig. tit. Covenant (E. 2); Plowden, 329; Iggulden *v.* May, 7 East, 241; Smith L. & T. 122 (2nd ed.).

(*b*) Bac. Abr. tit. Covenant (F.).

plied covenants and express covenants, namely, that the latter are to be taken more strictly (*c*).

Joint or several. — In preparing covenants entered into with several persons, it should be made clear whether it is intended to be a separate covenant with each person, as well as a joint covenant with the whole: and whether a covenant be joint or several (when the words used admit of either construction) depends upon the words used, the subject-matter of the covenant, and the interest which passes thereby (*d*). If the words of the covenant are expressly and clearly joint, the covenant will be so secured, although the interest is several;[1] and vice versâ (*e*). If the words used admit of two constructions, and the interest of the covenantees is joint, the covenant will be construed as joint (*f*): but if the interest of the covenantees is several, the covenant will be construed as several (*g*). Where A. by lease demised a house and land to B. and C. for a term of years at 16*l*. per annum, with a covenant by them jointly and severally to pay taxes and rates, &c., but none to pay rent; and B. occupied the whole premises, and paid the rent for five years; it was held that the demise being joint, the rent was payable by the two jointly (*h*).

(*c*) Shubrick *v.* Salmond, 3 Burr. 1639.

(*d*) Slingsby's case, 5 Co. R. 18 b; 3 Ch. R. 126; Duke of Northumberland *v.* Errington, 5 T. R. 522; Southcote *v.* Hoare, 3 Taunt. 89; Enys *v.* Donnithorne, 2 Burr. 1190.

(*e*) Sorsbie *v.* Park, 12 M. & W. 146; Keightley *v.* Watson, 3 Exch. 716; Lee *v.* Nixon, 1 A. & E. 201.

(*f*) Anderson *v.* Martindale, 1 East, 497; Foley *v.* Addenbrooke, 4 Q. B. 197; Pugh *v.* Stringfield, 3 C. B., N. S. 2; Hopkinson *v.* Lee, 6 Q. B. 964; Bradburne *v.* Botfield, 14 M. & W. 559.

(*g*) Withers *v.* Birchman, 3 B. & C. 54; James *v.* Emery, 2 Moo. 195; 5 Price, 529, 533; Servante *v.* James, 10 B. & C. 410; Mills *v.* Ladbrooke, 7 M. & G. 218; Poole *v.* Hill, 6 M. & W. 835; Harcourt *v.* Wyman, 3 Exch. 817; but see Thompson *v.* Hakewill, 19 C. B., N. S. 713; 35 L. J., C. P. 18; Wilkinson *v.* Hall, 1 Bing. N. C. 713.

(*h*) Rex *v.* Great Wakering, 5 B. & Ad. 971; see also Levy *v.* Sale, 37 L. T. 760.

[1] Covenants of lessees' (tenants in common), if there are no words severing their liability, are joint, and the survivor is solely liable for rent. White *v.* Tyndall, 13 App. Cas. 263, reversing 20 L. R. Ir. 517, and restoring 18 L. R. Ir. 263. The covenant was "for themselves, their executors, administrators, and assigns, that they the said G. & A. or some, or one of them, their executors, administrators and assigns" would pay, &c.

[*161] ***Lessee liable, notwithstanding assignment.** — The lessee has both a privity of contract and a privity of estate; and though he assigns, and thereby assigns the privity of estate, yet the privity of contract continues, and he is liable in covenant notwithstanding the assignment (*i*):[1] but the assignee comes in only in privity of estate, and is therefore liable to the lessor and his assigns only on those covenants which run with the land and for those breaches which occur during the continuance of such privity of estate, and before he assigns over (*k*).[2] But he continues liable to his immediate assignor, his executors or administrators, upon any express covenant by him in the deed of assignment, for payment of the rent and performance of the covenants contained in the original lease (*l*). If a covenant by two lessees be joint and several, it binds the executors of the deceased lessee, although the whole term, interest and benefit survived to the other lessee (*m*).

What covenants void. — A covenant to do a thing which

(*i*) Eaton *v.* Jacques, 2 Doug. 455; Chancellor *v.* Poole, 2 Doug. 764; Orgill *v.* Keamshead, 4 Taunt. 642; 1 Smith L. C. 77 (7th ed.).

(*k*) Harley *v.* King, 5 Tyr. 692; Taylor *v.* Shum, 1 B. & P. 21; Le Keux *v.* Nash, 2 Stra. 1122; Odell *v.* Wake, 3 Camp. 394; Onslow *v.* Corrie, 2 Madd. 330.

(*l*) Harris *v.* Goodwyn, 2 M. & Gr. 405; 9 Dowl. 409; Burnett *v.* Lynch, 5 B. & C. 589; Wolveridge *v.* Steward, 1 Cr. & Mec. 644.

(*m*) Enys *v.* Donnithorne, 2 Burr. 1190, 1197.

[1] The lessee continues liable after assignment upon all his express covenants. Walton *v.* Cronly, 14 Wend. (N. Y.) 63, 64 (*per* Sutherland, J.); Farmers' Bank *v.* Mut. Ass. Society, &c., 4 Leigh (Va.) 69, 84 (*per* Tucker, J.); Wall *v.* Hinds, 4 Gray (Mass.) 256 (liable for rent and taxes); Babington *v.* O'Connor, 20 L. R. Ir. 246 (liable for rent).

Debt, however, does not lie against him for rent, but covenant, and the lessee has a remedy over against the assignee in assumpsit. Fletcher *v.* M'Farlane, 12 Mass. 43.

[2] The assignee is liable to the lessor or his assignee directly upon all covenants which run with the land. Provost *v.* Calder, 2 Wend. (N. Y.) 517 (in this case to lessor's devisee); Boyce *v.* Bakewell, 37 Mo. 492; Berry *v.* M'Mullen, 17 Serg. & R. (Pa.) 84.

His liability is terminated by assigning over except for breaches prior thereto. Childs *v.* Clark, 3 Barb. Ch. (N. Y.) 52, 60, 61; Farmers' Bank *v.* Mut. Asso. Society, &c., 4 Leigh (Va.) 69, 83, 84; Weidner *v.* Foster, 2 Penn. 23, 26 (*per* Rogers, J.); Wickersham *v.* Irwin, 14 Pa. St. 108.

He is not liable for breaches occurring prior to taking assignment. Thomas *v.* Connell, 5 Pa. St. 13.

upon the face of it appears to be prejudicial to the public interest, or otherwise contrary to law, is absolutely void (*n*).

For illegality. — On this principle it was held that neither the covenant to pay rent, nor any other covenant in a lease expressed to be made for the purpose of the premises being used to boil oil and tar, contrary to the provisions of a Building Act, could be enforced against the lessee (*o*).

Covenant for impossibility, &c. — A covenant to do a thing which is impossible is void, if the impossibility exist at the time of making the covenant, but not otherwise (*p*). A covenant in a lease to repair *during the term* does not take effect where the lessor does not execute the lease (*q*). A lessee is not liable for the breach of a covenant committed before the execution of the lease, but subsequently to the day from which by the habendum the term was to commence (*r*). Where a covenant is founded on a conveyance of an estate which proves to be void, and no estate passes, the covenant is void also: thus, where the conveyance was "a grant of so much of a term as should be unexpired at the death of A.," and there was a covenant for quiet enjoyment, and a bond for performance; the *conveyance [*162] being void on account of the uncertainty of the time when the term was to commence and end, the covenants were adjudged to be void, as they depended on the estate (*s*): but although this is the case with respect to all dependent covenants, it is otherwise of covenants which are independent (*t*).

(*n*) Collins *v.* Blantern, 1 Smith L. C. 369 (7th ed.).

(*o*) Gas Light Co. *v.* Turner, 5 Bing. N. C. 666; 6 Id. 324.

(*p*) Shep. Touch. 163. See Hall *v.* Wright, E. B. & E. 746; 27 L. J., Q. B. 345; Appleby *v.* Myers, L. R., 2 C. P. 651; 36 L. J. C. P. 331; 16 L. T. 669.

(*q*) Pitman *v.* Woodbury, 3 Exch. 4; Linwood *v.* Squire, 5 Exch. 234; Wheatley *v.* Boyd, 7 Exch. 20; Swatman *v.* Ambler, 8 Exch. 72; 22 L. J. Exch. 81.

(*r*) Shaw *v.* Kay, 1 Exch. 412; Jervis *v.* Tompkinson, 1 H. & N. 195, 206; Bird *v.* Baker, 1 E. & E. 12; 28 L. J., Q. B. 7; Browne *v.* Burton, 5 D. & L. 289; Steele *v.* Mart, 4 B. & C. 272.

(*s*) Capenhurst *v.* Capenhurst, Sir T. Raym. 27; Hayne *v.* Maltby, 3 T. R. 438; Co. Lit. 456.

(*t*) Northcote *v.* Underhill, 1 Salk. 199; 1 Ld. Raym. 380.

(b) *Covenants, whether "Running with Land."*

Meaning of "Running with Land." — Covenants are either real or personal; the former are such as are annexed to an estate, or are to be performed on it, and are said to "run with the land," so that he who has the one is subject to the other. A covenant is said to run with the land when either the liability to perform it, or the right to take advantage of it, passes to the assignee of that land.[1] A covenant is said to run with the reversion when either the liability to perform it, or the right to take advantage of it, passes to the assignee of that reversion (*u*). Covenants which run with the land bind those who come in by act of law, such as the personal representatives of the assignee of a lessee, as well as those who come in by act of the parties (*x*); for the personal representatives of a lessee for years are his assigns (*y*). Covenants which run with the land therefore bind the assigns, although not mentioned.[2] But in preparing covenants which are intended to run with the land, the "assigns" should always be mentioned, for though some covenants will bind them although not mentioned, and others will not bind them although mentioned, yet there is a middle class, in which assignees are bound if mentioned, but not otherwise, and it is prudent to provide for the possibility of a covenant being held to belong to this class.[2]

(*u*) Spencer's case, 1 Smith L. C. 60 (7th ed.).
(*x*) Esp. N. P. 290.
(*y*) Hornidge *v.* Wilson, 11 A. & E. 645; Wollaston *v.* Hakewill, 3 M. & G. 297; Hopwood *v.* Whaley, 6 C. B. 744; 6 D. & L. 342; Collins *v.* Crouch, 13 Q. B. 542.

[1] **Covenants real** (relating to things *in esse* at the time of demise) run with the land (or the reversion), and may be enforced by (or against) assignees, whether named or not. Verplanck *v.* Wright, 23 Wend. (N. Y.) 506, 511 (*per* Nelson, Ch. J.); Hunt *v.* Danforth, 2 Curt. C. C. 592; Ecke *v.* Fetzer, 65 Wis. 55; *In re* Haisley, 44 U. C. 344, 347, 348; Berrie *v.* Woods, 12 Ont. 693 (*per* Boyd, C.); Norman *v.* Wells, 17 Wend. (N. Y.) 136 (they *were* however named in this case); Watertown *v.* Cowen, 4 Paige (N. Y.) 510, 514; Thompson *v.* Rose, 8 Cow. (N. Y.) 266, 269 (*per* Sutherland, J.).

[2] **Covenants strictly personal** are non-assignable. Landen *v.* McCarthy, 45 Mo. 106. An example of a strictly personal covenant is the covenant of seizin in a warranty deed. This is broken immediately, if at all,

All implied covenants run with the land (*z*), but with regard to express covenants some little uncertainty has prevailed. The general rules (*a*) appear to be that (1) an assignee, whether of the reversion or the term, can, although not named in the covenant, avail himself of those covenants which touch and concern the thing demised; (2) that of such covenants, those which concern something not in being at the time of the demise, bind the assignees if named, but otherwise not; and (3) that covenants which do not concern the thing demised, but are personal between the covenanting parties, do not bind assignees in any case.

* It seems that in equity the question whether [*163] assignees are bound turns on the doctrine of notice, so that by the effect of the Judicature Act it will, if the facts admit of it, be immaterial whether a particular covenant run with the land or not (*b*). This doctrine, which applies in cases arising out of the relation between vendor and purchaser in restrictive covenants only (*c*), may perhaps be held to apply to affirmative covenants also in cases arising out of the relation between landlord and tenant (*d*).

What covenants run with the land. — The following covenants seem to run with the land, so as to bind the assignee, whether of the reversion or the term, although not named: [1]

(*z*) As to implied covenants, see Sect. 9, *post*.

(*a*) See Spencer's case, 1 Sm. L. C. 60 (7th ed.); Smith L. & T. 388; Fawcett L. & T. 247.

(*b*) See Tulk *v.* Moxhay, 2 Ph. 774; Wilson *v.* Hart, L. R., 1 Ch. 463, and like cases discussed, 1. Sm. L. C., 7th ed. 94 (A.D. 1876).

(*c*) Haywood *v.* Brunswick Permanent Benefit Building Society, L. R., 8 Q. B. D. 403 — C. A.

(*d*) See *per* Lindley, L. J., Ib.

and does not pass to an assignee. It cannot run with the land, for there is no land for it to run with. See cases cited *post;* note to Personal Covenants.

Covenants not strictly personal (relating to things not in being, but afterward to arise), though assignable, are personal unless an intention to bind assignees is expressed. Tallman *v.* Coffin, 4 N. Y. 134, 136; Thompson *v.* Rose, 8 Cow. (N. Y.) 266, 269; Appeal of Winton, 111 Pa. St. 387, 403; Hansen *v.* Meyer, 81 Ill. 321.

[1] The following covenants have been held to run with the land, to wit: covenant to pay rent, Stewart *v.* L. I. R. R. Co., 102 N. Y. 601; Demarest *v.* Willard, 8 Cow. (N. Y.) 206; Allen *v.* Culver, 3 Denio (N. Y.) 284; Willard *v.* Tallman, 2 Hill (N. Y.); Fletcher *v.* M'Farlane, 12 Mass. 43; Wall *v.* Hinds, 4 Gray (Mass.) 256, 266 (*per* Bigelow, J.); Boyce *v.* Bakewell, 37 Me.

— A covenant to pay rent (*e*) or taxes, or to repair (*f*), or to leave in repair (*g*): to maintain a sea wall in esse (*h*): to repair, to renew and replace tenant's fixtures and machinery

(*e*) Parker *v.* Webb, 3 Salk. 5.

(*f*) Dean and C. of Windsor's case, 5 Co. R. 24; Conan *v.* Kemise, W. Jon. 245; Smith *v.* Arnold, 3 Salk. 4; Martyn *v.* Clue, 18 Q. B. 661; 22 L. J., Q. B. 147.

(*g*) Vin. Abr. Covenant (K. 19); Doe *d.* Strode *v.* Seaton, 2 C., M. & R. 730; Martyn *v.* Clue, *supra* (last point).

(*h*) Morland *v.* Cook, L. R., 6 Eq. 212, 267; 37 L. J., Ch. 825.

492; Provost *v.* Calder, 2 Wend. (N. Y.) 517; Berry *v.* M'Mullen, 17 S. & R. (Pa.) 84; Weidner *v.* Foster, 2 Penn. 23; Hannen *v.* Ewalt, 18 Pa. St. 9; Salisbury *v.* Shirley, 66 Cal. 223; Allenspach *v.* Wagner, 9 Col. 127, 132; Verplanck *v.* Wright, 23 Wend. (N. Y.) 506, 511 (*per* Nelson, Ch. J.); to pay taxes, Salisbury *v.* Shirley, 66 Cal. 223; to repair, Verplanck *v.* Wright, 23 Wend. 506, 511 (*per* Nelson, Ch. J.); Allen *v.* Culver, 3 Denio (N. Y.) 284; Crawford *v.* Bugg, 12 Ont. 8; Thompson *v.* Rose, 8 Cow. (N. Y.) 266, 269 (*per* Sutherland, J.); Lametti *v.* Anderson, 6 Id. 307, 308; to pay for buildings then on premises, or afterward to be erected to replace them, *In re* Haisley, 44 Upper Canada, 345, 347, 349; to pay for permanent improvements, Berrie *v.* Woods, 12 Ont. 693 (heirs and assigns were named, but (*per* Boyd, C.) *semble* if they had not been named); Lametti *v.* Anderson, 6 Cow. (N. Y.) 302; Ecke *v.* Fetzer, 65 Wis. 55; or for new erections, Hunt *v.* Danforth, 2 Curt. C. C. 592 (the court holding that the covenant touched the thing demised); but in Thompson *v.* Rose, 8 Cow. 266, 269, it was held that a covenant to pay for buildings to be erected would not bind the lessor's assignee unless named, and (*per* Savage, Ch. J., in Lametti *v.* Anderson, 6 Cow. (N. Y.) 307, 308) a covenant to build a wall does not run with the land, ———; covenant not to sell timber off demised premises runs with land, Verplanck *v.* Wright, 23 Wend. (N. Y.) 506; also covenant not to build, Watertown *v.* Cowen, 4 Paige (N. Y.) 510, 514; and covenant not to let any other site on same stream for sawing mahogany, Norman *v.* Wells, 17 Wend. (N. Y.) 136; covenant to renew, Piggot *v.* Mason, 1 Paige (N. Y.) 412; covenant to grant purchase privilege, Napier *v.* Darlington, 70 Pa. St. 64; Kerr *v.* Day, 14 Pa. St. 112; covenant of warranty, Sprague *v.* Baker, 17 Mass. 585; Withy *v.* Mumford, 5 Cow. (N. Y.) 137; Suydam *v.* Jones, 10 Wend. (N. Y.) 180; Le Ray De Chaumont *v.* Forsythe, 2 Penn. 507; Wyman *v.* Ballard, 12 Mass. 304, 305, 306; Mitchell *v.* Warner, 5 Conn. 497, 521; covenant of quiet enjoyment, Markland *v.* Crump, 1 Dev. & Bat. (N. C.) 94; also (*per* Nelson, Ch. J., in Verplanck *v.* Wright, 23 Wend. (N. Y.) 506, 511) covenants for further assurance, to discharge lessor of charges ordinary and extraordinary, to cultivate lands in a particular manner, to reside upon the premises, to supply them with good water, and not carry on particular trades, &c.; covenant not to erect building on common in front of premises conveyed, Watertown *v.* Cowen, 4 Paige (N. Y.) 510; covenant that neither grantor nor his heirs shall make any claim to the land conveyed, Fairbanks *v.* Williamson, 7 Greenl. (Me.) 96.

All covenants which are conditions annexed to the estate run with the land, and bind the assignee. Verplanck *v.* Wright, 23 Wend. (N. Y.) 506, 511; Hunt *v.* Danforth, 2 Curt. C. C. 592, &c.

fixed to the premises (*i*): not to plough (*k*): to use the land in a husbandlike manner (*l*): to lay dung on the demised land annually (*m*): to reside on the demised premises during the term (*n*): to permit the lessor to have access to two rooms excepted from the demise (*o*): to carry all the corn produced on the demised land to the lessor's mill to be ground (*p*): to leave the land as well stocked with game at the end of the term as it was found to be at the beginning of it (*q*): to supply demised houses with good water (*r*): to repair, and pay ground rent (*s*): for quiet enjoyment (*t*): to produce title deeds (*u*): to make further assurance (*x*): to renew the lease (*y*): to endeavour to procure a renewal of the lease for another life (in an underlease by lessee for lives) (*z*): and to build a new smelting mill in lieu of an old one in a lease of mines (*a*).

* **To insure.** — There is also authority that the [*164] covenant to insure (*b*), the covenant not to assign or sublet without licence (*c*), and the covenant not to carry on a particular trade (*d*), run with the land.

(*i*) Williams *v.* Earle, L. R., 3 Q. B. 739.

(*k*) Cockson *v.* Cock, Cro Jac. 125.

(*l*) Walsh *v.* Watson, Esp. N. P. 295.

(*m*) —— *v.* Davis, MS. M. T., 42 Geo. 3.

(*n*) Tatem *v.* Chaplin, 2 H. Blac. 133.

(*o*) Cole's case, 1 Salk. 196, S. C. *sub nom.* Bush *v.* Coles, 1 Snow, 389; Carth. 232.

(*p*) Vyvyan *v.* Arthur, 1 B. & C. 410. See Hemingway *v.* Fernandes, 13 Sim. 228.

(*q*) Hooper *v.* Clark, L. R., 2 Q. B. 200; 36 L. J., Q. B. 79.

(*r*) Jourdain *v.* Wilson, 4 B. & A. 266.

(*s*) Martin *v.* Clue, *supra.*

(*t*) Lewis *v.* Campbell, 8 Taunt. 715; 3 Moo. 35, 51; Campbell *v.* Lewis (in error), 3 B. & A. 392; Noke *v.* Awder, Cro. Eliz. 375, 436.

(*u*) Barclay *v.* Raine, 1 Sim. & Stu. 449.

(*x*) Middlemore *v.* Goodhall, Cro. Car. 503; Kingdon *v.* Nottle, 4 M. & S. 53; King *v.* Jones, 5 Taunt. 418; 4 M. & S. 188.

(*y*) Isteed *v.* Stoneley, 1 Anderson, 82; Brooke *v.* Bulkeley, 2 Ves. jun. 498; Roe *v.* Hayley, 12 East, 464.

(*z*) Simpson *v.* Clayton, 4 Bing. N. C. 758; 6 Scott, 469.

(*a*) Sampson *v.* Easterby, 9 B. & C. 505; Easterby *v.* Sampson (in error), 6 Bing. 644; 1 C. & J. 105.

(*b*) Vernon *v.* Smith, 5 B. & A. 1. And see *post*, Chap. XVII., Sect. 1.

(*c*) Williams *v.* Earle, L. R., 3 Q. B. 739; 37 L. J., Q. B. 231.

(*d*) Mayor of Congleton *v.* Pattison, 10 East, 130. The *obiter dicta* of Lord Ellenborough and Bayley, J., seem to be in accordance with principle. In Wilson *v.* Hart, L. R., 1 Ch. 463, it was held that a tenant from year to year was bound by his landlord's covenant that no building to be erected should be used as a beer shop, although such covenant did not run

With regard to the covenant to insure against fire, it was held in Vernon *v.* Smith (*b*) to run with the land, or on the ground that the Building Act, 14 Geo. 3, c. 78, s. 83, in that case assumed to have a local application only, enables the landlord to have the insurance money laid out in rebuilding, so that the covenant was in effect a covenant to repair. The statute has since been held to have a general application (*e*), so that if the reasoning in Vernon *v.* Smith be correct, the covenant to insure runs with the land.

Not to assign without licence. — The covenant not to assign or sublet without licence was expressly held to run with the land in Williams *v.* Earle (*f*); but in the later case of West *v.* Dobb (*g*) (where the point arose, but did not require to be decided), Blackburn, J., who was one of the two judges who decided Williams *v.* Earle, pointed out that in that case assigns were named in the covenant, and seems to have wished to confine his judgment accordingly (*h*). However this may be, the covenant not to assign or sublet appears to concern the thing demised in relation to its state at the time of the demise, and consequently to bind assignees whether named or not (*i*).

To pay for improvements.[1] — It has been stated in many prior editions of this work that a "covenant by a lessor to pay on a valuation for all trees planted (*k*), was a personal covenant not running with the land, and for this, Grey *v.* Cuthbertson (*k*) was cited; but that case, which is very briefly repeated, seems to have been decided on the ground

with the land. See, too, Wilkinson *v.* Rogers, 2 De G., J. & S. 62.

(*e*) *Ex parte* Goreley, 34 L. J., Bank. 1. In Vernon *v.* Smith, the judgment of Best, J., proceeded independently of the statute.

(*f*) L. R., 3 Q. B. 739; 37 L. J., Q. B. 231.

(*g*) L. R., 4 Q. B. 634; 38 L. J., Q. B. 289.

(*h*) And see *per* Bayley, B., in Paul *v.* Nurse, 8 B. & C. 489, Doe *d.* Cheere *v.* Smith, 5 Taunt. 795; Bally *v.* Wells, 3 Wils. 33

(*i*) And see 2 Sm. L. C. at p. 77.

(*k*) Grey *v.* Cuthbertson, 4 Doug. 351; 2 Chit. R. 482; 1 Selw. N. P. 448.

[1] **Bind assignees if named.** — See Lametti *v.* Anderson, 6 Cow. (N. Y.) 307, 308 (*per* Savage, Ch. J.), Thompson *v.* Rose, 8 Id. 266, 269; Hunt *v.* Danforth, 2 Curt. C. C. 592; Ecke *v.* Fetzer, 65 Wis. 55; Berrie *v.* Woods, 12 Ont. 693; *In re* Haisley, 44 U. C. 345, 347, 349.

that assigns were not named in the covenant; and from the later case of Gorton *v.* Gregory (*l*) it may perhaps be inferred, though the point was not expressly decided, that a covenant to pay for improvements to be executed on the land, whether by the lessor or the lessee, runs both with the land and the reversion, if assigns be named; and this is borne out in principle by the important case of Mansel *v.* Norton (*m*), which is more fully noticed elsewhere (*n*).

* In Minshull *v.* Oakes, a covenant to repair and [*165] leave in repair (inter alia) all buildings which should or might be thereafter erected during the term on the demised premises was considered to be, not a covenant absolutely to do a new thing, but to do something conditionally, viz. if new buildings were erected on the demised premises during the term to repair them; and, as when built they would be part of the thing demised, it was held that the assignee was bound, although not named in the covenant (*o*). In this case the court expressed an opinion that the rule that the naming the assigns in the covenant will bind them in relation to a thing not in esse at the time of the demise, was neither laid down in Spencer's case nor consistent with reason. The rule, however, appears to have been recognized as good law in many other cases, both prior (*p*) and subsequent to (*q*) Minshull *v.* Oakes. And it seems to be consistent with reason that the naming of the assigns should vary the liability (*r*).

Personal covenants do not run with the land. — A covenant which is merely personal or collateral to the thing demised does not run with the land or the reversion, and therefore assignees are not bound even though they be expressly named. Of the nature of such personal covenants are these:[1] — A covenant by a lessee to replace chattels which

(*l*) See *post*, note (*s*).
(*m*) L. R., 22 Ch. D. (C. A.) 769.
(*n*) *Post*, Ch. XX., Sect. 5.
(*o*) 27 L. J., Ex. 194; 2 H. & N. 793.
(*p*) Sampson *v.* Easterby, 6 Bing. 644, Exch.; Doughty *v.* Bowman, 4 Q. B. 444; Greenaway *v.* Hart, 14 C. B. 340.
(*q*) Williams *v.* Earle, *ubi supra*; West *v.* Dobb, *ubi supra*.
(*r*) But see *contra*, 1 Sm. L. C. 76 (ed. 7).

[1] The following are held to be personal covenants, viz.: the covenants of seizin and against incumbrances. Mitchell *v.* Warner, 5 Conn. 497, 503;

should become damaged or be superseded by new machinery (*s*) (although it would have been otherwise in the case of a covenant to replace fixtures) (*t*): to give the lessee the option of pre-emption of a piece of ground adjoining the demised premises (*u*): not to sell hay, &c. (*v*): not to keep a beershop within a certain distance of the demised premises (*x*): a covenant to pay rent and repair, made *with a mortgagor* and his assigns, in a lease granted by himself together with the mortgagee (*y*): a covenant in an underlease, whereby the lessor covenanted to observe and indemnify the lessee against the covenants in the superior lease, one of which was to build several houses on the land (*z*): and a covenant by lessee for himself, his executors and assigns not to have persons to work in a mill to be erected on the demised premises who were settled in other parishes without a parish certificate (*a*).

Boxes in theatre. — Where the lessee of a theatre agreed to repay money lent to him by the plaintiff on a day cer-
[*166] tain, and that until payment the plaintiff and * such persons as he might appoint should have the free use of two boxes (not specified) and afterwards assigned his

(*s*) Gorton *v.* Gregory, 3 B. & S. 90; 31 L. J., Q. B. 302. Such a covenant would bind executors in their representative capacity.

(*t*) Ib. per Willes, J.

(*u*) Collison *v.* Lettsom, 6 Taunt. 224.

(*v*) Lybbe *v.* Hart, 54 L. J., Ch. 860, *per* Baggallay, L. J.

(*x*) Thomas *v.* Hayward, L. R., 4 Ex. 311; 38 L. J., Ex. 175.

(*y*) Webb *v.* Russell, 3 T. R. 393; Stokes *v.* Russell, Id. 678; Russell *v.* Stokes (in error), 1 H. Blac. 562.

(*z*) Doughty *v.* Bowman, 11 Q. B. 444.

(*a*) Mayor, &c., of Congleton *v.* Pattison, 10 East, 130; indirectly confirmed by Walsh *v.* Fussell, 6 Bing. 163.

Bickford *v.* Page, 2 Mass. 455; Greenby *v.* Wilcocks, 2 Johns. (N. Y.) 1, 5; Abbott *v.* Allen, 14 Id. 248; Kane *v.* Sanger, Id. 89, 93; Withy *v.* Mumford, 5 Cow. 137, 139 (*per* Savage, Ch. J.).

The following are personal (at least, unless assigns are named), viz.: to give first refusal of subsequent lease, Appeal of Winton, 111 Pa. St. 387, 403; to pay for fixtures to be erected, Hansen *v.* Meyer, 81 Ill. 321; to pay for improvements, Tallman *v.* Coffin, 4 N. Y. 134; for re-entry, Porter *v.* Merrill, 124 Mass. 534, 541.

Parol agreements, though binding upon parties charged with notice, do not run with the land. Wilder *v.* Maine Cent. R. R. Co., 65 Me. 332; St. L. A. & T. H. R. R. Co. *v.* Todd, 36 Ill. 409.

interest, it was held that this was a mere personal contract, and that no action could be maintained against the assignee for refusing to permit the plaintiff to use the boxes (*b*).

Personal chattels. — If sheep or other things personal be demised, a covenant by the lessee for himself and his assigns to deliver them up at the end of the term will not bind the assigns (*c*), and the same rule applies to a covenant to deliver up mere utensils and other things not fixed to the demised premises (*d*).

Condition for re-entry. — It may be added here that a condition for re-entry in case the lessee or his assigns become bankrupt runs with the land (*e*), but a condition for re-entry in case the lessee or his assigns be convicted of any offence against the game laws does not (*f*).

Operation of Conveyancing Act. — By the Conveyancing Act, ss. 10 and 11 (*g*), both the rent and benefit of every covenant both of lessee and lessor, "having reference to the subject-matter of the lease," run with the reversion. By the same act, s. 58: —

"(1.) A covenant relating to land of inheritance, or devolving on the heir as special occupant, shall be deemed to be made with the covenantee, his heirs and assigns, and shall have effect as if heirs and assigns were expressed.

"(2.) A covenant relating to land not of inheritance, or not devolving on the heir as special occupant, shall be deemed to be made with the covenantee, his executors, administrators and assigns, and shall have effect as if executors, administrators and assigns were expressed.

"(3.) This section applies only to covenants made after the commencement of this act."

(c) *Covenants whether Dependent or Independent.*

General rule. — As to what covenants shall be construed to be conditions precedent or not, it has been laid down that

(*b*) Flight *v.* Glossop, 2 B. N. C. 125.

(*c*) Spencer's case, *ubi supra*.

(*d*) Williams *v.* Earle, L. R., 3 Q. B. 739.

(*e*) Roe *v.* Galliers, 2 T. R. 133.

(*f*) Stevens *v.* Copp, L. R., 4 Ex. 20; 38 L. J., Ex. 175.

(*g*) See these sections at length, p. 256, *post*.

the dependence or independence of covenants must be collected from the sense and meaning of the parties to be deduced from the whole instrument, and not merely from any technical words (*h*); and that in whatever order covenants may stand in a deed, their precedency must depend on the order of time in which the intent of the transaction requires their performance (*i*).[1] No precise technical words therefore are required in a deed to make a [*167] *stipulation a condition precedent or subsequent; neither does it depend on the circumstance whether the clause is placed prior or posterior in the deed: the merits therefore of a question of this kind must depend on the nature of the contract, and the acts to be performed by the contracting parties, and any subsequent facts disclosed which

(*h*) Roberts *v.* Brett, 11 H. L. Cas. 337; 34 L. J., Ch. 241.

(*i*) Jones *v.* Barkley, 2 Doug. 684.

[1] **Independent and dependent covenants.** — An independent covenant is an unconditional promise. Edwards *v.* Gale, 52 Me. 360; Simonds' Admr. *v.* Beauchamp, 1 Mo. 420. It does not depend for its obligation upon any prior performance or condition (*per* Gibson, J., in Bellas *v.* Hays, 5 S. & R. (Pa.) 427). Such promise being under seal binds without consideration. 2 Whart. on Cont. 688.

A dependent covenant is one which depends upon the prior performance of another covenant or condition. 2 Whart. on Cont. sec. 688; Bellas *v.* Hays, 5 S. & R. (Pa.) 427.

Where a covenant depends upon a *covenant*, the covenants are mutual. Bellas *v.* Hays, 5 S. & R. (Pa.) 427. If the obligation of mutual covenants is simultaneous, they are independent, neither being a condition for the other.

A simple contract is a sufficient consideration for a covenant. School Directors *v.* McBride, 22 Pa. St. 215; Grove *v.* Hodges, 55 Id. 504 (the remedy in one case being *assumpsit*, and in the other covenant). A covenantor who has sealed is liable to a promisor who has not sealed, if the latter have performed. Jennings *v.* McComb, 112 Pa. St. 518, 522 (*per* Trunkey, J.); Leake on Cont. 141; 2 Whart. on Cont. 688.

Want of mutuality, so long as a contract is purely executory, is fatal either to a suit for specific performance or for damages. Cleaves *v.* Willoughby, 7 Hill (N. Y.) 83 (*per* Beardsley, J.); Bellas *v.* Hays, 5 S. & R. (Pa.) 427; Grove *v.* Hodges, 55 Pa. St. 504, 516, &c.

Where a covenant depends upon prior performance of an optional condition, mutuality is wanting and the contract is unilateral. Frue *v.* Houghton, 6 Col. 318, 324. Performance in such case fixes the liability of the covenantor, making his promise absolute. Matter of Jane Hunter, 1 Edw. Ch. (N. Y.) 1, 5; Cutting *v.* Dana, 25 N. J. Eq. 265; Frue *v.* Houghton, 6 Col. 318, 324.

have happened in consequence of the contract (*k*).[1] Where a covenant is part only of the consideration on one side, it is an independent covenant, and not a condition precedent (*l*). If one party covenant to do one thing, the other party doing another, it is not a condition precedent, but a mutual covenant (*m*). If the contract be to grant a lease upon payment of 1,440*l.* by certain instalments at stated times, the granting of such lease is not a condition precedent to a right to recover the 1,440*l.* (*n*). It is a general rule that covenants are to be treated as independent rather than as conditions precedent, especially where some benefit has been derived by the covenantor (*o*).[2]

(*k*) Hotham *v.* East India Co., 1 T. R. 645; Newson *v.* Smythies, 3 H. & N. 840; 28 L. J., Ex. 97; 1 F. & F. 477.

(*l*) Carpenter *v.* Creswell, 4 Bing. 409.

(*m*) Boone *v.* Eyre, 2 W. Blac. 1312; Pordage *v.* Cole, 1 Wms. Saund. 319 b, 320 c; Newson *v.* Smythies, 3 H. & N. 840; 28 L. J., Ex. 97; 1 F. & F. 477; Mackintosh *v.* Midland Counties R. Co., 14 M. & W. 548; London Gas Light Co. *v.* Chelsea Vestry, 8 C. B., N. S. 215.

(*n*) Baggallay *v.* Pettit, 5 C. B., N. S. 637; 28 L. J., C. P. 169. So where A. agrees to sell and B. to purchase an estate, and B. covenants to pay A. on or before a specified day a certain sum as the consideration of such sale, with interest to the time of completion of the purchase, but no time is fixed for executing the conveyance; A. may maintain an action for the purchase-money and interest, without first tendering a conveyance. Mattock *v.* Kinglake, 10 A. & E. 50.

(*o*) Newson *v.* Smythies, 3 H. & N. 843.

[1] **Dependent covenants.** — Examples: Lessee's to pay rent depends upon lessor's for quiet enjoyment. Christopher *v.* Austin, 11 N. Y. 216; Dyett *v.* Pendleton, 8 Cow. (N. Y.) 731; Lawrence *v.* French, 25 Wend. (N. Y.) 445; Fitchburg Corp. *v.* Melven, 15 Mass. 268.

Lessor's express covenant to make repairs may, by the construction of the lease, be condition precedent to lessee's to pay rent. Strohecker *v.* Barnes, 21 Ga. 431.

Lessee's covenant to pay rent depends upon the continued existence of the thing demised, and will be discharged by total destruction thereof. For example, if apartments are leased and building totally destroyed by fire. Womack *v.* McQuarry, 28 Ind. 103; Winton *v.* Cornish, 5 Ohio, 477; Kerr *v.* Merchants' Ex. Co., 3 Edw. Ch. (N. Y.) 315, 322; Graves *v.* Berdan, 26 N. Y. 498. In case of partial destruction, as where land remains, it is otherwise.

[2] **Independent covenants.** — Examples: Lessor's unconditional covenant to erect building for use of lessee, and lessee's to pay rent. Edwards *v.* Gale, 52 Me. 360. Lessor's to make repairs and improvements, and lessee's to pay rent. Tibbits *v.* Percy, 24 Barb. (N. Y.) 39; Speckels *v.* Sax, 1 E. D. Smith (N. Y.) 253, 255 (*per* Woodruff, J., unless made dependent); Hill *v.* Bishop, 2 Ala. 320; Wright *v.* Lattin, 38 Ill. 293; Lunn *v.* Gage, 37 Id. 19;

Conditional covenant to repair. — A covenant to keep a house in repair, from and after the lessor has repaired it, is conditional; and it cannot be assigned as a breach that it was in good repair at the time of the demise, and that the lessee suffered it to decay; for the lessor must repair before the lessee is liable (*p*). Where the plaintiff let to the defendant a messuage, barn, stable, and buildings, and the defendant agreed to repair the said messuage, buildings, and premises, *the same being first put into repair by the plaintiff;* it was held, that the repair by the plaintiff was a condition precedent to the obligation on the defendant to keep in repair; that that condition precedent could not be divided: and that the plaintiff was not entitled to recover for the non-repair of any part of the premises without having first repaired the whole (*q*). So if a lessee covenant to repair, "provided always, and it is agreed that the lessor shall find great timber," &c., this makes a covenant on the part of the lessor to find great timber by the word "agreed," and is not to be a qualification of the covenant of the lessee (*r*): but where the words were, "he the said lessor finding, allowing and assigning timber sufficient for such reparations during the said term, to be cut [*168] * and carried by the lessee;" it was held not to be a covenant to provide timber, but a mere qualification of the covenant to repair (*s*), and where the lessee agreed to repair and the lessor to find timber for repairs, Kay, J., decided that the lessee could not recover damages from the

(*p*) Slater *v.* Stone, Cro. Jac. 645.

(*q*) Neale *v.* Ratcliff, 15 Q. B. 916; 20 L. J., Q. B. 130; Hunt *v.* Bishop, 8 Exch. 675; 22 L. J., Ex. 337; Hutchinson *v.* Read, 4 Exch. 761; Coward *v.* Gregory, L. R., 2 C. P. 153, 172; *post*, Chap. XVI., Sect. 1 (a).

(*r*) Bac. Abr. tit. Covenant (A).

(*s*) Thomas *v.* Cadwallader, Willes, 496.

Allen *v.* Culver, 3 Denio (N. Y.) 284, 294; Allen *v.* Pell, 4 Wend. (N. Y.) 506. Lessor's to pay for improvements, and lessee's to deliver up possession. Tallman *v.* Coffin, 4 N. Y. 134. Lessor's for right of common in other lands, and lessee's to pay rent. Watts *v.* Coffin, 11 Johns. (N. Y.) 495, 498.

In Simonds' Admr. *v.* Beauchamp, 1 Mo. 420, it was held that a covenant to convey by a general warranty deed on a day certain, and a covenant to pay the purchase-money on same day, made in separate instruments, were independent.

See, also, Post *v.* Vetter, 2 E. D. Smith (N. Y.) 248; Ellis *v.* McCormick, 1 Hilt. (N. Y.) 313; Brady *v.* Peiper, 1 Id. 61.

lessor who had neglected to find materials for an injury caused by non-repair (*t*). Where a lease for lives contained a covenant by the lessee at his own expense to keep the demised premises in proper repair, "having or taking in and upon the said demised premises competent and sufficient house-bote, hedge-bote, fire-bote, plough-bote and gate-bote for the doing thereof, without committing any waste or spoil:" it was held in an action for not repairing, that the covenant for repair was absolute, with a licence to the lessee to take competent and sufficient house-bote, &c.: and that the finding such house-bote, &c., was not a condition precedent to the liability of the lessee to repair (*u*). Where the lessee covenants to put and keep the demised premises in repair, "being allowed rough timber but not on the stem upon the demised premises, the timber to be fetched and carried at the expense of the lessee." In an action of covenant for not repairing, it is sufficient to allege that the lessor was *ready and willing* to allow and provide sufficient rough timber not on the stem, without stating that he did actually furnish it (*x*). Where a lessee covenanted to repair a house before the 1st of June, 5,000 slates being found by the lessor towards the repair, and afterwards to keep in repair during the term; it was held, that finding the slates was not a condition precedent to the covenant to keep in repair, but only to the covenant for putting the premises in repair before the 1st of June (*y*). In a farming lease the lessee covenanted with the lessor that the lessee should at all times during the term repair and glaze the windows and also the hedges, &c., when necessary, "the said farmhouse and buildings being previously put in repair and kept in repair by the lessor;" the latter clause was held to amount to an absolute and independent covenant on the part of the lessor to put the premises in repair (*z*). The words "and the whole of which is agreed to be left to the superintendence of the lessee and the lessor's son," annexed to a covenant by the lessor to do

(*t*) Tucker *v.* Linger, L. R., 21 Ch. D. 18.

(*u*) Dean and C. of Bristol *v.* Jones, 1 E. & E. 484; 28 L. J., Q. B. 201.

(*x*) Martyn *v.* Clue, 18 Q. B. 661; 22 L. J., Q. B. 147.

(*y*) Mucclestone *v.* Thomas, Willes, 146.

(*z*) Cannock *v.* Jones, 3 Exch. 233.

certain work, are neither a condition precedent to, nor concurrent with, the covenant (*a*). The covenant to repair generally, and to repair within three months after notice in writing, are independent covenants (*b*); and where [*169] a lessee covenanted * to leave premises in repair at the expiration of the term, and also that the lessors might direct the lessee to complete the repairs by giving six months' notice in writing, it was held, that these were two distinct and separate covenants, the former of which was not qualified by the latter (*c*); but where a lease contained a covenant by the lessee to repair the premises at all times (as often as need or occasion should require) and "at farthest within three months after notice," it was held to be one entire covenant, the former part of which was qualified by the latter (*d*). Where there was an agreement that the lessee should spend 200*l.* in repairs to be inspected and approved of by the lessor, and to be done in a substantial manner, and the lessee was to be allowed to retain the money out of the first year's rent of the premises, it was held, that the lessor's approval was not a condition precedent to the lessee retaining the rent (*e*). Where a lessee covenanted to expend a certain sum in substantial and beneficial improvements, under the direction or with the approbation of some competent surveyors to be named by the lessor, the appointment of the surveyors was held to be a condition precedent to the lessees liability to expend the money (*f*). Where the lessor covenanted to pay the lessee for the manure, &c., at the end of the term, upon the lessee delivering up the farm, *if* in the meantime he cultivated it on the four-course system and performed and kept all and singular other

(*a*) Jones *v.* Cannock, 3 H. L. Cas. 700; 5 Exch. 713; Smith *v.* Durrant, 9 H. L. Cas. 192.

(*b*) Doe *d.* Morecraft *v.* Meux, 4 B. & C. 606; 1 C. & P. 346; Wood *v.* Day, 7 Taunt. 646; Baylis *v.* Le Gros, 4 C. B., N. S., 537, 552; Cornish *v.* Cleife, 3 H. & C. 446; 13 W. R. 389; Roe *d.* Goatley *v.* Paine, 2 Camp. 520; Few *v.* Perkins, 36 L. J., Ex. 62; 15 W. R. 713.

(*c*) Wood *v.* Day, *supra*.

(*d*) Horsefall *v.* Testar, 7 Taunt. 385; cited 4 C. B., N. S. 551.

(*e*) Dallman *v.* King, 4 Bing. N. C. 105, recognized in Stadhart *v.* Lee, 3 B. & S. 364, 371.

(*f*) Coombe *v.* Greene, 11 M. & W. 480; 2 Dowl., N. S. 1023; Cannock *v.* Jones, 3 Exch. 233; 5 Id. 713; 3 H. L. Cas. 700; Hunt *v.* Bishop, 8 Exch. 675.

his covenants in the lease: it was held, that the delivery up of a certain agreement pursuant to a covenant in the lease was not a condition precedent to the tenant's right to recover for the manure, &c. (*g*). Where by deed reciting an agreement to let copyhold premises, A. covenanted that as soon as he had procured a licence from the lord of the manor he would lease them to B. for the then residue of a term of years from a certain day, and B. covenanted that he would repair during the term so to be granted, it was held that B. was liable on this covenant after having occupied the premises for the whole term, though no licence had been procured from the lord nor any lease ever made (*h*).

Option to determine term, &c. — Where in a lease for seven years, containing the usual covenants that the lessee should pay the rent, keep the premises in repair, &c., there was a proviso that the lessee might determine the term at the end of the first three or five years, giving six months' previous notice, and then, from and after the expiration of such notice, and * payment of all rents and duties to be paid by the lessee, and performance of all his covenants until the end of the three or five years, the indenture should cease and be utterly void, it was held, that the payment of rent and performance of the other covenants were conditions precedent to the lessee's determination of the term at the end of the first three years, and that his merely giving six months' notice, expiring within the three first years, was not sufficient for that purpose (*i*). A mining lease contained numerous covenants by the lessees, and also a proviso that if they should desire to quit the premises at the end of the first eight years, and should give eighteen months' notice thereof to the lessor, then, all arrears of rent being paid, and all and singular the covenants and agreements on the part of the lessees having been observed and performed, the lease should at the expiration of the eighth year be utterly void; but, nevertheless, without prejudice to any claim or remedy which any of the parties might then be entitled to for breach of any of the covenants; it was held,

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(*g*) Newson *v.* Smythies, 3 H. & N. 840; 28 L. J., Ex. 97; 1 F. & F. 477.

(*h*) Pistor *v.* Cater, 9 M. & W. 315.

(*i*) Porter *v.* Shephard, 6 T. R. 655.

in error, that the performance of all the covenants by the lessees was a condition precedent to their right to determine the lease (*k*). Another Court of Error, however, appears to have entertained a different opinion (*l*). A lease contained a proviso, that if the lessor should give notice for the delivery up of the land to him, the lessee covenanted to surrender it up, and that the lessor might take possession of it, paying the lessee compensation for money expended thereon: it was held, that the proviso did not operate as a mere covenant by the lessee to give up on notice, but expressly gave the lessor power to take possession; and that he might do so without having first paid compensation (*m*). So where it was agreed that the lessor should within eighteen months from the date of the lease build a cattle-shed, the whole to be left to the superintendence of the lessee and her son; it was held, that this latter provision was not a condition precedent to or concurrent with the lessor's covenant to build (*n*).

Covenant for employment of particular person, &c. — On a lease of some coal mines, the lessees covenanted that the lessor should, when he thought fit, employ a fit and proper person to weigh the coals and keep the accounts, the person so weighing and keeping the accounts to be paid by the lessees; but in case such person did not duly attend to his duties, the lessees were authorized to discharge him. It was held, that the appointment of a fit and proper person was a condition precedent to the liability of the lessees to pay the wages, and that therefore they were not bound to pay the wages though they had not dismissed him (*o*). An [*171] assignee of a term in * coal mines covenanted with the lessee that he would, so long as he should be in receipt of the rents of the premises, pay to the lessors the rent payable by the original lease — and would keep the lessee harmless indemnified against the rents and covenants of the lease: it was held, that the words "so long as he

(*k*) Friar *v.* Grey, 5 Exch. 584, 597; 4 H. L. Cas. 565.

(*l*) Grey *v.* Friar, 15 Q. B. 901.

(*m*) Doe *d.* Gardner *v.* Kennard, 12 Q. B. 244.

(*n*) Cannock *v.* Jones, 3 Exch. 233; 5 Id. 713; 3 H. L. Cas. 700.

(*o*) Lawton *v.* Sutton, 9 M. & W. 795.

should be in the receipt of the rents" did not extend to the covenant to indemnify (*p*). A covenant in a farming lease provided that the tenant should consume and convert into manure, and spread on the premises, all the turnips, &c., grown thereon; but that in case he should sell off any part thereof, which he was at liberty to do, then that he should for every ton of turnips, &c., so sold off, bring back and spread thereon one ton of manure within three months after. In an action on this covenant the plaintiff set out the first part only, and assigned for breach that the defendant carried away fourteen acres of turnips, without converting the same into manure and spreading the same: it was held, that the covenant was an alternative one, and that the plaintiff should have negatived the bringing back, within the time limited, an equivalent in manure (*q*).

(d) *How discharged.*

Before breach by deed. — Covenants cannot be discharged *before breach* otherwise than by deed; therefore a parol licence or agreement, dispensing with or changing the terms of such an obligation, could not, before the Judicature Act, be pleaded in bar to an action of covenant (*r*); and it does not seem that that act has made any difference.

By acts of parliament. — With respect to the operation of acts of parliament in discharging the obligation of a covenant there is this difference; viz. that where a man covenants not to do an act or thing which it was lawful to do, and an act of parliament is made afterwards and compels him to do it, the statute discharges the covenant. So, if a man covenant to do a thing which is lawful, and an act of parliament comes in and hinders him from doing it, the covenant is discharged (*s*). But if a man covenant not to do a thing which

(*p*) Crossfield *v.* Morrison, 7 C. B. 286.

(*q*) Richards *v.* Bluck, 6 C. B. 437; 7 D. & L. 325.

(*r*) Littler *v.* Holland, 3 T. R. 590; Thompson *v.* Brown, 7 Taunt. 656; Sellers *v.* Bickford, 1 Moo. 460; Harris *v.* Goodwin, 2 M. & G. 405; West *v.* Blakeway, 2 M. & G. 729, 752; 9 Dowl. 846.

(*s*) Brewster *v.* Kitchell, 1 Salk. 198; Doe *d.* Marquis of Anglesea *v.* Rugeley, 6 Q. B. 107, 114; Brown *v.* Mayor, &c., of London, 9 C. B., N. S. 726; 13 Id. 828; Bac. Abr. tit. Conditions (Q. 2); Com. Dig. tit. Condition (L. 1).

at the time was unlawful, and a subsequent statute makes the action lawful, such statute does not discharge the covenant (*t*): and if the covenant be to do that which is afterwards made unlawful in part only, it must be performed so far as it continues lawful (*u*). If there be a covenant [*172] to do a thing which * is unlawful by statute, the covenant will not be made lawful by the repeal of the statute, because the covenant was bad ab initio; although it would be otherwise, if the covenant had been originally lawful, but had been made unlawful by a statute which was itself afterwards repealed (*x*).

Discharge of covenant not to build, &c. — In accordance with these principles, it has been held that a covenant to build a workhouse on the land demised was discharged by the operation of the Poor Law Amendment Act, 1834 (*y*); and a covenant not to assign without licence (*z*), and a covenant not to permit assigns to build (*a*) by a compulsory assignment to a company under the Lands Clauses Consolidation Act, 1845.

Lessee of tithes. — But a lessee of tithes is liable on his covenant to pay rent, notwithstanding the tithes have been commuted for a rent charge, his remedy being by surrender of his lease, under the 88th section of the Tithe Commutation Act (6 & 7 Will. 4, c. 71) (*b*).

Sect. 9. — *Implied Covenants and Agreements.*

(a) *Generally.*

Covenants in law, when implied. — An implied covenant or covenant in law is one which the law intends and implies from the nature of the transaction, although not expressed by words in the deed. "A covenant in law, properly speak

(*t*) Brewster *v.* Kitchell, 1 Salk. 198.

(*u*) 2 Eq. Ca. Abr. 26.

(*x*) Jacques *v.* Withy, 1 H. Blac. 65.

(*y*) Doe *d.* Anglesea (Lord) *v.* Rugeley, (Churchwardens,) 6 Q. B. 107.

(*z*) Slipper *v.* Tottenham & Hampstead Junction R. Co., L. R., 4 Eq. 112; 36 L. J., Ch. 841.

(*a*) Baily *v.* De Crespigny, L. R., 4 Q. B. 180; 38 L. J., Q. B. 98.

(*b*) Tasker *v.* Bullman, 3 Exch. 351.

ing, is an agreement which the law infers or implies from the use of certain words having a known legal operation in the creation of an estate; so that, after they have had their primary operation in creating the estate, the law gives them a secondary force, by implying an agreement on the part of the grantor to protect and preserve the estate so by these words already created: as if a man by deed demise lands for years, covenant lies upon the word 'demise,' which imports or makes a covenant in law for quiet enjoyment" (*c*).

Upon a demise — That the word "demise" in a lease for years imports and makes a covenant in law for quiet enjoyment, at least during the continuance of the estate out of which the lease is granted, is clear from all the authorities (*d*).[1] By 8 & 9 Vict. c. 106, s. 4, the word "give" or the word "grant" in *a deed executed after the [*173] 1st of October, 1845, "shall not imply any covenant in law in respect of any tenements or hereditaments, except so far as the word 'give' or the word 'grant' may, by force of any act of parliament, imply a covenant" (*e*). Where a renewed lease of a mill was granted to a bleacher for the purpose of carrying on therein his business, parol evidence was held admissible to explain the special circum-

(*c*) Williams *v.* Burrell, 1 C. B. 429.

(*d*) Adams *v.* Gibney, 6 Bing. 656, 666; Nokes' case, 4 Co. R. 80 b; Holder *v.* Taylor, Hob. 12; Fraser *v.* Skey, 2 Chit. R. 646; Iggulden *v.* May, 9 Ves. 325. And see the cases as to "Quiet Enjoyment" further discussed, *post*, Chap. XVII., Sect. 8.

(*e*) As in conveyances to railway companies, &c.

[1] **Quiet enjoyment.** — A covenant for quiet enjoyment in a lease for years is implied in the words, "give," "grant," and "demise." Stott *v.* Rutherford, 92 U. S. 107, 109; Grannis *v.* Clark, 8 Cow. 36; Barney *v.* Keith, 4 Wend. (N. Y.) 502; Young *v.* Hargrave's Admr., 7 Ohio, 394, 400 (*per* Lane, J.); Cunningham *v.* Pattee, 99 Mass. 248, 251; Gardner *v.* Keteltas, 3 Hill (N. Y.) 330, 332 (*per* Nelson, Ch. J.); Dexter *v.* Manley, 4 Cush. (Mass.) 14, 24; Frost *v.* Raymond, 2 Caines (N. Y.) 188, 194 (*per* Kent, Ch. J.).

It has sometimes been held that the words "grant" and "demise" are not covenants of general warranty in leases for life or other estates of inheritance, Frost *v.* Raymond, 2 Caines (N. Y.) 188, 194; Young *v.* Hargrave's Admr., 7 Ohio, 394, 400; Barney *v.* Keith, 4 Wend. (N. Y.) 502; and generally it may be said that a covenant of quiet enjoyment is implied in a lease, Mack *v.* Patchin, 42 N. Y. 167; Mayor of N. Y. *v.* Mabie, 3 Kern. (N. Y.) 160; 11 Paige (N. Y.) 566; Tone *v.* Brace, 8 Id. 597; Vernam *v.* Smith, 15 N. Y. 328; Graves *v.* Berdan, 26 Id. 498.

stances under which the lease was granted, and from which an implied grant to use the stream for the purpose of the business might be inferred (*f*).

When an implied covenant ceases. — A covenant in law in a demise ceases with the estate of the lessor, and does not necessarily continue during the whole term expressed to be granted. Therefore, if a tenant for life demise by indenture for fifteen years, without any express covenant for quiet enjoyment, upon his death during the term the covenant in law implied from the word "demise" will cease (*g*). But an express covenant, or one to be implied by construction of words used in the deed by way of warranty or contract, would continue in force to the end of the term expressed to be granted, and not merely during the actual continuance of such term (*h*). A covenant in law goes to the assignee of the term, and he has advantage of it during the actual continuance of the term (*i*). But the executors or administrators of the lessor are not liable where the term ceases on his death, and the lessee is subsequently evicted (*k*).

(b) *On Letting Furnished House.*

No implied covenant that premises fit for occupation. — In general, there is no implied covenant by the lessor of a house or of land that it is reasonably fit for habitation, occupation, or cultivation (*l*);[1] nor that the house will endure during

(*f*) Hall *v.* Lund, 1 H. & C. 676; 32 L. J., Ex. 113.

(*g*) Swan *v.* Stransham, Dyer, 257 a; 1 Leon. 179; Owen, 105; s. c., cited 6 Bing. 666; Adams *v.* Gibney, 6 Bing. 656; Penfold *v.* Abbott, 32 L. J., Q. B. 67.

(*h*) Williams *v.* Burrell, 1 C. B. 402; Bragg *v.* Wiseman, Brownlow & G. 22.

(*i*) Bac. Abr. tit. Covenant (E. 5); Vyvyan *v.* Arthur, 1 B. & C. 410.

(*k*) See note (*g*), *supra*.

(*l*) Hart *v.* Windsor, 12 M. W. 68; Sutton *v.* Temple, Id. 52, overruling *nisi prius* decisions in Edwards *v.* Etherington, Ry. & M. 268; 7 D. & R. 117; Collins *v.* Barrow, 1 Moo. & R. 112; Salisbury *v.* Marshal, 4 C. & P. 65.

[1] **Covenants of quality, &c.; not implied.** — There is no implied covenant that an unfurnished house or other tenement is reasonably fit for occupation, Bowe *v.* Hunking, 135 Mass. 380 (a dwelling-house); Foster *v.* Peyser, 9 Cush. (Mass.) 242 (dwelling-house); Dutton *v.* Gerrish, 9 Id. 89, 93, 94 (dry goods warehouse); Naumberg *v.* Young, 44 N. J. L. 331, 344, 345 (*per* Depue, J.); Gillis *v.* Morrison, 22 N. B. 207 (dwelling-house); Welles *v.* Castles, 3

the term;[1] nor that the lessor will do any repairs whatever (*m*).[2] And if the landlord is bound to do repairs, there is

(*m*) Arden *v.* Pullen, 10 M. & W. 321; Gott *v.* Gandy, 2 E. & B. 845; Keates *v.* Earl Cadogan, 10 C. B. 591.

Gray (Mass.) 323; nor that any premises are suitable for the special purposes for which they were leased. Howard *v.* Doolittle, 3 Duer (N. Y.) 464, 474 (*per* Duer, J.); Jaffe *v.* Harteau, 56 N. Y. 398; Cleves *v.* Willoughby, 7 Hill (N. Y.) 83 (*per* Beardsley, J.); Hazlett *v.* Powell, 30 Pa. St. 293, 298; O'Brien *v.* Capwell, 59 Barb. (N. Y.) 497; Robbins *v.* Mount, 4 Rob't. (N. Y.) 553, 461; Royce *v.* Guggenheim, 106 Mass. 201, 202 (*per* Gray, J.); Loupe *v.* Wood, 51 Cal. 586; Scott *v.* Simons, 54 N. H. 426; Wilkinson *v.* Clauson, 29 Minn. 91; Edwards *v.* N. Y. & Harlem R. R. Co., 98 N. Y. 245, 247 (*per* Earl, J.).

In coal-mining and iron-mining leases there are no implied covenants of the existence of ore. Harlan *v.* Lehigh Coal & Navigation Co., 35 Pa. St. 287; Clark *v.* Midland Blast Furnace Co., 21 Mo. App. 58. So far is the principle carried that a lessee must pay rent, and has no remedy in damages, though the premises be uninhabitable, Fisher *v.* Lighthall, 4 Mack. (D. C.) 82; Foster *v.* Peyser, 9 Cush. (Mass.) 242; or dangerous (*per* Depue, J., in Naumberg *v.* Young, 44 N. J. L. 331, 344, 345).

A false expression representing the premises to be in good condition, if not knowingly false, will not (ordinarily) amount to a covenant of warranty.

The statement that the sewer was in excellent condition, though in fact in bad condition, Wilkinson *v.* Clauson, 29 Minn. 91, does not amount to a warranty.

Where, in a lease of a warehouse, lessor had said "he would warrant it would stand if filled with pig lead," and it broke down on account of being insecurely built, the court held the lessee had no remedy.

Where the false representation is fraudulent or knowingly false, the rule is otherwise (*per* Field, J., in Bowe *v.* Hunking, 135 Mass. 380, 384). The lessor will be liable if he conceal knowledge that premises are in dangerous condition (*per* Field, J., *supra*), as that house is infected with small-pox. Minor *v.* Sharon, 112 Mass. 477; Cesar *v.* Karutz, 60 N. Y. 229. In Bowe *v.* Hunking, *supra*, a lessor was held not liable for injuries caused by giving way of the tread of stair not known by him to be unsafe. In Jaffe *v.* Harteau, 56 N. Y. 398, damages were held not recoverable for injuries caused by the explosion of a kitchen boiler, and in O'Brien *v.* Capwell, 59 Barb. (N. Y.) 497, for injuries caused by the giving away of a piazza railing.

[1] There is ordinarily no implied covenant that a building will endure during the term, Branger *v.* Manciet, 30 Cal. 624; but *total* destruction of the demised property (as in case of lease of apartments where building is burned) terminates the tenancy, Stockwell *v.* Hunter, 11 Met. (Mass.) 448; and discharges the tenant from his covenant to pay rent, Graves *v.* Berdan, 26 N. Y. 498. See *post*, note 3.

[2] **Covenants of lessor to repair not implied, except when.** — There is no implied covenant in lease of an *entire* building on lessor's part to repair. Weinsteine *v.* Harrison, 66 Tex. 546; Rogan *v.* Dockery, 23 Mo. App. 313; Hughes *v.* Vanstone, 24 Mo. App. 637, 639; Vai *v.* Weld, 17 Mo. 232; Kahn *v.* Love, 3 Or. 206; Mumford *v.* Brown, 6 Cow. (N. Y.) 475; Howard *v.* Doolittle, 3 Duer (N. Y.) 464; Brewster *v.* Miller, 33 Cal. 341; Sherwood *v.*

no implied condition that if not done the tenant may quit (*n*); that should be the subject of an express stipulation (*o*).

Furnished house. — There is, however, an important [*174] exception to the general rule. In *letting a furnished house, the lessor impliedly promises that it is fit for occupation. So it was held in Smith *v.* Marrable (*p*), where a tenant for five or six weeks was held justified in quitting without notice on the ground of the house being infested with bugs; and this case, although shortly afterwards doubted by more than one member of the same court which decided it (*q*), was, in 1877, affirmed in Wilson *v.* Finch-Hatton (*r*), where its principle was held applicable to

(*n*) Surplice *v.* Farnsworth, 7 M. & G. 576; 8 Scott, N. R. 307.

(*o*) As in Furnivall *v.* Grove, 8 C. B., N. S. 400; 30 L. J., C. P. 3.

(*p*) 11 M. & W. 5; 12 L. J., Ex. 223. And see Campbell *v.* Wenlock, 4 F. & F. 716. See also Bird *v.* Lord Greville, 1 C. & E. 317, where the rule of Smith *v.* Marrable and Wilson *v.* Finch-Hatton was applied by Field, J., to a case of infection by measles.

(*q*) See, especially, *per* Parke, B., in Hart *v.* Windsor, *ubi supra*. It was, however, expressly approved of by Lord Abinger in Sutton *v.* Temple, *ubi supra*.

(*r*) L. R., 2 Ex. D. 336; 36 L. T. 473; 46 L. J., Ex. 489; 25 W. R. 537.

Seaman, 2 Bosw. (N. Y.) 130; Branger *v.* Manciet, 30 Cal. 624; Doupe *v.* Genin, 45 N. Y. 119; 1 Sweeney (N. Y.) 25; Joyce *v.* De Giverville, 2 Mo. App. 596; Post *v.* Vetter, 2 E. D. Smith (N. Y.) 248; Welles *v.* Castles, 3 Gray (Mass.) 323; Scott *v.* Simons, 54 N. H. 426; Cole *v.* McKey, 66 Wis. 500; Purcell *v.* English, 86 Ind. 34; Libbey *v.* Tolford, 48 Me. 316; Estep *v.* Estep, 23 Ind. 114; Humphrey *v.* Wait, 22 U. C. C. P. 580; Krueger *v.* Ferrant, 29 Minn. 385; Gill *v.* Middleton, 105 Mass. 477, 478 (*per* Ames, J.); Hill *v.* Woodman, 14 Me. 38.

Covenant to repair; when implied. — There is an implied covenant to repair the common portions of building leased to different tenants, Looney *v.* McLean, 129 Mass. 33; and if lessor fail to repair a common stairway he will be liable to tenant for injuries, Walkins *v.* Goodall, 138 Mass. 533, 536. The lessor held liable for injuries to tenant caused by obstructions of ice upon common piazza, arising from defects in common pipe. Worthington *v.* Parker, 11 Daly (N. Y. Superior Ct.) 545. Lessor impliedly covenants to repair roof of building if he has demised lower story. *Contra* Doupe *v.* Genin, 45 N. Y. 119; Bold *v.* O'Brien, 12 Daly (N. Y.) 160. Tenant in top of building may recover damages for injury to furniture caused by the building falling from its unsafe condition. Eagle *v.* Swayze, 2 Daly (N. Y.) 140. Lessor is liable to tenant occupying part of a building for damages caused by a fall of a chimney.

In Platt *v.* Farney, 16 Ill. App. 216, it was held that a lessor was not liable for the injuries if the want of repair was caused by acts of third parties.

In Woods *v.* Naumkeag Steam Cotton Co., 134 Mass. 357, it was held not to be the duty of lessor to remove the snow and ice from flight of stone steps (without railing) leading to street, though so constructed as to occasion accumulations, there being no change since tenancy began.

defective drainage, in the case of a house in London let from the 7th May to the 31st July, and although the drains were repaired by the landlord, and the house tendered in a wholesome condition on the 26th of May, the tenant (who had at once declined to occupy) was held neither liable for the agreed rent nor for use and occupation.

(c) *On Letting Unfurnished House at Low Rent.*

Another important exception to the rule that there is no implied condition of fitness in letting a house, has been introduced by the Housing of the Working Classes Act, 1885 (48 & 49 Vict. c. 72, s. 14), (which applies to lettings at certain low rents only), which is as follows: —

"In any contract made after the passing of this act for habitation by persons of the working classes of a house or part of a house, there shall be implied a condition that the house is at the commencement of the holding in all respects reasonably fit for human habitation. In this section the expression 'letting for habitation by persons of the working classes' means the letting for habitation of a house or part of a house at a rent not exceeding in England the sum named as the limit for the composition by sect. 3 of the Poor Rates Assessment and Collection Act, 1869" [*i.e.* in the metropolis 20*l.*, in Liverpool 13*l.*, in Manchester or Birmingham 10*l.*, and elsewhere 8*l.*] "and in Scotland or Ireland 4*l.*"

The effect of this section (which may perhaps be best described as *an enactment applying the doc- [*175]

The distinction between a furnished and an unfurnished house (which was not *expressly* drawn in Smith *v.* Marrable) was expressly approved of in Wilson *v.* Finch-Hatton. The case, although re-argued before three judges, Kelly, C. B., Pollock, B., and Huddleston, B., on account of its importance, was ultimately decided without hesitation. In Powell *v.* Chester, 52 L. T. 722, Bacon, V.-C., said that Smith *v.* Marrable was only an authority for the proposition that in taking furnished apartments at the seaside, or for temporary occupation only, there is the implied warranty; but it is submitted that this view of Smith *v.* Marrable is incorrect, and that both on principle and on the authority of Wilson *v.* Finch-Hatton, as far as it goes (for Kelly, C. B., appears to have grounded his judgment at least partly upon the brevity of occupation), the duration of the tenancy is immaterial, on the ground — if on no other — that a furnished house is far less easily examined than an unfurnished one.

trine, with all its consequences, of Wilson *v.* Finch-Hatton, to unfurnished houses let at rents therein mentioned), may clearly be avoided by express stipulation excluding its operation.

Implied covenants by lessee. — In the absence of any express covenant on the subject, a covenant or promise is implied on the part of the lessee that he will use the buildings in a tenantable and proper manner (*s*),[1] and that he will manage and cultivate the lands in a good and husbandlike manner, according to the custom of the country (*t*): but not that he will make a certain quantity of fallow, and spend a certain quantity of manure thereon, and keep the buildings in repair, or any other stipulation not arising out of the bare relation of landlord and tenant (*u*). Only the prevailing course of good husbandry and management in the neighborhood need be proved (*x*), and it will be considered applicable to all tenancies in whatever way created, whether verbal or in writing, unless expressly or impliedly excluded by the terms actually agreed on (*y*).

Covenants, when implied from express words. — Where a lessee covenanted to plough, sow, manure, and cultivate the demised premises (except the rabbit-warren and sheep-walk) in a due course of husbandry, it was held that it amounted

(*s*) Horsefall *v.* Mather, Holt, N. P. C. 7; Leach *v.* Thomas, 7 C. & P. 327; Harnett *v.* Maitland, 16 M. & W. 257; Yellowly *v.* Gower, 11 Exch. 294.

(*t*) Powley *v.* Walker, 5 T. R. 373; Legh *v.* Hewitt, 4 East, 154; Angerstein *v.* Handson, 1 C., M. & R. 789; Hallifax *v.* Chambers, 4 M. & W. 662; Martin *v.* Gilham, 7 A. & E. 450; Wilkins *v.* Wood, 17 L. J., Q. B. 319.

(*u*) Brown *v.* Crump, 6 Taunt. 300.

(*x*) Legh *v.* Hewitt, 4 East, 154.

(*y*) Wigglesworth *v.* Dallison, 1 Doug. 190; 1 Smith L. C. 598 (7th ed.); Senior *v.* Armytage, Holt, N. P. C. 197; Hutton *v.* Warren, 1 M. & W. 466.

[1] **Use in tenantable manner.** — "This implied obligation is part of the contract itself, as much so as if incorporated into it by express language" (*per* Waite, C. J., in United States *v.* Bostwick, 94 U. S. 53, 65, 66).

The premises must be "used in a proper and tenant-like manner, without exposing the buildings to ruin or waste by acts of omission or commission" (*per* Gibbons, J., in Nave *v.* Berry, 22 Ala. 382, 390).

Lessee must keep the premises in as good repair as he received them, ordinary wear and tear and accidental injuries excepted, nor suffer voluntary waste (*per* Hall, J., in Hughes *v.* Vanstone, 24 Mo. App. 637). See *post.*

to a covenant not to plough the sheep-walk (*z*). Where a lessee covenanted that he would, at all times and seasons of burning lime, supply the lessor and his tenants with lime at a stipulated price, for the improvement of their lands and repair of their houses: it was held, that this was an implied covenant also that he would burn lime at all such seasons; and that it was not a good defence to plead that there was no lime burned on the premises out of which the lessor could be supplied (*a*). So a covenant by a lessee to pen and fold his flock of sheep, which he should keep upon the premises, upon such parts where the same had been usually folded, was held to amount by implication to a covenant to keep a flock of sheep (*b*). A landlord having accepted the offer of a tenant, whose term was expiring, to continue tenant, provided he could not find any other tenant at the rent it appeared to him to be worth by a certain day, it was held to be an implied condition, that the tenant should allow persons applying for the farm to go over it, and that, the condition not having been performed, the * contract was at an end (*c*). [*176]

Brewery. — On the demise of a brewery, with the exclusive privilege of supplying ale, it would seem that no covenant can be implied with respect to such a privilege from the word "demise" (*d*). Where in an agreement for a lease from the plaintiff to the defendant of certain works, the plaintiff agreed to supply to the defendant the whole of the chlorine still waste as it came from the still, at a given rate per cwt., and not to part with any of the still waste, except to the defendant, it was held, that the defendant was bound to take the whole of the waste which, during his occupancy, came from the plaintiff's still (*e*).

Right of sporting. — In Newton *v.* Wilmott a demise was

(*z*) Duke of St. Albans *v.* Ellis, 16 East, 352.

(*a*) Earl of Shrewsbury *v.* Gould, 2 B. & A. 487.

(*b*) Webb *v.* Plummer, 2 B. & A. 746.

(*c*) Doe *d.* Marquis of Hertford *v.* Hunt, 1 M. & W. 690.

(*d*) Hinde *v.* Gray, 1 M. & G. 195; 1 Scott, N. R. 123.

(*e*) Bealey *v.* Stuart, 7 H. & N. 753; 31 L. J., Ex. 281.

made of a mansion-house and land, with the sole licence of sporting over all other lands of the lessor's, and the lessor covenanted that if any of his tenants should obstruct the lessee in the enjoyment of his licence, then the lessor would, on the requisition of the lessee, give the tenant notice to quit, and would enforce such notice. The court held that there was no breach of this covenant by the lessor subsequently demising some of his lands for a term of years, without any clause to prevent the tenant from obstructing the person having the licence of sporting to enjoy his licence, and without reserving a power to give notice to quit if he did (*f*).

Mining lease. — In the Earl of Glasgow *v.* Hurlet Alum Company a lease of alum mines gave the lessee the right to obtain alum from certain coal wastes. A subsequent lease of the coal mines provided that nothing thereby granted should injure the rights of the parties who held the alum mines. The alum existed in the coal wastes. The coal lessees could not thoroughly work the coal without removing the pillars which supported the roof; but by doing this, the alum would be rendered impossible to be reached: it was held by the House of Lords that the coal pillars could not be removed (*g*). A covenant will not be implied in a lease of mines for the lessees to sink a pit or shaft, although various provisions of the lease cannot be carried into effect without their doing so (*h*).

The tendency of modern decisions is not to imply covenants or stipulations which might and ought to have been expressed if intended (*i*).

(*f*) Newton *v.* Wilmott, 8 M. & W. 711.

(*g*) Earl of Glasgow *v.* Hurlet Alum Co., 3 H. L. Cas. 25.

(*h*) James *v.* Cochrane, 7 Exch. 170; 8 Id. 556. See also, as to mining leases, Rowbotham *v.* Wilson, 8 H. L. Cas. 348; Dugdale *v.* Robertson, 3 K. & J. 695; Smith *v.* Darby, 42 L. J., Q. B. 140; Eadon *v.* Jeffcock, 42 L. J., Ex. 36; in the last of which cases it was held that when the owner of surface and minerals beneath grants a lease of the minerals, there is not, outside the contract, an implied reservation of any right to have the surface supported by the minerals.

(*i*) Aspdin *v.* Austin, 5 Q. B. 671; Dunn *v.* Sayles, Id. 685; Doe *d.* Marquis of Bute *v.* Guest, 15 M. & W. 160; Smith *v.* Mayor, &c. of Harwich, 2 C. B., N. S. 651; Sharp *v.* Waterhouse, 7 E. & B. 816.

* A recital in a deed may amount to a covenant [*177] where it appears to be the intention of the parties that it should do so (*k*), and upon such implied covenant an action of covenant may be maintained (*l*).

Sect. 10. — *Of Exceptions and Reservations.*

Distinction between exception and reservation. — An exception relates to some existing component part of the thing demised, which is capable of being severed or distinguished from it:[1] but a reservation is properly of some right or

(*k*) Lay *v.* Mottram, 19 C. B., N. S. 479.

(*l*) Sampson *v.* Easterby, 9 B. & C. 505; s. c., in error, 6 Bing. 644; 1 C. & J. 105; Saltoun *v.* Houstoun, 1 Bing. 433; Farrall *v.* Hilditch, 5 C. B., N. S. 840.

[1] **Exceptions.** — Must be part of thing granted, must be of something that already exists, and something that can be severed from the thing demised (*per* McCoun, J., in Maynard *v.* Maynard, 4 Edw. Ch. (N. Y.) 711, 714); Doe *d.* Bennet *v.* Murdock, 4 Pugs. & Bur. (N. B.) 317 (east half of land demised, the exception being introduced by the words "reserving"); Fort *v.* Brown, 46 Barb. (N. Y.) 366, 370 (chamber and bedroom); Elwes *v.* Brigg Gas Co., 33 Ch. D. 562, 570 (*per* Chitty, J., "all mines and minerals, and all water courses," &c.); Jackson *v.* Lawrence, 11 Johns. (N. Y.) 191 (mill's seats).

Construction of exceptions; form, &c. — The following clause constitutes an exception, viz.: "saving and reserving, nevertheless, for his own use the coal contained in said price" with ingress and egress, &c. Whitaker *v.* Brown, 46 Penn. St. 197.

In Baker *v.* McDowell, 3 W. & S. (Pa.) 358, 360, a provision "excepting and reserving the one half of all iron ore," &c., was evidently considered an exception, because it was "parcel of the soil," though Gibson, C. J., speaks of it as a reservation.

Exceptions are frequently introduced by the word "reserving." In Shoenberger *v.* Lyon, 7 W. & S. 184, 194, there was a clause reserving iron ore held void because as large as the grant; and Gibson, C. J., says: "A reservation being an exception out of the thing granted, keeps the part reserved from passing," &c. This language, of course, could only apply to an exception.

In Whitaker *v.* Brown, 46 Pa. St. 197, 198, a clause saving and reserving coal, in a parcel of land with free ingress and egress, was held to constitute an exception.

In Bush *v.* Coles, 12 Mod. 24, the clause, "excepting two rooms and free passage, ingress, egress, and regress to and from them," was held to include both an exception and a reservation. It was an exception of the rooms and a reservation of the passage-way.

In Case *v.* Haight, 3 Wend. (N. Y.) 632, 635, 636, where the owner of the bed of a stream and of one bank conveyed to the owner of the other bank half the bed of the stream, reserving the right to build dam on both sides, it was held

not to be a good exception, but that it might be sustained under an implied covenant.

In Maynard *v.* Maynard, 4 Edw. Ch. (N. Y.) 711, 714, 715, the following clause, "excepting and reserving to my three daughters, H., E., & R., a right of living on the said before-mentioned premises as heretofore, so long as they shall respectively remain single," was held to constitute neither an exception nor a reservation, but the court held that it might be enforced under the statute. It was not an exception because it was not a part of thing demised, nor a reservation because not in favor of the grantor.

Exceptions are to be construed most strongly against the grantor. In Provost *v.* Calder, 2 Wend. (N. Y.) 517, 524, a stream of water was excepted; but court held the exception limited to the special purposes for which it was intended to be used, Jackson *v.* Gardner, 8 Johns. (N. Y.) 394, 406.

Exceptions which are indefinite are void. For example: a covenant "to let the lessor have what land he and his brothers might want for cultivation" cannot be enforced in favor of any one. Chipman *v.* Emeric, 5 Cal. 49, 51.

An exception, otherwise void, for uncertainty may sometimes be made certain by subsequent acts of parties. Thompson *v.* Gregory, 4 Johns. (N. Y.) 81. If grantor except the streams of water with the right of erecting mill dams and all such parts of the land as shall be overflowed, for the use of the mill, the exception is inoperative until the mills and dams are built. Provost *v.* Calder, 2 Wend. (N. Y.) 517, 524, 545.

In Noble *v.* Bosworth, 19 Pick. (Mass.) 314, it was held that a parol agreement to except fixtures could not control the instrument in writing.

Growing crops. — The ordinary rule is that a deed of land without reserve passes the growing crops, Crews *v.* Pendleton, 1 Leigh (Va.) 297; Steele *v.* Farber, 37 Mo. 71; Baird *v.* Brown, 28 La. An. 842; or a devise, Pratte *v.* Coffman's Ex'r, 27 Mo. 424. See *ante*, Chap. V., sec. 5, notes.

It has been held in some cases that growing crops may be excepted or reserved by parol, even though the lease or deed is in writing, Youmans *v.* Caldwell, 4 Ohio St. 71; Baker *v.* Jordan, 3 Id. 438; because thereby converted into personalty, and a distinction has been made between cases where the crops were to be immediately severed, and cases where they were to remain indefinitely, McIlvaine *v.* Harris, 20 Mo. 457.

There are other cases in which it has been held that parol reservations are repugnant to the deed. Brown *v.* Thurston, 56 Me. 126; Pattison *v.* Hull, 9 Cow. (N. Y.) 747, 754; Austin *v.* Sawyer, Id. 39 (though where parties exchanged farms orally, reserving each his growing crops, it was held that the crops did not pass by the deeds).

It is established by the weight of authority, that a prior oral transfer of such crops as are *fructus industriales*, whether mature or immature, will pass title to them as against subsequent deed. See *ante*.

Crops may be reserved by a clause in the lease, Jordan *v.* Staples, 57 Me. 352; Smith *v.* Atkins, 18 Vt. 461, 462, 464, 465; and also their use may be limited, as that hay shall be fed out on place, Heald *v.* Build Ins. Co., 111 Mass. 38; Potter *v.* Cunningham, 34 Me. 192; Coe *v.* Wilson, 46 Id. 314; Lewis *v.* Lyman, 22 Pick. (Mass.) 437. A simple stipulation that lessor shall furnish sufficient stock to eat up the hay, does not, it seems, prevent the hay from being liable to attachment as property of lessee. Turner *v.* Bachelder, 17 Me. 257. It has been held that a lessor cannot reserve the hay to be cut in a lease at will so that lessee's creditors cannot attach it. Bailey *v.* Fillebrown, 9 Me. 12; Butterfield *v.* Baker, 5 Pick. (Mass.) 522.

profit, to arise from the subject of the demise, which had previously no separate existence (*m*).[1] A right of way reserved to the lessor by the lease, over the lands demised, is not strictly an exception or a reservation, being neither parcel of the thing demised nor issuing out of it, but is in strictness of law an easement newly created by way of grant from the lessee (*n*).[2] But where a lease was made of lands, except and always reserved out of the demise unto the lessor all timber trees, &c., and also except and reserved all *royalties* whatsoever to the premises belonging or in anywise appertaining, it was held, that this was an exception or reservation, and was not pleadable as a grant (*o*).

Exception usually construed in favour of lessee. — An exception, being the act and words of the lessor, is usually taken strictly against him (*p*). But where a lease contained an exception in favour of the lessor of the mines and quarries under the demised property, with full power to win and

(*m*) 4 Jarm. Prec. 315 (3rd ed.).
(*n*) Durham and Sunderland R. Co. *v.* Walker, 2 Q. B. 940.
(*o*) Pannell *v.* Mill, 3 C. B. 625.
(*p*) Shep. Touch. 77.

[1] **Reservations.** — "A reservation is always of something issuing or coming out of the thing granted, and not a part of the thing itself" (*per* Johnson, J., in Bridger *v.* Pierson, 1 Lans. (N. Y.) 481, 483).

A reservation cannot be made in favor of any one but the grantor. Mitchell *v.* Cantrill, 37 Ch. D. 56. A reservation of right to obstruct ancient lights, by building on adjoining lot does not prevent lessee from acquiring prescriptive right against lessee of adjoining close. Ives *v.* Van Auken, 34 Barb. (N. Y.) 566. Reservation of "a privilege in a well for the lots owned by" other parties is void. Borst *v.* Empie, 5 N. Y. 33, 38 (*per* McCoun, J.); Jackson *v.* Swart, 20 Johns. (N. Y.) 85, 87 (though in this case the reservation was enforcible as a covenant to stand seized, &c.).

A lessor may reserve a lien upon demised machinery. Metcalfe *v.* Fosdick, 23 Ohio St. 114.

A reservation of an option to take bricks to be made at demised brick yard, in lieu of rent, does not pass title to the brick until possession is taken. Wait Appt., 7 Pick. (Mass.) 100.

[2] **Regrants of easements, &c.** — Burr *v.* Mills, 21 Wend. (N. Y.) 290 293, 294 (right to flow granted land was reserved or regranted to grantor). Atkins *v.* Bordman, 2 Met. (Mass.) 457 (a right of way).

A right of way seems more properly a regrant than an exception or reservation. Lord Dynevor *v.* Tennant, 13 App. Cas. 279, affmng. 33 Ch. D. 420. Provision that nothing in lease should prevent lessors, "their heirs or assigns," from using the land demised, or granting way leaves over it, operates as a covenant to them as owners of the reversion of the demised premises, not as owners of the adjoining premises.

work, and also with free way-leave and passage to, from, and along the same; and the lessor covenanted in using the excepted rights to do as little damage to the soil as possible: it was held, that the lessor was entitled to the absolute use of an underground right of way and not merely to a right restricted to the purpose of working the mines under the demised premises; but that he was not entitled so to work the reserved mines as to let down the surface (*q*). Where a railway company excepted and reserved out of a demise of land a patent slip therein, and the machinery connected therewith, with free access thereto "for themselves, their successors and assigns, officers, servants, and workmen:" it was held that a licensee of the company might justify using the slip (*r*). It has been held, too, in a suit for spe-
[*178] cific performance of an *agreement for a lease, where a rector agreed to let a farm, except thirty-seven acres (not saying which), that the rector had the right to select which thirty-seven acres should not be included in the lease (*s*).

What things must concur in an exception. — "In every good exception," it is said in Sheppard's Touchstone, "these things must always concur: 1, the exception must be by apt words 'saving and excepting,' or the like (*t*): 2, it must be a part of the thing demised, and not of some other thing: 3, it must be only part of the thing, and not all: 4, it must be such a thing as is severable from the premises demised, and not of an inseparable incident: 5, it must be of such a thing as he who doth accept may have, and which properly belongs to him: 6, it must be certainly or sufficiently described and set down" (*u*).

If a man be possessed of a new house and an old house, and make a lease with an exception of the new house for the use of the lessor when he pleases to reside there, and at other times for the use of the lessee, the new house is well

(*q*) Proud *v.* Bates, 34 L. J., Ch. 406; 11 Jur., N. S. 441.

(*r*) Mitcalfe *v.* Westaway, 17 C. B., N. S. 658; 34 L. J., C. P. 114.

(*s*) Jenkins *v.* Green, 27 Beav. 437; 28 L. J., Ch. 817, per Romilly, M. R. *Sed quære*; see Dann *v.* Spurrier, 3 B. & P. 399.

(*t*) Co. Lit. 47a.

(*u*) Shep. Touch. (7th ed.) by Preston, p. 78; Dorrell *v.* Collins, Cro. Eliz. 6.

excepted; and such exception is not avoided by the words "at all times to be used by the lessee, when the lessor doth not dwell there;" for that sentence doth not enure as an exception out of an exception (which sets the matter at large), but only as a declaration of the lessor's intention in making the exception; — the latter words, however, make the lessee tenant at will (*x*). So, if a man lease his houses, excepting his new house, *during the term*, this exception is good: but if he except it *during life*, it is void; for the words "during life" qualify the exception, and show his intent that the house shall not be excepted during the whole term, and so it is void.

Exception of trees. — A clause in a lease purporting to reserve underwoods and underground produce, enures not as a reservation, but as an exception (*y*). A lease of lands excepted all timber, timber trees and other trees, &c., bushes and thorns, other than such bushes and thorns as should be necessary for the repairs of the fences, the lessee covenanted to keep fences in repair, and the lessor covenanted to find and provide, if growing on the premises, rough timber, stakes and bushes: it was held, that the provision as to bushes and thorns necessary for repairs was not an exception out of an exception, but that all trees, bushes and thorns were excepted out of the demise, whether part of a fence or not, or whether necessary for repairs or not (*z*). An exception of "all the wood" will be an exception of the soil whereon the wood grows (*a*). In like manner, if all the underwood and copse would be *excepted, the land will also [*179] be excepted, unless it clearly appear that it was merely the intention of the parties to except only the wood itself (*b*). But where "timber trees" are excepted, the soil in which they grow will not be covered by the exception (*c*), nor will it where a tenement described as "all timber trees, wood, underwood, &c.," are excepted (*d*). It will be usually

(*x*) Cudlip *v.* Rundall, 3 Salk. 156.

(*y*) Doe *d.* Douglas *v.* Lock, 2 A. & E. 705.

(*z*) Jenney *v.* Brook, 6 Q. B. 323.

(*a*) Ive *v.* Sams, Cro. Eliz. 521; Whistler *v.* Paslow, Cro. Jac. 487.

(*b*) Whistler *v.* Paslow, *supra*; Pincomb *v.* Thomas, Cro. Jac. 524.

(*c*) Whistler *v.* Paslow, Cro. Jac. 487.

(*d*) Leigh *v.* Heald, 1 B. & Ad. 622.

not difficult to collect from the words used whether the exception was intended to extend to the soil or only to the trees, the more generic expressions pointing to the soil, and the more specific to the trees. A parol demise of land, reserving to the landlord "all the hedges, trees, thorn bushes, fences, with lop and top," operates as a licence to enter the land for the purpose of cutting and carrying away the trees (*e*). Where a lessee for life made a lease for years, excepting the wood, underwood and trees growing upon the land, it was held a good exception, although he had no interest in them but as lessee; because he remained always tenant, and was chargeable in waste — wherefore to prevent it he might make the exception: but if a lessee for years assign over his term with such an exception, it is a void exception (*f*).

Apple-trees. — An exception of "all trees, woods, coppice-wood grounds, of what kind or growth soever" (*g*), or of "all timber trees and other trees, but not the annual fruit thereof," does not include apple-trees (*h*).

"Reservation" of game. — A clause purporting to reserve and except to the lessor the power of hunting, &c., over the demised premises, ensures as a grant from the lessee to the lessor — a grant of a *profit à prendre*. It is not *in law* either a reservation or exception (*i*). A demise of lands, excepting and reserving all *royalties*, with a clause for the lessor to be allowed to prosecute actions against persons trespassing for the purpose of hunting, &c., does not amount to a grant by the lessee of a liberty for the lessor to enter for the purpose of pursuing, killing, and taking birds of warren (*k*). In a demise of a mansion-house and land, with the sole licence of sporting over all other lands of the lessor's subject to the liberty for each tenant on his *farm* to kill rabbits thereon,

(*e*) Hewitt *v.* Isham, 7 Exch. 77; Liford's case, 11 Co. R. 51 b.

(*f*) Bacon *v.* Gyrling, Cro. Jac. 296.

(*g*) London *v.* Southwell, Hob. 304; Wyndham *v.* Way, 4 Taunt. 316.

(*h*) Bullen *v.* Denning, 5 B. & C. 842.

(*i*) Doe *d.* Douglas *v.* Lock, 2 A. & E. 705, 743; Wickham *v.* Hawker, 7 M. & W. 103; Ewart *v.* Graham, 7 H. L. Cas. 333; Hall on Profits à Prendre, p. 324. And see *post*, Ch. XVIII. Sect. 6, "Game," &c.

(*k*) Pannell *v.* Mill, 3 C. B. 625.

the exception extends not only to farms existing at the time of the demise, but also to other lands, as plantations, subsequently let as farms (*l*).

Exception of minerals. — An exception of minerals includes stones got from quarries (*m*), and also everything that is necessary for working the mines or quarries, * including way-leave for carrying away the stone or [*180] minerals (*n*); but a reservation of "all mines and minerals, sand, quarries of stone, brick-earth, and gravel pits," in a farming lease does not prevent the lessee from selling, in accordance with a custom of the country, flints turned up by the lessee in course of ploughing (*o*).

The reservation of a full power to work mines does not include the power of working so as to let down the surface (*p*).

"Mines and minerals." — The legal meaning of the expression "mines and minerals," is "every substance which can be got from underneath the surface of the earth for the purpose of profit, unless there be something in the context or in the nature of the transaction between the parties to give it a more limited meaning" (*q*).

Right to take brick-earth. — It seems that a building-lessee, notwithstanding a reservation of minerals so framed as to include brick-earth, may dig foundations and convert the brick-earth for the purpose of building, but for the purpose of building only, and not for the purpose of carrying on the trade of brick-making (*r*).

Exception of water. — Where there was a lease of certain lands, together with all houses, water-courses, &c., excepting a "water-course flowing or descending from" a certain spot, through a meadow, it was held in the particular case to be an exception of the water itself, not of the channel through

(*l*) Newton *v.* Wilmott, 8 M. & W. 711.

(*m*) Micklethwait *v.* Winter, 6 Ex. 644; 20 L. J., Ex. 313.

(*n*) Cardigan *v.* Armitage, 2 B. & C. 197.

(*o*) Tucker *v.* Linger, L. R., 8 App. Cas. 588; 52 L. J., Ch. 941; 49 L. T. 373; 32 W. R. 40, affirming decisions below, 21 Ch. D. 18.

(*p*) Jeffryes *v.* Evans, 34 L. J., C. P. 261; 19 C. B., N. S. 246.

(*q*) Hext *v.* Gill, L. R., 7 Ch. 699.

(*r*) Robinson *v.* Milne, 53 L. J., Ch. 1070, *per* North, J.

which it flowed (*s*). Where there was a demise of a mill and a stream of water, except so much of the water as should be sufficient for the supply of persons whom the lessor had already contracted with or thereafter should contract to supply, provided that such a quantity should be left as should be sufficient to supply the mill for twelve hours a day: it was held, that this was not an absolute undertaking to supply water to work the mill twelve hours a day, but that it was a demise of the mill as the water was flowing at the time of the demise (*t*).

Sect. 11. — *Provisoes and Conditions.*

Nature of conditions. — The terms "proviso" and "condition" are synonymous, and signify some quality annexed to a real estate, by virtue of which it may be defeated, enlarged or created upon an uncertain event. Such qualities annexed to personal contracts and agreements are generally [*181] called * conditions (*u*). A proviso or condition of re-entry may be inserted in an agreement for a lease not under seal (*x*). It will even form part of a new implied tenancy from year to year upon the terms of a previous lease or agreement (*y*), and could be taken advantage of in case of entry and payment of rent upon the ordinary agreement for a lease.

Conditions precedent or subsequent. — Conditions are either precedent or subsequent.[1] Where a condition must be per-

(*s*) Doe *d.* Earl of Egremont *v.* Williams, 11 Q. B. 688.

(*t*) Blatchford *v.* Mayor, &c. of Plymouth, 3 Bing. N. C. 691.

(*u*) Bac. Abr. tit. Condition.

(*x*) Hayne *v.* Cummings, 16 C. B., N. S. 421.

(*y*) Thomas *v.* Packer, 1 H. & N. 669.

[1] **Conditions.** — Conditions are either express or implied, general or special, precedent or subsequent. A condition general terminates tenancy upon entry. A condition special merely authorizes entry to take profits and hold premises as security. A condition can only be reserved for benefit of the grantor and his heirs, not for a stranger. 4 Kent's Com. secs. 121–127.

It is distinguished from a limitation in that the latter marks the period or event which absolutely determines the estate without entry, while a condition

formed before the estate can commence, it is called "a condition precedent;" but where the effect of the condition is either to enlarge or defeat an estate already created, it is then called "a condition subsequent" (*z*).

Construction of conditions. — Conditions as well as covenants are to be construed according to the real intentions of the parties (*a*). What is or is not a condition precedent depends merely not on technical words, but upon the plain intention of the parties, to be deduced from the whole instrument (*b*). The court will not decide as to the meaning of an insensible condition or proviso for re-entry (*c*).

By what instrument made. — A condition may be contained

(*z*) Cruise's Dig. XII. tit. 1, s. 6; 1 Inst. 16 a, 237 a, n. 1.

(*a*) Cole Ejec. 407.

(*b*) Roberts *v.* Brett, 11 H. L. Cas. 337; 34 L. J., Ch. 241.

(*c*) Doe *d.* Wyndham *v.* Carew, 2 Q. B. 317; Doe *d.* Darke *v.* Bowditch, 8 Q. B. 973.

may possibly determine it meantime, only, however, after entry or claim. Same, sec. 126, 127.

A covenant may be a condition precedent. Ordinarily, however, a covenant is distinguished from a condition in that it is not a limitation or qualification upon the estate. Hilsendegen *v.* Scheich, 55 Mich. (684 that rents shall be paid in advance is not a condition unless the parties so intended); Langley *v.* Ross, 55 Mich. 163 (a covenant to pay taxes with no provision of re-entry is a mere covenant); Tallman *v.* Coffin, 4 N. Y. 134 (lessor's covenant to pay for improvements is not a condition but a mere covenant).

A covenant with clause of re-entry for breach constitutes a condition qualifying the title, Jackson *v.* Topping, 1 Wend. (N. Y.) 388, but not otherwise.

A condition can only be reserved for the benefit of the grantor or lessor and his heirs. Strangers cannot take advantage of it. 4 Kent's Com. (13th ed.) sec. 127; Porter *v.* Merrill, 124 Mass. 534, 541; Shumway *v.* Collins, 6 Gray (Mass.) 227, 230; Welch *v.* Silliman, 2 Hill (N. Y.) 491, 495; Nicoll *v.* N. Y. & Erie R. R. Co., 12 Barb. (N. Y.) 460.

In a lease of realty and personalty covenant, that lessee shall raise yearlings to be kept upon place and divided at end of term, is a condition limiting lessee's absolute right till end of term. Briggs *v.* Oaks, 26 Vt. 138, 145, 146.

Provision, that certain personal property, as stock and farming utensils, to value of $1000, shall be kept on premises and remain property of lessor as security to end of term, qualifies the title, and is valid against lessees, attaching creditors. Paris *v.* Vail, 18 Vt. 277.

A condition precedent will prevent the vesting of title until it has been performed. Andis *v.* Personett, 108 Ind. 202. It may, however, though in a sealed lease, be waived. Long *v.* Stafford, 103 N. Y. 274.

A condition subsequent, to be performed by lessor, must in order to defeat the lessee's title be performed *bonâ fide*. Trout *v.* Perciful, 105 Ind. 532.

in the same deed or indorsed upon the deed; or may be contained in another deed executed the same day (*d*); a condition indorsed upon a lease before the sealing and delivery is of equal force with a condition written within the deed (*e*).

By what words created. — Conditions are most properly created by using the word "condition," or the words "on condition;" but the word commonly and as effectually made use of, is, that of "provided" (*f*). The words "covenant" and "condition," when used in an agreement, do not necessarily mean a covenant under seal, or a condition in the strict legal sense of the word, but may, in order to effectuate the intention of the parties, be construed to mean "contract or stipulation" (*g*). If a proviso or condition have dependence upon another clause of the deed, or if the words of the lease be to compel the lessor to do something, then it is not a condition, but a convenant only; as if there be in the deed a covenant that the lessee should scour the ditches, and then these words follow, "provided that the lessor shall carry away the earth." If the words run thus: "provided always, and the lessee, &c., doth covenant, &c., that neither he nor his heirs shall do such an act;" this is both a [*182] condition and a covenant (*h*); so if the * words are "provided always, and it is covenanted and agreed between the parties, that the lessee shall not alien," this is both a condition and a convenant; for it is a condition by force of the proviso, and a covenant by force of the other words (*i*) A covenant by the lessor for quiet enjoyment by the lessee, his executors, administrators and assigns, during the term, he or they paying the rent thereby reserved and performing the covenants on his and their part contained, is not a covenant subject to a condition precedent (*k*).

Condition or covenant. — Where in an agreement to demise

(*d*) Com. Dig. tit. Condition (A. 9).

(*e*) Griffin *v.* Stanhope, Cro. Jac. 456; Goodright *d.* Nicholls *v.* Mark, 4 M. & S. 30.

(*f*) Shep. Touch. 122; Co. Lit. 146.

(*g*) Hayne *v.* Cummings, 16 C. B., N. S. 421.

(*h*) Shep. Touch. 122; Co. Lit. 146.

(*i*) Co. Lit. 103 b.

(*k*) Dawson *v.* Dyer, Bart., 5 B. & Adol. 584, *post*, Chap. XVII., Sect. 8 b; and see Lock *v.* Furze, 19 C. B., N. S. 96; L. R., 1 C. P. 441.

lands for a term of years at a certain annual rent, in which there was no clause of re-entry, there was a stipulation "that in case the said lessor should want any part of the said land to build or otherwise, or cause to be built, then the lessee shall give up that part of the said land as should be requested by the lessor, by his making an abatement in proportion to the rent charged; and also to pay for so much of the fence at a fair valuation, as he should have occasion from time to time to take away, by his giving or leaving six months' notice of what he intended to do:" it was held, that this was merely a covenant, and not a condition (*l*). But where a proviso in a lease was, that in case the lessor at any time shall be desirous of having any part of the land delivered up to him and shall sign three months' notice, the lessee covenants to give it up, and that the lessor shall and may take peaceable and quiet possession, paying a fair compensation, and the rent being reduced at a certain rate per acre, it was held not to be a covenant merely (*m*). By an agreement for a lease it was *stipulated and conditioned*, that A. should not assign, transfer or underlet any of the premises, otherwise than to his wife, child or children: it was held, that by such clause a condition was created for the breach of which the lessor might maintain an ejectment (*n*). But mere words of agreement, such as "the tenant hereby agrees that he will not underlet the premises without the consent in writing of the landlord" (*o*), do not constitute such a condition (*p*).

A condition that assignments should be left with the solicitor of the ground landlord has been held to be a covenant (*q*).

"Running with the land."— A condition which does not concern the thing demised, but is only collateral, does not

(*l*) Doe *d.* Wilson *v.* Phillips, 2 Bing. 13; 9 Moo. 46; Doe *d.* Wilson *v.* Abel, 2 M. & S. 541.

(*m*) Doe *d.* Gardner *v.* Kennard, 12 Q. B. 244.

(*n*) Doe *d.* Henniker *v.* Watt, 8 B. & C. 308.

(*o*) Shaw *v.* Coffin, 14 C. B., N. S. 372.

(*p*) Crawley *v.* Price, L. R., 10 Q. B. 302; 33 L. T. 203; 23 W. R. 874.

(*q*) Brooks *v.* Drysdale, L. R., 3 C. P. D. 52; 37 L. T. 467; see *ante*, 121 (*m*).

run with the land, nor with the reversion; and an assignee of the lessor cannot sue for any breach of it (*r*).

[*183] *Sect. 12.— *Schedules, Indorsements, &c.*

Schedule of fixtures, furniture, &c. — When a house is let, together with fixtures, furniture or other articles therein, it is usual to make a schedule or inventory of them, with a covenant or promise from the lessee to re-deliver them at the end of a term. Such covenant or promise will give the landlord a better remedy (with clearer evidence) than he would otherwise have (*s*). The schedule or inventory is generally written at the foot or end of the lease, or it is indorsed thereon, or annexed thereto.

When schedule not annexed. — Sometimes by oversight or mistake a schedule referred to in a deed as annexed thereto is not in fact annexed when the deed is executed. In such case the deed will operate and take effect, so far as may be, without the assistance of the schedule (*t*). But sometimes it is insensible and inoperative as to part without the aid of the schedule (*u*).

How articles describe. — The articles comprised in the schedule should be specified in such a manner as to prevent all doubt as to what was intended to be included (*x*). When they are numerous and comprise items of small value, the description of the property should be general enough to include all the items, after which may be added "the principal articles whereof are particularly enumerated and described in the schedule hereunder written, or hereunto annexed," or to that effect (*y*). But sometimes the schedule may be referred to in such a manner as to exclude any-

(*r*) Stevens *v.* Copp, L. R., 4 Ex. 20; and see 162, *ante*.

(*s*) Dampier *v.* Pole, 4 Exch. 678.

(*t*) Dyer *v.* Green, 1 Exch. 71; Dames *v.* Heath, 3 C. B. 938; Dampier *v.* Pole, 4 Exch. 678.

(*u*) Weeks *v.* Maillardet, 14 East, 568; Sellin *v.* Price, L. R., 2 Ex. 189; 36 L. J., Ex. 93.

(*x*) Wood *v.* Rowcliffe, 6 Exch. 407; Cort *v.* Sagar, 3 H. & N. 370; Hutchinson *v.* Kay, 23 Beav. 413; cited 3 H. & N. 372; Baker *v.* Richardson, 6 W. R. 663; Walsh *v.* Trevanion, 15 Q. B. 733; Barton *v.* Dawes, 10 C. B. 261.

(*y*) Dyer *v.* Green, 1 Exch. 71.

thing not therein specified (*z*). A deed is not avoided by subsequently annexing the schedule therein referred to (*a*); but frequently the deed may be used without the schedule (*b*).

When a fine or premium is paid, a receipt for the amount should be indorsed on the lease. It may be concisely expressed thus: —

Receipt for consideration. — "Received of Mr. C. D. the sum of pounds as within mentioned." No receipt stamp is necessary in addition to the lease stamp.

Attestation. — The usual attestation clause should not be omitted, especially when the lease is granted in pursuance of a power (*c*). Alterations in the deed should be specially mentioned in the attestation, or marked in the margin with the initials of the attesting witnesses.

Alterations indorsed before execution. — It sometimes happens that after a deed has been engrossed, but before it is executed, some additional covenant or stipulation is agreed * on, which cannot conveniently be interlined. [*184] In such case it may be *indorsed* on the lease, and referred to in the proper place thus: — "See back (A)." Memorandums indorsed upon leases, if made previously to the execution of the lease, are considered in construction and effect as part of the instrument, although they add to or change the provisions of the deed (*d*). An indorsement upon a deed or other alteration therein is taken to have been made before the execution of the deed and to be parcel of it, in the absence of proof to the contrary (*e*). It is no objection to a lease that an alteration therein was made and

(*z*) Wood *v.* Roweliffe, 6 Ex. 407; Bake *v.* Richardson, 6 W. R. 663, *contra.*

(*a*) West *v.* Steward, 14 M. & W. 47. But see Sellin *v.* Price, L. R., 2 Ex. 189, 192; 36 L. J., Ex. 93.

(*b*) Dames *v.* Heath, 3 C. B. 938; Dye *v.* Green, 1 Exch. 71.

(*c*) 22 & 23 Viet. c. 35, s. 12.

(*d*) Griffin *v.* Stanhope, Cro. Jac. 456; Goodright *d.* Nicholls *v.* Mark 4 M. & S. 30; Frogley *v.* Earl Lovelace, 1 Johns. 333.

(*e*) Brewster *v.* Kidgell, Carth. 438; Flint *v.* Brandon, 1 Bos. & P., N. R. 73; Doe *d.* Tatum *v.* Catamore, 16 Q. B. 745. The presumption is the other way with respect to a will or codicil; Doe *d.* Shallcross *v.* Palmer, 16 Q. B. 747.

signed, after the lease was signed, but before it was sealed and delivered (*f*).

Where after execution. — A memorandum indorsed upon an instrument subsequently to its execution, although it refers thereto, is to all intents a new instrument, and must be executed and stamped accordingly (*g*).

Sect. 13. — *Stamp.*

Stamps on leases, &c. — The stamping of leases and agreements for leases, which was, before the 1st of January, 1871, regulated by a number of complicated enactments, is now regulated by the Stamp Act, 1871, (33 & 34 Vict. c. 97), which came into operation on the 1st January, 1871, from which date also the Inland Revenue Repeal Act, 1870, (33 & 34 Vict. c. 99), repealed a large body of prior enactments on the subject, the titles of which may be seen on reference to that act.

Such portions of the Stamp Act, 1870, and of the schedule thereto as bear upon the subject of this work are set out at length hereafter (*h*).

In case of additional rent. — It may be mentioned here, however, that by the Inland Revenue Act, 1876, (39 & 40 Vict. c. 16), s. 11, an instrument whereby the rent reserved by any other instrument chargeable with duty as a lease and duly stamped is increased "shall not be chargeable with stamp duty, otherwise than as a lease in consideration of the additional rent thereby made payable."

Stamp depends on actual consideration. — Prior to the Stamp Act, 1870, the ad valorem stamp duty on a lease, [*185] * or agreement for a lease, was to be regulated by the consideration appearing on the face of it, although it might not be that which was actually paid (*i*), and

(*f*) Lyburn *v.* Warrington, 1 Stark. R. 162.

(*g*) Reed *v.* Deere, 7 B. & C. 261; 2 C. & P. 624; Hill *v.* Patten, 8 East, 373; French *v.* Patten, 9 East, 351; Tilsley's Stamp L. 359 (2nd ed.).

(*h*) See *post*, Appendix A. sect. 7; and as to stamping after execution, and for purposes of evidence, see sects. 15–17 of the act, and *post*, p. 172.

(*i*) Duck *v.* Braddyll, M'Clel. 217; 13 Price, 455.

the ad valorem duty applied only to considerations passing between the lessor and lessee (*k*); but both these rules are abrogated by the terms of the schedule to the Act of 1870, tit. "Lease."

Separate rents. — If two distinct rents be reserved, one for the house and land, and another for the furniture and fixtures, the stamp must be sufficient to cover both (*l*). Where the plaintiff demised a slate pit at S. and stone quarries at M. to the defendant under an indenture of lease, to hold the one from Lady-day, 1815, and the other from Michaelmas, 1817, for the several terms of fourteen years from the respective dates thereof, at the yearly rent of 70*l.* for the slate pit and 130*l.* for the quarries: it was held, that one ad valorem stamp on the aggregate amount was sufficient, as the letting must be considered as one transaction, there being no evidence of an intent by the parties to defraud the revenue (*m*). Again, where a lease contained a demise of two separate farms, with two habendums differing from each other, a reservation of a separate rent in respect to each farm, and separate covenants, some applying to one farm and some to the other: it was held, that one ad valorem stamp for the amount of both rents was sufficient (*n*). So also a lease containing a demise of land, at a certain rent, and of other land at the same rent as was then paid for it, but not describing the amount, is well stamped by one ad valorem stamp, calculated upon the whole amount of rent to be paid for all the lands (*o*).

New stipulation after signature. — If a contract, which is signed by one party, have, previously to the signature of the other, inserted in it a new stipulation, it is entire, and requires but one stamp (*p*): and where an instrument contained in its general terms a written contract or demise to several different tenants for different estates at different rents, set against each signature, and one stamp only ap-

(*k*) Boone *v.* Mitchell, 1 B. & C. 18.
(*l*) Coster *v.* Cowling, 7 Bing. 456.
(*m*) Boase *v.* Jackson, 3 B. & B. 185.
(*n*) Blount *v.* Pearman, 1 Bing. N. C. 408; 1 Scott, 55.
(*o*) Parry *v.* Deere, 5 A. & E. 551.
(*p*) Knight *v.* Crockford, 1 Esp. 189.

peared on the paper; the court held, that it was matter of circumstantial evidence to which contract such stamp should be applied (*q*). An agreement for a lease containing a provision that the lessee should give up a farm at Michaelmas was held not to require a new stamp by the addition of the words "house and buildings," on the ground that the addition merely expressed what the parties intended at first (*r*).

A new agreement of course requires a new stamp (*s*).

[*186] * It was formerly the law that if a lease in writing contained a contract for the purchase of goods, it could not be given in evidence to prove the sale of the goods, unless it had a lease stamp (*t*). The 97th section of the Act of 1870 now provides for this case, by the enactment that where part of the consideration consists of goods, the value of the goods is to be deemed a consideration in respect of which the lease is chargeable with duty.

A lease with option for lessee to purchase requires but one stamp as a lease (*u*).

When a stamp is necessary in evidence. — A stamp is only necessary where a paper is used as evidence of an agreement directly, and not where it is used incidentally (*x*). The court will not decide upon a special case stating that any of the deeds or documents therein mentioned are unstamped (*y*). The draft of an agreement for letting premises in which alterations were made, and which was finally agreed to by the solicitors on both sides, but was never signed, is not admissible as evidence of an express contract without a stamp (*z*). So a rough imperfect memorandum of an agreement to become surety for rent must be stamped, and will exclude oral evidence of such agreement (*a*). Where a proposal was made in writing by A. to let a piece of land to B. on certain terms contained in a written agreement between

(*q*) Doe *d.* Copley *v.* Day, 13 East, 241.

(*r*) Doe *d.* Waters *v.* Houghton, 1 Man. & R. 208.

(*s*) See Reid *v.* Deere, 7 B. & C. 261.

(*t*) Stone *v.* Rogers, 2 M. & W. 443.

(*u*) Worthington *v.* Warrington, 5 C. B. 636.

(*x*) Wheldon *v.* Matthews, 2 Chit. 399; Forsyth *v.* Jervis, 1 Stark. 437.

(*y*) Nixon *v.* Albion Marine Insurance Co., L. R., 2 Ex. 338; 36 L. J., Ex. 180.

(*z*) Chadwick *v.* Clarke, 1 C. B. 700.

(*a*) Glover *v.* Halkett, 2 H. & N. 487.

B. and C., and A. afterwards agreed, by parol, that B. should have the land upon the terms proposed; it was held, in an action for a breach of the agreement, that the original proposal was receivable in evidence without a stamp (*b*). Where, pending a negotiation for a tenancy for less than three years, the terms of which were arranged by parol, a memorandum was signed and delivered by the landlord to the tenant, saying he should be happy to allow him to quit on a certain event without notice: it was held this might be given in evidence without a stamp (*c*). A written paper, signed by an auctioneer, and delivered to a bidder, to whom lands were let by auction, containing the description of the lands, the term for which they were let to the bidder, and the rent payable, but not the lessor's name, was held necessary to be stamped (*d*): but a similar paper not signed by the auctioneer, or any of the parties, was held not to be such a minute of the agreement as was required to be stamped, nor such a writing as would exclude parol evidence (*e*). Where there was a parol agreement to demise certain premises upon * the terms and conditions con- [*187] tained in a lease of the same premises granted by the lessor to another person; it was held, that in an action by the lessor against the lessee for rent and non-repairs, the lease could not be read in evidence unless it was stamped (*f*). Where an instrument stamped with a lease stamp demised certain premises upon the conditions contained in the annexed lease, which was not stamped, it was held, that the annexed lease was admissible in evidence without a stamp (*g*). Though an oral lease for three years may be good, yet if it be reduced into writing it must be stamped, or it will not be receivable in evidence (*h*).

Objection to stamp at trial. — Where a document is offered

(*b*) Drant *v.* Browne, 3 B. & C. 665; Edgar *v.* Blicke, 1 Stark. R. 464.

(*c*) Bethell *v.* Blencowe, 3 M. & G. 119.

(*d*) Ramsbottom *v.* Mortley, 2 M. & S. 445.

(*e*) Ramsbottom *v.* Tunbridge, 5 M. & S. 434.

(*f*) Turner *v.* Power, 7 B. & C. 625; 1 Moo. & M. 131.

(*g*) Pearce *v.* Cheslyn, 4 A. & E. 225; Strutt *v.* Robinson, 3 B. & Ad. 395.

(*h*) Prosser *v.* Phillips, Bull, N. P. 269.

in evidence, and it is objected to by the opposite party on the ground that it is not sufficiently stamped, proof of that lies on the party who makes the objection, it being a fact (*i*). The objection is one of a preliminary nature to be decided by the judge (not by the jury), who will, immediately upon the objection being taken, permit evidence to be interposed, and arguments adduced, to prove or disprove the sufficiency of the stamp (*k*). Where a document has been altered so as to affect its validity and also the stamp, it should be objected to on two grounds, viz., 1. That the alteration has made the deed void; 2. That it has rendered a new stamp necessary: unless the second point be duly taken, it cannot be relied upon, on an application for a new trial, &c. (*l*). The judge's decision that the stamp is sufficient, or that no stamp is necessary, is conclusive (*m*); but his decision the other way may be reviewed upon an application for a new trial, &c. (*n*). Since the Common Law Procedure Act, 1854, s. 28 (repealed and re-enacted by s. 15 of the Stamp Act, 1870), objections to written evidence for want of a sufficient stamp are usually made by the judge's marshal or associate, whose duty it is to make the objection, although neither party wishes it, upon the production of the document as evidence. But sometimes this may be avoided by the parties mutually agreeing in writing before the trial to admit copies in evidence instead of the originals (*o*). Under the Stamp Act, 1870, the associate can make only such objections for want of a stamp as the parties might have made if the statute had not passed (*o*).

Stamping after execution. — By the Stamp Act, [*188] 1870, s. 15, an unstamped or insufficiently * stamped instrument may be stamped after execution, on pay-

(*i*) Waddington *v.* Francis, 5 Esp. 182; Doe *d.* Fryer *v.* Coombs, 3 Q. B. 687.

(*k*) Bartlett *v.* Smith, 11 M. & W. 483, 485; Painter *v.* Hill, 2 C. & K. 924; Doe *d.* Fryer *v.* Coombs, 3 Q. B. 687; Key *v.* Mathias, 3 F. & F. 279.

(*l*) Eagleton *v.* Gutteridge, 11 M. & W. 465, 469; 2 Dowl. N. S. 1053.

(*m*) C. L. P. Act, 1854 (17 & 18 Vict. c. 125), s. 31; Siordet *v.* Kuczynski, 17 C. B. 251; 25 L. J., C. P. 2, Heisir *v.* Grout, 5 H. & N. 35.

(*n*) Fishmongers' Co. *v.* Dimsdale, 12 C. B. 557; Gurr *v.* Scudds, 11 Exch. 190; Sharples *v.* Rickard, 2 H. & N. 57.

(*o*) Traviss *v.* Hargreave, 4 F. & F. 1078.

ment of the unpaid duty and a penalty of 10*l.*, and, in case the duty exceeds 10*l.*, of 5 per cent. interest on the unpaid duty from the day of execution up to the time when the interest is equal to the unpaid duty. Where an instrument is not required by law to be stamped within a particular time after its execution, the court, upon its being offered in evidence, will not inquire when the stamp was affixed, nor, if a penalty was incurred, whether the proper penalty was paid on the stamping (*p*): and if an instrument has been originally unstamped, but has been stamped on payment of the penalty, it is admissible in evidence, though the receipt for the penalty has been erased; provided it be proved that such receipt has been indorsed on it; it is not necessary to prove the commissioners' signature to such a receipt (*q*).

Stamping for purposes of evidence. — By s. 16 of the Stamp Act, 1870, an unstamped lease (amongst other documents) if tendered in evidence in any Court of Civil Judicature in England may be received in evidence on payment to the officer of the court of the amount of unpaid duty, and the penalty payable on stamping the same, and a further sum of one pound.

Lease stamped according to law at time of execution. — Under prior stamp acts it had been held (*r*), that in a case of stamping after execution, the proper stamp to be applied was that which was necessary at the time the stamp was actually affixed. But the Stamp Act, 1870, s. 17, expressly enacts that "save as aforesaid" [*i.e.*, save as in ss. 15, 16, mentioned], "no instrument executed in any part of the United Kingdom shall, except in criminal proceedings, be pleaded or given in evidence, or admitted to be good, useful or available, in law or equity, unless it is duly stamped *in accordance with the law in force at the time when it was first executed*" (*s*).

(*p*) Rex *v.* Preston, 5 B. & Ad. 1028.

(*q*) Apothecaries' Co. *v.* Fernyhough, 2 C. & P. 438.

(*r*) Buckworth *v.* Simpson, 1 C. M. & R. 834; Deakin *v.* Penniall, 2 Exch. 320.

(*s*) See this enactment acted on in Clarke *v.* Roche, 3 Q. B. D. 170.

Sect. 14. — *Execution of Lease.*

Sealing essential to lease by deed. — Where a lease is by deed, the respective parties should seal and deliver it, for an instrument not under seal is no deed (*t*).[1] One piece of wax may be the seal of several persons, but it must appear by the deed and profess to be the seal of each (*u*). It is not, however, absolutely essential, that there should be either [*189] wax or wafer; it *seems to be enough that there should be an impression on the parchment or paper, with the intent of sealing (*x*). The method of our Saxon ancestors was for such as could write to subscribe their names, and, whether they could write or not, to affix the sign of the cross, which custom illiterate persons for the most part to this day keep up by signing a cross for their mark, when unable to write their names. A deed is well executed by an illiterate person, if it be signed by a third person at his request and in his presence, and sealed and

(*t*) 1 Steph. Com. 492.

(*u*) Cooch *v.* Goodman, 2 Q. B. 580.

(*x*) See Reg. *v.* Trustees of Covent Garden, 7 Q. B. D. 238, n.

[1] **Execution of leases.** — Covenants in a sealed lease as a general rule in law bind only those mentioned as parties. Haley *v.* Boston Belting Co., 140 Mass. 73.

In New York, it has been held that a corporation which had agreed to assume the lessee's covenants, and was mentioned in lease as real party was liable directly to the lessor. Van Schaick *v.* Third Ave. R. R. Co., 38 N. Y. 346.

Parties who execute in their own names, although for benefit of others, are personally liable. Seaver *v.* Coburn, 10 Cush. (Mass.) 324. Upon a lease to "A., Treasurer of Eagle Lodge" with covenant not to underlet, A. is personally liable. Grau *v.* McVicker, 8 Biss. 13.

A sealed lease executed by but one party is binding upon him if accepted and performed by the other party, Jennings *v.* McComb, 112 Pa. St. 518, 522 (*per* Trunkey, J.); Grove *v.* Hodges, 55 Pa. St. 504; and the title will pass under an indenture sealed only by the grantor or lessor if accepted by the grantee or lessee, both being bound by the covenants, the remedy against one being assumpsit, and against the other covenant, Grove *v.* Hodges, *supra*; Libbey *v.* Staples, 39 Me. 166.

If, however, only the lessee execute and do not occupy, the lessor cannot enforce the lease. Cleves *v.* Willoughby, 7 Hill (N. Y.) 83 (*per* Beardsley, J.).

As to the effect of occupation under void and imperfectly executed leases, see *ante*, Chap. V., sec. 2, notes, and sec. 4, notes.

delivered by him. It need not be read over to him, unless he requires it (*y*).

Whether lease by deed must be signed. — It is a point on which authorities are at variance, whether the Statute of Frauds, 29 Car. 2, c. 3 (*z*), requires leases by deed to be signed (*a*). The preponderance of authority (*b*) seems to be in favour of the signature not being necessary.

Failure of lessor to execute. — A lessee entering and holding under a lease not executed by his landlord is not estopped, in an action by the assignee of the lessor, from showing such want of execution by the lessor (*c*). Where a lease for a term, containing a covenant to repair *during the term*, although executed by the lessee, is not executed by the lessor, the lessee is not bound *by the covenant*, for the lease being void he has not had the consideration for his covenant (*d*). And it seems that such lessee would not be bound by such a covenant by the fact of his having enjoyed the premises for a period of years equal to those which the term would have comprised, if it had been granted, if he was not bound during his continuance (*e*). But he may be liable upon an implied tenancy on the like terms and conditions as those expressed in the lease.

Delivery. — The lease must also be *delivered* either by the parties themselves or by their attorney authorized by a power, for merely sealing does not make a deed: the delivery is also expressed in their attestation "sealed and *delivered*," for delivery makes it a lease. Almost any manifestation, however, of the party's intention to deliver, if accompanied by an act importing the same, will constitute a delivery.

(*y*) Rex *v.* Longnor, 1 N. & M. 577.

(*z*) *Ante*, 127.

(*a*) Cooch *v.* Goodman, 2 Q. B. 580; Aveline *v.* Whisson, 4 M. & G. 801.

(*b*) Williams on Real Property, p. 142; Leake on Contracts, p. 77.

(*c*) Cardwell *v.* Lucas, 2 M. & W. 111; Soprani *v.* Skurro, Yelv. 19; Rose *v.* Poulton, 2 B. & Ad. 822.

(*d*) Com. Dig. tit. Covenant (F.); Soprani *v.* Skurro, Yelv. 18; Waller *v.* Dean and C. of Norwich, Owen, 136; Knipe *v.* Palmer, 2 Wils. 132; Pitman *v.* Woodbury, 3 Exch. 4; Swatman *v.* Ambler, 8 Exch. 72. But see How *v.* Greek, 3 H. & C. 391; 34 L. J., Ex. 4.

(*e*) Pitman *v.* Woodbury and Swatman *v.* Ambler, *supra*.

Escrow. — But when it is intended that the lease shall not take effect as a demise until something is done by [*190] the lessee — *e.g.* payment of the premium * or of the expenses — the lease should be delivered only as an escrow, *i.e.*, conditionally to take effect as a lease upon the performance of what is so to be done (*f*). Although sealed and delivered and attested in the usual manner, parol evidence is admissible to show that it was only to operate as an escrow, until, &c. (*g*). Whether it was intended to operate as a deed, or only as an escrow, is a question of fact for the jury (*h*).

By attorney. — An attorney or agent to execute a deed in the absence of his principal must be authorized by deed (*i*), and he must execute it in the name of his principal, or in his own name, adding such words as show that he acts solely as the agent of his principal (*k*). If an unauthorized person seal and deliver a deed in the name and on behalf of one of the parties, and the party himself deliver it afterwards, he thereby adopts the sealing, and makes it his own deed (*l*).

Date. — Every deed is taken to be delivered on the day it bears date, unless the contrary be proved (*m*); and if proved, it operates only from the time of execution (*n*): but if the date be false or impossible, the delivery ascertains the time of it (*o*). Parol evidence is admissible to show that a written contract which has no date was not intended to operate from its delivery, but from a future uncertain period (*p*).

(*f*) Shep. Touch. 58, 59.

(*g*) Gudgen *v.* Bessett, 6 E. & B. 986; Bowker *v.* Burdekin, 11 M. & W. 129; Christie *v.* Winnington, 8 Exch. 287, 290; Pym *v.* Campbell, 6 E. & B. 370; 25 L. J., Q. B. 277; Furness *v.* Meek, 27 L. J., Ex. 34; Millership *v.* Brookes, 5 H. & N. 797; 29 L. J., Ex. 369; Murray *v.* Earl of Stair, 2 B. & C. 82; Davies *v.* Jones, 17 C. B. 625, 634.

(*h*) Ponsford *v.* Walton, L. R., 3 C. P. 167, 174.

(*i*) Harrison *v.* Jackson, 7 T. R. 207; Berkely *v.* Hardy, 5 B. & C. 355; Smith L. & T. 82 (2nd ed.).

(*k*) M'Ardle *v.* Irish Iodine Co., 15 Ir. Com. L. R. 146.

(*l*) Tupper *v.* Foulkes, 9 C. B., N. S. 797.

(*m*) Co. Lit. 36; 2 Blac. Com. 307.

(*n*) Cooper *v.* Robinson, 10 M. & W. 694; Shaw *v.* Kay, 1 Exch. 412; Bird *v.* Baker, 1 E. & E. 12; 28 L. J., Q. B. 7; Jeron *v.* Tomkinson, 1 H. & N. 196, 206; Steele *v.* Mart, 4 B. & C. 272; Browne *v.* Burton, 5 D. & L. 289.

(*o*) Murray *v.* Earl Stair, 2 B. & C. 82; Bowker *v.* Burdekin, 11 M. & W. 128; Doe *d.* Garnons *v.* Knight, 5 B. & C. 671; Hare *v.* Horton, 5 B. & Ad. 715; Goodright *v.* Gregory, Lofft, 339; Goodright *d.* Carter *v.* Straphan, Cowp. 201; Lofft, 763.

(*p*) Davis *v.* Jones, 17 C. B. 625.

Attestation by witnesses. — The last requisite is the attestation or execution of the lease in the presence of witnesses, though this is generally necessary rather for the preservation of the evidence, than to constitute the essence of the deed. But if the lease be made in pursuance of a power, it must be executed and attested as required by the power, or by the stat. 22 & 23 Vict. c. 35, s. 12 (*q*). And when it requires to be registered in Middlesex or Yorkshire (infra, Sect. 15), the "memorial" required by s. 5 of the Yorkshire Registries Act, 1884, must, by s. 6 of that act, be attested by one witness or more, "one of whom at least," by s. 6 of the act, "shall have been a witness to the execution." In the North Riding two witnesses were necessary prior to the Act of 1884 (*r*).

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* Sect. 15. — *Registrations of certain Leases in Middlesex, Yorkshire and Bedford Levels.* [*191]

In Middlesex. — If the demised premises be situate in Middlesex, Yorkshire, or the Bedford Levels, and if the lease be not at a rack rent or for more than 21 years in Middlesex, or for more than 21 years in Yorkshire, or for more than 7 years in the "Bedford Levels," registration will be necessary to give it force against subsequent purchasers or mortgagees. This registration is provided for in Middlesex by 7 Ann. c. 20, s. 17 of which is as follows:

Leases not required to be registered. — "This act shall not extend to any *copyhold* estates, or to *leases at a rack rent* (*s*), or to *any lease not exceeding one-and-twenty years, where the actual possession and occupation goeth along with the lease*, or to any of the chambers in Serjeants' Inn, the Inns of Court, or Inns of Chancery; anything in this act contained to the contrary thereof in anywise notwithstanding."

Leases not comprised in this very extensive exception may be registered in such manner as is in the act directed; and every such lease "shall be adjudged fraudulent and void (*t*)

(*q*) *Post*, Sect. 19.
(*r*) *Post*, Sect. 15.
(*s*) *I. e.* a rent of the full annual value of the thing demised.
(*t*) See Wormald *v.* Maitland, 35 L. J., Ch. 69; 13 W. R. 832.

against any subsequent purchaser or mortgagee for valuable consideration, unless a memorial thereof be registered as by the act is directed before the registering of the memorial of the deed or conveyance under which such subsequent purchaser or mortgagee shall claim.

Memorials, how executed, &c. — By sect. 5, "every such memorial shall be put into writing (*u*) on vellum or parchment, and brought to the said office (*x*), and shall be under the hand and seal of some or one of the grantors, or some or one of the grantees, his or their heirs, executors or administrators, guardians or trustees, *attested by two witnesses, one whereof is to be one of the witnesses to the execution of such deed or conveyance*, which witness shall upon his oath, before one of the said registrars, or before a master extraordinary in Chancery (*y*), prove the signing and sealing of such memorial, and the execution of the deed or conveyance mentioned in such memorial."

Contents of memorial. — By sect. 6, "every memorial of any deed or conveyance shall contain the day of the month and the year when such deed or conveyance bears date, and the names and additions of all the parties to such deed or conveyance, and of all the witnesses thereto and the places of their abode, and shall express or mention the honors, manors, lands, tenements, and hereditaments con-
[*192] tained in such deed * or conveyance, and the names of all the parishes, townships, hamlets, precincts or extra-parochial places within the said county where any such honors, &c., are lying or being, that are given, granted, conveyed or in any way affected or charged by any such deed or conveyance, *in such manner as the same are expressed or mentioned in such deed or conveyance*, or to the same effect." In preparing a lease or other conveyance which will have to be registered, this enactment should be borne in mind, and the parcels described accordingly, so that they may be merely

(*u*) It may be lithographed; Reg. *v.* Registrars of Middlesex, 7 Q. B. 156.

(*x*) The Registrar's Office, No. 8, Serle Street, Lincoln's Inn, London, W. C.

(*y*) Now, "Commissioner to administer oaths in the Supreme Court," 16 & 17 Vict. c. 78; Judicature Act, 1873, s. 82.

copied in the memorial, and yet give all the particulars required by the statute (*z*).

Certificate of registration. — The deed must be produced, together with the memorial thereof, to the registrar, who is to indorse on the deed a certificate of the registration, &c., "which certificate shall be taken and allowed as evidence of such respective registries in all courts of record whatsoever" (*a*).

Memorials to be filed in due order. — And the registrar "shall duly file every such memorial in order of time as the same shall be brought to the said office, and enter or register the said memorials in the same order that they shall respectively come to his hands." When two deeds are registered on the same day and at the same hour, they must be presumed to have been registered in the order as numbered (*b*).

Two deeds as to same land. — By sect. 7, when two or more deeds relating to the same land are registered together, the parcels need not be stated at length more than once in the memorial and registry thereof.

Registry of judgments, &c. — By sect. 18, judgments, statutes, and recognizances shall affect or bind lands in Middlesex only from the time of a memorial thereof being registered as therein mentioned (*c*).

Yorkshire. — The Yorkshire Registry Act, 1884, 47 & 48 Vict. c. 54, consolidating and amending 2 & 3 Ann. c. 4, 5 & 6 Ann. c. 18, and 6 Ann. c. 35, s. 34 (West Riding), 6 Ann. c. 35 (East Riding), and 8 Geo. 2, c. 6 (North Riding), contains similar enactments with respect to hereditaments in Yorkshire.

The excepting clause, s. 28, is as follows:

"Nothing in this act contained shall be deemed to extend to any copyhold hereditaments, nor to any lease not exceeding twenty-one years, or any assignment thereof where

(*z*) Reg. *v.* Registrars of Middlesex, 15 Q. B. 976.

(*a*) The registered memorial of a deed conveying lands in Middlesex is secondary evidence of the contents of such deed against the personal representatives of the party by whom such deed is registered; Wollaston *v.* Hakewill, 3 M. & G. 297.

(*b*) Neve *v.* Pennell and Hunt *v.* Neve, 33 L. J., Ch. 19; 2 Hem. & M. 170.

(*c*) Benham *v.* Keane, 31 L. J., Ch. 129; 8 Jur., N. S. 604.

accompanied by actual possession, from the making of such lease or assignment."

Registry offices in Yorkshire. — By s. 31 of the act the registry offices are, as under the repealed acts, at Northallerton for the North Riding, at Beverly for the East Riding, and at Wakefield for the West Riding.

[*193] * By the Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78) (*d*), "where the will of a testator devising land in Middlesex or Yorkshire has not been registered within the period allowed by law in that behalf, an assurance of such land to a purchaser or mortgagee by the devisee or by some one deriving title under him shall, if registered before, take precedence of and prevail over any assurance from the testator's heir at law."

In the Bedford Level. — By 15 Car. 2, c. 17, s. 8, "no lease, grant or conveyance of or charge out of or upon the said ninety-five thousand acres [of the Bedford Level], or any part thereof, *except leases for seven years or under in possession*, shall be of any force but from the time it shall be entered with the registrar, as thereby directed; the entry whereof being endorsed by the said registrar upon such lease, grant, conveyance or charge, shall be as good and effectual in the law as if the original book of entries were produced at any trial at law or otherwise." The intention of these acts plainly is to secure subsequent purchasers and mortgagees against secret conveyances and fraudulent incumbrances.

Cases upon Middlesex, Yorkshire and Bedford Level Registry Acts. — A lessee of land in the Bedford Level cannot object to an action by his landlord for a breach of covenant in not repairing, that the lease was void by statute for want of being registered, as the act does not avoid it *as between the parties themselves*, but only postpones its priority with respect to subsequent incumbrancers registering their title before (*e*). All leases by deed for a valuable consideration not expressly excepted are subject to the provisions of the Middlesex and Yorkshire acts. Therefore, where lands within a register

(*d*) Sect. 18.

(*e*) Hodson *v.* Sharpe, 10 East, 350.

county are demised by way of mortgage, the mortgagor to enjoy the same until default in payment of the principal and interest, the deed requires registration (*f*). But a deposit of a lease with or without a memorandum in writing, by way of equitable mortgage of lands in Middlesex, need not be registered, not being a "deed or conveyance" within the meaning of the 7 Ann. c. 20 (*g*), although actual or constructive notice thereof will in equity affect a subsequent purchaser (*h*). A further charge which is not registered will be postponed to a subsequent mortgage which is registered (*i*). The mere receipt of rent would not, it seems, be deemed an actual possession and occupation within the registry acts (*k*). A lease within the * exception [*194] of these acts will so continue, notwithstanding it may afterwards become a valuable and saleable interest (*l*). Registering an assignment is not registering the lease (*m*). In registering an assignment of a lease, the parcels ought to be inserted in full, and it is not enough to refer to them as being described in the lease (*n*). A memorial of an assignment of lease indorsed on the lease was tendered for registration to the registrar for Middlesex, under stat. 7 Ann. c. 20, in the following form: "An indenture of assignment." Then followed a statement of the date and parties to the assignment, "assigning all that brick messuage," &c. (specifying the premises and giving a full description of them as to locality and occupation), "by the description of the messuage or tenement, out-offices and premises, comprised in and demised by the within-written indenture of lease, with the appurtenances." The memorial did not state the date of

(*f*) Rigge on Registration, 88, n. (*o*); Wilson on Registration, 29; Sug. V. & P. 727 (14th ed.).

(*g*) Sumpter *v.* Cooper, 2 B. & Adol. 223; Wright *v.* Stansfield, 27 Beav.; 28 L. J., Ch. 183. But see Neve *v.* Pennell, and Hunt *v.* Neve, 33 L. J., Ch. 19; 2 Hem. & M. 170; Wormald *v.* Maitland, 35 L. J., Ch. 69; 13 W. R. 832.

(*h*) Wormald *v.* Maitland, *supra*.

(*i*) Moore *v.* Culverhouse, 27 Beav. 639; 29 L. J., Ch. 419; Neve *v.* Pennell, and Hunt *v.* Neve, *contra*.

(*k*) Fury *v.* Smith, 1 Huds. & Br. 735, 751.

(*l*) Sug. V. & P. 727 (14th ed.); Wilson on Registration, 29.

(*m*) Honeycomb *d.* Halpen *v.* Waldron, 2 Stra. 1064; Fleming *v.* Neville, Hayes, 23; Fury *v.* Smith, 1 Huds. & Br. 735, 755.

(*n*) Sug. V. & P. 731 (14th ed.).

the lease itself or the parties to it. It appeared on affidavit, in support of a rule for a mandamus to the registrar to register this memorial, that the full description of the premises was taken from the lease: it was held, that the memorial did not comply with the requirements of stat. 7 Ann. c. 20, s. 6, as it did not show that the premises were described in such manner as the same were expressed in the deed to be registered, or in the lease thereby referred to. It was also held, that where the deed, of which a memorial is to be registered, is indorsed on an earlier deed, it is not sufficient to describe the premises by such memorial in the terms used in the earlier deed, without express reference to it, if the deed to be registered describes the premises simply by reference to the earlier deed (*o*). Where there were two assignments of the same lease of certain premises in Middlesex, and the last executed was registered first, it was held that at law the deed last registered must be considered as fraudulent and void, under the statute 7 Ann. c. 20, s. 1; although the party claiming under the second assignment knew, when it was executed, of the prior execution of the first assignment (*p*). So a mortgage of leaseholds in Middlesex, which is registered there before a prior judgment obtained against the mortgagor, and registered in the Common Pleas (but not in Middlesex until after the mortgage), will take precedence of the judgment and any elegit thereon (*q*). The enrolment of a lease granted by the Duke of Corn-
[*195] wall is evidence in the same * manner as if it had been granted by the crown, when there is no Duke of Cornwall (*r*).

Elaborate provisions have been made by the Land Registry Acts of 1862 (25 & 26 Vict. c. 53), and subsequently by the

(*o*) Reg. *v.* Registrar of Middlesex, 15 Q. B. 976.

(*p*) Doe *d.* Robinson *v.* Allsop, 5 B. & A. 142; Elsey *v.* Lutyens, 8 Hare, 159; Warburton *v.* Loveland, 3 Dow. & Cl. 480; Carlisle *v.* Whaley, L. R., 2 H. L. Cas. 391.

(*q*) Westbrook *v.* Blyth, 3 E. & B. 737; 23 L. J., Q. B. 386.

(*r*) Rowe *v.* Brenton, 8 B. & C. 755. In the Duchy of Lancaster, see Kinnersley *v.* Orpe, 1 Doug. 56. As to registration of conveyances, see Le Neve *v.* Le Neve, 3 Atk. 651; Ambl. 436; Hine *v.* Dodd, 2 Atk. 275; Jolland *v.* Stainbridge, 3 Ves. 478; Morecock *v.* Dickens, Ambl. 678.

Land Registry Act of 1875 (38 & 39 Vict. c. 87), which supersedes it, for the registration of titles generally; but these acts, unlike the particular acts above referred to, are simply permissive. The Middlesex and Yorkshire Registration Acts do not apply to land registered under either of the general acts (*s*). Leasehold land may not be registered under the act of 1875, unless it be held under a lease which is either immediately or mediately derived out of land of freehold tenure (sect. 2). Sects. 34–39 refer to the transfer of leases, and sects. 50, 51 to notice of leases.

Sect. 16. — *Costs of Lease and Counterpart.*

(a) *By whom payable.*

Costs of lease and counterpart. — The lease and counterpart are usually prepared by the lessor's solicitor on behalf of both parties; but frequently the draft lease is settled and approved of by the lessee's own solicitor; who sometimes claims the right to engross the counterpart (*t*), which however seems unusual and improper. The costs of surveyor's charges and counsel's fees for advising on title, &c., will not be allowed as part of the costs of the lease (*u*). In the absence of any express stipulation to the contrary, the expense of the lease falls upon the lessee, and of the counterpart upon the lessor (*x*), and the lessee frequently agrees to pay all the expenses of both lease and counterpart.

By whom solicitor employed. — The lessor's solicitor, when he acts for both parties, should, in the first instance, take care to be *employed by the lessee to act on his behalf* in the preparation of the deeds, so that he may recover the amount of his charges from him, whether the negotiation for a lease goes off or is completed. Slight evidence of such employ-

(*s*) Act of 1862, s. 104; Act of 1875, s. 127.

(*t*) Forster *v.* Rowland, 7 H. & N. 103; 30 L. J., Ex. 396.

(*u*) Lock *v.* Furze, 19 C. B., N. S. 96; L. R., 1 C. P. 441; 34 L. J., C. P. 201; 35 Id. 141.

(*x*) Jennings *v.* Major, 8 C. & P. 61.

ment is generally sufficient (*y*). If the solicitor of the lessor, who is not the solicitor for the lessee, nor [*196] employed by him on the particular * occasion, prepares the lease and counterpart, he must look to his own client, the lessor, for payment of his charges; and the lessor, having paid them, may *sometimes* recover the amount from the lessee, under the special agreement entered into between them, or as money paid to his use, at his request (*z*). When a proposed lease goes off, it is sometimes very important to ascertain correctly who is directly liable to the solicitor, because such party, after paying the amount, may have no remedy over against the other, by reason that the failure of the negotiation was attributable to him rather than to the other party; or that there was not a complete contract in writing sufficient to satisfy the Statute of Frauds (*a*). It is always a question for the jury by whom the solicitor was employed (*b*): and he should take care to secure in the first instance sufficient evidence of such employment by the lessee. Sometimes the charges of the lessor's solicitor may be taxed at the instance of the lessee, even after they have been paid (*c*).

(b) *Scale of Solicitors' Charges.*

Solicitors' Remuneration Order. — The Solicitors' Remuneration Order, 1882, of which so much as applies to leases and agreements for leases, is set out in the Appendix to this work (*d*), prescribes a scale of remuneration to solicitors (*e*)

(*y*) Webb *v.* Rhodes, 3 Bing. N. C. 732; Smith *v.* Clegg, 27 L. J., Ex. 300.

(*z*) Grissell *v.* Robinson, 3 Bing. N. C. 10, 16; Baker *v.* Meryweather, 2 C. & K. 737.

(*a*) 29 Car. 2, c. 3, s. 4; Forster *v.* Rowland, 7 H. & N. 103; 30 L. J., Ex. 396.

(*b*) Wilkinson *v.* Grant, 18 C. B. 319, 320; Smith *v.* Clegg, 27 L. J., Ex. 300.

(*c*) *In re* Newman, L. R., 2 Ch. 707; 36 L. J., Ch. 843.

(*d*) See *post*, Appendix A. sect. 13. As to agreements for leases, see, also, Ch. IV. sect. 8, *ante*.

(*e*) By s. 60 of the Stamp Act, 1870, every person, not being a barrister, solicitor, or conveyancer, &c., who "draws or prepares any instrument relating to real or personal estate shall forfeit 50*l*., but by par. 2 b, of the same section, it is provided that the term "instrument" in the section does not include "agreements underhand only."

for preparing, settling, and completing lease and counterpart. By this scale, if the lease be at a rack-rent, the charges are limited to 7*l.* 10*s.* on a rental not exceeding 100*l.* (but not less in any case than 5*l.*), and on a rental exceeding 100*l.*, to 7*l.* 10*s.* on the first 100*l.*, and 2*l.* 10*s.* more on each additional 100*l.*, and on a rental exceeding 500*l.* to 7*l.* 10*s.* on the first 100*l.* and 2*l.* 10*s.* more on each additional 100*l.* up to 500*l.*, and 1*l.* more on each additional 100*l.* The lessee's solicitor may charge one-half the above. A solicitor concerned for both parties "is to charge the lessor's solicitor's charges, and one-half of that (*sic*) of the lessee's solicitor."

Stamps and disbursements. — The above scale "is not to include stamps, counsel's fees, or other disbursements reasonably and properly paid (*f*)." It applies only to completed transactions (*ff*).

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* Sect. 17. — *Entry of Lessee.* [*197]

Interesse Termini. — Before entry a lessee for years has at common law only an *interesse termini* (an interest of a term), and no possession. He cannot before entry maintain an action of trespass (*g*); but he may maintain ejectment (*h*), or he may assign his interest, and his assignee may enter, or maintain ejectment (*i*). If a lease be so framed as to be a bargain and sale under the Statute of Uses, the possession is immediately executed in the lessee, without actual entry (*k*). In Neale *v.* Mackenzie premises were demised by parol for a year. The lessee accepted the lease, and, by virtue of the demise, entered upon the demised land. Before and at the time of the demise, eight acres included in it had been demised to a third party, in whose possession they were, so that the lessee could not, and did not, enter upon them. It was held that the latter demise was wholly void as to the

(*f*) Rule 4.

(*ff*) Rule 2 (b).

(*g*) Co. Lit. 296 *b*; Wheeler *v.* Montefiore, 2 Q. B. 133, 156; Turner *v.* Cameron's Steam Coalbrook Coal Co., 5 Ex. 932; Lichfield *v.* Ready, Id. 939; Lowe *v.* Ross, Id. 553; Harrison *v.* Blackburn, 17 C. B., N. S. 678; Cole Ejec. 287.

(*h*) Cole Ejec. 72, 287, 459; Doe *d.* Parsley *v.* Day, 2 Q. B. 156; Ryan *v.* Clark, 14 Q. B. 73; 7 D. & L. 8.

(*i*) 8 & 9 Vict. c. 106, s. 6.

(*k*) 2 Blac. Com. 270.

eight acres, and that the rent was not apportionable, and could not be distrained for, the impediment of the lessee taking possession not being analogous to an eviction by an elder title (*l*). So where the tenant could not obtain possession of part of the premises demised, it was held an action of covenant could not be maintained by the lessor against the lessee for the rent, as in such an action it could not be apportioned (*m*). The *interesse termini* is in the lessee, whether the lease be made to commence immediately or at a future day (*n*).

Sect. 18. — *Void or Voidable.*

Davenport *v.* The Queen. — When a lease contains a proviso or condition that on breach of any of the covenants, the lease "shall cease, determine, and be utterly void, to all intents and purposes whatsoever," such words will be construed to mean *void at the election of the lessor* (*o*). This has been held in a series of cases, affirmed by the Judicial Committee of the Privy Council in Davenport *v.* The Queen (*p*). [*198] The lessee will not be allowed * to take advantage of his own wrongful act or omission, and to say that thereby the lease has become void (*q*). The lessee must do some act evidencing his intention to enter for the forfeiture and determine the lease (*r*); and the lease will be *avoided from that time only;* but previous arrears of rent may be sued for, although upon re-entry the lessor is to have the premises again "as if the said indenture had never been made" (*s*). The subject of forfeiture is further considered hereafter (Chap. VIII., Sect. 5).

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

(*m*) Holgate *v.* Kay, 1 C. & K. 341.

(*n*) Com. Dig. tit. Estate (G. 14); Lock *v.* Furze, 19 C. B., N. S. 96, 103, 105; L. R., 1 C. P. 441; 34 L. J., C. P. 201; 35 Id. 141.

(*o*) Roberts *v.* Davey, 4 B. & Ad. 667; Pennington *v.* Cardale, 3 H. & N. 656; Hughes *v.* Palmer, 19 C. B., N. S. 393, 404, 407; Cole Ejec. 408.

(*p*) L. R., 3 App. Ca. at p. 128.

(*q*) Rede *v.* Farr, 6 M. & S. 121; Doe *d.* Bryan *v.* Bancks, 4 B. & A. 401; Arnsby *v.* Woodward, 6 B. & C. 519; Roberts *v.* Davey, 4 B. & Ad. 664; Doe *d.* Nash *v.* Birch, 1 M. & W. 402; Reid *v.* Parsons, 2 Chit. R. 247.

(*r*) Roberts *v.* Davey, 4 B. & Ad. 667; Arnsby *v.* Woodward, 6 B. & C. 519; Fenn *d.* Matthews *v.* Smart, 12 East, 444, 451; Baylis *v.* Le Gros, 4 C. B., N. S. 537.

(*s*) Hartshorne *v.* Watson, 4. Bing.

Fraud. — Where a lease was granted to a man on his fraudulent representation that he intended to use the premises for carrying on a lawful trade, he intending at the time to use them, and afterwards using them, as a brothel, the representation being collateral to the agreement, was held not to avoid the lease (*t*).

Illegality. — Where a lessee intending to assign knew that the intended assignee took the premises for the purpose of using them as a brothel (notwithstanding an express covenant therein contained not so to use them), the transaction was held void, so as to prevent the lessee, who had paid for dilapidations to the lessor, from recovering the money so paid from the assignee under the indemnity clause of the assignment, and it was said that no rent or damages for breaches of covenant would have been recoverable upon an underlease executed before the assignment (*u*). In covenant for rent it is a good defence that the premises were demised by the plaintiff to the defendant for the express purpose of being used for boiling oil and tar, contrary to the provisions of the Building Act (*x*).

What avoids a lease, erasure, &c. — A lease by deed may be avoided by matter ex post facto, as by erasure, interlineation or otheral teration in any material part (*y*). The same rule extends to a lease not by deed, and it has been held that the addition by a stranger of a seal to a written instrument will avoid it (*z*). A deed executed with blanks in material parts, whereby it is incapable of having any operation, and afterwards filled up and delivered by another person, in the

N. C. 178; Load *v.* Green, 15 M. & W. 216, 223; Selby *v.* Browne, 7 Q. B. 620; Franklin *v.* Carter, 1 C. B. 750; 3 D. & L. 213; Johns *v.* Whiteley, 3 Wils. 127; Att.-Gen. *v.* Cox, 3 H. L. Cas. 240.

(*t*) Feret *v.* Hill, 15 C. B. 207. As to plea of fraud to an action for not granting a lease, see Calvaleiro *v.* Paget, 4 F. & F. 537; and as to plea of illegality, see Cowan *v.* Milbourn, L. R., 2 Ex. 230; 36 L. J., Ex. 124; in which case it was held to be a defence that rooms agreed to be let were intended to be used for blasphemous lectures.

(*u*) Smith *v.* White, L. R., 1 Eq. 626; 35 L. J. Ch., 454. See, also, Jenning *v.* Throgmorton, Ry. and Mood. 251, and *post*, Ch. vi. Sect. 3.

(*x*) Gas Light Co. *v.* Turner, 7 Scott, 779; 8 Id. 609; 5 Bing. N. C. 666; 6 Id. 324.

(*y*) Pigot's case, 11 Co. R. 27; Bull. N. P. 267; 2 Blac. Com. 308; Davidson *v.* Cooper, 13 M. & W. 352 (Exch.).

(*z*) Davidson *v.* Cooper, *supra*.

[*199] absence of the party who has * executed, and unauthorized by instrument under seal, is invalid (*a*). If a deed be altered by a stranger in a point not material, the deed is not avoided; but it is otherwise if it be altered by a stranger in a point material; for the witnesses cannot prove it to be the act of the party where there is any material difference: an immaterial alteration, however, does not change the deed, and consequently the witnesses may attest it without danger of perjury; but if the deed be altered by the party himself, though in a point not material, yet it avoids it, for the law takes every man's act most strongly against himself.

Altered deed. — It is material to observe that an altered deed, although the covenants in it cannot be sued upon, may be good evidence to show the estate which passed by it, and which was not divested by these alterations (*b*). Where, by agreement between plaintiff and defendant, a house, No. 38, was let to the plaintiff, and after the agreement was executed and delivered to the plaintiff the number was altered to 35, but it did not appear by whom, No. 35 being in fact the house let; it was held that the agreement might be given in evidence in an action for an excessive distress, in which the demise was admitted, to show the terms of the holding (*c*).

Cancellation. — It has been held that the cancelling of a lease by the mutual consent of both parties does not destroy the term vested in the lessee, and that, therefore, notwithstanding such cancellation, the lessor may maintain an action *of debt* on the demise for the recovery of the rent (*d*), and the deed may be given in evidence to show that the estate passed (*e*).

(*a*) Hibblewhite *v.* M'Morine, 6 M. & W. 200; 8 Dowl. 802. But see Eagleton *v.* Gutteridge, 11 M. & W. 465; 2 Dowl., N. S. 1053.

(*b*) Davidson *v.* Cooper, 11 M. & W. at p. 800; Stewart *v.* Aston, 8 Ir. Com. L. R., N. S. 35; Doe *d.* Courtail *v.* Thomas, 9 B. & C. 288; West *v.* Steward, 14 M. & W. 47.

(*c*) Hutchins *v.* Scott, 2 M. & W. 809; Stewart *v.* Aston, 8 Ir. Com. L. R., N. S. 35.

(*d*) Lord Ward *v.* Lumley, 5 H. & N. 87, 656; 29 L. J., Ex. 322.

(*e*) The Agricultural Cattle Insurance Co. *v.* Fitzgerald, 16 Q. B. 432; Stewart *v.* Aston, *supra*; Roe *d.* Earl of Berkeley *v.* Archbp. of York, 6 East, 86.

Sect. 19. — *Leases under Powers* (*f*).

(a) *Generally.*

Construction of powers. — The rules for the construction of powers of leasing settled land have been variously laid down by different judges, who have severally declared that they must be construed strictly (*g*), liberally (*h*), * indifferently, without leaning to either side (*i*); equitably in favour of the donee (*k*), favourably for the donee (*l*); strictly for the tenant for life, and liberally for the remainderman (*m*). It seems, however, to be agreed that powers must be construed according to the intention of the parties (*n*); and so that the estate itself, which is subjected to the power, shall not be destroyed by the exercise of it (*o*). It is the duty of the court to support a power, if possible, and to give effect to its execution, if it is not exercised from improper motives or for improper objects (*p*). [*200]

Statutes as to powers. — Many formal defects in leases under powers have been remedied by 12 & 13 Vict. c. 26, as amended by 13 Vict. c. 17 (*q*); and a substantial alteration of the law of leasing settled land has been effected by the Settled Land Act, 1882 (45 & 46 Vict. c. 38), which by conferring detailed powers of leasing upon a tenant for life independently of his trustees, has greatly diminished the importance of the cases.

Settled Land Act. — The Settled Land Act, 1882, is by

(*f*) See Sugden (Lord St. Leonards) on Powers, 711–835 (8th ed.), A.D. 1861, and see, also, Farwell on Powers, A. D. 1874.

(*g*) Fitzwilliam's case, 6 Rep. 32; Taylor *d.* Atkyns *v.* Horde, 2 Smith L. C. 495; Doe *d.* Pulteney *v.* Cavan, 5 T. R. 567; 6 Bro. P. C. 175.

(*h*) Right *d.* Bassett *v.* Thomas, 3 Burr. 1441; 1 W. Blac. 446; and cases cited arguendo in Vivian *v.* Jegon, L. R., 3 H. L. Cas., at p. 288.

(*i*) Goodtitle *d.* Clarges *v.* Funucan, 2 Doug. 573; Doe *d.* Earl of Jersey *v.* Smith, 7 Price, 313.

(*k*) Ward *v.* Hartpole, 3 Bligh, 470, 485.

(*l*) O. Bridgm. by Bann, 90, 93.

(*m*) Orby *v.* Mohum, Gilb. Eq. Rep. 58; Taylor *d.* Atkyns *v.* Horde, 1 Burr. 60, 125; 2 Smith L. C.

(*n*) Goodtitle *v.* Funucan, 2 Doug. 573, 574; Hawkins *v.* Kemp, 3 East, 441; Doe *v.* Rendle, 3 M. & S. 99; 1 Platt on Leases, 397, 398.

(*o*) Powell on Powers, 407; Sug. Pow. 736; Winter *v.* Loveday, Carth. 428.

(*p*) Carver *v.* Richards, 29 L. J., Ch. 357; 6 Jur., N. S. 410.

(*q*) See *post*, sub-s. (*g*).

s. 2 retrospective, that is, it applies whether a settlement of the land were made before or after the commencement of the act (although of course a bad lease made before the commencement of the act does not become good by virtue of the act through having anticipated its provisions); and by ss. 50 and 51 a contract by a tenant for life not to exercise the powers of the act is void, and so is any prohibition or limitation in the settlement to a similar effect. What the leasing powers of a tenant for life under the act are, we have already seen (*r*): and it need only be added here, that by s. 54, a lessee dealing in good faith with the tenant for life is as against all remainder-men conclusively taken to have given the best rent that could reasonably be obtained; that by s. 56 the power of the act are cumulative, but prevail over the powers of a settlement in any case of conflict between them; and that by s. 57 a settler may confer either on a tenant for life or trustees any powers additional to or larger than those conferred by the act.

Cases prior to act. — Prior to the Settled Land Act, it was held in Vivian *v.* Jegon (*s*) that a general power to a tenant for life to lease mines did not imply a power to lease beyond the life; but that powers to lease for lives or years might be executed by a lease, either absolutely for certain lives, or a certain number of years; or conditionally [*201] for a number of years * determinable upon a life or lives (*t*). Where an estate was settled on several tenants for life in succession, with remainders in tail, with power to every tenant for life to make leases of all or any part of the demesne lands for not more than twenty-one years, or for one, two, or three life or lives: it was held, first, that the power only authorized either a chattel lease not exceeding twenty-one years, or a freehold lease not exceeding three lives: and that a lease by a tenant for life for ninety-nine years determinable on lives, as it might exceed twenty-one years, was void at law, and was not even good pro

(*r*) *Ante*, Ch. I., sect. 4.
(*s*) L. R. 3 H. L. 285.
(*t*) Commons *v.* Marshall, 6 Bro. P. C. 168; Sug. Pow. 409, 737.

tanto for the twenty-one years (*u*). Where by a marriage settlement the husband had the wife's estate for life, with a power to grant leases for twenty-one years, but no longer; and in breach of the power he granted a lease to A. for ninety-nine years, determinable upon lives; and the wife survived him, and conveyed the fee to B.: and in the conveyance was recited the lease to A., who was recognized as being then tenant in possession of the estate, at the yearly rent reserved: on an action of ejectment brought by B. against the assignee of the lease, it was held that the lease was void, and the recital only matter of description (*x*).

"Reasonable and proper" leases. — Under a power to lease for years or lives, with or without covenants for renewals, leases for 999 years were held valid (*y*), and in Mostyn *v.* Lancaster (*z*) a power to grant such mining leases as should seem "reasonable and proper" was held to authorize a lease of mines for ninety-nine years at a peppercorn rent by way of mortgage to secure an advance to the tenant for life.

Lease less than authorized. — A man having a power may do less than such power enables him to do. A lease for fourteen years is warranted by a power to lease for twenty-one years (*a*). A power to lease for any term or number of years certain, not exceeding twenty-one years, will warrant a lease for twenty-one years determinable at the option of the lessee at the end of the first seven or fourteen years (*b*). A power to lease for three lives may be executed by a lease for two lives (*c*). A power to lease for any term not exceeding three lives *and* forty-one years will warrant a lease for three lives and forty-one years to commence from the 1st of November preceding the day of the death of the survivor of the cestuis que vie (*d*).

(*u*) Roe *d.* Brune *v.* Prideaux, 10 East, 158; Sug. Pow. 738.

(*x*) Doe *d.* Briggs *v.* White, 2 D & R. 716.

(*y*) Sheehy *v.* Lord Muskerry, 1 H. L. Cas. 576.

(*z*) L. R., 23 Ch. D. 583; 52 L. J., Ch. 848; 48 L. T. 715; 31 W. R. 686, C. A., affirming Bacon, V.-C.

(*a*) Isherwood *v.* Oldknow, 3 M. & S. 382; Easton *v.* Pratt, 2 H. & C. 676; 33 L. J., Ex. 233.

(*b*) Edwards *v.* Milbank, 4 Drew. 606; 29 L. J., Ch. 45; Sug. Pow. 742.

(*c*) Sug. Pow. 746, pl. 26.

(*d*) *Re* Crommellin Estate, 1 Ir. Com. L. R., N. S. 182; Sug. Pow. 746.

Building and repairing leases. — A tenant for life, [*202] having a power to grant building leases for *sixty-one years, reserving the best improved ground rent, granted a lease for that term, which was not expressed to be a building lease, but which contained a covenant by the lessee to keep in repair the premises demised (old houses) or such other "house as should be built during the term:" it was held, that this was not a building lease within the power, and that such a lease being granted by tenant for life, who had a bare naked power without any legal interest, was void, and not capable of being confirmed by acceptance of rent by the remainder-man (*e*). So a power to grant long leases "for the purpose of new building or effectually rebuilding *and* repairing any messuage, &c., being or to be on the premises," was held to be not well executed by a lease containing a covenant *effectually to repair*, as it is not equivalent to a covenant *effectually to rebuild and repair* (*f*). But a power to grant leases for twenty-one years, or building or repairing leases for sixty-one years, is well executed by a lease for forty years containing the usual covenants to repair and keep in repair the demised premises, and so to leave them at the end of the term (*g*). Upon a power to grant building leases, such a lease expressly exempting the lessee from rebuilding in case of fire, and by another clause enabling him to surrender the lease upon notice, could not be sustained (*h*).

Sporting rights. — A power to demise lands or any part of them is not well executed by a demise of part with liberty of shooting over the whole (*i*). But the right to shoot and fish over the lands demised may be excepted and reserved to the lessor and his assigns (*k*).

Effect of charges. — If a tenant for life with a power to grant leases in possession for twenty-one years at the best rent, convey his life estates to trustees to pay an annuity for

(*e*) Jones *d.* Cowper *v.* Verney, Wilds, 169; Sug. Pow. 738.

(*f*) Doe *d.* Dymoke *v.* Withers, 2 B. & Ad. 896.

(*g*) Easton *v.* Pratt, 2 H. & C. 676; 33 L. J., Ex. 232.

(*h*) Sug. Pow. 743; Stiles *v.* Cowper, 3 Atk. 692.

(*i*) Dayrell *v.* Hoare, 12 A. & E. 356.

(*k*) Goodtitle *v.* Funucan, 2 Doug. 596.

his life, and the surplus to himself, the power is not thereby extinguished, but he may still grant a lease agreeable to the terms thereof (*l*). If a man having a power annexed to his estate, charge his estate, and afterwards execute his power, the estate which rises by the execution of the power is subject to the charge during the estate: as if a tenant for life, with power to make leases, grant a rent-charge, and afterwards make a lease, the lessee takes subject to the rent-charge during the life of the lessor (*m*).

In whom powers may vest. — If the power be to a man and his assigns to make leases, &c., it may be exercised toties quoties (*n*), and will run with the estate to the assignee in deed or in law, and go to his executor, or to the assignee * of the executor (*o*); or to his heir, together [*203] with the estate (*p*). It is no objection to a lease under a power, that it is in trust for him who executes the power; provided the legal tenant be bound during the term in all requisite covenants and conditions (*q*). But where by a marriage settlement a power was given to the wife, after the death of her husband, to grant leases for twenty-one years, reserving the best rent, &c., it was held that a lease by the wife to a second husband was not a good execution of the power (*r*). Where trustees are invested with a power of leasing, they must exercise it in like manner as a trust to let (*s*). Where devisees in trust, with discretionary powers, disclaim, and the trust estate descends to the heir, he cannot exercise any of the discretionary powers, such as granting leases, &c. (*t*). Where the heir of a surviving trustee is the

(*l*) Ren *d.* Hall *v.* Bulkeley, 1 Doug. 292, 565.

(*m*) Sabbarton *v.* Sabbarton, Cas. temp. Hardw. 415.

(*n*) Sug. Pow. 718.

(*o*) How *v.* Whitfield, 1 Ventr. 340; Freeman, 476.

(*p*) *Ex parte* Cooper, *re* North London R. Co., 34 L. J., Ch. 373.

(*q*) Taylor *d.* Atkyns *v.* Horde, 1 Burr. 124; 2 Smith L. C. 495 (6th ed.); Wilson *v.* Sewell, 1 W. Blac. 617; 4 Burr. 1975; Earl of Cardigan *v.* Montague, Sug. Pow. 918; Bevan *v.* Habgood, 1 Johns. & H. 222; 30 L. J., Ch. 107.

(*r*) Doe *d.* Hartridge *v.* Gilbert, 5 Q. B. 423.

(*s*) Sutton *v.* Jones, 15 Ves. 588; Sug. Pow. 722.

(*t*) Robson *v.* Flight, 34 L. J., Ch. 226; 13 W. R. 393.

proper party to demise, a lease granted by the executors of such trustee is void, and not cured by 12 & 13 Vict. c. 26 (*u*).

(b) *In Possession or Reversion.*

Leases in possession or reversion. — The Settled Land Act, 1882 (s. 7, subsect. 6), provides that leases by a tenant for life under that act shall be made to take effect in possession not later than twelve months after date.

In all well-drawn powers of leasing, where it was intended that a lease in reversion may be granted, it was always expressly declared so; and if a reversionary lease was not to be granted, it was expressly declared that the lease shall be made to take effect in possession, and not in reversion, or by way of future interest (*x*). Upon a general power to make leases, without saying more, the law adjudged that the leases ought to be leases in possession, and not leases in reversion, or in futuro (*y*). Under a power to make leases to one, two or three persons, the donee of the power cannot make a lease for the life of the first (unborn) son of J. S. (*z*).

On what land they attach. — If there be a power to make leases expressly stated to be in possession, which attaches upon an estate, part of which is in possession and part in reversion at the creation of the power; the donee of the power may immediately make leases in possession of the estate in reversion, as well as of that in possession; [*204] for in such case the word * "possession" in the power refers to the lease, and not to the land (*a*): but it seems, that if a power enable any one to make leases in reversion as well as in possession, and some parts of the land subject to the power be in possession, and other part of it in reversion, he cannot make a lease in possession and another lease in reversion of the same land; but his

(*u*) *Ex parte* Cooper, *re* North London R. Co., 34 L. J., Ch. 373.

(*x*) Sug. Pow. 747.

(*y*) Sheecomb *v.* Hawkins, Cro. Jac. 318; Yelv. 222; Brownl. 148; Countess of Sussex *v.* Wroth, Cro. Eliz. 5.

(*z*) Snow *v.* Cutler, T. Raym. 163.

(*a*) Powell on Powers, 425; Bac. Abr. tit Leases (I.); Fox *v.* Prickwood, Cro. Jac. 347; 2 Bulstr. 210; 2 Roll. Abr. 260, pl. 5; Sug. Pow. 755.

power to make leases in reversion will be confined to such land as was not then in possession (*b*).

Lease in reversion. — Where there is a power to grant leases in possession only, the lease in possession is not contrary to the power, although the estate at the time of granting the lease was held by tenants at will, if, at the time, they receive directions from the lessor to pay their rent to the lessee, to which they assent (*c*). Where a tenancy from year to year has expired, but the outgoing tenant has a customary right over part till a future day, a lease in possession may be granted (*d*). Where one under a power to lease for twenty-one years in possession, but not in reversion, granted a lease to his only daughter for twenty-one years, "to commence *from* the day of the date;" it was adjudged a good lease, as the word "from" may mean either inclusive or exclusive, according to the context and subject-matter, and the court will construe it so as to effectuate the deeds of parties, and not to destroy them (*e*). But if made to commence only a day after the execution of the lease, it was not good at common law or in equity as a lease in possession (*f*). Any such defect would now be cured by 12 & 13 Vict. c. 26, s. 4, if the lessor lived till the day appointed for the commencement of the term. Under a power to demise for twenty-one years in possession, and not in reversion, a lease dated 17th February, 1802, to hold from the 25th of March next ensuing the date thereof, is good, if not executed and delivered till after the 25th of March, for it then takes effect as a lease in possession, with reference back to the date actually expressed (*g*): but under a power to lease in possession and not in reversion, a lease for years executed on the 29th of March to the then tenant in possession, to hold as to the arable land from

(*b*) Bac. Abr. tit. Leases (I. 11).

(*c*) Goodtitle *d.* Clarges *v.* Funucan, 2 Doug. 565; Bac. Abr. tit. Leases (I. 11); Sug. Pow. 762.

(*d*) Doe *v.* Snowden, 2 W. Blac. 1224; Doe *v.* Calvert, 2 East, 376; Sug. Pow. 763.

(*e*) Pugh *v.* Duke of Leeds, Cowp. 714; Freeman *v.* West, 2 Wils. 165; Denn *v.* Fearnside, 1 Wils. 176; Att.-Gen. *v.* Countess of Portland, Cowp. 723; Sug. Pow. 760, 761.

(*f*) Pollard *v.* Greenvil, 1 Ch. Cas. 10; 1 Ch. Rep. 184; Doe *v.* Calvert, 2 East, 375; Bowes *v.* East London W. W. Co., Jacob, 374; Sug. Pow. 760.

(*g*) Doe *d.* Coxe *v.* Day, 10 East, 427; Sug. Pow. 761, pl. 43.

the 13th of February preceding, and as to the pasture from the 5th of April then next, under a yearly rent payable quarterly on the 10th of July, 10th of October, 10th of January and 10th of April, was held void for the whole; [*205] though such lease were according to the *custom of the country, and the same had been before granted by the person creating the power (*h*). But now any such defect would be cured by the 12 & 13 Vict. c. 26, s. 4, provided the lessor were living on the 5th of April, and then competent to grant such a lease.

Effect of existing leases. — The circumstance of a second lease for years being granted to the same lessee who holds under a former lease (*i*), to commence after the expiration of such former lease, does not operate to make the latter a continuation of the former lease, where the terms are granted by different deeds; although the residue of the time to come after the former lease, together with the period for which the latter lease is granted, do not in length of time exceed the limits fixed by the power; for the latter will notwithstanding be considered as a reversionary lease, as much as if it had been granted to a reversionary lessee (*k*).

Leases in possession or reversion. — If a man have power to make leases in possession or reversion, and he make a lease in possession once, he may never afterwards make a lease in reversion, for he has an election to do the one or the other, but not both (*l*). Under a power to lease in possession for lives, or for years determinable on lives, a man cannot make an absolute lease in possession for years; but he may make an absolute lease in reversion for years (*l*). Where powers were given to make leases of present but not of future interest, and so as the same should go with and be incident to the remainder and reversion; a lease with a reversion in execution of those powers to the tenant in possession of the freehold, his heirs and assigns, was held good,

(*h*) Doe *d.* Allan *v.* Calvert, 2 East, 376.

(*i*) As to the effect of a new lease operating as a surrender of a former lease, see *post*, Chap. VIII., sect. 3 (b).

(*k*) Doe *d.* Pulteney *v.* Lady Cavan, 5 T. R. 567; Smith *v.* Day, 2 M. & W. 684.

(*l*) Winter *v.* Loveday, 1 Ld. Raym. 267; 2 Salk. 537.

because "heirs and assigns" meant those to whom the remainder and reversion would go (*m*). Where one, having power to make leases for twenty-one years in possession, made a lease to A. for twenty-one years in trust for the payment of debts, but the lease was made to commence from a time to come, and so not pursuant to the power, yet being made for the payment of debts, it was supported in equity (*n*). Most defects of this sort would now be cured by 12 & 13 Vict. c. 26, s. 4 (*o*).

(c) *Usual Covenants.*

What are usual covenants. — What are *usual covenants* in a lease, under a power requiring such covenants is a question of fact for the jury, and not for the court (*p*).

*It depends on what are the usual and customary [*206] covenants of the neighborhood (*q*): but it has been held, that what are the "usual and reasonable covenants" must depend on the leases of the same land in existence at the time of the creation of the power (*r*). Where a power to lease was given upon reserving the ancient, usual and accustomed rents, heriots, boons, and services, a covenant "to keep in repair" was held to be "an ancient boon," and the omission of it was deemed fatal (*s*). Where there was a power to tenant for life to lease for years, with the usual covenants, &c., it was held, that a lease made by him, containing a proviso, that in case the premises were blown down, or burned, the lessor should rebuild, otherwise the rent should cease, was void, the jury finding such covenant to be unusual (*t*). Where the settlement creating the power does not require the usual covenants to be inserted in the

(*m*) Hotley *v.* Scott, Lofft, 316.

(*n*) Pollard *v.* Greenvil, 1 Ch. Cas. 10; 1 Ch. Rep. 184.

(*o*) *Post*, subs. (*g*).

(*p*) Goodtitle *d.* Clarges *v.* Funucan, 2 Doug. 565; Bennett *v.* Womack, 3 C. & P. 96; 7 B. & C. 627; Powell on Powers, 578.

(*q*) Boardman *v.* Mostyn, 6 Ves. 467, 471; 4 Jar. Prec. 297 (3rd ed.).

(*r*) Doe *d.* Earl of Egremont *v.* Stephens, 6 Q. B. 208; Smith *v.* Doe *d.* Earl of Jersey, 7 Price, 281; 3 Bligh, 290; 2 B. & B. 474; Doe *d.* Earl of Egremont *v.* Williams, 11 Q. B. 688.

(*s*) Earl of Cardigan *v.* Montague, Sug. Pow. 918 (8th ed.).

(*t*) Doe *d.* Ellis *v.* Sandham, 1 T. R. 705; Yellowly *v.* Gower, 11 Exch. 274.

leases, any covenants may be inserted or omitted, as agreed on, provided they do not amount to a fraud on the power (*u*).

Ways, &c. — A private act of parliament enabled a tenant for life to grant building leases, and "to lay out and appropriate any part of the land authorized to be leased as and for a way or ways, street or streets, avenue or avenues, square or squares, passage or passages, sewer or sewers, or other conveniences for the general improvement of the estate and the accommodation of the tenants thereof." A tenant for life having appropriated certain land, and laid it out for a way for the general improvement of the estate, in exercise of the powers of the act, by deed granted rights of way over it to two several tenants: held, that tenants under other leases granted in pursuance of the act, but containing no grant by deed of a right to use the way, were not entitled by the provisions of the act to use it (*x*).

(d) *Proviso for Re-entry.*

Power to grant with proviso for re-entry. — A power to tenants for life to grant leases, provided that a right of re-entry is reserved for non-payment of rent, is well executed by a lease, providing a re-entry in case the rent remains in arrear fifteen days, *and there is no sufficient distress upon the premises*, the conditional proviso being the usual form in leases (*y*). Where a power of leasing required the insertion in the leases of a clause of re-entry for [*207] * non-payment of rent, and a lease was made with a proviso for re-entry if the rent should be *forty-two* days in arrear, it was held such a lease was valid (*z*). But a lease with a proviso for re-entry, if the tenant should suffer the premises to be out of repair, and should not repair the

(*u*) Goodtitle *v.* Funucan, 2 Doug. 575.

(*x*) White *v.* Leeson, 5 H. & N. 53; 29 L. J., Ex. 105.

(*y*) Smith *v.* Doe *d.* Earl of Jersey, 7 Price, 281; 3 Bligh. 290; 2 Brod. & B. 473; 5 M. & S. 467; Lord Tankerville *v.* Wingfield, 7 Price, 343; 2 Brod. & B. 498, n.; but see *contra*, Coxe *v.* Day, 13 East, 118.

(*z*) Rutland *d.* Doe *v.* Wythe, 5 M. & W. 688; 12 Id. 355; 10 Cl. & F. 419.

same *within six months next after notice*, was held bad, the clause as to notice not being usual (*a*).

(e) *Lands usually let.*

What included in "Lands usually let." — Prior to the Settled Land Act the power of leasing usually extended to all the hereditaments therein comprised; and if the mansion-house or any other part was not intended to be let, it was expressly excepted (*b*). Where leases were granted under powers to lease lands "usually demised," it had to be shown by old leases or other satisfactory evidence that the lands have usually been demised; otherwise they could not be supported (*c*). Lands not demised for the space of twenty years before the execution of a power to demise at the rent then usually reserved and paid, could not be leased under such a power (*d*). Where the power was to extend to land usually demised, it was held, that land settled for years, determinable on lives, by a family settlement, came within that description (*e*); so lands which have been previously let two or three times (*f*), but not lands let only once for a short term (*f*); but a covenant to stand seised might amount to a sufficient demise (*g*). In a settlement of personal property the parties covenanted to settle all future-acquired property upon the same trusts, &c.: held, that this authorized the insertion of a power to grant mining leases in the settlement of subsequently-acquired freeholds, the prior owner having granted such leases, though the mines had never been effectually worked (*h*).

Lands not before in lease. — It seems to be settled that the question — whether lands not before in lease may be demised under a power to lease lands and other hereditaments, pro-

(*a*) Doe *d.* Earl of Egremont *v.* Burrough, 6 Q. B. 229.

(*b*) Sug. Pow. 727 (8th ed.). For exception in Settled Land Act, 1882, see s. 15 of that Act.

(*c*) Id. 735; Earl Cardogan *v.* Montague, Id. 918.

(*d*) Tristan *d.* Gore *v.* Boltinglas, Vaugh. 28; T. Jon. 27; Sug. Pow. 728, 729.

(*e*) Right *d.* Basset *v.* Thomas, 1 W. Blac. 446; 3 Burr. 1441, 1448.

(*f*) 2 Roll. Abr. 261; Sug. Pow. 728, 730.

(*g*) Right *d.* Basset *v.* Thomas, 3 Burr. 1441, 1447; 1 W. Blac. 446.

(*h*) Scott *v.* Steward, 27 Beav. 367.

vided that such rent or more be reserved upon every lease as has been reserved, or paid for it, within a given time previous to the creation of the power, — is a question of construction of the intention of the author of the power, to be collected from the instrument creating the power, [*208] and the circumstances of the estate (*i*). * Thus, where there was a power to lease a manor, except the demesne lands, it was held that copyholds, though within the description, could not be demised: but that the rents and services of the manor might, notwithstanding a qualification annexed to the power, which said that the ancient rent should be reserved, and there could be no reservation of rent upon a lease of rents and services out of which no rent issues: for it appeared to be the intent of the settlement, that part of the manor should be demisable (*k*). Under a power in a family settlement to make leases of all or any part of the premises, reserving the ancient rent, lands always occupied with the family seat cannot be demised; for in such case the qualification annexed to the power, "that the ancient rent must be reserved," manifestly excludes the mansion-house and lands about it *never* let: the nature of the thing in such case speaks the intent (*l*).

Whether good for part only. — Where there was a devise of lands to trustees and their heirs, in trust to the use of a man and his first and other sons in strict settlement, remainder to another and his first and other sons in strict settlement, with power to the trustees from time to time, during the minorities of the persons to whom the premises should descend, and to any tenant for life, to grant any *lease of all or any part of the lands so limited, so as there be reserved the ancient and accustomed yearly rent, &c.:* a lease of part of the lands devised, in several parcels, in one of which parcels were included, together with lands anciently demised, two

(*i*) Powell on Powers, 402; 2 Roll. Abr. 262; Wakeman *v.* Walker, 3 Keb. 597; 1 Ventr. 294; 2 Lev. 150.

(*k*) Loveday *v.* Winter, 5 Mod. 245, 378; 12 Mod. 148; 1 Comb. 37; 1 Ld. Raym. 267; 2 Salk. 537; Leigh *v.* Earl of Balcarres, 6 C. B. 847.

(*l*) Baggott *v.* Oughton, 8 Mod. 249; Fortescue, 332; Goodtitle *v.* Funucan, 2 Doug. 574. See also Pomery *v.* Partington, 3 T. R. 665.

closes never before demised, at one entire rent, viz., the ancient rent for that part which had been anciently demised, was held to be void for the whole of the lands included in that parcel, as well the lands never before let as those anciently let; but it was considered good as to the other parcels, which contained only lands anciently demised, and on each of which there was a *separate* reservation of the ancient rent (*m*). Where lands were demised to a person for life, with power to lease for lives all but a certain excepted portion, reserving the like rents as were then reserved, or more, the rents then being 29*l.*; and the devisee made a lease for three lives at the yearly rent of 40*l.* of the lands within the power and part of the excepted lands, it was held that the rent could not be apportioned, and that the lease being void for the excepted lands was void as to all (*n*). But where a lease was held void because lands under a power were let together with other lands not under the power, it was held that the lease was good as to the latter lands against the heirs of the lessor (*o*).

* (f) *Mode of Execution.* [*209]

By 22 & 23 Vict. c. 35, s. 12, "a deed hereafter executed in the presence of and attested by two or more witnesses in the manner in which deeds are ordinarily executed and attested (*p*), shall, as far as respects the execution and attestation thereof, be a valid execution of a power of appointment by deed or by any instrument in writing not testamentary (*q*), notwithstanding it shall have been expressly required that a deed or instrument in writing made in exercise of such power should be executed or attested with some additional or other form of execution or attestation or solemnity: provided always, that this provision shall not operate to defeat any direction in the instrument creat-

(*m*) Doe *d.* Barlett *v.* Rendle, 3 M. & S. 99; Fuller *v.* Abbott, 4 Taunt. 105.

(*n*) Doe *d.* Williams *v.* Matthews, 5 B. & Ad. 298.

(*o*) Doe *d.* Lord Egremont *v.* Stephens, 6 Q. B. 208.

(*p*) *In re* Rickett, 1 Johns. & H. 70; 29 L. J., Ch. 712.

(*q*) They are provided for by 1 Vict. c. 26, s. 10; Coie Ejec. 501.

ing the power that the consent of any particular person shall be necessary to a valid execution (*r*), or that any act shall be performed (*s*), in order to give validity to any appointment, having no relation to the mode of executing and attesting the instrument; and nothing herein contained shall prevent the donee of a power from executing it conformably to the power by writing or otherwise than by an instrument executed and attested as an ordinary deed, and to any such execution of a power this provision shall not extend."

It is to be observed that if the power prescribes less than the statute, it is sufficient to comply with the terms of the power: but if the power prescribes more than the statute, it is sufficient to comply with the statute.

(g) *Defects in — how cured.*

Invalid leases good as contracts for leases. — By 12 & 13 Vict. c. 26 (*t*) "a lease invalid by reason of the non-observance or omission of some condition or restriction, or by reason of any other deviation from the terms of the power, shall, after entry thereunder, be considered in equity as a contract for a grant in respect of a valid lease under the power to the like purport and effect as such invalid lease, save so far as any variation may be necessary in order to comply with the terms of such power; and all persons who would have been bound by a lease lawfully granted under such power shall be bound in equity by such contract."

Invalid leases cured by continuance of lessor's estate. — By sect. 4, "where a lease granted in the intended exercise of any such power of leasing as aforesaid is invalid by reason that at the time of the granting thereof the person [*210] 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 granted by

(*r*) Freshfield *v.* Reed, 9 M. & W. 404.

(*s*) As to the execution of a counterpart by the lessee, see Fryer *v.* Coombs, 11 A. & E. 403.

(*t*) Amended by 13 Vict. c. 17. See *post*, p. 210.

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."

Confirmation of invalid leases. — By 13 Vict. c. 17, "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."

It is to be observed that an invalid lease under a power may be confirmed by the remainderman or reversioner by a mere memorandum or note in writing coupled with acceptance of rent; but not by acceptance of rent only, without any intention of thereby confirming the lease. The mere acceptance of rent by a remainderman may create a new implied tenancy from year to year as between him and the lessee, which tenancy must be determined by notice to quit, or otherwise, before the tenant can be turned out of possession (*u*).

The above acts do not apply to leases granted by a mere stranger to the leasing power; as where a lease is granted by the executors of a surviving trustee instead of by his heir (*x*), or by the heir instead of the executors (*y*).

Sect. 20. — *Leases in Reversion.*

What are leases in reversion. — All leases which are not to take effect in possession immediately, but *from a future day*, are considered as reversionary leases, within the meaning of powers to grant leases in possession and not in reversion (*z*). In legal acceptance a lease for years in reversion, and a

(*u*) Doe *d.* Martin *v.* Watts, 7 T. R. 83; Doe *d.* Tucker *v.* Morse, 1 B. & Adol. 365; Doe *d.* Pennington *v.* Taniere, 12 Q. B. 998; Cole Ejec. 33; Sug. Pow. 715.

(*x*) *Ex parte* Cooper, *re* North London R. Co., 34 L. J., Ch. 373.

(*y*) Robson *v.* Flight, 34 L. J. Ch. 226.

(*z*) Winter *v.* Loveday, Comyn. 39, Holt, C. J.; 2 Salk. 537; 1 Ld. Raym. 267; Goodtitle *d.* Clarges *v.* Funucan, 2 Doug. 565; Sug. Pow. chap. 18, s. 4.

future interest for years, are one and the same: a future lease and a lease in reversion are synonymous (*a*). But strictly speaking a reversionary lease is one granted for a term which is to commence from or after the expiration or other determination of a previous lease. It does not [*211] create any term or estate, but only an interesse * termini, until entry thereunder after the time appointed for its commencement (*b*). The granting of a reversionary lease does not disentitle the landlord to distrain for rent under a subsisting lease (*c*). If a man make a lease for life, and afterwards grants the lands to another for twenty-one years after the death of the tenant for life; these words (without the word "demise") are sufficient to pass a reversionary interest by way of future lease (*d*). If the reversionary lease be expressed to begin from the end of the "term" of the subsisting lease, and the subsisting lease be afterwards determined by surrender or forfeiture, the reversionary lease will begin at once; but if it be expressed to begin after the end of twenty-one years, it will not begin upon the surrender, forfeiture or other determination of the first term till the twenty-one years have actually run out by effluxion of time (*e*). Where a lease for years was made, and during the term the lessor granted a lease in reversion of part of the premises to an underlessee, who was in possession of them, to commence on the day the original lease determined; it was held that the reversionary lease took effect in possession immediately on the determination of the first lease (*f*).

Sect. 21. — *Concurrent Leases.*

Nature of concurrent leases. — A concurrent lease is one granted for a term which is to commence *before* the expiration or other determination of a previous lease of

(*a*) Carth. 14, 15; Sug. Pow. 747 (8th ed.).

(*b*) Smith *v.* Day, 2 M. & W. 684.

(*c*) See Id. 684, 694, 699; Doe *d.* Rawlings *v.* Walker, 5 B. & C. 111; Blatchford, app., Cole, resp., 5 C. B., N. S. 514; 28 L. J., C. P. 140.

(*d*) Bac. Abr. tit. Leases (K.).

(*e*) Bac. Abr. tit. Leases (L. 1).

(*f*) Hinchliffe *v.* Earl of Kinnoul, 5 Bing. N. C. 1; 6 Scott, 650.

the same premises to another person. If under seal it operates as an assignment of part of the reversion during the continuance of such previous lease, and from thenceforth as a lease in possession during the residue of the time therein expressed to be granted. It entitles the lessee, as assignee of part of the reversion, to the rent reserved in the previous lease, and to the benefit of the covenants therein contained, which are to be respectively paid and performed during the then residue of the term granted by the first lease, and the continuance of the concurrent lease (*g*). Formerly a concurrent lease was inoperative to pass any estate during the prior term, unless the attornment of the previous tenant could be obtained, when it would operate as an assignment of the reversion, &c. (*h*). Now no attornment of the tenant in possession is necessary (*i*); but until he has *notice of such assign- [*212] ment he may safely continue to pay his rent to the lessor (*k*), who will, however, be liable over to the second lessee for so much money had and received for his use (*l*). If a concurrent lease be granted to and accepted by the *same lessee*, it will operate as an implied surrender by him of his previous term, and take effect as a lease in possession for the term thereby granted (*m*). The reason is that the same person cannot be, at the same time, both tenant and reversioner of the same premises. So where a party entitled to a remainder in tail expectant upon the determination of a life estate, grants a term of years to commence immediately, the grantee, without entry, takes an immediate vested *estate* carved out of the remainder, and not a mere interesse termini; and no attornment is necessary to complete such grant, the stat. 4 Ann. c. 16, s. 9, having rendered attornment unnecessary (*n*). A devisee for life, with power to

(*g*) Harmer *v.* Bean, 3 C. & K. 307.

(*h*) Bac. Abr. tit. Leases (N.).

(*i*) 4 Ann. c. 16, s. 9; *post*, Chap. VII., sect. 6, "Attornment;" Doe *d.* Agar *v.* Brown, 2 E. & B. 331, 348. Edwards *v.* Wickwar, L. R., 1 Eq. 403; 14 W. R. 79, 363, *contra* — in which there is no reference to 4 Ann. c. 16, s. 9 — would seem to be incorrect.

(*k*) 4 Ann. c. 16, s. 10; Cook *v.* Moylan, 1 Exch. 67; 5 D. & L. 101.

(*l*) Smith *v.* Jones, 1 Dowl., N. S. 526; Watson *v.* McLean, E. B. & E. 75; Neate *v.* Harding, 6 Exch. 349.

(*m*) *Post*, Chap. VIII., sect. (b).

(*n*) Doe *d.* Agar *v.* Brown, 2 E. & B. 331, 348.

make leases for twenty-one years, whereon the old accustomed rent should be reserved, made a lease for twenty-one years under the old rent, &c., and a year before the expiration of that lease he made a lease to another for twenty-one years to begin presently; the last was considered to be good within his power as a concurrent lease, because it was no charge upon the reversion, nor was there any more than twenty-one years in the whole against the reversioner: but this power would not warrant the making of leases in reversion, for then he might charge the inheritance ad infinitum (*o*). One who has a power to grant a concurrent lease within seven years of the expiration of the old one, may grant a lease at any time on the surrender of the old one (*p*). If apower enables a tenant for life to make leases for years, determinable upon one, two, or three lives in possession, of such part and parts, and so much only of the lands of the creator of the power as are then demised or granted for any such time, &c., no lands can be demised under such a power, but what are at the time of the execution of the power under lease for one, two, or three concurrent lives; or for any term of years, determinable upon one, two, or three concurrent lives; the meaning of such restriction is, in figurative language, that the candles shall be all burning at the same time (*q*).

[*213] * Sect. 22. — *Estoppel.*

Nature and use. — Indentures of lease for years sometimes enure by way of *estoppel*, which word signifies an impediment or bar to a man's invalidating his own solemn act (*r*).[1] Estoppels in general are not favoured (*s*); they continue no longer on either party than during the lease (*t*), or during

(*o*) Powell on Powers, 428; Bac. Abr. tit. Leases (L.).

(*p*) Com. Dig. tit. Estates (G. 13).

(*q*) Powell on Powers, 541; Doe *d.* Wyndham *v.* Halcombe, 7 T. R. 713.

(*r*) Lyon *v.* Reed, 13 M. & W. 285.

(*s*) Co. Lit. 353, n. 1; Rex *v.* Lubbenham, 4 T. R. 254; Skipworth *v.* Green, 8 Mod. 311; Com. Dig. tit. Estates (K. 8); Bac. Abr. tit. Joint Tenants and Tenants in Common (H. 1).

(*t*) Co. Lit. 47; James *v.* Landon, Cro. Eliz. 36.

[1] See *ante*, sec. 1, Chap. I., note.

any renewed tenancy (*u*): they ought to be mutual, otherwise neither party is bound by them (*v*).[1]

Effect of estoppels on the lessor. — A grantor by deed is estopped from saying that he had no interest (*x*).[1] So a lessor is estopped by the lease from denying that he had any estate in the land at the time the lease was executed by him, or that he had no right to dispose of the possession during the term thereby expressed to be granted (*y*).[1] Upon the execution of a lease which operates by estoppel, there is in contemplation of law, created in the lessor, a reversion in fee simple by estoppel, which passes by descent to his heir, and by purchase to his assignee or devisee, who may sue on the covenants in the lease (*z*). An under-lease made by a lessee who at the time of making it, and subsequently, had no legal interest, operates as a demise by estoppel (*a*). If a man make a lease for years by indenture of lands wherein he has nothing at the time of such lease made, and afterwards purchase those lands, this makes his lease as good and unavoidable, as if he had been in the actual possession and seisin thereof at the time of such lease made (*b*).

Estoppel in case of mortgage. — Where a lessee for years made an under-lease by way of mortgage, and afterwards another sub-lease by indenture for a short term, it was held that the latter sub-lease, though originally a lease by estoppel, was convertible into a lease in interest by a reconveyance by the mortgagees, so as to give a right of action to the assignee of the lessee (*c*). But where a mortgagor made a lease after

(*u*) London and North Western R. Co. *v.* West, L. R., 2 C. P. 553; 36 L. J., C. P. 245.

(*v*) Co. Lit. 352.

(*x*) Doe *d.* Hurst *v.* Clifton, 4 A. & E. 813; Doe *d.* Leeming *v.* Skirrow, 7 A. & E. 157; Doe *d.* Gaisford *v.* Stone, 3 C. B. 176; Doe *d.* Levy *v.* Horne, 3 Q. B. 757, 766.

(*y*) Darlington *v.* Pritchard, 4 M. & G. 783; 2 Dowl., N. S. 664; Green *v.* James, 6 M. & W. 656; Cole Ejec. 220.

(*z*) Cuthbertson *v.* Irving, 4 H. & N. 742; 6 Id. 135; 28 L. J., Ex. 306; 29 Id. 485.

(*a*) Doe *d.* Prior *v.* Ongley, 10 C. B. 25.

(*b*) Bac. Abr. tit. Leases (O.); Trevivan *v.* Lawrence, 6 Mod. 258; 2 Ld. Raym. 1048; 1 Salk. 276; Goodtitle *d.* Faulkner *v.* Morse, 3 T. R. 371; Sturgeon *v.* Wingfield, 15 M. & W. 224.

(*c*) Webb *v.* Austin, 7 M. & G. 701; 8 Scott, N. R. 419.

[1] See *ante*, sec. 1, Chap. I., note.

the mortgage, a subsequent purchaser of the legal estate from the mortgagee and of the equitable estate from the mortgagor, the latter joining in the conveyance of the legal estate, was not before the Conveyancing Act (*d*) [*214] *bound by the lease of the mortgagor (*e*). A lessor is estopped from contending that he had merely an equitable estate when he granted the lease (*f*). But where the lease stated that the lessors were *owners* subject to a mortgage, and that they *demised* the land to the lessee, it was held that neither party was estopped from denying that the lessors had a legal reversion, but that they were estopped from asserting it (*g*). After a term had been mortgaged, H., who had interest, made a lease for years by deed; the mortgagees and H. then surrendered to the lessor, who re-demised to H., and the latter then assigned his interest to the defendant: held that there was a reversion in H. by estoppel on the lease made by him which passed to the defendant, who was thereby liable to the lessee on the covenants of that lease (*h*).

Tenant estopped. — Cooke *v.* Loxley. — It is one of the first principles of the law of estoppel, as applied to the relations between landlord and tenant, that a tenant is estopped from disputing the title of his landlord (*i*). In an action on a bond conditioned for the payment of the rent of certain premises recited in the condition to be demised by indenture at a certain rent, the defendant is estopped from saying that by the indenture a less rent than that mentioned in the condition was reserved (*k*). In an ejectment for mines against a member of a mining company, it was held that the defendant was estopped from disputing the title of the lessor of the

(*d*) For effect of Conveyancing Act, see Ch. I., sect. 28 (*b*), *ante*.

(*e*) Doe *d.* Lord Downe *v.* Thompson, 9 Q. B. 1037.

(*f*) Green *v.* James, 6 M. & W. 656.

(*g*) Pargeter *v.* Harris, 7 Q. B. 708. But see Morton *v.* Woods, L. R., 4 Q. B. 293, and note (*t*), *post*.

(*h*) Sturgeon *v.* Wingfield, 15 M. & W. 224.

(*i*) Cooke *v.* Loxley, 5 T. R. 4; Cuthbertson *v.* Irving, *supra*, note (*s*); Beckett *v.* Bradley, 7 M. & G. 994; 8 Scott, N. R. 843; 2 D. & L. 586; Langford *v.* Selmes, 3 Kay & J. 220; Delaney *v.* Fox, 1 C. B., N. S. 166; 2 Id. 768.

(*k*) Lainson *v.* Tremere, 1 A. & E. 792.

plaintiff, who had leased the mines to the company, of which the lessor was a partner at the time of the action, but not at the time he granted the lease (*l*).

Tenant may show landlord's title to be expired. — Delaney *v.* Fox. — The tenant may, however, show that his landlord's title has expired (*m*): but where a defendant in an action for use and occupation, had occupied apartments in a house belonging to a wife, and had paid rent to the husband, who subsequently, with the knowledge of the defendant, granted a lease of the whole house to the plaintiff: it was held, that having occupied with notice of the lease, he could not impeach its validity, nor controvert the plaintiff's title (*n*). Upon an information to set aside a lease of charity lands, it was held in Chancery *that the lessees [*215] could not dispute the title by setting up an adverse title whilst they retained possession (*o*).

Tenant may show that other person than claiming assignee of reversion has title. — The rule that a tenant may not dispute his landlord's title applies only to the title of the landlord who let him in; and the tenant may deny the title of a claiming assignee of a reversion by showing a title in some other person (*p*).

Estoppel as against reversioner. — The interest of a tenant for life and a reversioner are the same, and therefore a lessee who has paid rent to the first, cannot set up title in another person as an answer to an action by the latter after the death of the former (*q*). A lessee, by executing an indenture of lease, admits a will under which it is recited that the lease was granted (*r*). A lessee of tolls, under an instrument signed by the persons as trustees, admits they are trus-

(*l*) Francis *v.* Doe *d.* Harvey, 4 M. & W. 331.

(*m*) Delaney *v.* Fox, 2 C. B., N. S. 768; Neave *v.* Moss, 1 Bing. 363; Doe *d.* Jackson *v.* Ramsbotham, 3 M. & S. 516; Doe *d.* Strode *v.* Seaton, 2 C., M. & R. 728; Downes *v.* Cooper, 2 Q. B. 256; Claridge *v.* Mackenzie, 4 M. & G. 143; Doe *d.* Leeming *v.* Skirrow, 7 A. & E. 157.

(*n*) Rennie *v.* Robinson, 1 Bing. 147.

(*o*) Att.-Gen. *v.* Ld. Hotham, 3 Russ. 415.

(*p*) Carlton *v.* Bowcock, 51 L. T., 659; and *post*, Ch. VII., sect. 5.

(*q*) Doe *d.* Colemore *v.* Whitroe, 1 D. & Ry. 1.

(*r*) Bringloe *v.* Goodson, 5 B. N. C. 738.

tees (*s*). An assignee is estopped by the deed which estops his assignor (*t*): and an assignor, by executing the assignment in which the original lease is recited, is precluded in an action by the assignee from calling upon him to prove the lease (*u*): so an assignee of a void lease by a tenant for life is estopped from disputing the title of the remainderman, though his assignment was after the death of the tenant for life, and payment to and acceptance of rent by the remainderman, and with notice of that fact (*x*). So where a lease was granted by A. and B. as granting parties, and reserved the rent and right of re-entry to a close, it was held that the assignee of the lessor was estopped from showing that A. had no interest in the premises (*y*). In defence of an action of ejectment, it may be shown that the parties under whom the plaintiff claims had no title when they conveyed to him, although the defendant himself claims by a conveyance from the same parties, if the latter conveyance was subsequent to that which the defendant seeks to impeach (*z*).

Want of title appearing on lease. — It was at one time thought, from Cuthbertson *v.* Irving (*a*) and other cases, that when the document of lease showed a want of title in the landlord, there was nothing to estop the tenant from denying that title; but this doctrine has now been distinctly overruled in Jolly *v.* Arbuthnot (*b*), as was pointed out by the Exchequer Chamber in Morton *v.* Woods (*c*).

[*216] ***Effect of estoppels on validity of lease.** — In an action for rent, where the title to the land is not in question, the defendant is estopped from saying the lease is not a good one; for the covenant for payment of the rent is good (*d*). But he may plead a new substituted tenancy

(*s*) Willington *v.* Brown, 8 Q. B. 169.

(*t*) Taylor *v.* Needham, 2 Taunt. 278; Barwick *d.* Mayor, &c., of Richmond *v.* Thompson, 7 T. R. 488; Bryan *d.* Child *v.* Winwood, 1 Taunt. 208.

(*u*) Nash *v.* Turner, 1 Esp. 217.

(*x*) Johnson *v.* Mason, 1 Esp. 89.

(*y*) Parke *v.* M'Loughlin, 1 Ir. Law R., N. S. 186.

(*z*) Doe *d.* Oliver *v.* Powell, 1 A. & E. 531.

(*a*) 29 L. J., Ex. 485; see, too, Pargeter *v.* Harris, 7 Q. B. 708.

(*b*) 4 De G. & J. 224; 28 L. J., Ch. 547.

(*c*) L. R., 4 Q. B. 293; 38 L. J., Q. B. 81; 9 B. & S. 659; 17 W. R. 414.

(*d*) Monroe *v.* Lord Kerry, 1 Bro. P. C. 67.

from year to year and the determination thereof by notice to quit before the rent claimed became due; and that notwithstanding he omitted so to plead in a previous action founded on the same lease or agreement (*e*). Where a tenant for life under a devise, with a leasing power, let to defendant by a lease, not noticing the power; and after the death of the lessor, a succeeding tenant for life under the same devise brought ejectment against the defendant, on the ground that the lease was not a valid execution of the power; it was held, that the defendant was not estopped from setting up an outstanding term of years in trustees created by a tenant in fee, from whom the devisor had inherited, as the lessor of the plaintiff himself denied the right of the defendant's lessor to grant the lease (*f*).

Effect of estoppels as to description of premises. — The tenant is not estopped by the description of the lands in the lease, as "meadows," from pleading and proving that they had been converted into arable before the lease, and have been used as such ever since (*g*).

Sect. 23. — *Bond for Performance of Covenant.*

Nature and effect. — Sometimes a bond is taken by the lessor from the lessee, with or without sureties, conditioned for payment of the rent and performance of the covenants in the lease (*h*), or a guarantee in writing for the due payment of the rent (*i*). Such a guarantee will cease when the tenancy is determined by due notice to quit, notwithstanding such notice is waived and a new tenancy created (*k*). Sometimes also a bond is made by a sub-lessor to a sub-lessee, conditioned to indemnify him from the rent reserved in the original lease, and from all distresses, ejectments, and other

(*e*) Howlet *v.* Tarte, 10 C. B., N. S. 813; 31 L. J., C. P. 146.

(*f*) Doe *d.* Lord Egremont *v.* Wyndham, 12 Q. B. 711.

(*g*) Skipworth *v.* Green, 1 Stra. 610; 8 Mod. 311.

(*h*) Lainson *v.* Tremere, 1 A. & E. 792.

(*i*) Tayleur *v.* Wildin, L. R., 3 Ex. 303; 37 L. J., Ex. 173.

(*k*) Tayleur *v.* Wildin, L. R., 3 Ex. 303; 37 L. J., Ex. 173; see this case distinguished in the very special case of Holmes *v.* Brunskill, L. R., 3 Q. B. D. 495.

proceedings in respect thereof; or by the assignee of a lease to the assignor to indemnify him from the rent and covenants in the lease; or by the assignor to the assignee (*l*). [*217] Such bonds respectively are within the 8 & 9 Will. *3, c. 11, s. 8, and operate as securities only, and the actual damages only are recoverable (*m*).

Sect. 24. — *Rectification of Erroneous Lease.*

In what cases. — If a lease or other deed be drawn up and executed upon terms materially different from those actually agreed on, and contrary to the real intention of both parties, a court of equity may cause it to be reformed and corrected, or set aside (*n*);[1] but it will do so only upon very strong evidence clearly showing a mistake by *both* parties, and the onus of proof lies on the plaintiff (*o*). This strict rule does not seem to apply as between vendor and purchaser, or lessor and lessee, where the parties can be replaced in statu quo (*p*), and in one case of a mistake in parcels, where the mistake

(*l*) Smith *v.* Day, 2 M. & W. 684.

(*m*) 2 Chit. Pl. 320 (7th ed.); 2 Wms. Saund. 187 a, n. (*c*).

(*n*) Murray *v.* Parker, 19 Beav. 305; Garrard *v.* Frankel, 30 Beav. 445; 31 L. J., Ch. 604; Mortimer *v.* Shortall, 2 Dru. & W. 363; Lister *v.* Hodgson, L. R., 4 Eq. 30; 15 W. R. 547; Harris *v.* Pepperell, L. R., 5 Eq. 1.

(*o*) Wright *v.* Goff, 22 Beav. 207; Sells *v.* Sells, 1 Drew. & Sm. 43; 29 L. J., Ch. 500; Rooke *v.* Ld. Kensington, 2 Kay & J. 743; Story Eq. Jur. s. 157; 8 E. & B. 257, 294; Earl of Bradford *v.* Earl of Romney, 30 Beav. 431; Garrard *v.* Frankel, 30 Beav. 445; Price *v.* Ley, 32 L. J., Ch. 530; Seaton *v.* Staniland, 4 Giff. 61; Elwes *v.* Elwes, 3 De Gex, F. & J. 667; Fallon *v.* Robins, 16 Ir. Ch. R. 422.

(*p*) Harris *v.* Pepperell, L. R., 5 Eq. 1.

[1] **Reformation and damages for fraud.** — A covenant which does not express intentions of parties will be rectified against party taking advantage of omission. Bulmer *v.* Brumwell, 13 A. R. (Ont.) 411.

Where a party signed under material false representations as to its contents, court held lease void and sustained an oral agreement in place of it. Wheeler & Wilson Man. Co. *v.* Charters, 21 N. B. 480.

It has been held that if lessor knowingly make false representations as to sanitary condition of premises, lessee may make suitable repairs and offset the expenses against rent. Wolfe *v.* Arrott, 109 Pa. St. 473.

Reformation will not be granted without clear proof of fraud or mistake. Albany Inst. for Savings *v.* Burdick, 87 N. Y. 40, 50. See *post*, sec. 25, Rescission for fraud, &c.

was partly on the side of the plaintiff, it appears to have been relaxed, and an annulment ordered unless the defendant would consent to a rectification, which he did (*q*). *Parol evidence* is admissible (*r*).[1] The court will not reform a deed on petition, but an action must be brought; and so long as the deed stands the court is bound to act upon it, notwithstanding it may be satisfied that the deed is at variance with the intention of the parties (*s*).

Action for rectification brought in Chancery Division. — By section 34 of the Judicature Act, 1873, any action for "the rectification or setting aside or cancellation of deeds or other written instruments" must be brought in the Chancery Division of the High Court. But the 24th section of the same act gives power to any other division to treat an instrument as rectified or set aside (*t*).

Compensation for error in lease. — In a very clear case of mistake, compensation may be awarded to a tenant for having accepted an erroneous lease, instead of rectifying the lease itself. This principle was recognized in Besley *v.* Besley (*u*), * in which case, however, compensation [*218] was refused.

Rectification of erroneous lease. — The facts were these. By contract in 1861 the defendant agreed to grant to the plaintiff a sub-lease for the residue of his own term less ten days. In pursuance of this contract an underlease was prepared by the defendant's solicitor for twenty-three years less ten days, and the lease was executed by the lessee, who

(*q*) Paget *v.* Marshall, 54 L. J., Ch. 575; 51 L. T. 351, *per* Bacon, V.-C. In this case the plaintiff granted a lease of certain portions of three warehouses, and by mistake included a first floor. The lease was ordered to be rescinded, with an option to the defendant to take it, excluding such first floor.

(*r*) Price *v.* Ley, *supra*.

(*s*) *In re* Malet, 31 L. J., Ch. 455, M. R.

(*t*) Mostyn *v.* West Mostyn, &c., Co., L. R., 1 C. P. D. 145; 45 L. J., C. P. 401; 34 L. T. 325.

(*u*) L. R. 9 Ch. D. 103; 38 L. T. 844; 27 W. R. 184.

[1] **Parol evidence; when admissible.** — Parol evidence is admissible to prove fraud or mistake, Bulmer *v.* Brumwell, 13 A. R. (Ont.) 411; Wheeler & Wilson Man. Co. *v.* Charters, 21 N. B. 480; Wolfe *v.* Arrott, 109 Pa. St. 473; but it must be clear and satisfactory, Albany Inst. for Savings *v.* Burdick, 87 N. Y. 40, 50.

neither inspected the head lease, nor employed a solicitor. In 1877 it was discovered that the head lease had only sixteen years to run at the time of the contract, and had in fact expired, and that the sub-lease had, *by pure mistake*, been made for seven years longer than the lessor had power to make it. The plaintiff, who had been obliged to procure a new lease from the head landlord at a greatly increased rent, claimed compensation, but Malins, V.-C., held that he was to blame in not having inspected the head lease at the time of the contract, and applying the rule of caveat emptor, disallowed the claim.

Correction of clerical error. — Where there is a clear case of a clerical error, it is presumed that the Court will correct it, and construe the lease as if the error had not been made.

Sect. 25. — *Cancellation of Lease for Fraud, Misrepresentation, or Concealment.*

If a lease has been obtained by fraud or material misrepresentation or concealment, either on the part of the lessor or lessee, it may be set aside (*x*).[1] Mostyn *v.* West, Mostyn &

(*x*) See Story on Equity, ss. 191–203.

[1] **Rescission for fraud; mistake; concealment, &c.** — (*a*) A lease obtained by fraud is void against lessee, though under seal. Holley *v.* Young, 66 Me. 520. If unfair advantage has been taken of one of weak mind, the court will order a rescission. Shanagan *v.* Shanagan, 7 Ont. 209 (lease made by old man without professional advice, &c.; rescission ordered, but lessor to pay for improvements).

A lease will be cancelled after building has been burned, if parties had agreed to insert provision for suspension of rent in such case, which had not been inserted by mistake. Gates *v.* Green, 4 Paige (N. Y.) 355.

If lessee be induced to take lease by fraudulent misrepresentations as to extent of premises, he can, after entering, sue lessor for damages. Whitney *v.* Allaire, 1 N. Y. 305. If he occupy, he will be liable only for reasonable value, Irving *v.* Thomas, 18 Me. 418; or he can bring a suit in equity for a rescission, Whitney *v.* Allaire, 1 N. Y. 305, 310 (*per* Gardiner, J.).

(*b*) *The rule caveat emptor* does not apply to a misrepresentation of facts within peculiar knowledge of lessor. Irving *v.* Thomas, 18 Me. 418, 423, 424 (misrepresentations as to the income and value of use of a tavern house).

(*c*) *Suppressio veri* may be ground of rescission. Chrétien *v.* Crowley, 2 Q. B. R. (Quebec) 385.

Co. (*y*) is an important case on this head, being decided on the ground of concealment only. In that case the lessor knew, but did inform the lessee, who had no means of knowing, that he had no title to part of the lands demised. It was held that the lessee might, if he pleased, be relieved of the lease altogether, that this relief might be given in an action by the lessor for the rent, and further the lessee might, if he pleased, reject that part only to which there was no title, and keep the remainder. It is to be observed, however, that in this case the lessee does not appear to have either entered into possession or paid rent (*z*).

(*y*) L. R., C. P. D. 145, and *supra* (217).

(*z*) See the judgment of Lindley, J.

[*219] * CHAPTER VI.

OF TENANCIES FOR LESS TERM THAN YEARS, AND OF PERMISSIONS TO OCCUPY.

SECT. 1. — *Tenancy generally.*

Evidence of tenancy. — In many cases, where no express contract of letting has been made, a tenancy may be implied from the acts of the parties,[1] especially the occupation and

[1] **Implied tenancies.** — Occupancy otherwise unexplained is *prima facie* evidence of a tenancy, Keyes *v.* Hill, 30 Vt. 759, 765 (*per* Barrett, J.); but liable to rebuttal, Keyes *v.* Hill, *supra*. If shown to be adverse, the presumption is thereby overcome. Wyman *v.* Hook, 2 Me. 337. A judgment debtor disputing validity of levy is not an implied tenant. One who enters and occupies adversely is a trespasser. Krug *v.* Davis, 101 Ind. 75.

A mere occupant without right is not a tenant. Merriam *v.* Willis, 10 Allen (Mass.) 118. Such occupant might maintain trespass against a mere intruder (*per* Metcalf, J., *supra*, and *per* Wilde, J., in Inh'b'ts of Barnstable *v.* Thacher, 3 Met. (Mass.) 239, 242, 243).

Occupancy with knowledge that rent will be charged will ordinarily create a tenancy. Ducey Lumber Co. *v.* Lane, 58 Mich. 520, 525; Ward *v.* Warner, 8 Mich. 508, 519, 520 (*per* Martin, Ch. J.); Dwight *v.* Cutler, 3 Mich. 566.

It will not if under an adverse claim. Ward *v.* Warner, 8 Mich. 508, 519, 520; Hogsett *v.* Ellis, 17 Mich. 351, 373 (*per* Christiancy, J.).

The adverse claim, however, must be more than a mere mental or silent one. It must be manifested by overt acts or by declarations communicated to the owner. Hogsett *v.* Ellis, *supra*.

If relation of landlord and tenant has been established, the tenant is estopped thereafter to set up an adverse claim during tenancy. See *ante*, Chap. I., sec. 1, p. 2, notes.

A party occupying land, if there is a lease on record, is *prima facie* a tenant. Libbey *v.* Staples, 39 Me. 166.

Occupancy otherwise explainable does not constitute tenancy. Hardin *v.* Pulley, 79 Ala. 381.

An execution debtor is not a tenant to the purchaser on execution sale nor entitled to notice to quit. Griffin *v.* Rochester, 96 Ind. 545.

A remainderman may be tenant to life tenant. Leavitt *v.* Leavitt, 47 N H. 329.

payment of rent (*a*). Such payment frequently affords evidence of a promise by the tenant to hold the premises from year to year on the terms of some previously-existing lease or agreement (*b*).[1] The presumption which arises from the payment and acceptance of rent is the same against a corporation as against an ordinary person (*c*). Where premises are taken under a written agreement, an oral alteration of the rent will not constitute a fresh demise (*d*).[2] So an agreement by the tenant to pay an additional sum yearly, in consideration of his landlord making certain improvements in the demised premises, does not create a new demise (*e*).

Sect. 2. — *Tenancy from Year to Year.*

Nature of the tenancy. — A tenant from year to year is one who holds under a demise (express or implied)[3] for a

(*a*) Smith L. & T. 24–29 (2nd ed.).

(*b*) Doe *d.* Rigge *v.* Bell, 5 T. R. 471; and see the cases cited *post*, p. 221.

(*c*) Doe *d.* Pennington *v.* Taniere, 12 Q. B. 998; and see Hill *v.* South Staffordshire R. Co., 11 Jur., N. S. 192.

(*d*) Crowley *v.* Vitty, 7 Exch. 319; 21 L. J., Ex. 136; Geeckie *v.* Monk, 1 C. & K. 307; Doe *d.* Monk *v.* Geeckie, Id. 307; 5 Q. B. 841; Clarke *v.* Moore, 1 Jon. & Lat. 723; Burrows *v.* Gradin, 1 D. & L. 213.

(*e*) Donellan *v.* Read, 3 B. & Ad. 899; Foquet *v.* Moor, 7 Exch. 870.

[1] Allen *v.* Bartlett, 20 W. Va. 46. But see as to effect of holding over after lease for years, *post*, sec. 2, notes.

[2] **New or old tenancy.** — Whether a tenancy, after waiver of notice and agreement for increased rent, is a new tenancy or old one, is question for jury. Lord Inchiquin *v.* Lyons, 20 L. R. Ir. 474.

[3] **Tenancies from year to year distinguished from tenancies at will.** — (*a*) *At common law* and in all the American states and provinces *except Maine and Massachusetts* parol leases for terms of years create after entry *implied* tenancies from year to year. Reeder *v.* Sayre, 70 N. Y. 180, 561; Schuyler *v.* Leggett, 2 Cow. (N. Y.) 660; People *v.* Rickert, 8 Id. 226; Blumenthal *v.* Bloomingdale, 100 N. Y. 558, 561; Lounsbery *v.* Snyder, 31 N. Y. 514; Brewing *v.* Berryman, 2 Pugs. (N. B.) 115; Doe *d.* Parkinson *v.* Haubtman, Bert (N. B.) 645; Koplitz *v.* Gustavus, 48 Wis. 48; Withnell *v.* Petzold, 17 Mo. App. 669; Kerr *v.* Clark, 19 Mo. 132; Goodfellow *v.* Noble, 25 Id. 60; Ridgley *v.* Stillwell, 28 Id. 400; Strong *v.* Crosby, 21 Conn. 398; Taggard *v.* Roosevelt, 2 E. D. Smith (N. Y.) 100; Shepherd *v.* Cummings, 1 Coldw. (Tenn.) 354; Dumn *v.* Rothermel, 112 Pa. St. 272; McDowell *v.* Simpson, 3 Watts (Pa.) 135; Williams *v.* Ackerman, 8 Or. 405; 1 Wash. on Real Prop. sec. 391.

(*b*) *Local statutes and decisions.* *In Indiana* all tenancies not otherwise ex-

term (*f*), which may be determined at the end of the first or any subsequent year of the tenancy, either by the land-

(*f*) How *v.* Kennett, 3 A. & E. 662.

pressed, are tenancies from year to year (Rev. Sts. sec. 5208). Sivan *v.* Clark, 80 Ind. 57.

In Delaware no estate is at will if it can be held from year to year (Laws of Del. Ch. 101, sec. 15); but where no term is limited (Ch. 120, sec. 2), tenancy is, from year to year, unless of houses or lots, usually let for less time.

In Dakota (Civil Code, sec. 1115), unless otherwise expressed, tenancies are for one year, except of lodgings or places where there is a different custom.

In Georgia, if no time specified (Code, sec. 2290), they are for one calendar year.

In South Carolina (Gen. Sts. sec. 1812), unless otherwise specified, they are for a year.

In Quebec (Civil Code, sec. 1608) tenancies without lease are annual, and terminate, if property is a house, May 1st, if a farm, Oct. 1st.

In Connecticut (Gen. Sts. sec. 2967) a parol lease reserving monthly rent, and not specifying time of termination, is a lease for one month.

In Rhode Island an indefinite agreement is held to be a tenancy from year to year (Pub. Sts. Ch. 232, sec. 5).

In New Hampshire, under the construction of the Statute of Frauds (Gen. Laws of N. H. Ch. 136, sec. 12), parol tenancies not otherwise expressed are *primâ facie* tenancies at will. Currier *v.* Perley, 24 N. H. 219, 225, 229; Hazeltine *v.* Colburn, 31 Id. 466, 471 (*per* Bell, J.); Weeks *v.* Sly, 61 Id. 89. Indeed, in Whitney *v.* Swett, 22 Id. 10, it was held that such a tenancy was conclusively at will. Justice Bell, however, who gave the opinion, has in two subsequent cases, *supra* (Currier *v.* Perley and Hazeltine *v.* Colburn), as well as Justice Smith (in Weeks *v.* Ely), limited this doctrine by saying that tenancies from year to year can be created if the facts show such to be the intentions.

In Maine and Massachusetts, under the Statute of Frauds, as there construed, all parol tenancies (definite or indefinite) are *conclusively* tenancies at will. There can be no tenancy from year to year created except by an instrument in writing. Rev. Sts. Me. Chap. 73, sec. 10; Pub. Sts. Mass. Chap. 120, sec. 3; Little *v.* Palister, 3 Me. 6, 15; Davis *v.* Thompson, 13 Me. 209; Young *v.* Young, 36 Id. 133; Withers *v.* Larrabee, 48 Id. 570; Esty *v.* Baker, 50 Id. 325; Cunningham *v.* Holton, 55 Id. 33; Robinson *v.* Deering, 56 Id. 357; Wilson *v.* Prescott, 62 Id. 115; Thomas *v.* Sanford Steamship Co., 71 Me. 548; Rollins *v.* Moody, 72 Id. 135; Ellis *v.* Paige, 1 Pick. (Mass.) 43, 45; Coffin *v.* Lunt, 2 Pick. 70; Curtis *v.* Galvin, 1 Allen (Mass.) 215, &c. This distinction arose from the construction of the statute in Massachusetts which omits the exception of three years in favor of oral leases (*per* Wilde, J., in Ellis *v.* Paige, 1 Pick. (Mass.) 43, 45). The decisions there have not been followed elsewhere except in Maine.

In Missouri, where the three years exception is also omitted, parol tenancies are held to be either from year to year, or at will according to the express or implied intentions. The Massachusetts cases have been cited, and distinguished (*per* Napton, J., in Ridgely *v.* Stillwell, 25 Mo. 570); or approved (*per* Bliss, J., in Hammon *v.* Douglas, 50 Id. 434, 437), but not followed.

It is held (as in most states), that parol leases for years, after entry, are from year to year, Kerr *v.* Clark, 19 Mo. 132; Goodfellow *v.* Noble, 25 Id.

lord or the tenant, by a regular notice to quit (*g*). He is substantially a tenant at will; except that such will can-

(*g*) Cole Ejec. 29, 441.

60; Ridgely *v.* Stillwell, 28 Id. 400, 403; Scully *v.* Murray, 34 Id. 420; other parol tenancies from year to year, or at will according to express or implied contract, Hammon *v.* Douglas, 50 Mo. 435; Withnell *v.* Petzold, 17 Mo. App. 669; Vegely *v.* Robinson, 20 Id. 199, 203 (*per* Phillips, P. J.); Ins. Co. *v.* Nat. Bank, 71 Mo. 58; St. L. & I. M. R. R. Co. *v.* Ludwig, 6 Mo. App. 584.

In Ridgely *v.* Stillwell, 25 Mo. 570, it was said (by Napton, J.) that "A tenancy at will must be created by express contract."

This has not been sustained by later cases above cited. By special statute (Rev. Sts. sec. 3078) parol tenancies of stores, shops, houses, or other buildings in cities or villages, are from month to month.

In Iowa (Rev. Code, sec. 2014) *and Kansas* (Comp. Laws, sec. 3204) occupants with consent are *primâ facie* tenants at will.

(*c*) *In the majority of the states* tenancies either at will or from year to year may be implied. Squires *v.* Huff, 3 A. K. Marsh. (Ky.) 18; Sullivan *v.* Enders, 3 Dana (Ky.) 66; Western Union Tel. Co. *v.* Fain, 52 Ga. 18; Duke *v.* Harper, 6 Yerg. (Tenn.) 280.

In few, if any, will tenancies from year to year be implied against an express contract. Laxton *v.* Rosenberg, 11 Ont. 199, 207; Humphries *v.* Humphries, 3 Ired. (N. C.) L. 362; Stedman *v.* McIntosh, 4 Id. 291; Say *v.* Stoddard, 27 Ohio St. 478; Waring *v.* L. & N. R. Co., 19 Fed. Rep. 863; Bastow *v.* Cox, 11 Q. B. 122; Walker *v.* Giles, 6 C. B. 662; Dixie *v.* Davies, 7 Exch. 89; Anderson *v.* Midland R. R. Co., 30 L. J. Q. B. 94.

(*d*) *Reservation of annual rent.* — This "is the *leading circumstance*" indicating a tenancy from year to year. Kent, J., in Jackson *v.* Bradt, 2 Caines (N. Y.) 169, 174; Lesley *v.* Randolph, 4 Rawle (Pa.) 123, Hall *v.* Wadsworth, 28 Vt. 410; Silsby *v.* Allen, 43 Vt. 172, Hey *v.* McGrath, 81 Pa. St. 310; Morrill *v.* Mackman, 24 Mich. 279; Carey *v.* Richards, 4 West L. Mon. 251; Barlow *v.* Wainwright, 22 Vt. 88; McClenaghan *v.* Barker, 1 Q. B. (Ont.) 26; Hammon *v.* Douglas, 50 Mo. 434, 437 (*per* Bliss, J.); Withnell *v.* Petzold, 17 Mo. App. 673, 674 (*per* Rombauer, J.); Ins. Co. *v.* Nat. Bank, 71 Mo. 58.

(*e*) *Annual rent not conclusive.* — It will not control a contrary agreement. Stedman *v.* McIntosh, 4 Ired. (N. C.) L. 291, Humphries *v.* Humphries, 3 Id. 363; Say *v.* Stoddard, 27 Ohio St. 478; Walker *v.* Giles, 6 C. B. 662; Dixie *v.* Davies, 7 Exch. 89; Anderson *v.* Midland R. R. Co., 30 L. J. Q. B. 94.

(*f*) *Monthly rent.* — This *sometimes* indicates a monthly tenancy. Anderson *v.* Prindle, 19 Wend. (N. Y.) 391, 23 Id. 616; O'Neil *v.* Wells, 2 Russ. & Ches. (N. S.) 205; Warner *v.* Hale, 65 Ill. 395, Huyser *v.* Chase, 13 Mich. 98; Woodrow *v.* Michael, 13 Id. 187; People *v.* Darling, 47 N. Y. 666; Hammon *v.* Douglas, 50 Mo. 434, 437 (*per* Bliss, J.); Withnell *v.* Petzold, 17 Mo. App. 673, 674 (*per* Rombauer, J.).

(*g*) *Monthly rental; under yearly tenancy.* — Where circumstances indicate a yearly tenancy, monthly rent payments will not change it. Scully *v.* Murray, 34 Mo. 420; Ridgely *v.* Stillwell, 25 Mo. 570; Lloyd *v.* Cozens, 2 Ashm. (Pa.) 131.

(*h*) *Oral leases for months* will create, ordinarily, tenancies from month to month. Geiger *v.* Braun, 6 Daly (N. Y.) 506. And a tenant, holding over after a lease for a month, ordinarily becomes a tenant from month to month.

not be determined by either party without due notice to quit (*h*). If no such notice be given the tenancy will continue from year to year, for any number of years [*220] until *surrendered, or extinguished by the Statute of Limitations, or the lessor's title ceases (*i*). The

(*h*) Parkes *d.* Walker *v.* Constable, 3 Wils. 25; Smith L. & T. 24 (2nd ed.).

(*i*) Smith L. & T. 30, 441.

Prickett *v.* Ritter, 16 Ill. 96; Macgregor *v.* Defoe, 14 Ont. 87, 92. But in Shaffer *v.* Sutton, 5 Binn. (Pa.) 228, a lease for nine months was held a tenancy from year to year.

(*i*) *Periodical rent payments; presumptions.* — Weekly, monthly, quarterly, or yearly payments indicate, in absence of express contract or controlling circumstances, tenancies from week to week, month to month, quarter to quarter, or year to year. Lord Ellenborough, in Doe *v.* Ruffin, 6 Esp. 4; Walworth, Chan., in Prindle *v.* Anderson, 23 Wend. (N. Y.) 616, 619; Wilson, C. J., in Macgregor *v.* Defoe, 14 Ont. 87, 92, &c.

(*j*) *The erection of valuable improvements* is sometimes evidence that the tenancy is from year to year. Doe *d.* Macqueen *v.* Hunter, 1 Kerr (N. B.) 518; Boudette *v.* Pierce, 50 Vt. 212.

(*k*) *Purposes of tenancy* often determines its character. A lease of a farm, &c., requiring a year's time, is usually from year to year. Carey *v.* Richard, 4 West. Law Mon. 251, 265, 270 (*per* Wm. Lawrence, J.); Hunt *v.* Morton, 18 Ill. 75; Hanchett *v.* Whitney, 2 Aik. (Vt.) 240; Leavitt *v.* Leavitt, 47 N. H. 329; Hammon *v.* Douglas, 50 Mo. 434, 437 (*per* Bliss, J.); Withnell *v.* Petzold, 17 Mo. App. 669, 673, 674 (*per* Rombauer, J.).

(*l*) *Holding over.* — A tenant for years holding over with consent is (in absence of new agreement) held to continue under the original terms so far as applicable to a yearly tenancy. Wilgus *v.* Lewis, 8 Mo. App. 336; Ins. Co. *v.* Nat. Bank, 71 Mo. 58; Withnell *v.* Petzold, 17 Mo. App. 673 (*per* Rombauer, J.); Hammon *v.* Douglas, 50 Mo. 434 (*per* Bliss, J.); St. L. & I. M. R. R. Co. *v.* Ludwig, 6 Mo. App. 583; Hilliard *v.* Gemmell, 10 Ont. 504, 505 (*per* Rose, J.); Conway *v.* Starkweather, 1 Denio (N. Y.) 113; Doe *d.* Heathcote *v.* Hughes, 3 Pugs. & Bur. (N. B.) 368; Condon *v.* Barr, 47 N. J. L. 113, 114, 115 (*per* Knapp, J.); Miller *v.* Ridgely, 19 Ill. App. 306; McKinney *v.* Peck, 28 Ill. 174; Pickett *v.* Bartlett, 13 Daly (N. Y.) 229, 230 (*per* Daly, Ch. J.); Smith *v.* Allt, 7 Id. 492, 493 (*per* Daly, Ch. J.); Schuyler *v.* Smith, 51 N. Y. 309; Critchfield *v.* Remaley, 21 Neb. 178; Sullivan *v.* Cary, 17 Cal. 80; Vrooman *v.* McKaig, 4 Md. 450; Hall *v.* Wadsworth, 28 Vt. 410; Allen *v.* Bartlett, 20 W. Va. 46; Wolffe *v.* Wolffe, 69 Ala. 549; Witt *v.* Mayor of N. Y., 6 Robt. (N. Y.) 441; Hall *v.* Myers, 43 Md. 446; Burbank *v.* Dyer, 54 Ind. 392; Doe *d.* Peters *v.* Pelletier, 4 Allen (N. B.) 33; Sturdee *v.* Merritt, 3 Kerr (N. B.) 641. As to tenancies arising from holding over, see, also, *post.*

(*m*) *Leases defectively executed.* — Tenancies from year to year arise from occupation under them. Doe *d.* Pennington *v.* Taniere, 12 Q. B. 998 (seven years' lease not under seal); Fongera *v.* Cohn, 43 Hun (N. Y.) 454; Stewart *v.* Apel, 5 Houst. (Del.) 189; Laughran *v.* Smith, 75 N. Y. 205.

death of either party will not determine it (*k*); unless, indeed, the lessor be tenant for his own life only, and the lease is not made pursuant to any statute or power (*l*).

Such lease gives one time of continuance. — "Leases from year to year," observes Mr. Preston, "give only one time of continuance. That time, however, may be confined to one year, or extended to several years, according to circumstances attending the tenancy in its progress. In the first place, the lease is for one year certain, and after the commencement of every year, or perhaps after the expiration of that part of the year in which a notice of determining the tenancy may be given, it is a lease for the second year; and in consequence of the original agreement of the parties every year of the tenancy constitutes part of the lease, and eventually becomes parcel of the term: so that a lease, which in the first instance is only for one year certain, may in the event be a term for one hundred years or more. Under this species of tenancy the law considers the lease, with a view to the time which has elapsed, as arising from an estate for all that time, including the current year; and with a view to the time to come, as a lease from year to year. For as all the time for which the land may be held under a running lease is originally given, and in effect passes, by the same instrument or contract, the whole time is consolidated, and every year as it commences forms part of the term" (*m*).

Settlement cases. — The renting of a tenement from three months to three months, or for an indefinite period, and an occupation under it and payment of rent for a year or more, constitute a tenancy from year to year, so as to confer a settlement under the Poor Law (*n*).

Creation by express contract. — Where parties usually agree

(*k*) Maddon *d.* Baker *v.* White, 2 T. R. 159; Doe *d.* Shore *v.* Porter, 3 T. R. 13; Mackay *v.* Mackreth, 4 Doug. 213; 2 Chit. R. 461; 15 Ves. 241; Doe *d.* Hull *v.* Wood, 14 M. & W. 682; Cattley *v.* Arnold, 1 J. & H. 651; 28 L. J., Ch. 352; Bootheroyd *v.* Woolley, 5 Tyr. 522.

(*l*) Doe *d.* Thomas *v.* Roberts, 16 M. & W. 778; 14 & 15 Vict. c. 25, s. 1.

(*m*) 3 Prest. Conv. 76, 77. And see Tomkins *v.* Lawrence, 8 C. & P. 729; Cattley *v.* Arnold, *supra*.

(*n*) Rex *v.* Herstmonceaux, 7 B. & C. 551; Hastings Union *v.* Guardians of St. James, Clarkenwell, L. R., 1 Q. B. 38; 35 L. J. M. C. 65.

for a tenancy "from year to year," and possession is taken, such a tenancy is thereby created, and may be determined at the end of the first or any subsequent year of the tenancy by a regular notice to quit (*o*). But where a tenancy is created "for one year certain, and so on from year to year" (which is frequently done by mistake), it enures as a tenancy for two years at the least, and cannot be determined at the end of the first year (*p*); though it may be determined by notice to quit at the end of the second or any subsequent year of the tenancy. A demise "for [*221] *a year," or "for one year certain," does not create a tenancy from year to year, nor require any notice to quit at the end of the year (*q*).[1]

Implied contract by entry under contract for lease or void lease. — Prior to Walsh *v.* Lonsdale, the doctrine was firmly established, that where a person is let into possession under a mere agreement for a future lease, he becomes only a tenant at will; but it was equally well established, that when he pays, or expressly agrees to pay, any part of the annual rent thereby reserved, his tenancy at will changes into a tenancy from year to year, upon the terms of the intended lease so far as they are applicable to and not inconsistent with a yearly tenancy (*r*). That the freehold interest was, subsequent to the making of the agreement, assigned to another person, made no difference in law (*s*). The effect of Walsh *v.* Lonsdale (*ss*) upon this doctrine has already been considered,[2] and here it only remains to point out that

(*o*) Doe *d.* Clarke *v.* Smaridge, 7 Q. B. 957; Doe *d.* Plumer *v.* Mainby, 10 Q. B. 472.

(*p*) Doe *d.* Chadborn *v.* Green, 9 A. & E. 658; Reg. *v.* Chawton, 1 Q. B. 247.

(*q*) Cobb *v.* Stokes, 8 East, 358, 361; Wilson *v.* Abbott, 3 B. & C. 89; Johnstone *v.* Hudlestone, 4 B. & C. 937; and see Wright *v.* Tracy, Ir. R., 8 C. L. 478.

(*r*) Doe *d.* Thomson *v.* Amey, 12 A. & E. 476.

(*s*) See Arden *v.* Sullivan, 14 Q. B. 832; and compare Wyatt *v.* Cole, 36 L. T. 613.

(*ss*) 21 Ch. D. 9; and see *ante*, Ch. IV. sect. 1, p. 86.

[1] Logan *v.* Herron, 8 S. & R. (Pa.) 459; Van Cortlandt *v.* Parkhurst, 5 Johns. (N. Y.) 128.

[2] **Walsh *v.* Lonsdale.** — The *dictum* of Jessel, M. R., would not apply to a void lease, for that is not ordinarily a lease in equity.

the doctrine applied to entry upon a void lease (*sss*), as well as to entry upon an agreement for a lease, and that Walsh *v.* Lonsdale has no application to entry under a void lease, except so far as it may be construed as an agreement for a future lease.

Terms applicable to yearly tenancy. — A stipulation for two years' notice to quit is inapplicable to a yearly tenancy within the meaning of the doctrine above stated (*t*). So is a covenant to build; or to do such material repairs as are not usually done by tenants from year to year (*u*). But a stipulation, in an agreement for a lease for more than three years, to keep the premises in good tenantable repair during the tenancy, was held applicable (*x*); as also a stipulation, in a lease not by deed, for seven years, to paint at the end of the seventh year (*y*); and a stipulation "to keep open the shop, and use the best endeavours to promote the trade of it during the tenancy" (*z*). So a stipulation that the tenant shall be paid for tillages on the expiration of his tenancy (*a*); although, perhaps, it may not apply to a new reversioner, who accepts rent in ignorance of such a stipulation (*b*). A proviso for re-entry or non-payment of rent or non-performance of covenants is applicable to an implied yearly tenancy (*c*). Such tenant is entitled to the usual notice to quit; but at the expiration of the term mentioned in the agreement the implied tenancy from year to year will cease without any notice to quit (*d*).

*** Rebutting of implied terms of holding.** — The implied contract can of course be rebutted, and there must be some evidence given of it. Actual payment of rent [*222]

(*sss*) Doe *d.* Rigge *v.* Bell, 5 T. R. 471; 2 Sm. L. C. 8th ed.

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

(*u*) Bowes *v.* Croll, 6 E. & B. 264.

(*x*) Richardson *v.* Gifford, 1 A. & E. 52.

(*y*) Martin *v.* Smith, L. R., 9 Ex. 50; 43 L. J., Ex. 43; 30 L. T. 268; 22 W. R. 336.

(*z*) Sanders *v.* Karnell, 1 F. & F. 356.

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

(*b*) Oakley *v.* Monck, 3 H. & C. 706; 34 L. J., Ex. 137; L. R., 1 Ex. 159; 4 H. & C. 251; 35 L. J., Ex. 84.

(*c*) Thomas *v.* Packer, 1 H. & N. 669.

(*d*) Doe *d.* Tilt *v.* Stratton, 4 Bing. 446; Doe *d.* Bramfield *v.* Smith, 6 East, 530; Berry *v.* Lindley, 3 M. & G. 498, 514; Doe *d.* Davenish *v.* Moffatt, 15 Q. B. 257, 265; Tress *v.* Savage, 4 E. & B. 36.

is not always essential, although that is perhaps the clearest proof (*e*). Where the payment of the rent is allowed to stand over by mutual consent, that is sufficient (*f*). Payment of rent does not of itself create a tenancy from year to year, but is *only evidence* from which a jury may find the fact (*g*). Where payment of rent unexplained would ordinarily imply a yearly tenancy upon the previous terms, it is open to the payer or receiver of such rent to prove the circumstances under which such payment was made, for the purpose of repelling such implication (*h*).

Where tenant holds over. — Where a tenant for a term of years holds over after the expiration of his lease, he becomes a tenant on sufferance;[1] but when he pays, or expressly

(*e*) Cox *v.* Bent, 5 Bing. 185; Vincent *v.* Godson, 24 L. J., Ch. 122; Smith L. & T. 27 (2nd ed.).

(*f*) Cox *v.* Bent, 5 Bing. 185; Vincent *v.* Godson, 24 L. J., Ch. 122; Smith L. & T. 27 (2nd ed.).

(*g*) Finley *v.* Bristol and Exeter R. Co., 7 Exch. 415; Jones *v.* Shears, 4 A. & E. 832.

(*h*) Doe *d.* Lord *v.* Crago, 6 B. C. 90; Oakley *v.* Monck, *supra*.

[1] **Holding over; different effects.** — (*a*) *Mutual consent where necessary.* — A tenant, holding over, without mutual agreement, is in *New Brunswick, Maine, Massachusetts*, &c., tenant at sufferance. Leighton *v.* Van Wart, 1 Pugs. & Bur. (N. B.) 489; Bowman *v.* Avery, 3 Kerr (N. B.) 210; Lithgow *v.* Moody, 35 Me. 214; Chesley *v.* Welch, 37 Id. 106; Delano *v.* Montague, 4 Cush. (Mass.) 42; Edwards *v.* Hale, 9 Allen, 462.

(*b*) *Tenancy at election of lessor; where.* — *In New York* and some other states the tenant, who holds over, is a tenant or trespasser at the election of landlord. Conway *v.* Starkweather, 1 Denio (N. Y.) 113; Pickett *v.* Bartlett, 13 Daly (N. Y.) 229, 230 (*per* Daly, Ch. J.); Smith *v.* Allt, 7 Id. 492, 493 (*per* Daly, Ch. J.); Schuyler *v.* Smith, 51 N. Y. 309; Wolffe *v.* Wolffe, 69 Ala. 549, 552 (*per* Somerville, J.); Clinton Wire Co. *v.* Gardner, 99 Ill. 151; Heinphill *v.* Flynn, 2 Penn. St. 144.

(*c*) *Landlord's consent is essential in all cases* in all the states. Den *v.* Adams, 12 N. J. L. 99; Condon *v.* Barr, 47 N. J. L. 113, 114, 115; Cairo, &c., R. R. Co. *v.* Wiggins Ferry Co., 82 Ill. 230; Perine *v.* Teague, 66 Cal. 446; Smith *v.* Allt, 7 Daly (N. Y.) 492.

Receipt of rent, distraining, or other recognition of tenancy will be sufficient to continue it. Condon *v.* Barr, 47 N. J. L. 113, 114, 115 (*per* Knapp, J.); Allen *v.* Bartlett, 20 W. Va. 46; Critchfield *v.* Remaley, 21 Neb. 178; Johnston *v.* McLellan, 21 C. P. (Ont.) 304.

A tenant may acquire right to continuance of tenancy by delay of lessor. Chesley *v.* Welch, 37 Me. 106. In Den *v.* Adams, 12 N. J. L. 99, it was held that mere expiration of time was not sufficient. And in Condon *v.* Barr, 47 N. J. L. 113, that a demand to pay rent or quit (not complied with) was not.

In Connecticut it is provided by statute (Gen. Sts. sec. 2967) that holding over shall not renew a tenancy.

agrees to pay, any subsequent rent, at the previous rate, a new tenancy from year to year is thereby created upon the same terms and conditions as those contained in the expired lease, so far as the same are applicable to and not inconsist-

In Kentucky (Gen. Sts. Ch. 66, Art. 4, sec. 1) it does not until ninety days have passed.

In Quebec, if continued more than eight days, it tacitly renews the tenancy (Civil Code, sec. 1609).

In Delaware (Laws of Del. Ch. 120, sec. 4) and Dakota (Civil Code, sec. 1119) continued possession will renew the tenancy, unless previous written notice has been given to terminate it.

(*d*) *Ordinary presumption* is that tenant holding over holds from *year to year* upon the terms of the original lease so far as applicable. Miller *v.* Ridgely, 19 Ill. App. 306; Wolffe *v.* Wolffe, 69 Ala. 549; Wilgus *v.* Lewis, 8 Mo. App. 336; Vrooman *v.* McKaig, 4 Md. 450, 454 (*per* Le Grand, C. J.); De Young *v.* Buchanan, 10 G. & J. (Md.) 149.

A tenant holding over in Maine and Massachusetts cannot be more than a tenant at will. Bennock *v.* Whipple, 12 Me. 346; Wheeler *v.* Cowan, 25 Id. 283; Longfellow *v.* Longfellow, 54 Id. 240; Kendall *v.* Moore, 30 Id. 327; Emmons *v.* Scudder, 115 Mass. 367.

(*e*) *Change of terms.* — A tenant may become a tenant from month to month if parties so agree, Macgregor *v.* Defoe, 14 Ont. 87, 92; or from week to week, or quarter to quarter (*per* Wilson, C. J.).

Whether tenancy becomes from year to year or from month to month is a question of fact, the payment of monthly or yearly rent being an important circumstance, sometimes decisive. Withnell *v.* Petzold, 17 Mo. App. 669; Hammon *v.* Douglas, 50 Mo. 434, 437; Vegely *v.* Robinson, 20 Mo. App. 199, 203 (*per* Phillips, P. J.); Ins. Co. *v.* Nat. Bank, 71 Mo. 58; Prindle *v.* Anderson, 23 Wend. (N. Y.) 616.

Usually a tenant for month or months, holding over, becomes tenant from month to month. Prickett *v.* Ritter, 16 Ill. 96; McPherson *v.* Norris, 13 Q. B. (Ont.) 472.

A distinct understanding will overcome presumptions from payment of annual rent. Waring *v.* Louisville, &c., R. R. Co., 19 Fed. Rep. 863. Notice to tenant, that if he hold over it must be from month to month, will usually change the tenancy into a tenancy from month to month, whether tenant consent or not. Shipman *v.* Mitchell, 64 Tex. 174.

Likewise, notice of a change in terms of tenancy before expiration binds tenant if he continue to occupy. Hunt *v.* Bailey, 39 Mo. 257. The contrary was held in De Young *v.* Buchanan, 10 G. & J. (Md.) 149, in Sturdee *v.* Merritt, 3 Kerr (N. B.) 641. In Hilliard *v.* Gemmell, 10 Ont. 504, notice to lessee that if he held over it must be at increased rent was held evidence for the jury of a tenancy from year to year at the advanced price.

(*f*) *Presumptions where mutual consent is required.* — In those states where mutual consent is essential to a continuance of the tenancy, continued occupation for any length of time will usually establish the relation as against the tenant. Longfellow *v.* Longfellow, 54 Me. 240; Bonney *v.* Foss, 62 Id. 248; Kendall *v.* Moore, 30 Id. 327; Dimock *v.* Van Bergen, 12 Allen (Mass.) 551.

An assignee may, by admissions, become tenant from year to year. Doe *d.* Peters *v.* Pelletier, 4 Allen (N. B.) 33.

ent with a yearly tenancy (*i*). This, however, appears to be a matter of evidence rather than of law (*k*). The landlord may show that he accepted the rent from time to time under a mistake, and upon the supposition that one of the lives for which the lease was granted continued in existence (*l*); or a new reversioner may show that he knew nothing of any special and unusual terms in the original lease, and therefore ought not to be deemed to have assented to them, so as to render himself liable to such terms (*m*), or the tenant may show any facts leading to an opposite conclusion, as that the continued occupation was only provisional and in expectation of a new lease on new terms.

In the absence, however, of any evidence one way or the other, it seems that upon a holding over and payment of rent, the jury would be directed to find a tenancy on the terms of the expired lease, and that this would be so even if there had been an assignment of the reversion prior to the holding over (*n*). Any such new tenancy (when implied) will be deemed to have commenced at the same time of the year as the original term, and notice to quit [*223] should be given * accordingly (*o*). Even if the rent be increased, the tenancy will be subject to covenants or stipulations similar to those contained in the former lease, unless others are expressly agreed on (*p*). It will also be subject to the custom of the country, so far as such custom is not excluded by the terms of the expired lease (*q*). It may be determined by notice at the end of the first or any subsequent year of the tenancy (*r*), or under an implied

(*i*) Bishop *v.* Howard, 2 B. & C. 100; Hyatt *v.* Griffiths, 17 Q. B. 505; Chit. on Contracts, 295 (7th ed.).

(*k*) Mayor of Thetford *v.* Tyler, 8 Q. B. 95; 2 Smith L. C. 90 (6th ed.).

(*l*) Doe *d.* Lord *v.* Crago, 6 C. B. 90.

(*m*) Oakley *v.* Monck, 3 H. & C. 706; 34 L. J., Ex. 137; L. R., 1 Ex. 159; 4 H. & C. 251; 35 L. J., Ex. 84.

(*n*) See Wyatt *v.* Cole, 36 L. T. 613.

(*o*) Doe *d.* Castleton *v.* Samuel, 5 Esp. 173; Doe *d.* Spicer *v.* Lea, 11 East, 312; Roe *d.* Jordan *v.* Ward, 1 H. Blac. 96; Doe *d.* Martin *v.* Watts, 7 T. R. 83; Doe *d.* Tucker *v.* Morse, 1 B. & Ad. 365.

(*p*) Digby *v.* Atkinson, 4 Camp. 275.

(*q*) Hutton *v.* Warren, 1 M. & W. 466.

(*r*) Doe *d.* Clarke *v.* Smaridge, 7 Q. B. 957; Doe *d.* Plumer *v.* Mainby, 10 Q. B. 473.

proviso for re-entry similar to that contained in the expired lease (*s*).

Acceptance of rent by remainderman. — If a remainderman accept money, or anything else reserved as rent in a lease granted by the previous tenant for life, which became *void* on the death of such tenant for life, he does not thereby confirm and establish the lease for the residue of the term therein expressed to be granted (without a previous memorandum in writing pursuant to 13 Vict. c. 17, s. 1), but he creates a new implied tenancy from year to year as between him and the tenant on the old terms, so far as they are applicable to and not inconsistent with a yearly tenancy, and the tenant is entitled to the usual notice to quit (*t*): unless, indeed, the rent reserved be so grossly inadequate, with reference to the annual value of the property, that the jury ought to presume and find that no such new tenancy was intended to be created (*u*). So any special and unusual terms, of which the reversioner was ignorant when he accepted the rent, will not bind him (*x*), unless the Settled Land Act applies. Any such new tenancy will be deemed to have commenced from the same day of the year as the original term, and the notice to quit should be given accordingly (*y*).

By attornment to prior mortgagee. — If a mortgagee induce or compel a *subsequent* tenant of the mortgagor to attorn to and pay him rent, that will not operate to confirm the lease for the whole time thereby granted, but will create between the mortgagee and the tenant a new tenancy from year to year (*z*); and such new tenancy will be subject to the terms

(*s*) Thomas *v.* Packer, 1 H. & N. 669; Hayne *v.* Cumming, 16 C. B., N. S. 421.

(*t*) Doe *d.* Martin *v.* Watts, 7 T. R. 85; Doe *d.* Tucker *v.* Morse, 1 B. & Adol. 365; Smith L. & T. 24, 25 (2nd ed.).

(*u*) Doe *d.* Brune *v.* Prideaux, 10 East, 158; Denne *d.* Brune *v.* Rawlins, Id. 261; Doe *d.* Lord *v.* Crago, 6 C. B. 90.

(*x*) Oakley *v.* Monck, 3 H. & C. 706; 34 L. J., Ex. 137; L. R., 1 Ex. 159; 4 H. & C. 251; 35 L. J., Ex. 84. As to application of Settled Land Act, see p. 9, *ante*.

(*y*) Roe *d.* Jordan *v.* Ward, 1 H. Blac. 96; Doe *d.* Collins *v.* Weller, 7 T. R. 478.

(*z*) Doe *d.* Hughes *v.* Bucknell, 8 C. & P. 567; Doe *d.* Prior *v.* Ongley, 10 C. B. 25 (3rd point).

and conditions of the lease, so far as the same are applicable to and not inconsistent with a yearly tenancy (*a*).

Not by agreement to pay an increased rent. — If, whilst a tenant from year to year is in possession of lands under an agreement reserving a certain rent, he agrees with [*224] his landlord to * pay an increased or reduced rent, this will not have the effect of then creating a new tenancy (*b*).

Underleases. — A demise by a tenant from year to year to another also to hold from year to year, is in legal operation a demise from year to year only during the continuance of the original demise to the intermediate landlord (*c*). A tenant from year to year, underletting from year to year, has a reversion which entitles him to distrain (*d*). If a tenant from year to year make a lease for twenty-one years, such term will cease whenever the tenancy from year to year is legally determined (*e*).

SECT. 3. — *Tenancy for less than a Year. — Lodgings.*

In leases of houses and apartments for an *indefinite* period less than a year, the hiring will be construed to be quarterly, monthly or weekly, according to the circumstances of each case and the custom of the place or country.[1] Of these circumstances the principal appears to be the payment of rent: therefore, where a tenancy was created of wharfs, warehouses, &c., at a certain rent per quarter, the tenancy to commence on the 14th June, the tenant paying a quarter's rent on that day and giving security for the payment of a quarter's rent in advance during his tenancy, it was held that

(*a*) Cole Ejec. 445.

(*b*) Doe *d.* Monck *v.* Geeckie, 5 Q. B. 841; 1 C. & K. 307; Clarke *v.* Moore, 1 Jon. & Lat. 723; Crowley *v.* Vitty, 7 Exch. 319; Burrowes *v.* Gradin, 1 D. & L. 213.

(*c*) Pike *v.* Eyre, 9 B. & C. 909.

(*d*) Curtis *v.* Wheeler, Moo. & M. 493.

(*e*) Mackay *v.* Mackreth, 4 Doug. 213.

[1] **Lease at will with monthly rent** is from month to month. Orser *v.* Vernon, 14 C. P. (Ont.) 573; O'Neil *v.* Wells, 2 Russ. & Ches. (N. S.) 205 Warner *v.* Hale, 65 Ill. 395; Huyser *v.* Chase, 13 Mich. 98; Woodrow *v.* Michael, 13 Id. 187; *contra*, Ridgely *v.* Stillwell, 25 Mo. 570.

he became tenant from quarter to quarter and not from year to year (*f*). So where the tenant is "*always* to be subject to quit at three months' notice" he will be deemed a quarterly tenant (*g*). Where premises are let, not for any definite period, but the tenant is to give up possession at any time on one month's notice, that creates a tenancy from month to month (*h*). So a demise of houses or of lodgings at a monthly or weekly rent affords a presumption of a monthly or weekly tenancy (*i*). Month in any legal document means lunar[1] month, unless calendar month be specified (*k*), or there be admissible evidence to show that a calendar month was intended (*l*). Where a person hired a furnished house for three lunar months, and a receipt was given for the rent for that period, but he continued in possession afterwards, it was held that a jury were warranted in finding that the subsequent occupation *was on [*225] a *weekly* hiring (*m*). By agreement on the 19th of April, certain premises were let at the yearly rent of 42*l*., payable quarterly; the first payment, 7*l*. 13*s*. 6*d*., to be made on the 24th of June next, being the proportion of rent due up to that time. The lessee was to enjoy at the said rent until one of the parties should give to the other six months' notice to quit, and at the expiration of "any" such notice to leave the premises in as good condition, &c. This was held to be a half-yearly tenancy, commencing from the 24th of June; and that a notice to quit given at Midsummer and expiring at Christmas was valid (*n*). Where the defendant hired of the plaintiff apartments in his dwelling-house at a fixed rent, payable half-yearly, and entered into

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

(*g*) Kemp *v.* Derrett, 3 Camp. 510; Cole Ejec. 31.

(*h*) Doe *d.* Landsell *v.* Gower, 17 Q. B. 589.

(*i*) Huffell *v.* Armitstead, 7 C. & P. 56. And see as to what notice to quit is required, *post*, Chap. VIII., Sect. 7.

(*k*) Simpson *v.* Margitson, 11 Q. B. 23.

(*l*) Ib. and see as to agreement for hire of furniture, Hutton *v.* Brown, 45 L. T. 343.

(*m*) Towne *v.* Campbell, 3 C. B. 921.

(*n*) Doe *d.* King *v.* Graton, 18 Q. B. 496; 21 L. J., Q. B. 276.

[1] In the United States, unless otherwise specified, a calendar month. See *post*.

possession at Michaelmas, 1822: and at Lady-day, 1823, paid one half-year's rent, and at the Midsummer following gave up possession without having given notice to quit; but at Michaelmas in the same year he paid another half-year's rent, though at Lady-day, 1824, he refused to pay a third half-year's rent; in an action for use and occupation for that half-year's rent, it was held that a tenancy from year to year could not be inferred from these facts, and therefore that the action was not maintainable (*o*). A general letting at a yearly rent, though payable half-yearly or quarterly, or an acceptance of yearly rent or rent measured by any aliquot part of a year, is evidence of a taking from year to year (*p*). Where premises are let, at a yearly rent payable weekly, with power to determine the tenancy at three months' notice from any quarter day, that creates a yearly tenancy, determinable as agreed (*q*).

Furnished house. — Where a house is let ready furnished the rent is deemed to issue out of the realty, and not partly out of the furniture (*r*).

Lodgings. — Lodgings may be let in the same manner as lands and tenements. A lodger is a tenant if the premises are let to him (*s*).[1]

Protection of lodger's goods from distress. — Prior to the Lodger's Goods Protection Act, 1871, care had to be taken by the lodger to ascertain that the rent of the house had been paid up, as if not, the goods of the lodger would be liable to a distress for rent due from his own landlord. But

(*o*) Wilson *v.* Abbott, 3 B. & C. 88.

(*p*) Richardson *v.* Langridge, 4 Taunt. 128; Doe *d.* Hull *v.* Wood, 14 M. & W. 682.

(*q*) Rex *v.* Herstmonceaux, 7 B. & C. 551.

(*r*) Newman *v.* Anderton, 2 Bos. & P. New R. 224.

(*s*) Cook *v.* Humber, 11 C. B., N. S. 33; 31 L. J., C. P. 73. As to executory agreement to let lodgings, see *ante*, p. 87. As to "lodger" franchise, see Bradley *v.* Baylis, L. R., 8 Q. B. D. 195; C. A.; Ancketill *v.* Baylis, L. R., 10 Q. B. D. 577.

[1] **Lease of apartments** of which lessee has exclusive possession creates a tenancy. Porter *v.* Merrill, 124 Mass. 534.

Board and lodgings. — In Wilson *v.* Martin, 1 Denio (N. Y.) 602, and White *v.* Maynard, 111 Mass. 250, it was held that a contract for board and lodgings in a boarding-house, though with specified rooms, was not a tenancy.

that act, which is fully set out hereafter (*t*), provides a simple process for freeing the lodger's goods from a distress of this kind. Previously to taking the premises, however, it may sometimes be prudent to make inquiries of the tax-gatherer and collector of the parochial rates, as if distresses be levied *for them, it may cause consid- [*226] erable inconvenience and annoyance to the lodger, although his goods are not liable to such distresses.

Use of knocker, door bell, &c. — A lodger has a right to the use of the door bell, the knocker, the skylight of the staircase, and the water-closet, unless it be otherwise stipulated at the time of taking the lodgings; therefore if the landlord deprive the lodger of the use of either, an action lies (*u*).

Lodgings to prostitutes. — If a person let lodgings to an immodest woman to enable her to consort with the other sex, or if not knowing her habits at the time of letting, but becoming acquainted with her habits afterwards, he permits her to continue his tenant, he cannot recover in an action for the lodgings so let; but if the woman merely lodge in the house, and receive her visitors elsewhere, the rent may be recoverable (*x*).

Larceny of lodger's goods. — A lodging-house keeper is not responsible to his lodger if property of the latter be stolen from his apartments, either by another lodger or by a third person: the principle is, that the lodger must himself take care of his own goods; there is a distinction in this respect between an innkeeper and a lodging-house keeper (*y*).

Sect. 4. — *Tenancy at Will.*

What constitutes a tenancy at will. — A tenancy at will is where lands or tenements are let by one man to another, to hold at the will of the lessor; in this case the lessee is called

(*t*) Chap. X., Sect. 7 (f).

(*u*) Underwood *v.* Burrows, 7 C. & P. 26.

(*x*) Appleton *v.* Campbell, 2 & P. 347; Jennings *v.* Throgmorton, Ry. & Moo. 251; Girardy *v.* Richardson, 1 Esp. 13.

(*y*) Holder *v.* Soulby, 8 C. B., N. S. 254; 29 L. J., C. P. 246; Dansey *v.* Richardson, 3 E. & B. 144; Clench *v.* Dr. Arenberg, 1 C. & E. 42.

tenant at will, because he has no certain or sure estate, for the lessor may put him out at any time he pleases (*z*).[1]

(*z*) Lit. s. 68; Cole Ejec. 448.

[1] **Tenancy at will.** — (*a*) *How created.* — It may be created by *writing*, Murray *v.* Cherrington, 99 Mass. 229, Say *v.* Stoddard, 27 Ohio St. 478; or by *parol*, Dutton *v.* Colby, 35 Me. 505; Goodenow *v.* Allen, 68 Id. 308; *expressly*, Laxton *v.* Rosenberg, 11 Ont. 199; Humphries *v.* Humphries, 3 Ired. (N. C.) L. 362; Stedman *v.* McIntosh, 4 Id. 291; Orser *v.* Vernon, 14 C. P. (Ont.) 573; or *impliedly*, Jackson *v.* Bradt, 2 Caines (N. Y.) 169; Rich *v.* Bolton, 46 Vt. 84; Herrell *v.* Sizeland, 81 Ill. 457.

(*b*) *Local decisions and statutes.* — *In Maine and Massachusetts* all oral leases are tenancies at will. Ellis *v.* Paige, 1 Pick. (Mass.) 43; Coffin *v.* Lunt, 2 Id. 70; Curtis *v.* Galvin, 1 Allen (Mass.) 215; Curtis *v.* Treat, 21 Me. 525; Cunningham *v.* Holton, 55 Id. 33; White *v.* Elwell, 48 Id. 360; Page *v.* McGlinch, 63 Me. 472.

In New Hampshire they are *primâ facie* tenancies at will. Whitney *v.* Swett, 22 N. H. 10 (which holds that they are conclusively so); Currier *v.* Perley, 24 Id. 219, 225, 229 (*per* Bell, J.); Hazeltine *v.* Colburn, 31 Id. 466, 471 (*per* Bell, J.); Weeks *v.* Sly, 61 Id. 89 (*per* Smith, J.).

In Iowa (Rev. Code, sec. 2014) *and Kansas* (Compiled Laws, sec. 3204), occupants with consent are presumed to be tenants at will until the contrary is shown.

In Indiana (Rev. Sts. sec. 5208) a tenancy is *conclusively* from year to year, unless expressly made at will.

In South Carolina (Gen. Sts. sec. 1812) leases not otherwise stipulated are held to be for a year.

In Delaware (Laws of Del. ch. 101, sec. 15) no estate is at will if it can be held from year to year. Where no term is limited (ch. 120, sec. 2), the tenancy from year to year, except as to houses and lots, usually let for less time.

In Georgia (Code, sec. 2290), if no time is specified, the tenancy is for a calendar year.

In Dakota (Civil Code, sec. 1115) tenancies not otherwise expressed, except as to lodgings and places where there is a different custom, are for one year.

In Quebec tenancies without leases are annual (Civil Code, sec. 1657).

In Rhode Island indefinite tenancies are from year to year (Pub. Sts. ch. 232, sec. 5).

In Missouri tenancies not created by writing, of stores, shops, houses, or other buildings in cities or villages, are by statute (Rev. Sts. sec. 3078) from month to month. Those not affected by statute (whether created by parol or by holding) are from year to year or from month to month, according to the presumed intentions. Withnell *v.* Petzold, 17 Mo. App. 673, 674 (*per* Rombauer, J.); Hammon *v.* Douglas, 50 Mo. 434, 437 (*per* Bliss, J.).

(*c*) *Generally.* — In the provinces and majority of the states it is a question upon the particular facts, whether the tenancy is at will or from year to year, time of rent payments, purposes of tenancy, erection of improvements, being leading circumstances.

The presumption naturally is that continuance after a term is from year to year. The terms, however, are frequently changed. Sometimes a tenancy for years is changed into one from month to month, sometimes into one at will.

Termination. — See *post*, Chap. VIII. sec. 1, notes.

Either party may at any time determine a strict tenancy at will, although expressed to be held at the will of the lessor only (*a*).[1] Such tenancy must be determined by a demand of possession or otherwise before an action of ejectment can be maintained against the tenant (*b*). The granting of a lease to a third person by the lessor of a tenant at will, though it determines the tenancy at will as against the lessor, does not give him such a right of entry as is contemplated by 3 & 4 Will. 4, c. 27, s. 2 (*c*). Where there is a tenancy at will, at a fixed rent, such rent may be distrained for (*d*). Where there is no such fixed rent an action for use and occupation may be maintained (*e*).

How created. — Where a person lets land to another without limiting any certain * or determinate [*227] estate, a tenancy at will is thereby created (*f*). A person who lives in a house rent free, by the sufferance of

(*a*) Co. Lit. 55 a; Smith L. & T. 17 (2nd ed.).

(*b*) Cole Ejec. 58, 453.

(*c*) Hogan *v.* Hand, 2 W. R. 673; 4 L. T. 465, P. C.

(*d*) Anderson *v.* Midland R. Co., 3 E. & E. 614; 30 L. J., Q. B. 94; Doe *d.* Davies *v.* Thomas, 6 Exch. 858.

(*e*) Chap. XIV., *post.*

(*f*) Com. Dig. tit. Estates, (H. 1); Richardson *v.* Langridge, 4 Taunt. 128; Smith L. & T. 20 (2nd ed.).

(*d*) *Contingent tenancies.* — Tenancies at will are sometimes made subject to contingencies, the happening or expiration of which terminate them without notice. See *post*, Chap. VIII. sec. 1, note 2, and sec. 2, notes.

The subject of conditional limitations, both upon tenancies at will and other tenancies, is there examined and instances are given. It is quite doubtful if a tenancy at will can be limited conditionally in Maine. The statute there prohibits the termination of tenancies at will in any way but by the statutory notice to quit, or by mutual consent. Rev. Sts. Me. ch. 94, sec. 2; Cunningham *v.* Horton, 57 Me. 420; Goodenow *v.* Allen, 68 Me. 308; but see Sullivan *v.* Carberry, 67 Id. 531. (See notes upon "Tenancies . . . distinguished," &c., and "Holding over," sec. 2, *ante.*)

[1] **Tenancies strictly at will.** — Notice to quit is not necessary at common law to terminate a strict tenancy at will. Jackson *v.* Bradt, 2 Caines (N. Y.) 169; Jackson *v.* Rogers, 2 Caines Cas. (N. Y.) 314, 318; Rich *v.* Bolton, 46 Vt. 84; Phillips *v.* Covert, 7 Johns. (N. Y.) 1, 4 (*per* Kent, C. J.); 4 Kent's Com. (13th ed.) sec. 114.

Such tenant, however, is entitled to reasonable time to remove his family and effects, and to free ingress and egress to harvest crops, Currier *v.* Earl, 13 Me. 216, 224 (*per* Weston, C. J.); Ellis *v.* Paige, 1 Pick. (Mass.) 43; Curt *v.* Lowell, 19 Id. 25, 26, 27 (*per* Wilde, J.), and statutory notice is now usually required.

See *post*, Chap. VIII. sec. 7, note, "The Shorter Tenancies"

the owner, is a tenant at will (*g*). A mere permission to occupy land constitutes a tenancy at will only (*h*). An interest of freehold or quasi freehold character cannot be created orally or by a mere written agreement (not under seal): a person, therefore, holding under such an agreement is a tenant at will, and (after determination of such tenancy) removable by ejectment, without prejudice to his equitable rights (*i*). Courts of law have of late years leaned as much as possible against construing demises, where no certain term is mentioned, to be tenancies at will, but have rather held them to be tenancies from year to year so long as both parties please, especially where an annual rent is reserved (*k*). If an agreement be made to let premises so long as both parties please, and reserving a compensation accruing de die in diem, and not referable to a year, or any aliquot part of a year, it does not create a holding from year to year, but a tenancy at will strictly so called; and though the tenant has expended money on the improvement of the premises, that does not give him a right to hold them until he be indemnified (*l*). If one demise a tenement to another, excepting the new house for his habitation when he pleases to stay there, and at other times for the use of the lessee; the lessee has the new house as tenant at will (*m*). The words "I give you a close to enjoy as long as I please, and to take again when I please, and you shall pay nothing for it," create a tenancy at will (*n*). So a party having become tenant to two others *at their will and pleasure*, at the rate of 25*l*. 4*s*. per annum, payable quarterly, and having remained in possession under this agreement for two years, and paid a year's rent, after which the lessors distrained for a quarter's rent, was held to be tenant at will and not from

(*g*) Rex *v.* Collett, Russ. & Ry. C. C. 498; Rex *v.* Jobling, Id. 525: Doe *d.* Groves *v.* Groves, 10 Q. B. 486.

(*h*) Doe *d.* Hull *v.* Wood, 14 M. & W. 682.

(*i*) Dossee *v.* East I. Co., 8 W. R. 245, P. C.

(*k*) Timmins *v.* Rawlinson, 3 Burr. 1609; 1 W. Blac. 533; Co. Lit. 55; Doe *d.* Hull *v.* Wood, 14 M. & W. 682; Anderson *v.* Midland R. Co., 30 L. J., Q. B. 94.

(*l*) Richardson *v.* Langridge, 4 Taunt. 128.

(*m*) Cudlip *v.* Rundall, 3 Salk. 156.

(*n*) Rex *v.* Fillongley, Cald. 569.

year to year (*o*). If a tenant whose lease has expired be permitted to continue in possession pending a treaty for a further lease, he is not a tenant from year to year, but a tenant strictly at will (*p*): it is the same if he be admitted tenant pending a treaty for purchase, which is afterwards broken off (*q*).[1]

Entry under void lease. — If a man enter under a void lease, he is not a disseisor, but a * tenant at [*228] will (*r*), under the terms of the lease in all other respects except the duration of time (*s*): and when he pays or agrees to pay any of the rent therein expressed to be reserved he becomes a tenant from year to year upon the terms of the void lease, so far as they are applicable to and not inconsistent with a yearly tenancy (*s*). A minister of a dissenting congregation, placed in possession of the chapel and dwelling-house by certain persons in whom the fee was vested, in trust to permit and suffer the chapel to be used for the purpose of religious worship, is a mere tenant at will to those persons; and his interest is determinable by a demand of possession, without any previous notice to quit; he is not entitled as of right, before the determination of his tenancy, to have a reasonable time allowed him for the removal of his furniture (*t*). Where a tenant at will let into possession a person whom the landlord had refused to take as tenant unless he found security, and who remained in possession two years, continuing to endeavour to find securities, but without success; it was held, that he was not

(*o*) Doe *d.* Bastow *v.* Cox, 11 Q. B. 122.

(*p*) Doe *d.* Hollingsworth *v.* Stennett, 2 Esp. 717; Simpkin *v.* Ashhurst, 1 C., M. & R. 261.

(*q*) Peacock *v.* Peacock, 16 Ves. 57; Doe *d.* Stanway *v.* Rock, 1 Car. & M. 549; 4 M. & G. 30; Ball *v.* Cullimore, 2 C., M. & R. 120. And see 237, *post.*

(*r*) Denn *d.* Warren *v.* Fearnside, 1 Wils. 176; Goodtitle *d.* Galloway *v.* Herbert, 4 T. R. 680; De Medina *v.* Polson, Holt N. P. C. 47.

(*s*) Doe *v.* Bell, 5 T. R. 471; *ante*, 221.

(*t*) Doe *d.* Jones *v.* Jones, 10 B. & C. 718; Doe *d.* Nicholl *v.* M'Kaeg, Id. 721; Revett *v.* Brown, 5 Bing. 7; Perry *v.* Shipway, 1 Giff. 1; Cole Eject. 451, 604; 23 & 24 Vict. c. 136, s. 14.

[1] **Entry under an agreement for a lease** does not *necessarily* (even in Massachusetts) create a tenancy at will. Lyon *v.* Cunningham, 136 Mass. 532.

even tenant at will (*u*). Slight evidence has been held sufficient to make a tenant on sufferance a tenant at will (*x*). An admission of half a year's rent being in arrear is some evidence of a tenancy at will (*y*). Actual payment of rent is not always necessary to create such a tenancy, so as to authorize a distress (*z*). Where a term of years is created by way of use, and limited to a trustee, the owner of the freehold who holds subject to such term is a quasi tenant at will to his own trustee (*a*).

Determination of tenancy at will. — An estate at will may be determined by a demand of possession, or by the express declaration of either of the parties (*b*), or by implication of law: of the latter description will be the death of either party, which in general determines the will (*c*) — acts of ownership exercised by the landlord (*d*) — his alienation of the reversion and notice thereof (*e*) — waste committed by the tenant (*f*) — his demising or leasing or assigning [*229] the premises over (*g*) — or, in short, doing any * act which is inconsistent with an estate at will (*h*). An entry by the landlord on the land without the tenant's consent, and cutting and carrying away stone therefrom, amounts to a determination of the will (*i*). It is requisite

(*u*) Doe *d.* Heming *v.* Brett, Hurl. & Walm. 3.

(*x*) Turner *v.* Doe *d.* Bennett (in error), 9 M. & W. 643.

(*y*) Cox *v.* Bent, 5 Bing. 185.

(*z*) Anderson *v.* Midland R. Co., 3 E. & E. 614; 30 L. J., Q. B. 94; Cox *v.* Bent, *supra*.

(*a*) Sug. V. & P. 1129 (14th ed.); Doe *d.* Jacobs *v.* Phillips, 10 Q. B. 130.

(*b*) Cole Ejec. 58, 452, 453; Doe *d.* Bastow *v.* Cox, 11 Q. B. 122.

(*c*) Doe *d.* Stanway *v.* Rock, 1 Car. & M. 549; 4 M. & G. 30; Cockerell *v.* Owerell, Holt, 417; James *v.* Dean, 11 Ves. 391; Att.-Gen. *v.* Ld. Foley, 2 Dick. 363.

(*d*) Co. Lit. 55 b, 57 b, 245 b; cited 9 M. & W. 646; Doe *d.* Moore *v.* Lawder, 1 Stark. R. 308; Smith L. & T. 17 (2nd ed.).

(*e*) Co. Lit. 55 b; Disdale *v.* Isles, 2 Lev. 88; 1 Vent. 247; Ball *v.* Cullimore, 2 C., M. & R. 120; Doe *d.* Goody *v.* Carter, 9 Q. B. 863; Doe *d.* Davies *v.* Thomas, 6 Exch. 854, 857.

(*f*) Lit. s. 71; Co. Lit. 55 b; Smith L. & T. 20, 268 (2nd ed.).

(*g*) Cole Ejec. 449, 453; Pinhorn *v.* Souster, 8 Exch. 763; Melling *v.* Leake, 16 C. B. 652.

(*h*) Cruise's Dig. tit. ix. s. 17; Co. Lit. 57 a, 55 b, n. 15; Hinchman *v.* Isles, 1 Ventr. 247; Countess of Shrewsbury's case, 5 Rep. 13 b; Birch *v.* Wright, 1 T. R. 382; Pollen *v.* Brewer, 7 C. B., N. S. 371; Wallis *v.* Delmar, 29 L. J., Ex. 276; Smith L. & T. 19 (2nd ed.).

(*i*) Doe *d.* Bennett *v.* Turner, 7 M. & W. 226; 9 Id. 643.

that the landlord should give the tenant notice that he determines the tenancy if the act relied on be done off the premises (*k*). Where the act is done on the land, it is presumed that the tenant is there and knows of it (*l*). A demand of possession made on the premises from the wife of a sub-lessee at will is sufficient (*m*). So the lessor by making a lease for years to commence presently determines the tenancy at will, although there be a stipulation that the new lessee shall not enter until after the day for payment of the rent by the tenant at will (*n*). The will is also determined by an agreement by the lessor for the sale of the freehold to the tenant at will (*o*). The words "Unless you pay what you owe me, I shall take immediate measures to recover possession of the property," addressed to the tenant by the party entitled to the fee, have been held a sufficient determination of the will, and equivalent to a demand of possession, so as to maintain ejectment (*p*). A., having been in possession of a house and lands adjoining as tenant at will to the lord of a manor, was told by a subsequent lord that he must leave. On his refusal to do so, a writ of ejectment was served upon him; it was then verbally arranged that A. should give up part of the land, and retain the house and remaining land during the life of himself and wife. It was held that these acts amounted to a determination of the tenancy at will, and as a new tenancy at will was thereby created as to part, the Statute of Limitations, 3 & 4 Will. 4, c. 27, ss. 7, 10, began to run from that time, and not from the date of the original tenancy (*q*). A sub-demise or assignment by a tenant without notice thereof to his landlord does not determine the will, so as to prejudice the landlord (*r*).

(*k*) Co. Lit. 55 b.

(*l*) Cole Ejec. 452; Pinhorn *v.* Souster, 8 Exch. 763; Carpenter *v.* Collins, Yelv. 73; Ball *v.* Cullimore, 2 C., M. & R. 120.

(*m*) Roe *d.* Blair *v.* Street, 2 A. & E. 329; 4 N. & M. 42.

(*n*) Disdale *v.* Isles, 2 Lev. 88; 1 Ld. Raym. 224.

(*o*) Daniels *v.* Davison, 16 Ves. 249.

(*p*) Doe *d.* Price *v.* 8 Bing. 356.

(*q*) Locke *v.* Matthews, 13 C. B., N. S. 753; 9 Jur., N. S. 874.

(*r*) Pinhorn *v.* Souster, 8 Exch. 763. Melling *v.* Leake, 16 C. B. 652; Cole Ejec. 453.

Bankruptcy. — Becoming an insolvent debtor has been held to be a determination of the will (*s*), and becoming bankrupt would seem to have the same effect.

Joint tenancy. — If two joint tenants create a tenancy at will at a certain rent, and one dies, the survivor takes [*230] the whole premises and may maintain an * action for the entire rent against the lessee continuing in possession (*t*). So where a lease is made to three joint tenants, rendering rent, the death of one does not determine the tenancy; but the survivors are liable to pay the whole rent (*t*).

Marriage. — A lease at will by a feme sole did not, even before the Married Women's Property Act, determine by her marriage, unless the husband did some express act to determine the tenancy (*t*); nor did the marriage of a feme sole determine a tenancy at will made to her (*t*); and the effect of the act is to give the married woman the same estate as if she were still a feme sole.

Rights of the parties on the determination. — The sudden determination of the will of one party will not operate to the material injury of the other: therefore if a tenant at will sow his land, and the landlord determine the tenancy before the corn be ripe, the tenant notwithstanding has free liberty to enter upon the land to cut and carry his crop (*u*); and, on a like principle of justice, the tenant may, in all cases, have reasonable time allowed him to remove his goods after the determination of the estate by the act of the landlord (*x*). Where there is a tenancy at will, rent being paid quarterly, the lessee, after a quarter of a year is commenced, may determine his will, but then he must pay that quarter's rent; and if the lessor determine his will after the commencement of a quarter, he loses his rent for that quarter; and so it is if the rent be payable half-yearly (*y*).

(*s*) Doe *d.* Davies *v.* Thomas, 9 Ex. 984.

(*t*) Henstead's case, 5 Co. R. 10 b.

(*u*) Lit. s. 68; Co. Lit. 55 b; Oland *v.* Burdwick, Cro. Eliz. 460; Bulwer *v.* Bulwer, 2 B. & A. 470, 471. And see Chap. XX., *post*.

(*x*) Lit. s. 69; Noy's Max. c. 11; Doe *d.* Nicholl *v.* M'Kaeg, 10 B. & C. 721.

(*y*) Carpenter *v.* Collins, Yelv. 73; Layton *v.* Field, 3 Salk. 222; Leighton *v.* Theed, 2 Salk. 413; 1 Ld. Raym. 707; Parker *v.* Harris, 4 Mod. 79; 1

Sect. 5. — *Tenancy on Sufferance.*

How constituted. — A tenant on sufferance is one who entered by a lawful demise or title, and after that has ceased wrongfully continues in possession without the assent or dissent of the person next entitled (*z*); as where a tenant per autre vie continues in possession after the death of the cestui que vie (*a*), or where any one continues in possession without agreement after a particular estate is ended (*b*).[1] If a tenant for years surrender and then hold over, he will be either tenant on *sufferance or disseisor, at [*231]

Salk. 262; Title *v.* Grovett, 2 Ld. Raym. 1008; Co. Lit. 55 a, b, note 374; Kighly *v.* Bulkly, 1 Sid. 338.

(*z*) Co. Lit. 57 b, 270 b; 1 Steph. Com. 273.

(*a*) Co. Lit. 57 b; Allen *v.* Hill, Cro. Eliz. 238; 3 Leon. 153.

(*b*) Com. Dig. tit. Estates (H.); Doe *d.* Martin *v.* Watts, 7 T. R. 83; Roe *d.* Jordan *v.* Ward, 1 H. Blac. 96; Roe *d.* Brune *v.* Prideaux, 10 East, 187; Doe *d.* Collins *v.* Weller, 7 T. R. 487; Doe *d.* Tucker *v.* Morse, 1 B. & Ad. 365.

[1] **Tenancy at sufferance.** — One who holds over after a term for years, or lesser period, without the consent of the landlord is (by all authorities), a tenant at sufferance. Hauxhurst *v.* Lobree, 38 Cal. 563; Perine *v.* Teague, 66 Id. 446; Jackson *v.* Parkhurst, 5 Johns. (N. Y.) 128; Jackson *v.* M'Leod, 12 Id. 182; Wilde *v.* Cantillon, 1 Johns. Cas. (N. Y.) 123; Den *v.* Adams, 12 N. J. L. 99; Condon *v.* Barr, 47 N. J. L. 113; Leighton *v.* Van Wart, 1 Pugs. & Bur. (N. B.) 489, 491 (*per* Allen, C. J.); Cairo, &c., R. R. Co. *v.* Wiggins Ferry Co., 82 Ill. 230.

In England, New Brunswick, Maine, and Massachusetts, one holding over without agreeing expressly or impliedly to continue, the tenancy is a tenant at sufferance. Leighton *v.* Van Wart, 1 Pugs. & Bur. 489; Bowman *v.* Avery, 3 Kerr (N. B.) 206, 210; Delano *v.* Montague, 4 Cush. (Mass.) 42; Bunton *v.* Richardson, 10 Allen (Mass.) 260 (*per* Bigelow, C. J.); Lithgow *v.* Moody, 35 Me. 214; Chesley *v.* Welch, 37 Me. 106. And the landlord (at common law) cannot recover for use and occupation. See above cases, and, also, Flood *v.* Flood, 1 Allen (Mass.) 217, 218 (*per* Chapman, J.); Merrill *v.* Bullock, 105 Mass. 486, 490 (*per* Gray, J.); though he may by statute in Massachusetts Pub. Sts. chap. 121, sec. 3; Bunton *v.* Richardson, 10 Allen, 260.

In New York and some other states, he is a tenant or trespasser at election of landlord. Wolffe *v.* Wolffe, 69 Ala. 549, 551, 552 (*per* Somerville, J.); Pickett *v.* Bartlett, 13 Daly (N. Y.) 230; Smith *v.* Allt, 7 Id. 492, 493; Schuyler *v.* Smith, 51 N. Y. 309; Critchfield *v.* Remaley, 21 Neb. 178; Conway *v.* Starkweather, 1 Denio (N. Y.) 113; Clinton Wire Co. *v.* Gardner, 99 Ill. 151; Noel *v.* McCrory, 7 Coldw. (Tenn.) 623.

A tenancy at will will be changed into a tenancy at sufferance by the death of the lessor, Reed *v.* Reed, 48 Me. 388; or alienation of the estate, Nelson *v.* Cook, 12 Q. B. (Ont.) 22; Esty *v.* Baker, 50 Me. 325.

the election of the landlord (*c*). An undertenant who is in possession at the determination of the original lease, and is suffered by the reversioner to hold over, is only a tenant on sufferance (*d*). Where a tenancy at will is determined by the landlord exercising acts of ownership, and the tenant remains in possession, he becomes tenant on sufferance only: but slight evidence would be sufficient to show a new creation of a tenancy at will (*e*), or he may by payment of rent or other acknowledgment of tenancy become tenant from year to year (*f*).

Distinction between tenant at will and on sufferance. — There is a great difference between a tenant at will and a tenant on sufferance: the former is always in by right; but the latter holds over by wrong after the expiration of a lawful title (*g*). The reversioner who suffers this is considered to be guilty of some laches or negligence, as is generally the case. Against the crown there can be no tenant on sufferance, for the crown not being capable of committing laches, such person will be an intruder (*h*). Where a cottager occupied a piece of land inclosed from the waste on the side of a turnpike road for more than thirty years, without paying rent, and at the end of that time paid sixpence rent on four several occasions to the owners of the adjoining land: it was held, that this was conclusive evidence of a permissive occupation only, so as to maintain ejectment; and that it was a proper question for the jury, whether there had been an acknowledgment of the tenancy (*i*).

Empty house. — Where a person obtained possession of a house which was empty, without the privity of the landlord, intending to take a lease of it from him, and some negotia-

(*c*) Pennington *v.* Morse, Dyer, 62 a; Winch, 32; Right *v.* Darby, 1 T. R. 159; Doe *d.* Tilt *v.* Stratton, 4 Bing. 466.

(*d*) Simpkins *v.* Ashhurst, 1 C., M. & R. 261.

(*e*) Doe *d.* Bennett *v.* Turner, 7 M. & W. 226; 9 Id. 643.

(*f*) Mann *v.* Lovejoy, Ry. & M. 355; Right *v.* Darby, 1 T. R. 159; Doe *d.* Calvert *v.* Frowd, 4 Bing. 557; Doe *d.* Clarke *v.* Smaridge, 6 Q. B. 957.

(*g*) Co. Lit. 57 b; cited 3 C. B. 229, note (*b*); Cole Ejec. 456.

(*h*) Co. Lit. 57 b; Cole Ejec. 456.

(*i*) Doe *d.* Jackson *v.* Wilkinson, 3 B. & C. 413; and see Doe *d.* Thompson *v.* Clark, 8 B. & C. 717; Locke *v.* Matthews, 13 C. B., N. S. 753; 9 Jur., N. S. 874.

tions afterwards took place between them upon the subject: it was held that the relation of landlord and tenant never subsisted, but that if there was a tenancy of any sort it was on sufferance (*k*). An instrument in these terms, "I hereby certify that I remain in the house, No. 3, Swinton Street, belonging to W. G., on sufferance only, and agree to give him possession at any time he may require," does not create any tenancy, nor require a stamp (*l*).

Ejectment. — A landlord may maintain ejectment against his tenant on sufferance without any previous demand of possession (*m*). A tenant on sufferance, who is turned out of possession by his landlord, without any *demand of possession, cannot maintain ejectment, [*232] but may sometimes maintain trespass (*n*). It would seem, however, that the action should be for assault and battery rather than for trespass to the land (*o*).

Demise by estoppel. — A tenant on sufferance has no demisable estate, but he may create a tenancy by estoppel (*p*).

Sect. 6. — *Mortgagor and Mortgagee.*

The notion of a mortgagor being in some cases a tenant at will seems to be recognized by 3 & 4 Will. 4, c. 27, s. 7, which provides that no mortgagor shall be deemed to be a tenant at will to his mortgagee within the meaning of that clause;[1] but it seems more correct to say that the mortgagor is a tenant on sufferance only (*q*). It is clear, too, that the mortgagor cannot create a subtenancy; that his subtenants would be tortfeasors, and could not sue the mortgagee in trespass (*q*).

(*k*) Doe *d.* Knight *v.* Quigley, 2 Camp. 505.

(*l*) Barry *v.* Goodman, 2 M. & W. 768.

(*m*) Doe *d.* Leeson *v.* Sayer, 3 Camp. 8; Doe *d.* Bennett *v.* Turner, 7 M. & W. 226; Doe *d.* Heming *v.* Brett, Hurl. & W. 3; Cole Ejec. 457.

(*n*) Doe *d.* Crisp *v.* Barber, 2 T. R. 749; Doe *d.* Harrison *v.* Murrell, 8 C. & P. 134.

(*o*) Cole Ejec. 456.

(*p*) Shopland *v.* Ryoler, Cro. Jac. 55, 99; Thunder *d.* Weaver *v.* Belcher, 3 East, 449.

(*q*) Gibbs *v.* Cruikshank, L. R., 8 C. P. 454; 42 L. J., C. P. 273.

[1] **Attornment clauses.** — Mortgages are sometimes made with attornment clauses. *In re* Willis, *Ex parte* Kennedy, 21 Q. B. D. 384; Southport & W. Lancashire Banking Co. *v.* Thompson, 37 Ch. D. 64.

Mortgagor may sue for rent. — By the Judicature Act, 1873, s. 25, subs. (5), "a mortgagor entitled to possession may, unless notice of an intention to take possession shall have been given by the mortgagee, or unless the cause of action arise upon some joint contract (*qq*), sue for possession or rent in his own name only."

"Attornment clause" in mortgage deed. — In order to obtain for the mortgagee the benefit of being able to recover his interest as rent by the preferential remedy of distress, it became common to insert in mortgage deeds an "attornment clause," by which the mortgagor "attorns," or agrees to become tenant to, the mortgagee at a rent representing the interest; and this fictitious tenancy has given rise to much litigation.

Where the mortgagor agreed to become tenant to the mortgagee at his will and pleasure, at the rate of 25*l.* per annum, payable quarterly, and occupied for two years, paying the rent, it was held to be a tenancy at will, and not from year to year (*r*). So where it was agreed that the mortgagor should hold the premises as tenant at will to the mortgagee at a specified rent, for which it should be lawful for the mortgagee to distrain, it was held that the clause creating a tenancy was operative, as not being inconsistent with the main object of the instrument, and that a tenancy at will was thereby created (*s*). But where the attornment clause expressly provides for a tenancy from year to year, a tenancy at will is not created by words also ex-
[*233] pressly providing that the * mortgagee may re-enter and determine the tenancy at any time without notice, so that the mortgagee in such a case may distrain under the 42nd section of the Bankruptcy Act, 1883 (*t*). Where the mortgagor by the mortgage deed attorned and agreed to

(*qq*) See the section at length, *ante*, 50.

(*r*) Doe *d.* Barstow *v.* Cox, 11 Q. B. 122; Doe *d.* Dixie *v.* Davies, 7 Exch. 89.

(*s*) Pinhorn *v.* Souster, 8 Exch. 763.

(*t*) Queen's Benefit Building Society, *Ex parte*, Trelfall, *In re*, L. R., 16 Ch. D. 274; 50 L. J., Ch. 318; 44 L. T. 74; 29 W. R. 128; C. A. As to what amount may be distrained for under an attornment clause, see Harrison, *Ex parte*, Betts, *In re*, L. R., 18 Ch. D. 127; 50 L. J., Ch. 832; 45 L. T. 290; 30 W. R. 38 C. A.

become tenant from year to year to the mortgagee at a fixed rent, payable half-yearly, to enable him to distrain for his interest when in arrear, and with the usual power of entry after default; it was held, that such attornment did not create a tenancy from year to year *with all its incidents*, and that the mortgagee might, after default, maintain ejectment against the mortgagor without giving him six months' notice to quit (*u*). The mere fact that the mortgagee has received *interest* down to a time later than the day of demise in ejectment, is not a recognition of the mortgagor as his tenant (*x*); nor is the distraining after such day of demise, for interest due before the day, under a power to do so as for rent reserved on a lease, there being no clause that the mortgagor shall keep possession so long as he pays interest (*y*). Where a mortgage contained a covenant that the mortgagor, during his occupation, should pay a rent rather larger than the interest, half-yearly, and that the mortgagee should have the usual remedies of landlords of distress and sale; provided that this reservation should not prejudice the mortgagee's right to enter and evict the mortgagor; it was held that, after distraining for one half-year's rent, the mortgagee might eject the mortgagor, without notice to quit, after a subsequent default (*z*). So where a mortgage deed contained a clause that for the better securing the principal and interest, and in contemplation of part discharge thereof, the mortgagor attorned tenant to the mortgagee, at a quarterly rent, to be recoverable by distress and sale, or action, with a power of immediate entry and sale for the mortgagee, upon default of payment of the mortgage money; it was held there was no need of a notice to quit after default (*a*).

Notice of intention to treat mortgagor as tenant. — But in Clowes *v.* Hughes, where the mortgage deed provided that

(*u*) Metropolitan Counties Assurance Co. *v.* Brown, 4 H. & N. 428.

(*x*) Doe *d.* Rogers *v.* Cadwallader, 2 B. & Ad. 473; but see Doe *d.* Whitaker *v.* Hales, 7 Bing. 322.

(*y*) Doe *d.* Wilkinson *v.* Goodier, 10 Q. B. 957; Metropolitan Counties Assurance Co. *v.* Brown, 4 H. & N. 428.

(*z*) Doe *d.* Garrod *v.* Olley, 12 A. & E. 481; Metropolitan Counties Assurance Co. *v.* Brown, *supra.*

(*a*) Doe *d.* Snell *v.* Tom, 4 Q. B. 615; Metropolitan Counties Assurance Co. *v.* Brown, *supra.*

the mortgagor, in event of default, should immediately, or at any time after such default, hold the mortgaged premises as yearly tenant to the mortgagees from the date of the deed, and that they should have the same remedies for recovering the rent as if it had been reserved upon a common lease, it was held that notice of an intention to [*234] treat the mortgagor as tenant was a * condition precedent to distress (*b*). A mortgage deed executed by the mortgagor only contained a clause whereby, "for the more effectual recovery of the interest, the mortgagor did attorn and become tenant to the mortgagee of the premises at the yearly rent of 40*l.* to be paid half-yearly, so long as the principal sum remained secured;" the mortgagor continued in possession, and made several of these half-yearly payments; it was held, that the subsequent occupation, connected with the covenant, created the relation of landlord and tenant, and that the mortgagee might distrain for a half-yearly payment in arrear (*c*).

Attornment to second mortgagee. — A mortgagor may attorn tenant to two mortgagees in respect of the same property. And if the amount of the rents fixed by the two attornment clauses is fair, so as not to raise a fraud upon the law of bankruptcy, valid distresses can be levied by both mortgagees after the commencement of the bankruptcy of the mortgagor. So it was held by the Court of Appeal in Punnett, *ex parte*, Kitchin, *in re* (*d*).

Fraud on bankruptcy law. — A rent may be so excessive as to lead the court to the conclusion that the attornment clause was a mere device to obtain an additional security, in which case a distress will be invalid as against the trustees in bankruptcy as a fraud upon the bankruptcy law (*e*).

Effect of Bills of Sale Act, 1878, on attornment clauses. — It

(*b*) Clowes *v.* Hughes, L. R., 5 Ex. 160; 39 L. J., Ex. 62; 22 L. T. 103; 18 W. R. 459.

(*c*) West *v.* Fritche, 3 Exch. 216; Morton *v.* Woods, L. R., 3 Q. B. 658; 37 L. J., Q. B. 242; aff. L. R., 4 Q. B. 293.

(*d*) Punnett, *Ex parte*, Kitchin, *In re*, L. R., 16 Ch. D. 226; 50 L. J., Ch. 212; 44 L. T. 226; 29 W. R. 129.

(*e*) Jackson, *Ex parte*, Bowes, *In re*, L. R., 14 Ch. D. 725; 43 L. T. 272; 29 W. R. 253 C. A. See also Williams, *Ex parte*, L. R., 7 Ch. D. 138; Stockton Iron Co., *In re*, L. R., 10 Ch. D. 335.

is enacted by s. 6 of the Bills of Sale Act, 1878, that "every attornment, instrument or agreement, not being a mining lease," whereby a power of distress is given and rent reserved as a mode of providing for interest on a debt, "shall be deemed to be a bill of sale" of the chattels which may be seized under the distress; but a proviso is added that nothing in the section shall extend to any mortgage of an estate "which the mortgagee, being in possession, shall have demised to the mortgagor as his tenant at a fair and reasonable rent."

Bills of Sale Act, 1882. — This section appears to incorporate the effect of the decisions, and to exempt reasonable attornment clauses from the operation of the Bills of Sale Acts; but by the Bills of Sale Act, 1882, s. 8, unregistered bills of sale, executed after the commencement of that act, are void not only as under the acts of 1854 and 1878, as against execution creditors and trustees in bankruptcy, but as against the grantor, and attornment clauses must always be attended with considerable risk to mortgagees.

Construction of mortgage deeds. — A mortgage indenture, after a power of sale on non-payment of the mortgage-money, contained a covenant by the mortgagee that there
*should be no sale or notice of sale, nor means taken [*235]
for obtaining possession until a year after notice thereof to the mortgagor: the mortgagee also covenanted for quiet enjoyment by the mortgagor or his tenant at will, on payment of a yearly rent; it was held, that under this deed the mortgagor was tenant at will only to the mortgagee, and that no tenancy from year to year was thereby created (*f*). An estate was mortgaged in fee, with the usual proviso for redemption, on payment in June, 1834, and it was also provided that the mortgagee should not call in the principal money until December, 1840, if the interest were regularly paid; and there was a covenant that the mortgagor should hold, occupy and enjoy the estate until default in payment of the principal or interest as aforesaid; it was held that this operated as a lease to the mortgagor until

(*f*) Doe *d.* Dixie *v.* Davies, 7 Exch. 89.

December, 1840 (*g*). A tenant for years of a house demised it by way of mortgage to hold from thenceforth, subject to the proviso after named; and he further sold and transferred the fixtures and some chattels to the mortgagee, also subject to the proviso after named; the deed contained a proviso for reconveyance on payment of the money on a certain day, and also a proviso that, on non-payment, the mortgagee might enter upon and receive the rents, and sell the premises, and also the fixtures and chattels; it was held that the mortgagee's right to take possession did not attach until the day on which the money was to be paid, and that therefore he could not maintain an action of trespass previously (*h*). But where a person demised premises, to hold from thenceforth for a term, provided that if the lessor paid a certain sum and interest a year after, then that the demise should be void; provided also, that upon default the lessee might sell; and there was a *covenant* by the lessor for payment of principal and interest, and that at any time after default it should be lawful for the lessee to enter, and from thenceforth to hold the premises and take the rents; it was held, that the lessee might take possession immediately and before default (*i*).

Summary judgment. — Where the attornment clause provided for a tenancy at will, and the mortgagee, having given notice to quit, sued for the recovery of the land, it was held that the action was one "for the recovery of land by a landlord against a tenant whose term had expired" within Ord. III., Rule 6, case F of the Rules of the Supreme Court, 1883, so that the plaintiff might specially endorse his writ and apply for final judgment under Order XIV. (*k*).

(*g*) Wilkinson *v.* Hall, 3 Bing. N. C. 508; Doe *d.* Lyster *v.* Goldwin, 2 Q. B. 143; Doe *d.* Roylance *v.* Lightfoot, 8 M. & W. 553; Doe *d.* Parsley *v.* Day, 2 Q. B. 147.

(*h*) Wheeler *v.* Montefiore, 2 Q. B. 133; but see Doe *d.* Parsley *v.* Day, 2 Q. B. 147.

(*i*) Rogers *v.* Grazebrook, 8 Q. B. 895.

(*k*) Daubuz *v.* Lavington, L. R. 13 Q. B. D. 347; 53 L. J., Q. B. 283 51 L. T. 206; 32 W. R. 772.

* Sect. 7. — *Master and Servant.* [*236]

Servant occupying separate house. — An agent or servant who is allowed to occupy premises belonging to his principal for the more convenient performance of his duties, acquires no *estate* therein, although he be also allowed to use the premises for carrying on therein an independent business of his own (*l*), nor does any tenancy arise in the common case of a servant occupying a cottage rent-free, with less wages on that account (*m*).[1] Where a person was employed by the Highgate Archway Company to collect toll for them, and lived in the toll-house, one shilling per week being deducted from his wages by way of rent; and the company having ceased to collect toll at the particular spot, he was dismissed from their employ, and received a notice to leave the house, which he promised to do: it was held that these circumstances did not constitute him a tenant of the company (*n*). Where a servant occupies premises of his master, without paying rent, as part remuneration for his services, in order to ascertain whether the servant is a "substantial householder" within the 43 Eliz. c. 2, s. 1, so as to be eligible to the office of overseer of the poor, the question is whether the occupation is subservient and necessary to the service; if it is, the occupation is that of the master; if it is not, the occupation is that of a tenant, and the servant is a "householder" (*o*).

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

(*m*) Bertie *v.* Beaumont, 16 East, 33; Rex *v.* Stock, 2 Taunt. 339; Mayhew *v.* Suttle, 4 E. & B. 347, 357; 23 L. J., Q. B. 372; 24 Id. 54; R. *v.* Shipdam, 3 D. & R. 384; R. *v.* Bardwell, 2 B. & C. 161; R. *v.* Kelstern, 6 M. & S. 136; R. *v.* Cheshunt, 1 B. & A. 473; R. *v.* Snape, 6 A. & E. 278; Allen *v.* England, 3 F. & F. 49.

(*n*) Hunt *v.* Colsen, 3 Moo. & Sc. 790; Mayhew *v.* Suttle, *supra.*

(*o*) Reg. *v.* Spurrell, L. R., 1 Q. B. 72; 35 L. J., M. C. 74.

[1] **Occupation of employees.** — McGee *v.* Gibson, 1 B. Mon. (Ky.) 105; Herrell *v.* Sizeland, 81 Ill. 457; Webb *v.* Seekins, 62 Wis. 26. In McGee *v.* Gibson, a farm laborer was furnished a house at $2 per month, and the court held that he was not a tenant, the agreement to furnish house not being an independent contract. In Herrell *v.* Sizeland, a man and wife who entered the house of another, and took care of him till his death, were held not to be tenants.

Service franchise. — Officers or servants *permitted* to occupy houses as part remuneration for their services, were considered as occupying as tenants within the Reform Act (2 Will. 4, c. 45), s. 27, but not if they were *required* to occupy them with a view to the more efficient performance of their duties (*p*); but this distinction has been done away with by s. 3 of the Representation of the People Act, 1884, 48 Vict. c. 3, which provides that "where a man himself inhabits any dwelling-house by virtue of any office, service, or employment," and the dwelling-house is not inhabited by any person under whom he serves, he shall be deemed for the purposes of the parliamentary franchise to occupy as a tenant.

Liability of servant in ejectment. — Where a servant, on being served with an ejectment, appeared and defended the action, it was held that he had thereby made himself personally liable as tenant in possession (*q*).

[*237] * SECT. 8. — *Vendor and Vendee.*

Occupation under contract for sale. — An occupation under an agreement for the purchase of land, if a good title can be made, may create a tenancy (*r*), which must be determined by a demand of possession or otherwise before an ejectment can be supported (*s*).[1] Where a person was let into posses-

(*p*) Hughes *v.* Chatham (Overseers), 5 M. & G. 54.

(*q*) Doe *d.* James *v.* Stanton, 2 B. & A. 371; 1 Chit. R. 119; Doe *d.* Atkins *v.* Roe, 2 Chit. R. 179; Doe *d.* Cuff *v.* Stradling, 2 Stark. 187; Cole Ejec. 84, 124.

(*r*) Doe *d.* Newby *v.* Jackson, 1 B. & C. 448; Kirtland *v.* Ponnsett, 2 Taunt. 145; Hearne *v.* Tomlins, Peake, 192; Hope *v.* Booth, 1 B. & Ad. 498; Doe *d.* Milburn *v.* Edgar, 2 Bing. N. C. 498; Winterbottom *v.* Ingham, 7 Q. B. 611.

(*s*) Right *d.* Lewis *v.* Beard, 13 East, 210; Doe *d.* Newby *v.* Jackson, 1 B. & C. 448; Doe *d.* Milburn *v.* Edgar, 2 Bing. N. C. 498; Doe *d.* Stanway *v.* Rock, 4 M. & G. 30; Doe *d.* Gray *v.* Stanion, 1 M. & W. 700; Cole Ejec. 58.

[1] **Whether vendee is a tenant.** — By many authorities occupation under a contract of purchase creates a *quasi* tenancy, Moshier *v.* Reding, 12 Me. 478; Millay *v.* Millay, 18 Id. 387; Kelley *v.* Kelley, 23 Id. 192; Goodenow *v.* Kilby, 24 Id. 425; Patterson *v.* Stoddard, 47 Me. 355; Dunning *v.* Finson, 46 Id. 546; Gould *v.* Thompson, 4 Met. (Mass.) 224; Dakin *v.* Allen, 8 Cush. (Mass.)

sion under an agreement of purchase, he paying interest on the purchase-money until completion of the purchase, which was to be in three months; and the purchase not being then completed, he continued in possession: it was held, that there was only a tenancy at will, which might be determined without a notice to quit (*t*).[1] So where A., having agreed to buy lands of B., had paid part of the purchase-money, and was let into possession, it was held, that this was a mere tenancy at will, which might be determined by a demand of possession: after which an ejectment might be maintained (*u*),

(*t*) Doe *d.* Tomes *v.* Chamberlain, 5 M. & W. 14; Doe *d.* Bord *v.* Burton, 16 Q. B. 807.

(*u*) Doe *d.* Hiatt *v.* Miller, 5 C. & P. 595; Ball *v.* Cullimore, 2 C., M. & R. 120.

33; Doe *d.* Kemp *v.* Garner, 1 Q. B. (Ont.) 39; Lundy *v.* Dovey, 1 C. P. (Ont.) 38; which merges in the fee upon completion of the contract, Shaw, C. J., in Gould *v.* Thompson, 4 Met. (Mass.) 224, 229; so that the *quasi* tenant will not be liable for intervening use and occupation, Carpenter *v.* U. S., 17 Wall. 489; Dennett *v.* Penobscot, 57 Me. 425; Cunningham *v.* Lyon, 136 Mass. 532 (*per* Field, J.).

If contract fail of completion through fault of occupant, he will be liable (by these authorities) in *assumpsit* for use and occupation from date of entry as tenant of the vendor. Gould *v.* Thompson, 4 Met. (Mass.) 224; Patterson *v.* Stoddard, 47 Me. 355. If, however, the failure to complete be the fault of the vendor, the occupant will not be liable, unless upon new and implied contract. Dwight *v.* Cutler, 3 Mich. 566, 573; Hogsett *v.* Ellis, 17 Id. 351; Cunningham *v.* Lyon, 136 Mass. 532 (*per* Field, J.).

An implied tenancy may arise after supersedure of the original agreement, and the *quasi* tenant will thereafter be liable as an *ordinary* tenant. Fowke *v.* Beck, 1 Spears (S. C.) 291; Barton *v.* Smith, 66 Iowa, 75.

Such tenancy might arise though failure to complete the purchase were fault of vendor, if he notify occupant to quit or pay rent. Dwight *v.* Cutler, 3 Mich. 566, 573; Hogsett *v.* Ellis, 17 Id. 351.

There are many cases which hold that an occupant under an agreement to purchase is not a tenant in any such sense, that an action for use and occupation may be maintained against him. Bancroft *v.* Wardwell, 13 Johns. (N. Y.) 489; Smith *v.* Stewart, 6 Id. 47; Sylvester *v.* Ralston, 31 Barb. (N. Y.) 286, 288; Stacy *v.* Vt. Cent. R. R. Co., 32 Vt. 551.

These cases hold that the owner's remedy for use of property is not *assumpsit* but trespass upon theory, that occupant becomes a trespasser *ab initio*.

There are other cases which hold that the vendor has an election of remedies, as that he can waive the tort, &c. Woodbury *v.* Woodbury, 47 N. H. 11, 21, 22 (*per* Sargent, J.); Clough *v.* Hosford, 6 Id. 231, 232.

[1] **Notice to quit. Is it necessary?** — One who has entered under an agreement to purchase which he has not executed, may be ejected without notice, Kilburn *v.* Ritchie, 5 Cal. 145; or demand of possession, Doe *d.* Kemp *v.* Garner, 1 Q. B. (Ont.) 39.

but not an action for use and occupation (*x*). Where the vendee of an estate sold by auction has been suffered to enter upon and hold the premises while the title was under investigation, and the contract has afterwards been determined for want of title, the vendor cannot on these grounds only recover for use and occupation, although a jury find that the occupation has been beneficial (*y*). But where by the contract of sale he admits himself to be tenant from week to week to the vendor at 80*l.* per week, payable in advance or otherwise, such rent may be distrained for (*z*). And if the vendee retain possession after the contract of purchase has gone off, he will be liable for subsequent use and occupation (*a*).

Under contract for assignment of term. — An occupation under an agreement for assigning a lease, where it was agreed that the assignee should pay the lessee, until the completion of the assignment, at the rate of 100*l.* per year, was held to constitute the relation of landlord and tenant between the lessee and the assignee (*b*); but where, in an agreement for the sale of leasehold premises, to be paid for [*238] by instalments, it was stipulated that, in * default of payments of the instalments at specified times, the former instalments should be forfeited, and the vendor should not be compellable to convey, upon which the purchaser was let into possession, and made default; he was held to be from thenceforth a mere tenant on sufferance (*c*).

Occupation by vendor. — A continuance of occupation by a vendor after conveyance executed, without any agreement, will not raise an implied tenancy, nor render him liable

(*x*) *In re* Banks *v.* Rebbeck, 2 Low. M. & P. 452.

(*y*) Winterbottom *v.* Ingham, 7 Q. B. 611. The rents taken from subtenants, not recoverable under a claim for use and occupation (Rumball *v.* Wright, 1 C. & P. 589), will be recoverable as money paid to the use of the intending vendor. See also Kirtland *v.* Pounsett, 2 Taunt. 146.

(*z*) Yeoman *v.* Ellis, L. R., 2 C. P. 601; 36 L. J., C. P. 326.

(*a*) Howard *v.* Shaw, 8 M. & W. 118.

(*b*) Saunders *v.* Musgrave, 6 B. & C. 524; 2 C. & P. 294; Anderson *v.* Midland R. Co., 3 E. & E. 614; 30 L. J., Q. B. 94. See also Seaton *v.* Booth, 4 A. & E. 528.

(*c*) Doe *d.* Moore *v.* Lawder, 1 Stark. R. 308; Doe *d.* Rogers *v.* Pullen, 2 Bing. N. C. 749.

to an action for use on occupation (*d*). But an express agreement that the purchaser shall receive "all rents and profits" from the day fixed for completion of purchase, entitles the purchaser to a fair occupation rent from the vendor until possession is given (*e*). And the same rule applies, although the delay in completion is the fault of neither party (*f*).

(*d*) Tew *v.* Jones, 13 M. & W. 12.

(*e*) Metropolitan R. Co. *v.* Defries, L. R., 2 Q. B. D. 387; 36 L. T. 494; 25 W. R. 841 — C. A., affirming decision below; L. R., 2 Q. B. D. 189; 36 L. T. 150; 25 W. R. 271.

(*f*) Sherwin *v.* Shakespeare, 5 De G., M. & G. 517; 23 L. J., Ch. 177.

[*239] * CHAPTER VII.

OF SUBSTITUTION OF PARTIES TO THE CONTRACT OF TENANCY BY ASSIGNMENTS, SUB-LEASE, BANKRUPTCY, MARRIAGE, AND DEATH.

SECT. 1. — *Assignments generally.*

What is an assignment. — An assignment is the transfer or conveyance of some pre-existing term or reversion, estate, right, title, or interest. The party assigning is called the assignor, and he to whom the assignment is made the assignee. The word "assigns" extends not only to the immediate assignee, but also to assignees ad infinitum (*a*). Every lessor may assign his reversion, and every lessee may assign his term, unless expressly restrained from so doing

(*a*) Spencer's case, 5 Co. R., 16; Bailey *v.* De Crespigny, L. R., 4 Q. B. 180, 186.

by some condition in his lease (*b*),[1] or be a tenant at will (*c*),[2] or on sufferance (*d*). "A contingent, an executory, and a future interest, and a possibility coupled with an interest, in any tenements or hereditaments, of any tenure, whether the object of the gift or limitation of such interest or possibility be or be not ascertained, also a right of entry, whether immediate or future, and whether vested or contingent, into or upon any tenements or hereditaments in England, of any tenure, may be disposed of by deed" (*e*). But a right of re-entry for a forfeiture cannot be so assigned (*f*).

* **Different modes of assignment.** — Persons become [*240] assignees either by act of the party or by act of law: under the first head may be classed those who become so by an instrument of assignment; under the latter head may be stated those who have thrown upon them the interest in the premises — in consequence of the property having been taken under writs of execution — by bankruptcy — by marriage — or by death. Each of those modes of becoming an assignee will be considered in this chapter.

Assignments must be by deed. — Assignments by act of the parties, whether of the reversion or the term, must be by deed.[3]

(*b*) *Post*, Chap. XVII., Sect. 2.
(*c*) *Ante*, 226.
(*d*) *Ante*, 230.
(*e*) 8 & 9 Vict. c. 106, s. 6.
(*f*) Hunt *v.* Bishop, 8 Ex. 675; *ante*, 2.

[1] There is no implied covenant not to assign. Robinson *v.* Perry, 21 Ga. 183; Cooney *v.* Hayes, 40 Vt. 478, 482.

[2] An assignment by tenant at will conveys no interest. Whittemore *v.* Gibbs, 24 N. H. 484; Cunningham *v.* Holton, 55 Me. 83; Dingley *v.* Buffum, 57 Me. 381.

[3] **Assignments. How made.** (*a*) *In Canada.* — If for terms longer than limited periods, must be by deed. Dove *v.* Dove, 18 C. P. (Ont.) 424; Galbraith *v.* Irving, 8 Ont. 751; Regina, *ex rel.* Northwood *v.* Askin, 7 L. J. (Ont.) 130; Montgomery *v.* Spence, 23 Q. B. (Ont.) 39; Ansley *v.* Peters, 1 Allen (N. B.) 339.

(*b*) *In United States.* — Need not (in most states) be by deed. Halliday *v.* Marshall, 7 Johns. (N. Y.) 211.

An assignment (unless an implied one) must be by "*an instrument of as high a nature*" as the lease. If lease is by deed, assignment must be. Bridgham *v.* Tileston, 5 Allen (Mass.) 371; Brewer *v.* Dyer, 7 Cush. (Mass.) 337; Wood *v.* Partridge, 11 Mass. 488. If lease is by parol, assignment may be. Overman *v.* Sanborn, 27 Vt. 54, 56.

The Statute of Frauds (*g*) enacts, "that no leases, estates or interests, either freehold or terms of years, or any uncer tain interest, not being copyhold or customary interest, of, in, to or out of any messuages, manors, lands, tenements or hereditaments, shall be assigned, granted or surrendered, unless it be by deed or note in writing, signed by the party so assigning, granting or surrendering the same, or their agents thereunto lawfully authorized by writing; or by act and operation of law."

(*g*) 29 Car. 2, c. 3, s. 4.

(*c*) *Implied assignments* result *by operation of law* from acts of parties, even though *instrument* executed be an insufficient one.

An unsealed assignment and occupation and recognition is sufficient to transfer the estate and liability under a sealed lease. Sanders *v.* Partridge, 108 Mass. 556. A parol assignment under similar circumstances will transfer the term and liability under a written lease. Dewey *v.* Payne, 19 Neb. 540. A written unsealed assignment *without entry and recognition* is not effectual if the lease is under seal. Sanders *v.* Partridge, 108 Mass. 556.

(*d*) *Assignment by estoppel.* — An assignee who has entered and taken the benefit of a lease is estopped to set up the invalidity of the assignment. Blake *v.* Sanderson, 1 Gray (Mass.) 332.

(*e*) *Presumption of assignment.* — Possession is *primâ facie* evidence to charge one as assignee. Armstrong *v.* Wheeler, 9 Cow. (N. Y.) 88; Williams *v.* Woodard, 2 Wend. (N. Y.) 487, 492 (*per* Savage, Ch. J.); Acker *v.* Witherell, 4 Hill (N. Y.) 112. The occupant must rebut the presumption. Provost *v.* Calder, 2 Wend. (N. Y.) 517, 522 (*per* Savage, Ch. J.); Cross *v.* Upson, 17 Wis. 618; Mariner *v.* Crocker, 18 Id. 251.

Possession is not usually held essential to the liability of an assignee by deed or other sufficient absolute assignment. Babcock *v.* Scoville, 56 Ill. 461; Weidner *v.* Foster, 2 Penn. 23; Smith *v.* Brinker, 17 Mo. 148; though it was so held in Damainville *v.* Mann, 32 N. Y. 197.

(*f*) *Substitution.* — Though lessee ordinarily remains liable after assigning, Wilson *v.* Gerhardt, 9 Col. 585; Greenleaf *v.* Allen, 127 Mass. 248, yet, if by parol agreement new tenant is substituted, lessee will be discharged. Wallace *v.* Kennelly, 47 N. J. L. 242, 245; Vandekar *v.* Reeves, 40 Hun (N. Y.) 430; Randall *v.* Rich, 11 Mass. 494; Smith *v.* Niver, 2 Barb. (N. Y.) 180. In Montgomery *v.* Spence, 23 Q. B. (Ont.) 39, was held still liable notwithstanding lessor had accepted the assignee (not by deed) in discharge of lessee.

In Levering *v.* Langley, 8 Minn. 107, it was held that where a lessor orally agreed to accept assignee in discharge of lessee, the latter was not thereafter liable.

(*g*) *Voluntary assignees.* — If voluntary assignee of lessee enters and occupies, he will be liable for rent, Boyce *v.* Bakewell, 37 Mo. 492; Dorrance *v.* Jones, 27 Ala. 630; Morton *v.* Pinckney, 8 Bosw. (N. Y.) 135; Young *v.* Peyser, 3 Id. 308; although otherwise, if he enter to get the goods, Lewis *v.* Burr, 8 Id. 140.

8 & 9 Vict. c. 106, s. 3. — By 8 & 9 Vict. c. 106, s. 3, "an assignment of a chattel interest, not being copyhold, in any tenements or hereditaments, shall be void at law unless made by deed."

Assignment to self and other person. — By 22 & 23 Vict. c. 35, s. 21, "any person shall have power to assign personal property, now by law assignable, including chattels real, directly to himself and another person, or other persons or corporation, by the like means as he might assign the same to another." Therefore, upon the appointment of a new trustee of leaseholds and personal estate, the continuing trustees may assign the trust property direct to themselves and the new trustees jointly, upon the trusts of the settlement; whereas previously an assignment and re-assignment were necessary to effect this object.

Sect. 2. — *The Contract for Assignment.*

(a) *Generally.*

Sale of reversion. — By virtue of the 4th section of the Statute of Frauds, the effect of which has been already considered (*h*), any contract to sell either a reversion or a term must be in writing.

Notice of tenant's interest. — Where a reversion is sold, the possession of a tenant is notice to a purchaser of the actual interest which a tenant may have (*i*). Where the purchaser at the date of the contract knew that the property was * occupied by a tenant, and did not inquire as [*241] to the tenant's interest, it was held that he had notice of the lease, which it was subsequently discovered that the tenant had (*k*). In Caballero *v.* Henty (*l*), the conditions of sale of a public-house stated it was in the occupation of a tenant. A brewer, intending to use the

(*h*) *Ante*, 85. And see Dart V. & P. (ed. 5), A.D. 1876.

(*i*) Daniels *v.* Davison, 15 Ves. 249.

(*k*) James *v.* Litchfield, L. R., 9 Eq. 51.

(*l*) L. R., 9 Ch. 447; 43 L. J., Ch. 635; 30 L. T. 314; 22 W. R. 446.

public-house for the sale of his beer, agreed to buy it. He afterwards learnt that it was under lease to another brewer for a term of which eight years were unexpired. It was held that the purchaser was not bound to ascertain from the tenant the terms of his tenancy, and that the vendor could not enforce specific performance.

In Phillips *v.* Miller (*m*), it was held that vendors were not bound to make good to purchasers certain sums paid by the purchasers to tenants for hay and straw according to market value (whereas by the custom of the country fodder value only was payable), in pursuance of special agreements by the vendors with the tenants not mentioned in the particulars of sale. This decision, however, proceeded principally on the ground that the agreements with the tenants were personal contracts not binding on the reversion (*n*). The vendors bonâ fide believed that it was unnecessary to mention the agreements in the particulars of sale.

(b) *Contract for Assignment of Term.*

Where A., being possessed of a messuage and premises for the residue of a certain term of years, agreed with B. to relinquish possession to him and to suffer him to become tenant of the premises for the residue of the term, in consideration of B.'s paying a sum of money towards completing certain repairs of the premises; it was held that this was an agreement relating to the sale of an interest in land within the statute (*o*). A., being tenant under a parol agreement for a seven years' lease, agreed to give up the immediate possession thereof to B., in order that B. might enter thereon as tenant; in consideration whereof, and also as a compensation for certain improvements made by A., and for the value of certain articles left, B. agreed to pay A. 100*l.* A. accordingly relinquished and gave up possession of the premises to

(*m*) L. R., 10 C. P. 420; 44 L. J., C. P. 265; 32 L. T. 638, Exch. Ch., reversing decision below, L. R., 9 C. P. 201.

(*n*) See also Roberts *v.* Tregaskis, 38 L. T. 176, where an agreement not to increase rent nor give notice to quit was held not to bind a purchaser of the landlord's interest.

(*o*) Buttermere *v.* Hayes, 5 M. & W. 456. See also Leaf *v.* Tuton, 10 M. & W. 393.

B., who was thereupon accepted as tenant from year to year, at a different rent from that formerly paid by A.: and B. afterwards, in part-performance of the agreement on his part, paid A. 51*l.* In an action to recover the balance of the *100*l.*: — held, that the contract was within [*242] the statute, and consequently that the plaintiff was not entitled to recover (*p*); except, perhaps, for money found to be due on an account stated (*q*). So, in consideration that A., who was in the possession and occupation of premises wherein he carried on the business of a milkman, would yield up the possession and occupation of the said premises to B., and permit him thenceforth to occupy the same, and would assign over to B. all his property in the stock and plant and deliver the same to B., the latter promised to pay a certain sum: — held, that this was a contract for an interest in or concerning lands within the statute (*r*). In Hodgson *v.* Johnson it was agreed verbally that the plaintiff should take possession of a brickyard of which the defendant was tenant, and take the plant and bricks at a valuation, and that the defendant should pay up all rent due, and endeavour to induce the landlord to accept the plaintiff as tenant. The plaintiff took possession and gave the defendant a warrant of attorney for payment of the sum at which the bricks and plant were valued. A distress was afterwards put in upon the premises, and the plant and bricks sold for rent due from the defendant before the agreement, and the plaintiff was turned out of possession by the landlord. In an action for breach of the agreement to pay up the rent, it was held, that the contract taken in its entirety was a contract for the sale of an interest in lands within the statute, and therefore that the plaintiff could not sever and sue only upon that part which related to the payment of rent (*s*). A. and B. agreed orally that A. should pay 37*l.* for the interest of B. in premises occupied by him as a slaughterhouse, and for the fixtures,

(*p*) Kelly *v.* Webster, 12 C. B. 282.

(*q*) Cocking *v.* Ward, 1 C. B. 858; Laycock *v.* Pickles, 4 B. & S. 497; 33 L. J., Q. B. 43.

(*r*) Smart *v.* Harding, 15 C. B. 652.

(*s*) Hodgson *v.* Johnson, E. B. & E. 685; 5 Jur., N. S. 290. See, however, Pulbrook *v.* Lawes, L. R. 1 Q. B. D. 284; and 88, *ante*.

B. to return 10*l.* if A. were refused a licence to use the premises as a slaughterhouse. The premises and fixtures were transferred to A.; and B. received the 37*l.* Subsequently an action was brought to recover back the 10*l.*, a licence to A. to use the premises as a slaughterhouse having been refused: held, that the contract being executed as far as regarded the land, and the promise sued on relating wholly to money, the plaintiff might recover, though the contract was not in writing (*t*). An agreement respecting the transfer of an interest in land not in writing cannot be enforced by action to recover the consideration after the transfer has been executed, and nothing remains to be done but to pay the consideration money; but if after such transfer the defendant admits owing the stipulated price, the amount may be recovered upon an account stated (*u*).

[*243] * The Statute of Frauds (29 Car. 2, c. 3), s. 4 (*x*), extends to sales by auction (*y*). The day for completion of the purchase of an interest in land inserted in a written contract cannot be waived by oral agreement, and another day substituted in its place (*z*).

Sales by auction. Particulars of sale. — An auctioneer selling a lease is bound to state in the particulars or conditions of sale a notice given by the landlord of his intention to enter unless the premises are put in repair, although the vendee is aware of the ruinous state of the buildings, and it is alleged that the auctioneer was not apprised of the notice (*a*): and where leasehold premises are sold by auction, and the lease containing the usual covenant to repair is produced and read to the bidders, if any of the buildings demised and described in the lease have been pulled down before the sale, the purchaser is not bound to complete the purchase, and may recover back his deposit, although the

(*t*) Green *v.* Saddington, 7 E. & B. 503.

(*u*) Cocking *v.* Ward, 1 C. B. 158; Laycock *v.* Pickles, 4 B. & S. 497; 33 L. J., Q. B. 43.

(*x*) *Ante*, 85.

(*y*) Walker *v.* Constable, 1 Bos. & P. 306; Fairbrother *v.* Simmons, 5 B. & A. 33; Kenworthy *v.* Schofield, 2 B. & C. 948.

(*z*) Stowell *v.* Robinson, 3 Bing. N. C. 928; Moore *v.* Campbell, 10 Exch. 323; Noble *v.* Ward, L. R., 1 Ex. 117; 35 L. J. Ex., 81.

(*a*) Stevens *v.* Adamson, 2 Stark. 422.

building pulled down be not described in the particulars of sale (*b*). Where leasehold premises were sold by auction by the defendant to the plaintiff, under a condition that the defendant should make a good title, it was held no defence to an action for not making a good title, that the premises had been assigned by the plaintiff to the defendant by way of mortgage, and that a good title was made, except that the premises were out of repair, of which the plaintiff had full knowledge, and that the lessor had not re-entered as he was entitled to do (*c*).

Misdescription. — In the conditions of sale of the lease of a public-house it was described as "a free public-house," and the lease contained a covenant that the lessee and his assigns should take their beer from a particular brewer; though the lease was entirely read over by the auctioneer at the time of the sale, who said mistakenly that it was a free public-house, and that the covenant about the beer had been decided to be bad; it was ruled that a purchaser who heard the lease read over was not bound under these circumstances to complete the purchase, but was entitled to recover back the deposit (*d*). Where the particulars of sale of premises in Covent Garden stated, that under the lease "no offensive trade was to be carried on, and that the premises could not be let to a coffee-house keeper or working hatter," and the original lease when produced appeared to prohibit the business of a brewer, baker, sugar-baker, vintner, victualler, butcher, tripe-seller, poulterer, fishmonger, cheese-seller, fruit-seller, herb-seller, coffee-house keeper, working hatter and many others, and the sale of coals, potatoes or any provisions, it was * held, that there was such a [*244] material discrepancy between the particulars and the lease so as to entitle a purchaser to rescind his contract (*e*). Where an original lessee of land subject to a covenant against certain obnoxious trades, with a proviso for re-entry for a breach of such covenant, granted under-leases of houses erected on the land, not containing a similar covenant and

(*b*) Granger *v.* Worms, 4 Camp. 83.
(*c*) Barnett *v.* Wheeler, 7 M. & W. 364; Wilson *v.* Wilson, 14 C. B. 616.
(*d*) Jones *v.* Edney, 3 Camp. 285.
(*e*) Flight *v.* Rooth, 1 Bing. N. C. 370.

proviso, it was held, that a purchaser by auction of houses erected on part of this land, and of the improved ground rents of the houses so under-let, might recover back his deposit-money from the auctioneer, the omission of the proviso in the under-leases not having been specified in the conditions or mentioned at the time of the sale (*f*). Where the particulars of sale by auction of several lots described one as subject to the same rights of way as were then enjoyed under existing leases of certain houses, one of which leases was to be seen; and a plan annexed showed one right of way to those houses over that lot, but not another, and it also showed another right of way over that lot to a second adjoining lot, and the same person bought these two lots by two biddings, but a single contract was entered into for the whole: — it was held, that he might rescind the contract as to both lots, and that it was not a case for the application of a compensation provision as to misdescription of the premises (*g*).

Where a public-house was sold with the victuallers' and other licences, the vendor not being at the time entitled to such licences, nor able to get them transferred to the purchaser in due time pursuant to his contract, it was held that the purchaser might rescind the contract and recover back his deposit (*h*).

It may be here mentioned that an auctioneer who has sold goods has no authority to pay the landlord's rent, in order to avoid the goods being distrained (*i*).

(c) *Title of the Vendor.*

Common law warranty of lessor's title. — Prior to the Vendor and Purchaser Act, 1874, there was, in every contract for the sale of an *existing lease*, an implied undertaking by the seller (if the contrary were not expressed, as it usually was in practice) to make out the lessor's title to demise (*k*),

(*f*) Waring *v.* Hoggart, 1 Ry. & Moo. 39; but see Hayward *v.* Parke, 16 C. B. 295.

(*g*) Dykes *v.* Blakes, 4 Bing. N. C. 463.

(*h*) Claydon *v.* Green, L. R., 3 C. P. 511; 37 L. J., C. P. 226.

(*i*) Sweeting, app. *v.* Turner, resp., 41 L. J., Q. B. 58.

(*k*) Hall *v.* Betty, 4 M. & G. 410.

and without showing such title, the seller could not maintain an action at law against the buyer for refusing to complete the purchase (*l*).

Warranty dispensed with by V. & P. Act, 1874. — This warranty is now dispensed with by the Vendor and Purchaser *Act, 1874 (37 & 38 Vict. c. 78), which by [*245] sect. 2, rule 1, enacts that "under a contract to assign a term of years, whether derived or to be derived out of a freehold or leasehold estate, the intended assign shall not be entitled to call for the title to the freehold." It is to be observed that this rule only barred the purchaser's right to call for the title to the *freehold*, so that if an under-lease be sold, the title of any mesne landlord might still be called for; and further that the rule does not apply at all to a lease for lives (*m*).

The Conveyancing and Law of Property Act, however (44 & 45 Vict. c. 41), enacts, by sect. 3, subsect. (1), that "under a contract to sell and assign a term of years derived out of a leasehold reversion, the intended assign shall not have the right to call for the title to the leasehold reversion;" but this section by subsects. (9) and (10) applies only "if and as far as a contrary intention is not expressed in the contract of sale," and "to sales made after the commencement" of the act, *i.e.* by s. 2, on or after the 1st January, 1882.

Purchaser to assume that covenants performed. — The same section (3) of the Conveyancing Act, following the common forms in conditions of sale, provides that a purchaser is to assume that covenants have been performed, &c., as follows: —

"(4.) Where land sold is held by lease (*not including under-lease*) the purchaser shall assume, unless the contrary appears, that the lease was duly granted; and on production of the receipt for the last payment for rent under the lease before the date of the actual completion of the purchase, he shall assume, unless the contrary appears, that all the covenants and provisions of the lease have been duly performed

(*l*) Souter *v.* Drake, 5 B. & Ad. 992; De Medina *v.* Norman, 9 M. & W. 820; 2 Dowl., N. S. 239; Laythorp *v.* Bryant, 2 B. & C. 735.

(*m*) See Dart V. & P. vol. i. p. 290.

and observed up to the date of the actual completion of the purchase.

"(5.) Where land is held by under-lease, the purchaser shall assume, unless the contrary appears, that the under-lease and every superior lease were duly granted; and on production of the receipt for the last payment due for rent under the under-lease before the date of the actual completion of the purchase, he shall assume, unless the contrary appears, that all the covenants and provisions of the under-lease have been duly performed and observed up to the date of actual completion of the purchase, and further that all rent due under every superior lease, and all the covenants and provisions of every superior lease, have been paid and duly performed and observed up to that date."

Agreement for lease. — Upon a contract for the sale of an agreement for a lease it is not an implied condition that the lessor has power to grant the lease (*n*). This rule was laid down before the Vendor and Purchaser Act, which affirms its principle, but does not expressly embody it.

[*246] * **Construction of contracts of sale.** — An agreement for the sale of *all B.'s interest* in a lease does not mean free from all under-leases by way of mortgage and other incumbrances then affecting the premises (*o*). When it was stipulated (before the Vendor and Purchaser Act) that the vendor should not be obliged to produce the lessor's title, the vendee might, notwithstanding, insist upon defects in the lessor's title, which were disclosed by the abstract delivered, or which he had discovered aliunde (*p*); but it was said to be otherwise where the purchaser had agreed to take the vendor's title "as he holds the same," without requiring the lessor's title (*q*). The Vendor and Purchaser Act appears to admit the objection of defects discovered in

(*n*) Kintrea *v.* Preston, 1 H. & N. 357; 25 L. J., Ex. 287.

(*o*) Phelps *v.* Pothero, 16 C. B. 370.

(*p*) Shepherd *v.* Keatley, 1 C., M. & R. 117; Wheeler *v.* Wright, 7 M. & W. 359; Barnett *v.* Wheeler, Id. 364; Sellick *v.* Trevor, 11 M. & W. 722; Darlington *v.* Hamilton, Kay, 550; Warren *v.* Richardson, 1 Younge, 1; Harnett *v.* Yielding, 2 Sch. & Lef. 549.

(*q*) Spratt *v.* Jeffery, 10 B. & C. 249; Hayward *v.* Parke, 16 C. B. 295; Hume *v.* Pocock, 14 W. R. 191; Mills *v.* Tweed, L. R., 1 C. P. 39. See Waddell *v.* Wolfe, L. R., 9 Q. B. 515.

the lessor's title by the abstract or otherwise. If a person, who has contracted to purchase the lease of a house, subsequently discovers that it was originally leased jointly with another house, and that the lessor could enter for breach of covenants in respect of either house, he seems clearly not bound to complete the purchase (*r*).

"Title to be approved by solicitor." — If a contract for the purchase of a lease state that it is made "subject to the approval of the title by the purchaser's solicitor," then, in the absence of mala fides on the part of the purchaser or his solicitor, the vendor cannot enforce specific performance of the contract if the purchaser's solicitor disapprove of the title.

Hussey *v.* Horne-Payne. — This rule was laid down by Fry, J., in Hudson *v.* Buck (*s*), is stated in Hussey *v.* Horn-Payne (*t*) in the Court of Appeal to the same effect, and although questioned by Lord Cairns in the House of Lords (*u*) is still law.

Objection on ground of forfeiture. — It was usual, before the Conveyancing Act, for the vendor of a leasehold interest to protect himself by a stipulation that the production of the last receipt for rent should be conclusive evidence of the due performance of covenants. This stipulation was always strictly construed against the purchaser (*x*). It is now, as we have seen, implied into all contracts by s. 3 of the Conveyancing Act. If it be negatived, however, a purchaser of a leasehold may object to the vendor's title, on the ground that he has incurred a forfeiture, *e.g.* by omitting for the space of a month to pay the annual premium * of [*247] insurance pursuant to his covenant, although it does not appear that the lessor has taken advantage of the for-

(*r*) Blake *v.* Phinn, 3 C. B. 976; Madeley *v.* Booth, 2 De Gex & Sm. 718; Darlington *v.* Hamilton, Kay, 550; Penniall *v.* Harborne, 11 Q. B. 368.

(*s*) L. R., 7 Ch. D. 683; 47 L. J., Ch. 247; 38 L. T. 56; 26 W. R. 190.

(*t*) L. R., 8 Ch. D. 670; 47 L. J., Ch. 751; 38 L. T. 543; 26 W. R. 703—C. A.

(*u*) L. R., 4 App. Cas. 411; 48 L. J., Ch. 846; 41 L. T. 1; 27 W. R. 585. The House of Lords affirmed the judgment of the Court of Appeal, but on different grounds.

(*x*) See Bull *v.* Hutchens, 32 Beav. 615; Laurie *v.* Lees, 7 App. Cas. at p. 32.

feiture (*y*). Under a contract for the purchase of the residue of an old term, a purchaser is not bound to accept a similar new lease: for the former differs in value from the latter, the residue of an old term being in certain respects more advantageous (*z*); but a purchaser cannot refuse to perform an agreement for the sale of "the unexpired term of eight years' lease and goodwill," on the ground that only seven years and seven months of the term remained (*a*).

Objection on ground of unusual covenants. — A purchaser cannot resist specific performance on the ground that the lease purchased contains unusual covenants not mentioned in the contract of sale (*b*).

Lessor's licence to assign. — It is incumbent on the vendor of a lease which contains a restriction against alienation, to prove that he has obtained the lessor's consent to the assignment (*c*); and it is also incumbent on him, and not on the purchaser, to procure the lessor's licence for the assignment (*d*).

Premium for licence. — If necessary, he must pay any reasonable premium and extra rent required for such consent (*e*). This was held in a case where the lessee held at the rent of 36*l.* for a term of thirty-five years, and the lessor refused the licence for a sub-lease for twenty-one years at a rent of 65*l.*, except upon payment of an increased rent of 6*l.* and a premium of 50*l.* Stuart, V.-C., decreed specific performance, and, in the event of the lessee being unable to grant a proper sub-lease, an inquiry as to damages (*e*). The failure to procure from the lessor a licence to assign, or to register previous assignments, before the day on which it is agreed to assign and give possession of leasehold premises, is no breach of the agreement (*f*).

(*y*) See Wilson *v.* Wilson, 14 C. B. 616.

(*z*) Mason *v.* Corder, 7 Taunt. 9.

(*a*) Belworth *v.* Hassell, 4 Camp. 140.

(*b*) Grosvenor *v.* Grosvenor, 28 L. J., Ch. 173; 5 Jur., N. S. 117.

(*c*) Mason *v.* Corder, 7 Taunt. 9; Winter *v.* Dumergue, 14 W. R. 699.

(*d*) Lloyd *v.* Crisp, 5 Taunt. 249; and see Bermingham *v.* Sheridan, 33 L. J., Ch. 571; 12 W. R. 658; Forrer *v.* Nash, 35 Beav. 167; 14 W. R. S; Wallis *v.* Littell, 11 C. B., N. S. 369; 31 L. J., C. P. 100; Barton *v.* Banks, 2 F. & F. 213; Davis *v.* Nisbett, 10 C. B., N. S. 752; 31 L. J., C. P. 6.

(*e*) Hilton *v.* Tipper, 18 L. T. 626; 16 W. R. 888.

(*f*) Stowell *v.* Robinson, 3 Bing. N.

Proof of discharge of an incumbrance. — A purchaser is not compellable to accept a title to premises formerly subject to an incumbrance, the discharge of which is shown only by presumption: thus where a leasehold was sold, subject to a ground rent, which was said to be apportioned out of a larger rent, but the apportionment was not evidenced by an existing deed, but only by the acceptance of a mesne landlord, and presumption; it was held that the purchaser was not bound to accept the title (*g*).

* (d) *Rights and Liabilities as to Title Deeds.* [*248]

It is an established principle that whoever is entitled to the land has also a right to all the title-deeds affecting it (*h*); and he may maintain an action of detinue against any person who withholds them from him after demand made (*i*); or an action of trover (*k*); consequently the party entitled to the term is entitled to the lease.

Lien on lease. — A solicitor's lien on a lease will not prevent the lessee from assigning estate (*l*).

Custody of expired lease. — After the expiration or determination of a lease the lessor is not entitled to possession of it as against the lessee, nor can he maintain trover for it (*m*).

(e) *Value of Leaseholds, Reversions and Annuities.*

Mode of valuation of property. — In order to show the value of leasehold estates, and to enable those persons who intend either to purchase or sell to form their judgment, the following tables have been extracted from a very accurate and useful work (*n*) upon the subject. The first table shows the

C. 928. And see Wrighton *v.* Newton, 2 C., M. & R. 124.

(*g*) Barnwell *v.* Harris, 1 Taunt. 430.

(*h*) Harrington *v.* Price, 3 B. & Ad. 170; Hooper *v.* Ramsbottom, 6 Taunt. 12.

(*i*) Lightfoot *v.* Keane, 1 M. & W. 745; Roberts *v.* Showler, 13 M. & W. 609; 2 D. & L. 687; Slater *v.* Dangerfield, 15 M. & W. 263; Goode *v.* Burton, 1 Exch. 189; Newton *v.* Beck, 3 H. & N. 220.

(*k*) Harrington *v.* Price, 3 B. & Ad. 173; Hooper *v.* Ramsbottom, 6 Taunt. 12; Davies *v.* Vernon, 6 Q. B. 443.

(*l*) Odell *v.* Wake, 3 Camp. 394.

(*m*) Hall *v.* Ball, 3 M. & G. 242; Elworthy *v.* Sanford, 3 H. & C. 330; 34 L. J., Ex. 42.

(*n*) Tables for the Purchasing of Estates, &c., by William Inwood, Ar-

value of leases, estates or annuities for terms of years certain, in number of years' purchase of the *clear* annual rent, at the several rates of 3, 4, 5, 6, 7, 8, 9 and 10 per cent. interest, which the purchaser may thereby make of his money. The clear annual rent must in all cases be ascertained, by deducting from the gross rent of the estate, or value of the annuity, the ground rent, all taxes, and other annual charges, which would fall upon the purchaser.

chitect and Surveyor, (1845). To arrive at as near an approximation as possible to the true value, by the use of vulgar fractions only, without decimals, the algebraical signs + and — have been used; the sign + signifying that the value is a little more than that stated, and the sign — that it is a little less.

* TABLE OF THE VALUE OF LEASES, ESTATES OR ANNUITIES, FOR A NUMBER OF YEARS CERTAIN, TO MAKE THE FOLLOWING RATES PER CENT. (*o*). [*249]

Years.	Years' Purch. at 3 per cent.	Years' Purch. at 4 per cent.	Years' Purch. at 5 per cent.	Years' Purch. at 6 per cent.	Years' Purch. at 7 per cent.	Years' Purch. at 8 per cent.	Years' Purch. at 9 per cent.	Years' Purch. at 10 per cent.
½	½ −	½ −	½ −	½ −	½ −	½ −	½ −	½ −
1	1 −	1 −	1 −	1 −	1 −	1 −	1 −	1 −
2	2 −	2 −	1¾ +	1¾ +	1¾ +	1¾ +	1¾ +	1 +
3	2¾ +	2¾ +	2¾ −	2¾ −	2½ +	2½ +	2¾ +	2½ −
4	3¾ −	3¾ −	3½ +	3½ −	3½ −	3¼ +	3¾ −	3¼ −
5	4½ +	4½ −	4¼ +	4¼ −	4 +	4 −	4 −	3¾ +
6	5½ −	5¼ −	5 +	5 −	4¾ +	4½ −	4½ +	4¼ +
7	6¼ −	6 +	5¾ +	5½ +	5½ −	5¼ −	5 +	4¾ +
8	7 +	6¾ −	6½ −	6¼ −	6 −	5¾ −	5½ +	5¼ +
9	7⅓ +	7½ −	7 +	6¾ +	6½ +	6¼ −	6 −	5¾ +
10	8½ +	8 +	7¾ −	7¼ +	7 +	6¾ −	6½ −	6½ −
11	9¼ +	8¾ +	8¼ +	8 −	7½ −	7¼ −	6¾ +	6½ −
12	10 −	9½ −	8¾ +	8½ −	8 −	7½ +	7¼ +	6¾ +
13	10¾ −	10 −	9½ −	8¾ +	8¼ +	8 −	7½ −	7 +
14*	11¼ +	10½ +	10 −	9¼ +	8¾ −	8¼ −	7¾ +	7¼ +
15	12 −	11 +	10½ −	9¾ −	9 +	8½ +	8 +	7½ +
16	12½ +	11¾ −	10¾ +	10 +	9½ −	8¾ +	8¼ +	7¾ +
17	13⅝ −	12¼ −	11¼ +	10½ −	9¾ +	9 +	8½ +	8 +
18	13¾ +	12¾ −	11¾ −	10¾ +	10 +	9¼ +	8¾ +	8¼ −
19	14¼ +	13¼ −	12 +	11¼ −	10¼ +	9½ +	9 −	8¼ +
20	15 −	13½ +	12½ −	11½ −	10½ +	9¾ +	9¼ −	8½ +
25	17½ −	15½ +	14 +	12¾ +	11¾ −	10¾ −	9¾ −	9 +
30	19½ +	17¼ +	15¼ +	13¾ +	12½ −	11¼ +	10¼ +	9½ −
35	21½ −	18¾ −	16¼ +	14½ −	13 −	11¾ −	10½ +	9¾ −
40	23 +	19¾ +	17¼ −	15 +	13¼ +	12 −	10¾ +	9⅔ +
45	24½ +	20¾ −	17¾ +	15½ −	13½ +	12 +	11 −	9¾ +
50	25¾ −	21½ −	18¼ +	15¾ +	13¾ +	12¼ −	11 −	10 −
60	27⅔ −	22½ +	19 −	16¼ −	14 −	12½ −	11 +	10 −
70	29 +	23½ −	19¼ +	16½ −	14¼ +	12½ −	11 +	10 −
80	30¼ −	24 −	19½ +	16½ +	14¼ −	12½ −	11 +	10 −
90	31 +	24¼ +	19¾ +	16½ +	14¼ +	12½ −	11 +	10 −
100	31½ +	24½ +	19¾ +	16½ +	14¼ +	12½ −	11 +	10
Perpetual	33¼ +	25	20	16¾ −	14¼ +	12½	11 +	10

* EXAMPLE. — A lease or annuity for 14 years, to make 5 per cent., and to get back the principal, is worth a little less than 10 years' purchase of the clear annual rent; at 3 per cent., a little more than 11¼ years' purchase; at 8 per cent., a little less than 8¼ years' purchase; and so on.

(*o*) Inwood, Table 1.

[*250] * TABLE OF THE PRESENT VALUE OF REVERSIONS IN YEARS' PURCHASE (p).

The following Table shows the present value of a reversion in years' purchase of the *clear* annual rent, after a given term not exceeding 60 years, at 3, 4, 5, 6, 7, 8, 9 and 10 per cent. interest.

After these Years.	Years' Purch. at 3 per cent.	Years' Purch. at 4 per cent.	Years' Purch. at 5 per cent.	Years' Purch. at 6 per cent.	Years' Purch. at 7 per cent.	Years' Purch. at 8 per cent.	Years' Purch. at 9 per cent.	Years' Purch. at 10 per cent.
1	32¼+	24+	19+	15¾−	13¼+	11½+	10¼−	9+
2	31½−	23+	18¼−	14¾+	12½−	10¾−	9¼+	8¼+
3	30½+	22¼−	10¼+	14−	11¾+	10−	8½+	7½+
4	29½+	21⅝+	16½−	13¼−	10¾+	9¼−	7¾+	6¾+
5	28¾+	20½+	15¾−	12½−	10¼−	8½+	7¼−	6¼−
6	28−	19¾+	15−	11¾	9½+	7¾+	6¾−	5¾−
7	27+	19	14¼−	11+	9−	7¼+	6+	5¼−
8	26¼+	18¼+	13½+	10½−	8¼+	6¾+	5½+	4¾−
9	25½+	17½+	13−	9¾+	7¾+	6¼+	5+	4¼−
10	24¾+	17−	12¼+	9¼+	7¼+	5¾+	4¾−	3¾+
11	24+	16¼−	11¾−	8¾+	6¾+	5¼+	4¼+	3½+
12	23½−	15½+	11¼−	8¼+	5¼+	5−	4−	3¼−
13	22¾−	15+	10½+	7¾+	6−	4½+	3½+	3−
14*	22+	14½−	10+	7¼+	5½+	4¼+	3¼+	2¾−
15	21½−	14−	9½+	7−	5¼−	4−	3+	2½−
16	20¾+	13¼+	9¼−	6½+	4¾+	3¾−	2¾+	2¼−
17	20¼−	12¾+	8¾−	6¼−	4½+	3½−	2½+	2−
18	19½+	12¼+	8¼+	5¾+	4¼−	3¼−	2¼+	1¾+
19	19	11¾+	8−	5½+	4−	3−	2¼−	1¾−
20	18½−	11½−	7½+	5¼−	3¾−	2¾−	2−	1½−
25	16−	9½−	6−	3¾+	2¾−	1¾+	1¼+	1−
30	13¾−	7¾−	4¾−	3−	2−	1¼−	¾+	½+
35	11¾+	6¼+	3¾−	2¼−	1¼+	¾+	½+	⅓+
40	10¼−	5¼−	2¾+	1½+	1−	½+	⅓+	¼−
45	8¾+	4¼+	2¼−	1¼−	¾−	½−	¼−	⅛−
50	7½+	3½+	1¾−	1−	½−	¼+	⅙+	1/12+
55	6½+	3−	1¼+	¾−	⅓+	⅙+	1/10−	1/20+
60	5¾−	2½−	1+	½+	¼−	⅛−	1/16	1/36

* EXAMPLE. — A reversion of an estate after a 14 years' term, is worth in present money, at 5 per cent., a little more than 10 years' purchase of the clear annual rent; at 3 per cent., a little more than 22 years' purchase; at 8 per cent., a little more than 4¼ years' purchase; and so on.

(p) Inwood, Table 13.

* Table of the Comparative Value of Lifehold and Leasehold Estates (q). [*251]

The following Table will show the relative value, at 5 per cent. interest, of estates held for a term of life, or for a term of years certain.

Age.	Equal to a Leasehold Estate for a Term certain.			
	One Life.	Two joint Lives.	Longest of Two Lives.	Longest of Three Lives.
	Years.	Years.	Years.	Years.
10	29	21	43	51
20	25	17	37	46
30*	21	15	33	39
40	18	12	27	32
50	15	10	22	26
60	11	7	16	19
70	7	4	11	13

* Example. — An estate held on a single life, aged 30, is equal in value to a leasehold estate for a term certain of 21 years, at 5 per cent.; one on two joint lives, aged 30, to a term certain of 15 years; one on the longest of two lives, aged 30, to a term certain of 33 years; and one held on the longest of three lives, aged 30, to a term certain of 39 years.

(q) Inwood, Table 26.

[*252] * SECT. 3. — *Assignment of Reversion.*

Right of assignee to sue for breach of covenant. — A lessor may by deed assign his reversion.[1] At common law such an assignment would only have given the assignee a right to the rent reserved, to distrain for rent, and to sue for breaches of covenants at law, but not for breaches of express covenants entered into by the lessee with the lessor (*r*). To remedy this, the statute 32 Hen. 8, c. 34, enacted that all grantees of reversions should enjoy all the advantages, benefits and remedies by entry for non-payment of rent, or for doing of waste or other forfeiture (*s*), or by action only for non-performance of conditions, covenants or agreements, contained or expressed in leases, which the lessors themselves had or enjoyed.

(*r*) Martyn *v.* Williams, 1 H. & N. 817, 826; 26 L. J., Ex. 117.

(*s*) Bennett *v.* Herring, 3 C. B., N. S. 370.

[1] **Assignment of reversion.** (*a*) *How made.* — See note, sec. 1. It takes effect from delivery. Meagher *v.* Coleman, 1 Russ. & Geld. (N. S.) 271.

(*b*) *A deed or other assignment is subject to the lease.* Page *v.* Esty, 54 Me. 319; Ala. Gold Life Ins. Co. *v.* Oliver, 78 Ala. 158; Comer *v.* Sheehan, 74 Id. 452, 457; Casey *v.* Gregory, 13 B. Mon. (Ky.) 505, 507 (*per* Simpson, J.). A demise for ninety-nine years operates as an assignment of the reversion of a prior shorter lease. Doe *d.* Jarvis *v.* M'Carthy, 3 Kerr (N. B.) 63.

(*c*) *Effect.* — Assignment transfers to assignee the right to rent subsequently accruing, Abercrombie *v.* Redpath, 1 Iowa, 111; Disselhorst *v.* Cadogan, 21 Ill. App. 179; Dixon *v.* Niccolls, 39 Ill. 372; Burden *v.* Thayer, 3 Met. (Mass.) 76; Howland *v.* Coffin, 12 Pick. (Mass.) 125; Van Driel *v.* Rosierz, 26 Iowa, 575; Townsend *v.* Isenberger, 45 Id. 670; Burns *v.* Cooper, 31 Pa. St. 426; though it be involuntary as in case of judicial proceedings, Lancashire *v.* Mason, 75 N. C. 455; Epley *v.* Eubanks, 11 Ill. App. 272; Bank of Penn. *v.* Wise, 3 Watts (Pa.) 394; McDevitt *v.* Sullivan, 8 Cal. 592; Martin *v.* Martin, 7 Md. 368; or purely by operation of law, as in case of heirs, Crosby *v.* Loop, 13 Ill. 625; Green *v.* Massie, Id. 363; Foltz *v.* Prouse, 17 Id. 487; Kimball *v.* Sumner, 62 Me. 305; Stinson *v.* Stinson, 38 Id. 593; Haslage *v.* Krugh, 25 Pa. St. 97. A devisee, also, is entitled to subsequently accruing rent. Cobel *v.* Cobel, 8 Barr (Pa.) 342.

Rent accrued, payable prior to assignment, does not pass to assignee as it is a chose in action. Wittrock *v.* Hallinan, 13 Q. B. U. C. 135; Burden *v.* Thayer, 3 Met. (Mass.) 76; Sheerer *v.* Stanley, 2 Rawle (Pa.) 276; Bank of Pa. *v.* Wise, 3 Watts (Pa.) 394; Braddee *v.* Wiley, 10 Id. 362; Farmers & Mechanics' Bank *v.* Ege, 9 Id. 436.

(*d*) *Conditional assignment.* — The reversion may be assigned as security as in mortgage. Payment of debt will discharge the assignment. Handershott *v.* Calhoun, 17 Ill. App. 163.

Lease must be by deed. — This statute does not apply where the demise is not by deed (*t*). If the demise be otherwise than by deed, the lessor, notwithstanding assignment of the reversion, retains his right of action (*u*).

But not under Conveyancing Act. — The 10th and 11th sections of the Conveyancing and Law of Property Act, however (*x*), which otherwise appear to re-enact 32 Hen. 8, c. 34, ss. 1 and 2, apply to leases generally and are not confined to leases by deed.

Reversion must be the same. — To enable the assignee of a reversioner to sue on the covenants in a lease, he must be seised of the same reversion to which the covenants were originally annexed; therefore, where there was a lease for years, under which the tenant entered, but which was never executed by the lessor, who died and devised the property, it was held, that the devisee could not sue as assignee of the reversion for breaches of covenants in the lease (*y*). A lease was made by A. and B. his wife, who were seised of an undivided moiety in right of the wife, and also by C., who was seised of the other undivided moiety, and it contained a covenant by the lessee, with A. and C. only, to repair; semble, that this was not a covenant running with the land on which the assignee of the reversion could sue (*z*). The assignee of a rent reserved by deed (without being an assignee of the reversion, if any), may maintain an action for the rent which becomes due after the assignment (*a*).

Assignment with reservation of rent to assignor. — In Southwell *v.* Scotter (*b*), it was doubted whether, by the peculiar form of words there used, the assignor of a reversion could bind the lessee by a stipulation in the assignment that rent could continue to * be paid to the assignor, [*253]

(*t*) Standen *v.* Christmas, 10 Q. B. 35; Elliott *v.* Johnson, L. R., 2 Q. B. 120; 36 L. J., Q. B. 41; 8 B. & S. 38.

(*u*) Bickford *v.* Parson, 5 C. B. 920.

(*x*) See these sections at length, p. 256, *post*.

(*y*) Cardwell *v.* Lucas, 2 M. & W. 111; Cooch *v.* Goodman, 2 Q. B. 580.

(*z*) Wootton *v.* Steffenoni, 12 M. & W. 129; Thompson *v.* Hakewill, 19 C. B., N. S. 717; 35 L. J., C. P. 18.

(*a*) Williams *v.* Hayward, 1 E. & E. 1040; 28 L. J., Q. B. 374; Allen *v.* Bryan, 5 B. & C. 512; Robins *v.* Cox, 1 Lev. 22; Newcomb *v.* Harvey, Carth. 161.

(*b*) 49 L. J., Ex. 356.

and it is very doubtful whether such an obligation (unless construed as an obligation to pay to the assignor as agent of the assignee) could be created by any form of words whatever. Such a stipulation seems to be repugnant to the assignment of a reversion, the very essence of which is that the assignee should stand to the lessee in the place of the assignor, whereas such a stipulation makes practically two landlords.[1]

Dispute of title of assignee by tenant. — The rule that a tenant may not dispute his landlord's title (*c*) applies only to the title of the original landlord who let him in, and not to that of an assignee of the reversion (*d*), and such title may be disputed by a tenant. But if the tenant has paid rent to a claiming assignee of the reversion or his agent, such payment is primâ facie evidence of the title of such assignee, and the tenant, except in a case of fraud or misrepresentation, can only defeat that title by showing that he paid in ignorance, and that some third person is the real assignee of

(*c*) Cooke *v.* Loxley, 5 T. R. 4, *ante*, ch. v. s. 22.

(*d*) Carlton *v.* Bowcock, 51 L. T. 659, *per* Cave, J.

[1] **Rent severable from reversion.** — "Each . . . may be assigned without the other" (*per* Clopton, J., in Ala. Gold Life Ins. Co. *v.* Oliver, 78 Ala. 158, 160).

In Crosby *v.* Loop, 13 Ill. 625, it was held that lessor might assign part of reversion, reserving to himself the entire rent.

In New York the assignee of rent, without the reversion, may sue therefor in his own name. Demarest *v.* Willard, 8 Cow. (N. Y.) 206; Willard *v.* Tillman, 2 Hill (N. Y.) 274, 276.

In Hopkins *v.* Hopkins, 3 Ont. 223, 230, it was said (*per* Boyd, C.) that accruing rent might be granted by deed or devised by will, and the devisee might distrain for it.

In Watson *v.* Hunkins, 13 Iowa, 547, 550, it was held that lessor might assign the lease without the rent.

It is held in Alabama that a note given for rent in advance will sever it from the reversion. Westmoreland *v.* Foster, 60 Ala. 448, 455; Ala. Gold Life Ins. Co. *v.* Oliver, 78 Ala. 158, 161.

If rent be payable in advance, sale of land after such payment does not entitle vendee to re-collect it. Farmers & Mechanics' Bank *v.* Ege, 9 Watts (Pa.) 436; Stone *v.* Patterson, 19 Pick. (Mass.) 476.

In Farley *v.* Thompson, 15 Mass. 18, an agreement to offset future rent payments against interest instalments was held valid.

A purchaser at a sale under a prior mortgage may collect rent over. McDevitt *v.* Sullivan, 8 Cal. 592.

In Ontario it is held that an assignment of future rent, with right of distrust, must be under seal. Galbraith *v.* Irving, 8 Ont. 751.

the reversion; it is not enough for him to show that the claiming assignee has no title (*e*).

Surrenderee of copyhold, mortgagor, &c. — The surrenderee of a copyhold reversion may bring covenant against the lessee within the equity of the statute 32 Hen. 8, c. 34; for it is a remedial law, and no prejudice can arise to the lord, notwithstanding the lessee had assigned the term before the surrender (*f*).

If a mortgagor and mortgagee of a term make an underlease in which the covenants for the rent and repairs are only with the mortgagor and his assigns, the assignee of the mortgagee cannot maintain an action for the breach of these covenants, because they are collateral to his grantor's interest in the land, and therefore do not run with it; but the mortgagor himself may, the covenants being in gross (*g*). Where a mortgagor made a lease for a term, reciting the mortgage, and the lessee covenanted to pay a certain sum annually in part of the interest on the mortgage at a certain place, it was held a covenant in gross, not running with the land (*h*).

On a covenant to repair, tenants in common may sue a lessee of a house, who, after the demise, but before the breach alleged, became a co-tenant of the plaintiffs in the same house (*k*).

The assignee of a lease, which is good only by estoppel, may maintain an action on the covenants (*l*). Where a person, who was in fact tenant from year to year (as he held under a void lease for years), underlet * by deed [*254] for a term, and the under-lessee again underlet by deed for a less term: it was held, that this under-lessee had a reversion on which his assignee could maintain an action of covenant (*m*). After assigning over a lease, the assignor

(*e*) Ib.

(*f*) Glover *v.* Cope, 1 Salk. 185; 4 Mod. 81; Whitton *v.* Peacock, 3 Myl. & R. 325.

(*g*) Webb *v.* Russell, 3 T. R. 393; Stokes *v.* Russell, Id. 679; Russell *v.* Stokes (in error), 1 H. Blac. 562.

(*h*) Pargeter *v.* Harris, 7 Q. B. 708; Saunders *v.* Merryweather, 3 H. & C. 902; 35 L. J., Ex. 115.

(*k*) Yates *v.* Cole, 2 Brod. & B. 660; Twynam *v.* Pickard, 2 B. & A. 105; Badeley *v.* Vigurs, 4 E. & B. 71; Norval *v.* Pascoe, 34 L. J., Ch. 82.

(*l*) Cuthbertson *v.* Irving, 4 H. & N. 742; 6 Id. 135.

(*m*) Oxley *v.* James, 13 M. & W. 209.

having no reversion cannot sue the assignee except on express covenants contained in the assignment (*n*).

Breaches before assignment. — The assignee of a reversion has no right of action for arrears of rent due (*o*), inasmuch as the right to rent is a chose in action,[1] or for breaches of covenants, although running with the land, committed before the assignment of the reversion (*p*); but the assignor may sue for such previous breaches notwithstanding the assignment. Where a mortgagor of a term of years made an under-lease by indenture, this, though at first a lease by estoppel, was held to be convertible into a lease in interest by a re-conveyance by the mortgagees, so as to give a right of action to the assignees of the lessee on the covenants in the under-lease (*q*).

Notice to tenant before re-entry. — The assignee of a reversion may re-enter for breach of covenants, other than the covenant to pay rent, without giving notice to the tenant that the reversion has been assigned to him (*r*). As regards rent, it is expressly provided by 4 Ann. c. 16, s. 10, that the tenant is not to be prejudiced without notice.

The grantee of a reversion, therefore, may take advantage of all covenants *which run with the land* (*s*). The remedy is mutual, for the same statute gives the lessee a right of action against the grantee of the reversion (*t*). The statute does not extend to mere collateral covenants (*u*); but it includes devises (*x*).

How assignments made. — An assignment of the reversion must be by deed (*y*).[2] A. let a house to B., as ten-

(*n*) Hicks *v.* Downing, 1 Ld. Raym. 99; 1 Salk. 13.

(*o*) Flight *v.* Bentley, 7 Sim. 149.

(*p*) Martyn *v.* Williams, 1 H. & N. 817; 26 L. J., Ex. 117.

(*q*) Webb *v.* Austin, 7 M. & G. 701.

(*r*) Scaltock *v.* Harston, L. R., 1 C. P. D. 106; 45 L. J., C. P. 125; 34 L. T. 130; 34 W. R. 431. Notice under the Conveyancing Act (see p. 328) is of course necessary.

(*s*) Spencer's case, 1 Sm. L. C. 60, *ante*, 163.

(*t*) Jourdain *v.* Wilson, 4 B. & A. 266.

(*u*) Webb *v.* Russell, 3 T. R. 393.

(*x*) Machell *v.* Dunton, 2 Leon. 33.

(*y*) Beely *v.* Perry, 3 Lev. 155; Brawley *v.* Wade, M'Clel. 664.

[1] **Rent in arrears.** — See *ante*, note upon "Assignment of Reversion."

[2] Not always in the United States. A reversion may be less than a freehold. See *ante*, notes to this section and section 1.

ant from year to year, and afterwards granted a lease by deed to C. of the house for twenty-one years: this was held to transfer the reversion to C., and to disentitle A. to recover from B. any rent which accrued during C.'s lease (*z*). A conveyance in fee, whether absolutely or by way of mortgage, will pass a term which has been carved out of it, and afterwards re-assigned to the grantor, subject to a sub-lease (*a*).

Effect of mortgage of reversion. — Mortgages *subsequent* to a lease operate as grants of the reversion, and carry with them, as incidental to such reversion, a right to the * rent and the benefit of the landlord's remedies for [*255] the recovery (*b*). The mortgagee, therefore, may enforce the payment of the rent from the lessee either by distress or action; and the lessee will be exonerated by such payment from any demand on the part of the mortgagor or those claiming under him; even though actual compulsion on the part of the mortgagee has not been resorted to, but the lessee has paid the rent voluntarily (*c*).

Payment of rent. — Payment of rent to the mortgagor without notice of the mortgage is valid (*d*), but payment of rent in advance is not within this rule, so as to discharge a tenant who had notice of the mortgage before the rent was due, for a payment of rent in advance is merely a loan by the tenant to the landlord (*e*). A payment, however, is a payment of rent when the rent falls due, and becomes irrecoverable by the mortgagee so far as it is made in respect of rent due before the notice (*f*). It is not necessary that the notice should be in terms; it is sufficient that the mortgage should be brought to the mind of the tenant (*g*).

(*z*) Harmer *v.* Bean, 3 C. & K. 307; Burrows *v.* Gradin, 1 D. & L. 213; *post*, Sect. 5; but see Edwards *v.* Wickwar, L. R., 1 Eq. 403.

(*a*) Burton *v.* Barclay, 7 Bing. 745.

(*b*) *Ante*, 51.

(*c*) Moss *v.* Gallimore, 1 Doug. 279; 1 Smith L. C. 629 (7th ed.).

(*d*) 4 Ann. c. 16, s. 10.

(*e*) De Nicolls *v.* Saunders, L. R., 5 C. P. 58; 39 L. J., C. P. 297; 22 L. T. 661; 18 W. R. 1106.

(*f*) Cook *v.* Guerra, L. R., 7 C. P. 132; 41 L. J., C. P. 89; 26 L. T. 97; 20 W. R. 367.

(*g*) Id.

SECT. 4. — *Severance of Reversion.*

Assignee of reversion of part. — An assignee of the reversion of part of the demised premises can sue for *apportioned* rent at common law (*gg*),[1] and could always, under the statute 32 Hen. 8, c. 34, sue for breach of the *covenants* respecting that part (*h*), and so might an assignee of part of the reversion (*hh*).

Assignee of part of reversion. — Where a lease of an undivided part of certain mines contained a recital of an agreement between the lessee, the lessor, and the owners of the other two-thirds, for pulling down an old mill, and building another of larger dimensions, and the lease contained a covenant to keep such new mill in repair, and so leave it at the end of the term, but did not contain a covenant to build, it was held that the assignee of the lessor of the one-third might sue in respect of his interest (*i*).

(*gg*) As to mode of apportionment, see *post*, Ch. X., Sect. 6; and for an instance of the rare action for apportionment see Burgoyne *v.* Ainsworth (*Law Times* newspaper for October 10th, 1885), in which case the action was brought in the Brompton County Court.

(*h*) Co. Litt. 315 a; Twynam *v.* Pickard, 2 B. & A. 105 (covenant to repair); Badeley *v.* Vigurs, 4 E. & B. 71 (covenant to leave in repair).

(*hh*) Attoe *v.* Hemmings, 2 Bulst. 281.

(*i*) Easterby *v.* Sampson, 6 Bing. 644; 4 M. & P. 601 (Exch. Ch.).

[1] **Severance of reversion.** — (*a*) *How effected.* — A severance of reversion is effected by conveyance of a single portion of demised premises, Reeve *v.* Thompson, 14 Ont. 499; Worthington *v.* Cooke, 56 Md. 51; Reed *v.* Ward, 22 Pa. St. 144; or separate assignments of different portions, Babcock *v.* Scoville, 56 Ill. 461; Van Rensselaer *v.* Bradley, 3 Denio (N. Y.) 135; Van Rensselaer's Ex'rs *v.* Gallup, 5 Id. 454; or by surrender to lessor of part of demised premises, Blake *v.* Sanderson, 1 Gray (Mass.) 332.

(*b*) *Consequences.* — And after severance the lessor and assignees may recover each his proportionate part of the rent, as ascertained by a jury, according to the value of each assignee's interest. See above cases, and Boulton *v.* Blake, 12 Ont. 522, 538.

If the rent be of a nature indivisible, it is extinguished. The lessor cannot throw entire burden upon one part. A rent item of a day's service with horse and carriage was held extinguished, in Van Rensselaer *v.* Bradley, 3 Denio (N. Y.) 135, 141, 142. Justice Jewett said the effect of partial assignment by the lessee would be to multiply the service.

In Rector *v.* Bacon, 6 Allen (N. B.) 134, it was held that the lessor could not maintain covenant for a portion of the rent, the covenant being entire.

It is well settled, however, that he may recover his proportion of the rent. Worthington *v.* Cook, 56 Md. 51.

But it was held that the assignee of the reversion of part could not take advantage of a condition broken, though an assignee of part of the reversion in the whole property might (*k*).

Apportionment of condition for re-entry. — It has since been enacted by 22 & 23 Vict. c. 35, s. 3, "that where the reversion upon a * lease is severed, and the rent or [*256] 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."

The passing of the benefit and burden of covenants and conditions to the several assignees of a several reversion *in the case of a lease after that act* is provided for by ss. 10–12 of the Conveyancing and Law of Property Act, 1881, 44 & 45 Vict. c. 41, as follows: —

Sect. 10. **Rent and benefit of lessee's covenants.** — "(1). Rent reserved by a lease and the benefit of every covenant or provision therein contained having reference to the subject-matter thereof, and on the lessee's part to be observed or performed, and every condition of re-entry and other condition therein contained, shall be annexed and incident to and shall go with the reversionary estate in the land, or in any part thereof, immediately expectant on the term granted by the lease, notwithstanding severance of that reversionary estate, and shall be capable of being recovered, received, enforced, and taken advantage of by the person from time to time entitled, subject to the term, to the income of the whole or any part, as the case may require, of the land leased.

(2). This section applies only to leases made after the commencement of this act."

Sect. 11. **Obligation of lessor's covenants.** — "(1). The obli-

(*k*) Wright *v.* Burroughs, 3 C. B. 685; 4 D. & L. 438.

gation of a covenant entered into by a lessor with reference to the subject-matter of the lease shall, if and as far as the lessor has power to bind the reversionary estate immediately expectant on the term granted by the lease, be annexed and incident to and shall go with that reversionary estate, or the several parts thereof notwithstanding severance of that reversionary estate, and may be taken advantage of and enforced by the person in whom the term is from time to time vested by conveyance, devolution in law, or otherwise; and if and as far as the lessor has power to bind the person from time to time entitled to that reversionary estate, the obligation aforesaid may be taken advantage of and enforced against any person so entitled.

(2). This section applies only to leases made after the commencement of this act."

Sect. 12. **Apportionment on severance of every condition.** — "(1). Notwithstanding the severance by conveyance, surrender or otherwise, of the reversionary estate in any land comprised in a lease, and notwithstanding the avoidance or cessor in any other manner of the term granted by a lease as [*257] to part only of the land comprised therein, *every condition or right of re-entry, and every other condition, contained in the lease, shall be apportioned, and shall remain annexed to the severed parts of the reversionary estate as severed, and shall be in force with respect to the term whereon each severed part is reversionary, or the term in any land which has not been surrendered, or as to which the term has not been avoided or has not otherwise ceased, in like manner as if the land comprised in each severed part, or the land as to which the term remains subsisting, as the case may be, had alone originally been comprised in the lease.

(2). This section applies only to leases made after the commencement of this act."

It will have been observed that none of these three sections are retrospective, but that they all apply only to leases made after the commencement of the Act, *i.e.* by s. 2, on or after the 1st January, 1882. Only the 12th section, however, effects any considerable alteration of the law. That

section goes beyond 22 & 23 Viet. c. 35, s. 3, in its application to all other conditions in addition to the condition of re-entry for non-payment of rent, and to severance "by surrender or otherwise" in addition to severance by conveyance; and it also appears to dispense with the necessity of the rent having been apportioned before action of ejectment for non-payment of rent. The only alteration effected by the 10th and 11th sections is that they apply to leases generally, whereas 32 Hen. 8, c. 34, applied to leases by deed only.

Sect. 5. — *Assignment of Term.*

(a) *Absolutely.*

Power to assign. — Every tenant, except a tenant on sufferance, has power to assign his term, unless he be, as is frequently the case (*l*), expressly prohibited in the contract of tenancy from doing so.[1]

An assignment by a tenant at will determines the tenancy,[2] but not without notice to his landlord (*m*).

What amounts to an assignment. — An assignment must be *by deed* (*n*),[3] and must pass the legal estate of the assignor; for a transfer of a mere equitable interest will not make a man liable as an assignee.[4] An agreement to take an assignment of a lease, followed by possession on the part of the equitable assignee, is not sufficient to give the lessor any right to sue the equitable assignee in equity on the covenants in the lease (*o*). The delivery and depositing of a

(*l*) See *post*, Ch. XVII., s. 2.
(*m*) Pinhorn *v.* Souster, 8 Ex. 763.
(*n*) 8 & 9 Viet. c. 106, s. 3; *ante*, 240.
(*o*) Cox *v.* Bishop, 8 De G., M. & G. 815; 26 L. J., Ch. 389.

[1] Robinson *v.* Perry, 21 Ga. 183; Cooney *v.* Hayes, 40 Vt. 478, 482.

[2] It is non-assignable. Cunningham *v.* Holton, 55 Me. 33; Dingley *v.* Buffum, 57 Me. 381; Whittemore *v.* Gibbs, 24 N. H. 484.

[3] An assignment must be of equal solemnity with the lease, but otherwise, in majority of states, need not be by deed. In the provinces it must be, except for the limited periods. See *ante*, sec. 1, note.

[4] The contrary has been held in several New York cases cited in note to sec. 1.

lease as a security for money, without any written [*258] *assignment, passes no interest at law, although it may create a right which may be enforced in equity (*p*); but the transfer may be complete, although the assignee has never in fact got possession of the deed of assignment, by reason of a claim of lien on the part of the assignor's attorney for the expense of preparing it (*q*).

An assignment, as contradistinguished from a sub-lease, signifies a parting with *the whole term;*[1] and when the whole

(*p*) Doe *d.* Maslin *v.* Roe, 5 Esp. 105; Williams *v.* Evans, 23 Beav. 239.

(*q*) Odell *v.* Wake, 3 Camp. 394.

[1] **Assignment distinguished from sub-lease.** — An assignment is a transfer of entire term, Bedford *v.* Terhune, 30 N. Y. 453; Ind., &c., Union *v.* Cleveland R. R. Co., 45 Ind. 281; Smiley *v.* Van Winkle, 6 Cal. 605; Blumenberg *v.* Myres, 32 Id. 93; and, *a fortiori*, a transfer for more than the term is an assignment, Langford *v.* Selmes, 3 Kay & Johns. 220; Stewart *v.* Long I. R. R. Co., 102 N. Y. 601; Selby *v.* Robinson, 15 C. P. U. C. 370.

A transfer of part of premises is an assignment. Prescott *v.* De Forest, 16 Johns. (N. Y.) 159; Woodhull *v.* Rosenthall, 61 N. Y. 383; Van Rensselaer's Ex'rs *v.* Gallup, 5 Denio (N. Y.) 454; Lee *v.* Payne, 4 Mich. 106; Childs *v.* Clark, 3 Barb. Ch. (N. Y.) 52; Cox *v.* Fenwick, 4 Bibb (Ky.) 538.

If lessee reserve a single day, transfer is a sub-lease. Van Rensselaer's Ex'rs *v.* Gallup, 5 Denio (N. Y.) 454, 460 (*per* Beardsley, Ch. J.); Davis *v.* Morris, 36 N. Y. 569. If lessee's transfer terminate at midnight of one day, and principal lease at noon of next, the transfer is a sub-lease. People *v.* Robertson, 39 Barb. (N. Y.) 9.

A transfer of entire term, with covenant to surrender to lessee at expiration, is a sub-lease, Piggot *v.* Mason, 1 Paige (N. Y.) 412; Post *v.* Kearney, 2 N. Y. 394; Ganson *v.* Tifft, 71 N. Y. 48, 54; Collins *v.* Hasbrouck, 56 N. Y. 157, 162, 163; Collamer *v.* Kelley, 12 Iowa, 319, 323; Stewart *v.* Long I. R. R. Co., 102 N. Y. 601, 613 (*per* Rapello, J.), the theory being that a shred of the term or fraction of a day remained. In several of the above cases, other covenants were combined with the surrender covenant, and the dicta is rather confusing.

For instance, in Piggot *v.* Mason and Collamer *v.* Kelley, there was a reservation of new rent; and in Ganson *v.* Tifft, there was a covenant for re-entry and conditional right to surrender during term. It is held (probably by the weight of authority) that a re-entry clause (alone) will not prevent a transfer of entire period from being an assignment, Smiley *v.* Van Winkle, 6 Cal. 605; Stewart *v.* Long I. R. R. Co., 102 N. Y. 601, 613; Lloyd *v.* Cozens, 2 Ashm. (Pa.) 131, 137, 138; although contrary doctrine was laid down by Justice Folger, in Collins *v.* Hasbrouck, 56 N. Y. 157, where an instrument reserving different rent with covenant of re-entry was held to be a sub-lease.

In Hamilton *v.* Read, 13 Daly (N. Y. Superior Ct.) 436, it was held that an instrument reserving new rent was a sub-lease, but this is opposed to the subsequent *dictum* of the Court of Appeals in the same state, in Stewart *v.* Long I. R. R. Co., 102 N. Y. 601, 613.

term or more than the whole term is made over by the lessee, although in the deed by which that is done the rent and a power of re-entry for non-payment are reserved to himself, and not to the original lessor, yet the instrument amounts to an assignment, and not a sub-lease (*r*), and in such case, the person to whom it is made over may sue the original lessor or his assignees of the reversion, or be sued by them as assignee of the term, on the respective covenants in the original lease, which run with the land,[1] even though new

(*r*) Hicks *v.* Downing, 1 Ld. Raym. 99; Palmer *v.* Edwards, 1 Doug. 187; Thorn *v.* Woolcombe, 3 B. & Ad. 596; Wollaston *v.* Hakewill, 3 M. & G. 297; Langford *v.* Selmes, 3 Kay & J. 220.

In Stewart *v.* Long I. R. R. Co., while the court admit that a covenant to surrender will ordinarily prevent the transfer from being an assignment, yet held that it would not have that effect in that case, because the transfer was for more than the term.

They also held that the term did not merge in lessee's future possible fee (under covenant to purchase), so that the transfer, of more than the term, carried all that he then had, and was, therefore, an assignment.

In Linden *v.* Hepburn, 3 Sand. (N. Y.) 668, 670, the court held a transfer with covenant for re-entry and surrender was a sub-lease *as between the lessee and his transferee.*

[1] **Effect of assignment of term.** — The assignee becomes liable directly to the lessor upon all the covenants in the lease which run with the land. Stewart *v.* Long I. R. R. Co., 102 N. Y. 601; Cox *v.* Fenwick, 4 Bibb. (Ky.) 538; Armstrong *v.* Wheeler, 9 Cow. (N. Y.) 88; Babcock *v.* Scoville, 56 Ill. 461; Blake *v.* Sanderson, 1 Gray (Mass.) 332; Douglass *v.* Murphy, 16 Q. B. U. C. 113; Selby *v.* Robinson, 15 C. P. U. C. 370; Smith *v.* Brinker, 17 Mo. 148; Salisbury *v.* Shirley, 66 Cal. 223; Le Gierse *v.* Green, 61 Tex. 128; Conrad *v.* Smith, 12 Phila. 306; Graves *v.* Porter, 11 Barb. (N. Y.) 592; Negley *v.* Morgan, 46 Pa. St. 281; Hannen *v.* Ewalt, 18 Pa. St. 9; Overman *v.* Sanborn, 27 Vt. 54; McCormick *v.* Young, 2 Dana (Ky.) 294.

He is not liable for breaches committed after he has assigned, Crawford *v.* Bugg, 12 Ont. 8; Boulton *v.* Blake, Id. 532, 541 (*per* Ferguson, J.); Magill *v.* Young, 10 Q. B. U. C. 301; Walton *v.* Cronly, 14 Wend. (N. Y.) 63, 65 (*per* Sutherland, J.); Hintze *v.* Thomas, 7 Md. 346; nor before he took the assignment, Johnston *v.* Bates, 48 N. Y. Superior Ct. 180; Thomas *v.* Connell, 5 Pa. St. 13; but only for those committed while assignee (*per* Shaw, C. J., in Patten *v.* Deshon, 1 Gray (Mass.) 325, 329).

The lessee continues liable upon all his express covenants, and he is virtually a surety for the assignee, Babington *v.* O'Connor, 20 L. R. Ir. 246; Greenleaf *v.* Allen, 127 Mass. 248; Wilson *v.* Gerhardt, 9 Col. 585; Wall *v.* Hinds, 4 Gray (Mass.) 256; Boulton *v.* Blake, 12 Ont. 532; Stinson *v.* Magill, 8 Q. B. U. C. 271; Montgomery *v.* Spence, 23 Q. B. U. C. 39; Farmers' Bank *v.* Mut. Asso., &c., 4 Leigh, 69, 84 (*per* Tucker, J.); and if he pay the rent he has a remedy over against the assignee, Lehman *v.* Dreyfus, 37 La. An. 587; Fletcher *v.* M'Farlane, 12 Mass. 43; and also against an assignee of an assignee, Ashford *v.* Hack, 6 Q. B. U. C. 541.

covenants are introduced into the assignment (*s*). Upon this principle an assignee of a term, who had granted a sub-lease for the whole term, was held in Beardman *v.* Wilson to have in effect assigned over, and therefore to have ceased to be liable to the lessor or his assignee for the subsequent rent or subsequent breaches of covenant (*t*).

The effect of the doctrine that the sub-lease is equivalent to an assignment is clearly to deprive the sub-lessor of his right to distrain (*u*), but it seems to be equally clear that his right to sue upon a covenant for rent remains (*x*), that he may recover for use and occupation (*y*), and that he may re-enter for condition broken (*z*).

It is necessary to point out, however, that the extent of the principle, that a sub-lease for the whole of the sub-lessor's term amounts to an assignment, has been much controverted (*a*). Poulteney *v.* Holmes (*b*), where it was held that a sub-lease by parol for the whole of the sub-lessor's term was good to sustain an ejectment of the sub-lessor by the lessee, was questioned in Barrett *v.* Rolph (*c*), and though confirmed in

(*s*) Palmer *v.* Edwards, 1 Doug. 187, n.

(*t*) Beardman *v.* Wilson, L. R., 4 C. P. 57; 38 L. J., C. P. 91; 19 L. T. 282; 17 W. R. 54.

(*u*) Parmenter *v.* Webber, 8 Taunt. 593; Brook's Abr. tit. Dette, pl. 39; Preece *v.* Corrie, 5 Bing. N. C. 24; Pascoe *v.* Pascoe, 3 Bing. N. C. 898.

(*x*) Baker *v.* Gostling, 1 Bing. N. C. 19.

(*y*) Pollock *v.* Stacey, 9 Q. B. 1033.

(*z*) Doe *v.* Bateman, 2 B. & Ald. 168.

(*a*) See the authorities reviewed in R. *v.* Wilson, 5 M. & R. 157, n; 1 Sm. L. C. in the notes to Spencer's case.

(*b*) 1 Stra. 405.

(*c*) 14 M. & W. 348.

The assignee is entitled to receive the rents from prior sub-leases, Patten *v.* Deshon, 1 Gray (Mass.) 325; and is estopped to set up, that prior sub-lease was contrary to covenant against assigning and subletting, Shumway *v.* Collins, 6 Id. 227; also to deny the title of lessor, Provost *v.* Calder, 2 Wend. (N. Y.) 517, 523; but he may show that it has terminated, Williams *v.* Woodard, 2 Wend. (N. Y.) 487.

If assignee hold over he may become implied tenant from year to year. De Pere Co. *v.* Reynen, 65 Wis. 271. Subtenants of assignee are liable to be ejected by lessor after proper notice to quit. Pardee *v.* Gray, 66 Cal. 524.

The assignee may take the benefit of all covenants running with the land, and sue thereon in his own name. For example: he may sue upon the covenant to pay for permanent improvements. *In re* Haisley, 44 Q. B. Up. Can. 345, 347, 349 (*per* Wilson, C. J.); Hunt *v.* Danforth, 2 Curt. C. C. 592, 603; Lametti *v.* Anderson, 6 Cow. (N. Y.) 302, and in the latter case for improvements made before the assignment.

Pollock *v.* Stacey (*d*), had some little doubt thrown upon it in Beardman *v.* Wilson (*e*). Upon the preponderance of authority there appears to be a distinction between a sub-lease by deed and a sub-lease by parol * only. [*259] The sub-lease by parol only not being operative as an assignment by virtue of 8 & 9 Vict. c. 106 (*f*), is said to create a lease so as to effectuate the intention of the parties (*g*).

Sub-lease for years by tenant from year to year. — A tenant from year to year who underlets for a long term, does not thereby assign all his estate, which may possibly continue longer than the term expressed to be granted by the sub-lease (*h*), and consequently retains a reversion with a title to distrain until his defeasible reversion be defeated (*i*), *i.e.* until a notice to quit given to him has expired.

Operative words in assignments. — An assignment is usually made by the word "assign," but sometimes "grant, assign, and set over" are used; no particular words are necessary, provided the intention of the parties be sufficiently expressed (*k*). Where a lessee for life granted all his estate and interest to A. and his executors: it was held not to amount to an assignment, because a grant to a man and his executors could not convey an estate for life, being a freehold (*l*). An agreement to assign on payment of a sum by instalments, the assignee in the meantime to perform the covenants in the lease and keep the assignor harmless, and the assignor to re-enter on non-payment of any instalment, is merely an agreement for an assignment and not an assignment (*m*). Where a lessee agreed to execute an

(*d*) 9 Q. B. 1033.

(*e*) L. R., 4 C. P. 17.

(*f*) Or before that Act, by the Statute of Frauds.

(*g*) An Irish statute, 23 & 24 Vict. c. 154, s. 3, enacts, in reference to the whole subject, and making no distinction between deed and parol enacts, "that the relation of landlord and tenant shall be deemed to be founded in the express or implied contract of the parties, and a reversion shall not be necessary to such relation."

(*h*) Oxley *v.* James, 13 M. & W. 209.

(*i*) Ib.

(*k*) See Forms of Assignments, *post*, Appendix B., Sects. 27, 28.

(*l*) Earl of Derby *v.* Taylor, 1 East, 502.

(*m*) Hartshone *v.* Watson, 5 B. N. C. 477.

effectual assignment of two leases of premises, "as he held the same for terms of twenty-eight years," and the assignee agreed to accept a proper assignment accordingly, without requiring the lessor's title, it was held that he was bound to take an assignment of two consecutive leases, though the second was void being executed under a power which had not been pursued (*n*).

An assignment in consideration of quarterly payments for the remainder of the term will not upon a payment being made constitute the assignee a tenant, so as to give the assignor a right to distrain for payments subsequently due (*o*).

Assignment for benefit of creditors. — In White *v.* Hunt (*p*), a debtor assigned to a trustee for the benefit of his creditors "all his goods and chattels, personal estate, substance and effects whatsoever, and all his right, title, property, benefit, claim and demand whatever therein." It was held that these words passed a term, and rendered the trustee liable as assignee for rent.[1]

[*260] * **Usual covenants in assignments.** — The proper and usual covenants on the part of the assignor of a term, viz., that the lease is in full force: that all the rent, covenants and conditions have been paid, performed and observed to that time: that notwithstanding any such act or thing as aforesaid he has power to assign: for quiet enjoyment by the assignee during the remainder of the term, with-

(*n*) Spratt *v.* Jeffery, 10 B. & C. 249; and see Tweed *v.* Mills, L. R., 1 C. P. 39.

(*o*) Hazeldine *v.* Heaton, 1 C. & E. 40.

(*p*) L. R., 6 Ex. 32; 40 L. J., Ex. 23; 23 L. T. 559; overruling Carter *v.* Warne, M. & M. 479.

[1] **Assignments for creditors.** — A general voluntary assignment will transfer the right to the term, and if the assignee take possession he will be liable for the rents. Boyce *v.* Bakewell, 37 Mo. 492; Ecker *v.* C. B. & Q. R. R. Co., 8 Mo. App. 223; Dorrance *v.* Jones, 27 Ala. 630; Morton *v.* Pinckney, 8 Bosw. (N. Y.) 135; Young *v.* Peyser, 3 Id. 308; Astor *v.* Lent, 6 Id. 612. But if assignee merely enter to take away the goods, he will not be personally liable. Lewis *v.* Burr, 8 Id. 140; Journeay *v.* Brackley, 1 Hilt. (N. Y.) 447; Pratt *v.* Levan, 1 Miles (Pa.) 358.

In Magill *v.* Young, 10 Q. B. U. C. 301, a voluntary assignee, after entering and occupying the premises, assigned the term to a pauper, and was thereby relieved from further liability.

out interruption by the assignor or any person claiming under him: — free from incumbrances for him: — and for further assurance; are implied in every assignment made on or after the 1st January, 1882, by virtue of s. 7 of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41). The proper covenants on the part of the assignee — for which no provision had been made by the Conveyancing Act — are, that he will pay the rent and perform the covenants in the lease and save harmless the assignor from any breach thereof by him or his assigns (*q*).

Liability of assignor to assignee. — The liabilities of an assignor to an assignee upon the covenant of indemnity were much considered by the Court of Appeal in the peculiar case of Russell *v.* Shoolbred (*r*), in which it was held, that an assignor who pays rent has no lien on the term, and cannot be prejudiced by a subsequent assignment; and that a right of distress is not a security to the benefit of which a surety paying rent is entitled under the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97, s. 5). On the general covenant to indemnify the proper costs of defending an action for breach of covenant are recoverable as damages (*s*). On an agreement to assign a lease, and to indemnify the lessee from the rent, the assignee entered before any legal assignment was made, some goods of the lessee being left on the premises; it was held that the assignee was liable on his indemnity, those goods having been taken as a distress for rent, and that it was immaterial whether the goods were left with the leave of the assignee (*t*).

Notice to lessor of assignment of term. — There is no obligation at common law upon either assignor or assignee to give any notice to the lessor of the assignment; but the lease fre-

(*q*) See forms, Appendix B., Sects. 27, 28.

(*r*) 29 Ch. D. 254—C. A.

(*s*) Murrell *v.* Tysh, 1 C. & E. 80. It has been held in Ireland that in an action by the lessee against the assignee of a lease for breach of a covenant in the deed of assignment to keep the demised premises in repair, the lessee, in the absence of actual loss, can only recover nominal damages, although the lessor may have commenced an action against the lessee for breach of covenant in the lease (Beattie *v.* Quiery, 10 Ir. R. C. L. 516).

(*t*) Groom *v.* Buck, 2 M. & G. 567.

quently contains a covenant that notice shall be given, and sometimes also that a copy of each assignment shall be furnished to, or even that the assignment itself shall be prepared by, the lessor's solicitors.

Liability of lessee, after assignment. — A lessee continues liable upon express covenants in the lease, notwithstanding any assignment; therefore an action of covenant will lie against a lessee for years, or his executors, on an ex- [*261] press covenant, *notwithstanding he has assigned his term, and the lessor has accepted rent from the assignee (*u*).[1] The lessor may at the same time sue the lessee upon his express covenant, and the assignee upon the privity of estate; but he can have execution against one only. An eviction out of part of the land will only amount to a discharge of an assignee pro tanto (*x*).

On what covenants the assignee is liable. — An assignee of a term is not bound by the personal covenants of the lessee. But he is bound to perform all the covenants which "run with the land," and that without being named by the special word "assigns" (*y*). He is also liable to his immediate assignor upon any express covenants by him in the deed of assignment (*z*). But he is not liable to the lessee for rent which the lessee has been called upon to pay after the assignee had assigned over (*a*); and there is no implied contract by an assignee entering upon an invalid assignment and quitting without notice, that he will indemnify the lessee against the rent for any period after he has ceased to occupy (*b*).

Remote assignee. — There is, however, an implied promise on the part of each successive assignee to indemnify the original lessee against breaches of covenant committed by each assignee during the continuance of his own estate, and

(*u*) Barnard *v.* Gadscall, Cro. Jac. 309; Thursby *v.* Plant, 1 Wms. Saund. 240.

(*x*) Stevenson *v.* Lambard, 2 East, 575; Campbell *v.* Lewis, 3 B. & A. 392.

(*y*) As to what covenants "run with the land," see *ante*, 163.

(*z*) Harris *v.* Goodwyn, 9 Dowl. 409; Burnett *v.* Lynch, 5 B. & C. 589.

(*a*) Wolveridge *v.* Steward, 1 C., M. & R. 644.

(*b*) Couch *v.* Tregoning, L. R., 7 Ex. 88; 41 L. J., Ex. 97; 26 L. T. 286; 20 W. R. 536.

[1] See note, *ante*, "Effect of assignment of term."

this promise is implied although such assignee may have covenanted to indemnify his immediate assignor against all subsequent breaches (*c*).

In an action by the assignor claiming indemnity from the assignee for breaches of covenant in the lease, the court will merely direct payment on account of breaches already committed, and will not make a general declaration of the assignor's right to indemnity (*d*).

When the assignee's liability commences. — An assignee of a term may be sued on the covenants which run with the land,[1] although he has not taken actual possession (*e*);[2] so the assignee of an assignee is liable, although he has not taken actual possession, for breaches of covenant happening after the assignment to him (*f*), and before any assignment over by him (*g*): so a mortgagee *by assignment* of the term, though not in possession, is liable to perform the covenants in the lease which run with the land (*h*).

*To avoid this, mortgages of leaseholds are gener- [*262] ally made by way of under-lease (*i*). Where a lessee covenanted for himself and his assigns to pull down certain old houses and build others within seven years, but did not perform the covenant, and, after the end of seven years, assigned, an action of covenant was held not to lie against the assignee because the breach was complete before the assignment, and the liability of the assignee depends solely upon the privity of estate; had the covenant, however, been broken after the assignment, as if the lessee had assigned before the seven years expired, the assignee would have been liable (*k*). And he would have been liable to an eject-

(*c*) Moule *v.* Garrett, L. R., 5 Ex. 132; 41 L. J., Ex. 62 (Exch. Ch.); 26 L. T. 367; 20 W. R. 416.

(*d*) Lloyd *v.* Dimmack, L. R., 7 Ch. D. 398; 47 L. J., Ch. 398; 38 L. T. 173; 26 W. R. 458.

(*e*) Walker *v.* Reeves, 2 Doug. 461, n.; 3 Id. 19.

(*f*) Taylor *v.* Shum, 1 Bos. & P. 21.

(*g*) Beardman *v.* Wilson, L. R., 4 C. P. 57; 17 W. R. 54.

(*h*) Stone *v.* Evans, Peake, Ad. Ca. 94; Burton *v.* Barclay, 7 Bing. 745; Williams *v.* Bosanquet, 1 Brod. & B. 238; overruling Eaton *v.* Jaques, 2 Doug. 455.

(*i*) *Post*, 264.

(*k*) Churchwardens of St. Saviour's, Southwark *v.* Smith, 1 W. Blac. 351;

[1] See note, *ante*, "Effect of assignment of term."

[2] See note, *ante*, sec. 1, "Assignments. How made."

ment for the forfeiture committed prior to the assignment to him, unless such forfeiture had been waived (*l*).

May assign to man of straw. — An assignee being liable to the original lessor or his assigns only in respect of privity of estate, may get rid of such liability by an assignment over (*m*), except as to previous breaches;[1] with respect to which he will continue liable both at law (*n*) and in equity (*o*). Such an assignment may be made even to a pauper or to a person imprisoned for debt (*p*), but the assignee will continue liable upon any express covenant entered into by him in the assignment to himself (*q*).

The assignee of a term, declared against as such, has been held not to be liable for rent accruing after he had assigned over, though it was stated that the lessor was a party executing the assignment, and agreed thereby that the term, which was determinable at his option, should be absolute (*r*). But if the breach had been continuing, it would have been otherwise: as if there had been a covenant to repair within a certain time after notice, and the repairs were not done according to such notice, though the premises were out of repair before the assignment (*s*).

Wolveridge *v.* Steward. — In Wolveridge *v.* Steward the lessee assigned to A. his interest in demised premises by indenture, executed by both parties, "subject to the payment of the rent and performance of the covenants and agreements

3 Burr. 1272; Grescott *v.* Green, 1 Salk. 199; Brittin *v.* Vaux, Lutw. 109; Hawkins *v.* Sherman, 3 C. & P. 459.

(*l*) Bennett *v.* Herring, 3 C. B., N. S. 370.

(*m*) Valiant *v.* Dodomede, 2 Atk. 546; Pitcher *v.* Tovey, 12 Mod. 23; Le Keux *v.* Nash, 2 Str. 1222; Walker *v.* Reeves, 2 Doug. 461, n.; 3 Id. 19; Taylor *v.* Shum, 1 Bos. & P. 21; Co. Lit. 3 a, 356 b; Boulton *v.* Canon, Freem. 336; Chancellor *v.* Poole, 2 Doug. 764; Beardman *v.* Wilson, L. R., 4 C. P. 57; 17 W. R. 54.

(*n*) Harvey *v.* King, 2 C., M. & R. 18; Pitcher *v.* Tovey, 1 Salk. 81.

(*o*) Philpot *v.* Hoare, 2 Atk. 219; Amb. 480; Treade *v.* Coke, 1 Vern. 165; 2 Eq. Ca. 47; Onslow *v.* Corrie, 2 Madd. 330.

(*p*) Valiant *v.* Dodomede, 2 Atk. 446; De Keux *v.* Nash, 2 Stra. 1221; Taylor *v.* Shum, 1 Bos. & P. 21; Onslow *v.* Corrie, 2 Madd. 330.

(*q*) Wolveridge *v.* Steward, 1 Cr. & M. 644.

(*r*) Chancellor *v.* Poole, 2 Doug. 764.

(*s*) Com. Dig. tit. Covenant (B.).

[1] See note, *ante*, "Effect of assignment of term"; also, Magill *v.* Young, 10 Q. B. U. C. 301.

reserved and contained in the original lease." A. took possession and occupied the premises under this *assignment, and before the expiration of the term [*263] assigned to a third person. After the assignment over the lessee was called upon by the lessor to pay rent which the assignee had suffered to be in arrear; it was held, that the lessee could not maintain an action of covenant against A. in respect of such breach, the words, "subject to the payment of rent, &c.," being words of qualification and not words of contract (*t*).

Rights of assignees of a term. — Assignees of a term may sue the reversioner, or his assigns, for breaches of covenant running with the land which are committed by him or them after the assignment (*u*); an assignee of a lease by estoppel is no exception to the rule (*x*). But an assignee cannot maintain an action upon a breach of covenant before the assignment to him (*y*), nor for the breach of any covenant which does not, by touching or concerning the demised premises, run with the land or the reversion (*z*).

(b) *By Way of Mortgage.*

Mortgagee's liability. — A mortgagee of a leasehold estate *by assignment* is liable, so long as he has the legal estate, to perform the covenants which are obligatory on any ordinary assignee, whether he be in possession or not (*a*):[1] he may

(*t*) Wolveridge *v.* Steward (in error), 1 Cr. & M. 644; 3 Moo. & Sc. 561.

(*u*) Bac. Abr. tit. Covenant (E. 5).

(*x*) Cuthbertson *v.* Irving, 4 H. & N. 742; 6 Id. 135; 28 L. J., Ex. 306; 29 Id. 485.

(*y*) Lewis *v.* Ridge, Cro. Eliz. 863; Martyn *v.* Williams, 1 H. & N. 817; 26 L. J., Ex. 117.

(*z*) See Spencer's case, 1 Smith L. C. 60; and Chap. V., Sect. 8 (b), *ante*, 162.

(*a*) Stone *v.* Evans, Peake, Ad. Ca. 94; 7 East, 341; Williams *v.* Bosanquet, 1 Brod. & B. 238; Westerell *v.* Dale, 7 T. R. 312; Burton *v.* Barclay, 7 Bing. 745.

[1] **Mortgages of term.** (*a*) *Effect.* — Mortgagee takes all the lessee's rights, subject to conditions in mortgage. Yates *v.* Kinney, 19 Neb. 275.

(*b*) *Possession by mortgagee: whether essential to liability.* It has been held in many cases in the United States that an assignee by mortgage, unlike an absolute assignee, is not liable unless he take possession. Astor *v.* Miller, 2 Paige (N. Y.) 68, 76, 77 (and see *per* Walworth, Chan.); Babcock *v.* Scoville,

assign it without being in actual possession (*b*). A mortgagee may avoid the liability of an assignee by taking a sublease instead of an assignment, and this is frequently done. If he become assignee, equity will not afford him any relief, though he may offer to forego his charge and lose his money (*c*). A trustee to whom a lease is assigned to secure an annuity to a third person is strictly an assignee (*d*). A power given to a trustee in a mortgage deed to sell if the mortgagee requests it, does not necessarily imply a right to enter on the premises (*e*).

Equitable assignments by deposit. — Every assignment of a lease is void at law unless made by deed (*f*).[1] Where a lease is deposited by way of equitable mortgage as a security for money advanced (*g*), it is clear that the depositee has no legal title (*h*); and it would seem to be the better opinion that the lessor has no remedy in equity against the [*264] depositee, upon the covenants in * the lease (*i*), even

(*b*) Smartle *v.* Williams, 3 Lev. 388; 8 & 9 Vict. c. 106, s. 5.

(*c*) Anon., Freem. Ch. 253; Casberd *v.* Att.-Gen., 6 Price, 411; Sparkes *v.* Smith, 2 Vern. 275.

(*d*) Gretton *v.* Diggles, 4 Taunt. 766.

(*e*) Watson *v.* Waltham, 2 A. & E. 485.

(*f*) 8 & 9 Vict. c. 106, s. 3.

(*g*) See Williams *v.* Evans, 23 Beav. 239; Matthews *v.* Goodday, 31 L. J., Ch. 282; Bulfin *v.* Dunne, 12 Ir. Ch. R. 67.

(*h*) Doe *d.* Maslin *v.* Roe, 5 Esp. 105.

(*i*) Moores *v.* Choat, 8 Sim. 508 (overruling Flight *v.* Bentley, 7 Sim. 149).

56 Ill. 461, 464 (*per* Sheldon, J., distinguishing mortgages from absolute assignments); Calvert *v.* Bradley, 16 How. 580, 595 (*per* Daniel, J., indicating his opinion and limiting 12 Pet. 201, and 13 Pet. 294); Farmers' Bank *v.* Leigh (Va.) 69, 83, 84; Weidner *v.* Foster, 2 Penn. 23, 26 (*per* Rogers, J.); Walton *v.* Cronly's Adm'r. 14 Wend. (N. Y.) 63.

The above cases, however, seem largely to rest upon the theory of mortgages of the civil law as laid down in Eaton *v.* Jaques, Doug. 454, followed in New York and many states, but overruled in England, and not followed in many of the states.

It appears by above cases that possession is considered essential to liability in some states where the common law theory prevails. It does not seem that possession is essential in Ontario. Cameron *v.* Todd, 22 Q. B. U. C. 390; Magrath *v.* Todd, 26 Id. 87.

[1] An assignment of less than a freehold interest need not (generally) be by deed in the United States unless required to be by some special statute, unless the lease, also, is by deed. See *ante*, sec. 1, 3, notes. The Statutes of Frauds do not usually require it.

although the depositee be in possession (*k*). It has been held, too, in a case where the depositee not only entered, but also paid rent in arrear, and was accepted by the lessor as owner of the lease, the lessor had no equity to compel the depositee to take a legal assignment of the lease (*l*).

Sect. 6. — *Severance of Term.*

An assignee of part of the land cannot be charged, in an action of debt, with the whole rent, but only for a proportionate part thereof (*m*).[1] But an assignee of part is liable to a distress for rent due for the whole of the demised premises (*m*), and to an action on every covenant running with the land and affecting the part assigned, inasmuch as an assignee cannot discharge himself of all his liability to the covenants running with the land, which are in their nature divisible (*n*).

The assignee of part may also sue without joining his co-assignees, as was held in a case where an assignee of five-sixths of a sub-lease recovered damages from the mesne landlord for breach of a covenant for renewal of the head lease (*nn*).

(*k*) Cox *v.* Bishop, 8 De G., M. & G. 815; 26 L. J., Ch. 389.

(*l*) Moore *v.* Greg, 2 De G. & S. 334. But see Lucas *v.* Comerford, 1 Ves. jun. 235; Close *v.* Wilberforce, 1 Beav. 112.

(*m*) Curtis *v.* Spitty, 1 Bing. N. C. 756; Merceron *v.* Dowson, 5 B. & C. 479; Hare *v.* Cator, Cowp. 766; Holford *v.* Hatch, 1 Doug. 183.

(*n*) Congham *v.* King, Cro. Car. 221; Gamon *v.* Vernon, 2 Lev. 231; Stevenson *v.* Lambard, 2 East, 576.

(*nn*) Simpson *v.* Clayton, 4 B. N. C. 758.

[1] **Severance of term.** — Assignees of separate parts of demised premises are separately and not jointly liable to the lessor, each for his proportionate part. Babcock *v.* Scoville, 56 Ill. 461; Van Rensselaer *v.* Bradley, 3 Denio (N. Y.) 135; Van Rensselaer's Exrs' *v.* Gallup, 5 Id. 454; Astor *v.* Miller, 2 Paige (N. Y.) 68, 69 (and see *per* Walworth, Chan.); Weidner *v.* Foster, 2 Penn. 23; Farley *v.* Craig, 11 N. J. L. 262.

In Demainville *v.* Mann, 32 N. Y. 197, it was held that the assignee of an undivided part, if in possession of whole was liable for whole rent, but in St. Louis Pub. Schools *v.* Boatmen's Ins. Co., 5 Mo. App. 91, in a similar case, just the opposite was held.

Where the rent is a service indivisible, assignment by lessee multiplies (*per* Jewett, J., in Van Rensselaer *v.* Bradley, 3 Denio (N. Y.) 135, 141, 142), and by lessor extinguishes it.

SECT. 7. — *Sub-lease.*

Sub-lease for whole term is an assignment. — A sub-lease is a demise by a lessee (or his assignee) for a less term than he himself has.[1] A demise for the whole term, if it be by deed, amounts to an assignment (*o*).[2] A fortiori, a lease by deed for a period beyond the term will operate as an assignment.[3] But there are many cases in which a sub-lease by parol for the whole term has been allowed to operate as such, so as to give the under-lessor a right to an action for rent (*p*), but not a right to distrain (*q*).

What sub-leases are good. — A sub-lease for years made by a lessee for years, to commence immediately on his death, is good, if he die during his own term; therefore a man possessed of a term for twenty years may grant the lands for nineteen years to commence after his death, and it [*265] will be good for *so many of the twenty years as shall be unexpired at the time of his death. Where a lessee has power to renew his term upon giving six months'

(*o*) Hicks *v.* Downing, 1 Ld. Raym. 99; Wollaston *v.* Hakewill, 3 M. & G. 297; Beardman *v.* Wilson, L. R., 4 C. P. 57; 38 L. J., C. P. 91; 19 L. T. 282; 17 W. R. 54.

(*p*) Poulteney *v.* Holmes, 1 Str. 405; Smith *v.* Mapleback, 1 T. R. 445; Pollock *v.* Stacy, 9 Q. B. 1033; Williams *v.* Hayward, 1 E. & E. 1040; Baker *v.* Gostling, 1 Bing. N. C. 19; *In re* Turner, 11 Ir. Ch. R. 304.

(*q*) Preece *v.* Corrie, 5 Bing. 24; Pascoe *v.* Pascoe, 3 Bing. N. C. 898.

[1] **Sub-lease.** (*a*) *What is it.* — See *ante*, sec. 5, note, "Assignment, distinguished from sub-lease."

A lessee may sublet unless restrained by terms of lease. Goldsmith *v.* Wilson, 68 Iowa, 685.

Lease for twenty years by tenant for lives is a sub-lease, Jackson *v.* Silvernail, 15 Johns. (N. Y.) 278; or for two years, by tenant for seven years, Jackson *v.* Harrison, 17 Johns. (N. Y.) 66.

(*b*) *Remedies and liabilities.* — Sub-lessee's remedies are against the lessee, Quay *v.* Lucas, 25 Mo. App. 4; and he is not liable to the lessor, Quackenboss *v.* Clarke, 12 Wend. (N. Y.) 487, 492; Williams *v.* Woodard, 2 Id. 487, 492 (*per* Savage, Ch. J.); Gibson *v.* Mullican, 58 Tex. 430; Fulton *v.* Stuart, 2 Ohio, 216.

In Missouri a sub-lessee is liable, by statute, for rent directly to the lessor. Rev. St. of Mo. sec. 3095; Hicks *v.* Martin, 25 Mo. App. 359.

[2] Bedford *v.* Terhune, 30 N. Y. 453; Ind., &c., R. R. Co. *v.* Cleveland R. R., 45 Ind. 281; Smiley *v.* Van Winkle, 6 Cal. 605; Blumenberg *v.* Myres, 32 Id. 93. It is not always necessary to be by deed in United States.

[3] Stewart *v.* Long I. R. R. Co., 102 N. Y. 601; Selby *v.* Robinson, 15 C. P. U. C. 370.

notice of his intention before its expiration, and upon his preparing a fresh lease, &c., he cannot, though he gave notice of such his intention, demise the premises to another party beyond the expiration of the first term, unless he prepare such fresh lease and get it executed, or at least endeavour so to do (*r*).

Rights of lessor against sub-lessee. — There being no privity of contract between the lessor and the sub-lessee, the lessor cannot sue the sub-lessee on any of the covenants of the original lease (*s*), but the lessor may distrain on the sub-lessee for the rent payable under the original lease, and may also avail himself of a condition for forfeiture in the original lease (*t*).

An injunction has also been granted to restrain a sub-lessee from permitting a sale by auction in contravention of a covenant in the original lease (*u*), and to restrain a sub-lessee from using the demised premises for a particular trade, in contravention of a covenant in the assignment of the premises to his lessor (*x*).

Sales of sub-leases. — A contract to sell a lease is not satisfied by the conveyance of a sub-lease (*y*), for a sub-lease might become void if the covenants and conditions in the original lease were not duly performed (*z*). But on the purchase of a sub-lease it is not a valid objection to the title that the sub-lease may become forfeited by the non-performance of the covenants in the original lease (*a*). It is the duty of a person contracting for a sub-lease to ascertain the contents of the original lease (*b*).

Covenant to perform covenants of head lease. — A sub-lease should always contain an express covenant by the sub-lessee,

(*r*) Mackay *v.* Mackreth, 4 Doug. 213.

(*s*) Holford *v.* Hatch, 1 Doug. 183.

(*t*) Arnold *v.* Woodward, 6 B. & C. 519.

(*u*) Parker *v.* Whyte, 1 H. & M. 167; 32 L. J., Ch. 520.

(*x*) Clement *v.* Welles, L. R., 1 Eq. 209; 35 Beav. 213.

(*y*) Madeley *v.* Booth, 2 De G. & Sm. 718; Darlington *v.* Hamilton, Kay, 550; Blake *v.* Phinn, 3 C. B. 976; Henderson *v.* Hudson, 15 W. R. 860; Sheard *v.* Venables, 36 L. J., Ch. 922; 15 W. R. 1166; Duddell *v.* Simpson, L. R., 2 Ch. Ap. 102.

(*z*) Doe *d.* Muston *v.* Gladwin, 6 Q. B. 953; Logan *v.* Hall, 4 C. B. 598.

(*a*) Hayford *v.* Criddle, 22 Beav. 477.

(*b*) Cosser *v.* Collinge, 3 Myl. & K. 283.

to observe and perform all the covenants and conditions in the original lease, except those which he is especially exempted from performing (*c*).

Such a contract was held in the important case of Hornby *v.* Cardwell, Hanbury, Third Party (*d*), to amount to a contract of indemnity, so that the sub-lessee is liable to the mesne landlord for the costs of an action (reasonably defended) by the head landlord against the mesne landlord on the contracts of the head lease, where as there is no such indemnity if the contract of the sub-lessee be merely to perform similar contracts to those contained in the head lease (*e*).

[*266] * **Bringing in sub-lessee as third party.** — Where there is a contract to perform all the contracts of the head lease, and both the contracts of the head lease and the mesne lease are broken, the head landlord (although he can eject) cannot sue the sub-tenant for damages, there being no privity of contract between them; but the head landlord may sue the mesne landlord, who, in his turn, may sue the sub-tenant, or pursue what seems to be the more convenient course of bringing him in as third party under sect. 24, sub-s. 3 of the Judicature Act, 1873, and Order XVI., Rules 17-19 of the Rules of the Supreme Court. If this be done, the High Court has a discretion, under Order LV., to order the sub-tenant so made third party to pay the costs of an action by the head landlord against the mesne landlord reasonably defended (*f*).

Sub-lessee not affected by surrender. — A sub-lessee is not affected by the voluntary surrender of the lease by his mesne landlord to the superior landlord; nor, if he has knowledge of it, is he bound in any way to treat it as a notice to quit (*g*).

(*c*) See Form, Appendix A., Sect. 14.

(*d*) L. R., 8 Q. B. D. 329; 51 L. J., Q. B. 89; 45 L. T. 781; 30 W. R. 263—C. A.

(*e*) Logan *v.* Hall, 4 C. B. 598; Penley *v.* Watts, 7 M. & W. 601; Walker *v.* Walton, 10 M. & W. 249; overruling Neale *v.* Wyllie, 3 B. & C. 533.

(*f*) Hornby *v.* Cardwell, Hanbury, Third Party, L. R., 8 Q. B. D. 329—C. A.

(*g*) Mellor *v.* Watkins, L. R., 9 Q. B. 400; 23 W. R. 55.

Sect. 8. — *Attornment.*

Origin of attornment. — After the statute *Quia emptores* (*h*), by which subinfeudation was prohibited, it became necessary when the reversioner or remainderman after an estate for years, for life or in tail, granted his reversion or remainder, that the particular tenant should attorn to the grantee (*i*). This necessity of attornment was in some degree diminished by the Statute of Uses (*k*), whereby the possession was immediately executed to the use: and by the Statute of Wills (*l*), by which the legal estate was immediately vested in the devisee.

Substitution of notice for attornment. — Attornments, however, have long been rendered unnecessary in nearly every case by the 4 Ann. c. 16, s. 9, which enacts, that "all grants or conveyances, by fine or otherwise, of any manors or 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 tenants of any such manors, or of the land out of which such rents shall be issuing, or of the particular tenants upon whose particular estates any such reversions or remainders shall and may be expectant or depending, as if their attornment had been had and made" (*m*); but by sect. 10 it is provided that "no such tenant shall be prejudiced * or damaged by pay- [*267] ment of any rent to any such 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" (*n*).

Attornments to strangers void. — By 11 Geo. 2, c. 19, s. 11, attornments made by tenants to strangers claiming title to the estate of their landlords shall be null and void, and their landlords' possession not affected thereby, unless made "pur-

(*h*) 18 Edw. 1, st. 1.

(*i*) Shep. Touch. chap. xiii.

(*k*) 27 Hen. 8, c. 10; Rivis *v.* Watson, 5 M. & W. 255.

(*l*) 34 & 35 Hen. 8, c. 5, repealed and re-enacted by 1 Vict. c. 26.

(*m*) This appears to have been overlooked in Edwards *v.* Wickwar, L. R., 1 Eq. 403.

(*n*) See Cook *v.* Moylan, 1 Exch. 67; 5 D. & L. 101; Cole Ejec. 229, 473.

suant to and in consequence of some judgment at law, or decree or order of a court of equity; or made with the privity and consent of the landlord or landlords, lessor or lessors; or to any mortgagee after the mortgage is become forfeited."

Attornment by mortgagor to mortgagee. — For the purpose of securing mortgage interest by the preferential powers of distress for rent, it has been the practice for mortgagors to "attorn tenants" to their mortgagees. The cases upon this subject have been already considered (*o*).

Assignee may sue or distrain without attornment. — An assignee of the reversion, whether by way of mortgage or otherwise, if he has given due notice under 4 Ann. c. 16, s. 9, may sue or distrain for the rent (*p*). It makes no difference that the previous tenancy was only from year to year (*q*). But a prior mortgagee is not an assignee of the reversion, and therefore cannot distrain or sue for the rent until after the mortgagor's tenant has attorned to him, and so created a new tenancy as between them (*r*). After an attornment the mortgagee may distrain for the arrears of rent thereby admitted to be due (*s*). Such attornment may be made "after the mortgage is become forfeited" without the assent of the mortgagor (*t*).

No stamp on mere attornments. — An instrument in writing, professing to be a mere attornment, but which is in fact an agreement to create a fresh tenancy on new terms, requires a stamp as a lease or as an agreement for a lease (*u*). But a mere memorandum of attornment, not creating any new ten-

(*o*) *Ante*, ch. vi., sect. 6.

(*p*) Lumley *v.* Hodgson, 16 East, 99; Rivis *v.* Watson, 5 M. & W. 255; Lloyd *v.* Davies, 2 Exch. 103.

(*q*) Burrowes *v.* Gradin, 1 D. & L. 213; Harmer *v.* Bean, 3 C. & K. 307.

(*r*) Evans *v.* Elliott, 9 A. & E. 342; Partington *v.* Woodcock, 6 A. & E. 690; Rogers *v.* Humphreys, 4 A. & E. 313. See Forms of Attornment, Appendix C., Nos. 16 and 16 (a).

(*s*) Gladman *v.* Plumer, 15 L. J., Q. B. 79; 10 Jur. 109.

(*t*) Moss *v.* Gallimore, 1 Smith L. C. 629 (7th ed.); Doe *d.* Higginbotham *v.* Barton, 11 A. & E. 314; Doe *d.* Mayor, &c., of Poole *v.* Whitt, 15 M. & W. 571; Hickman *v.* Machin, 4 H. & N. 720; but see Alchorne *v.* Gomme, 2 Bing. 54, 59, 61; Delaney *v.* Fox, 2 C. B., N. S. 768.

(*u*) Cornish *v.* Searall, 8 B. & C. 471; Doe *d.* Frankis *v.* Frankis, 11 A. & E. 792; Eagleton *v.* Gutteridge, 11 M. & W. 465; 2 Dowl., N. S. 1053.

ancy, or fresh terms, but merely substituting one landlord for another, does not require a stamp either as a lease or as an agreement (*v*). An instrument in these terms: "I hereby certify that I remain in the house No. 3, Swinton Street, belonging to W. G., on sufferance * only, and [*268] agree to give him possession at any time he may require:" was held not to amount to an agreement for a tenancy so as to require a stamp (*x*).

Effect of attornment as an estoppel. — An attornment generally estops the party making it from denying the title of the person to whom the attornment is made (*y*). Thus where an attornment was made to the claimants in an ejectment, who derived their title under a will, the tenant was held to be estopped from contending in a subsequent action that upon the true construction of the will the claimants had no title (*z*), although on a previous occasion it had been decided that the tenant might show the attornment to have been made by mistake and under suspicious circumstances, and that it had not been acted on for seven years, and a conveyance to himself made by the real owner (*a*). A. and B., tenants in common, having agreed to divide their property, and that *Blackacre* should belong to A.; the occupier of *Blackacre*, who after this agreement had paid his whole rent to A., cannot in an ejectment brought against him by A. object that the partition deed between A. and B. is not executed (*b*). Where a tenant had attorned and paid rent to a devisee of the landlord, and no fraud or misrepresentation had been practised towards him, it was held that he could not afterwards dispute the devisee's title by evidence showing that the testator was incompetent to make a will (*c*). Attornment by tenant to heir upon threat of eviction is tantamount to entry by the heir, and prevents the tenant from

(*v*) Doe *d.* Linsey *v.* Edwards, 5 A. & E. 95, 102; Doe *d.* Wright *v.* Smith, 8 A. & E. 255.

(*x*) Barry *v.* Goodman, 2 M. & W. 768.

(*y*) Cole Ejec. 218, 219, 230.

(*z*) Gravenor *v.* Woodhouse, 2 Bing. 71.

(*a*) Gravenor *v.* Woodhouse, 1 Bing. 38.

(*b*) Doe *d.* Pritchett *v.* Mitchell, 1 Brod. & B. 11; 3 Moo. 219; and see Arden *v.* Sullivan, 14 Q. B. 832.

(*c*) Doe *d.* Marlow *v.* Wiggins, 4 Q. B. 367.

afterwards disputing his title (*d*). So, where a tenant of glebe land, has attorned and paid rent to the subsequent incumbent, he will not be permitted to dispute his title by evidence of a simoniacal presentation of the incumbent (*e*). Sometimes, however, a tenant who has attorned will be allowed to prove that such attornment was procured by fraud, covin or misrepresentation, or that it was made by mistake and in ignorance of material facts, and that the person to whom the attornment was made really had no title (*f*). Thus where A., being tenant to B. who died, afterwards attorned to C. as heir of B., in ignorance that C.'s title as heir was disputed: held, that A. was not thereby estopped from showing that C. really had no title to the property, and that the attornment to him was a mistake (*g*). Where a person, having possession of land under a good title, became [*269] tenant and paid rent to a stranger, it was *held, that he was not estopped, after such tenancy had determined and before he had given up possession, from setting up his own prior title in an ejectment by his lessor (*h*). But it is to be observed that in all such cases the onus of proof as to the title, &c., is shifted and thrown upon the person who attorned, and he must (amongst other things) *disprove* the title of the person to whom such attornment was made, which is sometimes impracticable or very difficult.

What amounts to an attornment. — Payment of rent by a tenant to his landlord, after the title of the latter had expired, and after the tenant had received notice of an adverse claim, does not amount to an acknowledgment of title in the landlord, or to a virtual attornment; unless at the time of such payment the tenant heard the precise nature of the adverse claim, or how the landlord's title had expired (*i*). Where A. was tenant of premises under a lease granted by

(*d*) Hill *v.* Saunders, 4 B. & C. 529.

(*e*) Cooke *v.* Loxley, 5 T. R. 4.

(*f*) Rogers *v.* Pitcher, 6 Taunt. 202; Cornish *v.* Searall, 8 B. & C. 471; Doe *d.* Plevin *v.* Brown, 7 A. & E. 447; Brook *v.* Biggs, 2 Bing. N. C. 572; Hughes *v.* Hughes, 15 M. & W. 703.

(*g*) Gregory *v.* Doidge, 3 Bing. 474.

(*h*) Accidental Death Insurance Co. *v.* Mackenzie, 9 W. R. 713.

(*i*) Fenner *v.* Duploc, 2 Bing. 10; England *v.* Slade, 4 T. R. 682; Gregory *v.* Doidge, 3 Bing. 474; Claridge *v.* Mackenzie, 4 M. & G. 143.

B., and a sequestration issued out of the Court of Chancery against the latter; and A. then signed the following instrument: "I hereby attorn and become the tenant to C. and D., two of the sequestrators named in the writ of sequestration issued in the said suit in Chancery, and to hold the same for such time and upon such conditions as may be subsequently agreed upon:" it was held, that this was an agreement to become tenant, and operated as an attornment; and also that as A. had not received possession from C. and D. he was not estopped by the attornment from disputing their title to the premises (*k*). But an instrument whereby the tenant merely puts one person in the place of another as his landlord, and continues to hold under the same terms and conditions as before, is a mere attornment and not an agreement, and is evidence of ownership at the time it was executed against future occupiers, though they do not claim through the person who signed it (*l*). If an attornment be relied on to defeat the Statute of Limitations it must be made before action brought (*m*), and the defendant may contend that the party making such attornment did so without any intention to admit the party's right or title, and in ignorance that it would have that effect (*n*).

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* Sect. 9. — *Writs of Execution.* [*270]

(a) *Fieri Facias.*

Seizure of term under fi. fa. — Under the writ of fieri facias the sheriff may levy the debt on the lands or goods of the debtor, and may therefore seize a leasehold interest.[1]

(*k*) Cornish *v.* Searall, 8 B. & C. 471; but see Hall *v.* Butler, 10 A. & E. 204.

(*l*) Doe *d.* Linsey *v.* Edwards, 5 A. & E. 95; Doe *d.* Wright *v.* Smith, 8 A. & E. 255; Cole Ejec. 229.

(*m*) Doe *d.* Mee *v.* Leatherhead, 4 A. & E. 784.

(*n*) Doe *d.* Linsey *v.* Edwards, 5 A. & E. 95, 106; Kearny *v.* Genner, cited Cole Ejec. 231.

[1] **Seizure on execution.** — The officer may levy by extent upon a life estate as realty, Chapman *v.* Gray, 15 Mass. 439; but cannot, upon a term for years, because it is a chattel, Chapman *v.* Gray, 15 Mass. 439, unless made

Yearly tenancy. — He may also seize the interest of a tenant under a tenancy from year to year (*o*).

Sheriff's duty on executing a fi. fa. — When the sheriff under a writ of fieri facias seizes a lease (actually or constructively) and sells the term, he must make an assignment of it by deed.[1] If he merely puts the execution creditor in possession, that will not pass the term and the debtor may recover in ejectment (*p*). Seizure by a sheriff of a lease of a debtor's dwelling-house does not vest the term in the sheriff, but it remains in the debtor, even though sold by public auction, until after the sheriff executes an assignment to the purchaser (*q*). If the sheriff sells the term before the writ is returnable, but does not execute the assignment to the vendee till a subsequent period, the assignment is valid (*r*). Any such assignment may be made by the undersheriff in the name and under the seal of office of the sheriff (*s*). Where a sheriff takes a lease and fixtures in execution, he must sell the fixtures separately, if he cannot find a purchaser for the whole (*t*). Where an outgoing

(*o*) Doe *d.* Westmoreland *v.* Smith, 1 M. & R. 137.

(*p*) Doe *d.* Hughes *v.* Jones, 9 M. & W. 372; 1 Dowl., N. S. 352; Cole Ejec. 569.

(*q*) Playfair *v.* Musgrove, 14 M. & W. 239; 3 D. & L. 72.

(*r*) Doe *d.* Stevens *v.* Donston, 1 B. & A. 230.

(*s*) Doe *d.* James *v.* Brawn, 5 B. & A. 243; cited 8 Q. B. 1042.

(*t*) Barnard *v.* Leigh, 1 Stark. R. 43.

freehold by statute. Terms for one hundred years or more, whereof fifty years remain unexpired, are, for certain purposes, declared freeholds in Massachusetts, and may be levied upon as real estate. Pub. Sts. Mass. ch. 121, sec. 1.

Terms for years of no matter how long duration (unless made freeholds) may be sold on execution as chattels. Lessee of Bisbee *v.* Hall, 3 Ohio, 449, 465; People *v.* Westervelt, 17 Wend. (N. Y.) 674.

[1] **Sheriff's deed.** — The purchaser of a lease at judicial sale is liable both for the premium paid for it and for the rent for the unexpired term. D'Aquin *v.* Armant, 14 La. An. 217; Brinton *v.* Datas, 17 Id. 174; Hayden *v.* Shiff, 12 Id. 524; Matter of Morgan R. R. & S. S. Co., 32 Id. 371, 375, 376; Lehman *v.* Dreyfus, 37 Id. 587. If lessee pay subsequent rent, assignee is liable over to him, Lehman *v.* Dreyfus, 37 La. An. 587, 588 (and *per* Manning, J.); and lessee's creditors may garnish it.

He is not liable for rent between the sale and date of the deed. Thomas *v.* Connell, 5 Pa. St. 13.

In Wickersham *v.* Irwin, 14 Pa. St. 108, it was held that a purchaser who had never entered possession, but had given the lease to another who had, was not liable for rent to the lessor.

tenant has agreed to assign the remainder of his term, the sheriff, before an actual assignment made, may sell the term under a fi. fa. against the tenant, and put upon it the value agreed to be given by the incoming tenant (*u*).

Equitable Interest. — Before the Judicature Act, an equitable interest in a term could not be seized and sold under a fi. fa. (*x*), but it would seem that it might have been reached in a court of equity (*y*), and that the effect of the Judicature Act is to render such an interest liable to execution generally, though this has been doubted (*z*).

Possession under fi. fa. — When the sheriff seizes and sells a term under a fi. fa., he does not usually put the purchaser into actual possession of the property, especially if there be an under-tenant (*a*): but the purchaser is left to *obtain actual possession by ejectment (*b*), or to [*271] recover the rent from any under-tenant by distress or action in the usual manner (*c*). The purchaser becomes liable to the rent and covenants in the lease in like manner as any other assignee of the term (*d*). But the lessee continues liable on his covenants in the lease to pay rent and to repair, &c., notwithstanding the term has been taken from him under the execution (*e*), in like manner as he would have done had he executed an assignment of the term to a purchaser, in which case he would have probably had the usual covenant of indemnity from such rent and covenants.[1]

(*u*) Sparrow *v.* Earl of Bristol, 1 Marsh. 10.

(*x*) Scott *v.* Scholey, 8 East, 467; Metcalfe *v.* Scholey, 2 Bos. & P., N. R. 461; Burden *v.* Kennedy, 3 Atk. 739; Martindale *v.* Booth, 3 B. & Ad. 498; The Mayor, &c., of Poole *v.* Whitt, 15 M. & W. 571.

(*y*) Gore *v.* Bowser, 3 Sm. & Giff. 1; 24 L. J., Ch. 316, 440; Partridge *v.* Foster, 10 Jur., N. S. 741; 12 W. R. 1127.

(*z*) See Atkinson on Sheriff.

(*a*) Taylor *v.* Cole, 3 T. R. 295; 1 Smith L. C. 115 (6th ed.); Rumball *v.* Murray, 3 T. R. 298; Miller *v.* Parnell, 2 Marsh. 78.

(*b*) Cole Ejec. 569.

(*c*) Lloyd *v.* Davies, 2 Exch. 103; Mayor, &c., of Poole *v.* Whitt, 15 M. & W. 571.

(*d*) 1 Doug. 184.

(*e*) Auriol *d.* Mills, 4 T. R. 98; 1 Smith L. C. 782 (6th ed.).

[1] **Purchase of reversion.** — The purchaser of a reversion at judicial sale is entitled to the rents only from the date of acknowledgment of sheriff's deed, Scheerer *v.* Stanley, 2 Rawle (Pa.) 276; Bank of Penn. *v.* Wise, 3 Watts (Pa.) 394; Braddee *v.* Wiley, 10 Id. 362; and in Farmers & Mechanics' Bank *v.* Ege, 9 Id. 436, it was held that rent paid in advance, according to the

(b) *Elegit.*

Writ of elegit. — Under a writ of elegit the sheriff, instead of levying, delivers to the creditor who *elects* this remedy in preference to a levy, the lands of the debtor. The Statute of Westminster 2 from which the writ is derived, provided for the delivery of "all the chattels" and half the land. The Bankruptcy Act, 1883, s. 146, enacts that a writ of elegit "shall not extend to goods," but it is submitted that a leasehold interest does not come within the expression "goods" in that section. The statute 1 & 2 Vict. c. 110, s. 11, authorizes the delivery under an elegit of all the lands instead of half only. The words of this section, which appear to include leaseholds (*f*), are that the sheriff may "make and deliver execution unto the party in that behalf suing of *all* such lands, tenements, tithes, rents, and hereditaments, including lands and hereditaments of copyhold and customary tenure, as the person against whom execution is so sued, or any person in trust for him, shall have been seised or possessed of at the time of entering up the said judgment (*g*), or at any time afterwards, or over which such person shall at the time of entering up such judgment, or at any time afterwards, have any disposing power which he might, without the assent of any other person, exercise for his own benefit" (*h*).

The same land cannot be extended under two or more elegits, nor can the sheriff be entitled to poundage under more than one of such writs (*i*). But if two or more elegits be delivered to the sheriff, he should execute and give [*272] priority to that which was first delivered to *him, and return to the other that he has not delivered the

(*f*) See Rolleston *v.* Morton, 18 M. & W. at p. 182, decided on the Irish Act, 3 & 4 Vict. c. 105; Harris *v.* Davidson, 15 Sim. at p. 138, decided on s. 13 of 1 & 2 Vict. c. 110.

(*g*) The estates and interests of subsequent *bonâ fide* purchasers and mortgagees will not be affected, unless the judgment, &c., be duly registered. See *post*, 272.

(*h*) 1 & 2 Vict. c. 110, s. 11.

(*i*) Carter *v.* Hughes, 2 H. & N. 714.

contract for current year, could not be collected over again, though otherwise by statute, if it had been voluntarily paid.

land to the plaintiff by a reasonable price and extent, the same having been already extended and delivered to A. B. under a writ of elegit dated, &c., which had previously been delivered to him to be executed according to law.

The sheriff does not usually deliver actual possession of the property to the execution creditor: but it seems that he may lawfully do so where the debtor himself is in occupation (*k*). Tenants of the debtor cannot be turned out of possession under an elegit (*l*). The writ and inquisition thereon, when returned and filed, operate only as an assignment of the reversion; and therefore the judgment creditor cannot maintain ejectment against the tenants in possession until after their respective terms have expired or been duly determined by notice to quit or otherwise (*m*). But he may, like any other assignee of the reversion, sue or distrain for the rent which becomes due after the filing of the writ and the return thereto, and that without any previous attornment by the tenant (*n*), provided the writ and inquisition be valid, but not otherwise (*o*). He is not entitled to any rent which became due before the inquisition, although after the delivery of the writ to the sheriff (*p*). He may give a tenant such notice to quit as the debtor himself might have given, and afterwards maintain ejectment (*q*). If the tenancy commenced after the judgment was entered up and duly registered, an ejectment may be maintained against such tenant without previous notice to quit (*r*). So if the debtor himself is in actual possession (*s*).

When the debt and costs have been satisfied, and that appears upon an account taken by the master, the court will

(*k*) Rogers *v.* Pitcher, 6 Taunt. 206; Chatfield *v.* Parker, 8 B. & C. 543.

(*l*) Taylor *v.* Cole, 3 T. R. 295.

(*m*) Doe *d.* Da Costa *v.* Wharton, 8 T. R. 2; Cole Ejec. 566.

(*n*) Lloyd *v.* Davies, 2 Exch. 103; Ramsbottom *v.* Buckhurst, 2 M. & S. 565.

(*o*) Arnold *v.* Ridge, 13 C. B. 745; Cole Ejec. 566.

(*p*) Sharp *v.* Key, 8 M. & W. 379; 9 Dowl. 770.

(*q*) Cole Ejec. 566.

(*r*) Doe *d.* Putland *v.* Hilder, 2 B. & A. 782; Doe *d.* Evans *v.* Owen, 2 C. & J. 71; but see 27 & 28 Vict. c. 112, s. 1, *post*.

(*s*) Doe *d.* Parr *v.* Roe, 1 Q. B. 700; Doe *d.* Roberts *v.* Parry, 13 M. & W. 356; 2 D. & L. 430; Cole Ejec. 566.

order possession of the land to be restored to the defendant (*t*).

Registration of judgments, &c. — Judgments, &c., will not affect lands situate in Middlesex or Yorkshire, as against bonâ fide purchasers and mortgagees, until a memorial thereof is registered pursuant to the statutes in that behalf (*u*). In those and also in other counties, judgments, &c. must be registered with the senior master of the Common Pleas, and execution thereon actually executed and registered, otherwise they will not prejudice subsequent bonâ fide [*273] purchasers and mortgagees, with or without * notice of the judgment (*x*). In the counties palatine of Lancaster and Durham, judgments, &c. must be registered with the proper officers of the courts there (*y*), and execution thereon actually executed and registered.

By 23 & 24 Vict. c. 38, s. 1, "no judgment, statute or recognizance to be *entered up after the passing of this act* (*z*) shall affect any land (of whatever tenure) as to a bonâ fide purchaser for valuable consideration, or a mortgagee (whether such purchaser or mortgagee have notice or not of any such judgment, statute or recognizance), unless a writ or other due process of execution of such judgment, statute or recognizance shall have been issued and registered as hereinafter is mentioned before the execution of the conveyance or mortgage to him, and the payment of the purchase or mortgage money by him: provided always that no judgment, statute or recognizance to be *entered up after the passing of this act* (*a*) nor any writ of execution or other process thereon, shall affect any land, of whatever tenure, as to a bonâ fide purchaser or mortgagee, although execution or other process shall have issued thereon and have been duly registered, unless such execution or other process shall be executed and

(*t*) Price *v.* Varney, 3 B. & C. 733; Hughes *v.* Lumley, 4 E. & B. 274.

(*u*) Benham *v.* Keane, 31 L. J. Ch. 129; 8 Jur., N. S. 604.

(*x*) 1 & 2 Vict. c. 110, s. 19; 2 & 3 Vict. c. 11; 3 & 4 Vict. c. 82; 18 & 19 Vict. c. 15; 22 & 23 Vict. c. 35, s. 22; 23 & 24 Vict. c. 38, *supra;* 27 & 28 Vict. c. 112.

(*y*) 18 & 19 Vict. c. 15.

(*z*) 23rd July, 1860. If entered up after 29th July, 1864, see 27 & 28 Vict. c. 112, s. 1.

(*a*) 23rd July, 1860. If entered up after 29th July, 1864, see 27 & 28 Vict. c. 112, s. 1.

put in force within three calendar months from the time when it was registered."

By 27 & 28 Vict. c. 112, s. 1, "no judgment, statute or recognizance to be entered up *after the passing of this act* (*b*) shall affect any land (of whatever tenure) until such land shall have been *actually delivered in execution* by virtue of a writ of elegit or other lawful authority, in pursuance of such judgment, statute or recognizance." And by sect. 3, the writ itself must be registered pursuant to 23 & 24 Vict. c. 38; after which a summary remedy is given by petition to the Chancery Division of the High Court for a sale of the debtor's interest in the land (*c*). This act includes equitable interests (*d*) and since the Judicature Act it has been unnecessary for a creditor, seeking to obtain equitable execution thereunder upon an equitable interest, previously to sue out an elegit (*e*); the appointment of a receiver is a delivery in execution by lawful authority (*f*).

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* Sect. 10. — *Bankruptcy of Lessor.*[1] [*274]

Reversion vests in trustees. — The reversion in lands held by lease under a landlord becoming bankrupt will under the term "property" vest in his trustees in bankruptcy (*g*), to whom there will be an assignment of the reversion by operation of law.[2] It is conceived that the statute 34 Hen. 8, c. 34 (*h*), whereby the assignee of the reversion may sue the

(*b*) 29th July, 1864.

(*c*) Sects. 4, 5, 6; see also Jud. Act, 1873, s. 34.

(*d*) Halton *v.* Haywood, L. R., 9 Ch. 229.

(*e*) Evans, *Ex parte*, Watkins, In R. L. R., 13 Ch. D. 252; 49 L. J. Bank. 7, C. A.

(*f*) Ib.

(*g*) Bankruptcy Act, 1883, ss. 64, 168.

(*h*) *Ante*, p. 252.

[1] The last United States Bankruptcy Act was the act of March 2, 1867. This was amended June 22, 1874, and repealed June 7, 1878.

The prior acts were the acts of 1800 and 1841.

The English Bankruptcy Acts of 1869 and 1883 have some material variations not found in the American acts. The subject of bankruptcy is still important here, owing to the existence of insolvency laws and liability to a re-enactment of a bankruptcy law at any time.

[2] The reversion passes to the assignee, subject to the lease. Meador *v.* Everett, 10 Nat. Bankr. Reg. 421.

lessee on the covenants, does not apply to such an assignment, but whether this be so or not is of little consequence, inasmuch as by sect. 57 of the Bankruptcy Act, 1883, trustees in bankruptcy may bring or defend any action, or other legal proceeding, relating to the property of the bankrupt.

The Bankruptcy Act contains no special provisions as to the tenants of a bankrupt. In the possible event of a reversion binding the landlord to an act so onerous as to make it worthless in the hands of the trustees, they may disclaim it as being "land burdened with onerous covenants" under sect. 55 of the act (*i*).[1] Under sect. 23 of the Act of 1869, the reversion, like any freehold estate, would probably, on disclaimer, have vested in the Crown (*j*), but by sect. 55, sub-sect. 6 of the Act of 1883 (*k*) the court may make a vesting order of any disclaimed property, and a tenant would no doubt have a *locus standi* to apply to have such a vesting order made in his favour.

Bankruptcy of lessor determines tenancy at will. — The bankruptcy of the landlord as soon as known to a tenant at will operates as a determination of the will, inasmuch as it works an assignment of the reversion (*l*).

Bankruptcy of mesne landlord. — If the lessor be himself a tenant having created a sub-lease, the provisions of sect. 55, as to disclaimer, and especially of sub-sect. 2 and 6 thereof (post, pp. 280, 281), should be carefully considered.

SECT. 11. — *Bankruptcy of Lessee.*

(a) *Re-entry by landlord for forfeiture.*

Proviso for re-entry lawful. — A proviso for re-entry by the lessor in case of the bankruptcy of the lessee has for a long

(*i*) See the effect of this section, *post*, 279.

(*j*) *Re* Mercer and Moore, L. R., 14 Ch. D. 278.

(*k*) *Post*, p. 281.

(*l*) Doe *v.* Thomas, 6 Ex. 854; 20 L. J., Ex. 367.

[1] Assignee is not bound to take property which is burdensome. Amory *v.* Lawrence, 3 Cliff. 523; Glenn *v.* Howard, 65 Md. 40.

If the interest is beneficial, he may be compelled to accept. Exp. Fuller, 2 Story, 327.

time been commonly inserted in leases; and in 1787 it was held in Roe *d.* Hunter *v.* Galliers (*m*), that such a proviso was perfectly good. Such a proviso, in all except building leases, is at the present day perhaps more commonly inserted than not, but it has been held nevertheless not to be a "usual" one (*n*). A proviso *for re-entry if the [*275] lessee should be bankrupt or file a petition in liquidation, in a lease executed before the Act of 1883, may be put in force upon the presentation of a petition under that act (*o*). A condition for actual occupation by the tenant may be put in operation if trustees in bankruptcy take possession and assign to a purchaser (*p*) and so may the ordinary proviso for re-entry in case of bankruptcy notwithstanding any such assignment; but if the proviso be merely for re-entry in case of assignment without licence, and do not extend to bankruptcy, the trustees may disregard it, and assign without any licence from the landlord (*q*).

Ejectment on proviso for re-entry; no relief. — The proviso for re-entry in case of bankruptcy may be put in force by peaceable entry or by action of ejectment, and this is one of the cases in which the notice ordinarily required by sect. 14 of the Conveyancing Act (*r*) is expressly dispensed with by that section (*s*). But there is no obligation upon the landlord to announce either to the bankrupt or his trustees whether he intends to take advantage of the proviso or not. If, however, after the act of bankruptcy or adjudication or other act to which the proviso applies, he accept or distrain for rent with knowledge of such act, he will have waived the forfeiture (*t*) and the trustees will have become his tenants, they, however, on their part being at liberty to disclaim the lease within the time and under the restrictions limited by sect. 55 of the Act of 1883.

(*m*) 2 T. R. 133. The lease was an agricultural one.

(*n*) Hyde *v.* Warden, L. R., 3 Ex. D. 72, and see *ante*, 122.

(*o*) Gould, *Ex parte*, Walker, *In re*, L. R., 13 Q. B. D. 454; 51 L. T. 368; B. R. 168.

(*p*) Doe *d.* Lockwood *v.* Clarke, 8 East.

(*q*) Doe *v.* Bevan, 3 M. & S. 353, and *post*, p. 276.

(*r*) *Post*, p. 330.

(*s*) See Gould, *Ex parte*, L. R., 13 Q. B. D. 454.

(*t*) *Post*, Ch. VIII. Sect. 5.

Effect of proviso for re-entry on building materials. — It has been held that in a building agreement a stipulation for forfeiture of building materials in event of the bankruptcy of the builder is void as contrary to the policy of the law of bankruptcy, and that such materials pass to the trustees notwithstanding the stipulation (*u*).

Tenant-right. — It has not been expressly decided whether a "tenant-right" to allowances for seed and labour, &c., under a custom of the country passes to trustees in bankruptcy upon a proviso for re-entry in case of bankruptcy. The landlord is entitled to emblements in such a case (*x*) and in Silcock *v.* Farmer (*y*) it was held by the Court of Appeal that a stipulation to pay for hay and straw grown in the last year of the term at the expiration of the term applied only to an expiration by effluxion of time, and not to a determination by re-entry for forfeiture. This decision, [*276] which is at variance in principle with *some old authorities (*z*) would it is conceived have the effect of preventing a tenant-right under a custom from passing to the trustees, but a right to allowances under the Agricultural Holdings Act would seem to be given them by sect. 61 of that act.

Fixtures. — Removable fixtures (*a*) are removable during the term only or during such period after the expiration of it in which the tenant continues in lawful possession. Therefore after re-entry for forfeiture by bankruptcy the trustees have no right to enter and remove the fixtures (*b*), unless indeed the lease contain a stipulation for their removal by the bankrupt, in which case the trustees may enter and remove within a reasonable time after the re-entry by the

(*u*) *Ex parte* Jay, *Re* Harrison, L. R., 14 Ch. D. 19; 42 L. T. 600; 28 W. R. 449.

(*x*) See Davis *v.* Eyton, 7 Bing. 154, and Ch. XX., Sect. 3, (*c*).

(*y*) 46 L. T. 404; C. A., *per* Lord Coleridge, C. J., and Brett and Holker, L. J. J.

(*z*) See *Ex parte* Maundrell, *Re* Drake, 1 Buck, 85, in which was held in 1817 that a right to way-going crops under a lease determined by the Lord Chancellor under the repealed 49 Geo. 3, c. 121, s. 10, passed to assignees in bankruptcy.

(*a*) See as to this, *post*, Ch. XVI. Sect. 8.

(*b*) See Pugh *v.* Arton, L. R., 8 Eq. 626.

landlord (*c*) or at any rate recover them from the landlord by action (*d*).

(b) *Vesting of Lease in Trustees in Bankruptcy.*

Time of vesting. — If the lease contain no proviso of re-entry in case of bankruptcy, or if it contain one, and the landlord does not re-enter, the lease, subject to the right of disclaimer which will be considered presently, vests in the official receiver on the lessee being adjudged bankrupt, and in the bankrupt's trustees as from time of their appointment (*e*). The bankrupt's option to claim a lease passes to his trustees (*f*) and so does his contract for a lease.

Assignment by trustees. — Trustees in bankruptcy may assign the lease to a purchaser without any licence from the landlord, notwithstanding that it contain a covenant against assignment (*g*) [1] whether such covenant be with the lessee and his executors merely (*h*) or with the lessee his executors and assigns (*i*).

Personal liability. — They may also assign to a pauper for the mere purpose of getting rid of their liability (*k*) upon the covenants in the lease, which liability is personal, with a right to be indemnified out of the assets (*l*).

Tenant-right. — Set-off. — Trustees can claim against the landlord at the expiration of their own tenancy by a notice to quit all that the bankrupt tenant could have claimed against him, and the landlord cannot set off against a claim by trustees for allowances by custom a claim of his own for rent due from the tenant before the bankruptcy (*m*).

(*c*) Stansfield *v.* Mayor of Portsmouth, 4 C. B., N. S. 120.

(*d*) Gould, *Ex parte*, Walker, *In re*, *supra*, note (o).

(*e*) Bankruptcy Act, 1883, s. 54.

(*f*) See Buckland *v.* Papillon, L. R., 2 Ch. 67.

(*g*) Doe *v.* Bevan, 3 M. & S. 353.

(*h*) Doe *v.* Smith, 5 Taunt. 795.

(*i*) Doe *v.* Bevan, *ubi supra*.

(*k*) Hopkinson *v.* Lovering, 11 Q. B. D. 692.

(*l*) Titterton *v.* Cooper, L. R., 9 Q. B. D. 473; 51 L. J., Q. B. 472; 46 L. T. 670; 30 W. R. 866; Onslow *v.* Corrie, 2 Mad. 330.

(*m*) Alloway *v.* Steere, L. R., 10 Q. B. D. 22; 52 L. J., Q. B. 38; 47 L. T. 333; 31 W. R. 290.

[1] It was held in United States that a lease non-assignable without consent was cancelled by bankruptcy. *In re* O'Dowd, 8 Nat. Bankr. Reg. 451; *In re* Breck, 12 N. B. R. 215.

[*277] * **Determination of trustees' tenancy.** — The tenancy of the trustees will be determinable in the same manner as that of the bankrupt was, *i.e.*, by expiration of a lease, or by notice to quit in the case of a tenancy from year to year, given by either the trustees or the landlord. In a large number of cases, however, it is to be expected that the trustees will resort to the peculiar provisions of the Bankruptcy Act, and determine the tenancy by "disclaimer" (*n*).

Surety not discharged. — A surety for a lessee will not be discharged by his trustee taking to the lease (*o*).

User of hay and straw. — It was provided by 56 Geo. 3, c. 50 (*p*), s. 11, that "no assignee of any bankrupt" should dispose of any hay, straw, grass or grasses, turnips or other roots or any other produce "of a farm, or any manure, compost, ashes, seaweed or other dressings" intended for the farm in any other way than the bankrupt ought to have disposed of the same, if no commission of bankruptcy had issued. It was held by the Court of Appeal in Lybbe *v.* Hart (*pp*), that this act applied to a trustee in bankruptcy under the Act of 1869; and it would seem also to apply to a bankruptcy under the Act of 1883, so that a trustee, notwithstanding disclaimer, is not entitled to sell hay, &c., which is subject to a covenant for consumption on the farm.

(c) *Rescission of Lease.*

Rescission of lease. — Sect. 55, sub-sect. 5, of the Bankruptcy Act, 1883, is as follows: —

"The Court may, on the application of any person who is as against the trustee entitled to the benefit or subject to the burden of a contract made with the bankrupt, make an order rescinding the contract on such terms as to payment by or to either party of damages for the non-performance of the contract or otherwise, as to the Court may seem equitable, and

(*n*) See sub-s. (d), *infra*.

(*o*) See Harding *v.* Preece, L. R., 9 Q. B. D. 281; 51 L. J., Q. B. D. 515; 47 L. T. 100; 31 W. R. 42.

(*p*) See this Act at length, *post*, Appendix.

(*pp*) L. R. 29 Ch. D. 8; 54 L. J. Ch. 860; 52 L. T. 634. S. 149 of the Act of 1883 is similar to s. 119 of the Act of 1869 in providing for the construction of acts making mention of a "commission in bankruptcy."

any damages payable under the order to any such person may be proved by him as a debt under the bankruptcy."

A lease would seem to be a "contract" within the meaning of this sub-section.

(d) *Disclaimer of Lease.*[1]

By the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), all pre-existing bankruptcy acts were repealed. Many of the

[1] **The law as to disclaimer by assignees in bankruptcy in the United States.** — The decisions under the former United States Bankruptcy Acts following those under the earlier English acts (prior to the English act of 1869 and the present English act of 1883) held that disclaimer was not necessary to relieve an assignee from liability for rent under a lease.

An assignee was held not liable for rent accruing subsequently to the bankruptcy, unless by some *positive act* he had accepted the lease, and he was allowed a reasonable time in which to make his election. *Ex parte* Houghton, 1 Low. 554, 556 (and see whole opinion of Lowell, J.); Hoyt *v.* Stoddard, 2 Allen (Mass.) 442; *Re* Washburn, 11 N. B. R. 66; *In re* Ives, 18 Id. 28; *In re* Lucius Hart Man. Co., 17 Id. 459; *In re* Merrifield, 3 Id. 25; *In re* Ten Eyck, 7 Id. 26; *In re* Wheeler, 18 Id. 385; Matter of Fowler, 8 Ben. 421; Matter of McGrath, 5 Id. 183.

Mere temporary occupancy (as for storage or removal of goods, &c.) was not necessarily an acceptance of the lease. If unreasonably continued, &c., of course it would be. The assignee was held liable in a reasonable sum for such temporary use, whether by himself or by the marshal or other officers of the court, to be reimbursed, if beneficial to the estate. *In re* Walton, 1 N. B. R. 557; Matter of Fowler, 8 Ben. 421; *In re* Hamburger & Frankel, 12 N. B. R. 277; Matter of McGrath, 5 Ben. 183 & 5 N. B. R. 254; *In re* Lucius Hart Man. Co., 17 Id. 459; *In re* Merrifield, 3 Id. 25; *In re* Wheeler, 18 Id. 385.

The assignee became personally liable, if by entry and occupation or other equivalent act he accepted the lease, *In re* Laurie, 4 N. B. R. 7; *In re* Rose, 3 Id. 63; *Ex parte* Faxon, 1 Low. 404; Buckner *v.* Jewell, 14 N. B. R. 286; *In re* Commercial Bulletin Co., 2 Woods, 220; *In re* Webb, 6 N. B. R. 302, to be reimbursed, of course, out of the funds if the occupation was justifiable under the condition of the estate.

The amount paid for temporary use and occupation might, *Re* Merrifield, 3 N. B. R. 25, or might not, *Re* Lucius Hart Man. Co., 17 Id. 459, be at the lease rate; but if assignee accepted the term, he took it subject to all the accruing rent, and not merely from commencement of his occupancy. *Ex parte* Faxon, 1 Low. 404.

"If assignee found that lease was not a beneficial one and desired to occupy for a time, but not to take the lease with all its burdens, it was his duty to make some definite arrangement with the landlord" (*per* Bradley, C. J., in *Re* Commercial Bulletin Co., 2 Woods, 220), and this, in fact, was usually done in such cases.

The time allowed for making a decision varied according to circumstances. In case the rental was large the election should be speedy. *In re* Laurie, 4 N. B. R. 7

earlier acts (*q*) contained certain special provisions in reference to the case of a bankrupt tenant, and the Act of 1869 contained special provisions for the same case, the [*278] * material difference between the former acts and the Act of 1869 being, that, under the former acts, a lease involving obligations which might exceed in value the benefits to be derived from it did not vest in the bankrupt's assignees until they did some act manifesting their acceptance, whereas, under the Act of 1869, all leases whatever, together with the rest of the bankrupt's property, vested in the trustees until they did some act manifesting their dis-

(*q*) See, for instance, 49 Geo. 3, c. 121, s. 19; 6 Geo. 4, c. 16, s. 75; 12 & 13 Vict. c. 106, s. 145; 24 & 25 Vict. c. 134, s. 131.

If assignee occupied under a special agreement independent of the lease, it did not amount to an acceptance. *In re* Ten Eyck, 7 N. B. R. 26; *In re* Secor, 18 Fed. Rep. 319.

In states where distress for rent existed, the landlord's lien upon the goods entitled him to payment in full, both for rent in arrears and for that subsequently accruing; Longstreth *v.* Pennock, 9 Phila. (U. S. C. C. E. D. Pa.) 394; *In re* Commercial Bulletin Co., 2 Woods, 220; *In re* Bowne, 12 N. B. R. 529.

The landlord's claim for subsequently accruing rent was not a provable claim against the estate, but a personal claim against the assignee, *Ex parte* Houghton, 1 Low. 554; *In re* Commercial Bulletin Co., 2 Woods, 220 (*per* Bradley, C. J.); Buckner *v.* Jewell, 14 N. B. R. 286, rent to accrue not being held to be a contingent debt. Bosler *v.* Kuhn, 8 W. & S. (Pa.) 183; Savory *v.* Stocking, 4 Cush. (Mass.) 607.

Rent in arrears at the date of the bankruptcy was provable, *Ex parte* Houghton, 1 Low. 454; Matter of Croney, 8 Ben. 64, and by sec. 5071 of the U. S. Rev. Sts., was apportionable at the date of the bankruptcy, as if the same grew due from day to day.

The bankrupt himself remained liable for the after-accruing rent, and was not discharged therefrom by discharge in insolvency (Lowell, J., in *Ex parte* Houghton, 1 Low. 554, 556; Hendricks *v.* Judah, 2 Caines, 25), and the discharge relieved him only from liability for the arrears. Treadwell *v.* Marden, 18 N. B. R. 353.

A sale by the assignee to the lessor extinguished the term, merging it in the reversion. White *v.* Griffing, 18 N. B. R. 399.

Adoption in Massachusetts of English bankruptcy provisions. — Provisions somewhat similar to those of the later English Bankruptcy Acts have been adopted in the insolvency laws of Massachusetts. It is provided by Pub. Sts. ch. 157, sec. 26 (Sts. 1879, ch. 245, sec. 1) that the assignee at any time may disclaim the lease, and must, upon request in writing of either lessor or debtor, within twenty days thereafter, by written instrument filed of record, elect either to accept or disclaim.

The debtor, if he obtains his discharge in insolvency, is discharged also from all liability under the lease, and that whether assignee disclaim or not. If lessor or his representatives are demnified, they may prove a claim therefor.

claimer (*r*). The Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), which repeals and re-enacts with material amendments the Acts of 1869, follows the same principle in respect to leases, and brings it out more fully by limiting a time within which a disclaimer is allowed to be operative. The many other amendments effected by the Act of 1883 are chiefly directed to safeguarding, mainly through the discretionary power of the Court of Bankruptcy, the interests of persons deriving title from the lessee. The subject-matter dealt with is an extremely complicated one, and the imperfect phraseology of the Act of 1869 had been supplemented by very numerous judicial decisions, occasionally almost legislative in character.

Effect of s. 23 of Act of 1869. — Shortly put, the enactments of sects. 23 and 24 of the Act of 1869 were that the trustee in bankruptcy might, by writing under his hand, disclaim an onerous lease, and that upon the execution of such disclaimer, the lease should be deemed to have been *surrendered* on the date of the order of adjudication; that any person interested in a disclaimed lease might apply to the Bankruptcy Court, which might order possession of the lease to be delivered up to him, or make such other order as to the possession as might be just; that any person injured by the operation of the enactment should be deemed and might prove as a creditor of the bankrupt to the estate of the injury; and (sect. 24) that the trustee should not be entitled to disclaim where for not less than twenty-eight days he had failed upon application by any interested to notify whether he disclaimed or not. A bankruptcy rule of doubtful validity (*s*) (Rule 28 of 1871) prescribed further that a trustee might not disclaim without leave of the court.

Decisions on s. 23 of Act of 1869. — The main decisions upon these sections amounted in effect to this: — that disclaimer of a lease did not put an end to a sub-lease (*t*): that it did not prevent the lessor from enforcing against a sub-lessee

(*r*) See Wilson *v.* Wallani, L. R., 5 Ex. D. 155; 49 L. J., Ex. 437; 42 L. T. 375; 28 W. R. 597.

(*s*) See Reed *v.* Harvey, L. R., 5 Q. B. D. 184.

(*t*) Smalley *v.* Hardinge, L. R., 7 Q. B. D. 524; 50 L. J., Q. B. 365.

the remedies of distress and re-entry derived from the lease (*u*): that if the bankrupt were assignee, the lessee remained liable on the covenants (*x*): that all rights of the lessee under the lease, such as to remove fixtures, be-
[*279] came lost to the trustee (*y*), and that the trustee, * if neglecting or unable to disclaim, was personally liable on the covenants as from the date of his appointment (*z*).

Act of 1883, s. 55. — The 55th section of the Act of 1883 to a great extent follows the principle of the above decisions, but also materially amends the statute law of the subject.

This effect of this section, and the rule of court thereunder, which are printed in full in the Appendix, is as follows: —

Disclaimer by leave. — Where a lease is onerous, or a contract for a lease is unprofitable, the trustee may, with leave of the court having jurisdiction in bankruptcy (or without such leave, if the bankrupt has not assigned, sub-let or mortgaged the lease, *and* if the rent and value be less than 20*l.*, or if the estate is, as being not more than 300*l.* in value, being administered summarily, or if "the trustee serves the lessor with notice of his intention to disclaim, and the lessor does not within seven days after the receipt of such notice give notice to the trustee requiring the matter to be brought before the court" (*a*)), by writing signed by him disclaim such lease or contract for lease.

Contract for lease. — An oral lease seems to be clearly within the sub-section under the words "unsaleable property," and also a contract for a lease under the words "unprofitable contract" (*b*).

Effect of disclaimer without leave. — A disclaimer without leave, if leave be required, is void (*c*): but if no leave was required, the court has no power over the trustee in the matter, either to review his decision, or to order him to pay rent

(*u*) *Ex parte* Walton, *Re* Levy, L. R. 17 Ch. D. 746; 50 L. J., Ch. 657 45 L. T. 1; 30 W. R. 395.

(*x*) Hill *v.* East and West India Dock Co., L. R., 9 App. Cas. 448.

(*y*) *Ex parte* Glegg, *Re* Latham, L. R., 19 Ch. D. 7.

(*z*) Titterton *v.* Cooper, *supra* (*l*).

(*a*) Rule 232, *post*, Appendix A.

(*b*) See Maughan, *In re*, L. R., 14 Q. B. D. 956; 2 Morrell, 25.

(*c*) Rule 232, *post*, Appendix A.

for use and occupation from the time that the premises vested in him (*d*).

Limit of time for disclaimer. — The disclaimer must be made in ordinary cases within three months after the first appointment of a trustee; but it is provided that "where the property shall not have come to the knowledge of the trustee within one month after such appointment, he may disclaim at any time within two months after he became aware thereof;" and this time may be extended by the court either before or after the expiration thereof upon such terms, if any, as the court may think fit to impose, under sect. 105, sub-sect. 4 of the Act (*e*).

Restriction on disclaimer. — It is further provided that the trustee shall not be entitled to disclaim in any case where he has been applied to in writing by any person interested to decide whether he will disclaim or not, and he has for twenty-eight days after such application, or such extended period as the court may allow, declined or neglected to give notice whether he disclaims or not. For this provision to operate, it must be proved that the application was actually delivered: mere proof of *posting it will [*280] not be enough (*f*). Leave for extension ought to be applied for within twenty-eight days (*g*); but the extension may be granted afterwards (*h*), though special circumstances should be shown (*i*). In one case, where the trustee did not signify his intention as required, leave to disclaim was given only on condition of payment of a month's rent to the landlord, such rent, together with the landlord's costs, to be paid by the trustee personally (*k*).

Leave of the court. — Sub-s. 3. — By sub-sect. 3, the court may, before or on granting leave to disclaim, require such

(*d*) Zerfass, *Ex parte*, Sandwell, *In re*, L. R., 14 Q. B. D. 960; 33 W. R. 523; 2 Morrell, 95.

(*e*) Foreman, *Ex parte*, Price, *In re*, L. R., 13 Q. B. D. 466; 33 W. R. 139; 1 Morrell, 153.

(*f*) Reed *v.* Harvey, L. R., 5 Q. B. D. 184; 49 L. J., Q. B. 295; 42 L. T. 511; 28 W. R. 423.

(*g*) See *Ex parte* Lovering, *Re* Jones, L. R., 9 Ch. 586; 43 L. J., Bank. 94.

(*h*) Banner *v.* Johnson, L. R., 5 H. L. 157; 40 L. J., Ch. 730.

(*i*) *Ex parte* Harris, *Re* Richardson, L. R., 16 Ch. D. 613; 44 L. T. 282.

(*k*) Page, *In re*, 1 Morrell, 2871.

notices to be given to persons interested and impose such conditions of granting leave, and make such orders with regard to fixtures, tenant's improvements and other matters arising out of the tenancy as the court thinks just.

Leave has been given to disclaim an expired lease (*l*). If the trustee has continued to occupy the premises with a view to the benefit of the estate, or if his occupation has in fact produced a benefit, in either case there will be a reason for awarding compensation to the landlord (*m*).

Fixtures and tenant's improvements. — It had been held, under sect. 23 of the Act of 1869, that by disclaimer the trustee lost all right to remove fixtures (*n*), even by virtue of an express stipulation (*o*), so that the landlord was entitled as against the trustee to fixtures severed after bankruptcy, whether severed after (*p*) or before (*q*) disclaimer; and a similar rule was held to be applicable to rights in connection with acts of husbandry derived from an agricultural lease (*r*). Under the above sub-section 3 of sect. 55 of the Act of 1883, the court appears to have full discretionary power to order either fixtures or compensation to be given by any party before it to any other (*s*). By sect. 61 of the Agricultural Holdings Act, 1883, a trustee in bankruptcy is included in the term tenant, and appears to have a statutory claim to compensation for improvements within the meaning of that act.

As to user of hay and straw where there is a covenant to consume on the premises, see *ante*, p. 277.

Effect of disclaimer. — Sub-s. 2. — Sub-sect. 2 provides that disclaimer shall put an end to the lease as between the lessor

(*l*) *Ex parte* Paterson, *Re* Throckmorton, L. R., 11 Ch. D. 908; *Ex parte* Dyke, *Re* Morrish, L. R., 22 Ch. D. 410; 52 L. J., Ch. 570; 48 L. T. 303; 31 W. R. 278 (C. A.).

(*m*) See *Ex parte* Arnal, *Re* Wilton, L. R., 24 Ch. D. 26; 49 L. T. 221; *Re* Zappert, 1 Morrell, 72; *Re* Brooke, Ib. 82.

(*n*) *Ex parte* Brook, *Re* Roberts, L. R., 10 Ch. D. 100; 48 L. J., Bank. 22; 39 L. T. 458; 27 W. R. 255 (C. A.).

(*o*) *Ex parte* Glegg, *Re* Latham, L. R., 19 Ch. D. 7.

(*p*) *Ex parte* Stephens, L. R., 7 Ch. D. 127.

(*q*) *Ex parte* Brook, *supra* (*n*).

(*r*) *Ex parte* Dyke, *Re* Morrish, L. R., 22 Ch. D. 410; 32 L. J., Ch. 570; 48 L. T. 303; 31 W. R. 278.

(*s*) See Moser, *In re*, 1 Morrell, 244.

and the bankrupt or his trustee, but as between *the lessor and the bankrupt or his trustee only, in [*281] the following terms: —

Effect of disclaimer. — "The disclaimer shall operate to determine, as from the date of disclaimer, the rights, interests and liabilities of the bankrupt and his property in or in respect of the property disclaimed, and shall also discharge the trustee from all personal liability in respect of the property disclaimed as from the date when the property vested in him, but shall not, except for the purpose of releasing the bankrupt and his property and the trustee from liability, affect the rights or liabilities of any other person."

By disclaimer, therefore, the lease is lost to the bankrupt and his estate for ever, and the rights of the landlord *upon the lease against the bankrupt and his estate* are also lost, though, as we shall see presently, the landlord has certain rights of proof and distress reserved to him.

Personal liability of trustee. — The lease, with the other property of the bankruptcy, vests in the trustee at the date of his appointment, so that disclaimer will save him wholly from all personal liability whatever. Should he not disclaim, his personal liability is undoubted (*t*).

Rights of mortgagee, assignee, &c., where assignee bankrupt. — The "other persons" whose rights and liabilities are preserved by this sub-section are assignees, mortgagees (*u*), sub-lessees (*x*), lessees, where it is the assignee who is bankrupt (*y*), sureties for rent (*z*), and all persons whatever whose rights or liabilities may be affected by the disclaimer. Especially should it be borne in mind that if it be an assignee who is bankrupt, the lessee is, and has always been, liable on his covenants to the lessor, notwithstanding assignment (*a*).

(*t*) See Titterton *v.* Cooper, L. R., Q. B. D., and *ante*, p. 276.

(*u*) See *Re* Wilson, L. R., 13 Eq. 186.

(*x*) See Smalley *v.* Hardinge, L. R., 7 Q. B. D. 524; 50 L. J., Q. B. 368.

(*y*) See East and West India Dock Co. *v.* Hill, L. R., App. Cas. 448, and *ante*, 278.

(*z*) See Harding *v.* Preece, L. R., 9 Q. B. D. 281; 51 L. J., Q. B. 515.

(*a*) Barnard *v.* Godschall, Cro. Jac. 309, and *ante*, 260. By the Bankruptcy Act, however, the lessee loses

Vesting order. — Sub-s. 6. — It is enacted by sub-sect. 6 that the court may, on application by any person either claiming any interest in any disclaimed property or [being] under any liability not discharged by the act in respect of any disclaimed property, make an order for the vesting the property in any person (*b*) entitled thereto: but this enactment is subject to the following restrictive proviso: —

Restriction upon vesting order. — "Provided always, that where the property disclaimed is of a leasehold nature, the court shall not make a vesting order in favour of any person claiming under the bankrupt, whether as under-lessee or as mortgagee by demise, except upon the terms of making such person subject to the same liabilities and obligations as the bankrupt was subject to under the lease in respect [*282] of the property at the date when * the bankruptcy petition was filed, and any mortgagee or under-lessee declining to accept a vesting order upon such terms shall be excluded from all interest in and security upon the property, and if there shall be no person claiming under the bankrupt who is willing to accept an order upon such terms, the court shall have power to vest the bankrupt's estate and interest in the property in any person liable either personally or in a representative character, and either alone or jointly with the bankrupt to perform the lessee's covenants in such lease, freed and discharged from all estates, incumbrances and interests created therein by the bankrupt."

A mortgagee by demise, therefore, by taking a vesting order will incur the very liability — that of the covenants in the lease — which the substitution of a mortgage by demise for a mortgage by assignment was intended to free him from.

Proof. — Sub-s. 7. — Section 55 closes with a provision that any person injured by the disclaimer may prove his injury as a debt.

the benefit of the covenant of indemnity which the assignee would give him, and therefore would seem to have a right of proof against the bankrupt's estate.

(*b*) Quære, *per* Cave, J., in Parker, *In re*, Turquand, *Ex parte*, 1 Morrell, 275, whether these words apply to the landlord.

(e) *Distress for Rent.*[1]

The early bankruptcy acts left the landlord's common law remedy by distress whole and intact, and goods in the custody of a messenger in bankruptcy were early held (*c*) not to be in the custody of the law so as to be exempt from distress under that head of exemptions (*d*). A mere limitation of the distress to one year's rent, first imposed in 1826 by 6 Geo. 4, c. 16, s. 74, and repeated in 1849 by 12 & 13 Vict. c. 106, s. 129, has been continued by the Acts of 1869 and 1883 in terms which first affirm and afterwards limit the common law.

The 42nd section of the Act of 1883, repeating exactly sect. 34 of the Act of 1869, is as follows: —

Distress for one year's rent. — "The landlord or other person to whom any rent is due from the bankrupt may at any time, either before or after the commencement of the bankruptcy, distrain upon the goods or effects of the bankrupt for the rent due to him from the bankrupt, with this limitation, that if such distress for rent be levied after the commencement of the bankruptcy, it shall be available only for one year's rent accrued due prior to the date of the order of adjudication, but the landlord or other person to whom the rent may be due from the bankrupt may prove under the bankruptcy for the surplus due for which the distress may not have been available."

A "landlord or other person." — The words "landlord or other person" apply to a person who is made landlord by an attornment clause in a mortgage deed (*e*), unless * the rent be a sham rent agreed on for the purpose [*283] of evading the law of bankruptcy (*f*), but not to a

(*c*) Plummer, *Ex parte*, 1 Atk. 103, *per* Lord Hardwicke.

(*d*) See *post*, Ch. XI.

(*e*) Jackson, *Ex parte*, Bowes, *In re*, L. R., 14 Ch. D. 725. See also Williams, *Ex parte*, L. R., 7 Ch. D. 138; Stockton Iron Furnace Co., *In re*, L. R., 10 Ch. D. 335; Voisey, *Ex parte*, Knight, *In re*, L. R., 21 Ch. D. 442; 52 L. J., Ch. 121; 47 L. T. 362; 31 W. R. 19.

(*f*) See Voisey, *Ex parte*, *ubi supra*.

[1] See *ante*, (d), note upon "The law as to disclaimer in the United States."

gas company in respect of gas rent (*g*), unless it have special statutory powers, *e.g.* to recover the gas rent "by the same process as landlords are by law empowered to recover rent in arrear" (*h*).

Whether distress barred. — There appears to be some authority for saying that a landlord, if he choose to prove for the year's rent for which he might have distrained, loses the right of distress for such rent (*i*); and it seems, at any rate, that he cannot prove and distrain for the same amount of rent.

Right of distress paramount. — Distress is not such a "legal process" as can be restrained by the court under sect. 10, sub-sect. 2, of the Bankruptcy Act, 1883 (*k*), and it can be fully proceeded with, notwithstanding that a receiver is in possession of the bankrupt's property (*l*).

No right to follow goods. — If the goods be sold by the trustees and removed from the premises before the landlord has distrained upon them, he has no right to follow them for the purpose of distress, but loses his preferential right altogether (*m*).

Benefit of distress how lost. — If the goods distrained be left unsold, and found in the order and disposition of the bankrupt at the commencement of the bankruptcy, they will pass to the trustee by the order and disposition clause of the Bankruptcy Act (*n*).

Third party not protected. — The limitation, that only one year's rent may be distrained for, protects the goods of the bankrupt only, and not the goods of a third party which may

(*g*) Hill, *Ex parte*, Roberts, *In re*, L. R., 6 Ch. D. 63; 46 L. J., Bank. 116; 37 L. T., 46; 25 W. R. 784.

(*h*) Birmingham Gaslight Co., *Ex parte*, L. R., 11 Eq. 615; 40 L. J. Bank. 52.

(*i*) Grove, *Ex parte*, 1 Atk. 105, *per* Lord Hardwicke, in 1739. See also Robson, p. 303, where it is said that the landlord "must make his election to waive either his proof or distress." But in *Ex parte* Grove, the rights of a vendee came in question, and in *Ex parte* Devine, Cooke, B. L. 201, it was said by Lord Bathurst that that was the ground of decision. On principle, it is submitted that this question ought to be determined in favour of the landlord.

(*k*) *Ex parte* Birmingham Gaslight Co., L. R., 11 Eq. 615; 40 L. J. Bank. 52.

(*l*) *Ex parte* Till, *In re* Mayhew, L. R., 16 Eq. 97.

(*m*) Bradyll *v.* Bale, 1 Bro. C. C. 427.

(*n*) *Ex parte* Shuttleworth, *Re* Deane, 1 D. & C. 223.

be on the premises of the bankrupt. This follows from the very words of the section, which limit only "such distress," *i.e.* distress on the goods of the bankrupt, and from the case in which it was held that property which the bankrupt tenant had mortgaged was liable to distress in full (*o*).

Distress for rent due after adjudication. — The landlord's right to distrain for rent accruing due after the order of adjudication is quite unaffected; for such rent (though payable in advance), if the trustee do not disclaim the lease, or if the trustee continue in possession, the landlord may distrain in full (*q*), otherwise, as was observed by Bacon, C. J., a trustee in bankruptcy * might make [*284] use of a man's property without paying any rent for it, and snap his fingers at him.

Payments to avoid distress valid. — Payment by a tenant, after an act of bankruptcy, of a year's rent to avoid a distress is valid (*r*), and a person who paid out a distress has been held entitled to be recouped in full out of the bankrupt's estate before the creditors received any dividend (*s*).

(f) *Proof for Rent, &c.*[1]

Proof for rent for broken period. — By Rule 19 of the second schedule of the Bankruptcy Act, 1883, re-enacting sect. 35 of the Act of 1869, "when any rent falls due at stated periods, and the receiving order is made at any time other than one of those periods, the person entitled to the rent may prove for a proportionate part thereof up to the date of the order as if the rent grew due from day to day."

Proof for rent in addition to distress. — We have already seen that a landlord may distrain for a year's rent only, but may prove under the bankruptcy for the surplus due for which the distress may not have been available (*t*), and dis-

(*o*) Brocklehurst *v.* Lawe, 7 E. & B. 176; 26 L. J., Q. B. 107.

(*q*) Hale, *Ex parte, Re* Binns, L. R., 1 Ch. D. 285; 45 L. J., Bank. 21; 33 L. T. 706; 24 W. R. 300.

(*r*) Stevenson *v.* Wood, 5 Esp. 200.

(*s*) *Ex parte* Kennard, 21 L. T. 684. The payment was at the request of certain creditors.

(*t*) *Ante*, 282.

[1] See *ante*, (*d*), note upon "The law as to disclaimer in the United States."

cussed the question how far the right of distress is barred by proof (*u*).

Proof for injury by disclaimer. — It is provided by sub-sect. 7 of sect. 55 of the Bankruptcy Act, 1883, that: —

"Any person injured by the operation of a disclaimer under this section shall be deemed to be a creditor of the bankrupt to the extent of the injury, and may accordingly prove the same as a debt against the bankruptcy."

This sub-section re-enacts part of sect. 23 of the Act of 1869. A lessor suffering by the disclaimer of a lease of partnership premises, may, as was held under that section, prove against the separate estate of each partner for the injury (*x*), and, as was also held, if disclaimed premises let for a term, can only be re-let at a reduced rent, the landlord is entitled to prove for the difference between the present worth of the agreed rent for the term, or for the period at which it may be by option determinable (*y*), and the present worth of the letting value for the same period (*z*).

[*285] * SECT. 12. — *Marriage.*[1]

(a) *Of Female Lessor* (*a*).

The law of this subject has been revolutionised by the Married Women's Property Act, the effect of which has been already given, and it is only necessary here shortly to state the effect of the law before that act.

Interest of husband in wife's freeholds. — At common law a husband took a freehold interest during the coverture in such of his wife's freeholds of inheritance as were not put into settlement before the marriage, and he might dispose of such freehold interest by deed without her concurrence (*b*).

(*u*) *Ante*, 283.

(*x*) *Ex parte* Corbett, *Re* Shand, L. R., 14 Ch. D. 122.

(*y*) *Ex parte* Blake, *Re* McEwan, L. R., 11 Ch. D. 572.

(*z*) *Ex parte* Llynvi Coal and Iron Co., *Re* Hide, L. R., 7 Ch. 28.

(*a*) And see *ante*, p. 58.

(*b*) Robertson *v.* Norris, 11 Q. B. 916.

[1] See *ante*, chaps. 1 & 2, notes.

Tenancy by the curtesy. — Tenancy by the curtesy, however, appears to have survived the Married Women's Property Act, and if the husband have issue by his wife born alive, who might by possibility have inherited, he will still become tenant by the curtesy for his life of her freeholds of inheritance (including estates tail) (*c*). But such title is only initiate during her life, and will not merge any term of years to which he may be entitled in his own right (*d*). Unless he becomes tenant by the curtesy he cannot distrain or sue for rent of the wife's freeholds which accrues after her death under a demise made by his wife and himself, or by him on her behalf (*e*). If, however, the lease was made by him in his own name only, the tenant would be thereby estopped from denying his title to the subsequent rent during the continuance of the tenancy (*e*).

Arrears of rent, &c., before marriage. — Arrears of rent and other debts due to a female lessor before her marriage, and breaches of covenant, trespasses, &c., before then committed, were at common law *choses in action*, which could only be sued for by the husband and wife jointly, and not by the husband alone (*f*); nor by the wife alone (*g*).

Leases at will. — At common law if a feme sole made a lease at will, or was lessee at will, and afterwards married, the marriage was no determination of her will, so as to make the lease void; nor could she herself, without the consent of her husband, determine the lease in either case (*h*); but the Married Women's Property Act would seem to give this right. Where the husband and wife made a lease for years by indenture of the wife's lands, reserving rent, and, the lessee having entered, the husband before any day of payment died; upon which the wife took a second * husband, and he at the day accepted the rent and [*286] died: it was held, that the wife could not avoid the

(*c*) Co. Lit. 29 a — 30 b; Burton, Comp. ss. 348–355.

(*d*) Jones *v.* Davies, 5 H. & N. 766; 29 L. J., Ex. 378; 31 Id. 116.

(*e*) Hill *v.* Saunders, 2 Bing. 112; s. c. (in error), 4 B. & C. 529; Howe *v.* Scarrott, and Sharp *v.* Scarrott, 4 H. & N. 723; 28 L. J., Ex. 325.

(*f*) Milner *v.* Milnes, 3 T. R. 631; 1 Chit. Pl. 33 (7th ed.).

(*g*) Caudell *v.* Shaw, 4 T. R. 361.

(*h*) Bac. Abr. tit. Baron and Feme (E.).

lease; for that by her second marriage she had transferred the power of avoiding it to her husband, and his acceptance of the rent had bound her, as her own before such marriage would have done; for he, by the marriage, succeeded into the power and place of his wife, and what she might have done, either as to affirming or avoiding the lease before marriage, the husband might do after the marriage (*i*).

(b) *Of Female Lessee.*

Effect of marriage on the leasehold. — Marriage was a gift in law to the husband of all the wife's chattels real (not put into settlement), — as a term for years in right of his wife; of which he alone might dispose, or forfeit, or they may be extended for his debts (*k*). If he sublet any of them in his own name only, the rent belonged to his executors or administrators, and not to the wife as survivor (*l*). He might even dispose of them by deed to take effect on his death to the exclusion of the wife (*m*). If lands were demised to a man and his wife, and the husband alone made an underlease, he alone might sue a third person for an injury to the reversion (*n*). If a husband agreed to grant an underlease of the wife's term of years, such agreement was a good disposition in equity of the term, and would bind the wife in case of the husband's death without granting the lease (*o*). But a husband could not assign his wife's reversionary interest in leaseholds, if that interest was of such a nature that it could not possibly vest in the wife in possession during the coverture (*p*).

(*i*) Bac. Abr. tit. Leases (C.).

(*k*) Bac. Abr. tit. Baron and Feme (C. 2), (I.).

(*l*) Com. Dig. tit. Baron and Feme (E. 2); Co. Lit. 46 b, 351 a; 1 Roll. 343, l. 15; Blaxton *v.* Heath, Poph. 145.

(*m*) Herbin *v.* Chard, Poph. 96; Grute *v.* Locroft, Cro. Eliz. 287.

(*n*) Wallis *v.* Harrison, 5 M. & W. 142; 7 Dowl. 395.

(*o*) Stead *v.* Creagh, 9 Mod. 43; Druce *v.* Denison, 6 Ves. 385; Bac. Abr. tit. Baron and Feme (C. 2).

(*p*) Day *v.* Duberly, 5 H. L. Cas. 388.

Sect. 13. — *Death.*

(a) *Heirs*[1] *or Devisees.*

Bequest of leaseholds; assent of executors. — By the Wills Act, 1 Vict. c. 26, a man may devise all real and personal estate which he is entitled to, at the time of his death, and the better opinion is that such a devise is not a breach of the covenant not to assign without licence (*q*). Where a

(*q*) See the cases considered, *post*, Ch. XVII., Sect. 2, p. 661.

[1] **Rents; when belonging to heirs and devisees.** — Rents accruing subsequently to the death of testator or intestate belong to the heirs, Shouse *v.* Krusor, 24 Mo. App. 279; Haslage *v.* Krugh, 25 Pa. St. 97; Stinson *v.* Stinson, 38 Me. 593; Crosby *v.* Loop, 13 Ill. 625; Green *v.* Massie, Id. 363; Foltz *v.* Prouse, 17 Id. 487; Towle *v.* Swasey, 106 Mass. 100, 107; Gibson *v.* Farley, 16 Mass. 280; Rank *v.* Hill's Adm'r, 8 Bush. (Ky.) 66; O'Bannon *v.* Roberts' Heirs, 2 Dana (Ky.) 55; Atchison's Heirs *v.* Lindsey, 6 B. Mon. (Ky.) 86, 88; Williamson's Adm'x *v.* Richardson, 6 Mon. (Ky.) 596, 603; or devisees, Combs' Devisees *v.* Branch, 4 Dana (Ky.) 547; Burnell's Estate, 9 Weekly Notes of Cases (Pa.) 334, and 13 Phila. 387; Ball *v.* First Nat. Bank of Covington, 80 Ky. 501, as owners of the realty, the realty itself vesting immediately in them upon the death of the decedent, Douglass *v.* Massie, 16 Ohio, 271; Gill *v.* Pinney's Adm'r, 12 Ohio St. 38, 46 (*per* Scott, C. J.); Rubottom *v.* Morrow, 24 Ind. 202; Lucy *v.* Lucy, 55 N. H. 9; Lane *v.* Thompson, 43 Id. 320, 325 (*per* Sargent, J.), subject to sale for payment of debts. Until such sale the rents belong to them notwithstanding the estate is insolvent, Kimball *v.* Sumner, 62 Me. 305; Lobdell *v.* Hayes, 12 Gray (Mass.) 236; Overturf *v.* Dugan, 29 Ohio St. 230; Ball *v.* First Nat. Bank of Covington, 80 Ky. 501; or the lands subject to legacies, Towle *v.* Swasey, 106 Mass. 100. After such sale the balance of proceeds belongs to them. Griswold *v.* Frink, 22 Ohio St. 79.

If, as is frequently the case, the executor collects the rents, he holds them not in his capacity as executor, Newcomb *v.* Stebbins, 9 Met. (Mass.) 540; Towle *v.* Swasey, 106 Mass. 100, but as trustee or tenant for them, Landis *v.* Scott, 32 Pa. St. 495; Burns *v.* Cox, 10 Phila. 8; but not to be accounted for in the probate, surrogates', or orphans' courts, Lucy *v.* Lucy, 55 N. H. 9; Gregg *v.* Currier, 36 Id. 200; Terry *v.* Bale, 1 Dem. (N. Y. Sur.) 452; Burnell's Estate, 9 W. N. C. (Pa.) 334, and 13 Phila. 387; M'Coy *v.* Scott, 2 Rawle (Pa.) 222; McClead *v.* Davis, 83 Ind. 263; Trimble *v.* Pollock, 77 Id. 576; Hendrix *v.* Hendrix, 65 Id. 329, unless authorized thereto by special statute, and the sureties upon his official bond are not liable therefor.

In Massachusetts, by special statute, he is allowed upon mutual consent to include the rents in his probate accounts. Pub. Sts. chap. 144, sec. 5; Stearns *v.* Stearns, 1 Pick. (Mass.) 157; Palmer *v.* Palmer, 13 Gray (Mass.) 326.

Lands which are, in equity, personalty, belong to the executor. Buckwalter *v.* Klein, 2 Am. Law Rec. 347.

Rent of leaseholds (being derived out of personalty) belongs to the executor. Williamson's Adm'x *v.* Richardson, 6 Mon. (Ky.) 596, 603 (*per* Bibb, C. J.), and see *post*, (b), notes.

term is specifically bequeathed, it will, notwithstanding, in the first instance vest in the executor by virtue of [*287] his office; and the legatee cannot enter until he * has the assent of the executor to the bequest (*r*). Indeed, even where a term is bequeathed to an executor for his own use, it does not vest in him as legatee until he as executor assents to it (*s*). An executor may before obtaining probate assent to a bequest (*t*); but not an administrator before obtaining letters of administration (*u*). The assent of any one of several executors is sufficient (*x*). The assent of an executor to a bequest is not matter of law, but a question of fact for the jury (*y*). An assent once given cannot afterwards be retracted (*z*). Executors should never assent to a bequest until they have very clearly ascertained that there is sufficient property to pay all the testator's debts and liabilities. An executor who has assented unconditionally to a specific bequest of the testator's leaseholds is not entitled, in a Court of Equity, to require an indemnity out of the testator's general estate in respect of his covenants contained in the leases (*a*).

Actions for breaches before or after lessor's death. — Where the covenant of a lessee, whether it runs with the land or not, has been broken in the lessor's lifetime, and whilst the lessor continued to be the reversioner, his executors or administrators are the only persons entitled to sue upon it: and so, also, with respect to covenants which do not run with the land or with the reversion. The administratrix of the surviving trustee of freehold or leasehold property may sue for arrears of rent which became due in

(*r*) Doe *d.* Maberley *v.* Maberley, 6 C. & P. 126; 2 Wms. Exors. 1372 (7th ed.).

(*s*) Young *v.* Holmes, 1 Stra. 70; Doe *d.* Hayes *v.* Sturges, 7 Taunt. 217; Shep. Touch. 454; 2 Wms. Exors. 1380 (7th ed.).

(*t*) Fenton *v.* Clegg, 9 Exch. 680; Johnson *v.* Warwick, 17 C. B. 516; 25 L. J., C. P. 102.

(*u*) Morgan *v.* Thomas, 8 Exch. 302.

(*x*) 2 Wms. Exors. 948, 1378 (7th ed.).

(*y*) Mason *v.* Farnell, 12 M. & W. 674; 1 D. & L. 576.

(*z*) Doe *d.* Ld. Saye and Sele *v.* Guy, 3 East, 120; Foley *v.* Barnell, 4 Bro. P. C. 34.

(*a*) Shadbolt *v.* Woodfall, 2 Coll. 30; Hickling *v.* Bowyer, 3 Mac. & G. 635, 646; 2 Wms. Exors. 1348, 1378 (7th ed.).

his lifetime (*b*). Where a covenant of the lessee, which runs with the land, has been broken *after* the death of the lessor, the right of action is vested in the person then legally entitled to the reversion (*c*).

Who entitled to rent, &c. before birth of posthumous child. — A qualified heir is entitled to the rents and profits of realty which accrue between the death of the ancestor and the birth of the ancestor's posthumous and only child, whether such rents be actually received before such birth or not (*d*).

Actions against legatees and heirs. — The legatee of a term is an assignee thereof (after the executor has assented to the bequest), and as such is liable for subsequent breaches of covenants which run with the land (*e*); but a legatee of an equity of redemption in a term cannot be charged as an assignee (*f*). If there be a breach of the lessor's covenants in his lifetime, his heir is * liable if named, [*288] if the covenant be real, in respect of his assets by descent; and he may be sued as an assignee of the reversion (*g*).

(b) *Executors and Administrators.*[1]

What goes to executors and administrators. — Executors and administrators are entitled, by virtue of their office, to

(*b*) Dollen *v.* Batt, 4 C. B., N. S. 760; 27 L. J., C. P. 281.

(*c*) Com. Dig. tit. Covenant (B. 3).

(*d*) Richards *v.* Richards, 1 Johns. 754; 29 L. J., Ch. 836.

(*e*) Holford *v.* Hatch, 1 Doug. 184.

(*f*) Mayor of Carlisle *v.* Blamire, 8 East, 487.

(*g*) Derisley *v.* Custanee, 4 T. R. 75.

[1] **Relations to realty.** — (*a*) *Generally.* — Executors and administrators at common law have no control over realty (except to sell it under license if necessary to pay debts and legacies) unless given by will. See *ante*, (a), note. Rodman *v.* Rodman, 54 Ind. 444; Hankins *v.* Kimball, 57 Id. 42; Kidwell *v.* Kidwell, 84 Id. 224; Lane *v.* Thompson, 43 N. H. 320, 325 (*per* Sargent, J.).

The power to lease property may be conferred by will. Martin's Appeal, 23 Pa. St. 433; Hauck *v.* Stauffer, 31 Id. 235; Carlile's Appeal, 38 Id. 259.

The power to sell does not necessarily imply the right to lease or to occupy. Rubottom *v.* Morrow, 24 Ind. 202; Gregg *v.* Currier, 36 N. H. 200.

A fortiori, the power to sell upon the happening of a future expected event (as the marriage or death of a widow), does not give the present right of possession and control. James *v.* Beesly, 4 Redf. (N. Y.) 236. Realty, which is in equity personalty, is subject to the control of the executor to be distributed like personalty. It was so held where lessee, under lease with purchase

all the chattels real [1] and personal [2] of the deceased, notwithstanding a specific bequest of any of them to another person. A legatee of leaseholds has no complete title until one or more of the executors has assented to the bequest (*h*). If a lease for years of land be granted to a man and his heirs, or to him and the heirs of his body, or to him and his successors, and he die, his executor or administrator, and not his heir, takes the term (*i*). If a rent be granted or reserved out of land to a person in fee-simple, fee-tail, for life or years, the arrears due at his death go to his executor or administra-

(*h*) *Ante*, Ch. I. Sect. 27, and see, also, 286.

(*i*) Lit. s. 740; 10 Co. R. 18; Shep. Touch. 469; 1 Wms. Exors. 673 (7th ed.).

option, tendered his money and claimed right to purchase after the death of lessor. The money was held to be assets for the lessor's executor. Buckwalter *v.* Klein, 2 Am. Law Record, 347.

(*b*) *In California* the executor or administrator has full control of *both* realty and personalty during the settlement of the estate. Code Civil Procedure, sec. 1452. He can maintain ejectment to gain possession of the lands, Curtis *v.* Herrick, 14 Cal. 117; Touchard *v.* Keyes, 21 Id. 202, 208, 209, and even against the heirs or devisees, Page *v.* Tucker, 54 Id. 121; and the heirs cannot recover possession, Meeks *v.* Hahn, 20 Id. 620. He may lease the realty during the period of administration, Doolan *v.* McCauley, 66 Cal. 476; is entitled to receive the rents and profits as against the heirs, Smith *v.* Walker, 38 Id. 385; and must account for them in the probate court, Walls *v.* Walker, 37 Id. 424. The rents are not thereby changed into personalty, but retain their character except so far as needed to pay debts. Matter of Estate of Woodworth, 31 Id. 595, 604, 605.

[1] **Chattels real belong to executor.** — Terms for years and other leasehold property less than freehold are chattels real, and belong to the executor. Wiley's Appeal, 7 W. & S. (Pa.) 244; Green *v.* Green, 2 Redf. (N. Y.) 408; Mayor *v.* Mabie, 13 N. Y. 151, 159 (*per* Denio, J.); Gay, Petitioner, 5 Mass. 419; Pugsley *v.* Aikin, 11 N. Y. 494; Murdock *v.* Ratcliff, 7 Ohio, 119; Reynold's Heirs *v.* Commissioners, &c., 5 Id. 204; Lewis's Heirs *v.* Ringo, 3 A. K. Marsh. (Ky.) 247; Faler *v.* McRae, 56 Miss. 227; Webster *v.* Parker, 42 Miss. 465; Dillingham *v.* Jenkins, 7 S. & M. (Miss.) 479, 487; Horn *v.* Bowen, 2 Clev. Law Rep. 133, and Schee *v.* Wiseman, 79 Ind. 389 (mining leases); Emeret's Estate, 2 Pars. (Pa. Eq. Cas.) 195 (tenancy from year to year); Keating *v.* Condon, 68 Pa. St. 75; Coppels' Estate, 4 Phila. 378.

In Cunningham *v.* Baxley, 96 Ind. 367, it was held that a parol sub-lease, given by life tenant during own life, was a chattel, and passed to the executor.

[2] **Accrued rents.** — Rents accrued prior to the death of testator or intestate belong to the executor. Ball *v.* First Nat. Bank of Covington, 80 Ky. 501; Combs' Devisees *v.* Branch, 4 Dana (Ky.) 547; O'Bannon *v.* Roberts' Heirs, 2 Id. 55.

tor (*k*); and a rent-charge pur autre vie goes to the executors or administrators of the grantee, though they are not mentioned in the grant (*l*).

Effect of probate. — The right of an executor to the personal estate and effects of his testator (including chattels real and choses in action) is derived from the will, of which the probate is merely evidence (*m*). He is legally possessed from the time of the testator's death,[1] and before obtaining probate (*n*). Where leaseholds are mortgaged, probate duty is payable in respect thereof only on the value beyond the mortgage (*o*).

Letters of administration. — The validity of letters of administration cannot be disputed on the ground that there is a will, without first getting them recalled by the Court of Probate (*p*). The right and power of an administrator is derived wholly from the letters of administration (*q*). He cannot bind the testator's estate by asserting to any application or disposal thereof, before obtaining letters of administration; which do not relate back (*r*). An executor de son tort, to whom administration is subsequently granted, may repudiate an agreement made by him, to surrender a term of years vested in the intestate (*s*).

Executor cannot renounce. — If a testator die possessed of a term of years, it will vest in his executor,[2] who cannot

(*k*) 1 Wms. Exors. 820 (7th ed.); Dollen *v.* Batt, 4 C. B., N. S. 760; 27 L. J., C. P. 281.

(*l*) 1 Vict. c. 26, s. 6; Bearpark *v.* Hutchinson, 7 Bing. 178; Reynolds *v.* Wright, 25 Beav. 100; 27 L. J., Ch. 392; 2 De Gex, F. & J. 590.

(*m*) Hensloe's case, 9 Co. R. 38 a; 1 Wms. Exors. 293 (7th ed.); Pemberton *v.* Chapman, 7 E. & B. 218; 26 L. J., Q. B. 120.

(*n*) Smith *v.* Milles, 1 T. R. 480; Roe *d.* Bendall *v.* Summerset, 2 W. Blac. 692; 5 Burr. 2608.

(*o*) 31 & 32 Vict. c. 124, ss. 7, 8.

(*p*) Prosser *v.* Wagner, 1 C. B., N. S. 289; 26 L. J., C. P. 81.

(*q*) Shep. Touch. 474; 1 Wms. Exors. 404 (7th ed.).

(*r*) Morgan *v.* Thomas, 8 Exch. 302.

(*s*) Doe *d.* Hornby *v.* Glenn, 1 A. & E. 49.

[1] **Administrator's title relates back** to the decedent's death; and where a lessor reserved option to take bricks at fair market value in payment of rent, but did not exercise the option till death of lessee, it was held then too late, as the title to the bricks had vested in the administrator. Wait's Appeal, 7 Pick. (Mass.) 100.

[2] Executors are liable *de bonis propriis*, if they occupy. Smiley *v.* Van Winkle, 6 Cal. 605, 606 (*per* Murray, C. J.).

waive it although it be worth nothing; for he must renounce the executorship in toto, or not at all (*t*). If he [*289] assign *it, or assent to a specific bequest of it, he may thereby be guilty of a devastavit to the extent of its real value. Terms of years belonging to a testator or intestate vest in his executor or administrator without any entry (*u*). In the case of a tenancy from year to year as long as both parties please, if the tenant die, his personal representative has the same interest in the land as he had (*x*). Any one of several executors, without the concurrence of the others, has power to assign the whole of the testator's term and interest in all or any of his leasehold property (*y*); but not after either of them has assented to a bequest of such property to a legatee (*z*).

Actions by executors. — An action for rent, which became due in the lifetime of the lessor, may be brought by his executor or administrator. So he may sue the lessee for breach of a covenant not to fell, stub up, lop or top timber trees, excepted out of the demise, the breach having been committed in the lifetime of the lessor (*a*). So the executor of a tenant for life may sue for breach of a covenant to repair, committed by the lessee in the lifetime of the testator (*b*). By 3 & 4 Will. 4, c. 42, s. 2, executors and administrators may bring actions for injuries to the real estate of the deceased committed within six months before his death.

(*t*) Hellier *v.* Casbard, 1 Sid. 266; 1 Lev. 127; Rubery *v.* Stevens, 4 B. & Ad. 244.

(*u*) Wollaston *v.* Hakewill, 3 M. & G. 297; Atkins *v.* Humphrey, 2 C. B. 654; 3 D. & L. 612; but see Kearsley *v.* Oxley, 2 H. & C. 896.

(*x*) Doe *d.* Shore *v.* Porter, 3 T. R. 13; James *v.* Dean, 11 Ves. 391; Mackay *v.* Mackreth, 4 Doug. 213; Rex *v.* Great Glenn, 5 B. & Ad. 188; Thompson *v.* Thompson, 9 Price, 464.

(*y*) Hawkins *v.* Williams, 10 W. R. 692, Q. B.

(*z*) Cole Ejec. 529, 530.

(*a*) Raymond *v.* Fitch, 2 C., M. & R. 588. See 1 Wms. Exors. 806 (7th ed.).

(*b*) Rickets *v.* Weaver, 12 M. & W. 718; Noble *v.* Cass, 2 Sim. 343.

In England they are liable only up to the *letting* value except so far as they have assets.

In re Bowes, 37 Ch. D. 128, 132 (*per* North, J.).

In the United States an executor is liable to the extent of the assets for the full value of the term, but if he waive the term and decline to enter and occupy the premises, he is not liable *de bonis propriis*. Walworth, Chan., in Martin *v.* Black, 9 Paige (N. Y.) 641, 644.

Distress. — As to distresses by executors or administrators, see post (*c*).

Liability of personal representatives. — An executor or administrator may be charged as such for arrears of rent due from the deceased, so far as he has assets (*d*), but by the operation of 32 & 33 Vict. c. 46, the lessor is not entitled to any priority over other creditors (*e*). So also is an executor de son tort, and that merely on proof that the term vested in him as such (*f*). For subsequent rent he may be charged either as executor (or administrator) during the term (*g*), or personally as an assignee of the term, even where he has not entered to take possession of the demised premises (*h*). But the husband of an executrix or administratrix, who has never entered, ought not to be sued alone as assignee of the term (*i*).

*** Liability of executor de son tort.** — An executor de [*290] son tort is liable as assignee upon the covenants of a lease, and the executor of an executor de son tort may himself become executor de son tort in respect of the estate of the original estate. Where the father was executor de son tort with regard to a lease, and the son upon his death acted as agent to the mother till her death, and then continued in possession of the lease for the benefit of himself and the other children, it was held that he became assignee of the lease, and liable upon the covenants therein (*k*).

Personal liability of executor. — An executor, so far as he has assets, is no doubt liable upon the covenants of his testator, and there is strong authority for saying that even if the estate be insufficient, he is personally liable (*l*); but this

(*c*) Chap. XI. Sect. 3 (d).

(*d*) 2 Wms. Exors. 1752 (7th ed.).

(*e*) Shirreff *v.* Hastings, L. R., 6 Ch. D. 610; 25 W. R. 842.

(*f*) Paull *v.* Simpson, 9 Q. B. 365.

(*g*) Coghil *v.* Freelove, 3 Mod. 325; Pitcher *v.* Tovey, 4 Mod. 71; 1 Wms. Saund. 241 b, note (5); 2 Wms. Exors. 1752 (7th ed.).

(*h*) Wollaston *v.* Hakewill, 3 M. & G. 297; Nation *v.* Tozer, 1 C., M. & R. 172; Green *v.* Ld. Listowell, 2 Ir. L. R. 384; Ackland *v.* Pring, 2 M. & G. 937; Lyddall *v.* Dunlop, 1 Wils. 4, 5; 1 Wms. Saund. 1, note (1); but see Kearsley *v.* Oxley, 2 H. & C. 896.

(*i*) Kearsley *v.* Oxley, 2 H. & C. 896.

(*k*) Williams *v.* Heales, L. R., 9 C. P. 177; 43 L. J., C. P. 80; 30 L. T. 20; 22 W. R. 317.

(*l*) See Platt on Covenants, p. 458, and the cases cited, *infra*.

naked question of personal liability has not come before the courts for very many years, and the extreme hardship of making an executor personally liable upon some covenants (as to rebuild a house which has been burnt down), is so apparent, that an express decision to that effect would probably be followed by remedial legislation.

Executor may assign over to pauper. — An executor or administrator may discharge himself from personal liability as assignee of the term by an assignment over, even to a pauper (*m*); and if, not having a sufficiency of assets, he do not so assign, after first offering to surrender, he cannot throw the resulting loss upon beneficiaries (*n*).

Executor not personally liable for rent. — The proper course to be pursued is that pointed out in 22 & 23 Vict. c. 35, s. 27 (*o*). In cases to which that act does not apply, or where it is not pursued, an executor or administrator sued as an assignee of the term, and who has not assigned over, may plead — except as to £ —— (being the full actual value of the demised premises during the period in respect of which the rent is claimed, and which should be paid into court, or the claim for it be otherwise answered (*p*)) — that the term did not vest in him by assignment otherwise than as executor or administrator, and that he has not any time since the death of the lessee received or derived, nor could he during any part of that time receive or derive, any profit from the said demised premises, except sums amounting to the sum excepted, and that the said demised premises have not since the death of the lessee yielded any profit whatever, except to the amount excepted; and that the defendant had not at the commencement of the action, nor has since had, nor has any goods or chattels which were of the lessee at the time of his death in the hands of the defendant as executor (or administrator) as aforesaid to be administered (*q*).

(*m*) Pitcher *v.* Tovey, 4 Mod. 71; Taylor *v.* Shum, 1 B. & P. 21; Wilson *v.* Wigg, 10 East, 315.

(*n*) Rowley *v.* Adams, 4 Myl. & Cr. 534.

(*o*) *Post*, 269.

(*p*) Patten *v.* Reid, 6 L. T. 281, Q. B.

(*q*) Billinghurst *v.* Spearman, 1 Salk. 297; Buckley *v.* Porter, 1 Salk. 317; Rubery *v.* Stevens, 4 B. & Ad. 241; Wollaston *v.* Hakewill, 3 M. & G. 297; Hopwood *v.* Whaley, 6 C. B. 744; 6 D. & L. 342.

*** Breach of covenant to repair.** — But the defence [*291] that the premises are worth nothing does not seem to be available in an action for non-repair, or for other breaches of covenant running with the land (not being for non-payment of rent) (*r*). And it would seem that the absence of assets is equally unavailable as a defence (*s*). The preponderance of authority seems to be in favour of this rule, though it may work extreme injustice in particular cases (as, for instance, where a house is burnt down); and the danger foreseen by Tindal, C. J., in Tremeere *v.* Morison (*t*), viz., that the landlord would have no redress though the property went on deteriorating, can rarely arise in practice, as almost all leases have a proviso for re-entry in case of breach of covenants.

If issue be taken on the value of the premises the question will be whether they were of any annual value (*u*), or of any value beyond the sum excepted out of the defence and paid into court or otherwise pleaded to. In estimating such value the jury must calculate according to the actual annual value of the premises, supposing them to be kept in proper repair according to the covenants in the lease, and without deducting any loss occasioned by the insolvency of an under-tenant, or the non-payment of the rent by him (*x*).

Continuing liability of executors. — An executor or administrator cannot be sued as assignee of the term where the testator or intestate has assigned it: nor for causes of action which accrue after the executor or administrator has himself assigned it over: but (except so far as protected by 22 & 23 Vict. c. 35, s. 27) he will continue liable as executor or administrator in respect of any other assets, notwithstanding

(*r*) Tremeere *v.* Morison, 1 Bing. N. C. 89; Sleap *v.* Newman, 12 C. B., N. S. 116; Hornidge *v.* Wilson, 11 A. & E. 645; Tilvey *v.* Norris, 1 Ld. Ray. 553; but see *per* Bayley, B., in Reid *v.* Lord Tenterden, 4 Tyr. 111.

(*s*) Tremeere *v.* Morison, *ubi supra*; Wollaston *v.* Hakewill, 3 M. & G. 320, where, however, it is said that the executor is not liable without entry.

(*t*) The law upon the subject of the liability of the executor of a lessee is well summarized in the notes to Dean and Chapter of Bristol *v.* Guyse, 1 Wms. Saund. 124 (ed. 1871); see, too, Jevens *v.* Harridge, Id. 1.

(*u*) Rubery *v.* Stevens, 4 B. & Ad. 241.

(*x*) Hornidge *v.* Wilson, 11 A. & E. 645; Rubery *v.* Stevens, *supra*; Reid *v.* Ld. Tenderden, 4 Tyr. 111.

any such assignment (*y*). The term vests in the executor or administrator as assignee thereof without any entry by him (*z*).

Only profits are assets. — When an executor takes leasehold property nothing is assets but the profits above the rent: as, if the land be worth 10*l.* per annum, and 5*l.* is reserved, in that case nothing is assets but the 5*l.* above the rent (*a*). The profits of the land may be inadequate to the rent: in a variety of cases they may be easily supposed insuffi-
[*292] cient for a given * period, although the lease may on the whole be beneficial; as, for instance, where rent is claimed for the occupation of premises from Michaelmas to Lady-day, where almost the whole profit is taken in the summer (*b*): so the profits for a series of years may be less than the amount of the rent, although the lease for the whole term may be of no small value, — as in the case of a lease of woods, which are fellable only once in eight or nine years, and the felling has been very recent (*c*). In these and the like instances, the executor is personally liable only to the extent of the profits; and for such proportion of the rent as shall exceed the profits, he is chargeable merely in the capacity of executor, or, in other words, as far only as he has assets, provided he pleads the whole matter specially and accurately (*d*). The profits of the land are to be applied by the executor, in the first place, to the discharge of the rent, and if that fund prove insufficient, the residue of the rent is payable out of the general assets, and stands on the same footing with other debts by specialty; and this whether the rent be reserved by lease in writing or by parol. A lease belonging to an intestate, on which another has a lien, is

(*y*) Hellier *v.* Casbard, 1 Lev. 127; 1 Sid. 266; Coghil *v.* Freelove, 3 Mod. 325; Wilson *v.* Wigg, 10 East, 315; Howse *v.* Webster, Yelv. 103; 2 Wms. Exors. 1751 (7th ed.).

(*z*) Wollaston *v.* Hakewill, 3 M. & G. 297; Atkins *v.* Humphreys, 2 C. B. 654; 3 D. & L. 612; but see Kearsley *v.* Oakley, 2 H. & C. 896.

(*a*) Hargrave's case, 5 Co. R. 31 b, cited 4 B. & Ad. 245.

(*b*) 2 Wms. Exors. 1622 (6th ed.).

(*c*) Ibid.

(*d*) Buckley *v.* Pirk, 1 Salk. 317; Billinghurst *v.* Spearman, 1 Salk. 297; Rubery *v.* Stevens, 4 B. & Ad. 241; Hornidge *v.* Wilson, 11 A. & E. 645; Hopwood *v.* Whaley, 6 C. B. 744; 6 D. & L. 348; Collins *v.* Crouch, 13 Q. B. D. 542; Bullen & L. Pl. 583, 584 (3rd ed.).

assets in the hands of the administrator, who has power to redeem it as well as to dispose of the legal estate (*e*). So an equity of redemption in a sum of money charged on real estate is a legal asset because the money is recoverable by the executor virtute officii (*f*).

Insurance. — In Fry *v.* Fry a lessee was bound to insure. The insurance expired on the 25th March. He died on 27th March, without having paid the premium. The house was burnt down on the 26th May, his executors (who did not prove till the 17th June) not having paid the premium. It was held, that they were not personally liable to the residuary legatees for neglect in not having kept up the assurance (*g*).

Party-walls. — An administrator of a lessor has been held obliged to contribute as owner towards the rebuilding of a party-wall under the old Building Act, though not otherwise owner than as administrator, and though he had no assets to meet the expenses (*h*).

How executor may get rid of personal liability. — The hardship of the common law upon executors has been somewhat modified by the statute 22 & 23 Vict. c. 35, which enables an executor, *having sufficient assets* and taking advantage of the act, to rid himself completely of his personal liability under any lease or agreement for a lease. By section 27 of this act, "where an executor or administrator, liable as such to the rents, covenants or agreements * con- [*293] tained in any lease or agreement for a lease, granted or assigned to the testator or intestate, whose estate is being administered, shall have satisfied all such liabilities under the said lease or agreement for a lease as may have accrued due and been claimed up to the time of the assignment hereafter mentioned, and shall have set apart a sufficient fund to answer any future claim that may be made in respect of any fixed and ascertained sum covenanted or agreed by the lessee to be laid out on the property demised, or agreed to be de-

(*e*) Vincent *v.* Sharp, 2 Stark. R. 507.

(*f*) Cook *v.* Gregson, 3 Drew. 547; 25 L. J., Ch. 706.

(*g*) Fry *v.* Fry, 27 Beav. 146; 28 L. J., Ch. 593.

(*h*) Thackor *v.* Wilson, 3 A. & E. 142.

mised, although the period for laying out the same may not have arrived, and shall have assigned the lease, or agreement for a lease, to a purchaser thereof, he shall be at liberty to distribute the residuary personal estate of the deceased to and amongst the parties entitled thereto respectively, without appropriating any part, or any further part (as the case may be), of the personal estate of the deceased to meet any future liability under the said lease, or agreement for a lease; and the executor or administrator so distributing the residuary estate shall not, after having signed the said lease or agreement for a lease, and having, where necessary, set apart such sufficient fund as aforesaid, be personally liable in respect of any subsequent claim under the said lease or agreement for a lease."

Right of lessor to follow assets. — The section goes on to provide, that "nothing herein contained shall prejudice the right of the lessor, or those claiming under him, to follow the assets of the deceased into the hands of the person or persons to or amongst whom the said assets may have been distributed." Leases made before the act are within this section (*i*), and so are leases assigned to the testator or intestate (*k*), but a lease assigned to a residuary legatee is not (*i*). It is not clear whether an executor should set apart a fund to meet a contingent liability under a lease, which he knows of, but as to which no notice has been given him, or claim made; perhaps he may do so for his own indemnity, but the landlord has no right to bring an action to compel him to do so (*l*).

By sect. 28, the executor has the like power of getting rid of personal liability under conveyances on chief rent or rent-charges, and agreements for such conveyances.

By sect. 29, executors or administrators may advertise for creditors and others to send in their claims against the estate of the testator or intestate, and at the expiration of the time named in the advertisements for sending in such claims, are at liberty to distribute the assets of the testator or intestate amongst the parties entitled thereto.

(*i*) Dodson *v.* Sammell, 1 Drew. & Sm. 575; 30 L. J., Ch. 799; Smith *v.* Smith, 1 Drew. & Sm. 384.

(*k*) *In re* Green, 2 De Gex, F. & J. 121.

(*l*) King *v.* Walcott, 4 Hare, 692.

By sect. 30, executors or administrators may, by petition or summons, obtain the opinion of a judge of the Chancery division "on * any question respecting the [*294] management or administration of the trust property or the assets of any testator or intestate," and may act on such opinion with perfect safety, except in case of fraud or wilful concealment. Questions of construction affecting capital of considerable amount will not be decided upon a petition under this section (*m*). Executors bringing facts plainly before the court and distributing the assets under its direction are absolutely protected against any future claim; and the only remedy of a creditor on covenant or otherwise is against the legatees (*n*). A lessor is not entitled, in respect of a breach of covenant in a lease, to follow the assets of a deceased lessee, which had been placed in settlement upon the marriage of the lessee's daughter, there being no imputation as to the honesty with which the assets have been dealt with (*o*).

Where leaseholds are sold under an order of the court in an administration action, and the purchase-money is paid into court, the order is a sufficient indemnity to the executors (*p*).

Use and occupation. — Actions for use and occupation by and against executors and administrators will be treated of hereafter (*q*). Where there was a lease by deed, and on the death of the lessee her son applied to the lessor to become tenant on the same terms as the lessee, and was accepted; it was held, in an action for use and occupation against the son, to whom, jointly with another, letters of administration had been granted to the estate of his mother after the commencement of the action, that it was a question

(*m*) *In re* Burnett, 10 Jur. N. S. 1098, Wood, V.-C.; *In re* Evans, 30 Beav. 232.

(*n*) Bennett *v.* Lytton, *in re* Sanford, 2 Johns. & H. 155; Smith *v.* Smith, 1 Drew. & Sm. 384.

(*o*) Dilkes *v.* Broadmead, 2 Giff. 113; 29 L. J., Ch. 310; 30 Id. 268.

(*p*) Waller *v.* Barrett, 24 Beav. 413; 27 L. J., Ch. 214; Williams *v.* Headland, 34 L. J., Ch. 20. It was otherwise before the passing of 22 & 23 Vict. c. 35. See Garratt *v.* Lancefield, 2 Jur., N. S. 177; Brewer *v.* Pocock, 23 Beav. 310.

(*q*) Chap. XIV.

for the jury whether the defendant occupied as assignee of the lease or upon a fresh taking (*r*).

Wrongs to property committed by testator or intestate. — Formerly an executor or administrator could not be charged in any case for any personal wrong done by the deceased, and therefore no action could be brought against him for any such cause; as for cutting down trees, or for suffering his cattle to eat up the plaintiff's grass; but by 3 & 4 Will. 4, c. 4, s. 2, such actions may be brought against executors within six months after administration commenced in respect of wrongs committed by the deceased within six months before his death.

(*r*) Drury Lane Theatre *v.* Chapman, 1 C. & K. 14.

* CHAPTER VIII. [*295]

DETERMINATION OF TENANCY.

SECT. 1. — *The Modes of Termination.*

Enumeration. — A lease for years may be determined in various ways, viz.: — 1. By effluxion of time, on the expiration of the term granted.[1] 2. By the happening of some

[1] **Leases for terms certain expire without notice.** — Logan *v.* Herron, 8 S. & R. (Pa.) 459; Clark *v.* Smith, 25 Pa. St. 137; McCarthy *v.* Yale, 39 Cal. 586; Neumeister *v.* Palmer, 8 Mo. App. 491; Clapp *v.* Paine, 18 Me. 264; Stockwell *v.* Marks, 17 Id. 455; Lithgow *v.* Moody, 35 Id. 214; Preble *v.* Hay, 32 Id. 456; Hauxhurst *v.* Somers, 38 Cal. 563; Jackson *v.* Parkhurst, 5 Johns. (N. Y.) 128; Jackson *v.* M'Leod, 12 Id. 182. They are for life, for lives, for years, for months, for weeks, for days, &c. A lease may provide for a tenancy at will after expiration of a term. Van Rensselaer's Heirs *v.* Penniman, 6 Wend. (N. Y.) 569.

From year to year; limited. — A tenancy from year to year may be limited to expire at a time certain. This will result if parol lease is made for a term of years. Doe *d.* Parkinson *v.* Haubtman, Bert. (N. B.) 645.

event upon which the term is limited conditionally. 3. By a surrender. 4. By merger. 5. By forfeiture and re-entry or ejectment pursuant to some proviso or condition in the lease, for breach of covenant, &c. 6. By a notice to quit, where the tenancy is from year to year, or for other like period (greater or less)[1] determinable by notice.[2] 7. By a

Where a seal is required, a written lease (not under seal) will have the same effect as oral lease, terminating without notice at end of period. Caverhill *v.* Orvis, 12 C. P. (Ont.) 392.

[1] **Shorter periodical tenancies; how terminated.** — These are from *quarter* to *quarter*, Witt *v.* Mayor of N. Y., 6 Robertson (N. Y.) 441; from *month* to *month*, Anderson *v.* Prindle, 19 Wend. (N. Y.) 391 and 23 Id. 616; Gruenewald *v.* Schaales, 17 Mo. App. 324; McDevitt *v.* Lambert, 80 Ala. 536; Gunn *v.* Sinclair, 52 Mo. 327; Prickett *v.* Ritter, 16 Ill. 96; Huyser *v.* Chase, 13 Mich. 98; Woodrow *v.* Michael, Id. 190; from *week* to *week* (*per* Walworth, Chan., in Anderson *v.* Prindle, 23 Wend. (N. Y.) 616, 619), &c.

Notice to terminate them is, at common law, usually equal to the intervals. Statutory notices are *sometimes* shorter, but it is usually held must terminate with the periods.

[2] **Termination of tenancies at will.** — By the *common law* they are determinable without notice, see *post*, sec. 7, note, "Tenancy at will; notice to quit," &c., other than a reasonable informal one necessary to enable lessee to comfortably remove his family and effects, and harvest his crops.

Statutory notices are, however, now generally required. See *post*, ch. 8, sec. 7, (c), note, "The shorter tenancies."

In Maine these tenancies can *only* be determined by the statutory notice or by mutual consent. Rev. Sts. Ch. 94, sec. 2; Cunningham *v.* Horton, 57 Me. 420; but see Sullivan *v.* Carberry, 67 Id. 531. The statute is very sweeping, and (if taken literally) would exclude termination by alienation, death, eviction, &c., as well as prevent limiting such tenancies upon conditions.

In Massachusetts a statutory notice is provided, but it is held that parties may agree upon a different one, May *v.* Rice, 108 Mass. 150; Davis *v.* Murphy, 126 Id. 143; distinguishing Batchelder *v.* Batchelder, 2 Allen, 105; or may limit the tenancy on conditions, Creech *v.* Crockett, 5 Cush. 133 (for special purpose); Ashley *v.* Warner, 11 Gray, 43, 45 (so long as he kept a good school); Hollis *v.* Pool, 3 Met. 350 (till sale); Lyon *v.* Cunningham, 136 Mass. 532, 541 (*per* Field, J.); Elliott *v.* Stone, 1 Gray, 571 (to pay rent in advance or leave, held a limitation terminating without entry; but see *contra*, Elliott *v.* Stone, 12 Cush. 174, Shaw, C. J., giving the opinion in both cases), the happening of which will *ipso facto* determine the tenancy, or the tenancies may be limited to expire at a given time without notice, Morton, J., in Davis *v.* Murphy, 126 Mass. 143, 144; Shaw, C. J., in Elliott *v.* Stone, 1 Gray, 571, 574. Such limitations on the tenancy do not make it any *greater* than a tenancy at will.

See further as to conditional limitations, *post*, sec. 2, note, and sec. 5, note, "Forfeiture clauses."

Tenancies at will are terminated in following among other ways besides by notice to quit, to wit: by death of landlord, Joy *v.* McKay, 70 Cal. 445; Reed *v.* Reed, 48 Me. 388; death of lessee, Keating *v.* Moises, 2 Manitoba, 47;

notice to determine the term at the end of the first seven or fourteen years thereof, or at some other specified period, pursuant to a power in the lease. 8. By a disclaimer of the reversioner's title, where the tenancy is only from year to year, or other less period, and not for a term of years. 9. By death of the party on whose life the lease depends, as in the case of a lease for lives.[1]

By effluxion of time. — When the term of years granted by a lease expires by effluxion of time, the lessee or his assigns ought thereupon to quit possession (*a*).

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* Sect. 2. — *When the Term is limited conditionally.*[2] [*296]

Conditional limitations and conditions. — Sometimes the term itself is limited conditionally, ex. gr. for forty years if

(*a*) For the consequence of "Holding Over," see Chap. XIV., *post*.

Robie *v.* Smith, 21 Me. 114; alienation by landlord, Emmes *v.* Feeley, 132 Mass. 346; Curtis *v.* Galvin, 1 Allen (Mass.) 215; Howard *v.* Merriam, 5 Cush. (Mass.) 563, 574; McFarland *v.* Chase, 7 Gray (Mass.) 462; Esty *v.* Baker, 50 Me. 325; Nelson *v.* Cook, 12 Q. B. U. C. 22; written lease for term certain by landlord to third party, Groustra *v.* Bourges, 141 Mass. 7 (and it matters not what were lessor's motives); Merger Doe *d.* Cliff *v.* Connaway, Bert. (N. B.) 574, 578, 579 (as where lessee acquires the reversion); lessee making a sub-lease (at option of lessor), Reckhow *v.* Schenck, 43 N. Y. 448; Cook *v.* Cook, 28 Ala. 660, 668 (*per* Walker, J.); alienation by lessee, Little *v.* Palister, 4 Greenl. (Me.) 209; by disclaimer or inconsistent acts directly or impliedly disaffirming lessor's title, Campbell *v.* Procter, 6 Greenl. (Me.) 12 (pointing out the property as his own to be levied upon); Bennock *v.* Whipple, 12 Me. 346 (receiving a deed from a stranger); Ware *v.* Wadleigh, 7 Greenl. (Me.) 74; Currier *v.* Earl, 13 Me. 216; Bryant *v.* Tucker, 19 Id. 383; and (also at election of lessor) by voluntary waste, Daniels *v.* Pond, 21 Pick. (Mass.) 367.

[1] **Termination by total destruction.** — It is, also, held in America that tenancies may be terminated by *total destruction* of demised thing. Stockwell *v.* Hunter, 11 Met. (Mass.) 448 (lease of basement, whole building burned); Graves *v.* Berdan, 26 N. Y. 498 (lease of basement and chamber, whole building burned); Kerr *v.* Merchants' Ex. Co., 3 Edw. Ch. (N. Y.) 315; and Winton *v.* Cornish, 5 Ohio, 477; and Womack *v.* McQuarry, 28 Ind. 103; and Alexander *v.* Dorsey, 12 Ga. 12 (all cases of leases of apartments in buildings which were wholly destroyed by fire).

If any part of the demised thing is not destroyed, as (in case of lease of whole building) where land remains, the tenancy continues, and tenant remains liable for rent. See *post*, ch. 10, sec. 7, note, "Destruction of demised buildings by fire."

[2] **Terms limited conditionally expire without notice.** — Examples: So long as lessee remains postmaster, Easton *v.* Mitchell, 21 Ill. App. 189 (expired with expiration of commission); so long as lessee shall keep fur-

the lessee, or some other person or persons therein named shall so long live. In such case the term will determine at the end of the forty years, or on the death of the person or persons named, which shall first happen (*b*). Where a certain term of years is granted provided the lessee shall so long continue to occupy the premises personally, it will cease whenever he parts with the possession, even by compulsion of law, as by his becoming bankrupt (*c*). It was held in an old case that a lease for twenty-one years, if the lessee continue so long in the service of the lessor, was not determined by the death of the lessor (*d*); and in another old case, that if a lease of a house was made to a widow for forty years, *sub conditione quod si tamdiu vixerit sola et inhabitaverit*, the term passed to her executor upon her death unmarried within the term (*e*): but these rulings seem hardly to be correct, the first because the contract of service terminates with the death of the master, and the second because the

(*b*) Cole Ejec. 402; Hughes and Crowther's case, 13 Co. R. 66; Brudnell's case, 5 Co. R. 9.

(*c*) Doe *d.* Lockwood *v.* Clarke, 8 East, 185.

(*d*) Wrenford *v.* Gyles, Cro. Eliz. 643; Noy, 70.

(*e*) Hardy *v.* Seyer, Cro. Eliz. 414.

nace and buildings on premises, Cook *v.* Bisbee, 18 Pick. (Mass.) 527 (but if buildings are burned, lessee has right to rebuild them); during the existence of said club, Alexander *v.* Tolleston Club, 110 Ill. 65 (continued notwithstanding subsequent incorporation of the club); so long as he "kept a good school," Ashley *v.* Warner, 11 Gray (Mass.) 43; lease of ferry for season of 1855, Fraser *v.* Drynan, 4 Allen (N. B.) 74 (terminates with the freezing of the river (Miramichi), or at least upon Dec. 31, 1855); during continuance of partnership, Russell *v.* McCartney, 21 Mo. App. 544; to firm for firm purposes, Johnson *v.* Hartshorne, 52 N. Y. 173, 177 (terminated by dissolution of firm though five years' lease); for specified business purposes, Horner *v.* Leeds, 25 N. J. L. 106; Hurd *v.* Cushing, 7 Pick. (Mass.) 169, 174; so long as the land should be occupied and overflowed as a mill pond, Kerr *v.* Bearinger, 29 Q. B. U. C. 340.

To these should be added leases with purchase options, Knerr *v.* Bradley, 105 Pa. St. 190; Forge *v.* Reynolds, 18 C. P. U. C. 110; Sutherland *v.* Buchanan, 9 Chy. (Ont.) 135, purchase covenants, Stewart *v.* Long I. R. R. Co., 102 N. Y. 601; Bostwick *v.* Frankfield, 74 N. Y. 207, and forfeiture clauses. See *post*, sec. 5, notes.

Tenancies may be limited upon will of lessor, Folts *v.* Huntley, 7 Wend. (N. Y.) 210, or upon will of lessee, Effinger *v.* Lewis, 32 Pa. St. 367. See *ante*, sec. 1, notes, for examples of limitations upon tenancies at will and from year to year.

meaning of the parties appears to have been that the lease should be for the life of the widow.

Devise of house rent free, &c. — Where the testator appointed the defendant to be his agent, "to live rent free in my house as long as he continued agent, that is, as long as he does the business honestly and to the satisfaction of the trustees," it was held that the direction of the testator was only a recommendation to the trustees to continue the defendant as agent, and that they might eject him from the house, unless the defendant could prove the dismissal to be malicious (*f*).

Re-entry. — Upon the breach of any *condition* the lessor or his assigns may re-enter or maintain an ejectment, without any express proviso for re-entry (*g*). A proviso in a lease with no penalty annexed is a condition; but if a penalty is annexed it is a covenant (*h*).

Sect. 3. — *Surrender.*

(a) *Surrender by express Terms.*

What is a surrender. — A surrender is the yielding up an estate for life or years to him who has the immediate estate in reversion or remainder, wherein the
* estate for life or years may merge, by mutual agree- [*297]
ment (*i*). The party making the surrender is called the surrenderor, and the party to whom it is made the surrenderee. It differs from a release in this respect, that the release operates by the greater estate descending upon the less; whereas a surrender is the falling of a less estate into a greater (*k*). The proper operative words of a surrender are "surrender and yield up" (*l*). If a lessee reserve to himself any interest in or part of the estate, it is no sur-

(*f*) Belaney *v.* Kelly, 24 L. T. 738.

(*g*) Harrington *v.* Wise, Cro. Eliz. 486, cited 8 B. & C. 316; Earl of Pembroke *v.* Sir H. Berkeley, Cro. Eliz. 384, 560; Knight *v.* Mory, Id. 60; see *post*, Sect. 5, "Forfeiture."

(*h*) Simpson *v.* Titerell, Cro. Eliz. 242.

(*i*) 1 Inst. 337 (b); Smith L. & T. 303 (2nd ed.).

(*k*) Smith *v.* Mapleback, 1 T. R. 441; Williams *v.* Sawyer, 3 B. & B. 70.

(*l*) Smith L. & T. 304 (2nd ed.). See Forms of Surrenders, *post*, Appendix B, Sects. 30, 31, 32, 33.

render (*m*); nor does a surrender, it seems, operate as such unless accepted by the reversioner (*n*).

Surrenders must be in writing, and if for more than three years by deed. — Every surrender, by the act of the parties, must be in writing, and every surrender of a term of more than three years must be by deed.[1] This is the effect of the third section of the Statute of Frauds, and of the third section of 8 & 9 Vict. c. 109, the later enactment providing that if a deed be necessary for the creation of the term, a deed is requisite to its surrender (*o*).

By the Statute of Frauds (29 Car. 2, c. 3), s. 3, "no leases, estates or interests, either of freehold or of term of years, or any uncertain interest not being copyhold or customary interest, of, in, to or out of any messuages, manors, lands, tenements or hereditaments, shall be assigned, granted or surrendered, unless it be by deed or note in writing, signed by the party so assigning, granting or surrendering the same, or their agents thereunto lawfully authorized by writing, or by act and operation of law."

By 8 & 9 Vict. c. 106, s. 3, "A surrender *in writing* of an interest in any tenements or hereditaments, not being a copyhold interest, and not being an interest which might by law have been created without writing (*p*), made after the 1st day of October, 1845, shall be void at law unless made *by deed*."

No surrender by mere cancellation. — It has been held that a lease cannot be surrendered by mere cancellation (*q*); and it has been held also, where a lease appeared to have had the names of the parties torn off, that there was neither a sur-

(*m*) Com. Dig. tit. Surrender (H.); Bac. Abr. tit. Leases (S. 3); Co. Lit. 337.

(*n*) Coles *v.* Evanson, 19 C. B., N. S. 382.

(*o*) See McGarth *v.* Shannon, 17 Ir. R., C. L. 128.

(*p*) *I. e.* by Sect. 1 of the Statute of Frauds, "a lease not exceeding three years from the making thereof whereupon the rent reserved unto the landlord shall amount unto two-thirds parts at least of the full improved value."

(*q*) Roe *v.* Archbishop of York, 6 East, 86; Ld. Ward *v.* Lumley, 5 H. & N. 87, 656; 29 L. J., Ex. 322.

[1] In United States usually (except where lease is under seal) neither assignment nor surrender need be. In Canadian Provinces the rule is otherwise.

render by operation of law, nor primâ facie evidence of a surrender by deed or note in writing (*r*).

Conditional surrender. — A lessee may surrender upon condition, and if the condition be broken, the particular estate is revested (*s*); therefore, if a lessee for years surrender his whole term to the original lessor upon condition, * he may, upon non-performance of the condition, [*298] re-enter and revive the term (*t*).

When may surrender be made. — The lessee cannot before entry merge the term by a surrender, because till entry there is no term and no reversion wherein the possession may be merged; but if the lessee enter and assign, the assignee may before entry surrender his term to the lessor (*u*). But it is not necessary that the surrenderor of a lease, to begin at a future day, should be in possession in order to make a surrender before the period of commencement: thus, if a lease be to commence at Michaelmas next, and the lessee take a new lease under seal before Michaelmas, it is a surrender in law of the first lease (*x*). As to surrender of leases in futuro or future interests, there is this distinction to be observed, that a lessee for years of a term to begin at a day to come cannot surrender it by an actual surrender before the day of the term begin, but he may by a surrender in law (*y*). Whenever a deed purporting to be a surrender cannot operate as such, it will probably take effect as an assignment or as a release of the right to the term, *ut res magis valeat quam pereat.*

Requisites of good surrender. — In order to make a good surrender of lands by deed, and to make them pass by such a surrender, these things are requisite: — 1. That the surrenderor be a person able to surrender, and that he have an estate in possession of the thing surrendered at the time of the surrender made. 2. That the surrender be to him who has the next immediate estate in remainder or

(*r*) Doe *d.* Courtail *v.* Thomas, 9 B. & C. 288.

(*s*) Co. Lit. 218 b.

(*t*) Lloyd *v.* Langford, 2 Mod. 176; Bac. Abr. tit. Leases (S. 3).

(*u*) Bac. Abr. tit. Leases (S. 2).

(*x*) Shep. Touch. 302.

(*y*) Id. 304; Ive *v.* Sims, Cro. Eliz. 521; Hutchins *v.* Martin, Cro. Eliz. 605.

reversion, and that there be no intervening estate coming between. 3. That there be a privity of estate between the surrenderor and the surrenderee. 4. That the surrenderee have a higher and greater estate in the thing surrendered than the surrenderor hath, so that the estate of the surrenderor may be drowned therein. 5. That he have the estate in his own right, and not in the right of another. 6. That he be sole seised of this estate in remainder or reversion, and not in joint-tenancy (*z*). 7. That apt, or at all events sufficient, operative words be used (*a*). Those commonly employed are "surrender, grant, and yield up," or "assign and surrender." But no particular words are essential (*b*). Where a deed is not required by 8 & 9 Vict. c. 106, s. 3 (*c*), any instrument in writing duly signed, and expressing an *immediate* purpose of giving up the estate on the part of the tenant, if accepted by the landlord, will be sufficient (*d*). But such acceptance would seem to be necessary (*e*).

[*299] * **Instances of surrenders.** — A written instrument in this form: — "We do hereby renounce and disclaim, and also surrender and yield up all right, &c.," a tenancy from year to year being in existence, has been held a surrender and not a disclaimer (*f*). A written request by the tenant to his landlord to re-let the premises to some other person may, *when acted on*, amount to a surrender by act and operation of law (*g*). A written notice given by the tenant of his intention to quit at a time when he believed his tenancy to expire, but which is afterwards discovered not to be the time, does not operate as a surrender (*h*).

(*z*) Shep. Touch. 303; 2 Blac. Com. 326; but see *contra*, Shep. Touch. 308.

(*a*) *Post*, note (*d*).

(*b*) See usual Forms of Surrenders, *post*, Appendix B., Sects. 30–33.

(*c*) *Ante*, 274.

(*d*) Farmer *v.* Rogers, 2 Wils. 26; Smith *v.* Mapleback, 1 T. R. 441; Weddall *v.* Capes, 1 M. & W. 50; Harrison *v.* Blackburn, 17 C. B., N. S. 679, 680.

(*e*) *Per* Byles, J., in Colles *v.* Evanson, 10 C. B., N. S. 382.

(*f*) Doe *d.* Wyatt *v.* Stagg, 5 Bing. N. C. 564.

(*g*) Nickells *v.* Atherstone, 10 Q. B. 944.

(*h*) Lyon *v.* Reed, 13 M. & W. 285; Doe *d.* Murrell *v.* Milward, 3 M. & W. 328; Bessell *v.* Landsberg, 7 Q. B. 638.

(b) *Surrender by Act and Operation of Law.*

Surrender by acceptance of a new lease. — Surrenders by "act and operation of law," [1] or implied surrenders, are excepted in the Statute of Frauds (*i*), and are not affected by

(*i*) *Ante*, 274; Shep. Touch. 300; Com. Dig. tit. Surrender (L. 1); Perk. c. 9.

[1] **Surrender (by operation of law)** results from abandonment with consent. Amory *v.* Kannoffsky, 117 Mass. 351 (new tenant taken); Talbot *v.* Whipple, 14 Allen (Mass.) 177 (lessor resumed possession); Randall *v.* Rich, 11 Mass. 494; and Matthias *v.* Pace, 3 Russ. & Geld. (N. S.) 366 (keys given up, premises relet); Philip *v.* McLaughlin, 24 N. B. 532 (delivery to third party at request); Elliott *v.* Aiken, 45 N. H. 30 (delivery and acceptance of key); Boehm *v.* Rich, 13 Daly (N. Y.) 62; Vandekar *v.* Reeves, 40 Hun (N. Y.) 430; and Schieffelin *v.* Carpenter, 15 Wend. (N. Y.) 400, 407 (*per* Nelson, Ch. J.); Hesseltine *v.* Seavey, 16 Me. 212, 214 (*per* Shepley, J.); Vegely *v.* Robinson, 20 Mo. App. 199; Forbes *v.* Smiley, 56 Me. 174; Wallace *v.* Kennelley, 47 N. J. L. 242; Smith *v.* Niver, 2 Barb. (N. Y.) 180; Randall *v.* Rich, 11 Mass. 494. In several of above cases leases were under seal.

An unaccepted abandonment is not a surrender. Auer *v.* Penn, 99 Pa. St. 370; Gillis *v.* Morrison, 22 N. B. 207; Withers *v.* Larrabee, 48 Me. 570; Lucy *v.* Wilkins, 33 Minn. 441 (cases of delivery up of key without acceptance of possession); Williams *v.* Ackerman, 8 Or. 405; Doty *v.* Gillett, 43 Mich. 203; Conn. Mut. Life Ins. Co. *v.* U. S., 21 Ct. of Claims, 195; Rollins *v.* Moody, 72 Me. 135; Thomas *v.* Sanford Steamship Co., 71 Id. 548.

Authorized by statute. — *In New York* the statutes give right to surrender if premises become untenantable without fault of lessee. Laws of 1860, chap. 345. This right may be waived in lease. Butler *v.* Kidder, 87 N. Y. 98. Fears that premises *may become* untenantable are not sufficient. Tallman *v.* Gashweiler, 13 Daly (N. Y.) 555. Defects in plumbing, causing overflow, odors, St. Michael's P. E. Church *v.* Behrens, 13 Id. 548, damages, Vann *v.* Rouse, 94 N. Y. 401, or escape of sewer gas, Bradley *v.* De Goicouria, 12 Daly (N. Y.) 392, have been held sufficient.

Justifiable abandonment without consent. — Lessee may abandon if lease was taken through material, false, fraudulent representations if he exercise the right seasonably. Conklin *v.* White, 17 Abbott's N. C. (N. Y.) 315, 317 (*per* Hyatt, J.) (house not as represented), Lawrence *v.* Burrell, 17 Id. 312 (defect in flues, chimneys, &c.); Jackson *v.* Odell, 12 Daly (N. Y.) 345, 354 (abandonment after several months' occupancy); Wallace *v.* Lent, 1 Daly, 481 (failure to disclose existence of deleterious smells).

A tenant cannot abandon premises, on account of gases and odors from adjacent premises. Franklin *v.* Brown, 53 N. Y. Superior Ct. 474; Sultphin *v.* Seebas, 12 Daly (N. Y.) 139.

It has been held that he cannot abandon premises if the misrepresentations were not *wilfully* false, even though condition were injurious to health. Coulson *v.* Whiting, 12 Id. 408.

Eviction, actual or constructive, general or partial, justifies surrender. Warren *v.* Wagner, 75 Ala. 188, 204 (partial eviction); Simers *v.* Saltus, 3 Denio (N. Y.) 214 (constructive eviction).

See *post*, ch. 10, secs. 6 and 7, notes.

the 8 & 9 Vict. c. 106, s. 3, which only applies to surrenders made in writing (*k*). Of this sort are surrenders created by the acceptance of a new lease from the reversioner either to begin presently, or at any time during the continuance of the first lease; for the acceptance of a valid new lease implies a surrender of the existing lease (*l*), and operates as a surrender thereof by act and operation of law (*m*),[1] but not if the second lease be void or voidable (*n*), or if there be a mere agreement for a future lease, and not an actual demise (*o*).[2] The reason why such acceptance of a new lease operates as a surrender of the first is, because the lessee, by accepting the new lease, has been party to an act, the validity of which he is afterwards estopped from disputing, and which would not be valid if the first lease continued to exist, for he would be estopped from saying that the lessor had not power to make the new lease; and as the lessor could not grant the new lease until the first lease was surrendered, the acceptance of the new lease is of itself a surrender of the first (*p*).

What is a sufficient new lease. — If a lessee for twenty years take a lease for ten years to begin at Michaelmas next, there is no doubt but that the term of twenty years is sur-

(*k*) *Ante*, 274.

(*l*) Davison *d.* Bromley *v.* Stanley, 4 Burr. 2210; Com. Dig. tit. Surrender (I.).

(*m*) Roll. Abr. tit. Surrender; Crowley *v.* Vitty, 7 Exch. 319; 21 L. J., Ex. 136; Furnivall *v.* Grove, 8 C. B., N. S. 496; 30 L. J., C. P. 3.

(*n*) *Post*, 278.

(*o*) John *v.* Jenkins, 1 Cr. & M. 227; Foquet *v.* Moore, 7 Exch. 870; Cannan *v.* Hartley, 9 C. B. 634, 648; Badeley *v.* Vigeurs, 4 E. & B. 71; 23 L. J., Q. B. 377.

(*p*) Lyon *v.* Reed, 13 M. & W. 285; Bessell *v.* Landsberg, 7 Q. B. 638.

[1] **Surrender by acceptance of new lease.** — This implies surrender of old, Hoag *v.* Carpenter, 18 Ill. App. 555; Jungerman *v.* Bovee, 19 Cal. 354; Livingston *v.* Potts, 16 Johns. (N. Y.) 28; Van Rensselaer's Heirs *v.* Penniman, 6 Wend. (N. Y.) 569; Donkersley *v.* Levy, 38 Mich. 54, though old were under seal and new by parol. Ryan *v.* Kirchberg, 17 Ill. App. 132; Smith *v.* Niver, 2 Barb. (N. Y.) 180.

Old lease may be impliedly surrendered or cancelled by giving new lease to third party, with consent of lessee. Wallace *v.* Kennelly, 47 N. J. L. 242; Vandekar *v.* Reeves, 40 Hun (N. Y.) 430.

[2] In Schieffelin *v.* Carpenter, 15 Wend. (N. Y.) 400, it was held that if the new parol agreement was unperformed, though possession were taken under it, there was no surrender.

rendered or determined immediately; for by the lessee's acceptance of the new lease, he admits that the lessor is in a situation to demise to him notwithstanding the existence of the other lease; and, indeed, by such acceptance the lessor has power to make a new lease * during [*300] the former (*q*). But where a lessee for twenty-one years took a lease of the same lands for forty years, to begin immediately after the death of J. S., it was held that this was not any present surrender of the first term, because J. S. might wholly outlive that term, and then there would be no union to work a surrender: and it was considered that in the meantime, the chances being equal, whether he would survive it or not, the first term should not be hurt till that contingency happened; but that if J. S. died within the first term, then what remained of it was surrendered and gone by the taking place of the second (*r*). Where the lessee for years of a house accepts a grant of the custody of the same house, it is a surrender; for the custody of a thing which was let before, is another interest in the same thing leased, and cannot stand with the first lease (*s*): and if the first lease be of the land itself, and the second lease of the vesture of the same land, it is a surrender of the first lease: so it is if a lessee accept a grant of common, or rent out of the same land, to commence at a certain day within the term (*t*). If the king [or queen regnant] make a demise for years, the acceptance of a new lease is no surrender of the first lease (*u*): so if a lessee accept a grant of a thing consistent with the lease of the land, it is no surrender; as if the lessee of a manor accept the grant of a bailiwick, or the stewardship of the same manor; or if he accept the office of park-keeper of the same park for his life, it is no surrender, for the subsequent grant is merely collateral, and not of the thing itself (*x*); but where a lessee for years of an advow-

(*q*) Ive *v.* Sams, Cro. Eliz. 521; Hutchins *v.* Martin, Id. 604; Bac. Abr. Leases (S. 2); 2 Smith L. C. 713 (6th ed.).

(*r*) Bac. Abr. tit. Leases (S. 3).

(*s*) Gybson *v.* Searls, Cro. Jac. 177.

(*t*) Com. Dig. tit. Surrender (I. 1); Mellows *v.* May, Cro. Eliz. 874.

(*u*) Brook *v.* Goring, Cro. Car. 197.

(*x*) Gie *v.* Rider, 1 Sid. 75; Gybson *v.* Searls, Cro. Jac. 176, 184; Earl of Arundel *v.* Lord Gray, 2 Dyer, 200 b; Woodward *v.* Aston, 1 Ventr. 296.

son was presented to the advowson by the lessor it was adjudged to a surrender of his term (*y*).

What does not create a surrender. — A recital in a second lease, that it was granted in consideration (amongst other things) of a surrender of a prior lease of the same premises, is not a surrender by deed or note in writing of such prior lease, as it does not purport to be of itself a surrender or yielding up of the interest (*z*). A mere agreement for a new lease is not sufficient to create an implied surrender of the previous one (*a*); so an agreement between the lessor and a stranger, that the lessee shall have a new lease, is no surrender (*b*): and if a lessee accept a new lease in trust for another it is no surrender (*c*). But it seems that if a lessee re-demise to the lessor, for his whole term, re-
[*301] serving a rent, that * amounts to a surrender (*d*). A notice to quit at a *future* day cannot operate as a surrender (*e*), but a written request by the tenant to his landlord to relet the premises to some other person may, when acted on, amount to a surrender by act and operation of law (*f*).

Effect of an invalid new lease. — No *implied* surrender by the grant of a new lease will take effect, if the new lease be absolutely void (*g*): and if the new lease do not pass an interest according to the contract and intention of the parties, an acceptance of it is not an implied surrender of the old lease (*h*). The acceptance of a voidable lease which is afterwards made void contrary to the intention of the parties, but which has operated to pass some part of the term con-

(*y*) Gybson *v.* Searls, Cro. Jac. 84, 176.

(*z*) Roe *d.* Earl of Berkeley *v.* Archbp. of York, 6 Last, 86; Doe *d.* Earl of Egremont *v.* Courtenay, 11 Q. B. 702.

(*a*) *Ante*, 276 (*o*).

(*b*) Porris *v.* Allin, Cro. Eliz. 173.

(*c*) Com. Dig. tit. Surrender (H.) (L. 1).

(*d*) Lloyd *v.* Langford, 2 Mod. 175; Smith *v.* Mapleback, 1 T. R. 441.

(*e*) Doe *d.* Murrell *v.* Milward, 3 M. & W. 328; Bessell *v.* Landsberg, 7 Q. B. 638.

(*f*) Nickells *v.* Atherstone, 13 Q. B. 944.

(*g*) Zouch *d.* Abbott *v.* Parsons, 3 Burr. 1807; Wilson *v.* Sewell, 4 Burr. 1980; 1 W. Blac. 617; Roe *d.* Earl of Berkeley *v.* Archbp. of York, 6 East, 86; Davison *d.* Bromley *v.* Stanley, 4 Burr. 2210; Doe *d.* Earl of Egremont *v.* Courtenay, 11 Q. B. 702; Smith L. & T. 307 (2nd ed.); 3 Prest. Conv. 164, 165.

(*h*) Com. Dig. tit. Estates (G. 13).

tracted for, is not a surrender of a valid former lease inconsistent therewith: therefore when a tenant for life, with a power of leasing, made a lease of part of some land, which was not a good execution of the power, in consideration of the surrender of two prior leases of the whole of the land, and in order to effectuate an agreement entered into between the lessee and another person for the sale of the remaining part of the land, which the lease recited that it was intended to lease to the vendee by indenture of even date, and which was done; it was held, after the death of the tenant for life, that this new lease as to the premises thereby demised did not operate as a surrender of the two prior leases (*i*). So where a tenant for life, with power of leasing, granted a lease "in consideration of the surrender up" of a former lease, "which surrender is hereby made and accepted," it was held, that the new lease not being a good execution of the power, and therefore voidable by the remainderman, did not operate as a surrender of the prior lease (*k*). Where a voidable bishop's lease, which had been granted in consideration of a surrender by deed executed a few days before of a prior lease, was avoided by the successor; it was held, that the first lease was not revived by such avoidance (*l*).

Effect of new lease of part only. — If a lessee for years accept a new lease by indenture of part of the lands, it is a surrender for that part only, and not for the whole (*m*); and though a contract for years cannot be so divided, as to be avoided for part of the years and to subsist for the residue, either * by act of the party or by act in law; [*302] yet the land itself may be divided, and the tenant may surrender one or two acres, either expressly or by act of law, and the lease for the residue will stand good and

(*i*) Doe *d.* Biddulph *v.* Poole, 11 Q. B. 713; Roe *d.* Earl of Berkeley *v.* Archbp. of York, 6 East, 86; 2 Smith L. & T. 713 (6th ed.); Smith L. & T. 308 (2nd ed.).

(*k*) Doe *d.* Earl of Egremont *v.* Courtenay, 11 Q. B. 702; overruling Doe *d.* Earl of Egremont *v.* Forwood, 3 Q. B. 627.

(*l*) Doe *d.* Murray *v.* Bridges, 1 B. & Ad. 847.

(*m*) Earl of Carnarvon *v.* Villebois, 13 M. & W. 342; Morrison *v.* Chadwick, 7 C. B. 266; 6 D. & L. 567.

untouched (*n*). If there be two lessees for life, or years, and one of them take a new lease for years, it is a surrender of the moiety (*o*).

By estoppel. — The term "surrender by operation of law" is properly applied to cases where the owner of a particular estate has been party to some act having some other object than that of a surrender, but which object cannot be effected whilst the particular estate continues, and the validity of which act he is by law estopped from disputing (*p*). Such surrender is the act of the law, and takes place independently of, and even in spite of, the intention of the parties (*q*). It is presumed to have *preceded* the act to which the tenant is party (*r*). The acts in pais, which bind parties by way of estoppel, are acts of notoriety, not less formal and solemn than the execution of a deed, as, for instance, livery, entry, acceptance of an estate, and the like (*s*).

By consent and acceptance of possession. — A tenancy from year to year cannot be determined unless there be either a legal notice to quit or a surrender (*t*): and therefore a tenancy from year to year, created by parol, is not determined by a parol licence from the landlord to the tenant to quit in the middle of a quarter, and the tenant's quitting the premises accordingly (*u*); but where upon a tenancy from year to year, determinable at a quarter's notice, the lessor licensed the tenant to quit in the middle of a quarter, and the tenant accordingly quitted, and the lessor accepted possession; it was held to be a surrender by operation of law, destroying the right to rent for the whole or any part of the current quarter (*x*).

By mutual agreement. — An agreement by landlord and tenant that the term shall be put an end to, acted upon by

(*n*) Bac. Abr. tit. Leases (S. 3). See Jones *v.* Bridgeman, 39 L. T. 500.

(*o*) Shep. Touch. 302.

(*p*) Lyon *v.* Reed, 13 M. & W. 285; Bessell *v.* Landsberg, 7 Q. B. 638; Com. Dig. tit. Surrender (I.).

(*q*) Lyon *v.* Reed, 13 M. & W. 285.

(*r*) 9 C. B. 634, note.

(*s*) Id.; Nickells *v.* Atherstone, 10 Q. B. 944.

(*t*) Doe *d.* Read *v.* Ridout, 6 Taunt. 519.

(*u*) Mollett *v.* Brayne, 2 Camp. 10; Thompson *v.* Wilson, 2 Stark. R. 379.

(*x*) Grimman *v.* Legge, 8 B. & C. 324; Brown *v.* Burtinshaw, 7 D. & R. 603; Furnivall *v.* Grove, 8 C. B., N. S. 496; 30 L. J., C. P. 3; Bac. Abr. tit. Leases (S. 2).

the tenant's quitting the premises, and the landlord by some unequivocal act taking possession, amounts to a surrender by operation of law (*y*). Where, therefore, a tenant left the key at the counting-house of the landlord, and the latter, though he at first refused to accept it, afterwards put up a board to let the premises, and used the key to show them, and painted out the tenant's name from the front, this was held sufficient evidence of a surrender by operation of law (*z*). In Reeve *v.* Bird, the tenant of a house, three cottages, and a stable and yard, let at an entire rent for a term, before the * expiration of it, assigned all the [*303] premises, the house and cottages being in the possession of subtenants; the landlord accepted a sum of money as rent up to the day of the assignment, which was in the middle of a quarter; the assignee took possession of the stable and yard only; the occupiers of the cottages having left them after the assignment, and before the expiration of the term, the landlord relet them; the tenant paid no rent after the assignment, but the landlord received rent from the subtenants, and before the expiration of the term he advertised the whole of the premises to be let or sold; it was held that this was a surrender by operation of law of all the premises (*a*). But where a tenant from year to year by a Lady-day holding, orally agreed with his landlord's agent to quit at the ensuing Lady-day, which was within half a year; and the premises were relet by auction, at which the tenant attended and bid, but the new tenant was not let into possession; it was held that the tenancy was not determined, there not having been a surrender by operation of law (*b*).

Acceptance of key. — If the landlord of a house in the middle of a quarter accept the key from his tenant under a parol agreement that upon his then giving up the possession the rent shall cease, and he never afterwards occupy the premises, he cannot recover in an action for the use and

(*y*) Phené *v.* Popplewell, 12 C. B., N. S. 334; 31 L. J., C. P. 235.
(*z*) Id.
(*a*) Reeve *v.* Bird, 1 C., M. & R. 31.
(*b*) Doe *d.* Hudlestone *v.* Johnstone, 1 M'Clel. & Y. 141; Johnstone *v.* Hudlestone, 4 B. & C. 922; Doe *d.* Murrell *v.* Milward, 3 M. & W. 328.

occupation of the house for the time subsequent to his accepting the key (*c*).[1] But where A. was tenant to B. of rooms for a term of years, and upon the bankruptcy of B., A. sent the key of the rooms to the office of the official assignee, where it was left with a clerk, who was told that it was the key of the rooms which A. had occupied; and A. immediately quitted possession, but no further communication took place: this was held not to amount to a surrender by act and operation of law (*d*). Where two persons demised a house by lease in writing, one of whom, after signing the lease, never further interfered, and the other, before the first quarter's rent became due, accepted the key from the tenant's wife; it was held, that there was a sufficient surrender by the tenant which bound both the lessors, the wife of the tenant acting as his agent, and the lessor, who accepted the key, as the agent of the other (*e*).

Mere acceptance of key does not effect surrender. — But the mere fact that the landlord has received the key, and attempted unsuccessfully to relet the premises, does not estop him from alleging that the tenancy still subsists; and if, afterwards, before the expiration of the term, the landlord relet, the surrender by operation of law takes effect from such reletting, and does not relate back to the receipt of the key. So it was held by the Court of Appeal in Oastler *v.* Henderson (*f*).

[*304] * **Letting to another person, &c.** — Where a lessee quitted in the middle of his term apartments which he had taken for a year, and the lessor let them to another person, so that the lessee could not have come back if he had chosen; it was held that, by so doing, the lessor dispensed with the necessity of a written surrender (*g*). Where the owner of a ferry demised it for a year, but after a few weeks the lessee finding it unprofitable, agreed instead to become servant to the owner, and received daily wages for attending

(*c*) Whitehead *v.* Clifford, 5 Taunt. 518; Furnivall *v.* Grove, 8 C. B., N. S. 496; 30 L. J., C. P. 3.

(*d*) Cannan *v.* Hartley, 9 C. B. 634.

(*e*) Dodd *v.* Acklom, 6 M. & G. 672.

(*f*) L. R., 2 Q. B. D. 575; 46 L. J., Q. B. 607; 37 L. T. 22.

(*g*) Walls *v.* Atcheson, 3 Bing. 462.

[1] **Delivery of key.** — See *ante*, note, "Surrender (by operation of law)."

to the ferry for him, it was held to be a surrender by act and operation of law (*h*). Where a tenant from year to year agreed to buy the freehold of the land, it was held, that the agreement, not being absolute, but conditional on a good title being found, did not operate as a surrender of the tenancy by operation of law (*i*).

Acceptance of another tenant. — The effect of a surrender by operation of law has been extended to cases in which a third person has, with the consent of both landlord and tenant, taken possession of the demised premises and been treated by the landlord as his tenant (*k*).

A tenancy from year to year cannot be surrendered by the mere agreement of the landlord to accept a third person in the place of his tenant, unless such agreement be in writing, or the third person actually taken possession (*l*): but an oral agreement between a landlord and tenant from year to year, that another tenant shall be substituted in his place, who is accordingly substituted, and thereupon takes possession, is a sufficient surrender to determine the former tenancy (*m*).[1] Where a landlord grants a new lease to a stranger with the assent of the tenant under an existing lease, and the latter gives up his own possession, that is a surrender by operation of law (*n*), and there is a similar surrender if where A. being tenant from year to year sublet to B., and the original landlord, with the assent of A. accept B. as his tenant (*o*). Where

(*h*) Peter *v.* Kendal, 6 B. & C. 703.

(*i*) Doe *d.* Gray *v.* Stanion, 1 M. & W. 695; Tarte *v.* Darby, 15 M. & W. 601.

(*k*) Thomas *v.* Cook, 2 B. & Ad. 119. See Smith L. & T. 308, where this and similar cases are ably discussed, and it is remarked that the whole doctrine is an encroachment on the Statute of Frauds.

(*l*) Taylor *v.* Chapman, Peake Ad. Cas. 19.

(*m*) Stone *v.* Whiting, 2 Stark. 235; Nickells *v.* Atherstone, 10 Q. B. 944; Walker *v.* Richardson, 2 M. & W. 882; Lawrence *v.* Faux, 2 F. & F. 435; Hobson *v.* Cowley, 26 L. J., Ex. 209.

(*n*) Davison *v.* Gent, 1 H. & N. 744; 26 L. J., Ex. 122; Lawrence *v.* Faux, 2 F. & F. 435.

(*o*) Thomas *v.* Cook, 2 B. & Ad. 119; Johnstone *v.* Hudlestone, 4 B. & C. 922; Smith L. & T. 308–310 (2nd ed.); Wilson *v.* Sewell, 4 Burr. 1975; Hall *v.* Burgess, 5 B. & C. 332; Walls *v.* Atcheson, 3 Bing. 462; Woodcock *v.* Nuth, 8 Bing. 170; Lawrence *v.* Faux, 2 F. & F. 435.

[1] **Substitution of new tenant.** — See *ante*, note, "Surrender (by operation of law)."

two persons being tenants from year to year of two closes under different lessors agreed verbally to exchange them, which they did, and then the arrangement was mentioned to a person who was steward of both the lessors, and who [*305] *expressed his assent to it, it was held that this was evidence of new demises, and of a surrender by operation of law of the previous interests of the tenants (*p*). A tenant from year to year died, his widow remained in possession, and continued paying the rent to the landlord, with the knowledge of a person who, above a year after, took out administration; the widow still continued in possession for a year, paying the rent as before; it was held, that this did not amount to a surrender by operation of law of the tenancy from year to year (*q*). A tenant quitted possession of premises, and, on being applied to for rent, stated in a letter to his landlord, that he hoped his landlord would be able to let them to some other person on better terms; this the landlord did a few days after, and the new tenant entered and paid rent: it was held, that these facts amounted to a surrender, but the court declined to consider the effect of the letter as evidence of a surrender by a note in writing within the Statute of Frauds (*r*). Where W. and H., who were partners, by agreement, in March, 1827, became tenants to the plaintiff, and at Midsummer, 1828, W. retired from the partnership, and in January, 1829, H. entered into partnership with S.; and the plaintiff gave receipts for rent as received from H. after W. retired, and as received from H. and S. after S. became a partner; and also gave H. a letter to his attorney, signifying that a lease might be made to H. and S., but which was kept by H. and not acted upon, and no lease was prepared; it was held, that W. remained liable for the rent accruing at the time of H. and S. (*s*). Where premises had been let to B. for a term determinable by a notice to quit, and, pending the term, A., the landlord, agreed

(*p*) Bees *v.* Williams, 2 C., M. & R. 581; Lyon *v.* Reed, 13 M. & W. 285; Smith L. & T. 310 (2nd ed.).

(*q*) Doe *d.* Hull *v.* Wood, 14 M. & W. 682.

(*r*) Nickells *v.* Atherstone, 10 Q. B. 944; Smith L. & T. 314 (2nd ed.).

(*s*) Graham *v.* Wichelo, 1 Cr. & M. 188; Woodcock *v.* Nuth, 8 Bing. 170.

to let C. stand in B.'s place, and C. offered to pay rent; it was held, in an action for use and occupation against C., that he could not set up as a defence that B.'s term had not been determined either by a notice to quit, or a surrender in writing (*t*). Where a sole tenant from year to year, before the termination of his tenancy, entered into an agreement with his landlord for a lease to be granted to him and another jointly, and *both entered* upon and occupied the premises jointly; it was held, that the first tenancy was determined though the lease was never executed pursuant to the agreement (*u*).

(c) *Operation of Surrender.*

Surrender will not prejudice previous sub-leases. — The surrender of a lease will not affect or prejudice a sub-lease previously granted (*x*), unless indeed the subtenant expressly assents *to the surrender and in effect [*306] attorns to the surrenderee;[1] to hold of him on new terms, or as his agent or servant (*y*). Where a lessee mortgaged tenant's fixtures, and afterwards surrendered his lease to the lessor, who granted a fresh lease to a third party; it was held, that the mortgagee had a right to enter and sever

(*t*) Phipps *v.* Sculthorpe, 1 B. & A. 50; but see Hyde *v.* Moakes, 5 C. & P. 42.

(*u*) Hamerton *v.* Steed, 3 B. & C. 478.

(*x*) Mellor *v.* Watkins, L. R., 9 Q. B. 400; Doe *d.* Beaden *v.* Pyke, 5 M. & S. 146; Pleasant *d.* Hayton *v.* Benson, 14 East, 232; Torriano *v.* Young, 6 C. & P. 8; Piggott *v.* Stratton, 1 De G., F. & J. 33; 29 L. J., Ch. 1, 7.

(*y*) Lambert *v.* M'Donnell, 15 Ir. Com. L. R. 136.

[1] **Effect of surrender upon sub-lease.** — A lessee cannot surrender to prejudice of sub-lessee. McKenzie *v.* Lexington, 4 Dana (Ky.) 129. Sub-lessee may sue lessor if he disturb him. Eten *v.* Luyster, 60 N. Y. 252. If lessor make new lease, and sub-lessee attorn, he will lose remedy against lessor. Ritzler *v.* Raether, 10 Daly (N. Y.) 286.

Such surrender operates, in most cases, as a *quasi* assignment, lessor becoming landlord to sub-lessee. Eten *v.* Luyster, 60 N. Y. 252, 259; Ritzler *v.* Raether, 10 Daly, 286, 289; Benson *v.* Bolles, 8 Wend. (N. Y.) 175, 180.

In McKenzie *v.* Lexington, 4 Dana (Ky.) 129, 130, however, the lessee, having sublet without rent and surrendered, was held himself liable for the rent. See *post*, sec. 4, notes.

A lessee cannot surrender to prejudice of lien men or others who have acquired interests. Hagan *v.* Gaskill, 42 N. J. Eq. 215.

the fixtures, as it was not competent to the tenant to defeat his grant by the subsequent voluntary act of surrender (*z*).

Operation on rents reserved in sub-leases. — Formerly if a lessee for years, who had sublet for a less term, surrendered his term to the lessor, it followed that the reversion on the sub-lease being gone, the rent and the covenants were gone also (*a*). But the Act 4 Geo. 2, c. 28, s. 6, enabled a lessee to surrender his lease for the purpose of taking a new one without a surrender of a sub-lease, and saved to the lessee all the same remedies against the sublessee for rents, covenants and duties, and to the original lessor the same remedies for rents and duties reserved by the new lease, so far as they exceed not the rents and duties reserved in the former one, out of which the sub-lease was derived, as if the original lease were still kept on foot (*b*). And by 8 and 9 Vict. c. 106, s. 9, if a reversion expectant on a lease is surrendered, the estate which confers, as against the tenant, the next vested right to the tenements, shall be deemed the reversion for the purpose of preserving the incidents to and obligations on the reversion (*c*); so that, by the effect of this statute, the surrenderee becomes assignee of the reversion expectant on the sub-lease.

Effect on rent previously due. — Where a lease containing a personal covenant for the payment of rent is surrendered, the personal covenant is independent of the estate in the property, and as to rent previously due is not affected by the surrender, but the lessor remains a specialty creditor for the rent which accrued due before the surrender (*d*).

Accruing rent. — Before the Apportionment Act, 1870 (*e*), rent reserved by the lease at fixed periods, quarterly or otherwise, which was *accruing* when a surrender was made,

(*z*) London and Westminster Loan and Discount C. Limited *v.* Drake, 6 C. B. N. S. 798; 28 L. J., C. P. 297; and see Saint *v.* Pilley, L. R., 10 Ex. 137; 44 L. J., Ex. 33.

(*a*) Thrér *v.* Barton, Moore, 94; Webb *v.* Russell, 3 T. R. 393; Burton *v.* Barclay, 7 Bing. 756.

(*b*) Smith L. & T. 317; Doe *d.* Palk *v.* Marchetti, 1 B. & Ad. 715. See this section at length, *post*, Chap. IX., Sect. 4.

(*c*) Smith L. & T. 316. See 286, *post*.

(*d*) Att.-Gen. *v.* Cox, 3 H. L. Cas. 240; Smith L. & T. 317 (2nd ed.).

(*e*) *Post*, Chap. X., Sect. 6 (b).

sank and was entirely lost (*f*); but that act, sect. 3, by the words "re-entry, death or otherwise," seems to include the case of a surrender.

*** Surrender after assignment of future rent.** — In the [*307] peculiar case of Southwell *v.* Scotter (*g*), the plaintiff, having let to the defendant, assigned the reversion, but agreed with the assignee that they should continue to receive rent from the defendant, to whom they gave notice of the agreement. The defendant afterwards surrendered to the assignee of the reversion, and it was held that such a surrender was valid, and that the rent accruing due after it could not be recovered by the plaintiff from the defendant; but it seems that the plaintiff would have had a remedy against the assignee, though it was not necessary to decide that point.

(d) *By and to whom Surrender made.*

Surrenderee must be the immediate reversioner. — Those persons who are disabled to grant are unable to surrender; and such persons as are disabled to take by a grant are unable to take by a surrender (*h*). Moreover, the surrenderee must be the immediate reversioner (*i*); if therefore A. let to B. for ten years, who lets to C. for five years, C. cannot surrender to A. by reason of the intermediate interest of B.; but in such case B. may surrender to A., and afterwards C. likewise, because then his lease for five years is become immediate to the reversion of A. (*k*). If a husband have a lease or estate for years in right of his wife, he alone, or he and his wife together, may surrender it; but if the husband have an estate for life in right of his wife, who is tenant in dower or otherwise, and he alone, or he and she together, surrender it, the surrender is good only during the life of

(*f*) Grimman *v.* Legge, 8 B. & C. 324; Slack *v.* Sharp, 8 A. & E. 366; Dodd *v.* Acklom, 6 M. & G. 673; Doe *d.* Philip *v.* Benjamin, 9 A. & E. 644; Furnivall *v.* Grove, 8 C. B., N. S. 496; 30 L. J., C. P. 3.

(*g*) Southwell *v.* Scotter, 49 L. J., Ex. 356. As to whether there was or could be a valid assignment of the rent to the plaintiff as a chose in action, see 252, *ante*.

(*h*) Shep. Touch. 303.

(*i*) Edwards *v.* Wickwar, L. R., 1 Eq. 68, 403.

(*k*) Bac. Abr. tit. Leases (S. 2).

the husband, unless the deed be acknowledged by the wife pursuant to the Act for the Abolition of Fines and Recoveries.

Joint tenants, executors, &c. — One joint tenant cannot *surrender* to another joint tenant, but he may grant, release or assign to him. One of two or more executors may also surrender an estate or lease for years, which the executors have in the right of their testator (*l*). Where the lessee of premises, under a covenant of re-entry if the rent should be in arrear twenty-eight days, died in bad circumstances, and his brother administered de son tort, and then after having agreed with the landlord to give him possession and suffer the lease to be cancelled on his abandoning the rent, which was twenty-eight days in arrear, took out letters of administration; it was held, that the agreement of the brother as administrator de son tort did not conclude him as rightful administrator, nor give a right of possession to the landlord who had entered under the agreement, but who had [*308] not made any formal demand of the rent, * nor taken a regular surrender of the lease (*m*). Where a lessee who had paid rent sometimes to a trustee and sometimes to a cestui que trust, gave up possession on the last day of the term, but before it was ended, to the person who had been trustee, and not to the party then having the legal title; it was held, that as the act was equivocal, it did not amount to either a surrender or to a forfeiture (*n*).

Infants. — An infant may make a surrender in law by the acceptance of a new lease, if such new lease increase his term or decrease his rent; but a surrender by an infant lessee by deed is absolutely void.

Sequestrators. — A surrender of a lease cannot be made to sequestrators; it must be to the lessor, or to a party legally entitled under him (*o*).

What estate surrender may operate on. — A lessee may sur-

(*l*) Shep. Touch. 303.
(*m*) Doe *d.* Hornby *v.* Glenn, 1 A. & E. 49.
(*n*) Ackland *v.* Lutley, 9 A. & E. 879.
(*o*) Cornish *v.* Searell, 8 B. & C. 471.

render to him who has the immediate reversion, either in fee or for any less estate (*p*).

Sect. 4. — *Merger.*

What amounts to a merger of a term. — A lease for years may be determined by merger; that is, when there is a union of the term with the immediate reversion, both being vested at the same time in one person in the same right. In such case the reversion merges or drowns the term, because they are inconsistent and incompatible (*q*). *Nemo potest esse tenens et dominus.* A person cannot be, at the same time, both landlord and tenant of the same premises.[1] It may be laid down as a general rule, that whenever the particular estate and that immediately in reversion are both legal or both equitable, and by any act or event subsequent to the creation of the particular estate become for the first time vested in one person in the same right, their separate existence will cease and a merger will take place. But where a tenant for ninety-nine years purchases the reversion in fee, and takes a conveyance thereof to a trustee for himself, expressly to prevent a merger, the term becomes one in gross, and no merger takes place (*r*). A particular estate will merge in a reversion of a shorter duration than itself (*s*); as if one be lessee for twenty years, and the reversion expectant thereon be granted to another for one year, who grants it to the

(*p*) Bac. Abr. tit. Leases (S. 1, 2); Challoner *v.* Davis, 1 Ld. Raym. 402; Hughes *v.* Robotham, Cro. Eliz. 302.

(*q*) Bac. Abr. tit. Leases (R.); 2 Blac. Com. 177; Salmon *v.* Swan, Cro. Jac. 619; Burton *v.* Barclay, 7 Bing. 745.

(*r*) Belaney *v.* Belaney, L. R., 2 Ch. Ap. 138; 36 L. J., Ch. 265.

(*s*) Hughes *v.* Robotham, Cro. Eliz. 302; Poph. 30.

[1] **Merger.** — Ordinarily, assignment to lessor merges term in reversion, Smiley *v.* Van Winkle, 6 Cal. 605; Bartels *v.* Creditors, 11 La. An. 433, unless there is outstanding sub-lease, Bailey *v.* Richardson, 66 Cal. 416. Lessee's sureties remain liable. Hamilton *v.* Read, 13 Daly (N. Y.) 436.

The term is not merged in a future possible fee under purchase option or covenant. Bostwick *v.* Frankfield, 74 N. Y. 207; Stewart *v.* L. I. R. R. Co., 102 N. Y. 601.

lessee, it will operate as a merger of the twenty
[*309] *years' term, and the term for one year will begin to run (*t*). Where a lessee made a sub-lease for all his term, except a few days, and then granted the sub-lease and the rent thereby reserved to his lessor for the term mentioned in the sub-lease (but not for the few days so excepted), it was held, that the chattel interest was not merged in the fee (*u*). Where a lessee of premises for a term of twenty-one years, which would expire at Michaelmas, 1809, in December, 1799, took a further lease of the same premises for sixty years, to commence from Michaelmas, 1809; and the lessor died in December, 1800, and devised the premises in question to A., the lessee, for his life, who by lease and release *in* 1806 *conveyed his life estate to B.:* — it was held that A.'s interest in the lease of 1799, which was to commence in 1809, was not merged in his estate for life (*x*). Sir Edward Coke lays it down as a general rule that a person cannot have a term for years in his own right, and a freehold in autre droit, but that his own term shall drown in the freehold; but a man may have a term of years in autre droit, and a freehold in his own right (*y*); and it seems to be agreed, that if a man, being possessed of a term of years in right of his wife, purchase the inheritance, the term for years, though in right of his wife, is merged and extinct, because the purchase was the express act of the husband, and therefore amounts in law to a disposition of the term, by reason of the merger consequent thereupon; but a bare intermarriage of a woman who is a termor with the reversioner will not merge the term, because by the intermarriage the term is cast upon the husband by act of law, without any concurrence or immediate act done by him to obtain the same; and therefore in such case the law will preserve the term in the same plight as it gave it to the husband, till he by some express act destroys it or gives it away (*z*). Where,

(*t*) Cruise, Dig. 96; Burton Conv. 287; Stephens *v.* Bridges, 6 Madd. 66.

(*u*) Burton *v.* Barclay, 7 Bing. 745.

(*x*) Doe *d.* Rawlings *v.* Walker, 5 B. & C. 111.

(*y*) Webb *v.* Russell, 3 T. R. 401, Lord Kenyon, C. J.

(*z*) Co. Lit. 338 b; Lady Platt *v.* Sleap, Cro. Jac. 275; Sug. V. & P. 617 (14th ed.).

however, the husband himself is lessee for life, and intermarries with the lessor, this merges his own term, because he thereby draws to himself the immediate reversion, in nature of a purchase by his own voluntary act, and so undermines his own term; whereas in the other case, the term existing in the woman until the marriage, is not thereby so drawn out of her or annexed to the freehold as to merge therein; because that attraction which is only by act of law consequent upon the marriage, would, by merging the term, do wrong to a married woman, and so take the term out of her, though the husband did no express act for that purpose, which the law will not allow. If a husband is possessed of a term of years, and the owner of the reversion in fee devises it to the wife, who has issue, the husband, who in the lifetime * of the wife is tenant by the curtesy [*310] initiate, holds the two estates in different rights, without having acquired the freehold by his own act, and consequently there is no merger (*a*).

Administrator. — C. as administrator held certain land for a term of years, which he demised to P. for a shorter term. P. afterwards assigned this land to C. for the shorter term. In the first deed C. was described as administrator, but not in the second. It was held that there had been no merger in equity (*b*).

Merger of reversion. — Formerly if a tenant for a term of years leased for a less term, and assigned his reversion, and the assignee took a conveyance of the fee, by which his former reversionary interest was merged, the covenants of the sub-lease incident to that reversionary interest were thereby extinguished (*c*). But by 8 & 9 Vict. c. 106, s. 9, "when the reversion expectant on the lease, made either before or after the passing of this Act, of any tenements or hereditaments of any tenure, shall, after the 1st of October, 1845, be surrendered or merged, the estate, which shall for

(*a*) Jones *v.* Davies, 5 H. & N. 766; 7 Id. 507; 29 L. J., Ex. 374.

(*b*) Chambers *v.* Kingham, L. R., 10 Ch. D. 743; 39 L. T. 272, *per* Fry, J.

(*c*) Webb *v.* Russell, 3 T. R. 393; Thorne *v.* Woolcombe, 3 B. & Ad. 586.

the time being confer as against the tenant under the same lease the next vested right to the same tenements or hereditaments, shall, to the extent and for the purpose of 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."

Merger after Judicature Acts. — By the Judicature Act, 1873, s. 25, subs. (4), "there shall not after the commencement of this act (*d*), be any merger by operation of law only of any estate, the beneficial interest of which would not be deemed to be merged or extinguished in equity."

SECT. 5. — *Forfeiture.*

(a) *How incurred generally.*

By breach of covenant, where condition of re-entry. — A lease may be determined by entry or ejectment for a forfeiture [1] incurred either by (1) breach of a *condition* therein in

(*d*) *I.e.* 1st of November, 1875.

[1] **Forfeiture clauses.** — (*a*) The law construes them strictly. Waterman *v.* Clark, 58 Vt. 601; Machias Hotel Co. *v.* Fisher, 56 Me. 321; Jackson *v.* Silvernail, 15 Johns. (N. Y.) 278, and Jackson *v.* Harrison, 17 Id. 66 (covenant against assigning not broken by subletting); Adams *v.* Goddard, 48 Me. 212 (to pay extra insurance not broken without proof that extra insurance is due); Eberts *v.* Fisher, 54 Mich. 294 (to pay assessments not broken until their validity settled).

(*b*) *Limitations.* — If provisions are limitations, breach of them *ipso facto* terminates title. 4 Kent's Com. sec. 127; Wilde, J., in Fifty Associates *v.* Howland, 11 Met. (Mass.) 99.

(*c*) *Re-entry clauses.* — If provisions (not limitations) are joined to re-entry clauses, breach of them works no forfeiture, *unless* lessor or his representative re-enters. Strangers cannot enforce them. Porter *v.* Merrill, 124 Mass. 534, 541; Shumway *v.* Collins, 6 Gray (Mass.) 227, 230; Welch *v.* Silliman, 2 Hill (N. Y.) 491, 495.

The lessor or his representatives may enter, Fifty Associates *v.* Howland, 11 Met. (Mass.) 99; and may bring ejectment, Doe *d.* Mayor, &c., of St. John *v.* Roe, 24 N. B. 357; Jackson *v.* Topping, 1 Wend. (N. Y.) 388.

(*d*) *Demand before entry.* — They cannot for non-payment of rent without previous demand. This must be on pay-day, just before sunset. If no other place is named, it must be at mansion-house or other most notorious place on premises (though no person be there). Johnston *v.* Hargrove, 81 Va. 118;

the lease; or (2) for a breach of any covenant, in case (and in case only (*e*)) the lease contain a condition or proviso for re-entry for a breach of such covenant (*f*). The same rule applies to the breach of the terms of *an [*311] agreement for a lease for years, whether a person has entered and holds as tenant from year to year (*g*), or is considered as actual lessee (*h*). In that case also, if the agreement stipulate for a proviso for re-entry, ejectment can be brought at once. The lessor, having the jus disponendi, may annex whatever conditions he pleases to his grant, provided they be not illegal or repugnant to the grant itself; and upon the breach of any of these conditions may, subject to special statutory provisions for "relief against forfeiture," avoid the lease (*i*).

By what acts a forfeiture may be incurred. — Besides incurring a forfeiture by the breach of express conditions, which will be hereafter considered, a lessee may incur a forfeiture for breach of implied conditions, either by matter of record, or by act in pais: 1, by matter of record, where he sues out a writ, or resorts to a remedy which claims or supposes a right to the freehold, or where, in an action by his lessor grounded upon the lease, he resists the demand under the

(*e*) It is of importance that a lease for years should contain a proviso for re-entry for non-payment of rent at any rate, as otherwise the lessor may find himself saddled with an impecunious tenant, and not be able to get rid of him — unless, indeed, he can get judgment signed for rent due, and seize the term of years in execution.

(*f*) Lit. s. 325; Doe *d.* Wilson *v.* Phillips, 2 Bing. 13; Doe *d.* Darke *v.* Bowditch, 8 Q. B. 973.

(*g*) Doe *d.* Thomson *v.* Amey, 12 A. & E. 476; Thomas *v.* Packer, 1 H. & N. 669; Hayne *v.* Cummings, 16 C. B., N. S. 421.

(*h*) See as to this, Walsh *v.* Lonsdale, 21 Ch. D. 9, *ante*, p. 86.

(*i*) Baylis *v.* Le Gros, 4 C. B., N. S. 537, 539; 6 Id. 552. As to "relief against forfeiture" see *post*, Sect. 6.

Connor *v.* Bradley, 1 How. 211, 217; Jackson *v.* Harrison, 17 Johns. (N. Y.) 66, 71 (simply in afternoon will not do); Remsen *v.* Conklin, 18 Id. 447, 450 (*per* Spencer, Ch. J.); Van Rensselaer *v.* Jewett, 2 N. Y. 141; Smith *v.* Whitbeck, 13 Ohio St. 471 (must be at front door sufficient time before sunset to allow for counting money); Chipman *v.* Emeric, 3 Cal. 283; Gaskill *v.* Trainer, Id. 334; Gage *v.* Bates, 40 Id. 384 (the rule is now changed by statute in California).

Disavowal of title waives demand. Jackson *v.* Collins, 11 Johns. (N. Y.) 1.

Breaches of ordinary covenants do not work forfeitures. Pickard *v.* Kleis, 56 Mich. 604; Langley *v.* Ross, 55 Id. 163; Hilsendegen *v.* Scheich, Id. 468.

grant of a higher interest in the land; or where he acknowledges in court the fee to be in a stranger; for having thus solemnly protested against the right of his lessor, he is estopped by the record from claiming an interest under him (*j*), but anything of this sort can seldom, if ever, now happen, real actions having been abolished: 2, by act in pais, where he aliens the estate in fee (*k*).[1] Where a tenant delivered up possession of the premises and the lease, in fraud of his landlord, to a person who claimed under an hostile title, with the intention of enabling him to set up that title, not with the intention that he should hold under the lease; it was held, that the term was forfeited (*l*). Where a lessee, who had paid rent sometimes to a trustee and sometimes to a cestui que trust, gave up possession on the last day of the term, but before the term was ended, to the person who had been trustee, and not to the party then having the legal title; it was held, that as the act was equivocal, it did not amount either to a surrender or a forfeiture of the term (*m*). Where a forfeiture may be incurred by a grant or deed, it is necessary that the deed be a valid instrument, for if by reason of any defect it be void, it will not work a forfeiture of the estate (*n*): but granting a lease of

(*j*) *Post*, Sect. 8.

(*k*) Rees *v.* Irvington, Cro. Eliz. 322.

(*l*) Doe *d.* Ellerbrock *v.* Flynn, 1 C., M. & R. 137.

(*m*) Ackland *v.* Lutley, 9 A. & E. 879.

(*n*) Denn *d.* Dolman *v.* Dolman, 5 T. R. 641; Doe *d.* Lloyd *v.* Powell, 5 B. & C. 308, 312.

[1] **Disavowal of lessor's title.** — Express or implied disavowal terminates tenancy at lessor's option. Wells *v.* Sheerer, 78 Ala. 142; Jackson *v.* Collins, 11 Johns. (N. Y.) 1 (perpetual lease terminated); Newman *v.* Rutter, 8 Watts (Pa.) 51, 54 (*per* Rogers, J., applies doctrine to tenancies for years, but doubt if it applies to leases in fee); Jackson *v.* Vincent, 4 Wend. (N. Y.) 633 (lease for sixty-seven years terminated); Duke *v.* Harper, 6 Yerg. (Tenn.) 280; Doty *v.* Burdick, 83 Ill. 473; Brown *v.* Keller, 32 Id. 151, 155; Tuttle *v.* Reynolds, 1 Vt. 80; Currier *v.* Earl, 13 Me. 216; Campbell *v.* Procter, 6 Greenl. (Me.) 12; Bryant *v.* Tucker, 19 Id. 383; as receiving deed from stranger, Bennock *v.* Whipple, 12 Me. 346; making conveyance in fee, for years, or in mortgage, Ware *v.* Wadleigh, 7 Id. 74; Esty *v.* Baker, 50 Id. 325; Little *v.* Palister, 4 Id. 209; pointing out premises (to be levied upon) as own property, Campbell *v.* Procter, 6 Greenl. (Me.) 12; claiming under deed from third party, Jackson *v.* Vincent, 4 Wend. (N. Y.) 633; or declaring that one had taken deed or agreed to accept lease from third party, Jackson *v.* Collins, 11 Johns. 1, &c.

the land for more years than he himself has is no forfeiture, because it is only a contract between him and his sublessee (or rather assignee), which cannot possibly prejudice the interest of the original lessor, and does not even pretend to usurp or touch the freehold or inheritance. A proviso in a lease for re-entry on a condition *broken [*312] can only operate during the term (*o*). But it will extend to any new implied tenancy from year to year upon the like terms and conditions (*p*).

Time and place of performance of condition. — Where a time certain is appointed in a proviso or condition for the performance of anything, neither party is bound to attend at any other time; and if it is provided that any act be done on a day certain, but no hour of the day is specified wherein the same shall be done, the party must attend such a length of time before and until sunset as may be convenient to do the act. If a place be limited and agreed on by the parties where the condition is to be performed, the party who is to perform is not obliged to seek the party to whom it is due elsewhere, nor is he to whom it is to be performed *obliged* to accept of the performance elsewhere; but he *may* accept it at another place, and it will be good (*q*).

Effect of the Statute of Limitations. — The Real Property Limitation Act, 1874 (37 & 38 Vict. c. 74), bars the party who has a right to enter for a forfeiture, but who neglects to do so for more than *twelve years* after his right accrued (*r*). Where an ejectment is founded on a particular forfeiture, it must be commenced within twelve years after such forfeiture accrued (*s*). But a lessor is not bound to take advantage of the first or any other forfeiture committed during the term (*t*). Therefore it is no defence to an ejectment commenced after the expiration of the lease that a forfeiture and

(*o*) Johns *v.* Whitley, 3 Wils. 127.

(*p*) Thomas *v.* Packer, 1 H. & N. 669.

(*q*) Bac. Abr. tit. Conditions (O. 4).

(*r*) Doe *d.* Tarrant *v.* Hillier, 3 T. R. 162.

(*s*) Cole Ejec. 11.

(*t*) Doe *d.* Boscawan *v.* Bliss, 4 Taunt. 735; Doe *d.* Sheppard *v.* Allen, 3 Taunt. 78; Doe *d.* Bryan *v.* Bancks, 4 B. & A. 401; Doe *d.* Baker *v.* Jones, 5 Exch. 498.

right of re-entry thereon accrued under the lease more than twelve years before the commencement of the action (*u*).

Estate of party entering. — It may be laid down for a general rule that he who enters or recovers by ejectment for a condition broken shall be seized or possessed of that estate which the lessor had at the time of the estate made upon condition; and he may avoid all mesne charges and incumbrances (*x*).[1]

(b) *Construction of Proviso for Re-entry.*[2]

Construction of proviso for re-entry. — Provisoes for re-entry in leases are conditions annexed to the term, and are to be construed, like other contracts, according to the intent of the parties to be collected from the words used, and not with the strictness of conditions at common law (*y*); therefore, where there is a proviso in a lease, that on non-
[*313] payment of rent or non-performance * of any of the lessee's covenants the term shall cease, the lessor, and not the lessee, has the option of determining a lease upon a breach made (*z*). A proviso in a lease, that, upon breach of any of the covenants therein on the part of the lessee, the lessor may re-enter on the premises, "and the same have again, as if the said lease had never been made," means, that the lease is to be void from and after re-entry by the lessor, and does not deprive him of the right of bringing an action of covenant for rent which accrued previously: and this principle equally applies to a covenant for repairs or other service to be rendered by the lessee (*a*). An agreement of

(*u*) Cole Ejec. 11; Doe *d.* Allen *v.* Blakeway, 5 C. & P. 563; Doe *d.* Cook *v.* Danvers, 7 East, 299.

(*x*) Co. Lit. 202; Bac. Abr. tit. Conditions (O. 4); Cole Ejec. 68.

(*y*) Doe *d.* Davis *v.* Elsam, Moo. & M. 189; Doe *d.* Muston *v.* Gladwin, 6 Q. B. 953, 961; Croft *v.* Lumley, 5 E. & B. 667; 6 H. L. Cas. 672; 27 L. J., Q. B. 321; Perry *v.* Davis, 3 C. B., N. S. 769.

(*z*) Rede *v.* Farr, 6 M. & S. 121. And see the cases *ante*, 181.

(*a*) Hartshorn *v.* Watson, 4 Bing. N. C. 178; 6 Dowl. 404; see also Selby *v.* Browne, 7 Q. B. 620.

[1] **Voluntary waste** will terminate a tenancy at will at option of landlord. Walcot *v.* Pomeroy, 2 Pick. (Mass.) 121 (selling off manure); Phillips *v.* Covert, 7 Johns. (N. Y.) 1 (cutting timber); Suffern *v.* Townsend, 9 Id. 35, 36 (*per curiam*).

[2] See *ante*, (a), notes.

demise contained a clause that if the rent should be unpaid for ten days, or if the lessee should not observe all the conditions, &c., then it should be lawful for the lessor to enter upon and take possession of the premises, and to expel the lessee, without any legal process, and as effectually as a sheriff might do on a recovery in ejectment; and that, in case of such entry and an action being brought, the defendant might plead leave and licence in bar; it was held, that the lessee's right to possession as tenant continued until the lessor had availed himself of the licence given (*b*). Such a clause does not dispense with a formal demand of the rent (*c*). An agreement to let a house and for the lessee to make certain alterations, and if they were not done that the lessor might retake possession, and that the agreement should be null and void, is voidable only at the election of the lessor if the lessee does not make the alterations (*d*). Where in an agreement amounting to an actual demise there was a clause in the following form, "it is stipulated and conditioned that the lessee shall not underlet;" it was held, that these words created a condition, and being such, upon breach of it the lessor might maintain ejectment, without an express clause of re-entry (*e*). A proviso that the lessee shall pay 120*l*. per annum creates both a covenant and a condition, and therefore for breach of it an ejectment may be maintained without any express power of re-entry (*f*). If by a written agreement premises are let for a term, "at and under the rent of 80*l*.," it is an agreement by the lessee to pay that rent; and therefore if there be a power of re-entry in case of breach of "any of the agreements therein contained," the lessor has a right of re-entry on non-payment of rent, although there is no express agreement to pay rent (*g*). A proviso that if buildings should not be

(*b*) Kavanagh *v.* Gudge, 7 M. & G. 316; 1 D. & L. 928.

(*c*) Barry *v.* Glover, 10 Ir. Com. L. R. 113; Acocks *v.* Phillips, 5 H. & N. 183.

(*d*) Doe *d.* Nash *v.* Birch, 1 M. & W. 402; Hayne *v.* Cummings, 16 C. B., N. S. 421.

(*e*) Doe *d.* Henniker *v.* Watt, 8 B. & C. 308; Simpson *v.* Titterell, Cro. Eliz. 242; Marsh *v.* Curteys, Cro. Eliz. 528; Cole Ejec. 402.

(*f*) Harrington *v.* Wise, Cro. Eliz. 486; cited 8 B. & C. 316; Cole Ejec. 402.

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

[*314] * completed on a certain day "it shall be lawful for the lessors into the demised premises or any part thereof in the name of the whole [omitting the words 'to re-enter'] and repossess," would seem to give a right of re-entry (*h*).

Insensible proviso. — Where a proviso for re-entry was insensible, the court refused to decide its meaning, and nonsuited the plaintiff in an ejectment for a forfeiture (*i*). Where the lessee covenanted to pay the rent, and not to assign without the leave of the lessor, and there was a proviso for re-entry if the rent was in arrear, or if all or any of the covenants *thereinafter* contained on the part of the lessee should be broken; and there were no covenants on the part of the lessee after the proviso, but only a covenant by the lessor that upon the lessee paying the rent, and performing all and every the covenants *thereinbefore* contained on his part to be performed, he should quietly enjoy; it was held, that the lessor could not re-enter for breach of the covenant not to assign, for that the proviso was restrained by the word *thereinafter* to subsequent covenants; and though there were none such, yet the court could not reject the word (*k*). A proviso giving a power of re-entry if the lessee "shall do or cause to be done any act, matter or thing contrary to and in breach of any of the covenants," does not apply to a breach of the covenant to repair, the omission to repair not being *an act done* within the proviso (*l*).

Proviso for re-entry for breach of negative covenant. — It has been said to be a general rule that the proviso for re-entry applies only to the breach of an affirmative and not to the breach of a negative covenant (*m*). If the proviso be expressed to operate in case of "default in performance" or "failure to perform," or the like, this rule would seem to hold

(*h*) Hunt *v.* Bishop, 8 Exch. 675.

(*i*) Doe *d.* Wyndham *v.* Carew, 2 Q. B. 317; but see Doe *d.* Darke *v.* Bowditch, 8 Q. B. 973.

(*k*) Doe *d.* Spencer *v.* Godwin, 4 M. & S. 265.

(*l*) Doe *d.* Abdy *v.* Stevens, 3 B. & Ad. 299; Cole Ejec. 407.

(*m*) West *v.* Dobb, 39 L. J., Q. B. 190; Exch. Chamb. *per* Channell, B.; see also Doe *d.* Palk *v.* Marchetti, 1 B. & Ad. 715; Evans *v.* Davis, 39 L. T. at pp. 392, 394.

good; and indeed in Hyde *v.* Warden (*n*) the Court of Appeal was prepared to hold, if it were necessary, that the power of re-entry in event of the lessee "wilfully failing or neglecting to perform any of the covenants" does not apply to a breach of a negative covenant. But as was pointed out by Blackburn, J., in Wadham *v.* Postmaster General (*o*), the difficulty arises in consequence of the form of the proviso for re-entry. A proviso expressed to operate in case of "breach" or "non-observance" for instance, as well as in case of non-performance, would seem clearly to apply to the breach of a negative covenant.

Proviso for re-entry for waste to fixed value. — Where a lease contained a proviso for re-entry, if the lessee *committed waste to the value of 10*s.*, and the lessor [*315] re-entered, and brought ejectment in consequence of the tenant's having pulled down some old buildings of more than 10*s.* value, and substituted others of a different description: it was held, that the waste contemplated in the proviso was waste producing an injury to the reversion, and that it was a question for the jury whether, under all the circumstances, such waste to the value of 10*s.* had been committed (*p*).

Effect of covenant with penalty on proviso for re-entry. — Where there was, amongst others, a covenant not to carry off hay under a penalty, and a clause followed which enumerated all the covenants except that, and provided for re-entry upon breach of any of the covenants; it was held, that the penalty did not prevent the clause of re-entry from applying to the hay covenant, the words being large enough (*q*). Similarly, where the reddendum clause stipulated for an additional rent in case of the lessee carrying on certain trades which he covenanted not to carry on, and a proviso for re-entry for breach of covenants generally, it was held that the lease could not be construed as meaning that the lessee was entitled to carry on the trades in question on pay-

(*n*) L. R., 3 Ex. D. at p. 82.
(*o*) L. R., 6 Q. B. at p. 648.
(*p*) Doe *d.* Earl of Darlington *v.* Bond, 5 B. & C. 855.
(*q*) Doe *d.* Antrobus *v.* Jepson, 3 B. & Ad. 402.

ment of the additional rent, and that the right of re-entry might be exercised on breaches upon which the additional rent became payable (*r*).

Proviso for re-entry in case of execution. — Where a lease contained a clause of re-entry, in case the term of years thereby granted should be *extended or taken in execution;* and before the end of the term, the sheriff entered the premises under a writ of extent against the lessee at the suit of the crown, held an inquisition, and seized the lessee's interests into the king's hands; it was held, that this proceeding was a *taking in execution* within the latter clause of the condition, and that the term was determined and forfeited to the lessor (*s*); and where the condition was, amongst other things, to be void "if the lessee should incur any debt on which any judgment should be signed, entered up or given against him, and on which any writ of fieri facias, or other writ of execution, should be issued," and the tenant gave a warrant of attorney, on which judgment was entered up and execution issued and the tenant's goods were taken, and the lessor entered; it was held, that he was entitled to the emblements (*t*).

Proviso for re-entry in case of bankruptcy. — A proviso was, that in case the lessee should commit an act of bankruptcy, whereon a commission or fiat in bankruptcy should or might be issued, and under which he should be *duly* found [*316] and * declared a bankrupt, the term should determine; the tenant became bankrupt, and was found and declared a bankrupt, but there was not a proper petitioning creditor's debt on which the fiat was founded; it was held by two judges, against the opinion of Parke, B., that the lessee was not *duly* found and declared a bankrupt within the meaning of the proviso (*u*). A proviso was, that if the lessee, his executors, administrators or assigns, should become bankrupt or insolvent, or suffer any judgment to be

(*r*) Weston *v.* Metropolitan Asylums Board, L. R., 8 Q. B. D. 387; 46 L. T. 166.

(*s*) Rex *v.* Topping, 1 M'Clel. & You. 544.

(*t*) Davies *v.* Eyton, 7 Bing. 154.

(*u*) Doe *d.* Lloyd *v.* Ingleby, 15 M. & W. 465.

entered against him by confession or otherwise, or suffer any extent, process or proceedings to be had or taken against him, whereby any reasonable probability might arise of the estate being extended, &c., the estate should determine, and the lessor have a power to re-enter; the tenant died during the term, and by his will devised the premises to his executors on trust, and the surviving executor became a bankrupt; it was held the lessor's right of re-entry thereupon accrued (*x*). The non-payment of a debt mentioned in an insolvent's schedule was held not to be a continuing insolvency, so as to constitute a new forfeiture of a lease, the former forfeiture by the insolvency having been waived (*y*). A lease for three lives contained a proviso that if the lessee, his heirs, &c., should, during the continuance of the term, happen to become insolvent, and unable in circumstances to go on with the management of the farm, the demise should from thenceforth cease and be absolutely void: the court doubted whether the attainder of the tenant for felony was a forfeiture of the lease; but held, that if it was a breach of the condition, it was not a continuing breach, but was contemporaneous with the conviction (*z*).

Proviso for re-entry for ceasing to work mines. — Where a lease of coal mines reserved a royalty rent for every ton of coal raised, and contained a proviso that the lease should be void altogether if the tenant should cease working at any time within two years; but after the working had ceased more than two years the lessor received rent; it was held, that the lease was not absolutely void by the lessee's ceasing to work, but voidable only at the option of the lessor; and that he might avoid the lease upon any cessation to work, commencing two years before the day of the demise in the ejectment (*a*).

For non-production of cestui que vie. — In a lease for years if a person should so long live, there was a covenant to pro-

(*x*) Doe *d.* Bridgeman *v.* David, 1 C., M. & R. 405; Doe *d.* Williams *v.* Davis, 6 C. & P. 614.

(*y*) Doe *d.* Gatehouse *v.* Rees, 4 Bing. N. C. 384.

(*z*) Doe *d.* Griffith *v.* Pritchard, 5 B. & Ad. 765. See further, p. 274, *post*.

(*a*) Doe *d.* Bryan *v.* Bancks, 4 B. & Ad. 401; Doe *d.* Boscawan *v.* Bliss, 4 Taunt. 735; Roberts *v.* Davey, 4 B. & Ad. 664.

duce that person, or, if he should be in a foreign country, to make it appear by a good and sufficient certificate that he was living, with a proviso for re-entry on default; [*317] the person having * gone to Brazil, an affidavit that the deponent had three years before seen him, and had often heard from him since, and was convinced that he was alive nine months before when the deponent left Brazil, was held not to be a sufficient certificate within the covenant, and that therefore a forfeiture was incurred (*b*).

For no sufficient distress. — Under a clause of forfeiture in case no sufficient distress can be found upon the premises, every part of the premises must be searched (*c*).

For non-payment of rates. — Where a lessee has broken his covenant to pay rates and taxes, the lessor may avail himself of the proviso for re-entry without proof of any demand made (*d*).

(c) *Who may avail themselves of a Forfeiture.*

Not the lessor. — A lessee cannot avail himself of his own act or default to vacate a lease; on the principle that no man shall be permitted to take advantage of his own wrong (*e*).

The lessor or his assigns. — No one can re-enter for a forfeiture but the person then *legally* entitled to the rent or to the reversion (*f*); but a lessor who has demised his whole interest, subject to a right of re-entry on breach of a condition, may enter on the condition being broken, though he have no reversion (*g*).[1] A reversioner who has parted with his reversion, either absolutely or by way of mortgage, can-

(*b*) Randle *v.* Lory, 6 A. & E. 218.
(*c*) Rees *d.* Powell *v.* King, Forrest, 19; 2 Brod. & B. 514.
(*d*) Davis *v.* Burrell, 10 C. B. 821.
(*e*) Rede *v.* Farr, 6 M. & S. 121.
(*f*) Hotley *v.* Scott, Lofft, 319 a; Doe *d.* Barney *v.* Adams, 2 C. & J. 232; Doe *d.* Barker *v.* Goldsmith, 2 C. & J. 674.
(*g*) Doe *d.* Freeman *v.* Bateman, 2 B. & A. 168; Colville *v.* Hall, 14 Ir. Com. L. R. 265, C. P.

[1] Jackson *v.* Collins, 11 Johns. (N. Y.) 1. A lessor under a perpetual lease with re-entry proviso may re-enter for disavowal of title or non-payment of rent.

not re-enter or maintain ejectment for a forfeiture (*h*), nor after his reversion has been merged and extinguished (*i*).

Persons having equitable estates. — It was held before the Judicature Act that a right of entry could not be effectually reserved to a stranger to the legal estate, although he joined in the demise and had some equitable or beneficial estate or interest in the property (*k*). Thus, where by lease a mortgagee demised, and the executrix of the mortgagor demised and confirmed, and a power of re-entry for breach of covenants was reserved *to them or either of them*, it was held, that the deed operated as a demise by the mortgagee, and a confirmation by the executrix, and that the proviso for re-entry enured only to the mortgagee, and not to both (*l*).

Trustees. — The same rule applied where trustees and cestui qui trust joined in a lease, reserving rent to the cestui que trust, with a proviso for re-entry * on [*318] non-payment (*m*), and where the tenant for life and the reversioner joined in a demise (*n*). The effect of the Judicature Act is to allow beneficiaries to avail themselves of a forfeiture (*o*), but in practice they will generally be represented by their trustees.

Devisees, coparceners, &c. — Where a power to determine a lease is reserved to the lessor, his heirs, executors or administrators, it will extend to his devisee (*p*). Where a power for re-entry for breach of covenants is reserved, and the reversion descends to coparceners, it seems that one or more of them cannot, without the other or others, maintain ejectment for a forfeiture, the condition or proviso for re-entry not being divisible (*q*). A lease granted under a power contained in a settlement reserved a right of entry to the lessor

(*h*) Fenn *d.* Matthew *v.* Smart, 12 East, 443; Doe *d.* Marriott *v.* Edwards, 5 B. & Ad. 1065; Doe *d.* Prior *v.* Ongley, 10 C. B. 25.

(*i*) Webb *v.* Russell, 3 T. R. 393, 402; Thrér *v.* Barton, Moore, 94.

(*k*) Doe *d.* Barber *v.* Lawrence, 4 Taunt. 23; Lit. s. 347; Co. Lit. 214 b.

(*l*) Doe *d.* Barney *v.* Adams, 2 C. & J. 232; Moore *v.* Earl of Plymouth, 3 B. & A. 66.

(*m*) Doe *d.* Barker *v.* Goldsmith, 2 C. & J. 674.

(*n*) Treport's case, 6 Co. R. 15; Cole Ejec. 404.

(*o*) Judicature Act, 1873, s. 24; R. S. C. Order XVI. rules 7, 11, 13.

(*p*) Roe *d.* Bamford *v.* Hayley, 12 East, 464.

(*q*) Doe *d.* Rutzen *v.* Lewis, 5 A. & E. 277.

and his assigns; it was held, that "assigns" meant assigns of the settlor; and that although the right of re-entry could not be well reserved to the lessor, yet that the owners of the reversion under the settlement for the time being were entitled to the advantage of it as "assigns" (*r*). Where a lease was granted of a piece of land with two partly-erected messuages thereon, and the lessee covenanted to complete them within two months, and also to keep the said messuages in repair during the term, with a proviso for forfeiture for breach of any of the covenants, and the messuages were never completed, but after the expiration of the two months the reversion was assigned to the plaintiff, and afterwards the messuages were much dilapidated in the roofs and other parts; it was held, that whether the plaintiff could or not maintain ejectment for not completing the messuages within the two months, he could certainly do so for the subsequent non-repair (*s*).

Right of assignee of reversion to re-enter. — At common law, no one but the grantor could re-enter for a forfeiture; and no grantee or assignee of the reversion could take the benefit or advantage of a condition for re-entry (*t*), but by 32 Hen. 8, c. 34, all grantees of the reversion, their heirs, executors, successors and assigns, have the like advantage against the lessees, their executors, administrators and assigns, *by entry for non-payment of rent, or for doing waste or other forfeiture*, and the same remedy by action only for not performing other conditions, covenants and agreements contained in the said leases as the lessors or grantors themselves had (*u*).

[*319] * (d) *Entry of Lessor.*

Entry for a forfeiture generally. — Generally speaking, where a forfeiture has been incurred for breach of any covenant or condition, the lessor must do some act evidencing his intention to enter for the forfeiture and determine

(*r*) Greenaway *v.* Hart, 14 C. B. 348; 23 L. J., C. P. 115.

(*s*) Bennett *v.* Herring, 3 C. B., N. S. 370.

(*t*) Lit. s. 374; Co. Lit. 214.

(*u*) As to the application of this act, see Chap. VII., Sect. 3, "Assignment of Reversion," *ante*, 235.

the lease (*x*): and the lease will be avoided *from that time only* (*y*). Perhaps an actual entry should be made *before action* to avoid a freehold lease; but the action itself is sufficient to avoid a lease for years (*z*).

Entry by corporations aggregate. — A corporation aggregate cannot, without deed, authorize their servant or agent to enter into land on their behalf for a condition broken (*a*).[1]

(e) *For Non-payment of Rent.*[2]

In ejectment proviso for re-entry necessary. — No ejectment can be maintained for non-payment of rent unless the reservation amount to a condition, for there is an express proviso in the lease or agreement giving the landlord a right to re-enter and determine the lease or tenancy for such non-payment (*b*).

Demand of rent dispensed with by agreement. — Such condition or proviso may by express words dispense with the necessity of a formal demand of the rent; as where it says, "although no formal demand shall have been made thereof," or to that effect (*c*). If the proviso be for re-entry on default in payment of rent within twenty-one days, *being demanded*, the demand must be made after the twenty-one days have elapsed (*d*).

By the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), s. 210, a formal demand of the rent is rendered unnecessary in all cases between landlord and tenant when one-half year's rent is in arrear, and no sufficient distress is *to be found* on the demised premises, or any part thereof.

(*x*) Fenn *d.* Matthews *v.* Smart, 12 East, 444, 451; Arnsby *v.* Woodward, 6 B. & C. 519; Roberts *v.* Davey, 4 B. & Ad. 664; Baylis *v.* Le Gros, 4 C. B., N. S. 537; 6 Id. 552.

(*y*) Cole Ejec. 408.

(*z*) Cole Ejec. 403.

(*a*) 1 Roll. 514.

(*b*) Doe *d.* Dixon *v.* Roe, 7 C. B. 134; Hill *v.* Kempshall, Id. 975.

(*c*) Doe *d.* Harris *v.* Masters, 2 B. & C. 490; Goodright *d.* Hare *v.* Cater, 2 Doug. 477, 486.

(*d*) Phillips *v.* Bridge, 43 L. J., C. P. 13; 29 L. T. 692.

[1] A deed is not necessary and a formal vote is not always required in the United States. See *ante*, Ch. 8, (a), notes.

[2] See *ante*, Ch. 8, (a). notes.

countervailing the arrears then due; and the lessor has power to re-enter for non-payment thereof (*e*).

To what cases applies. — The above enactment only applies — 1. As between landlord and tenant. But the assignee of a lessee, whether by way of mortgage or otherwise, is a "tenant" within the meaning of the enactment (*f*): so is a mere sublessee, because he is a person "claiming or deriving under the lease" (*g*). 2. One half-year's rent at the [*320] least must *be in arrear (*h*). 3. No sufficient distress to be found on the demised premises, or any part thereof, countervailing the arrears due (*i*); i.e. *all* the arrears, and not merely half-a-year's rent where more is due (*k*). But a strict search must be made on the demised premises after the last day for saving the forfeiture, and before the writ issues (or at all events before the writ is served) (*l*), to ascertain that there is no sufficient distress on any part of the demised premises (*m*). Unripe growing crops may amount to a sufficient distress (*n*). A distress is not to be "found" on the demised premises where it cannot be got at by reason of the tenant having locked the outer doors, &c. (*o*), nor unless the goods are so visibly there that a broker going to distrain would, using reasonable diligence, find them so as to be able to distrain them (*p*). If a distress be found on the demised premises sufficient to satisfy so much of the rent as would reduce the arrears to less than

(*e*) See *post*, Chap. XXII., Sect. 1.

(*f*) Doe *d.* Whitfield *v.* Roe, 3 Taunt. 402; Williams *v.* Bosanquet, 1 Brod. & B. 238.

(*g*) Doe *d.* Wyatt *v.* Byron, 1 C. B. 623; 3 D. & L. 31.

(*h*) Hill *v.* Kempshall, 7 C. B. 975; Cotesworth *v.* Spokes, 10 C. B., N. S. 103; 30 L. J., C. P. 220; 2 F. & F. 390.

(*i*) Doe *d.* Forster *v.* Wandlass, 7 T. R. 117.

(*k*) Cross *v.* Jordan, 8 Exch 149; overruling Doe *d.* Powell *v.* Roe, 9 Dowl. 548.

(*l*) Doe *d.* Dixon *v.* Roe, 7 C. B. 134.

(*m*) Rees *d.* Powell *v.* King, Forrest, 19, cited 2 Brod. & B. 514; Doe *d.* Forster *v.* Wandlass, 7 T. R. 117; Doe *d.* Smelt *v.* Fuchau, 15 East, 286; Doe *d.* Haverson *v.* Franks, 2 C. & K. 678; Price *v.* Worwood, 4 H. & N. 512; 28 L. J., Ex. 329; Wheeler *v.* Stevenson, 6 H. & N. 155; 30 L. J., Ex. 66.

(*n*) *Ex parte* Arnison, L. R., 3 Ex. 56; 37 L. J., Ex. 57.

(*o*) Doe *d.* Chippendale *v.* Dyson, 1 Moo. & M. 77; Doe *d.* Cox *v.* Roe, 5 D. & L. 272; Hammond *v.* Mather, 3 F. & F. 151.

(*p*) Doe *d.* Haverson *v.* Franks, 2 C. & K. 678.

half-a-year's rent, and it is wished to bring ejectment, no distress should be taken (*q*); but clear proof should be obtained as to the insufficiency of the distress to satisfy *all* the arrears (*r*). A distress for rent, under which part was recovered, will not prevent an ejectment for the residue, provided such residue amount to half-a-year's rent, or more, and there be no sufficient distress on the premises to satisfy such residue (*s*); but it is otherwise where the proceeds of the distress reduces the arrears to less than half-a-year's rent (*t*). 4. The landlord or lessor to whom the arrears are due must have "right by law to re-enter for non-payment thereof" (*u*). The right to re-enter must be a right to enter *and determine the lease* for non-payment of the rent, and not merely a right to enter and hold the premises until the arrears are paid: otherwise this section will not apply (*x*). The twenty-one days or other specified period mentioned in the proviso must have elapsed before any forfeiture can accrue for non-payment of the rent (*y*). If the proviso contain the words "being lawfully demanded," no demand * will be necessary if it be proved that half-a- [*321] year's rent was due before action brought, and no sufficient distress to be found on the demised premises (*z*). Service of the writ of ejectment under the above circumstances is sufficient "without any formal demand or re-entry" (*a*). The statute makes such service a substitute for, and equivalent to, a formal demand of the rent according to the strict rules of the common law (*b*). And the right of re-entry by virtue of the statute must be taken to have accrued on the day when the forfeiture would have

(*q*) Cotesworth *v.* Spokes, 10 C. B., N. S. 103; 30 L. J., C. P. 220; 2 F. & F. 390.

(*r*) Doe *d.* Haverson *v.* Franks, 2 C. & K. 678.

(*s*) Brewer *d.* Ld. Onslow *v.* Eaton, 3 Doug. 230.

(*t*) Cotesworth *v.* Spokes, 10 C. B., N. S. 103; 30 L. J., C. P. 220.

(*u*) Brewer *d.* Ld. Onslow *v.* Eaton, 3 Doug. 230, cited 6 T. R. 220.

(*x*) Doe *d.* Darke *v.* Bowditch, 8 Q. B. 973.

(*y*) Doe *d.* Dixon *v.* Roe, 7 C. B. 134.

(*z*) Doe *d.* Scholefield *v.* Alexander, 2 M. & S. 525; Doe *d.* Earl of Shrewsbury *v.* Wilson, 5 B. & A. 364 (4th point); Id. 384, 394; 1 Wms. Saund. 287 a, n.; Cole Ejec. 417.

(*a*) 15 & 16 Vict. c. 76, s. 210.

(*b*) Cole Ejec. 417; Hassell *d.* Hodgson *v.* Gowthwaite, Willes, 500, 507.

accrued at common law if a demand of payment had been duly made, and not when the writ of ejectment was served (*c*). The statute merely authorizes an action of ejectment in those cases to which it applies, but it will not justify the landlord or lessor in making an actual entry for non-payment of the rent (*d*).

Demand of rent according to the common law. — Unless there are express words in the lease or agreement dispensing with a formal demand of the rent, or the case falls within the above enactment, no entry or ejectment can be maintained for non-payment of rent unless there has been a formal demand thereof made according to the strict rules of the common law (*e*).[1] Such rules are as follows:

1. **By whom.** — The demand must be made by the landlord or by his agent duly authorized in that behalf (*f*).

2. **On what day.** — It must be made on the *very last day* to save the forfeiture. Therefore, if the proviso for re-entry be on non-payment of rent for thirty days after it becomes due, the demand must be made on the thirtieth day *after* the rent became due (exclusive of the day on which it became due), and not on any other day before or afterwards (*g*).

3. **At sunset.** — It must be made *a convenient time before and at sunset* (*h*). It must be continued actively or constructively until sunset (*i*).

4. **At the proper place.** — It must be made *at the proper place*. Therefore, if the lease or agreement specify the place at which the rent is to be paid, the demand must be made there and not elsewhere (*k*). But if no place be so appointed, the demand must be made upon the land, and at

(*c*) Doe *d.* Lawrence *v.* Shawcross, 3 B. & C. 752.

(*d*) Cole Ejec. 69.

(*e*) Molineux *v.* Molineux, Cro. Jac. 144; Doe *d.* Forster *v.* Wandlass, 7 T. R. 117; Acocks *v.* Phillips, 5 H. & N. 183; Barr *v.* Glover, 10 Ir. Com. L. R. 113.

(*f*) Roe *d.* West *v.* Davis, 7 East, 363; Toms *v.* Wilson, 32 L. J., Q. B. 33; Id. 382.

(*g*) Doe *d.* Dixon *v.* Roe, 7 C. B. 134; Doe *d.* Forster *v.* Wandlass, 7 T. R. 117; Smith and Bustard's case, 1 Leon. 141; Plow. 70; Co. Lit. 202 a.

(*h*) Co. Lit. 202 a; 1 Wms. Saund. 287; Cole Ejec. 413.

(*i*) Wood and Chiver's case, 4 Leon. 179; Acocks *v.* Phillips, 5 H. & N. 183.

(*k*) Borrough's case, 4 Co. R. 73; Buskin *v.* Edmunds, Cro. Eliz. 415; Co. Lit. 202 a.

[1] See *ante*, (a), notes.

the most notorious place of it (*l*). Therefore, if there be a *dwelling-house upon the land, the de- [*322] mand must be made at the front door of it; but it is not necessary to enter the house, although the door be open (*m*). If the premises consist of a wood only, the demand must be made at the gate of the wood, or at some highway leading through the wood, or other most notorious place. If one place be as notorious as another, the lessor has election to demand it at which he will (*n*). Such demand must be actually made, although there be no person present on behalf of the tenant to answer it (*o*). Or it may be made on a subtenant (*p*).

5. The demand must be made of the precise sum then payable, and not one penny more or less (*q*). If the rent be payable quarterly, and more than one quarter is due, only the last quarter's rent should be demanded, and not the previous arrears, otherwise the demand will be altogether bad (*r*).

(f) *Waiver of Forfeiture.*

Acknowledgment of continuance is waiver of forfeiture. — Courts of law always lean against forfeitures; therefore, whenever a landlord means to take advantage of any breach of covenant or condition so that it should operate as a forfeiture of the lease, he must take care not to do anything which may be deemed an acknowledgment of the continuance of the tenancy, and so operate as a waiver of the forfeiture.[1]

(*l*) Cole Ejec. 413.

(*m*) Co. Lit. 201 b; 1 Wms. Saund. 287.

(*n*) Co. Lit. 202 a.

(*o*) Kidwelly *v.* Brand, Plow. 70 a, 70 b; Co. Lit. 201 b.

(*p*) Doe *d.* Brook *v.* Brydges, 2 D. & R. 29.

(*q*) Fabian and Winsor's case, 1 Leon. 305; Fabian *v.* Winston, Cro. Eliz. 209.

(*r*) Scot *v.* Scot, Cro. Eliz. 73; Tomkins *v.* Pincent, 7 Mod. 97; 1 Salk. 141; Doe *d.* Wheeldon *v.* Paul, 3 C. & P. 613.

[1] **Waiver — what constitutes.** — A breach of covenant to pay rent (joined to a re-entry clause) is waived by receipt of rent after entry. Coon *v.* Brickett, 2 N. H. 163. Receipt of rent after breach of covenant against subletting (joined with re-entry clause) is a waiver or breach of covenant against assigning. Crouch *v.* Wabash, St. L. & Pac. Ry. Co., 22 Mo. App. 315.

Lying by. — Merely lying by and witnessing the breach is no waiver: some positive act must be done (*s*). The general rule is, that if a lessor, or other person legally entitled to the reversion, knowing that a forfeiture has been incurred by the breach of any covenant or condition, *does any act* whereby he *acknowledges the continuance of the tenancy at a later period*, he thereby waives such forfeiture (*t*).

What acts amount to waiver. — Thus, the following acts amount to a waiver: — Demand of rent accruing due after the forfeiture, if the demand be absolute and unqualified (*u*). Acceptance of rent accruing due after the forfeiture (*x*). Such an acceptance operates as matter of law to waive all forfeitures then known to the lessor, *notwithstanding any protest on his part against such waiver* (*y*); but the [*323] subsequent receipt of rent * due *prior* to the forfeiture is no waiver (*z*). Action for rent accruing due after the forfeiture (*a*). Distress for rent (*b*).

A forfeiture of a lease by a lessee's insolvency has been held to be waived by acceptance of rent from him after his discharge under the Insolvent Act (*c*).

Waiver by pleading. — Forfeiture may be waived by a pleading, as was held in a case where a landlord, suing in respect of breaches of covenants agreed to be inserted in a lease contracted for, claimed an injunction and possession, but stated in his pleadings that he was willing to grant the lease (*d*).

Waiver by distress. — It is well settled that a forfeiture is

(*s*) Doe *d.* Sheppard *v.* Allen, 3 Taunt. 78.

(*t*) Dendy *v.* Nicholl, 4 C. B., N. S. 376; 27 L. J., C. P. 220; Pellatt *v.* Boosey, 31 L. J., C. P. 281; Ward *v.* Day, 4 B. & S. 337; 5 Id. 359; 33 L. J., Q. B. 3, 251.

(*u*) Doe *d.* Nash *v.* Birch, 1 M. & W. 402, at p. 408, *per* Parke, B.

(*x*) Doe *d.* Gatehouse *v.* Rees, 4 Bing. N. C. 384; Doe *d.* Griffith *v.* Pritchard, 5 B. & Ad. 765.

(*y*) Croft *v.* Lumley, 5 E. & B. 648; 6 H. L. Cas. 672; 27 L. J., Q. B. 321; Davenport *v.* Reg., L. R., 3 App. Cas. 115, P. C.

(*z*) Marsh *v.* Curteys, Cro. Eliz. 528; Price *v.* Worwood, 4. H. & N. 512; 28 L. J., Ex. 329.

(*a*) Dendy *v.* Nicholl, 4 C. B., N. S. 376; 27 L. J., C. P. 220.

(*b*) Cotesworth *v.* Spokes, 10 C. B., N. S. 103; 30 L. J., C. P. 220.

(*c*) Doe *d.* Gatehouse *v.* Rees, 4 Bing. N. C. 384.

(*d*) Evans *v.* Davis, L. R., 10 Ch. D. 747; 48 L. J., Ch. 223; 39 L. T. 391; 27 W. R. 285.

waived by distress (*e*), and it seems also, as was pointed out by Crompton, J., in Ward *v.* Day (*f*), that the doctrine of waiver by distress depends on a different principle from that of waiver by other acts — the principle that distress can only be levied on a tenant — so that a distress waives any forfeiture not only up to the day on which the rent distrained for was due, as had been previously held in Cotesworth *v.* Spokes (*g*), but up to the day of the distress itself. A case in the Year Books appears to show this (*h*).

No waiver by acceptance of rent, &c., after ejectment. — If ejectment be brought on a forfeiture of a lease, and after the bringing of such ejectment the landlord accept rent (*i*), or distrain (*k*), or set up as a cause of forfeiture a subsequent non-payment of rent (*l*), it is no waiver. This best appears from Grimwood *v.* Moss, where a landlord brought ejectment on the 21st of July, and after action brought, distrained for rent due on the 24th of June. It was held that, in the action of ejectment, he might rely on a forfeiture accruing before the 24th of June, and it was said that the distress was a simple act of trespass (*m*). Of course, if there be an intention to waive, it is otherwise, as was held on demurrer in a case where the facts pleaded amounted to an agreement for a new tenancy on the terms of an old lease (*n*).

Lessor must have notice of forfeiture. — In order to render acceptance of rent or any other act a waiver of a forfeiture, the lessor must have notice or knowledge of the forfeiture *at the time of the supposed waiver (*o*), unless the [*324] forfeiture be of such a nature as to be equally within

(*e*) Cotesworth *v.* Spokes, *supra*.

(*f*) 4 B. & S. 336; 33 L. J., Q. B. 11; Smith L. & T. (3rd ed.) 151; 1 Sm. L. C. (8th ed.) 61; Cotesworth *v.* Spokes was not cited in Ward *v.* Day.

(*g*) *Supra*, note (*b*).

(*h*) 14 Ed. 3, 3rd Ass. cited in Ward *v.* Day by Blackburn, J.

(*i*) Doe *d.* Moorecraft *v.* Meux, 4 B. & C. 606; 1 C. & P. 346; Jones *v.* Carter, 15 M. & W. 718.

(*k*) Grimwood *v.* Moss, L. R., 7 C. P. 360; 41 L. J., C. P. 239; 27 L. T. 768.

(*l*) Toleman *v.* Portbury, 41 L. J., Q. B. 98, Ex. Ch.

(*m*) Grimwood *v.* Moss, *ubi supra*, *per* Willes, J.

(*n*) Evans *v.* Wyatt, 43 L. T. 176.

(*o*) Pennant's case, 3 Co. R. 63 b; Duppa *v.* Mayo, 1 Wms. Saund. 288 a, b, note (16); Harvie *v.* Oswel, Cro. Eliz. 563, 572; Goodright *d.* Walker *v.* Davids, 2 Cowp. 803.

the knowledge of both the lessor and lessee (*p*). The act which is insisted on as amounting to a waiver is matter of evidence only, to show with what intent it was done, to be left to the jury under the circumstances of the case (*q*). Where a lessor was too ill to attend to business, and it did not appear that he knew of a forfeiture, his son, who collected the rents, was held not to have authority to waive a forfeiture (*r*).

Continuing breach. — Where the breach is of a continuing nature, the waiver of any forfeiture up to a certain day will afford no defence to an ejectment for a subsequent breach (*s*); as where the covenant is to keep the demised premises in repair during the term (*t*), or to keep them insured in a certain manner from loss or damage by fire during the term (*u*), or not to use certain rooms in a particular manner (*x*). Acceptance of rent which becomes due pending a notice to repair, is no waiver of a subsequent forfeiture occasioned by non-compliance with such notice (*y*). Indeed, it would seem that acceptance of rent due after the expiration of the notice will not bar an ejectment if the premises continue subsequently unrepaired (*z*).

Distress only acknowledges tenancy up to day of distress. — A distress and continuance in possession may be a waiver of a forfeiture existing at the time (*a*); but a distress is only an acknowledgment of a tenancy to the day of the distress, and a waiver of any forfeiture to that time (*b*). Where the plaintiff, after the service of a writ in ejectment for non-pay-

(*p*) Roe *d.* Gregson *v.* Harrison, 2 T. R. 425.

(*q*) Doe *d.* Cheney *v.* Batton, Cowp. 243.

(*r*) Doe *d.* Nash *v.* Birch, 1 M. & W. 402.

(*s*) Cole Ejec. 409.

(*t*) Doe *d.* Baker *v.* Jones, 5 Exch. 498.

(*u*) Doe *d.* Mustin *v.* Gladwin, 6 Q. B. 953, 956; Penniall *v.* Harborne, 11 Q. B. 368, 374; Hyde *v.* Watts, 12 M. & W. 254; 1 D. & L. 479; Doe *d.* Flower *v.* Peck, 1 B. & Ad. 428.

(*x*) Doe *d.* Ambler *v.* Woodbridge, 9 B. & C. 376.

(*y*) Doe *d.* Rankin *v.* Brindley, 4 B. & Ad. 84; Doe *d.* Baker *v.* Jones, 5 Exch. 498, 505.

(*z*) Fryett *d.* Harris *v.* Jefferys, 1 Esp. 393; Cole Ejec. 409.

(*a*) Doe *d.* Taylor *v.* Johnson, 1 Stark. 411; Zouch *d.* Ward *v.* Willingale, 1 H. Blac. 311.

(*b*) Doe *d.* Flower *v.* Peck, 1 B. & Ad. 428; Ward *v.* Day, 4 B. & S. 337; 33 L. J., Q. B. 54; s. c. in error, 5 B. & S. 359.

ment of rent, distrained for rent which subsequently became due; and by the notice of distress stated that such distress was made without prejudice to the year's rent due on the 25th of March, and for which ejectment proceedings were then pending; it was held, that such distress did not operate as a waiver of the ejectment (*c*).

Breach of covenant to repair. — A forfeiture incurred by breach of a covenant to repair generally, is waived by a notice given by the landlord, under a special covenant * that he should enter and do the repairs, and dis- [*325] train for the expenses (*d*). A forfeiture, by omission to repair after notice, is suspended but not waived by an agreement to allow further time to repair (*e*).

Of covenant not to sublet. — The acceptance of rent with knowledge of a written subletting for a time certain is a waiver of a forfeiture for the breach of a covenant not to sublet, and the breach is not a continuing breach, although the covenant be that the lessee "will not permit any person to occupy" (*f*).

Of covenant not to carry on trade, &c. — If a lessee exercise a trade on the demised premises by which his lease is forfeited, the landlord does not, by merely lying by and witnessing the act, waive the forfeiture (*g*), as some positive act of waiver, as by receipt of rent (*h*), is necessary; but if he permit the tenant to expend money in improvements, it would seem that it is evidence to be left to a jury of his consent to the alteration of the premises (*i*): and if a lessor after a forfeiture advise a person to purchase the term of his lessee, he cannot maintain an ejectment for a forfeiture against such purchaser; but he may do so if the party have an interest,

(*c*) Bailey *v.* Mason, 2 Ir. Rep., N. S. 582.

(*d*) Doe *d.* Reutzen *v.* Lewis, 5 A. & E. 277; Roe *d.* Goatley *v.* Paine, 2 Camp. 520.

(*e*) Doe *d.* Rankin *v.* Brindley, 4 B. & Ad. 84.

(*f*) Walrond *v.* Hawkins, L. R., 10 C. P. 342; 44 L. J., C. P. 116; 32 L. T. 119. It is doubtful whether the principle of this case would be held to apply to the case of a covenant not to use the demised premises in a particular way. *Per* Bramwell, L. J., in Lawrie *v.* Lees, L. R., 14 Ch. D. at p. 262.

(*g*) Doe *d.* Sheppard *v.* Allen, 3 Taunt. 78.

(*h*) Griffin *v.* Tomkins, 42 L. T. 359.

(*i*) Doe *d.* Sheppard *v.* Allen, *ubi sup.*, *per* Mansfield, C. J.

viz., an annuity secured on the premises, and the advice is merely "to take to them" (*k*). If A., tenant for life, subject to forfeiture, with a remainder over to B., lease to C. for a term, and afterwards apprehending that he has forfeited, acquiesce in B.'s claim to and receipt of the rent from C., his executor may, on showing that he acquiesced under a false apprehension, recover from C. the amount of the rent erroneously paid to B.; for in order to constitute a confirmation of the payment, some act ought to have been done by A. with the knowledge of his own situation (*l*). Where land was demised with a covenant by the lessee to build and complete thereon houses within a year, and a proviso that if he did not, the lease should be void; the houses not being completed, it was held, that the forfeiture was not waived by the steward of the lessor having permitted the lessee to employ workmen in completing the houses for a short period after the forfeiture (*m*). When the landlord does any act amounting to a constructive eviction of the tenant he cannot maintain an ejectment for a forfeiture for not repairing [*326] during the continuance of such eviction (*n*). *A. demised land with a covenant by the lessee to finish certain houses thereon, and with a power of re-entry in case of default, and by another indenture between A. and the plaintiff, reciting that A. had made sub-leases of the land in question, A. assigned the land to the plaintiff subject to the sub-leases; the court inclined to think that if the condition had been broken, the assignment, subject to the sub-leases, would have been a waiver of the forfeiture although the forfeiture was not known to A. (*o*). Though an acceptance of rent or other act of waiver may make a voidable lease good, it cannot make valid a deed or a lease which was actually void at first; but where a lease for years contains the common proviso "that it shall and may be lawful for the lessor to re-enter," or a proviso "that the term shall cease and deter-

(*k*) Doe *d.* Sore *v.* Eykins, 1 C. & P. 154; Ry. & Moo. 29.

(*l*) Williams *v.* Bartholomew, 1 Bos. & P. 326.

(*m*) Doe *d.* Ld. Kensington *v.* Brindley, 12 Moo. 37.

(*n*) Pellatt *v.* Boosey, 3 L. J., C. P. 281.

(*o*) Hunt *v.* Bishop, 8 Exch. 675; Hunt *v.* Remnant, 9 Exch. 635.

mine if the lessor please," the lease will be only voidable by a breach of covenant; and the forfeiture may be waived by a subsequent acknowledgment of a tenancy (*p*).

Actual waiver does not operate as general waiver. — By 23 & 24 Vict. c. 38, s. 6, "where any actual waiver of the benefit of any covenant or condition in any lease on the part of any lessor, or his heirs, executors, administrators or assigns, shall be proved to have taken place after the passing of this act 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 shall specially relate, nor to be a general waiver of the benefit of any such covenant or condition, unless an intention to that effect shall appear."

Sect. 6. — *Relief against Forfeiture.*

(a) *The law before the Conveyancing Act.*

Equitable relief. — An unqualified proviso for re-entry in case of breach of any covenant has long been usually inserted as a common form in leases, and the courts of law, though "leaning against forfeiture," invariably gave effect to such proviso upon a breach being clearly proved, however great the hardship to the lessee (*q*). Courts of equity were, therefore (before the Judicature Acts), frequently (*r*) applied to for relief by injunction to restrain actions of ejectment. In the case of the breach of the covenant to pay rent, relief was granted from very early times, the statute 4 Geo. 4, c. 28, only regulating the mode *of granting the [*327] relief, and not originating it (*s*). As for forfeiture by other breaches, the early cases are not quite uniform.

No equitable relief for "wilful" breach. — They will be found reviewed by Lord Erskine in Sanders *v.* Pope (*t*), and by

(*p*) Doe *d.* Bristow *v.* Old, Ad. Ejec. 155 (4th ed.).

(*q*) See Doe *v.* Gladwin, 6 Q. B. at p. 961.

(*r*) See the whole series of cases up to 1847 reviewed in "Platt on Leases," Vol. 2, at p. 485 *et seq.*

(*s*) Green *v.* Bridges, 4 Sim. 96.

(*t*) 12 Ves. 262.

Lord Eldon in Hill *v.* Barclay (*u*), and in Reynolds *v.* Pitt (*x*). In Sanders *v.* Pope, Lord Erskine granted relief against forfeiture of a public-house lease incurred by not laying out a particular sum in repairs within a given time, and declared the result of the prior authorities to be that the court had jurisdiction to grant relief in all cases where full compensation could be made, although the breach might have been wilful. But in Hill *v.* Barclay, Lord Eldon, though distinguishing Sanders *v.* Pope (*y*), distinctly disapproved of the doctrine that relief could be given in case of a wilful breach, and refused relief in a case of non-repair in which the landlord had given a notice which had not been complied with. But, as was pointed out by Stuart, V.-C., in Bamford *v.* Creasy (*z*), Lord Eldon expressly recognized the exceptions in case of accident or surprise, and accordingly relief was granted in a case (*a*) where it appeared that out of twenty-two items of repair twenty had been proceeded with, and fourteen completed, and that the repairs had been partially delayed by the weather; Stuart, V.-C., mentioning "as an equity always recognised" the equity of a tenant who has bound himself by a covenant to repair, and who can show to the court *equitable circumstances sufficient* to entitle him either to a relief from a strict performance of the lease, or to ensure him against a forfeiture by reason of the neglect to perform them.

The rule of Hill *v.* Barclay was recognized in Gregory *v.* Wilson (*b*) by Turner, V.-C., in refusing to grant specific performance of an agreement for a lease. In Nokes *v.* Gibbon (*c*), Kindersley, V.-C., refused relief where the breach consisted in a failure to construct certain drains, and in Job *v.* Banister (*d*), where a lease was granted with a covenant for perpetual renewal by the lessor, provided the lessee's covenants should be kept, Wood, V.-C., refused to compel

(*u*) 18 Ves. 56; and see id. 16 Ves. 402.

(*x*) 19 Ves. 134.

(*y*) Sanders *v.* Pope, 12 Ves. 262.

(*z*) 3 Giff. 675. In this case the lessor had obtained judgment by default in ejectment.

(*a*) Bargent *v.* Thompson, 4 Giff. 473.

(*b*) 9 Hare, 683.

(*c*) 26 L. J., Ch. 483.

(*d*) 6 K. & J. 374.

the lessor to renew or to restrain him from ejecting the lessee for breaches of covenant to repair and insure, although the lessee had expended large sums of money on the premises, and their value was much increased, the lessee losing about 5,000*l.* for a breach of covenant which might be amply remedied by 500*l.*

Lunatic. — In one case, however — subsequent to Hill *v.* Barclay — Lord Eldon granted relief against an ejectment for non-repair brought by the committee of a lunatic, on the principle that harsh proceedings would not * be for the benefit of the lunatic's estate (*e*); but [*328] there does not seem to be any direct authority upon the question how far trustees neglecting to take advantage of a forfeiture would be protected by the court.

Result of modern cases. — The result of the modern cases appears to be that accident and surprise afford the only instances in which relief was given, and that the fact that a landlord gained ever so large an improved value by insisting on the forfeiture was not taken into account.

Statutory relief against failure to insure. — The covenant to insure is one which from its nature may be broken without producing the slightest injury to the reversion, and yet a court of law allowed a lessor to re-enter on the smallest breach of it (*f*). And for a long period no relief could have been obtained in a court of equity against an ejectment for a forfeiture by not insuring (*g*), unless there had been fraud or misleading on the part of the lessor (*h*). But by 22 & 23 Vict. c. 35, now repealed and superseded by the Conveyancing Act, power was given to a court of equity to relieve in a case where no loss had happened, and the breach had been committed without fraud or gross negligence, and there was an insurance on foot at the time of the application to the court. The court was required to direct a record of

(*e*) *Ex parte* Vaughan, 1 Turn. & Russ. 434.

(*f*) Doe *v.* Gladwin, 6 Q. B. 953; *post*, Chap. XVII., Sect. 1.

(*g*) White *v.* Warner, 2 Meriv. 459; Green *v.* Bridges, 4 Sim. 96, cited 6 Q. B. 961; Gregory *v.* Wilson, 9 Hare, 683.

(*h*) Meek *v.* Carter, 4 Jur. N. S. 992.

the relief having been granted, and had not power to relieve the same person more than once in respect of the same covenant or condition, nor to grant any relief where a prior forfeiture had been already waived out of court in favour of the person seeking the relief. By the Common Law Procedure Act, 23 & 24 Vict. c. 126, this relief might be granted by a court of law.

(b) *Relief against Forfeiture under the Conveyancing Act.*

Except as above stated, that is, except in the case of non-payment of rent, and failure to insure, and except in rare cases of accident and surprise, no relief against forfeiture could be given until the year 1882. The Conveyancing and Law of Property Act, 1881, 44 & 45 Vict. c. 41, which by sect. 2 took effect from and after the 31st December, 1881, by s. 14 (1) restricts the landlord's right of forfeiture, and (2) empowers the Chancery Division of the High Court to "relieve" against its exercise in the following general, retrospective, and compulsory terms: —

"(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 [*329] action or otherwise (*i*), unless and * until the lessor serves on the lessee a notice (*k*) 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.

Relief by court against forfeiture. — "(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

(*i*) *e.g.*, by peaceable re-entry, without action.

(*k*) By s. 67 of the Act, *infra*, p. 330, the notice must be in writing, and may be addressed to the lessee by that designation, and served either by leaving it at the last place of abode, or by sending it in a registered letter by post, addressed to the lessee by name.

action, if any, or in any action brought by himself, apply to the court (*l*) 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 grant of an injunction to restrain any like breach in the future, as the court, in the circumstances of each case, thinks fit.

Meaning of "Lease," "Lessor," and "Lessee." — "(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 or assigns.

Act of Parliament. — "(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 (*m*).

Length of term. — "(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.

Cases to which section does not apply. — "(6) This section does not extend —

"(i) To a covenant or condition against the assigning, under-letting, parting with the possession, or disposing of

(*l*) That is, by s. 2 (xviii.) and s. 69 (1) of the Act, the Chancery Division of the High Court; but the Queen's Bench Division has jurisdiction to relieve in an action before it.

(*m*) See *e.g.*, Settled Estates Act, 1856, 19 & 20 Vict. c. 120, s. 32, 10 Geo. 4, c. 50, s. 27, 8 & 9 Vict. c. 124.

the land leased (*n*), or to a condition for forfeiture on the bankruptcy (*o*) of the lessee, or on the taking in execution of the lessee's interest: or —

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

Repeal. — "(7) The enactments described in Part I. of the second schedule to this act (*q*) are hereby repealed.

Non-payment of rent. — "(8) This section shall not affect the law relating to re-entry or forfeiture or relief in case of non-payment of rent.

Retrospective and compulsory. — "(9) This section applies to leases made either before or after the commencement of this act, and shall have effect notwithstanding any stipulation to the contrary."

Effect of section 14 of Conveyancing Act. — The effect of this section is first to interpose in favour of the tenant the requirement, which did not exist at common law, that the landlord shall, before proceeding to enforce a supposed right of re-entry, give fair notice of his intention to do so, in order that the parties may settle the matter between themselves, without any resort to the court; and secondly, in case of the parties so failing to settle the matter, to allow the tenant (not the landlord, whose course will be, if he wishes to push the matter to extremity, to decline to be satisfied with the compensation offered) to apply for an adjustment of differences to a court having the most absolute and comprehensive discretion.

Decisions. — It has been laid down that the landlord's

(*n*) See Ch. XVII., Sect. 2, *post*.

(*o*) See p. 274, *ante*. By s. 2, subs. (xv.), of the Act "bankruptcy includes liquidation by arrangement, and any other act or proceeding in law having, under any act for the time being in force, effects or results similar to those of bankruptcy."

(*p*) By s. 2, subs. (xi.) of the Act "a mining lease is a lease for mining purposes, that is, the searching for, winning, working, getting, making merchantable, carrying away, or disposing of mines and minerals, or purposes connected therewith, and includes a grant or licence for mining purposes."

(*q*) See the effect of these enactments which relate to relief against forfeiture for non-insurance, p. 328, *ante*.

notice under sub-s. 1 must expressly require the tenant to remedy the breach complained of (*r*); that sub-s. 2 has no application where the landlord has actually re-entered (*s*), that although no notice may have been given, the Court has an absolute discretion to refuse relief (*ss*); and that for relief to be grantable, it is not necessary that it should have been claimed in the defendant's pleading (*t*). But the cases as yet (January, 1886) reported, throw but little light upon the section.

Service of notice. — As to the service, &c., of the notice under sub-sect. 1, sect. 67 of the Conveyancing Act provides that —

"(1) Any notice required or authorized by this act to be served shall be in writing.

"(2) Any notice required or authorized by this act to be served on *a lessee or mortgagor shall be [*331] sufficient although only addressed to the lessee or mortgagor by that designation, without his name, or generally to the persons interested, without any name, and notwithstanding that any person to be affected by the notice is absent, under disability, unborn, or unascertained.

Service of notice. — "(3) Any notice required or authorized by this act to be served shall be sufficiently served if it is left at the last known place of abode or business in the United Kingdom, of the lessee, lessor, mortgagee, mortgagor, or other person to be served, or, in case of a notice required or authorized to be served on a lessee or mortgagor, is affixed or left for him on the land or any house or building comprised in the lease or mortgage, or in case of a mining lease, is left for the lessee at the office or counting-house of the mine.

"(4) Any notice required or authorized by this act to be served shall also be sufficiently served, if it is sent by post in

(*r*) North London Land Co. *v.* Jaques, 32 W. R. 283, 49 L. T. 659 (relief granted for failure to complete a house within a given time).

(*s*) Quilter *v.* Mapleson, L. R. 9 Q. B. D. 675, C. A. (relief for non-insurance was granted).

(*ss*) Scott *v.* Matthew Brown & Co., 51 L. T. 746 (relief refused).

(*t*) Mitchison *v.* Thompson, 1 C. & E. 72 (relief granted for non-repair, though premises in very dilapidated condition).

a registered letter addressed to the lessee, lessor, mortgagee, mortgagor, or other person to be served, by name, at the aforesaid place of abode or business, office, or counting-house, and if that letter is not returned through the post office undelivered; and that service shall be deemed to be made at the time at which the registered letter would in the ordinary course be delivered.

"(5) This section does not apply to notices served in proceedings in the court."

The words "by action or *otherwise*" seem intended to include a peaceable re-entry without action, and also to prolong the time within which the lessee may apply to the court to restrain the delivery of the writ of possession into the hands of the sheriff. The words "injunction to restrain" seem to apply to a breach of negative covenants only.

(c) *Relief against Forfeiture for Non-payment of Rent.*

The law relating to relief against forfeiture for non-payment of rent is expressly excepted from the operation of the 14th section of the Conveyancing Act by the 8th sub-section.

Prior to 4 Geo. 2, c. 28, the tenant might at an indefinite time after he was evicted have filed his bill and been relieved against the effect of the mere non-payment of rent (*u*); but this statute, which is re-enacted in substance by sect. 210 of the Common Law Procedure Act, 1852, confined the tenant to a period of six months after execution executed, within which he might obtain relief, in order to relieve the landlord from the inconvenience of continuing liable to an uncertainty of possession (*x*). The 210th section of the Common [*332] Law * Procedure Act, 1852, provided that unless the tenant should proceed for relief in equity within six months after execution he should be "barred and foreclosed from all relief or remedy in law or equity," the 211th that the tenant should not have relief without payment of rent and costs, and the 212th that the tenant might stay proceedings at any time *before trial*, by paying the rent and costs.

(*u*) Bowser *v.* Colby, 1 Hare, 125. (*x*) Doe *d.* Hitchins *v.* Lewis, 1 Burr. 619.

The 1st section of the Common Law Procedure Act, 1860, 23 & 24 Vict. c. 126, extended these provisions by allowing the court or a judge to give relief in a summary manner either before or *after* the trial up to and within the six months after execution executed.

It has been held that a defendant against whom judgment had been obtained, in an action in which the plaintiff had been deprived of costs, might, under this section, obtain relief after trial upon payment of rent and costs of application for relief, without being required to pay the costs of the action (*z*).

Sect. 7. — *Notice to Quit.*

(a) *Nature and Operation of.*

Nature of notice to quit. — The notice to quit which it is here proposed to consider is the certain reasonable notice required by law, or by custom, or by special agreement, to enable either the landlord or tenant, or the assignees or representatives of either of them, *without the consent of the other*, to determine a tenancy from year to year, or month to month, &c. The term is also applied to the notice given in exercise of an option to determine a lease, which is considered hereafter (*a*). Without such notice, or an actual or implied surrender (*b*) or merger (*c*), a tenancy of the above nature would continue in the tenant and his assigns or representatives; and the immediate reversion would continue in the landlord and his assigns or representatives (*d*), until extinguished by the Statute of Limitations (*e*).

Special stipulations as to notice. — The right to determine a tenancy from year to year by a notice to quit is a *necessary incident* to such tenancy: a stipulation against any such notice being given by one party or by the other is repugnant to the nature of the tenancy, and therefore void, and

(*z*) Croft *v.* London & County Banking Co., 54 L. J., Q. B. 277, C. A.
(*a*) *Post*, Sect. 8.
(*b*) *Ante*, Sect. 8.
(*c*) *Ante*, Sect. 4, p. 308.
(*d*) Maddon *d.* Baker *v.* White, 2 T. R. 159.
(*e*) 3 & 4 Will. 4, c. 27; Doe *d.* Landsdell *v.* Gower, 17 Q. B. 589.

mere surplusage (*f*). Thus, an agreement to let at a fixed yearly rental, and not to give notice to quit so long as the rent is paid, constitutes more than a yearly tenancy, [*333] and gives the tenant a right to stay in, so * long as the landlord's interest continues and the tenant pays rent (*g*). The tenancy may generally be determined by half-a-year's notice [1] expiring at the end of the first or any subsequent year of the term (*h*): but the parties may expressly stipulate for a longer or shorter notice to quit than that usually required by law (*i*); or for a notice expiring at some

(*f*) Doe *d.* Warner *v.* Browne, 8 East, 165.

(*g*) King's Leasehold Estates, *Re*, L. R., 16 Eq. 521; L. T. 288; 21 W. R. 881.

(*h*) Doe *d.* Clarke *v.* Smaridge, 7 Q. B. 957; Doe *d.* Plumer *v.* Mainby, 10 Q. B. 473.

(*i*) Cole Ejec. 31, 32; Doe *d.* Pitcher *v.* Donovan, 1 Taunt. 555; 2 Camp. 78; Doe *d.* Green *v.* Baker, 8 Taunt. 241. Doe *d.* Robinson *v.*

[1] **Tenancies from year to year; notice to terminate.** — (*a*) *At common law* the notice required to terminate such tenancies was six months, Jackson *v.* Bryan, 1 Johns. (N. Y.) 322, 323, 324; Jackson *v.* Rogers, 2 Caines' Cas. (N. Y.) 314, 318 (*per* Kent, J.); Witt *v.* Mayor of N. Y., 6 Robertson (N. Y.) 441; Hanchet *v.* Whitney, 1 Vt. 311; Currier *v.* Perley, 24 N. H. 219 (*per* Bell, J.); Den *v.* Blair, 15 N. J. L. 181; Den *v.* Drake, 14 Id. 523; Bradley *v.* Covel, 4 Cow. (N. Y.) 349; Prickett *v.* Ritter, 16 Ill. 96 (*per* Scates, J.), and the notice must terminate with the year. Reeder *v.* Sayre, 70 N. Y. 180, 186 (*per* Folger, J.); Bradley *v.* Covel, 4 Cow. (N. Y.) 349, 351 (*per* Woodworth, J.); Nowlan *v.* Trevor, 2 Sweeny (N. Y.) 67,70 (*per* Monell, J.); Fahnestock *v.* Faustenauer, 5 S. & R. (Pa.) 174; Lesley *v.* Randolph, 4 Rawle (Pa.) 123, 127 (*per* Kennedy, J.).

(*b*) *Statutory notices.* — The common law notice still remains unchanged in several of the states. In several others a notice similar to the common law notice has been expressly required by statute, and in others the common law notice has been superseded by a shorter notice (three months, two months, ninety days, sixty days, &c., as the case may be).

In Maryland (Rev. Code, Art. 67, Subtitle 7, sec. 1) the required notice is six months; in Virginia (Code, sec. 2785), three months in cities and towns, and six months in the country; in Nova Scotia (Rev. Sts. ch. 125), Quebec (Civil Code, sec. 1657), New Brunswick (Con. Sts. ch. 83, sec. 16), Indiana (Rev. Sts. sec. 5209), Missouri (Rev. Sts. sec. 3077), Colorado (Gen. Sts. sec. 1504), North Carolina (Code, sec. 1750), and Pennsylvania (Act of March 21, 1772, Purd. Dig. p. 1015), three months; in Mississippi (Rev. Code, sec. 1330), two months; in Illinois (Sts. of Ill. ch. 80, sec. 5), sixty days; in Oregon, in tenancies for farming purposes, ninety days; in other tenancies, ten days. Many states have no statutory provisions for terminating tenancies from year to year, but leave them to be terminated as at common law. Connecticut provides (Gen. Sts. sec. 2967) that a holding over shall not renew a lease. Some of the states provide only for notice to terminate tenancies at will, and from period to period shorter than from year to year. See note, *ante*, "The shorter tenancies."

other period of the tenancy than at the end of the first or some other year, ex. gr. at the end of any quarter (*k*); or at some particular quarter (*l*); or at any time of the year, upon the expiration of a certain specified previous notice (*m*). But as the power of determining the tenancy at any time of the year is generally attended with inconvenience to one or both parties, the language conferring such power must be clear and explicit (*n*). Therefore, on a letting from year to year "to quit at a quarter's notice," such notice must expire *at the end* of the first or some other year of the tenancy, and not at any other part of the year; such stipulation merely substituting a three months' notice for the usual six months' notice (*o*). It seems, that where a "six months' notice" on either side is contracted for, a six lunar months'[1] notice will be sufficient (*p*). Where a tenant is "*always* to be subject

Dobell, 1 Q. B. 806; Tooker *v.* Smith, 1 H. & N. 732; Evans *v.* Whittingstall, 2 F. & F. 175; Rogers *v.* Kingston-upon-Hull Dock Co., 34 L. J., Ch. 165.

(*k*) Kemp *v.* Derrett, 3 Camp. 510; Rex *v.* Herstmonceaux, 7 B. & C. 551; Collett *v.* Curling, 10 Q. B. 785; Bird *v.* Defonville, 2 C. & K. 415, 418.

(*l*) Doe *d.* Rigge *v.* Bell, 5 T. R. 471.

(*m*) Doe *d.* Green *v.* Baker, 8 Taunt. 244; Doe *d.* King *v.* Grafton, 18 Q. B. D. 496; 21 L. J., Q. B. 276; Bridges *v.* Potts, 17 C. B., N. S. 314.

(*n*) Cole Ejec. 31.

(*o*) Doe *d.* Pitcher *v.* Donovan, 1 Taunt. 555; 2 Camp. 78; Brown *v.* Burtenshaw, 7 D. & R. 603.

(*p*) Rogers *v.* Kingston-upon-Hull Dock Co., 34 L. J., Ch. 165.

[1] **Month means calendar month in the United States.** — Sheets *v.* Selden's Lessee, 2 Wall. 177, 189, 190; Brewer *v.* Harris, 5 Gratt. (Va.) 285, 398; Strong *v.* Birchard, 5 Conn. 357, 360; Leffingwell *v.* Pierpoint, 1 Johns. Cas. (N. Y.) 100; Hardin *v.* Major, 4 Bibb (Ky.) 104; Pyle *v.* Maulding, 7 J. J. Marsh. (Ky.) 202; Alston *v.* Alston, 2 Treadw. (S. C. Const.) 604; Williamson *v.* Farrow, 1 Bailey (S. C. Ct. of App.) 611. *Contra,* Loring *v.* Halling, 15 Johns. (N. Y.) 119, 120.

Exceptional decisions. — It has been held, in one or two cases, to mean lunar month in *statutes,* Stackhouse *v.* Halsey, 3 Johns. Ch. (N. Y.) 74 (Kent, Chan., giving the opinion); and *per* Savage, Ch. J., in Parsons *v.* Chamberlain, 4 Wend. (N. Y.) 512, 513; and in several cases to mean calendar only because the language used showed that calendar months were intended, Parsons *v.* Chamberlain, 4 Wend. 512, 513; Snyder *v.* Warren, 2 Cow. 518.

By the weight of authority the word "month" in statutes, as elsewhere, *unexplained,* means *calendar* month. Hunt *v.* Holden, 2 Mass. 168, 170; Avery *v.* Pixley, 4 Id. 460; Kimball *v.* Lamson, 2 Vt. 138; Churchill *v.* Merchants' Bank, 19 Pick. (Mass.) 532, 535; Commonwealth *v.* Chambre, 4 Dall. 143; Brudenell *v.* Vaux, 2 Id. 302; Moore *v.* Houston, 3 S. & R. (Pa.) 169; Payne *v.* Wallace, 2 A. K. Marsh. (Ky.) 244; Gross *v.* Fowler, 21 Cal. 392.

to quit at three months' notice," he will be deemed a quarterly tenant, and the notice to quit must expire with some quarter, and not at any other part of the year (*q*). Where premises are let at so much per quarter (not saying for what period), that creates a quarterly tenancy, and not a yearly tenancy at a rent payable quarterly (*r*). So where premises are let not for any definite period, but the tenant is to give up possession at any time on one month's notice, that creates a tenancy from month to month (*s*). But where premises are let for an indefinite period, at a yearly rent, payable weekly, with power to determine the tenancy at three months' notice from any quarter day, that creates a yearly tenancy, determinable at the end of any quarter (*t*).

[*334] The parties to a demise may * expressly stipulate that in a certain event the tenant may quit without any notice (*u*). An agreement for a weekly tenancy of a house determinable by a week's notice, accompanied by a memorandum that the tenant might have the house until the landlord required it for the purpose of pulling it down, has been held to be terminable by a week's notice, although the landlord did not require the house for the purpose of pulling it down (*x*).

Effect of insufficient notice. — An insufficient notice to quit given by the tenant and assented to by the landlord will not determine the tenancy, unless the assent be communicated to the tenant, nor operate as a surrender on the expiration of such notice (*y*). A tenancy from year to year created by parol is not determined by a parol licence from the landlord to quit in the middle of a quarter, and the tenant quitting

(*q*) Kemp *v.* Derrett, 3 Camp. 510.

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

(*s*) Doe *d.* Lansdell *v.* Gower, 17 Q. B. 589.

(*t*) Rex *v.* Inhbts. of Herstmonceaux, 7 B. & C. 551; Overseers of Willesden, app., Overseers of Paddington, resp., 3 B. & S. 593; Guardians of Hastings Union *v.* Guardians of St. James, Clerkenwell, 35 L. J., M. C. 65.

(*u*) Bethell *v.* Blencowe, 3 M. & G. 119; Cole Ejec. 31, 36.

(*x*) Cheshire Lines Committee *v.* Lewis, 50 L. J., Q. B. 120; 44 L. T. 293, C. A.

(*y*) Doe *d.* Hudlestone *v.* Johnstone, 1 M'Clel. & Y. 141; Johnstone *v.* Hudlestone, 4 B. & C. 922; Doe *d.* Murrell *v.* Milward, 3 M. & W. 328; Bessell *v.* Landsberg, 7 Q. B. 638.

the premises accordingly, without the landlord taking possession (*z*). An agreement for a new lease upon different terms (not amounting to an actual demise) will not be sufficient, without a notice to quit, to determine a previous yearly tenancy (*a*).

Effect of sufficient notice. — Upon the expiration of a notice to quit duly given by either party *the tenancy ceases*, and, unless a fresh tenancy be afterwards created, the landlord cannot distrain for *subsequent* rent, notwithstanding the tenant continues in possession for a year or more after the expiration of the notice (*b*). The remedy in such case is by action for use and occupation (*c*), or for double value or double rent (*d*).

(b) *When necessary.*

Notice necessary. — A notice to quit is necessary — 1. Where there is some express stipulation on the subject. 2. By local custom. 3. By the common law.

Express stipulations. — Where there is any express stipulation as to the notice to be given by either party to determine the tenancy, such notice, whether more or less than that usually required by law, must be given and will be sufficient (*e*). But less than the stipulated notice will be bad (*f*). Where a six "months'" notice on either side is to be given, it seems that a six lunar[1] months' notice is sufficient (*g*).

***Local custom.** — Where there is a special local [*335] custom regulating the notice to be given to determine the tenancy, and there is no express stipulation on the subject, such custom will be deemed part of the contract as an *implied* term or condition thereof, and notice to quit must

(*z*) Mollett *v.* Brayne, 2 Camp. 103.

(*a*) John *v.* Jenkins, 1 Cr. & M. 227; Jones *v.* Reynolds, 1 Q. B. 506.

(*b*) Alford *v.* Vickery, Car. & M. 280.

(*c*) Chap. XIV., *post*.

(*d*) Chap. XX., *post*.

(*e*) Doe *d.* Green *v.* Baker, 8 Taunt. 281; Doe *d.* Robinson *v.* Dobell, 1 Q. B. 806; Cole Ejec. 31, 32.

(*f*) Doe *d.* Peacock *v.* Raffan, 6 Esp. 4.

(*g*) Rogers *v.* Kingston-upon-Hull Dock Co., 34 L. J., Ch. 165.

[1] Calendar months in the United States. See note, *ante*, (a).

be given accordingly (*h*). The custom of the country is not admissible to prove that a notice to quit served on the 3rd of April is a good notice to quit by reason of the tenancy being a Michaelmas tenancy, but it must be proved by direct evidence that such is the case (*i*).

Notice at common law. — Where a tenancy from year to year is created by express agreement, and there is no special stipulation or local custom providing for the determination of the tenancy, the usual notice to quit required by law, i.e. half-a-year's notice to quit at the end of the first or some other year of the tenancy, must be given (*k*).[1] The same rule applies where a tenancy from year to year is *implied by law* from the payment and acceptance of rent, or from other circumstances (*l*), as where a person enters under a void lease (*n*). Similarly, where a tenant for a term of years holds over and continues to pay rent as before, which the landlord accepts (*o*); or where a lease becomes void upon the death of the lessor (a tenant for life), and the remainderman

(*h*) Tyler *v.* Seed, Skin. 649; Roe *d.* Henderson *v.* Charnock, Peake, 6. As to proof of custom, see Doe *d.* Brown *v.* Wilkinson, Co. Lit. 270 b, note (228).

(*i*) Hogg *v.* Norris, 2 F. & F. 246.

(*k*) Parker *d.* Walker *v.* Constable, 3 Wils. 25; Right *d.* Flower *v.* Darby, 1 T. R. 159; Doe *d.* Shaw *v.* Porter, 3 T. R. 13; Doe *d.* Martin *v.* Watts, 7 T. R. 85; Doe *d.* Pitcher *v.* Donovan, 1 Taunt. 555; Goode *v.* Howell, 4 M. & W. 198; Smith L. & T. 24, 319 (2nd ed.).

(*l*) Doe *d.* Wawn *v.* Horn, 3 M. & W. 333; Doe *d.* Cater *v.* Somerville, 6 B. & C. 126, 132.

(*n*) Doe *v.* Bell, 5 T. R. 471. See *ante*, 221. As to whether an entry under an agreement for a lease constitutes a tenancy from year to year only, or gives a title to the lease, see Walsh *v.* Lonsdale, 21 Ch. D. 9, and p. 86, *ante*.

(*o*) Hyatt *v.* Griffiths, 17 Q. B. 570. See *ante*, 222.

[1] **Tenancies; in what part of year determinable.** — In some states there are special statutory provisions fixing *the time of year* at which tenancies not otherwise limited can be terminated.

In Iowa tenancies may be terminated March 1, except tenancies on shares and cropping contracts, which expire at harvest, or not later than December 1 (Rev. Code, sec. 2015); in Kansas farming tenancies may be terminated March 1 (Com. Laws, sec. 3209); in New York City tenancies, not otherwise agreed, terminate May 1 (3 Rev. Sts. Part 2, Tit. 4, sec. 1); in New Jersey tenancies for indefinite periods, with monthly rent, so long as the rent is paid cannot be terminated by the landlord until April 1 (Act of April 14, 1881); in Quebec tenancies (*without lease*) of houses terminate May 1, and of rural estates October 1 (Civil Code, sec. 1657).

accepts subsequent rent, whereby a new implied tenancy is created (*p*); any such new tenancy will be deemed to have commenced from the same day of the year as the original term, and the notice to quit should be given accordingly (*q*).

Time of day for quitting. — The tenant is entitled to retain possession till midnight of the same day of the year on which the tenancy commenced; a notice to quit at noon of such day is bad (*r*).

Notice under Agricultural Holdings Act. — The common law rule, that in all cases of yearly tenancies, the tenant is entitled to half-a-year's notice expiring at that period of the year at which the tenancy commenced, is altered in favour of tenants of agricultural or pastoral holdings or market gardens (*s*) by the * 33rd section of the Agri- [*336] cultural Holdings Act, 1883 (*t*), which doubles the length of notice required. This section enacts: — "Where a half-year's notice, expiring with a year of tenancy, is by law necessary and sufficient for determination of a tenancy from year to year, in the case of any such tenancy under a contract of tenancy made either before or after the commencement of the act, a year's notice so expiring shall by virtue of this act be necessary and sufficient for the same, unless the landlord and tenant of the holding, by writing under their hands, agree that this section shall not apply, in which case a half-year's notice shall continue to be sufficient; but nothing in this section shall extend to a case where the tenant is adjudged bankrupt, or has filed a petition for a composition or arrangement with his creditors." This section applies only to the common case where a half-year's notice is necessary by implication of law (*u*), and has no application to the case where a half-year's notice, much less where six months'

(*p*) Doe *v.* Watts, 2 Esp. 501; 7 T. R. 83. See *ante*, 223.

(*q*) Doe *d.* Jordan *v.* Ward, 1 H. Blac. 96; Doe *d.* Collins *v.* Weller, 7 T. R. 478; Humphreys *v.* Franks, 18 C. B. 323.

(*r*) Page *v.* More, 15 Q. B. 684.

(*s*) For exact application of the Act, see p. 337, *post*.

(*t*) 46 & 47 Vict. c. 61. See this act set out at length Appendix A., *post*.

(*u*) See Right *d.* Flower *v.* Darby, 1 T. R. 159, and the other cases, *ante* (*k*).

notice (*x*), is expressly stipulated for (*y*). Such is the effect of Wilkinson *v.* Calvert, decided upon precisely similar words in s. 51 of the repealed Agricultural Holdings Act, 1875, and of Barlow *v.* Teal (*z*), decided upon s. 33 of the Act 1883 in a case where the stipulation in a contract of tenancy made in 1871, was "to hold from year to year, until six months' notice is given in the usual way;" and in Barlow *v.* Teal all the members of the Court of Appeal intimated that (as it was put by Brett, M. R.), section 33 "applies where there is no express stipulation as to the termination of the tenancy, and does not apply where there is an express stipulation."

Notice to quit part of holding. — The 41st section of the same act provides that on a tenancy from year to year a notice to quit, which relates to part only of the holding, and would therefore be wholly bad at common law (*a*), shall be good as to such part if given with a view to the use of land for the erection of labourers' cottages, the providing of gardens for labourers, the planting of trees, the working of coal, "the obtaining of brick earth, gravel or sand," the making of a watercourse or road, or other purposes therein enumerated, the tenant to be entitled to a proportionate reduction of rent. The notice must "so state," i.e. must state its purpose. The same section provides that "the tenant shall further be entitled at any time within *twenty-eight* days after service of the notice to quit, to serve on the landlord a notice in writing to the effect that he (the tenant) accepts the same as a notice to quit the entire holding, to take effect at the expiration of the then current year of
[*337] * tenancy; and the notice to quit shall have effect accordingly." This last provision, which it is purely optional with the tenant to avail himself of, seems intended to give him the benefit of giving up the part of the holding to which the notice applies sooner than he would be entitled to do in the ordinary course of things; for if the tenant

(*x*) Wilkinson *v.* Calvert, L. R., 3 C. P. D. 360; 47 L. J., C. P. 679; 38 L. T. 813; 26 W. R. 829, *per* Lord Coleridge, C. J.

(*y*) See Id.

(*z*) Barlow *v.* Teal, L. R., 15 Q. B. D. 501, 54 L. J., Q. B. 564; 34 W. R. 54 C. A. It will be observed that the express stipulation need not be in writing.

(*a*) Doe *d.* Rodd *v.* Archer, 14 East, 244.

should not avail himself of the provision the notice will be a "year's notice, expiring with a year of tenancy" (in accordance with sect. 33), and not with the "current year."

Application of Agricultural Holdings Act. — The Agricultural Holdings Act, 1883, 46 & 47 Vict. c. 61, by ss. 54 and 61 applies to the following and no other holdings: —

"*Holdings, either wholly agricultural or wholly pastoral, or partly agricultural and partly pastoral, or wholly or partly cultivated as market gardens, held under a landlord for a term of years or for lives, or for lives and years, or from year to year, by a tenant holding no employment under such landlord.*"

Service of notice under Agricultural Holdings Act. — It is enacted by s. 28 of the Agricultural Holdings Act, that "any notice under this act" may be served by registered letter through the post; but it is submitted that a notice to quit is not a notice under the act, and that s. 33 merely lengthens the notice required at common law (*b*).

What tenancies are determinable at end of first year. — A tenancy "from year to year so long as both parties please" is determinable at the end of the first, as well as of any subsequent year, unless in creating such tenancy the parties use words showing that they contemplate a tenancy for two years at least (*c*). But where a tenancy is created for "one year certain, and so on from year to year" (which is often done by mistake), it enures as a tenancy for two years at the least, and cannot be determined by notice to quit at the end of the first year (*d*); but it may be determined by due notice to quit at the end of the second or any subsequent year of the tenancy. A tenancy "for twelve months certain and six months' notice afterwards" may be determined by notice to quit at the end of the first year (*e*): but a demise "not for one year only, but from year to year," has been

(*b*) See the act, *post* Appendix, and for one instance out of many of a notice "under the act" see s. 7. A contrary opinion to that in the text is given in Roscoe on Evidence, ed. 14.

(*c*) Doe *d.* Clarke *v.* Smaridge, 7 Q. B. 957; Doe *d.* Plumer *v.* Nainby, 10 Q. B. 473; Smith L. & T. 323 (2nd ed.).

(*d*) Doe *d.* Chadborn *v.* Green, 9 A. & E. 658.

(*e*) Thompson *v.* Maberley, 2 Camp. 573; Brown *v.* Symons, 8 C. B., N. S. 208; 29 L. J., C. P. 251.

held to constitute a demise for two years at least (*f*). A tenancy for six months, and so on from six months to six months until determined by either party, is a tenancy for one year at least (*g*). So a lease for three years, and so on from three years to three years, makes one term for [*338] six years (*h*). Such tenancy may be * determined by a half-year's notice to quit expiring at the end of the first six years, or of any subsequent period of three years, but not at any other time (*i*). A demise for a "term of three years determinable on a six months' previous notice to quit, otherwise to continue from year to year until the term shall cease by notice to quit at the usual times," is a demise for three years certain, determinable only at the end of that period by six months' previous notice; and if not then determined, a subsisting tenancy from year to year. Such a demise cannot be determined by a notice to quit at the end of the first or second of the three years (*k*).

By husband. — Prior to the Married Women's Property Act it was held that a husband could not maintain ejectment for his wife's lands, let from year to year with his express or implied assent, without first giving due notice to quit (*l*). The effect of that act would seem to be that the notice to quit need be given in the wife's name only.

By infant. — An infant must give the same notice to quit as if he were of full age (*m*).

After death or assignment. — A notice to quit is not rendered unnecessary by the death of the landlord (*o*), or of the tenant (*p*), nor by an assignment of the term (*q*), or of

(*f*) Dean *d.* Jacklin *v.* Cartwright, 4 East, 31.

(*g*) Reg. *v.* Chawton, 1 Q. B. 247.

(*h*) Hemmings *v.* Brabason, 2 Lev. 45.

(*i*) Cole Ejec. 35; Roe *d.* Bree *v.* Lees, 2 W. Blac. 1171; Hemmings *v.* Brabason, 2 Lev. 45; Jones *v.* Nixon, 1 H. & C. 48.

(*k*) Jones *v.* Nixon, 1 H. & C. 48; 31 L. J., Ex. 505; Brown *v.* Trumper, 26 Beav. 11.

(*l*) Doe *d.* Leicester *v.* Biggs, 1 Taunt. 367; 2 Id. 109.

(*m*) Maddon *d.* Baker *v.* White, 2 T. R. 159; Doe *d.* Miller *v.* Nodon, 2 Esp. 530.

(*o*) Maddon *d.* Baker *v.* White, 2 T. R. 159.

(*p*) Doe *d.* Shore *v.* Porter, 3 T. R. 13; Doe *d.* Hull *v.* Wood, 14 M. & W. 682; Mackay *v.* Mackreth, 4 Doug. 213; 15 Ves. 241; Gulliver *d.* Tasker *v.* Burr, 1 W. Blac. 596.

(*q*) Doe *d.* Castleton *v.* Samuel, 5 Esp. 173.

the reversion (*r*). But in all such cases notice to quit should be given by or to the person or persons for the time being legally entitled to the term, or to the reversion, as the case may be (*s*).

Subsequent reversioners. — Where notice to quit is duly given by the landlord, or other person for the time being legally entitled to the reversion, and he afterwards assigns his reversion, the assignee may avail himself of the notice (*t*). So the churchwardens and overseers of a parish may avail themselves of a notice to quit duly given by their predecessors (*u*).

Notice by tenant binds assignee. — A proper notice to quit given to the tenant or his assignee will operate against any subsequent assignee (*x*).

(c) *When unnecessary.*[1]

Demise for specific term. — Where the demise or agreement specifies the term or event upon which the tenancy is to determine, no notice to quit is necessary (*y*);[2] *as where the demise is for one year (*z*):[3] or for [*339]

(*r*) Birch *v.* Wright, 1 T. R. 378; Burrows *v.* Gradin, 1 D. & L. 213, 218.

(*s*) Cole Ejec. 35.

(*t*) Doe *d.* Earl of Egremont *v.* Forwood, 3 Q. B. 627.

(*u*) Doe *d.* Higgs *v.* Terry, 4. A. & E. 274; Doe *d.* Hobbs *v.* Cockell, Id. 478.

(*x*) Doe *d.* Castleton *v.* Samuel, 5 Esp. 173.

(*y*) Right *d.* Flower *v.* Darby, 1 T. R. 162; Id. 54.

(*z*) Cobb *v.* Stokes, 8 East, 358, 361; Johnstone *v.* Huddlestone, 4 B. & C. 937; Strickland *v.* Maxwell, 2 Cr. & M. 539.

[1] For some of the many ways of terminating tenancies at will, beside notice, see *ante*, sec. 1, notes.

[2] **Complex tenancies.** — A tenancy from year to year may be made to expire without notice at end of a term, Doe *d.* Parkinson *v.* Hanbtman, Bert. (N. B.) 645; Caverhill *v.* Orvis, 12 C. P. U. C. 392; Secor *v.* Pestana, 37 Ill. 525; and so may a tenancy at will at end of a definite period (*per* Morton, J., in Davis *v.* Murphy, 126 Mass. 143, 144, and Shaw, C. J., in Elliott *v.* Stone, 1 Gray (Mass.) 571, 574. See *ante*, sec. 1, notes). For instance, a parol lease for a week or a month in Massachusetts (though by statute a tenancy at will) expires without notice at the end of the period. In Maine (by Rev. Sts. ch. 94, sec. 2) it is otherwise. It is believed such tenancies for fixed periods generally, in the states and provinces, expire without notice.

[3] Logan *v.* Herron, 8 S. & R. (Pa.) 459; McCanna *v.* Johnston, 19 Pa. St. 434; or for a month, Gibbons *v.* Dayton, 4 Hun (N. Y.) 451; Neumeister *v.* Palmer, 8 Mo. App. 491; or for days, McCarthy *v.* Yale, 39 Cal. 586; or to a day certain, Evans *v.* Hastings, 9 Pa. St. 273 (*per* Coulter, J.).

any certain number of years (*a*):[1] or till a particular day (*b*).

Agreement for lease for specific term. — Similarly, if a tenant enter under an agreement for a lease for seven years, which lease is never executed, at the end of the seven years the tenancy from year to year, created by the payment and acceptance of rent during that period, determines without any notice to quit (*c*). But if there be an agreement for a lease of twenty-one years, determinable at the end of the first seven or fourteen years, the tenant cannot quit at the end of the first seven years without giving any notice (*d*).

When term limited. — If a term is granted which in the lease is limited by the happening of a certain event, the term will end on the happening of the event without any notice to quit being required.[2] Thus where there is a lease or agreement for a lease "during the joint lives of A. and B.;" upon the death of either of them the term determines without any notice to quit (*e*); and where a house or part of a house is occupied by one of several partners "during the continuance of the partnership;" upon a dissolution thereof he may be ejected without any notice to quit (*f*). So where premises are occupied by a servant and his family as part of the remuneration for his services, whenever such service is determined, an ejectment may be maintained against the servant without notice to quit (*g*). And where an intended

(*a*) Messenger *v.* Armstrong, 1 T. R. 54; Doe *d.* Godsell *v.* Inglis, 3 Taunt. 54; Roberts *v.* Hayward, 3 C. & P. 432.

(*b*) Doe *d.* Leeson *v.* Sayer, 3 Camp. 8.

(*c*) Doe *d.* Tilt *v.* Stratton, 3 C. & P. 164; 4 Bing. 446; Berrey *v.* Lindley, 3 M. & G. 498, 514; Doe *d.* Davenish *v.* Moffatt, 15 Q. B. 257, 265; Tress *v.* Savage, 4 E. & B. 36.

(*d*) Chapman *v.* Towner, 6 M. & W. 100; and see Brown *v.* Trumper, 26 Beav. 11.

(*e*) Doe *d.* Bromfield *v.* Smith, 6 East, 530.

(*f*) Doe *d.* Waithman *v.* Miles, 1 Stark. 181; Doe *d.* Colnaghi *v.* Bluck, 8 C. & P. 464.

(*g*) Doe *d.* Hughes *v.* Corbett, 9 C. & P. 494.

[1] Jackson *v.* Parkhurst, 5 Johns. 128; Jackson *v.* M'Leod, 12 Id. 182; Hauxhurst *v.* Somers, 38 Cal. 563; MacGregor *v.* Rawle, 57 Pa. St. 184.

[2] See *ante*, sec. 2, note, and cases there cited; also sec. 1, note 2, and cases there cited of conditional limitations of tenancies at will. It seems that both tenancies from year to year and at will may be limited to expire at a fixed date, if not terminated earlier by notice to quit.

purchaser is let into possession until a given day on terms the same rule will apply (*h*).

Where notice to quit is dispensed with. — It may be expressly stipulated that the tenant may quit *without notice*, at any time, upon the happening or discovery of a particular event or fact (which happens), ex. gr. "if he finds anything that may at all lead him to suspect that there is any embarrassment in his landlord" (*i*).

Monthly or weekly tenancy. — Where the tenancy is otherwise than yearly, and there is no local custom or special stipulation as to notice, it is very doubtful what notice to quit is necessary.[1] A notice corresponding with the period of ten-

(*h*) Doe *d.* Leeson *v.* Sayer, 3 Camp. 8; Doe *d.* Parker *v.* Boulton, 6 M. & S. 148; Doe *d.* Moore *v.* Lawder, 1 Stark. 308; Right *d.* Lewis *v.* Beard, 13 East, 210.

(*i*) Bethell *v.* Blencowe, 3 M. & G. 119.

[1] **The shorter tenancies.** — (*a*) *Notice to terminate.* — Tenancies for the shorter *fixed* periods (week, month, quarter, &c.) terminate, like terms for years, without notice. In fact (though fractional) they are tenancies for years. 4 Kent's Com. sec. 85.

(*b*) *Shorter periodical tenancies.* — It is usually held at common law in America that a notice equal to the intervals between rent payments is sufficient to terminate them, as three months to terminate a tenancy from quarter to quarter, Witt *v.* Mayor of N. Y., 6 Rob. 441; one month, from month to month, Anderson *v.* Pindle, 19 Wend. (N. Y.) 391; 23 Id. 616; McDevitt *v.* Lambert, 80 Ala. 536; Prickett *v.* Ritter, 16 Ill. 97 (*per* Scates, J.); Huyser *v.* Chase, 13 Mich. 98; Woodrow *v.* Michael, Id. 190; Sanford *v.* Harvey, 11 Cush. (Mass.) 93; and Walker *v.* Sharpe, 14 Allen (Mass.) 43 (and this is so by statute in Mass.); Gunn *v.* Sinclair, 52 Mo. 327; Gruenewald *v.* Schaales, 17 Mo. App. 324 (and by statute in Missouri); a week, from week to week (*per* Walworth, Chan., in Anderson *v.* Prindle, 23 Wend. 619).

(*c*) *Statutory notices to terminate the shorter tenancies and tenancies at will.* — The notices are very frequently fixed at the intervals between rent payments, but not always, and there is a great variety in the statutes.

In Nova Scotia (Rev. Sts. ch. 125), New Brunswick (Con. Sts. ch. 83, sec. 16), Quebec (Civil Code, sec. 1657), Ontario (Rev. Sts. ch. 143, sec. 15), Manitoba (Con. Sts. ch. 54, sec. 8), and Delaware (Laws of Delaware, ch. 101, sec. 4), tenancies from month to month are terminated by a month's notice and from week to week by a week's notice. In Quebec tenancies from quarter to quarter, as well as all uncertain verbal and presumed leases, are terminated by a three months' notice.

In Massachusetts (Pub. Sts. ch. 121, sec. 12), Michigan (Statutes, sec. 5774), and Minnesota (Sts. ch. 76, sec. 40), the notice to terminate a tenancy at will is three months, but if the rent is payable oftener than that the notice will be sufficient if equal to the intervals; and, in case of non-payment of rent, fourteen days' notice is sufficient.

ancy, ex. gr. a week's notice in case of a weekly tenancy, is clearly sufficient (*k*), but whether it is necessary is not set-

(*k*) See Doe *d.* Peacock *v.* Raffan, 6 Esp. 4.

In Iowa (Rev. Code, sec. 2015), Kansas (Compiled Laws, sec. 3207), and Maine (Rev. Sts. ch. 94, sec. 2), notice to terminate a tenancy at will is thirty days. In Iowa and Kansas, if the intervals are less than thirty days, the notice will be sufficient if it equal them.

In New York (3 Rev. Sts. Part 2, Tit. 4, sec. 7), Maryland (Rev. Code, Art. 67, Subtitle 7, sec. 1), Indiana (Rev. Sts. sec. 5207), Kentucky (Gen. Sts. ch. 66, Art. 6, sec. 1), Missouri (Rev. Sts. ch. 45, sec. 3077), California (Civil Code, sec. 789), and Dakota (Civil Code, sec. 239), notice in case of a tenancy at will is one month.

In Indiana (Rev. Sts. sec. 5209), if the periods are shorter than three months, the notice will be sufficient if it equal them; likewise in Wisconsin (Rev. Sts. sec. 2183), if they are less than a month.

In Missouri (Rev. Sts. sec. 3078) *all* tenancies less than from year to year may be terminated by a month's notice.

In New York City, unless otherwise expressly agreed, rent is payable quarterly upon all leases, and they expire May 1 (3 R. S. Part 2, Tit. 4, sec. 1).

In Illinois (Statutes, ch. 80, sec. 6) thirty days is required to terminate a monthly tenancy, or for periods less than a year, Seem *v.* McLees, 24 Ill. 192; Brownell *v.* Welch, 91 Id. 523; though it is still considered that tenancies at will are determined without notice, Dunne *v.* Trustees of Schools, 39 Ill. 578; Herrell *v.* Sigeland, 81 Id. 457.

In Colorado one month's notice terminates a half-yearly, and ten days a monthly, tenancy (Gen. Sts. sec. 1504). In Georgia two months' notice from landlord, or one month from tenant, will terminate a tenancy at will (Code, sec. 2291).

In North Carolina notice to terminate a tenancy from month to month is fourteen days; from week to week, two days (Code, sec. 1750).

In Rhode Island, in terms less than year, notice is one-half the term, not exceeding three months (Pub. Sts. ch. 232, sec. 1).

In Mississippi (Rev. Code, sec. 1330) the notice to terminate half-yearly and quarterly tenancies is one month; to terminate monthly or weekly tenancies, it is one week.

In Oregon the notice is ten days in all cases except farming tenancies, and for such tenancies it is ninety days (Law of Ore. sec. 3520).

In Connecticut parol leases reserving monthly rent expire without notice at end of month (Gen. Sts. sec. 2967).

In New Hampshire (Gen. Laws, ch. 250, sec. 2) three months' notice is sufficient in all cases, thirty days if rent is payable oftener than once in three months, and seven days if the rent is in arrears.

In Pennsylvania *probably* a notice equal to the rent intervals would be sufficient to terminate the shorter periodical tenancies. "The Law of Landlord and Tenant in Pennsylvania" (by Jackson and Gross), p. 213.

The editors rely upon outside decisions, and say there are good lawyers who differ from them.

Several of the states have no statutory provisions for terminating either tenancies at will or the shorter periodical tenancies.

Termination of notices.— Notices to terminate the shorter periodical ten-

tled. It was ruled by Parke, B., at nisi prius (*l*), in an action for use and occupation, *that the well- [*340] known rule that a yearly tenancy cannot be determined without a half-a-year's notice "cannot be applied to a weekly taking," inasmuch as "the effect of it would be to show that half-a-week's notice was necessary to put an end to such a tenancy;" that a week's notice to quit is not implied as part of the contract in a weekly taking, and that a tenant who quitted on the same day of the week on which he entered was not bound to pay rent for the week subsequent. But in Jones *v.* Mills (*m*), the Court of Common Pleas held that a tenancy from week to week does not determine without *some reasonable notice:* and that an ejectment cannot be maintained against such tenant without any previous notice. Both these cases being decided in favour of the tenant, they are not so conflicting as has been generally supposed. On the whole, the law appears to be that, in the case of weekly tenancies, the landlord is entitled to such reasonable notice, not exceeding a week, as will enable him to get a new tenant, and the tenant to such reasonable notice, not exceeding a week, as will give him a reasonable time to remove his property from the premises (*n*).

Tenant may stay till midnight. — After notice given the tenant appears to be entitled in strict law to stay until *midnight* of the day on which the notice expires, at whatever hour of the day the tenancy may have commenced, or the notice may have been given; — for the law takes no account of fractions of a day. This seems to follow from the authority (*o*) in which a notice to quit at noon (of the proper day) was held bad in the case of a tenancy from year to year; but

(*l*) Huffell *v.* Armistead, 7 C. & P. 56, 58.

(*m*) 10 C. B., N. S. 788; 31 L. J., C. P. 66. Williams, J., thought that a week's notice, and Willes, J., that half-a-week's notice, was necessary.

(*n*) See *per* Erle, C. J., in Jones *v.* Mills, *ubi supra*, citing Thunder *d.* Weaver *v.* Belcher, 3 East, 449.

(*o*) Page *v.* Moore, 15 Q. B. 66.

ancies must terminate at the end of the rent periods. Gunn *v.* Sinclair, 52 Mo. 327, 331; Russell *v.* McCartney, 21 Mo. App. 544, 547; Woodrow *v.* Michael, 13 Mich. 187, 190; Sanford *v.* Harvey, 11 Cush. (Mass.) 93; Prescott *v.* Elm, 7 Id. 346; Steward *v.* Harding, 2 Gray (Mass.) 335; Currier *v.* Barker, Id. 224; Bay State Bank *v.* Kiley, 14 Gray (Mass.) 492.

a custom to quit at a more convenient time, if it could be proved in fact, would no doubt be good in law.

Proof of custom. — The onus of proof of any custom (where a custom is relied on) lies on the party asserting its existence (*p*). If there be any such local custom or special stipulation, notice to quit must be given accordingly (*q*), and such notice will of course be sufficient (*r*).

Tenants at will. — A notice to quit is unnecessary to determine a strict tenancy at will (*s*).[1] But such tenancy must be duly determined by a "demand of possession," or by entry, or by something equivalent, on or *before* the date of the plaintiff's alleged title in an ejectment (*t*). Implied tenancies at will frequently change into tenancies from [*341] year to year, *upon payment of rent, &c. (*u*), in which case the usual notice to quit must be given.

Tenants on sufferance. — A tenant on sufferance is not

(*p*) Cole Ejec. 33, 37.

(*q*) Doe *d.* Peacock *v.* Raffan, 6 Esp. 4; Doe *d.* Finlayson *v.* Bayley, 5 C. & P. 67.

(*r*) Doe *d.* Parry *v.* Hazell, 1 Esp. 94; Doe *d.* Campbell *v.* Scott, 6 Bing. 362.

(*s*) Doe *d.* Tomes *v.* Chamberlaine, 5 M. & W. 14; Doe *d.* Milburn *v.* Edgar, 2 Bing. N. C. 498; Doe *d.* Jones *v.* Jones, 10 B & C. 718; Doe *d.* Hall *v.* Wood, 14 M. & W. 682 (2nd point); Doe *d.* Hollingsworth *v.* Stennett, 2 Esp. 717.

(*t*) Goodtitle *d.* Galloway *v.* Herbert, 4 T. R. 680; Denn *d.* Brune *v.* Rawlins, 10 East, 261; Doe *d.* Jacobs *v.* Phillips, 10 Q. B. 130; Doe *d.* Nicholls *v.* M'Kaeg, 10 B. & C. 721.

(*u*) Clayton *v.* Blakey, 8 T. R. 3, *ante*, 206.

[1] **Tenancy at will; notice to quit; when necessary.** — A formal notice to quit is not necessary to determine a strict tenancy at will *by the common law*. Jackson *v.* Bradt, 2 Caines (N. Y.) 169; Jackson *v.* Rogers, 2 Caines' Cas. (N. Y.) 314, 318; Rich *v.* Bolton, 46 Vt. 84; Ellis *v.* Paige, 1 Pick. (Mass.) 43; Curl *v.* Lowell, 19 Id. 25, 26, 27 (*per* Wilde, J.); Jackson *v.* Bryan, 1 Johns. (N. Y.) 322, 323 (*per* Thompson, J.); Phillips *v.* Covert, 7 Id. 1, 4 (*per* Kent, C. J.); Humphries *v.* Humphries, 3 Ired. L. (N. C.) 362; Davis *v.* Thompson, 13 Me. 209 (*per* Weston, C. J.); Moore *v.* Boyd, 24 Me. 242; Withers *v.* Larrabee, 48 Id. 570, 571 (*per* Appleton, J.); Dunne *v.* Trustees, 39 Ill. 578; Herrell *v.* Sizeland, 81 Id. 457.

The lessee, however, cannot be expelled without a demand of possession and reasonable time allowed him to remove his family and effects, and harvest his crops. Ellis *v.* Paige, 1 Pick. (Mass.) 43; Curl *v.* Lowell, 19 Id. 25, 26, 27; Moore *v.* Boyd, 24 Me. 242; and many other cases, some of them cited *supra*.

Statutory notices are now frequently required. See *ante*, note, "Shorter tenancies."

For many other ways, beside notice, in which tenancies at will may be determined, see *ante*, ch. 8, sec. 1, note, "Termination of tenancies at will."

entitled to any notice to quit, nor even to a demand of possession, before an ejectment can be maintained against him (*x*). But such tenancy will easily change into a tenancy at will, or into a tenancy from year to year, whereupon a demand of possession, or a regular notice to quit, will become necessary (*y*).

Intruders. — If a man get into possession of a house to be let, without the privity of the landlord, and they afterwards enter into negotiations for a lease, but differ upon the terms, the landlord may maintain ejectment to recover possession of the premises without giving any notice to quit (*z*). But possession should be demanded before action, to put an end to any implied tenancy at will, arising from the negotiations (*a*).

Mortgagors. — A mortgagor who is suffered to remain in possession, or in receipt of the rents and profits of the property mortgaged, not being a tenant of the mortgagee, but in the nature of a bailiff to receive the rents, and thereout pay the interest, and keep the surplus for his own use (*b*), is not entitled to any notice to quit, nor even to a demand of possession, before ejectment (*c*).

Tenants of mortgagor. — Tenants from year to year of the mortgagor, whose tenancies commenced *before* the mortgage, are entitled to the usual notice to quit (*d*). But if their tenancies commenced *after* the mortgage, they are not entitled to any notice to quit, nor even to a demand of possession (*e*), unless a new tenancy has been created as between the mortgagee and the tenant (*f*).

(*x*) Doe *d.* Moore *v.* Lawder, 1 Stark. R. 308; Doe *d.* Leeson *v.* Sayer, 3 Camp. 8; Doe *d.* Roby *v.* Maisey, 8 B. & C. 767.

(*y*) Cole Ejec. 38.

(*z*) Doe *d.* Knight *v.* Quigly, 2 Camp. 505.

(*a*) Cole Eject. 58.

(*b*) Trent *v.* Hunt, 9 Exch. 14; *ante*, 47.

(*c*) Doe *d.* Roby *v.* Maisey, 8 B. & C. 767; Doe *d.* Fisher *v.* Giles, 5 Bing. 421; Doe *d.* Snell *v.* Tom, 4 Q. B. 615; Doe *d.* Wilkinson *v.* Goodier, 10 Q. B. 957; Doe *d.* Garrod *v.* Olley, 12 A. & E. 481; Cole Ejec. 38, 462; but see West *v.* Fritche, 3 Exch. 216.

(*d*) Doe *d.* Bowman *v.* Lewis, 13 M. & W. 241; 2 D. & L. 667.

(*e*) Keech *v.* Hall, 1 Doug. 21; 1 Smith L. C. 579; Thunder *d.* Weaver *v.* Belcher, 3 East, 450; Doe *d.* Parker *v.* Boulton, 6 M. & S. 148.

(*f*) Doe *d.* Hughes *v.* Bucknell, 8 C. & P. 566; Doe *d.* Whittaker *v.* Hales, 7 Bing. 322.

Corporations. — It seems that notice to quit need not be given by or to a corporation aggregate where there has been no demise *under seal*, and that either party may determine the tenancy at any time without notice (*g*).[1] A notice to quit (when necessary) may be given by the steward of the corporation without his being authorized so to do under the common seal (*h*.) If given to a corporation it must be directed to them, and not to their head officers (*i*).

[*342] * Where the plaintiff claims by title paramount to the tenancy from year to year notice to quit is unnecessary (*k*).

Disclaimer. — A disclaimer by a tenant from year to year of the reversioner's title renders any notice to quit unnecessary (*l*).

(d) *By whom and to whom given.*

By whom. — A notice to quit may be given either by the landlord or by the tenant, or by the authorized agent of either party (*m*).

Agents. — The agent, who, if acting generally, may give the notice in his own name, but not if he is acting specially (*n*), ought to have sufficient authority when the notice is given, or, at the latest, when it begins to operate: a subsequent recognition is not sufficient (*o*). Where the trustees of a marriage settlement left the entire control and management of the trust estates to their cestui que trust, who was tenant for life in possession, it was held, that he was their general agent in that behalf, and had power to give notices

(*g*) Finlay *v.* Bristol and Exeter R. Co., 7 Exch. 409; Copper Miners' Co. *v.* Fox, 16 Q. B. 229; Pennington *v.* Cardale, 3 H. & N. 656; but see Doe *d.* Pennington *v.* Tanniere, 12 Q. B. 998.

(*h*) Roe *d.* Dean and C. of Rochester *v.* Pierce, 2 Camp. 96; Doe *d.* Birmingham Canal Co. *v.* Bold, 11 Q. B. 127.

(*i*) Doe *d.* Earl of Carlisle *v.* Woodman, 1 East, 228.

(*k*) Doe *d.* Putland *v.* Hilder, 2 B. & A. 782; Cole Ejec. 40.

(*l*) *Post*, Sect. 8; Cole Ejec. 41.

(*m*) Cole Ejec. 42; see Forms, Appendix C., Nos. 3, 5.

(*n*) Jones *v.* Phipps, *infra*.

(*o*) Doe *d.* Mann *v.* Walters, 10 B. & C. 626; Doe *d.* Lyster *v.* Goldwin, 2 Q. B. 143, 146; Doe *d.* Rhodes *v.* Robinson, 3 Bing. N. C. 677; Doe *d.* Fisher *v.* Cuthell, 5 East, 491, 498.

[1] The same rules pertain as in cases of individuals in the United States.

to quit, and that such a notice given in his own name only was sufficient (*p*). But when a notice to quit is given by a particular agent, having a limited authority only, such notice should be given in the name of the principal, or expressly on his behalf (*q*). A notice given by an agent in the names of W. and B. "and others" is valid as a notice from W. and B. only (*r*). A notice by an agent of an agent is not generally sufficient (*s*).

Assignees, devisees, heirs, executors, &c. — Any person for the time being legally entitled to the immediate reversion of and in the demised premises, ex. gr. as assignee, devisee, heir, executor or administrator of the landlord, may give notice to quit (*t*).[1] One of several executors or administrators is competent to give a notice to quit on behalf of all (*u*). Any subsequent owner deriving title through or under the party giving the notice may avail himself of it (*x*).

Subsequent mortgagee. — A mortgagee whose mortgage is *subsequent* to the commencement of a tenancy from year to year created by the mortgagor is an assignee of the reversion, and he may give the tenant the usual notice * to quit (*y*). But a *prior* mortgagee need not give [*343] any notice to quit (*z*).

Partners. — Where A. demises to a mining company, and afterwards becomes a member of that company, he may nevertheless give the company notice to quit, and afterwards

(*p*) Jones *v.* Phipps, L. R., 3 Q. B. 303; 37 L. J., Q. B. 173.

(*q*) Doe *d.* Lyster *v.* Goldwin, 2 Q. B. 143, 146; Buron *v.* Denman, 2 Exch. 188; Cole Ejec. 44.

(*r*) Doe *d.* Bailey *v.* Foster, 3 C. B. 215.

(*s*) Doe *d.* Rhodes *v.* Robinson, 3 Bing. N. C. 677; Cole Ejec. 45.

(*t*) Cole Ejec. 42.

(*u*) Id. 43.

(*x*) Doe *d.* Earl of Egremont *v.* Hellings, 6 Jur. 821, Q. B.; Doe *d.* Earl of Egremont *v.* Forwood, 3 Q. B. 627; Doe *d.* Higgs *v.* Terry, 4 A. & E. 274.

(*y*) Burrowes *v.* Gradin, 1 D. & L. 213, 218; Rawson *v.* Eicke, 7 A. & E. 451; Burton *v.* Dickenson, 17 L. T. 246.

(*z*) *Ante*, 314.

[1] The notice ought to show the assignee's authority, Donaldson *v.* Likens, 2 Brewst. (Pa.) 486; but the omission may be corrected orally at the time of service, Thamm *v.* Hamberg, Id. 528.

maintain ejectment against them (*a*). Where a brewer demised to a publican upon a yearly tenancy, determinable at any time by three months' notice, after which the brewer took in two new partners, and the subsequent receipts for rent were given in the name of the firm: held, that a notice to quit given by the lessor in his own name only was sufficient, and that it was not to be presumed from the receipts that the *legal* estate in the reversion had vested in the firm (*b*).

Joint tenants. — Where several joint tenants demise from year to year, such of them as give notice to quit may severally recover their respective shares (*c*). A notice to quit signed by one of several joint tenants on behalf of himself and the others (whether authorized by them or not) is sufficient to determine a tenancy from year to year as to all; because the tenant holds *the whole premises of all* so long as he and all shall please, and a notice to quit given by any one effectually puts an end to that tenancy (*d*). And therefore also a notice to quit given on behalf of several joint tenants by a person authorized by one of them to give such notice is sufficient to determine the tenancy as to all (*e*). A notice given by an agent in the names of W. and B. "and others" is valid as a notice from W. and B. only (*f*).

Tenants in common. — A notice to quit given by one of several tenants in common may be to quit his undivided part or share (*g*). Where they *demise jointly* they seem to stand on the same footing as joint tenants, and notice to quit may accordingly be given by either of them on behalf of himself and the others (*h*).

Receivers. — A receiver, whether appointed by the High Court, or by a private individual *with a general authority to*

(*a*) Doe *d.* Harvey *v.* Francis, 4 M. & W. 331.

(*b*) Doe *d.* Green *v.* Baker, 8 Taunt. 241.

(*c*) Doe *d.* Whayman *v.* Chaplin, 3 Taunt. 120.

(*d*) Doe *d.* Aslin *v.* Summersett, 1 B. & Ad. 135, 140; Doe *d.* Kindersley *v.* Hughes, 7 M. & W. 141; Alford *v.* Vickery, Car. & M. 210; Smith L. & T. 327 (2nd ed.).

(*e*) Doe *d.* Kindersley *v.* Hughes, 7 M. & W. 141.

(*f*) Doe *d.* Bailey *v.* Foster, 3 C. B. 215.

(*g*) Cutting *v.* Derby, 2 W. Blac. 1075; Doe *d.* Robertson *v.* Gardiner, 12 C. B. 323. See the form, *post*, Appendix C.

(*h*) Cole Ejec. 44.

let the lands to tenants from year to year, has thereby implied authority to determine such tenancies by a regular notice to quit (*i*). But a person authorized to manage the affairs of another during his absence abroad, and to receive his rents, has no authority *implied by law* to determine a tenancy by notice to * quit; but it is a question of fact for the jury whether he had such authority (*k*). "A mere receiver of rents, as such, has no authority to determine a tenancy" (*l*). [*344]

To whom, given by landlord. — A notice to quit given by the landlord should be given to his immediate tenant, or to his assignee, &c., in whom the term is then vested, and not to a mere subtenant (*m*).[1] A notice addressed to the tenant, but served upon the subtenant upon the premises, is insufficient (*n*). The notice should be directed to the tenant, and may be delivered to his solicitor or agent (*o*). In Tanham *v.* Nicholson (*p*) it was held by the House of Lords that service upon a person whose duty it would be to deliver the notice to the tenant was sufficient to sustain ejectment, although in fact the notice was never delivered to the tenant: in this case the tenant was imbecile, and the notice was delivered to his daughter, who lived in the house and managed it. If the notice be served upon the tenant personally,

(*i*) Wilkinson *v.* Colley, 5 Burr. 2696, 2698; Doe *d.* Marsack *v.* Read, 12 East, 57; Doe *d.* Manvers *v.* Mizen, 2 Moo. & R. 56.

(*k*) Doe *d.* Mann *v.* Walters, 10 B. & C. 626.

(*l*) Id. 633, Parke, J.; Doe *d.* Rhodes *v.* Robinson, 3 Bing. N. C. 677; Haseler *v.* Lemoyne, 5 C. B., N. S. 550; Pearse *v.* Boulter, 2 F. & F. 133.

(*m*) Pleasant *d.* Hayton *v.* Benson, 14 East, 234; Doe *d.* Morris *v.* Williams, 6 B. & C. 41.

(*n*) Doe *d.* Mitchell *v.* Levi, Ad. Ejec. 92, note (b).

(*o*) Doe *d.* Prior *v.* Ongley, 10 C. B. 25, 34.

(*p*) L. R., 5 H. L. 561; 6 Ir., C. L. 188.

[1] **Service of notice.** — Notice given to assignee in possession is sufficient, Lloyd *v.* Cozens, 2 Ashm. (Pa.) 131; or to one of two joint tenants, Glenn *v.* Thompson, 75 Pa. St. 389; Grundy *v.* Martin, 143 Mass. 279; or left on premises with wife of tenant, Blish *v.* Harlow, 15 Gray (Mass.) 316; Clark *v.* Keliher, 107 Mass. 406; or left at shop with a co-partner who is constituted agent, tenant and wife being out of state, Walker *v.* Sharpe, 103 Id. 154.

In case of a sub-lease, notice is sufficient given to lessee. Lloyd *v.* Cozens, 2 Ashm. (Pa.) 131, 139 (*per* King, Pres.); Jackson *v.* Baker, 10 Johns. (N. Y.) 270.

it need not be directed to him by name (*q*). The tenant on being served with the notice should give a similar notice to his subtenant, and will be liable to an ejectment if his subtenant hold over (*r*). In the absence of proof to the contrary, a person who has obtained possession from a tenant will be presumed to be in possession as assignee of the term, and not as a mere subtenant (*s*). Where on the death of a tenant from year to year his widow remained in possession, and a notice to quit was given to her, this was held sufficient in the absence of any evidence of a probate or letters of administration granted to some other person (*t*). Where there are two or more joint lessees, a notice to quit given to one of them, even by parol, is sufficient for all (*u*). Where a corporation aggregate is the tenant, and a notice to quit is necessary (*x*), it should be addressed to the corporation, and not to its officers (*y*).

To whom, given by tenant. — A notice to quit given by the tenant should be given to his *immediate landlord* or his assigns, and not to the ground landlord or other person through whom the immediate landlord derives his title (*z*). [*345] * If the immediate landlord is dead, or has assigned his reversion, the notice should be given to the person or persons for the time being *legally entitled to the immediate reversion*, ex. gr. to the heir, executor, administrator, devisee or assignee of such landlord, as the case may be (*zz*). Or it may be given to the attorney or agent duly authorized in that behalf of such landlord, or other person so entitled as afore-

(*q*) Doe *d.* Matthewson *v.* Wrightman, 4 Esp. 5.

(*r*) Roe *v.* Wiggs, 2 Bos. & P., N. R. 330.

(*s*) Doe *d.* Morris *v.* Williams, 6 B. & C. 41; Roe *d.* Blair *v.* Street, 2 A. & E. 329, 331; Hindley *v.* Rickerby, 5 Esp. 4.

(*t*) Rees *d.* Mears *v.* Perrot, 4 C. & P. 230.

(*u*) Doe *d.* Ld. Macartney *v.* J. and W. Crick, 5 Esp. 196 (the marginal note of this case is incorrect); Doe *d.* Ld. Bradford *v.* Watkins, 7 East, 551.

(*x*) *Ante*, 308.

(*y*) Doe *d.* Ld. Carlisle *v.* Woodman, 8 East, 228.

(*z*) Woods *v.* Hyde, 31 L. J., Ch. 295; 10 W. R. 339.

(*zz*) Woods *v.* Hyde, 31 L. J., Ch. 295; 10 W. R. 339.

said (*a*): but not to a mere collector of rents who has no actual authority to receive such notices (*b*).

(c) *Form and Service of.*

Parol notice generally sufficient. — A parol notice to quit is generally sufficient, whether given by or on behalf of the landlord (*c*), or the tenant (*d*); even when given on behalf of a corporation aggregate by their steward or agent (*e*), if any notice be necessary in such case (*f*). A good parol notice will not be waived by a subsequent insufficient notice in writing (*g*).

Notice in writing. — Generally speaking, notice to quit is given in writing (*h*).[1] No particular form is necessary; but if given by or on behalf of the landlord, it must in substance and effect request the tenant, or other the person for the time being legally entitled to the term (not a mere sub-tenant (*i*)), to quit and deliver up possession of *all* the demised premises *at the proper time:* if given by or on behalf of the tenant, it must in substance and effect inform the landlord, or other the person or persons for the time being legally entitled to the immediate reversion, that the tenant

(*a*) Doe *d.* Prior *v.* Ongley, 10 C. B. 25 (last point); Papillon *v.* Brunton, 5 H. & N. 518; 29 L. J., Ex. 265.

(*b*) Pearse *v.* Boulter, 2 F. & F. 133.

(*c*) Doe *d.* Ld. Macartney *v.* Crick, 5 Esp. 196; 2 C. & K. 420.

(*d*) Timmins *v.* Rawlinson, 3 Burr. 1603; 1 W. Black. 533; Bird *v.* Devonvielle, 2 C. & K. 415.

(*e*) Roe *d.* Dean and C. of Rochester *v.* Pierce, 2 Camp. 96; 7 Q. B. 577.

(*f*) Cole Ejec. 39; Finlay *v.* Bristol and Exeter R. Co., 7 Exch. 409; Copper Miners' Co. *v.* Fox, 16 Q. B. 229; Doe *d.* Pennington *v.* Taniere, 12 Q. B. 998; Pennington *v.* Cardale, 3 H. & N. 656.

(*g*) Doe *d.* Ld. Macartney *v.* Crick, 5 Esp. 196.

(*h*) See the forms, *post*, Appendix C., Nos. 1-7.

(*i*) *Ante*, 344 (*m*).

[1] **Must notice be in writing.** — At common law it need not be. Wilgus *v.* Whitehead, 89 Pa. St. 131, 134 (*per* Trunkey, J.); Thamm *v.* Hamberg, 2 Brews. (Pa.) 528, 530 (*per* Allison, P. J.).

In many of the states it is required to be. Massachusetts (Pub. Sts. ch. 121, sec. 12); Maine (Rev. Sts. ch. 94, sec. 2); New York (3 Rev. Sts. Part 2, Tit. 4, sec. 1); West Virginia (Code, ch. 93, sec. 5); Indiana (Rev. Sts. sec. 5207); Michigan (Sts. sec. 5774); Minnesota (Sts. ch. 76, sec. 40); Kansas (Comp. Laws, sec. 3207); Oregon (Laws, sec. 3520), &c.

Oregon (Laws, sec. 3520) &c. Service of a written notice may be proved by parol, Chung Yow *v.* Hop Chong, 11 Or.

will quit and deliver up possession of *all* the demised premises [1] *at the proper time* (*k*).

Certainty of notice. — A notice to quit must be clear and certain, so as to bind the party who gives it, and to enable the party to whom it is given to act upon it at the time when he ought to receive it (*l*). And in conformity with the interpretation usually given to a dictum of Lord Mansfield (in a case in which the court held the particular notice before them to be good) (*m*), it was also laid down in prior editions [*346] of this work, and * in the text books generally (*n*), that a notice to be good must not be optional, *i.e.* must not give the noticee an option to enter into a new contract of tenancy. But in Ahearn *v.* Bellman (*o*) the majority of the Court of Appeal held that a notice might be optional, and yet good. In that case the tenant held at 150*l.* a year, and the notice was this: — "I hereby give you notice to quit and deliver up possession of the shop, premises, and show rooms situate and being 20, Moss Street, Liverpool, and now held by you as tenant from me, on or before the 1st day of May, 1878. *And I hereby further give you notice that should you retain possession of the premises after the date before mentioned, the annual rental of the premises now held by you from me will be* 160*l.*, *payable quarterly in advance.*" The court (Brett, L. J., dissenting) held that the words in italics did not invalidate the notice to quit. "It has been said, and

(*k*) Cole Ejec. 46, 47.

(*l*) See Doe *d.* Lyster *v.* Goldwin, 2 Q. B. 143.

(*m*) Doe *d.* Matthews *v.* Jackson, 1 Dougl. 175. The words were, "I desire you to quit, or I shall insist on double rent."

(*n*) See Smith's Landlord and Tenant, 2nd ed. 326; Adams on Ejectment, 95; Cole on Ejectment, 46.

(*o*) L. R., 4 Ex. D. 201; 48 L. J. Ex. 681; 40 L. T. 711; 27 W. R. 928 — C. A., reversing the ruling of Lopes, J., at Liverpool Assizes; Roberts *v.* Hayward, 3 C. & P. 432.

[1] **Accuracy.** — The notice is sufficiently accurate if it identify the premises without specifically describing them, Dimmett *v.* Appleton, 20 Neb. 208; and even though there be errors in the description if not calculated to mislead, King *v.* Connolly, 44 Cal. 236; Congdon *v.* Brown, 7 R. I. 19.

In Grant *v.* Marshall, 12 Neb. 488, 489, it was held that "lot 15, block 42, city of Lincoln," was not sufficient, but that case is overruled by Cummings *v.* Winters, 19 Id. 719. In the latter case "The N. E. quarter of section 28, T. 7, R. 7," was held sufficient.

truly said," observed Cotton, L. J., "that a notice to determine the tenancy must be clear and unambiguous; but that does not at all mean that a notice otherwise sufficient is made insufficient by its being accompanied by something else."

A notice given by the grantor of a licence to mine, that *unless* the grantee kept a certain number of miners at work, as he was bound to do, the grantor *would* re-enter, is not a good notice to avoid the licence, which the grantor was entitled to give (*p*). A notice desiring the tenant to "quit the premises which you hold under me, your term therein having long since expired," does not recognize a subsisting tenancy from year to year, subsequent to the term, but is a mere demand of possession (*q*). A notice to quit and give up possession, but not stating to whom, is sufficient (*r*).

Must extend to all the premises. — The notice must extend to *all* the demised premises, and *not to a part only*, otherwise it will be bad (*s*). But the court will if possible construe the notice as a good notice for the whole, rather than as a bad notice for part only. Therefore a notice to quit "Town Barton, &c." is sufficient for other lands having distinct names held therewith (*t*). So a notice to quit "all that messuage, tenement or dwell-house, farm, lands and premises, with the appurtenances, which you rent of me in the parish of S.," is sufficient to include the great and small tithes held therewith under a parol demise (*u*). A joint tenant or tenant in common may give notice to quit *all his part or * share* of the demised premises (*x*). [*347]

Misdescriptions, when immaterial. — A mere misdescription of the property in a notice to quit is not fatal if the tenant be not misled by it. Thus where the premises were fully and accurately described, except that they were called "The Waterman's Arms" instead of "The Bricklayer's

(*p*) Muskett *v.* Hill, 5 Bing. N. C. 694.

(*q*) Doe *d.* Godsell *v.* Inglis, 3 Taunt. 54.

(*r*) Doe *d.* Bailey *v.* Foster, 3 C. B. 215.

(*s*) Right *d.* Fisher *v.* Cuthell, 5 East, 498; Doe *d.* Rodd *v.* Archer, 14 East, 244.

(*t*) Doe *d.* Rodd *v.* Archer, 14 East, 244.

(*u*) Doe *d.* Morgan *v.* Church, 3 Camp. 71.

(*x*) *Ante*, 343.

Arms" (*y*), and where the premises were described as situate in the parish of D. (instead of the parish of H.), in the county of York (*z*), both these notices were held sufficient.

When must expire. — The notice must require the tenant to quit, or give notice of his intention to quit, *at the proper time.* This is the point with respect to which mistakes are most frequently made; and such mistakes are usually fatal to the validity of the notice (*a*). In the case of an implied tenancy from year to year, if the holding be agricultural, a year's notice expiring with a year of tenancy must be given, unless the Agricultural Holdings Act, 1883, has been excluded by mutual agreement in writing (*b*). Where that act does not apply, or has been excluded, the law requires half-a-year's notice to quit at the end of the first or some other year of the tenancy, and not at any other period (*c*), whether the demised premises consist of land or houses (*d*).

Mining Lease. — In a *mining* lease, where the lessees are to be at liberty to determine it at any time upon a six months' notice, such notice may expire at any time and not merely at the end of the year (*e*).

Weekly, &c. tenancies. — The peculiar case of weekly, &c. tenancies has been already dealt with (*f*).

Customary half-year's notice. — If the tenancy commence on one of the ordinary feast days,[1] a notice on or before one

(*y*) Doe *d.* Cox *v.* ———, 4 Esp. 185.

(*z*) Doe *d.* Armstrong *v.* Wilkinson, 12 A. & E. 743.

(*a*) Cole Ejec. 48; Doe *d.* Castleton *v.* Samuel, 5 Esp. 173; Doe *d.* Spicer *v.* Lea, 11 East, 312; Doe *d.* Finlayson *v.* Bayley, 5 C. & P. 67; Doe *d.* Daniel *v.* Williams, 7 C. & P. 322; Doe *d.* Murrell *v.* Milward, 3 M. & W. 328; Goode *v.* Howells, 4 M. & W. 198.

(*b*) See sect. 33 of that act, *ante*, 335.

(*c*) Parker *d.* Walker *v.* Constable, 3 Wils. 25; Right *d.* Flower *v.* Darby, 1 T. R. 159; Doe *d.* David *v.* Williams, 7 C. & P. 322; Doe *d.* Murrell *v.* Milward, 3 M. & W. 328; Roe *d.* Brown *v.* Wilkinson, Co. Lit. 270 b, note (228).

(*d*) Roe *d.* Brown *v.* Wilkinson, Co. Lit. 270 b, note (228); Right *d.* Flower *v.* Darby, 1 T. R. 162.

(*e*) Bridges *v.* Potts, 17 C. B., N. S. 314; 33 L. J., C. P. 338.

(*f*) *Ante*, p. 339.

[1] **Time of service.** — Notice served December 25 is (in Pennsylvania, at least) in season to terminate tenancy commencing March 25. Ogden *v.* Duffy,

of the feast days in the earlier half of the tenancy to quit on the feast day at the conclusion of the tenancy is sufficient and necessary, although the period between the two feast days should exceed or fall short of the number of days which constitute a half-year (*g*). Thus a notice served on or before Michaelmas-day to quit on the following Lady-day (from which day the tenancy commenced) is sufficient (*h*), though there are fewer than 183 days *between the [*348] 28th September and the 25th March. So a notice to quit on the 24th of June served on the preceding Christmas-day is sufficient (*i*); but a notice served on the 26th of March to quit on the 29th of September then next is insufficient (*k*), although there are more than 183 days between the 26th of March and the 29th of September. Where the tenancy commenced from some day in the year other than one of the usual quarter days, a full half-year's notice (183 days), expiring on such day, must be given (*l*). But where a "six months'" notice on either side is expressly agreed for, it seems that a six lunar months' notice is sufficient (*m*).

New style or old style. — A notice to quit at "Michaelmas next" primâ facie means Michaelmas, new style (29th of September); but it will be sufficient for a tenancy com-

(*g*) Morgan *v.* Davies, L. R., 3 C. P. D. 260; 26 W. R. 816; Doe *v.* Kightley, 7 T. R. 63; Howard *v.* Wemsley, 6 Esp. 53; Smith L. & T. 319 (2nd ed.).

(*h*) Roe *d.* Durant *v.* Doe, 6 Bing. 574; Doe *d.* Matthewson *v.* Wrightman, 4 Esp. 5; Doe *d.* Harrop *v.* Green, Id. 198, 199; Doe *d.* Ld. Bradford *v.* Watkins, 7 East, 551; Papillon *v.* Brunton, 5 H. & N. 518; 29 L. J., Ex. 265.

(*i*) Doe *d.* Buddle *v.* Lines, 11 Q. B. 402.

(*k*) Morgan *v.* Davies, 3 C. P. D. 360; 26 W. R. 816.

(*l*) Doe *d.* Spicer *v.* Lea, 11 East, 312; Mills *v.* Goff, 14 M. & W. 72; 2 D. & L. 23; Doe *d.* Cornwall *v.* Matthews, 11 C. B. 675.

(*m*) Rogers *v.* Kingston-upon-Hull Dock Co., 34 L. J., Ch. 765.

1 Leg. Gaz. Rep. 4, and 64 Pa. St. 240, 241, 242. Agnew, J., said the year expired at midnight, March 24; and, counting December 25 as an entire day, three entire months had then passed. Notice served February 12 is in season to terminate tenancy commencing May 12. McGowen *v.* Sennett, 1 Brews. (Pa.) 397, 398.

In reckoning time *from* a certain day, ordinarily that day is excluded in the reckoning. 1 Wash. on Real Prop. sec. 292; Atkins *v.* Sleeper, 7 Allen (Mass.) 487. The *contrary* case of Marys *v.* Anderson, 2 Grant's Cas. (Pa.) 446, would probably not now be followed in Pennsylvania, as it is in principle overthrown by Cromelien *v.* Brink, 29 Pa. St. 522.

mencing at Michaelmas, old style (11th of October), because the tenant cannot have been misled or prejudiced by it (*n*). But a notice to quit "on the 11th of October, Old Michaelmas-day," is bad, if the tenancy commenced at New Michaelmas (*o*). Upon a written agreement to demise from the following "Lady-day," a notice to quit on the 6th of April is good, upon parol evidence that by "Lady-day" the parties meant Old Lady-day: such evidence is admissible where the written agreement is not under seal (*p*). A notice to quit on "Lady-day" is good either for the New or Old Lady-day, according to the holding, if served in due time (*q*). A notice to quit "on the 25th day of March *or* the 6th day of April next," if served in sufficient time, is good for New or Old Lady-day, according as the tenancy actually commenced (*r*).

Must expire on last day of some year. — Generally speaking, a notice to quit should expire *on the last day* of some year of the tenancy, and not on the same day on which the tenancy commenced (*s*). Thus, upon a tenancy *from* Lady-day, the notice should expire on Lady-day, and not on the 26th of March (*t*).

Not "at noon." — A notice to quit on the proper day at twelve o'clock at noon is bad (*u*).

Need not mention particular day. — The notice *need not mention the particular day* on which the tenant is required to quit. Thus a notice to quit "at the expiration of the current year of the tenancy which shall expire next after the [*349] end of *one half-year from the date hereof" is sufficient (*x*). A notice on 22nd March to quit "at the

(*n*) Furley *d.* Mayor, &c. of Canterbury *v.* Wood, 1 Esp. 198; Doe *d.* Hinde *v.* Vince, 2 Camp. 256; Doe *d.* Willis *v.* Perrin, 9 C. & P. 467.

(*o*) Doe *d.* Spicer *v.* Lea, 11 East, 312; Smith *v.* Walton, 8 Bing. 235; Cadby *v.* Martinez, 11 A. & E. 720.

(*p*) Denn *d.* Peters *v.* Hopkinson, 3 D. & R. 507; Doe *d.* Hale *v.* Benson, 4 B. & A. 588.

(*q*) Denn *d.* Willan *v.* Walker, Peake, Ad. Cas. 194.

(*r*) Doe *d.* Matthewson *v.* Wrightman, 4 Esp. 6.

(*s*) Poole *v.* Warren, 8 A. & E. 587, 588.

(*t*) Ackland *v.* Lutley, 9 A. & E. 879.

(*u*) Page *v.* More, 15 Q. B. 684.

(*x*) Doe *d.* Phillips *v.* Butler, 2 Esp. 589; Doe *d.* Williams *v.* Smith, 5 A. & E. 350.

expiration of the current year" is sufficient for the 29th September, if the tenancy commenced from that day (*y*), but it is better not to use the expression *current* year (*z*). A notice on 27th September to quit "at the expiration of the term for which you hold the same" is sufficient for Lady-day, if the tenancy commenced from that day (*a*). A notice to quit "at the expiration of the present year's tenancy" is sufficient, although it does not appear *on the face of it* that it was given six months before the expiration of the current year of the tenancy (*b*).

When commencement of tenancy unknown. — Where it is unknown and cannot be ascertained or proved at what time of the year the tenancy actually commenced, the notice should be to quit on a specified quarter day, "or at the expiration of the current year of your tenancy which shall expire next after the end of one half-year from the service of this notice" (*c*). If an ejectment founded on such notice be not commenced, nor the claimant alleged in the writ to be entitled to possession, until some day after the third quarter day succeeding that mentioned in the notice, such notice will certainly be sufficient, supposing the rent to be payable on the usual quarter days and no rent to be received which accrued *subsequently* to the quarter day mentioned in the notice. This is the safest course to be pursued under such circumstances (*d*). But sometimes an implied admission may be obtained from the tenant, by serving him personally with a notice to quit on a particular day, and reading it to him, or getting him to read it, if he make an objection to it on the ground that it is to quit at the wrong time (*e*). But the defendant may rebut such primâ facie evidence as to the time when the term commenced by proof that the tenancy

(*y*) Doe *d.* Baker *v.* Wombwell, 2 Camp. 559.

(*z*) Doe *d.* Mayor of Richmond *v.* Morphett, 7 Q. B. 577; Smith L. & T. 323, 326 (2nd ed.).

(*a*) Doe *d.* Milnes *v.* Lamb, Ad. Ejec. 272, Holroyd, J.

(*b*) Doe *d.* Gorst *v.* Timothy, 2 C. & K. 351.

(*c*) Doe *d.* Digby *v.* Steel, 3 Camp. 117; Hirst *v.* Horn, 6 M. & W. 393.

(*d*) Cole Ejec. 54.

(*e*) Thomas *d.* Jones *v.* Reece, 2 Camp. 647; Doe *d.* Clarges, Bart. *v.* Forster, 13 East, 405; Doe *d.* Leicester *v.* Biggs, 2 Taunt. 109; Walker *v.* Godé, 6 H. & N. 594; 30 L. J., Ex. 172.

actually commenced at a different part of the year (*f*). In the absence of such proof the jury should be directed to infer and find that the tenancy commenced at the time mentioned in the notice (*g*). If the tenant, in answer to an application by the landlord or his agent, state that the tenancy commenced on a particular day, and a notice is thereupon given him to quit on that day, it seems that he will be [*350] estopped from * afterwards proving that the tenancy commenced on a different day (*h*). It was once ruled that a notice to quit upon a particular day was primâ facie evidence that the tenancy commenced on that day, and threw upon the defendant the onus of proof that it commenced on some other day (*i*). But it is now settled that such a notice (without more) is not even primâ facie evidence that the tenancy commenced on the day therein mentioned (*k*).

When tenant enters in middle of quarter. — When a tenant enters in the middle of a quarter, and *pays rent for the broken period* to the next regular quarter day, and subsequently pays his rent from quarter to quarter, his tenancy will be deemed to have commenced, not when he first entered, but at the ensuing quarter day, and notice to quit should be given accordingly (*l*). But if he has not paid any rent the tenancy will be deemed to have commenced on the day when he entered, and notice to quit at that time will be good (*m*).

When different parts are entered at different times. — Where different parts of the demised premises were entered upon at different times the notice should be to quit at corresponding periods, "or at the expiration of the year of the tenancy which will expire next after the expiration of half a year from the delivery of this notice" (*n*). Such notice has been

(*f*) Oakapple *d.* Green *v.* Copous, 4 T. R. 361; Cadby *v.* Martinez, 11 A. & E. 720.

(*g*) Walker *v.* Gode, 6 H. & N. 594; 30 L. J., Ex. 172.

(*h*) Doe *d.* Eyre *v.* Lambley, 2 Esp. 625; but see Doe *d.* Murrell *v.* Milward, 3 M. & W. 331.

(*i*) Matthewson *v.* Wrightman, 4 Esp. 7.

(*k*) Doe *d.* Ash *v.* Calvert, 2 Camp. 388.

(*l*) Doe *d.* Holcomb *v.* Johnson, 6 Esp. 10; Savage *v.* Stapleton, 3 C. & P. 275; Doe *d.* King *v.* Grafton, 18 Q. B. 496; 21 L. J., Q. B. 276.

(*m*) Doe *d.* Cornwall *v.* Matthews, 11 C. B. 675.

(*n*) Doe *d.* Williams *v.* Smith, 5 A. & E. 350.

held to be sufficient for the whole of the premises, if served in time for the principal subject of the demise (*o*). But this was in the case of agricultural tenancies, where the entry upon the accessorial part of the premises was at a different time from that upon the substantial part for agricultural reasons, and the court viewed the landlord as having given a licence to enter the accessorial part rather than as having made a demise of it. If any doubt arise as to which is the principal and which the accessorial subject of the demise, that is a question of fact for the jury (*p*); but if the judge assumes the fact either way, and decides accordingly, that the notice to quit is or is not sufficient, the party against whom he so decides should expressly desire him to leave the question of fact to the jury, otherwise it will be taken, upon any application for a new trial, &c., that he acquiesced in the fact assumed by the judge as the ground of his decision (*q*).

Increase of rent. — No new tenancy is created by a mere agreement for an increase of rent *in the [*351] middle of the year of a tenancy, and a notice to quit after the receipt of the increased rent must expire at the time when the tenant originally entered (*r*).

Where tenant holds over. — Generally speaking, an implied tenancy from year to year, created by the payment and acceptance of rent after the end or determination of a previous term, will be deemed to have commenced at the same time of the year as the original term, and notice to quit should be given accordingly (*s*). And this rule prevails even where the original term did not cease at the same time of the year as it commenced, as where premises were originally demised for five and a half years, and an implied tenancy from

(*o*) Doe *d.* Dagget *v.* Snowden, 2 W. Blac. 1224; Doe *d.* Strickland *v.* Spence, 6 East, 120; Doe *d.* Ld. Bradford *v.* Watkins, 7 East, 551; Doe *d.* Davenport *v.* Rhodes, 11 M. & W. 602, 603.

(*p*) Smith L. & T. 322 (2nd ed.).

(*q*) Doe *d.* Heapy *v.* Howard, 11 East, 498; Doe *d.* Kindersley *v.* Hughes, 7 M. & W. 141.

(*r*) Ad. Ejec. 107 (4th ed.); Doe *d.* Holcombe *v.* Johnson, 6 Esp. 10; Crowley *v.* Vitey, 7 Ex. 319; 21 L. J., Ex. 136.

(*s*) Roe *d.* Jordan *v.* Ward, 1 H. Blac. 96; Doe *d.* Martin *v.* Watts, 7 T. R. 83; Doe *d.* Collins *v.* Weller, 7 T. R. 478; Doe *d.* Castleton *v.* Samuel, 5 Esp. 173; Doe *d.* Spicer *v.* Lea, 11 East, 312; Doe *d.* Tucker *v.* Morse, 1 B. & Ad. 365; Humphreys *v.* Franks, 18 C. B. 323.

year to year was afterwards created (*t*); and where a new landlord allowed the tenant of his predecessor to remain in occupation and receive rent from him (*u*). But this rule applies only to a case where the tenant holds over on a lease made to himself (*x*).

Where a subtenant by assignment holds over, and pays rent after the expiration of a lease commencing at Christmas and expiring at Midsummer, a notice requiring him to quit at Midsummer is good (*y*).

Where possession is under void demise. — Where the tenant comes into possession under a void lease, a tenancy from year to year is created; but, generally speaking, the holding must be taken with reference to the period of entry under the lease so far as regards the expiration of the notice to quit: thus where a remainderman creates a new tenancy with a tenant in possession under a void lease granted by a tenant for life, and receives rent on the days of payment mentioned in the lease, a notice to quit must expire on the day of entry under the original demise (*z*). And it was held in the leading case of Doe *d.* Rigge *v.* Bell, that if a landlord lease for seven years by parol, and agree that the tenant shall enter at Lady-day and quit at Candlemas, though the lease be void by the Statute of Frauds as to the duration of the term, the tenant holds under the terms of the lease in other respects; and therefore the landlord can only put an end to the tenancy at Candlemas (*a*).

[*352] *** Where three months' notice sufficient.** — Where premises are let from year to year upon an agreement that either party may determine the tenancy by a quarter's notice, the notice must expire at the period of the

(*t*) Berrey *v.* Lindley, 3 M. & G. 498; Doe *d.* Robinson *v.* Dobell, 1 Q. B. 806; Kemp *v.* Derrett, 3 Camp. 510.

(*u*) Kelley *v.* Patterson, L. R., 9 C. P. 681; 43 L. J., C. P. 320; 30 L. T. 842, where see the cases reviewed by Brett, J.

(*x*) *Per* Brett, J., id.

(*y*) Doe *d.* Buddle *v.* Lines, 11 Q. B. 402.

(*z*) Roe *d.* Jordan *v.* Ward, 1 H. Blac. 96; Doe *d.* Collins *v.* Weller, 7 T. R. 478; Beale *v.* Sanders, 3 Bing. N. C. 850; Lee *v.* Smith, 9 Exch. 662.

(*a*) Doe *d.* Rigge *v.* Bell, 5 T. R. 571; 2 Smith L. C. 96 (7th ed.); Doe *d.* Peacock *v.* Raffan, 6 Esp. 4; Richardson *v.* Giffard, 1 A. & E. 52; Doe *d.* Thomson *v.* Amey, 12 A. & E. 476; Doe *d.* Davenish *v.* Moffatt, 15 Q. B. 257.

year when the tenancy commenced (*b*): so where premises are taken under an agreement, by which the tenant "is always to quit at three months' notice," the notice must expire either on the same day of the year the tenancy commenced, or on one of the three other corresponding quarter days (*c*).

Weekly tenancies. — It appears not to have been expressly decided what notice to quit is necessary in the case of a weekly tenancy. The authorities on the point have already been examined (*d*).

Date of notice. — The day or time mentioned in the notice to quit should always be correct with reference to the date of the notice. Any mistake in this respect is generally fatal to the validity of the notice (*e*). But a notice dated on the 27th, and served on the 28th *September*, requiring a tenant to quit "at *Lady-day* next, or at the end of his current year," was held in one case to mean a six months' and not a two days' notice to quit (*f*); but this decision has been since overruled in a case where a notice was held bad which was served on the 21st October, to quit "on the 13th of May next, or upon such other day as the *current* year for which you now hold will expire," the holding being one from a day in November (*g*). A notice served on the 17th June to quit "on the 11th October now next ensuing, or such other day and time as your said tenancy may expire on," is not a good notice for the Michaelmas in the following year (*h*). A notice delivered to a tenant at *Michaelmas*, 1795, to quit "at *Lady-day* which will be in the year 1795," was held to be a good notice to quit at *Lady-day*, 1796; for the intention was clear, and 1795 was to be rejected as an impossible year (*i*). So where a yearly tenancy expired in February, and in October, 1833, a notice was given to quit "at the expiration of half a year from the delivery of this notice, or at such other time or times as your *present* year's

(*b*) Doe *d.* Pitcher *v.* Donovan, 1 Taunt. 555; 2 Camp. 78.

(*c*) Kemp *v.* Derrett, 3 Camp. 510.

(*d*) *Ante*, 339; see especially Jones *v.* Mills, 31 L. J., C. P. 66.

(*e*) Cole Ejec. 52.

(*f*) Doe *d.* Ld. Huntingtower *v.* Culliford, 4 D. & R. 249; Doe *d.* Earl of Egremont *v.* Forwood, 3 Q. B. 627.

(*g*) Doe *d.* Mayor, &c. of Richmond *v.* Morphett, 7 Q. B. 577.

(*h*) Mills *v.* Goff, 14 M. & W. 72.

(*i*) Doe *d.* Duke of Bedford *v.* Kightley, 7 T. R. 63.

holding of or in the said messuage, &c. shall expire after the expiration of half a year from the delivery of this notice," it was held a good notice for February, 1835 (*k*).

To whom notice should be directed and given. — It is not necessary that a notice to quit should be directed to the tenant in possession, if proved to have been delivered [*353] to him as tenant * at the proper time (*l*): and if a notice to quit be directed to the tenant by a wrong Christian name, and he keeps it without objection, it is a waiver of the misdirection (*m*): and where two tenants hold premises in common, a notice to quit to one of them is sufficient to determine the tenancy (*n*): at least it is evidence that the notice reached the other tenant who lived elsewhere (*o*). Where a tenant from year to year sublet part of the premises, and then gave up to his landlord the part remaining in his own possession, the landlord cannot entitle himself to recover against the sublessee, no notice to quit having been given to the lessee, but only a notice to the sublessee, and that by the landlord, in his own name, and not in the name of the first lessee (*p*). In ejectment against S. and F., where it is shown that B., not a party to the cause, came into possession of the premises under an unperformed contract of sale, and that S. and F. held under him, notice to quit served upon S. and F. is sufficient (*q*).

Attestation of notice. — A notice to quit need not be attested. If attested it may be proved without calling the attesting witness (*r*); but this was formerly otherwise (*s*). It may be proved by an examined copy or duplicate, without any notice to produce the original (*t*).

When and how served. — The notice must generally be

(*k*) Doe *d.* Williams *v.* Smith, 5 A. & E. 350; Doe *d.* Kindersley *v.* Hughes, 7 M. & W. 139.

(*l*) Doe *d.* Matthewson *v.* Wrightman, 4 Esp. 5.

(*m*) Doe *v.* Spiller, 6 Esp. 70.

(*n*) Doe *d.* Ld. Macartney *v.* Crick, 5 Esp. 196.

(*o*) Doe *d.* Ld. Bradford *v.* Watkins, 7 East, 551.

(*p*) Pleasant *d.* Hayton *v.* Benson, 14 East, 234.

(*q*) Roe *d.* Blair *v.* Street, 2 A. & E. 329.

(*r*) C. L. P. Act, 1854, s. 26.

(*s*) Doe *d.* Sykes *v.* Durnford, 2 M. & S. 62; Poole *v.* Warren, 8 A. & E. 582.

(*t*) Doe *d.* Fleming *v.* Somerton, 7 Q. B. 58; Reg. *v.* Mortlock, Id. 459; Cole Ejec. 54, 159.

served *half a year* before the time when the tenant is to quit possession (*u*). But a customary half-year's notice is sufficient where the tenancy is from one of the usual quarter days (*x*). Where a greater or less notice than that usually required by law is provided for by express stipulation or local custom, it will be sufficient to give notice accordingly (*y*). Where a "six months'" notice is agreed for, it seems that a six lunar[1] months' notice is sufficient (*z*).

Sunday. — The notice may be served on a Sunday (*a*).

Service of notice to quit. — A notice to quit *need not be served personally* on the tenant.[2] It is sufficient to leave it at his dwelling-house with his wife or servant (*b*). Such service is sufficient although the notice does not actually reach the tenant's (*or* landlord's) hands before the half-year has commenced (*c*). But merely leaving the notice at the tenant's house, without any explanation, and without proof that the person to whom * it was delivered was [*354] the tenant's wife or servant, or that it ever came to his hands, is not sufficient (*d*). So service on the tenant's wife, off the demised premises and without proof that it was at her husband's residence, where she was then living with him, appears to be insufficient (*e*). Service of the notice upon a relative of the *subtenant* upon the premises is not sufficient, although the notice was properly addressed to the tenant (*f*). Putting the notice under the door of the tenant's house, or any other mode of service, has been said to be sufficient, if it be shown that the notice came to the ten-

(*u*) Right *d.* Flower *v.* Darby, 1 T. R. 159, 163; Johnstone *v.* Huddlestone, 4 B. & C. 932.

(*x*) *Ante*, 347.

(*y*) *Ante*, 352; Cole Ejec. 32, 53.

(*z*) Rogers *v.* Kingston-upon-Hull Dock Co., 34 L. J., Ch. 165.

(*a*) The act 29 Car. 2, c. 7, s. 6, makes only writs, &c. void.

(*b*) Smith *v.* Clarke, 9 Dowl. 209; Jones *d.* Griffiths *v.* Marsh, 4 T. R. 464; Roe *d.* Blair *v.* Street, 2 A. & E. 329; Reg. *v.* Js. of North Riding of Yorkshire, 7 Q. B. 154; Appleton *v.* Murray, 8 W. R. 653; Mason *v.* Bibby, 2 H. & C. 886, Pollock, C. B.

(*c*) Doe *d.* Neville *v.* Dunbar, Moo. & M. 10; Papillon *v.* Brunton, 5 H. & N. 518; 29 L. J., Ex. 265.

(*d*) Doe *d.* Buross *v.* Lucas, 5 Esp. 153.

(*e*) Roe *d.* Blair *v.* Street, 2 A. & E. 328, 331; Cole Ejec. 54.

(*f*) Doe *d.* Michell *v.* Levi, Ad. Ejec. 92.

[1] Calendar in United States. See *ante*, (a), note.

[2] See *ante*, (d), note, "Service of notice."

ant's hands before the commencement of the six months (*g*); and in Tanham *v.* Nicholson (*h*) it was held that it was sufficient to serve the notice upon a person whose duty it was to deliver it to the tenant.

Sending notice by post. — In Papillon *v.* Brunton (*i*), between nine and ten o'clock on the 25th March a tenant put into a post-office in London a letter containing a notice to quit on the following Michaelmas, and addressed to the place of business in London of his landlord's agent. The agent was at his place of business until between six and seven o'clock in the evening and did not receive the letter, but found it on the following morning. This was held a sufficient notice to determine the tenancy, the jury having found that the letter was delivered on the 25th March, after the agent left (*i*). If a notice be posted on one day, and delivered in due course of post on the next, the latter is considered as the day on which it was sent (*k*).

Joint tenants, corporations, &c. — Service on one of several joint tenants is primâ facie sufficient for all of them (*l*).[1] Service on a corporation may be on one of its officers (*m*), and in the case of a company "incorporated by act of parliament for the purpose of carrying on any undertaking," the Companies Clauses Consolidation Act, 1845 (8 Vict. 16), prescribes by sect. 135, that "any notice" may be served "by being left at or transmitted through the post, directed to the principal office of the company, or one of their principal offices where there shall be more than one, or being given

(*g*) Alford *v.* Vickery, Car. & M. 280.

(*h*) *Ante*, 344.

(*i*) Papillon *v.* Brunton, 5 H. & N. 518; 29 L. J., Ex. 265. This case does not decide that mere posting amounts to a service in law; it seems, however, that a notice to quit, if posted so as to be delivered in due time, will be presumed to have been so delivered, but that the presumption may be rebutted by proof that the notice was not in fact received — the question being for the jury. See Roscoe on Evidence, 14th ed. p. 929, citing Gresham House Estate Co. *v.* Rossa Grande Mining Co., 5 W. N. 1870.

(*k*) Reg. *v.* Recorder of Richmond, E., B. & E. 253 (notice of chargeability of pauper); Tew *v.* Harris, 11 Q. B. 7 (notice of appointment of referee).

(*l*) Doe *v.* Watkins, 7 East, 551; Doe *v.* Crick, 5 Esp. 196.

(*m*) Doe *v.* Woodman, 8 East, 228.

[1] See *ante*, (d), note, "Service of notice."

personally to the secretary, or if there be no secretary, then by being given to any one director of the company."

Agricultural tenants. — As to whether notice to quit may be served by registered letter under s. 28 of the Agricultural Holdings Act, see p. 337, ante.

*** Indorsement of service.** — A proper indorsement [*355] of the service should be made in the usual course of business, which will be admissible in evidence after the death of the witness (*n*).

Proof of notice. — It is not necessary to prove the signature to the notice (*o*); nor to produce the attesting witness (if any (*p*)); nor to give notice to produce the original notice served (*q*). The regular service of a notice to quit, held to have been properly inferred from the circumstance of the tenant speaking about "the notice to quit which he had received," and engaging a valuer to value his rights as an outgoing tenant (*r*). But a party who is driven to rely on such evidence should, as a matter of precaution, give a notice to produce the notice to quit, describing its contents fully (*s*).

(f) *Waiver of Notice.*

Creation of new tenancy by waiver. — A notice to quit can be waived, and a new or continual tenancy created, only by the express or implied consent of both parties (*t*)[1]. "There is this difference between a determination of a tenancy by a notice to quit and a forfeiture; in the former case the tenancy is put an end to by the agreement of the parties, which determination of the tenancy cannot be waived without the assent of both; but in the case of a forfeiture the lease is voidable only at the election of the lessor: in the one case the estate continues though voidable, in the other the ten-

(*n*) Doe *d.* Patteshall *v.* Turford, 3 B. & Ad. 890; Stapylton *v.* Clough, 2 E. & B. 933; Smith L. & T. 328 (2nd ed.).

(*o*) Forman *v.* Dawes, 1 Car. & M. 127.

(*p*) C. L. P. Act, 1854, s. 26.

(*q*) *Ante*, 353 (*t*).

(*r*) Doe *d.* Simpson *v.* Hall, 5 M. & G. 795.

(*s*) Cole Ejec. 160.

(*t*) Cole Ejec. 55.

[1] **Waiver of notice** is usually a question for the jury. Whitney *v.* Swett, 22 N. H. 10, 14.

ancy is at an end" (*u*). By a notice to quit given to a tenant from year to year, his tenancy is determined on the expiration of the current year; and a waiver of the notice creates a new tenancy, taking effect on the expiration of the old one (*x*).

Guarantee for rent ceases. — A guarantee for the rent will not extend to such new tenancy (*x*).

Waiver by acceptance of rent or distress. — If a landlord receive rent due *after the expiration* of a notice to quit, it is a waiver of that notice (*y*), and a distress for such rent is also a waiver: but the landlord may receive or distrain for rent at any time *after the giving* of the notice, so long as this be done before the expiration of it.[1]

Even after the expiration of the notice, where rent is usually paid at a banker's, if the banker, without any special authority, receive rent accruing after such expiration, the notice is not thereby waived (*z*): so if the money be not paid or received *as rent*, but as a satisfaction [*356] *for the injury done by the tenant in continuing on the premises as a trespasser, it will not have such an operation (*a*). But where the money is expressly *paid as rent*, the landlord cannot, under protest or otherwise, receive it only as compensation for subsequent occupation: such payment and receipt, notwithstanding the protest, will operate as matter of law to waive all forfeitures then known to the landlord (*b*). A demand of rent accruing subsequently to the expiration of a notice to quit is not necessarily a waiver

(*u*) Blyth *v.* Dennett, 13 C. B. 178, 180; 22 L. J., C. P. 79, 80; Dendy *v.* Nicholl, 4 C. B., N. S. 381.

(*x*) Tayleur *v.* Wildin, L. R., 3 Ex. 303; 37 L. J., Ex. 173.

(*y*) Goodright *d.* Charter *v.* Cordwent, 6 T. R. 219; Croft *v.* Lumley, 5 E. & B. 648; 6 H. L. Cas. 672.

(*z*) Doe *d.* Ash *v.* Calvert, 2 Comp. 387.

(*a*) Goodright *d.* Charter *v.* Cordwent, 6 T. R. 220; Zouch *d.* Ward *v.* Willingale, 1 H. Blac. 311.

(*b*) Croft *v.* Lumley, 5 E. & B. 648; 6 H. L. Cas. 672.

[1] **Receipt of rent accrued** at expiration of notice, even after bringing ejectment, does not waive notice. Laxton *v.* Rosenberg, 11 Ont. 199.

In Fitzpatrick *v.* Childs, 2 Brews. (Pa.) 365, it was said that whether the receipt of rent waived the notice depended on the *quo animo*, and held that an unauthorized receipt of rent by lessor's agent was not a waiver.

of the notice, but is a question of intention which ought to be left to the jury (*c*).

Waiver by giving second notice. — Generally speaking, giving a second notice to quit amounts to a waiver of a notice previously given (*d*);[1] but a good parol notice to quit will not be waived by a subsequent insufficient notice in writing (*e*). Where a landlord gave a notice to quit different parts of a farm at different times which the tenant neglected to do in part, in consequence of which the landlord commenced an ejectment; and before the last period mentioned in the notice was expired, the landlord, apprehending that the witness by whom he was to prove the notice would die, gave another notice to quit at the same respective times in the following year, but continued to proceed with his ejectment, it was held that the second notice was not a waiver of the first (*f*). If, after the expiration of a notice to quit, the landlord give the tenant a fresh notice, that unless he quit in fourteen days, he will be required to pay double value, the second notice is no waiver of the first (*g*): so if a landlord give notice to his tenant to quit at the expiration of the lease, and the tenant hold over, and a second notice be delivered to the tenant, after the expiration of such notice, "to quit on a subsequent day or to pay double rent;" it is no waiver of the first notice (*h*).

By other acts. — If the landlord has given notice to quit,[2] and the tenant holds over, the landlord cannot waive his notice and distrain for rent subsequently accruing (*i*). Where a three months' notice was given, the rent being

(*c*) Blyth *v.* Bennett, 13 C. B. 178; Doe *d.* Cheny *v.* Batten, Cowp. 243.

(*d*) Doe *d.* Brierly *v.* Palmer, 16 East, 53.

(*e*) Doe *d.* Ld. Macartney *v.* Crick, 5 Esp. 196.

(*f*) Doe *d.* Williams *v.* Humphrey, 2 East, 237.

(*g*) Doe *d.* Digby *v.* Steel, 3 Camp. 117; Doe *d.* Godsell *v.* Inglis, 3 Taunt. 54; Blyth *v.* Dennett, 13 C. B. 178.

(*h*) Messenger *v.* Armstrong, 1 T. R. 53.

(*i*) Jenner *v.* Clegg, 1 Moo. & R. 213; Alford *v.* Vickery, 1 Car. & M. 280; Williams *v.* Stiven, 9 Q. B. 14.

[1] **A new notice**, inconsistent with former notice, waives it. O'Neill *v.* Cahill, 2 Brews. (Pa.) 357.

[2] Simple failure to expel a tenant after notice, even though for more than a year, is not a waiver. Boggs *v.* Black, 1 Binn. (Pa.) 333.

reserved quarterly, and the landlord expressed neither his assent nor dissent to admit it, and took the rent up to the time when his tenant quitted; it was construed to be such an acquiescence as amounted to presumptive evidence that the parties intended to dispense with the notice, and [*357] was therefore deemed a waiver of it (*k*). * If at the end of the year (where there has been a tenancy from year to year) the landlord accept another person as his tenant in the room of the former tenant, without any surrender in writing, such acceptance is a dispensation of the notice to quit (*l*). Where a landlord of premises about to sell them, gave his tenant notice to quit on the 11th October, 1806, but promised not to turn him out unless they were sold; and not being sold till February, 1807, the tenant refused, on demand, to deliver up possession; on ejectment brought, it was held that the promise (which was performed) was no waiver of the notice, as it did not operate as a licence to be on the premises, otherwise than subject to the landlord's right of acting on such notice, if necessary; and, therefore, that the tenant not having delivered up possession on demand after a sale, was a trespasser from the expiration of the notice to quit (*m*). Where a landlord gave his tenants a good parol notice to quit at old Michaelmas, but at the same time said that if it would be any convenience to them he would permit them to occupy till Christmas, and that they should pay no rent; and one of the tenants expressed himself well satisfied and grateful for the indulgence; after which a written notice was served on the tenants to quit at Christmas: it was held, that an ejectment commenced after Christmas might be maintained upon the parol notice to quit at old Michaelmas (*n*). Where a tenant gave notice of his intention to quit at Michaelmas, but before that time offered to continue tenant at a reduced rent, which the landlord agreed to, provided he could not find another tenant at a better rent before the 12th day of August then next; but

(*k*) Shirley *v.* Newman, 1 Esp. 266.

(*l*) Sparrow *v.* Hawkes, 2 Esp. 505.

(*m*) Whiteacre *d.* Boult *v.* Symonds, 10 East, 13, 16.

(*n*) Doe *d.* Ld. Macartney *v.* Crick, 5 Esp. 196.

before that day the tenant refused to permit a third person, who contemplated taking the farm, to go over it: it was held, that the conditional agreement for a new tenancy was thereby determined, and that the notice to quit at Michaelmas remained in force and would support an ejectment (*o*).

SECT. 8. — *Exercise of Option to determine Lease.*

Form of proviso. — A lease is often made for a term of years subject to a proviso or power therein contained, enabling either (or one) of the parties to determine it at an earlier period by notice, &c. For instance, the lease may be for twenty-one years, determinable at the end of the first seven or fourteen years by either party (or by the lessee) upon *giving [twelve] calendar months' previous notice, &c. (*p*). [*358] Sometimes a proviso of this sort is framed very strictly as regards the tenant by making it a *condition precedent* on his part not only to give the notice, but also to pay and perform all rent and his covenants. The consequence of this is, that in case of any breach of covenant the lessee is unable to determine the lease at the end of the first seven or fourteen years, in pursuance of the proviso: his power to do so being conditional only, and the condition not having been performed (*q*). Such conditions should be carefully considered, on behalf of the tenant, before the lease is executed.

Form of notice. — Where a power is given to a party to determine a lease on giving a notice *in writing*, he cannot determine it by giving a parol notice (*r*). The notice need not refer to the power (*s*), but must end with the first seven or fourteen years, or other specified period, according to the terms of the proviso, and not at any other time (*t*), and must

(*o*) Doe *d.* Marquis of Hertford *v.* Hunt, 1 M. & W. 690.

(*p*) See form of proviso, *post*, Appendix B., Sect. 13.

(*q*) Friar *v.* Grey (in error), 5 Exch. 584, 597; 4 H. L. Cas. 565; Friar *v.* Grey, 15 Q. B. 891; Porter *v.* Shepherd, 6 T. R. 665; Jervis *v.* Tomkinson, 1 H. & N. 195; and compare *post*, Chap. IX., Sect. 2.

(*r*) Legg *d.* Scott *v.* Benion, Willes, 43.

(*s*) Giddens *v.* Dodd, 3 Drew. 485; 25 L. J., Ch. 451.

(*t*) Cadby *v.* Martinez, 11 A. & E. 720; 3 P. & D. 386; Bird *v.* Baker, 1

be to quit *all* the demised premises and not part only (*u*). The landlord may however reserve to himself the right to determine the lease by notice as to all or *any part* of the land which he may want for building purposes (*x*); and after the stipulated notice has been given, if possession be refused, the landlord may maintain ejectment (*y*).

Option whether with lessor or lessee. — If a lease be granted for "seven, fourteen or twenty-one years," the lessee only has the option of determining it at the end of the first seven or fourteen years (*z*). But a demise for twenty-one years "determinable nevertheless in seven or fourteen years if the said parties hereto shall so think fit," is determinable only by the consent of *both* the parties, although it may have been their intention to give the option to either of them (*a*).

Notice by executors, &c. — Where the demise was for twenty-one years, and it was stipulated that if either party should die before the end of the said term, then the heirs, executors, &c., *of the person so dying* should give twelve months' notice to quit, &c., it was held, that the lease could only be determined by twelve months' notice given by the representatives of the party dying before the end of the term; and consequently, that such notice given by [*359] the lessor to the representatives of the lessee *(who died during the the term) did not determine the lease (*b*). A proviso in a lease for twenty-one years, that if either of the parties shall be desirous to determine it in seven or fourteen years it shall be lawful for either of them, *his executors or administrators*, so to do, upon twelve months' notice to the other of them, his heirs, executors or administrators, extends by reasonable intendment to the *devisee* of

E. & E. 12; 28 L. J., Q. B. 7; Jones *v.* Nixon, 1 H. & C. 48; 31 L. J., Ex. 505; Sharp *v.* Milligan, 22 Beav. 612.

(*u*) Doe *d.* Rodd *v.* Archer, 14 East, 245, 248. See form of notice, *post*, Appendix C., No. 8.

(*x*) See form of proviso, Appendix B., Sect. 23; also form of notice to take part, Id., Sect. 24.

(*y*) Doe *d.* Wilson *v.* Abel, 2 M. & S. 541.

(*z*) Dann *v.* Spurrier, 3 Bos. & P. 399, 442; Doe *d.* Webb *v.* Dixon, 9 East, 15; Fallor *v.* Robins, 16 Ir. Ch. R. 422.

(*a*) Fowell *v.* Frantz, 3 H. & C. 458; 34 L. J., Ex. 6.

(*b*) Legg *d.* Scott *v.* Benion, Willes, 43.

the lessor, he being entitled to the rent and reversion (*c*). Where a lease for twenty-one years contained a proviso that in case either the landlord or tenant, or their respective heirs, executors or administrators, wished to determine it at the end of the first fourteen years, and should give six months' notice in writing *under his or their respective hands*, the term should cease: it was held, that a notice to quit signed by *two only* of three executors of the lessor, to whom he had bequeathed the freeholds as joint tenants, was not good under the proviso, although such notice purported to be given on behalf of all the executors — the proviso requiring the notice to be given "under the respective hands" of all of them (*d*).

Landlord's option — delivery of notice, when tenant absconds. — If the option be in the landlord, and the proviso for notice should stipulate, not, as is usual and proper, that it should be left on the demised premises, but that it should be delivered to the tenant, great difficulties may arise. In Hogg *v.* Brooks (*e*), the proviso was that the lease might be determined by the landlord or his assigns "delivering to the tenant or his assigns six months' previous notice in writing." The tenant mortgaged the premises by way of sub-lease, and disappeared. A notice was sent to his last known address, and also to the mortgagee, and was also left on the demised premises, which the mortgagee had sublet. It was ruled by Mathew, J., that these notices were ineffectual to support an action of ejectment by the assignee of the reversion against the tenant of the mortgagee, on the ground that the lease provided for direct service upon the lessee or his assigns, and the mortgagee was only a subtenant, and this ruling was confirmed by the Court of Appeal (*e*).

No bail in ejectment after such notice. — When a lease has

(*c*) Roe *d.* Bamford *v.* Hayley, 12 East, 464.

(*d*) Right *d.* Fisher *v.* Cuthell, 5 East, 491; 2 Smith, 83; recognized and distinguished in Doe *d.* Aslin *v.* Summersett, 1 B. & Ad. 135, 141. See also Turner *v.* Hardy, 9 M. & W. 770.

(*e*) Hogg *v.* Brooks, L. R. 15 Q. B. D. 256, C. A., affirming Mathew, J.; 14 Q. B. D. 475. Perhaps this decision may be open to question on the ground that a mortgagee by demise is not only technically an "assign," but also practically an assignee.

been determined by notice pursuant to a proviso in that behalf, and the landlord brings ejectment, he cannot compel the tenant to find sureties to pay the costs and damages, pursuant to 15 & 16 Vict. c. 73, s. 213 (*f*); nor can any accruing or subsequent rent be recovered after any such determination (*g*).

[*360] * Sect. 9. — *Disclaimer.*[1]

Parol by lessee for years, insufficient. — It is a general rule that the tenant commits a forfeiture if he disclaim and deny his landlord's title (*h*). But a denial by parol of a landlord's title does not cause a forfeiture of a lease for a *term certain*, whether under seal or not (*i*); nor will payment to a third person of the rent reserved by such lease (*k*). Where a tenant for five years delivered up possession of the demised premises and of the lease *in fraud* of his landlord, to a person claiming under a hostile title, with the intention of enabling him to set up such title and not to hold under the lease: it was held, that the term was thereby forfeited (*l*). But that case turned upon the fraud of the tenant, and can only be sustained on that ground. All the other cases in the books of forfeiture by disclaimer have been by matter of record (*m*). Any person who obtains possession from the tenant or subtenant, by an arrangement made with him, whether by collusion or otherwise, but without any deed of assignment or sub-lease, will not be permitted to defend such possession by proof of a title *aliunde*, but will be estopped from denying the landlord's title in like manner as the tenant

(*f*) Doe *d.* Cardigan *v.* Roe, 1 D. & R. 540; Doe *d.* Cundey *v.* Sharpley, 15 M. & W. 558. As to the evidence in such action, see Cole Ejec. 399.

(*g*) Furnivall *v.* Grove, 8 C. B. N. S. 496; 30 L. J., C. P. 3.

(*h*) Bac. Abr. tit. Leases and Terms for Years (T. 2).

(*i*) Doe *d.* Graves *v.* Wells, 10 A. & E. 427; Rees *d.* Powell *v.* King, Forrest, 19; Cole Ejec. 42.

(*k*) Doe *d.* Dillon *v.* Parker, Gow, 180; Doe *d.* Williams *v.* Pasquali, Peake, 196.

(*l*) Doe *d.* Ellenbrock *v.* Flynn, 1 C., M. & R. 137.

(*m*) *Per* Lord Denman, C. J., in Gregg *v.* Wells, 10 A. & E. 427.

[1] See *ante*, sec. 5 (a), note, "Disavowal of lessor's title."

or subtenant would have been had he remained in possession (*n*).

Disclaimer by tenant from year to year. — A disclaimer by a tenant from year to year of the title of his landlord, or of the person for the time being entitled to the immediate reversion as assignee, heir, devisee, executor or administrator of the landlord, will *operate as a waiver by the tenant of the usual notice to quit*, and will in effect determine the tenancy at the election of the landlord or other person so entitled (*p*); for "a notice to quit is only requisite where a tenancy is admitted on both sides, and if a defendant denies the tenancy there can be no necessity to end that which he says has no existence" (*q*).

What amounts to disclaimer. — It is sometimes a nice question whether what has taken place does or does not amount to a disclaimer of the tenancy. It is difficult, if not impossible, to reconcile all the cases on this point. But the * result of them seems to be, that if a tenant from [*361] year to year use any expressions which, being reasonably construed with reference to the circumstances under which they were uttered or written, amount to a denial of the existence of any tenancy as between him and the claimant, such expressions amount to a disclaimer, and render a notice to quit unnecessary (*r*). On the other hand, if the expressions used cannot under the circumstances be reasonably construed to amount to such a denial, they will not operate as a disclaimer nor render a notice to quit unnecessary (*s*). In order to make either a verbal or written dis-

(*n*) Doe *d.* Buller *v.* Mills, 2 A. & E. 17; Doe *d.* Haden *v.* Burton, 9 C. & P. 254; Doe *d.* Thomas *v.* Shadwell, 7 Dowl. 527; Cole Ejec. 215, 216.

(*p*) Doe *d.* Bennett *v.* Long, 9 C. & P. 773; Doe *d.* Grubb *v.* Grubb, 10 B. & C. 816; Doe *d.* Phillips *v.* Rollins, 4 C. B. 188; Doe *d.* Davies *v.* Evans, 9 M. & W. 48; Doe *d.* Landsell *v.* Gower, 17 Q. B. 589; Vivian *v.* Moat, L. R. 16 Ch. D. 730; 50 L. J. Ch. 331; 44 L. T. 210; 29 W. R. 504, *per* Fry, J.

(*q*) *Per* Best, C. J., in Doe *d.* Calvert *v.* Frowd, 4 Bing. 560; Doe *d.* Phillips *v.* Rollings, 4 C. B. 188, 200; Doe *d.* Jefferies *v.* Whittick, Gow, 195.

(*r*) Cole Ejec. 41; Doe *d.* Calvert *v.* Frowd, 4 Bing. 560; Doe *d.* Grubb *v.* Grubb, 10 B. & C. 816; Doe *d.* Bennett *v.* Long, 9 C. & P. 773; Doe *d.* Hughes *v.* Bucknell, 8 C. & P. 566; Doe *d.* Whitehead *v.* Pittman, 2 N. & M. 673; Doe *d.* Davies *v.* Evans, 9 M. & W. 48; Doe *d.* Phillips *v.* Rollings, 4 C. B. 188, 200; Doe *d.* Landsell *v.* Gower, 17 Q. B. 589.

(*s*) Cole Ejec. 41; Doe *d.* Lewis *v.*

claimer sufficient, it must amount to a *direct repudiation of the relation of landlord and tenant*, or to a distinct claim to hold possession of the estate upon a ground wholly inconsistent with that relation, which by necessary implication is a repudiation of it (*t*). "A disclaimer, as the word imports, must be a renunciation by the party of his character of tenant, either by setting up a title in another or by claiming title in himself (*u*); and it was held to be a disclaimer where the tenant wrote a letter disputing the landlord's right to raise the rent, but offering to pay a customary rent, as being all that the tenant was liable to pay (*x*). But a very slight matter, not really intended as a repudiation, will sometimes be construed as a repudiation, in order to defeat an objection of a technical nature (*y*).

Refusal to pay rent. — A refusal to pay rent to a devisee in a will which is contested is not a disavowal of the title of such devisee. But where the defendant held premises under a tenant for life, on whose death possession was claimed and rent demanded by the heir at law of the devisor; whereupon the defendant wrote to the attorney of the heir at law, stating that he held as tenant to J. S. (the husband of the tenant for life) in right of his wife; that he had never considered the claimant as the landlord of the house; and that he should be ready to pay the arrears to any person who should be proved to be heir at law; but that he must decline taking upon himself to decide upon the claim made on him without more satisfactory proof in a legal manner; it was held, that this letter amounted to a disclaimer of the title of the heir at law, and that he might maintain ejectment against [*362] the tenant without *giving him a previous notice to quit (*z*). A remainderman, after the death of tenant

Earl Cawdor, 1 C., M. & R. 398; Doe *d.* Williams *v.* Cooper, 1 M. & G. 135; 1 Scott, N. R. 36; Doe *d.* Williams *v.* Pasquali, Peake, 259 (3rd ed.); Hunt *v.* Allgood, 10 C. B., N. S. 253; Jones *v.* Mills, Id. 788.

(*t*) Doe *d.* Grey *v.* Stanion, 1 M. & W. 695, 703; Doe *d.* Williams *v.* Cooper, Hunt *v.* Allgood, and Jones *v.* Mills, *supra*.

(*u*) *Per* Tindal, C. J., in Doe *d.* Williams *v.* Cooper, 1 M. & G. 135; Jones *v.* Mills, 10 C. B., N. S. 788, 796, 801; Vivian *v.* Moat, 44 L. T. 210.

(*x*) Vivian *v.* Moat, *ubi supra*.

(*y*) Doe *d.* Davies *v.* Evans, 6 M. & W. 48.

(*z*) Doe *d.* Calvert *v.* Frowd, 4 Bing. 557; 1 Moo. & P. 480.

for life who had made a voidable lease, applied for rent to the tenant, who at first did not refuse to pay, but after some negotiation did so, saying that he understood that another person was entitled to the estate; held that the remainderman might maintain ejectment without notice to quit or demand of possession, there being a disclaimer of the remainderman's title (*a*). Where several persons joined in letting land, and it was agreed that the rent should be paid to an agent for them, and afterwards one of the lessors, to whom alone in fact the land belonged, demanded rent of the tenant, who said "you are not my landlord:" it was left to the jury to say whether he intended that the relation of landlord and tenant did not exist between them or merely that the rent was to be paid to the agent (*b*). An attornment by a tenant from year to year to a third person amounts to such a disclaimer of the landlord's title as will enable him to maintain ejectment without any notice to quit (*c*). "I have no rent for you, because A. B. has ordered me to pay none." This is evidence of a disclaimer of the tenancy (*d*). In another case the defendant had for several years occupied a cottage as tenant from week to week to one M., and after the death of M. the defendant continued to pay his rent weekly to certain persons to whom M. had devised the premises. The devise being discovered to be void by reason of the Mortmain Act, the heir at law of M., by his agent, demanded the rent. The defendant said that he had *received notice from the other party and would not pay any more rent until he knew who was the right owner.* It was held, that this did not amount to a disclaimer or repudiation of the title of the heir at law so as to entitle him to eject the defendant without any notice to quit (*e*).

Date of disclaimer. — Where a disclaimer is relied on, it must appear to have been made *before or on* the day mentioned in the writ of ejectment as the time when the claimant

(*a*) Doe *d.* Phillips *v.* Rollings, 4 C. B. 188.

(*b*) Doe *d.* Bennett *v.* Long, 9 C. & P. 773.

(*c*) Throgmorton *v.* Whelpdale, Bull. N. P. 96; Cole Ejec. 42.

(*d*) Doe *d.* Whitehead *v.* Pittman, 2 N. & M. 673.

(*e*) Jones *v.* Mills, 10 C. B., N. S. 788.

was entitled to possession (*f*). But where the defendant by his agent, on 26th June, answered an application for rent by saying that his "connection as tenant with the late John Grubb, Esq. (through whom the plaintiff derived his title), has *ceased for several years*, and that he now pays his rent to his brother;" this was held to be evidence of a disclaimer of title *before the* 1*st May* (on which day the demise was laid in the ejectment), and rendered any notice to quit un-
[*363] necessary (*g*). In ejectment against two *persons as landlord and tenant, an admission by the tenant, after action brought, of an attornment by him to the landlord having taken place before the day from which possession was claimed in the ejectment, was held sufficient evidence of a disclaimer as against both the defendants (*h*).

Waiver of disclaimer. — A disclaimer may be waived by any act of the landlord acknowledging the party as his tenant at a later period, as by a distress for subsequent rent (*i*).

SECT. 10. — *Death.*

Death of tenant. — A tenancy does not determine by the death of the lessee, but will vest in his legal personal representatives, who are entitled to give or receive the usual notice to quit (*k*).

Death of landlord. — So it will not determine by the death of the lessor (*l*), unless he was only a tenant for his own life, and the demise was not made in pursuance of any power or statute (*m*). And even in such case the tenant, if the holding be agricultural, is entitled (in lieu of emblements (*n*)) to

(*f*) Doe *d.* Lewis *v.* Earl Cawdor, 1 C., M. & R. 389; 4 Tyrw. 852; Doe *d.* Bennett *v.* Long, 9 C. & P. 773.

(*g*) Doe *d.* Grubb *v.* Grubb, 10 B. & C. 816.

(*h*) Doe *d.* Mee *v.* Litherland, 4 A. & E. 784.

(*i*) Doe *d.* David *v.* Williams, 7 C. & P. 322.

(*k*) Mackay *v.* Mackreth, 4 Doug. 213; Doe *d.* Shore *v.* Porter, 3 T. R. 13; Parker *d.* Walker *v.* Constable, 3 Wils. 25; James *v.* Dean, 11 Ves. 391; Rex *v.* Stowe, 6 T. R. 295, 298; Doe *d.* Hull *v.* Wood, 14 M. & W. 682.

(*l*) Maddon *d.* Baker *v.* White, 2 T. R. 159; Cole Ejec. 31.

(*m*) Doe *d.* Thomas *v.* Roberts, 16 M. & W. 778; Doe *d.* Kirby *v.* Carter, Ry. & Moo. 237.

(*n*) Kelly *v.* Webber, 11 Ir. Com. L. Rep. 57.

hold the demised premises until the end of the then current year of the tenancy (*o*).

When term limited conditionally. — Sometimes a lease is granted for a certain term of years, if the lessee shall so long live; in which case it will determine either at the end of the specified term or upon the death of the lessee, which shall first happen (*p*).

Death of cestui que vie. — When a person holds for the term of another's life he is called tenant pur autre vie; leases made by him of course determine on the death of the cestui que vie, or person for whose life he holds, or at the end of the then current year of the tenancy (*q*): but not on his own death; and a lease by him may be made to commence on his own death (*q*). We have already considered how a tenant pur autre vie may be compelled to produce his cestui que vie, if living (*q*).

(*o*) 14 & 15 Vict. c. 25, s. 1; *post*, Appendix A., Sect. 4.

(*p*) *Ante*, Chap. IV., Sect. 3.

(*q*) *Ante*, 148.

[*364] * CHAPTER IX.

OF THE RENEWAL OF LEASES, AND OF THE EXERCISE OF AN OPTION TO PURCHASE.

SECT. 1. — *Covenants to renew — whether perpetual or not.*

Construction of covenants. — Some nice points occur in the books concerning the construction of covenants for the renewal of leases; the question in general being whether the renewed lease is to contain a similar covenant for renewal, so giving a right of renewal for ever.[1] Covenants for renewal of leases are considered as real agreements, and go

[1] **Covenants of renewal.** — Covenants for renewal will not be construed to create perpetuities if it can be avoided. Syms *v.* Mayor of New York, 105 N. Y. 158; Rutgers *v.* Hunter, 6 Johns. Ch. (N. Y.) 215; Banker *v.* Braker, 9 Abb. New Cases (N. Y.) 471.

A covenant to renew does not imply insertion of covenant to renew, Piggot *v.* Mason, 1 Paige (N. Y.) 412; nor does covenant to renew with similar covenants, Carr *v.* Ellison, 20 Wend. (N. Y.) 178; Muhlenbrinck *v.* Pooler, 40 Hun (N. Y.) 526.

It implies same term and rent, Kent, Chan., in Rutgers *v.* Hunter, 6 Johns. Ch. (N. Y.) 215, 218; M'Coun *v.* Chan. in Willis *v.* Astor, 4 Edw. Ch. (N. Y.) 594, 595; Cunningham *v.* Pattee, 99 Mass. 248; but not necessarily the same covenants generally in new lease, Rutgers *v.* Hunter; Willis *v.* Astor, *supra*.

A privilege of "further term," of one, two, and three years, entitles at most to one term for three years. Austin *v.* Stevens, 38 Hun (N. Y.) 41.

In case of alternative covenant to renew after valuation of premises, less improvements, by arbitrators, or to pay for improvements, the court (holding it could not enforce arbitration) awarded damages. Hopkins *v.* Gilman, 22 Wis. 476.

Under covenant of perpetual renewal, tenant cannot do anything to impair value of security. Crowe *v.* Wilson, 65 Md. 479.

Subject to that, he may tear down, build up, alter, or remodel, as he pleases (*per* Bryan, J., in Wilson *v.* Crowe).

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*): but a covenant for perpetual renewal, entered into by a person having a limited interest in lands, does not bind the estate; and therefore, if his assignee acquire the inheritance, it is not bound by the covenant (*b*). A covenant for renewal, which is so framed as to create a perpetuity in the heirs of the body of a particular person, is invalid (*c*).

Running with land. — It has been already stated that a covenant for renewal runs both with the reversion and the land (*cc*).

Ordinarily not held perpetual. — The leaning of the courts is against perpetual renewals (*d*); and therefore, in order to establish this construction, the intention must be unequivocally expressed, and 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 (*e*). An agreement in a lease for lives, that upon the renewing or inserting of any life or lives, a * certain [*365] sum shall be paid by the lessee, his heirs and assigns, to the lessor, his heirs and assigns, does not amount to a covenant for perpetual renewal (*f*). A covenant in a lease of land for ninety-eight years, that the lessor will from time to time renew the lease, and perfect such other assurances as the lessee should reasonably require for strengthening, confirming and sure-making the demised premises, at such rents, and under such covenants and conditions, as in the lease were contained, is not a covenant for perpetual renewal (*g*).

(*a*) Earl of Shelburne *v.* Biddulph, 6 Bro. P. C. 363.

(*b*) Brereton *v.* Tuohey, 8 Ir. Ch. R. 190; Postlethwaite *v.* Lewthwaite, 2 J. & H. 237; 31 L. J., Ch. 584; and see Trumper *v.* Trumper, L. R., 14 Eq. 295; 41 L. J., Ch. 295.

(*c*) Hope *v.* Mayor, &c., of Gloucester, 7 De G., M. & G. 647; 25 L. J., Ch. 145.

(*cc*) *Ante*, 163 (*y*) and (*z*).

(*d*) Baynham *v.* Guy's Hospital, 3 Ves. 298.

(*e*) 4 Jarm. Prec. 394 (3rd ed.); Tritton *v.* Foote, 2 Bro. C. C. 636; 2 Cox, 174.

(*f*) Smyth *v.* Nangle, 7 Cl. & Fin. 405; 1 West, 184.

(*g*) Browne *v.* Tighe, 2 Cl. & Fin. 396.

Where one, in consideration of 5*l.* 8*s.* in nature of a fine, and of a yearly rent of 6*s.* 9*d.* demised certain ground, with the buildings, &c., for twenty-one years, with a proviso for distress if the rent were in arrear for fourteen days; and the lessor covenanted at the end of eighteen years of the term, or before, on request of the lessee, to grant a new lease of the premises "for the like fine, for the like term of twenty-one years, at the like yearly rent, with all covenants, grants, and articles, as in that indenture were contained:" it was held, that this covenant was satisfied by the tender of a new lease for twenty-one years, containing all the former covenants except the covenant for future renewal (*h*). Where a lessor covenanted to renew the lease at the request of the lessee within the term; and the lessee did not request, but his executors did; Lord Macclesfield, C., ordered the lessor to renew the demise of the premises for twenty-one years, that being the usual term, but said that though the new lease was to be made on the same covenants, yet that that did not take in a covenant for renewing (*i*). In another case, premises were demised for three lives and for twenty-one years after the death of the last survivor. The lessor covenanted with the lessee that if he should lose a life and think proper to have a new life put in, then, within six months after the death of the first life, and so on continuing the term and estate thereby demised, the lessor would put in a new life; it was held, that the lessee had power to introduce one new life only, and that one in the place of the first life dropping, but with a new term of twenty-one years, commencing with the death of the survivor of the two survivors and the new life (*k*).

Also in Swinburne *v.* Milburn (*l*) a right of renewal was held not to be perpetual, but to be a right of renewal as often as any of three lives should drop, but the covenant in this case was so special, that a reference thereto is considered sufficient.

(*h*) Iggulden *v.* May, 7 East, 237; 2 New R. 449; 9 Ves. 331.

(*i*) Hide *v.* Skinner, 2 P. Wms. 197; but see 3 Atk. 448.

(*k*) Walmesley *v.* Pilkington, 35 Beav. 362.

(*l*) L. R., 9 App. Cas. 844; 54 L. J., Q. B. 6.

Perpetual renewal. — But although primâ facie a lessor is not taken to have intended to *enter into [*366] a covenant for perpetual renewal if there are in the lease expressions indicative of such an intention, the High Court will give effect thereto (*m*). Thus, where a lease for lives contained a covenant on the death of either of the cestui que vies 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 *totidem verbis* with that contained in the original lease, but with the name of the new cestui que vie substituted for that of the deceased (*n*). It was once held that a lessor and his ancestors had, by their own acts of successive renewal, construed a covenant in a lease for lives to be for a perpetual renewal, and that he was therefore bound by it (*o*). But in a subsequent case, this method of construing the covenant by the equivocal acts of the parties was repudiated (*p*).

Renewal to one of two lessees. — One of two lessees has no single right of renewal (*q*).

Breach of covenant to "endeavour" to renew. — If a lease for ninety-nine years, determinable on three lives, be conveyed in trust for A. for life, and A. covenant to use his utmost endeavours, as often as any of the persons on whose lives the premises are held shall die, to renew the same by purchasing of the lord of the fee a new life in the room of such as shall fail, it is no breach of the covenant, if upon one of the lives failing he procure a renewal upon his own life (*r*). A sum falling short of three years' annual value of premises, calculated on the rack rent, is not an unreasonable fine for the renewal of a lease by the Duchy of Cornwall; and therefore the lessee having covenanted in a sub-lease to

(*m*) Hare *v.* Burgess, 4 K. & J. 45; 27 L. J., Ch. 86; Bridges *v.* Hitchcock, 1 Bro. P. C. 522; Furnival *v.* Crewe, 3 Atk. 83.

(*n*) Hare *v.* Burgess, *supra*.

(*o*) Cooke *v.* Booth, Cowp. 819.

(*p*) Baynham *v.* Guy's Hospital, 3 Ves. 298; Eaton *v.* Lyon, Id. 694; Iggulden *v.* May, 9 Ves. 331; 7 East, 237; 2 New R. 449.

(*q*) Finch *v.* Underwood, 45 L. J., Ch. 522; *post*, 368.

(*r*) Seudamore *v.* Stratton, 1 Bos. & P. 455.

do his utmost endeavours to procure a renewal of the letters-patent, on either of three cestui que vies dying, commits a breach of his covenant by not paying such a fine demanded for a renewal (*s*).

Trust for renewal. — Under a trust to renew leases out of the rents, issues and profits, followed by a power to mortgage in case, from any cause, the money wanted to pay the fines should not be produced by the ways and means aforesaid, it was held that the rents being sufficient for that purpose, the fines ought to be paid out of the income (*t*). A trust for renewal fails if renewal be impossible (*u*).

[*367] * Sect. 2. — *Forfeiture of Right to renew.*

By not applying in time. — Where it was covenanted that the lessor would renew whenever any life or lives, dropped, provided that if the lessee, his executors or administrators, upon or after the death of any of the life or lives should refuse or neglect to renew the said lease, or make application therein, or tender such new lease, and pay or tender a certain fine, then the indenture should be void; it was held, that the lessee forfeited his right of renewal for not applying when the first life dropped (*x*). But where a lease, for sixty-one years, of house property contained a covenant that the lessee might renew, on certain terms, at the end of each and every term of fourteen years, on giving ten days' notice of such his desire; and the lessee, or those claiming under him, continued in possession after the two first terms of fourteen years each had expired, and then, before the expiration of the third fourteen years, desired to renew: held, that the lessee was not precluded, by his not having given notice earlier, from claiming his right to have a renewed lease in the terms of the covenant (*y*). A covenant in a corporation

(*s*) Simpson *v.* Clayton, 4 Bing. N. C. 758.

(*t*) Solley *v.* Wood, 29 Beav. 482.

(*u*) Maddy *v.* Hale, 45 L. J., Ch. 791.

(*x*) Baynham *v.* Guy's Hospital, 3 Ves. 295; Eaton *v.* Lyon, Id. 690.

(*y*) Bogg *v.* Midland R. Co., L. R., 4 Eq. 310, 313; 36 L. J., Ch. 440.

lease to renew upon the falling in "of one life for ever," cannot be extended to the case where two are suffered to fall in, although a compensation be offered (*z*). Where A. and B. covenanted in a lease for sixty-one years, that at any time within one year after the expiration of twenty years of that term, upon the request of the lessee and his paying 6*l.* to the lessors they would execute another lease of the premises for the further term of twenty years, to commence from the expiration of the said term of sixty-one years, &c., and so in like manner at the end of every twenty years during the said term of sixty-one years, for the like consideration and upon the like request, would execute another lease for the further term of twenty years, &c., to commence at the expiration of the term then last before granted, &c.; it was held, that, under this covenant, the lessee could not claim a further term at the end of the last term of twenty years in the lease, where he had omitted to claim a further term at the end of the first and second twenty years in the lease (*a*). Where a lease renewable for ever had expired by the dropping of the lives, so that, in fact, only a tenancy from year to year existed; but the owner in fee of the land, the tenants, and their subtenants, had all been acting for years on the terms of the lease, which was at length duly renewed: held, that no one of them could subsequently set up in *equity claims adverse to the several characters [*368] they bore under such lease and the sub-lease (*b*).

Non-performance of covenants. — Where the lessee has not performed his covenants to repair and insure, the court will not decree a specific performance of a perpetual covenant to renew "provided the rent should have been paid and the covenants kept" (*c*). So where the covenant was to renew at the end of the term "if it should not be sooner determined by the lessee's acts or defaults" (*d*). The covenant to renew in case the lessee's covenants are duly performed is construed strictly against the lessee, and will not be specifi-

(*z*) 3 Bro. C. C. 529.
(*a*) Rubery *v.* Jervoise, 1 T. R. 229.
(*b*) Archbold *v.* Scully, 9 H. L. Cas. 360.
(*c*) Job *v.* Banister, 2 Kay & J. 374; 26 L. J., Ch. 125.
(*d*) Thompson *v.* Guyon, 5 Sim. 65; cited 2 K. & J. 381.

cally enforced if the lessor have a right of action for the breach of covenant to repair, although the want of repair be but small. If there be any repairs wanted at all, the lessee should have them done before applying to the court. This was held in Finch *v.* Underwood (*e*). In Bastin *v.* Bidwell (*f*), the same strictness was observed. There the covenants were by the lessee to paint inside and outside at certain fixed periods, and by the lessor that the lessee should be entitled, "on giving six months' notice before the expiration of the term," to have a further lease "upon the lessee paying the rent and performing and observing the covenants of this present lease." Neither when the six months' notice was given nor when it expired had the requisite painting been completed. Kay, J., held that the performance of the covenant to paint was a condition precedent to the right of renewal, but left the point open whether the condition would have been complied with if the painting had been completed at the time that the notice was given. One of two lessees has no single right of renewal (*g*). Where there was a lease for twenty-one years at 1*l.* rent within covenant to the tenant to renew from twenty-one years to twenty-one years, to make up ninety-nine years; and at the expiration of the first term an arrear of rent being due, and no application being made for a renewal, the lessor brought an ejectment and obtained judgment and possession; on a bill filed in Chancery, a renewal was decreed, on payment of the rent in arrear and interest; the delay being accounted for, and there being no neglect on the part of the lessee, or prejudice to the lessor (*h*).

When option not determined. — A. agreed to let premises to B. for three years, and at the expiration of that term to grant him a lease for an extended term. A. died, and three years having expired B. continued to hold on under A.'s

(*e*) Finch *v.* Underwood, L. R., 2 Ch. D. 310; 45 L. J., Ch. 522; 34 L. T. 779 (C. A.).

(*f*) Bastin *v.* Bidwell, L. R., 18 Ch. D. 238; 44 L. T. 742.

(*g*) Finch *v.* Underwood, *supra.*

(*h*) Rawston *v.* Bentley, 4 Bro. C. P. 415; Statham *v.* Liverpool Docks Trustees, 3 Y. & J. 565; Hunter *v.* Earl of Hopetoun, 13 L. T., N. S. 130 (H. L.).

executors for four years without asking for a lease. He then required a lease: * held, that B.'s option had [*369] not determined, and that he was entitled to the extension of the term (*i*).[1]

SECT. 3. — *Renewal by Minors, Lunatics and Married Women.*

Renewal in the case of minors, &c. — Where guardians of minors, married women and infants are concerned, and a renewal of leases is required, existing leases may be surrendered and new leases granted by direction of the Chancery Division of the High Court (*k*). The Lunacy Regulation Act, 1853 (16 & 17 Vict. c. 70), contains detailed provisions for renewal to the committee of a lunatic tenant (*l*) and by the committee of a lunatic landlord (*m*). Where a person bound by covenant to renew a lease if required "at the cost and charges in all things" of the lessee, subsequently devised the land in strict settlement, and died pending the arrangements for a renewal, leaving the first person entitled to an estate of inheritance under his will an infant, so that it was necessary to institute a suit in Chancery to obtain a renewal of the lease, it was held, that the cost of the suit must be paid out of the estate of the covenantor, because it had been rendered necessary by his own act done subsequently to entering into the covenant (*n*).

SECT. 4. — *Renewal by Trustees, &c., in their own Names.*

Renewal by trustees. — A lease renewed by a trustee or executor in his own name, even in the absence of fraud, and

(*i*) Moss *v.* Barton, 35 Beav. 197; L. R., 1 Eq. 474; and see Buckland *v.* Papillon, L. R., 2 Ch. Ap. 67; 36 L. J., Ch. 81.

(*k*) 11 Geo. 4 & 1 Will. 4, c. 65, ss. 16, 17; *ante*, 36.

(*l*) Sect. 113.

(*m*) Sect. 134.

(*n*) Wortham *v.* Ld. Dacre, 2 Kay & J. 437.

[1] **Extension privileges.** — These differ from covenants of renewal in that no formal renewal is necessary. The tenant manifests his election by simply remaining, or otherwise signifies it. Kramer *v.* Cook, 7 Gray (Mass.) 550; Delashman *v.* Berry, 20 Mich. 292, 298; Sweetser *v.* McKenney, 65 Me. 225; Holley *v.* Young, 66 Id. 520.

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 (*o*). The same rule applies to an executor de son tort renewing a lease in his own name (*p*). Where a trustee obtains a new lease which comprises not only the premises in the original lease, but also additional lands, the trusts will not attach upon the additional lands (*q*). The ground of decreeing renewals by trustees and executors to enure to the [*370] benefit of cestui que trusts is *public policy, to prevent persons in such situations from acting so as to take a benefit to themselves (*r*).

By agents. — A person acting as agent, or in any similar capacity for a person having an interest in a lease, cannot renew it for his own benefit (*s*).

By tenant for life. — If a person having a limited interest in a renewable lease, as a tenant for life, renews it in his own name, he will be held a trustee for those entitled in remainder to the old lease (*t*).

By a person jointly interested. — If one of several persons jointly interested in a lease renew it in his own name he will hold in trust for the others according to their respective shares (*u*). And if a person jointly interested with an infant renew, and the renewed lease turn out not to be beneficial, the person renewing must sustain the loss; if beneficial, the infant can claim his share of the benefit to be derived from it (*u*).

By a partner. — If a partner renew a lease of the partnership premises in his own name and on his own account he will be held a trustee of it for the firm (*x*).

(*o*) Keech *v.* Sandford, Select Cas. Ch. 61; Fitzgibbon *v.* Scanlan, 1 Dow. 261 (after twenty years); Mill *v.* Mill, 3 H. L. Cas. 828; Cooper *v.* Phibbs, L. R., 2 H. L. Cas. 149; White *v.* Tudor, L. C. 36, 37 (2nd ed.).

(*p*) Mulraney *v.* Dillon, 1 Ball & B. 409; Griffin *v.* Griffin, 1 Sch. & Lef. 352.

(*q*) Acheson *v.* Fair, 3 Dru. & W. 512; 2 Conn. & Law. 208.

(*r*) Griffin *v.* Griffin, 1 Sch. & Lef. 352; Blewett *v.* Millett, 7 Bro. P. C. 367.

(*s*) White & Tudor, L. C. 41 (2nd. ed.).

(*t*) Keech *v.* Sandford, White & Tudor, 41. In Phillips *v.* Phillips, 54 L. J., Ch. 943, a tenant for life who had twice renewed, and then purchased the reversion, was held to hold the fee thus acquired in trust for the remaindermen.

(*u*) Id. 39.

(*x*) Id. 40; Clegg *v.* Edmondson, 8

By a mortgagee. — If a mortgagee renew a lease in his own name the renewal is deemed to be for the benefit of the mortgagor, paying the mortgagee his charges (*y*); nor will the case be altered by the expiration of the lease before renewal (*z*).

By a mortgagor. — On the other hand, if a lessee mortgage leaseholds, and afterwards obtain a new lease in his own name, the new lease will be held a graft on the old one for the benefit of the mortgagee (*a*).

By owner of incumbered lease. — Upon the same principle, if a person entitled to a lease subject to debts, legacies or annuities, renews in his own name, the incumbrances will remain a charge upon the renewed lease (*b*).

Against volunteers. — The same remedies which may be had against trustees, executors, and persons with limited interests renewing leases in their own names, may also be had against volunteers claiming through them (*c*).

Purchasers with notice. — And against purchasers from them with notice express or implied (*c*). But the cestui que trust may be barred by acquiescence and lapse of time (*c*).

Not against a quasi tenant in tail of leaseholds. — A quasi tenant in tail of leaseholds being the absolute owner of them is not barred by the same equities as persons having merely limited interests (*d*).

Nor against a stranger. — Where a stranger obtains a renewal of a lease, or a reversionary lease, the old tenant has no equity against him (*e*); nor, it seems, has *a [*371] lessee any equity against his sublessee who obtains a renewal from the head landlord without consulting him (*f*).

Sale of right of renewal. — If a person having a right of renewal sells such right, the money produced by the sale will

De Gex, M. & G. 787; Tudor's L. C. Merc. L. 359 (2nd ed.).

(*y*) White & Tudor L. C. 40 (2nd ed.).

(*z*) Id. 40; Rakestraw *v.* Brewer, 2 P. Wms. 510; Nesbitt *v.* Tredennick, 1 Ball & B. 29.

(*a*) Smith *v.* Chichester, 1 Conn. & Law. 486.

(*b*) White & Tudor L. C. 41 (2nd ed.).

(*c*) Id. 42.

(*d*) Blake *v.* Blake, 1 Cox, 266.

(*e*) White & Tudor L. C. 44 (2nd ed.).

(*f*) Maunsell *v.* O'Brien, 1 Jones (Ir. Ex.) 176.

be affected with the same trusts as the leaseholds, if renewed, would have been (*g*).

Nature of relief in equity. — A trustee who has renewed will be directed to assign the lease, free from incumbrances, except, as it seems, any lease made by him bonâ fide at the best rent (*h*); and he must account also for the mesne rents and profits which he may have received (*i*), notwithstanding the lease had expired before the action was brought (*k*). But where a tenant for life has renewed, the account will commence only from his decease (*l*). On the other hand, the person who has renewed the lease will be entitled to be indemnified against the covenants he may have entered into with the lessor (*m*), and he will have a lien upon the estate for the costs and expenses of renewing the lease, with interest (*n*), and for the expenses of lasting improvements (*o*), but not for any improvements adopted as a mere matter of taste, or as matter of personal convenience (*p*); at the same time there may be many charges in the nature of waste, and as to deterioration, which must be set off against anything found due in respect of improvements (*p*). So also will a tenant for life have a lien for such proportion of the fine upon renewal as ought to be borne by the remainderman (*q*).

Sect. 5. — *Renewal without Surrender of Sub-leases.*

Renewal in case of sub-lease. — By 4 Geo. 2, c. 28, s. 6, after reciting "that many persons hold considerable estates by leases for lives or years, and lease out the same in parcels to several under-tenants; and many of those leases cannot by law be renewed without the surrender of all the under-leases derived out of the same, so that it is in the power of any such under-tenants to prevent or delay the renewal of the

(*g*) White & Tudor L. C. 41; Owen *v.* Williams, Ambler, 734.

(*h*) Id. 41; Bowles *v.* Stewart, 1 Sch. & Lef. 230.

(*i*) Id. 41.

(*k*) Eyre *v.* Dolphin, 2 Ball & B. 290.

(*l*) Geddings *v.* Geddings, 3 Russ. 241.

(*m*) Keech *v.* Sandford, Select Cas. Ch. 61; Mill *v.* Mill, 3 H. L. Cas. 828; White & Tudor L. C. 36; Geddings *v.* Geddings, 3 Russ. 241.

(*n*) White & Tudor L. C. 41, 42.

(*o*) Id. 42.

(*p*) Mill *v.* Mill, 3 H. L. Cas. 869.

(*q*) White & Tudor L. C. 42.

principal lease by refusing to surrender their under-leases, notwithstanding they have covenanted so to do, to the great prejudice of their immediate landlords the first lessees;" it is enacted, "that in case any lease shall be duly surrendered in order to be renewed, and a new lease made and *executed by the chief landlord or landlords, the [*372] same new lease shall, without a surrender of all or any 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 taking of such new lease; and all and every person and persons in whom any estate for life or lives, or for years, shall from time to time be vested by virtue of such new lease, and his, her and their executors and administrators, 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 and landlords shall have and be entitled to such and the same remedy by distress or entry in and upon the messuages, &c., 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."

The effect of this enactment, while it gives a lessee the right to surrender notwithstanding his contracts with his sub-lessee, leaves untouched the sub-contract, though it is merely an agreement for a sub-lease; and the effect of a new demise after the surrender for the residue of the original term is to make the new lessee the assignee of the reversion of the terms created by the surrenderor (*r*).

Substituted reversion on leases. — By 8 & 9 Vict. c. 106, s. 9, "when the reversion expectant on a lease made either

(*r*) Cousins *v.* Phillips, 3 H. & C. 892; 35 L. J., Ex. 84; Doe *d.* Palk *v.* Marchetti, 1 B. & Ad. 715; Wootley *v.* Gregory, 2 Y. & J. 536.

before or after the passing of this act, of any tenements or hereditaments of any tenure, shall after the said first day of October, 1845, be surrendered or merge, the estate which shall for the time being confer as against the tenant under the same lease the next vested right to the same tenements or hereditaments, shall, to the extent and for the purpose of preserving such incidents to and obligations on the same reversion as but for the surrender or merger thereof would have subsisted, he deemed the reversion expectant on the same lease." The object of this enactment was to do away with the rule that the covenants of and remedies against the lessee, and the obligations on the lessor, being incident to the *immediate* reversion, cease as regards the land on the merger of that reversion in another estate (*s*). Such rule was altogether technical, and generally productive of injustice.

[*373] * "**Tenant right of renewal.**" — It has long been an established practice to consider those who are in the possession of lands under leases for lives or years, particularly from the crown, colleges, &c., as having an interest beyond the subsisting term: and this interest is usually denominated "the tenant right of renewal," which though not any certain or even contingent estate, there being no means of compelling a renewal, yet is so adverted to in all transactions relative to leasehold property, that it influences the price in sales, and is often an inducement to accept of it in mortgages and settlements.

Purchase of reversion by assignee of mortgagor of term. — Where a lease from a dean and chapter was mortgaged, and the mortgagor's interest assigned to a person who afterwards bought the reversion, and borrowed money on the security of such reversion, it was held that such person, upon the Ecclesiastical Commissioners refusing to renew, held the fee simple upon the expiration of the lease subject to the mortgage of the lease, so that the lender on the security of the

(*s*) Webb *v.* Russell, 3 T. R. 393; Stokes *v.* Russell, 3 T. R. 678; Wootley *v.* Gregory, 2 Y. & J. 536; Burton *v.* Barclay, 7 Bing. 745; Thorn *v.* Woolcombe, 3 B. & Adol. 586.

reversion was not entitled to any prior lien in respect of his advance (*t*).

Sect. 6. — *Exercise of Option to purchase.*

A lease sometimes contains a clause enabling the tenant, upon giving certain notice to the landlord, to purchase the reversion.[1] Such a clause is always for the interest of the tenant, as it binds him to nothing, and allows him the advantage of a trial of the demised premises. A form is given hereafter (*u*).

Time of the essence. — Time has been held to be of the essence of a stipulation that the lessee may purchase (*x*).

Executor receives purchase-money. — The purchase-money goes to the lessor's personal representatives, if the option be exercised after the lessor's death (*y*); and on the death of the lessee, the option of purchase goes to the personal representative of the lessee (*z*).

Sub-lease with option, not grantable by executor. — We have already seen that it is ultra vires, and a breach of trust, for an executor or administrator to grant a sub-lease with an option of purchase to be exercised by the sublessee at a price fixed at the time of the grant of the sub-lease (*a*).

* **Insurance money.** — Where the landlord cove- [*374] nanted to insure, and the tenant had the option to

(*t*) Leigh *v.* Burrell, 33 W. R. 578.

(*u*) See *post*, Appendix B., Sect. 7, and see also Dav. Prec., Vol. V., p. 157. "Lease to Builder's Nominee of First-Class House in London," Prideaux Prec., Vol. II., p. 44.

(*x*) Lord Ranelagh *v.* Melton, 2 Dr. & Sm. 278. And see the cases cited *ante*, 108. As to reinstating property out of insurance money after exercise of option, see Reynard *v.* Arnold, L. R., 10 Ch. 386.

(*y*) See Weeding *v.* Weeding, 1 J. & H. 424; Prideaux, 45.

(*z*) Adams and Kensington Vestry, *in re*, L. R., 27 Ch. D. 394; 54 L. J., Ch. 87; 51 L. T. 382; 32 W. R. 883 (C. A.).

(*a*) 1 L. R., 16 Ch. D. 236; and *ante*, 49.

[1] Sometimes lessee has an option, Buckwalter *v.* Klein, 2 Am. Law Record, 347; Langford *v.* Selmes, 3 Kay & Johns. 220; and sometimes himself covenants to purchase, Stewart *v.* L. I. R. R. Co., 102 N. Y. 601; Bostwick *v.* Frankfield, 74 Id. 207.

A covenant, in six years' lease of water, reserving right to sell at end of two, giving lessee first refusal, is not broken by sale subject to lessee's right to use water for entire six years. Blanchard *v.* Ames, 60 N. H. 404.

purchase, and before the time for exercising the option expired the demised premises were burnt, the landlord receiving the insurance money; it was held that the tenant, upon exercising the option, could not sustain a claim to the insurance money as part of his purchase (*b*)

(*b*) Edwards *v.* West, L. R., 7 Ch. D. 858; 47 L. J., Ch. 463; 38 L. T. 481; 26 W. R. 507, distinguishing Reynard *v.* Arnold, L. R., 10 Ch. 386.

* CHAPTER X. [*375]

RENT.

SECT. 1. — *Different kinds of Rent.*

Definition of rent. — Rent (redditus) is a retribution or compensation for the lands demised. It is defined to be a certain profit issuing yearly out of lands and tenements corporeal: and may be regarded as of a twofold nature: — first, as something issuing out of the land, as a compensation for the possession during the term; and, secondly, as an acknowledgment made by the tenant to the lord of his fealty or tenure (*a*).

Need not be in money, but must be certain, and issue from thing demised. — Rent must always be a profit; but there is no occasion for it to be, as it usually is, a sum of money;[1]

(*a*) Bradby, 24; 2 Blac. Com. 41; Co. Lit. 142 a; Gilb. Rents, 9; Smith L. & T. 111 (2nd ed.).

[1] **Rent may be payable** in *money*, Irving *v.* Thomas, 18 Me. 418; *grain*, Boyd *v.* McCombs, 4 Pa. St. 146; *cotton*, McDougal *v.* Sanders, 75 Ga. 140; Durdin *v.* Hill, Id. 228; Wadley *v.* Williams, Id. 272; Bridgers *v.* Dill, 97 N. C. 222; *board*, Baker *v.* Adams, 5 Cush. (Mass.) 99; *support*, Shouse *v.* Krusor, 24 Mo. App. 279; Roberts *v.* Sims, 64 Miss. 597; *taxes*, Roberts *v.* Sims, 64 Miss. 597; *valuable improvements*, Doe *d.* Macqueen *v.* Hunter, 1 Kerr's (N. B.) 518, &c., &c.

In Van Rensselaer *v.* Jewett, 2 N. Y. 141, the rent reserved was eighteen

for spurs, capons, horses, corn, and other matters, may be, and occasionally are, rendered by way of rent (*b*): it may also consist in services and manual operations; as to plough so many acres of ground, and the like; which services, in the eye of the law, are profits (*c*). This profit must also be certain, or capable of being reduced to a certainty by either party, and 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 of part of the thing granted (*d*).

Royalty. — But a royalty payable to a landlord upon the bricks which are made out of a brickfield is a rent, although it is not paid for the produce of the land, which is periodically renewed, but for portions of the land itself, which is gradually exhausted by the working (*e*).

[*376] * **Incorporeal hereditaments.** — The lessee of tithes, advowsons or any incorporeal hereditaments, is liable to an action for the gross sum or sums agreed upon for the use and enjoyment but not for "rent" (*f*).

"Standings" for machinery. — Where the owner of a factory let "standings" in some of its rooms for lace-machines, he himself supplying the steam power by which they were put in motion; it was held, that there was no demise of the room, and consequently that the weekly payments reserved could not be distrained for, *as rent* (*g*). But where A. let to B. a

(*b*) 1 Inst. 142 a.

As to corn rent, see 381, *post*.

(*c*) Doe *d.* Edney *v.* Benham, 7 Q. B. 976 (cleaning church, and ringing church bell); Doe *d.* Robinson *v.* Hinde, 2 Moo. & R. 441 (keeping up a grindstone ruled with doubt *not* to be rent); Duke of Marlborough *v.* Osborn, 5 B. & S. 67; 33 L. J., Q. B. 148 (team work); Smith L. & T. 111, 112 (2nd ed.).

(*d*) Smith L. & T. 112; Bac. Abr. Rent (A.).

(*e*) Reg. *v.* Westbrook, 10 Q. B. 178. And see Daniel *v.* Gracie, 6 Q. B. 145; *post*, 349.

(*f*) Co. Lit. 47 a; Gilb. Rents, 24.

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

bushels of wheat, four fat hens, and one day's service with carriage and horses. In Fiske *v.* Framingham Man. Co., 14 Pick. (Mass.) 491, no rent was reserved in lease of mill, but lessee engaged to manufacture goods, at a fixed price, for lessor.

A reservation of rent is not essential to a lease. Failing *v.* Schenck, 3 Hill (N. Y.) 344; State *v.* Page, 1 Speer's (S. C.) 408, 429 (*per* O'Neall, J.); Jackson *v.* Wheeler, 6 Johns. (N. Y.) 272; 1 Washburne on Real Property, sec. 292.

As to leases on shares, see *ante*, p. 203, note.

defined portion of a room in a factory, with steam-power for working lace-machines belonging to B., at a certain sum per annum, payable quarterly, a deduction to be allowed in the event of hindrances in the supply of power beyond seven days in each quarter; this was held a sufficient demise to entitle A. to distrain (*h*).

Rent-service. — There are at common law three sorts of rents: — rent-service, rent-charge and rent-seek (*i*). Rent-service was so called because it had some corporeal service incident to it, as, at the least, fealty (*k*). Every copyhold rent (*l*), and every rent reserved on a lease, is a rent-service (*m*).

Rent-charge. — A rent-charge is where land is charged with a rent by deed or will *with power to distrain* for the same, but the owner of the rent has no reversion in the land: as where a person conveys to another land in fee-simple, reserving a certain rent payable thereout, with a clause of distress, that if the rent be in arrear or behind for a specified number of days it shall be lawful to distrain for the same. In such 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 (*n*).

Fee-farm rent. — A fee-farm rent is a rent-charge reserved on a grant in fee; the name is founded on the perpetuity of the rent or service, and not on the amount (*o*).

Rent-seck. — Rent-seck (redditus-siccus), or barren rent, is in effect nothing more than a rent reserved by deed or will, but *without any clause of distress;* and differs from a rent-charge only in being reserved without a clause of distress (*p*).

(*h*) Selby *v.* Greaves, L. R., 3 C. P. 594; 37 L. J., C. P. 251. And see Smith *v.* Egginton, 43 L. J., C. P. 140; L. R., 9 C. P. 145, 30 L. T. 521.

(*i*) Bac. Abr. Rent (A.); Smith L. & T. 112, 114 (2nd ed.).

(*k*) Co. Lit. 87 b; Gilb. Rents, 9.

(*l*) Laugher *v.* Humphrey, Cro. Eliz. 524.

(*m*) Smith L. & T. 112.

(*n*) Co. Lit. 143 b; Gilb. Rents, 17, 38; Bradbury *v.* Wright, 2 Doug. 628; Smith L. & T. 113, 116 (2nd ed.).

(*o*) Co. Lit. 143 b, n. (5); Governors of Christ's Hospital *v.* Harrild, 2 M. & G. 713, n.; Smith L. & T. 114 (2nd ed.).

(*p*) Gilb. Rents, 38.

A right to distrain for rent-seck, however, "as in the case of rents reserved upon lease," and also for rent of assize [*377] and *chief rents, is given by the statute 4 Geo. 2, c. 28, s. 5, which applies to all rents "duly answered or paid for the space of three years within the space of twenty years" before that session of parliament, "or should be thereafter created." The three years mentioned in this section need not be consecutive (*q*), and a fee-farm rent may be distrained for if brought within the section (*r*).

Rents of assize, chief-rents and quit-rents. — Rents of assize are the certain established rent of the freeholders and ancient copyholders of a manor, and which cannot be departed from: those of the freeholders are frequently called chief-rents, and both sorts are indifferently denominated quit-rents, because thereby the tenant goes quit and free of all other services (*s*). Payment of an unvaried rent for a long series of years to the lord of a manor is evidence only of a title to the rent (which is presumed to be a quit-rent), but not to the land in respect of which the rent is paid (*t*); but in Weller *v.* Stone (*u*), the payment of an "encroachment rent" of 4*s.* 10*d.* since 1811, the land having been dealt with as held in fee simple and built upon since 1805, was held to be evidence of a tenancy from year to year only, so that the plaintiff recovered the land in an action brought in 1878 upon a half-year's notice to quit; and it was further held that the defendant was not entitled to equitable relief on the ground of his predecessors having built to the knowledge of the predecessors of the plaintiff. For such relief to be grantable, the tenant must either be in possession under a mistaken belief of title, which the reversioner must have known of and stood by, or the tenant must have laid out money upon the faith of an expectation, created or encouraged by the reversioner, of a lease (*x*).

(*q*) Musgrave *v.* Emerson, 10 Q. B. 326.

(*r*) Id.; Bradbury *v.* Wright, 2 Dougl. 624.

(*s*) 2 Blac. Com. 41; Gilb. Rents, 38; Co. Lit. 144, Harg. n. (5).

(*t*) Doe *d.* Whittick *v.* Johnson, Gow, 173: here the rents had been 2*s.* and 4*s.* 3*d.* for thirty-nine years.

(*u*) 54 L. J. Ch. 497; 33 W. R. 42 (C. A.).

(*x*) Ramsden *v.* Dyson, L. R., 1 H. L. 129.

Peppercorn rent. — A peppercorn rent is a nominal rent not intended to be paid, but stipulated for on the view (which is not correct)[1] that the reservation of some rent is necessary to constitute a lease. It is most frequently found in building leases, in which it is usually reserved for the first few years of the term only, during which the houses to be built will be in course of erection only, and therefore not yet profitable to the lessee.

Rent having no money value. — The residue, if not less than 200 years, of a term (not liable to be determined by re-entry, or created by sub-demise) originally created for not less than 300 years, without any trust for the freeholder, and without any rent "or with merely a peppercorn rent or other rent having no money value" (*y*) may, under sect. 65 of the Conveyancing *Act, 1881, as amended by sect. [*378] 11 of the Conveyancing Act, 1882, be enlarged into a fee simple.

Rent barred by time. — The Statute of Limitations (see chap. xiii. s. 1) does not apply to rent reserved on a lease (*z*); but the provisions of the Conveyancing Acts above mentioned apply also to cases where a rent having money value has become barred by lapse of time.

Rack-rent. — Rack-rent is a rent of the full annual value of the tenement, or near it (*a*).

Fore-hand rents or fines. — A fine or premium given by the lessee to the lessor at the time of taking or renewing a lease is in the nature of a fore-hand rent, and has been considered as an improved rent (*b*). In the case of renewal of a lease by an ecclesiastical corporation, if an accident, which has not happened from their fault or that of the tenant, delay the lease, a new member coming in has his proportion of the fine (*b*).

(*y*) A rent so small as to be unsaleable, as a rent of 3*s*., has been held not to be within these words (*re* Smith and Scott, 31 W. R. 411); but a rent of "one silver penny if demanded" is clearly within them (*re* Chapman and Hobbs, 33 W. R. 703).

(*z*) Grant *v.* Ellis, 9 M. & W. 113.

(*a*) 2 Blac. Com. 42.

(*b*) Irish Society *v.* Needham, 1 T. R. 486; Southall *v.* Leadbetter, 3 T. R. 461; Wynne *v.* Bampton, 3 Atk. 473.

[1] See *ante*, note, "Rent," &c.

Rent payable in advance. — Sometimes rent is made payable from quarter to quarter or otherwise *in advance*. Such rent could not of course be recovered in advance in an action for use and occupation (*c*), but a distress may be made,[1] or an action maintained for such rent, as soon as it becomes payable, according to the terms of the demise (*d*). The reservation should be clearly expressed so as to make the rent payable from time to time in advance: otherwise it may perhaps be construed as applicable to the first quarter only (*e*). Thus where premises were let, "the yearly rent to be 110*l*., and to be payable in advance if the landlord required the same," nothing being said as to the days of payment; and after a quarter had expired the landlord demanded a quarter's rent only: it was held, that he was not entitled to distrain for the whole 110*l*. (*f*). But where it was a condition in the lease of a farm that the tenant should pay the last half-year's rent in advance, which last half-year's rent should be considered as reserved and due on the 29th September preceding, if the landlord should see cause for such demand; it was held, that the landlord was entitled to demand the last half-year's rent, and to distrain for it at any time between the 29th September and the expiration of the tenancy, without demand previous to the 29th September (*g*).

[*379] * SECT. 2. — *Reservations of Rent.*

(a) *Mode of Reservation.*

Reservation ought to be sufficiently certain. — The usual formal reddendum in a lease is not essential. Any expressions showing the intention of the parties that a rent shall

(*c*) Angell *v.* Randall, 16 L. T. 489.

(*d*) Jenner *v.* Clegg, 1 Moo. & R. 213; Lee *v.* Smith, 9 Exch. 662; Morton *v.* Woods, L. R., 3 Q. B. 658; 37 L. J., Q. B. 242; Smith L. & T. 218 (2nd ed.).

(*e*) Holland *v.* Palser, 2 Stark. R. 161; Hopkins *v.* Helmore, 8 A. & E. 463.

(*f*) Clarke *v.* Holford, 2 C. & K. 540.

(*g*) Witty *v.* Williams, 12 W. R. 755.

[1] See *post*, ch. 11, sec. 10, (a), note, "Distress; when may be made."

be payable will be a sufficient reservation (*h*). The reservation of rent, however, ought to be certain as to the amount and the time when payable (*i*); although if there be anything in the reservation by which the amount of the rent may be ascertained, this will be as good as if the sum itself were clearly specified, in accordance with the maxim *Id certum est quod certum reddi potest* (*k*). Thus in Daniel *v.* Gracie, the proprietor of a house, and of a marl pit and brick mine, demised the house by unwritten agreement to D. from a day named, and it was at the same time agreed between them, without writing, that D. should take the marl pit and the brick mine, and should pay quarterly, at the usual quarter days, 8*d. per solid yard* for all the marl that he got, and 1*s.* 8*d. per thousand* for all the bricks that he made. D. took the marl and made bricks accordingly, and paid the stipulated sums for a time; but they afterwards fell into arrear. It was held, that the agreement for the marl pit and brick mine was a demise of the land from year to year, at a rent capable of being ascertained with certainty, for which, consequently, the lessor might distrain (*l*).

Rent may commence before enjoyment. — Rent may be reserved to commence before the lessee is to enter upon the enjoyment of the land. Thus where a man made a lease of Blackacre to commence in futuro, and of Whiteacre to begin in præsenti, rendering rent payable at Michaelmas before the commencement of the term in Blackacre; it was held to be a reservation immediately; for it was but one entire rent, and as such was payable according to the reservation (*m*). A subsequent agreement may by relation operate to make a reservation of rent from the beginning (*n*).

From what rent must issue. — Properly speaking, a rent

(*h*) Gilb. Rents, 30, 33; Doe *d.* Rains *v.* Kneller, 4 C. & P. 3; Attoe *v.* Hemmings, 2 Bulstr. 281; cited 2 H. & C. 427.

(*i*) Parker *v.* Harris, 1 Salk. 262; 4 Mod. 79; Lit. s. 213; Gilb. Rents, 9.

(*k*) Orby *v.* Mohun, 2 Vern. 531, 542; 2 Freem. 291; 3 Bro. P. C. 248; Gilb. Eq. R. 45; Gilb. Rents, 9, 10; Co. Lit. 96 a, 142 a.

(*l*) Daniel *v.* Gracie, 6 Q. B. 145; and see Pollitt *v.* Forrest, 11 Q. B. 949; Bowers *v.* Nixon, 12 Q. B. 546; Edmonds *v.* Eastwood, 2 H. & N. 811, 826.

(*m*) Gilb. Rents, 25.

(*n*) M'Leish *v.* Tate, Cowp. 781.

can be reserved out of no inheritance but such as is manurable, as it is called, or upon which the lessor may enter to distrain (*o*); a lease of the vesture or herbage of the land reserving rent is good, because the lessor may come upon the land to distrain the lessee's beasts feeding thereon; but a reservation of grass, herbage, or other vesture of [*380] the land, would be bad, because * they are part of the thing demised (*p*). There is this difference between a reservation, which is always of a thing not in being, but newly created or reserved out of the land or tenement demised; and an exception, which is ever a part of the thing granted, and of a thing in being (*q*).

Where reservations are entire or several. — There is a difference between a rent reserved entire, upon a demise of several things in the same lease, and where the rent is not originally reserved entire, but the reservation is several and apportioned to the several things demised: for instance, if a lease be made of several houses, rendering the annual rent of 5*l.* at the two usual feasts — viz. for one house 3*l.*, for another 10*s.*, and for the rest of the houses the residue of the said rent of 5*l.* — with a clause of re-entry into all the houses for non-payment of any parcel of the rent: this is but one reservation of one entire rent; because all the houses were leased, and the 5*l.* was reserved as one entire rent for them all, and the "viz." afterwards does not alter the nature of the reservation, but only declares the value of each house (*r*). But if the lease had been of three houses, rendering for one house 3*l.*, for another 20*s.*, and for the third 10*s.*, with a condition to re-enter into all for the non-payment of any parcel; these are three several reservations, and in the nature of three distinct demises: and each house in this case is only chargeable with its own rent (*s*).

Demise void if part cannot be legally demised. — Where there is a demise of premises, and an entire rent reserved, if any part of the premises could not be legally demised, the

(*o*) Gilb. Rents, 20.
(*p*) Co. Lit. 47, 142 a; Gilb. Rents, 26.
(*q*) *Ante*, 161.
(*r*) Gilb. Rents, 34.
(*s*) Gilb. Rents, 35; Tanfield *v.* Rogers, Cro. Eliz. 341.

whole demise is void (*t*). But in an action for rent upon an indenture of demise, a plea of the defendant that prior to the making of the demise the plaintiff had demised two roods, part of the demised premises, to A., which demise to A. was still in force, whereby the defendant was kept out of possession of that part of the demised premises, was held no answer to the claim for the entire rent reserved. This was because the demise to the defendant, which was under seal, operated as a lease in possession of all that part of the lands of which the lessor had the possession at the time of the demise, and as a lease of the reversion, with the rent incident thereto, of that part of the lands of which the lessor had not the possession, and thereby conveyed to the defendant the whole interest in respect of which the entire rent was reserved (*u*).

Reservation on specified days. — In early times it was much the practice to reserve the rent payable on two alternate days, as on the usual feasts or days of payment, or within a certain number of days afterwards (*x*). But this being found * to be attended with serious inconven- [*381] iences (*y*), rent is now generally reserved on a day certain, with a proviso for re-entry on non-payment within a specified number of days after the day appointed.

Rent in advance. — If rent is intended to be paid in advance (*z*), the reservation should be clearly expressed.

Corn-rent. — A restriction occurs with regard to college leases, created by statute 18 Eliz. c. 6 (*a*), by which it is directed that one-third of the old rent then paid should for the future be reserved in wheat or malt, reserving a quarter of wheat for each 6*s.* 8*d.*, or a quarter of malt for every 5*s.*, or that the lessees should pay the same according to the price that wheat and malt should be sold for in the market next adjoining to the respective colleges, on the market day before the rent becomes due. This sagacious plan is said to

(*t*) Doe *d.* Griffith *v.* Lloyd, 3 Esp. 78.

(*u*) Eccl. Commrs. of Ireland *v.* O'Connor, 9 Ir. Com. L. R. 242.

(*x*) Anon., 2 Show. 77.

(*y*) Gilb. Rents, 52, 53; Clun's case, 10 Co. R. 127; Biggin *v.* Bridge, 3 Keb. 534.

(*z*) See the cases *ante*, 378.

(*a*) This statute is specially exempted from the operation of 39 & 40 Geo. 3, c. 41, by sect. 7 of that act.

have been the invention of Lord Treasurer Burleigh and Sir Thomas Smith, then principal Secretary of State; who, observing how greatly the value of money had sunk, and the price of all provisions risen, by the quantity of bullion imported from the newly-found America, devised this method for upholding the revenues of colleges. Their foresight and penetration have in this respect been very apparent. The corn-rent has made the old rent approach in some degree nearer to its present value; otherwise it would seem that the principal advantage of a corn-rent is to secure the lessor from the effect of a sudden scarcity of corn (*b*). If the reservation be of corn — as in the case of a hospital renewed lease, where the reddendum was "so many quarters of corn" — it will be understood to mean legal quarters, reckoning the bushel at eight gallons (*c*). A reservation of eight bushels of grain in lieu of one quarter is good, because it is all one in quality, value and nature (*d*).

Computation of rent by average price of corn. — In a lease of land for twenty-one years from the 25th of March, 1848, it was covenanted that the lessee should pay a stipulated sum for the first year, with a proviso that the rent for each subsequent year of the term should be reduced or increased according to the "average price of wheat in any one year of the said term," such average "to be taken and ascertained from the then current year's averages, which were taken in the month of January in every year under and by virtue of the Tithe Commutation Act (6 & 7 Will. 4, c. 71), s. 56," which is the result of the sales "during seven years ending on the Thursday next before Christmas-day then next preceding." It was held, that the rent might be computed according to such septennial average so published in each year (*e*).

[*382] * (b) *Construction of Reservations.*

Generally. — Where there are special days of payment mentioned in the reddendum, the rent ought to be computed

(*b*) 2 Blac. Com. 322.
(*c*) Master, &c. of St. Cross *d.* Ld. Howard *v.* Walden, 6 T. R. 338.
(*d*) Mountjoy's case, 5 Co. R. 3 b; Sug. Pow. 797.
(*e*) Kendall *v.* Baker, 11 C. B. 842.

according to the reddendum and not according to the habendum (*f*); but where the reservation is general, as half-yearly or quarterly, and no special days are mentioned, there the half-year or quarter must be computed according to the habendum (*g*). If a man make a lease the first day of May, reserving rent payable quarterly, this means quarterly from the making of the lease: for if the beginning of the quarter should be construed to be any other day than the date of the lease, the lessor would lose the profits of his land for some time, and consequently not have quarterly payment made during the continuance of the lease (*h*). Where rent was to be payable by a parol demise from the Lady-day following, evidence of the custom of the country was admitted to show that by "Lady-day," "Old Lady-day" was intended (*i*).

A *net* rent is a sum to be paid to the landlord clear of all deductions, so as to include, for instance, land tax and sewers rate (*k*).

Mining leases. — Where a lessee of a colliery covenanted to pay as rent "one-third part of the money that should arise, be made, received or produced from the sale of the coals;" and also covenanted to keep "true accounts of all coal daily raised, and to make and deliver true copies thereof;" it was held, that the rent was to be calculated on the amount of coals sold, not on the amount of money actually received for them (*l*).

Dead rent. — Mining leases frequently stipulate for two rents; first, a dead rent, i.e. a rent payable whether the mines be worked or not; and secondly, a royalty upon the minerals raised. In one case the demise was of all right and interest in coals and other minerals in a certain estate,

(*f*) As to discrepancy between the habendum and reddendum with respect to the length of the term, see Burchell *v.* Clark, 46 L. J. 115 (C. A.), and 145, *ante*.

(*g*) Tomkins *v.* Pinsent, 2 Ld. Raym. 819; 1 Salk. 141; 7 Mod. 96.

(*h*) Gilb. Rents, 50; 2 Roll. Abr. 449, 450.

(*i*) Doe *d.* Hall *v.* Benson, 4 B. & A. 588; Denn *v.* Hopkinson, 3 D. & R. 507; Smith *v.* Walton, 8 Bing. 235; but see Hogg *v.* Norris, 2 F. & F. 246.

(*k*) Bennett *v.* Womack, 7 B. & C. 627; 3 C. & P. 96.

(*l*) Edwards *v.* Rees, 7 C. & P. 340.

Michaelmas following, before which time the lease would have expired (*u*). By indenture dated 21st March, a messuage was demised from 25th March then instant, for seven years wanting seven days, paying therefor yearly and every year during the term the yearly rent of 285*l.* by four equal quarterly payments on the 25th of March, 24th June, 29th September, and 25th December, in every year commencing from the said 25th March then instant; it was held, that this was either a covenant to pay a before-hand rent, whereby all the payments would become due within the term, or else that, by virtue of the words yearly and every year, the lessee would be liable for the last quarter's rent on a day after the expiration of the term (*x*). Where, by agreement, dated 8th September, a house was let for seven years at an annual rent payable quarterly, the *first payment* to be made on the 25th March following, it was held that only a quarter's rent became due on the 25th March, and that in effect the payment for the first quarter was postponed until after the end of the term (*y*).

"Gale." — Each periodical payment of rent is termed a "gale," from "*gavel*," a rent or duty, and each "gale" is a distinct debt (*z*).

"Team work." — In a lease of a farm, the clause "the tenant to perform each year for the landlord at the rate of one day's team work with two horses and one proper person for every 50*l.* of rent when required (except at hay and corn harvest), without being paid for the same," extends to other than agricultural work, such as hauling coals; but it does not oblige the tenant to find a cart, plough or other vehicle or machine necessary for the performance of the work (*a*).

(c) *To whom Rent reserved.*

Must be to lessor himself. — Rent must be reserved to the lessor himself, and not to a stranger, for it is something

(*u*) Gilb. Rents, 49, 51; Hill *v.* Grange, Plow. 171.

(*x*) Hopkins *v.* Helmore, 8 A. & E. 463.

(*y*) Hutchins *v.* Scott, 2 M. & W. 809.

(*z*) Welby *v.* Phillips, 2 Vern. 129.

(*a*) Duke of Marlborough *v.* Osborn, 5 B. & S. 67; 33 L. J., Q. B. 148.

paid by way of retribution or compensation for
* the land, and ought to be made to him from whom [*385]
the land passes: only the crown can make a reservation of rent to a stranger (*b*). If A., and B., his son, by lease reciting that B. is the heir apparent of A., let for years to commence after the death of A., rendering rent to B., it will be void; for a reservation to him by his proper name, and not to him as heir, is the same as if it were to a stranger (*c*). Where by a lease rent was reserved to a person *not a party* to the lease, and the lessees covenanted with him and the lessors to pay rent, &c., it was held, that he could not join with the lessors in an action of covenant for non-payment of the rent (*d*). Where there is any doubt as to the person to whom the reservation should be made, the clearest and safest way is to reserve the rent *generally*, *during the term* (*without saying to whom*), and leave it to be distributed by the law in the mode pointed out in Whitlock's case (*e*): for if the reservation of rent be general, the law directs it to be paid according to the intent and the nature of the thing demised. In such case the rent goes to the person who would have succeeded in the estate if the lease had not been made (*f*).

Effect of inaccuracies as to parties. — As rent is intended by law to follow the reversion, inaccuracies of expression, by which the reservation is made to other persons than the reversioner, have not the effect of severing it from the reversion: thus, if the reservation be made to the owner in fee, "his heirs, executors or assigns," the word "executors" will be rejected, and the rent will go with the reversion and belong to the heirs (*g*). In any case (except under a power) it is safe to make the reservation to the lessor, "his heirs, executors, administrators and assigns" (*h*). If a lessee for a

(*b*) Lit. s. 346; Co. Lit. 47 b; Id. 143 b; Gilb. Rents, 54.

(*c*) Com. Dig. tit. Rent (B. 5); Oates *v.* Frith, Hob. 130; Co. Lit. 47, 143 b; Sacheverell *v.* Froggat, 1 Ventr. 161; 2 Saund. 370; Gilb. Rents, 59.

(*d*) Ld. Southampton *v.* Brown, 6 B. & C. 718.

(*e*) 8 Co. R. 70, 141.

(*f*) Gilb. Rents, 64, 71.

(*g*) Id. 61; Cro. Car. 207; Co. Lit. 47 a; 1 Wms. Exors. 768 (6th ed.).

(*h*) Dollen *v.* Batt, 4 C. B., N. S. 768; Whittome *v.* Lamb, 12 M. & W. 813.

term of years makes a lease for a less term of years, rendering rent to him "and his heirs during the term," it will go to his executors (*i*); but it seems to be otherwise when the words "during the term" are omitted (*k*). If a tenant in tail demise for years, rendering rent to himself and his heirs, this goes to the heir in tail (*l*), and not to the general heir. So if a tenant in tail to him and the heirs male of the body of his father, lets the land, rendering rent to him, "his heirs and assigns," the rent will go to the heir male of the body of his father, though he be not heir to the lessor (*m*).

[*386] * **Reservation by tenant for life.** — If a tenant for life, having a power, demise, rendering rent to himself, his heirs and assigns, "it shall be adjudged to him in remainder" (*n*).

Reservation by tenant in fee to himself simpliciter. — It appears that a simple reservation of rent to the lessor only, not mentioning his heirs, is good for the life of the lessor only (*o*); but that a reservation to the lessor or his heirs *during the term* is good for the whole of the term (*p*). Where the words "during the term" are omitted, and the reservation be either to the lessor *or* his executors or assigns (*q*), or to the lessor *or* his assigns (*r*), the reservation is good for the life of the lessor only.

(d) *Sums in Gross, quasi Rent.*

Where sum reserved not rent. — A reservation of an annual sum of money to a third person in consideration of a demise, may be good by way of contract, though it is not a sufficient reservation of rent, but the grantee cannot distrain for it, because he has not the reversion (*s*). If a lessee simply cov-

(*i*) Gilb. Rents, 66; 1 Ventr. 162; 2 Wms. Saund. 371, n. (7).

(*k*) Gilb. Rents, 66; 1 Ventr. 161.

(*l*) Com. Dig. tit. Rent (B. 5); Sacheverell *v.* Froggat, 1 Ventr. 161; 2 Wms. Saund. 371, n. (7); Sir T. Raym. 213.

(*m*) Cother *v.* Merrick, Hardr. 91, 95; Gilb. Rents, 70.

(*n*) Whitlock's case, 8 Co. R. 70 b; Gilb. Rents, 70; 2 Wms. Saund. 371, n. (7); Greenaway *v.* Hart, 14 C. B. 340.

(*o*) Co. Lit. 47 a.

(*p*) Sacheverell *v.* Froggat, 1 Ventr. 161.

(*q*) Gilb. Rents, 62.

(*r*) Id. 65.

(*s*) Oates *v.* Frith, Hob. 130.

enant to pay such a sum yearly, without mentioning it as a consideration of the demise of the premises, it is not a rent, properly so called, but a sum in gross (*t*). So under a contract for a building lease, where sums in the nature of rent are from time to time to be paid before the lease is granted, such payments are sums in gross, and not rent (*u*). Where a landlord who had demised premises for a term of years at a certain rent, afterwards agreed to enlarge the buildings, the lessees agreeing to pay 10*l.* per cent. additional on the outlay; it was held, that this was a collateral agreement, and not a contract running with the land (*x*). So where a sum of money is made payable for goodwill, over and above the rent, this additional sum, though payable annually, is not to be considered as rent, but only as a sum in gross (*t*). Where a lease reserved a rent of 40*l.* per annum, and at the end of it, the words "the allowance of the road to the Six Bells' Yard to be made as usual" were added, and it appeared that it had been usual for the landlord to allow a payment of 5*l.* annually, which the lessee paid to a third person for the use of a road, it was held, that the clause in question was a mere covenant, and not an alteration of the rent, so as to support a plea of non tenuit in replevin (*y*).

* (e) *In Lease of Settled Land.* [*387]

General restrictions in powers. — The power of leasing commonly introduced into settlements of estates in England requires the best rent to be reserved, and expressly prohibits the taking of a fine (*z*). Formerly these powers required the ancient or usual rent (*a*) to be reserved, but at the present day this practice is very properly exploded (*b*). and the Settled Land Act, to which reference at length has

(*t*) Smith *v.* Mapleback, 1 T. R. 441.

(*u*) Howlett *v.* Tarte, 10 C. B., N. S. 813; 31 L. J., C. P. 146; Marquis Camden *v.* Batterbury, 7 C. B., N. S. 864.

(*x*) Lambert *v.* Norris, 2 M. & W. 333; Hoby *v.* Roebuck, 7 Taunt. 157; Donellan *v.* Read, 3 B. & Ad. 899.

(*y*) Davies *v.* Stacey, 12 A. & E. 506.

(*z*) Sug. Pow. 779 (8th ed.).

(*a*) For construction of these terms see Sug. Pow. 790, citing Right *v.* Thomas, 1 W. Blac. 446, and other cases.

(*b*) Id. 790.

already been made (*c*), expressly requires the best rent to be reserved that can reasonably be obtained.

Power to allow for improvements. — In two cases, however, the best rent need not of necessity be reserved. Where the holding is agricultural, and the tenant has made or paid for improvements thereon, the 43rd section of the Agricultural Holdings Act, 1883, provides that it shall not be necessary, in estimating the rent, to take into account against the tenant the increase in value arising from the improvements; and where a lease is made of land for the purpose of erecting thereon dwellings for the working classes, the 11th section of the Housing of the Working Classes Act, 1885, provides that the lease may be "for such rent as having regard to the said purpose, and to all the circumstances of the case, is the best that can be reasonably obtained, notwithstanding that a higher rent might have been obtained if the land were leased for another purpose."

What a sufficient execution of a power. — Where a lease is made under a leasing power, it must clearly appear by the instrument that the proper rent has been reserved (*d*); and although generally the lease must specify the rent reserved, yet in some cases the reservation may be made in the terms of the power generally (*e*), for, *Id certum est quod certum reddi potest.*

To whom reservation made. — Although at common law rent can be reserved only to the lessor and his heirs who are privies in blood, and not to any who is privy in estate — as to him in reversion, remainder, &c. (*f*) — yet in the case of powers the reservation to a tenant for life and his heirs is good, and enures as rent to the remainderman, who may distrain for it (*g*). But where the lease did not recite the power, and was made by a tenant for life in remainder after a term of 500 years, and reserved the rent to him, his heirs

(*c*) *Ante*, Ch. I., Sect. 4.

(*d*) Ker *v.* Duke of Roxburgh, 2 Dow, 149; Sug. Pow. 792, pl. 35; Id. 802.

(*e*) Powell on Powers, 555; Orby *v.* Mohun, 3 Ch. Rep. 56; Lewson *v.* Pigot, cited 3 Ch. Rep. 61; Sug. Pow. 801.

(*f*) *Ante*, 384.

(*g*) Anon., Anderson, 278; Powell on Powers, 572–574.

and assigns, it was decided to be void, the rent not being made incident to the immediate reversion (*h*).

The whole rent must be payable annually during the whole term, for the design of the donor is not answered unless a continual revenue * be yearly payable by com- [*388] pulsion of law, and not in expectancy or in futuro (*i*); but under a power to make leases reserving the ancient yearly rent annually, if it were reserved upon a day before the year was up — as if the year ended at Christmas, and it was reserved at Michaelmas, it would be sufficiently in pursuance of the power (*k*).

Construction of "best rent." — Whether the "best rent" is reserved is a question of fact to be decided by a jury (*l*). Improvements by the tenant, however valuable, will not authorize a lease at an undervalue (*m*), unless the holding be agricultural (*n*). Where a testator gave lands to trustees upon certain trusts, with a power to lease for the best yearly rent without fine or foregift; it was held that a lease for a fixed rent, with a proviso that the first five years' rent should be paid in advance, was not warranted by the power (*o*). A lease from 11th of October, making the rent payable by half-yearly payments on the 6th of April and the 11th of October, except the last half-year's rent, which was made payable on the 1st of August before the end of the term, was held good, as being more likely to benefit than to prejudice the remainderman (*p*). Under a power to grant leases for twenty-one years, "so as upon every such lease there shall be reserved the best improved rent that can reasonably be had for the same," a lease by a tenant for life, reserving a larger rent than had been paid to the devisor, but not the best rent which could have been fairly obtained, though there

(*h*) Yellowly *v.* Gower, 11 Exch. 274, 291; Bailey *v.* Tennant, 11 Exch. 776.

(*i*) Taylor *d.* Atkyns *v.* Horde, 1 Burr. 121; 2 Smith L. C. 495 (6th ed.).

(*k*) Reg. *v.* Weston, 2 Ld. Raym. 1198.

(*l*) Wright *v.* Smith, 5 Esp. 203; see also Doe *d.* Griffith *v.* Lloyd, 3 Esp. 78; Doe *d.* Sutton *v.* Harvey, 1 B. & C. 426.

(*m*) Roe *v.* Archbp. of York, 6 East, 86.

(*n*) *Ante*, 387.

(*o*) Booth *v.* A'Beckett, 1 Moo. P. C. C. (N. S.) 201; 9 L. T., N. S. 68.

(*p*) Rutland *d.* Doe *v.* Wythe, 2 M. & W. 661; 12 Id. 355; 10 Cl. & F. 419.

was no fraud or collusion, was determined to be void (*r*). It would seem that the best rent means the best rack-rent that can reasonably be required by the landlord, taking all the requisites of a good tenant for the permanent benefit of the estate into the account (*s*). A lease at 43*l.* a year, granted under a power directing the best rent to be reserved, cannot be impeached merely by showing that the lessor rejected at the time two specific offers, one at 50*l.* and another of from 50*l.* to 60*l.* from other tenants, though the responsibility of such other tenants could not be disproved; for in the exercise of such a power, where fairly intended, and no fine or other collateral consideration is received, or injurious partiality plainly manifested by the lessor, all other requisites of a good tenant are to be regarded as well as the mere amount of the rent offered, unless something extravagantly wrong in the bargain for rent be shown (*s*). In Doe *v.* Harvey a power was reserved to grant leases for a term not exceeding seven years, "so as there was reserved in such leases the best rent that could be gotten for the same, without [*389] * taking any premium for the making thereof." The donee of the power granted a lease for seven years at a specified rent, which lease contained a covenant by the lessee to find board, lodging and wearing apparel, during the term, for three children of the donee (if they wished it), at 7*l.* a year each, and for the donee's son gratis. It was held by Parke and Patteson, JJ., that (assuming the power to require two conditions, first, that the rent reserved should be the best rent, and secondly, that there should be no fine or premium) it did not clearly appear on the face of the lease that either of those conditions had been broken, because the covenant to maintain the children was not necessarily beneficial to the lessor, and, therefore, parol evidence was admissible to show that the rent reserved was the best that could be obtained (*t*). The best rent must be reserved during the whole term, so as not to prejudice any remainderman or

(*r*) Wright *v.* Smith, 5 Esp. 203; 5 Dow, 344; Sng. Pow. 780 (8th ed.).

(*s*) Doe *d.* Lawton *v.* Radcliffe, 10 East, 278; Dyas *v.* Cruise, 2 Jon. & Lat. 460.

(*t*) Doe *d.* Rogers *v.* Rogers, 5 B. & Ad. 755 (diss. Taunton, J.).

reversioner (*u*); nor even the tenant for life who demises (*x*).

As to fines or premiums. — A tenant for life under a settlement with power to lease at the "usual rent," may demise upon reserving the usual fines and rent, where the usual profit had previously been made by fines (*y*). Where there was a devise to the use of H. I. for life without impeachment of waste, &c., remainder to the use of plaintiff for life, with power to make leases for two or three lives, &c., or for the term of twenty-one years, so as there be reserved the best rent, without taking any sum or sums of money or other thing, for or in lieu of a fine; and H. I., by indenture of 15th October, leased for fourteen years, to be computed as to the meadow land from 13th February, the pasture from 25th March, and the messuage from 12th May previously, under a yearly rent, payable to the lessor and such other person as should be entitled to the freehold and inheritance, half-yearly, on the 11th November, and 25th March, the first payment to be made on 11th November next ensuing; and the lessee covenanted with the lessor, his heirs and assigns, for payment to the lessor and such other person, &c., of the rent at the days and times, &c.: it was held, that the reservation of the first half-year's rent, payable at the end of twenty-seven days, was not taking a sum of money for a fine, being in consideration of a preceding occupation (*z*). Where a power was given to a tenant for life to make leases, with or without a fine, at such rent as he thought proper; it was held, that a lease, without any reservation of rent whatever, was good (*a*).

* **Effect of improvement.** — Where a tenant for life [*390] entered and built a new house upon the land, and then made a lease for twenty-one years, reserving only the

(*u*) Doe *d.* Sutton *v.* Harvey, 1 B. & C. 426.

(*x*) Mountjoy's case, 5 Co. R. 6 a, b; Sug. Pow. 792. Where the rent is reserved at a future day by mistake, see Marquis of Donegal *v.* Grey, 13 Ir. Eq. R. 12, 52, 53.

(*y*) Right *d.* Bassett *v.* Thomas, 3 Burr. 1446; Doe *d.* Newnham *v.* Creed, 4 M. & S. 371.

(*z*) Isherwood *v.* Oldknow, 3 M. & S. 382; Sug. Pow. 792 (8th ed.).

(*a*) Talbot *v.* Tipper, Skin. 427; Sug. Pow. 433; *In re* Molton, 2 Ir. Com. L. R. 64; Clarke *v.* Smith, 9 Cl. & F. 126.

ancient rent, &c., the court would not suffer an objection to it to be argued (*b*).

Sect. 3. — *Penalty or Liquidated Damages.*

Penalty in leases, &c. — Sometimes the payment of rent and performance of covenants in a lease or agreement for a lease are secured by a bond or penalty, with or without sureties (*c*). The right to such penalty will pass with the reversion as an incident thereto, and may be enforced against an assignee of the term (*d*). If there be a penalty to secure the payment of rent, the lessor must demand the rent at the day fixed for the payment of it (*e*). It seems that such penalty, like any other forfeiture, may be waived by acceptance of the rent (*f*).

Action for the penalty. — Whenever a breach first occurs, for which an action is necessary, the lessor may sue either for the penalty or for general damages (*g*). Where he elects to sue for the penalty he must allege (inter alia) that the penalty has not been paid: otherwise there will be no sufficient breach, and only general damages can be recovered (*h*). The judgment will be for the penalty with costs: but execution may issue only for the damages as assessed by the jury and all costs (*i*). Such judgment will afterwards stand as a security for further breaches, which may be suggested from time to time when necessary (*k*).

Action for damages. — After obtaining judgment for the penalty the plaintiff cannot bring a fresh action for damages

(*b*) Read and Nash's case, 1 Leon. 147; Sug. Pow. 799.

(*c*) Andrews *v.* Wood, Cro. Eliz. 332; Chapman *v.* Chapman, Cro. Car. 76; Stancliffe, app., Clarke, resp., 7 Exch. 439; 21 L. J., Ex. 129.

(*d*) Co. Lit. 61 b, 126; Budloss *v.* Phillips, Cro. Eliz. 895; Thynn *v.* Cholmley, Cro. Eliz. 383; Egerton *v.* Sheafe, Lutw. 1151; Gilb. Rents, 143.

(*e*) Bac. Abr. tit. Condition (O. 2); Id. tit. Rent (I.); Grantham *v.* Thornborough, Hob. 82, 133; Gilb. Rents, 74, 141; but see Thynn *v.* Cholmley, Cro. Eliz. 383.

(*f*) Doe *d.* Cheeny *v.* Batten, Cowp. 247.

(*g*) Iveley *v.* Grew, 6 N. & M. 467.

(*h*) Hurst *v.* Hurst, 4 Exch. 571; 5 Exch. 203; Reindell *v.* Schell, 4 C. B., N. S. 97.

(*i*) 1 Chit. Arch. 602 (11th ed.); 2 Id. 1002; Chit. Forms, 256, 702 (9th ed.).

(*k*) Astley *v.* Weldon, 2 Bos. & P. 353; Lowe *v.* Peers, 4 Burr. 2228.

in respect of subsequent breaches, but must suggest them as above mentioned. On the other hand, if the lessor (or his assigns) elect to sue for damages for any breach, he cannot afterwards maintain an action for the penalty, but he may recover damages *toties quoties* to a greater amount than the penalty (*l*). Only such damages as the jury shall find that the plaintiff has actually sustained by the alleged breaches can be recovered (*m*).

* **Liquidated damages.** — "Liquidated damages" are [*391] sums agreed to be paid, and *intended to be actually paid* (*n*), for the breach of any particular covenant or stipulation. Thus, where a tenant covenants or agrees not to plough up any of the ancient meadow or pasture ground, and that if he does so, he will pay an additional yearly rent of 5*l.* per acre; or that he will pay an additional specified rent per acre, and so in proportion, for every acre had in tillage beyond a certain quantity (*o*); or that he will not sow more than seventy acres with clover in one year, or if he does so, will pay an additional rent of 10*l.* for every acre above seventy for the residue of the term (*p*); or if the lease contain a stipulation that for every acre, and so in proportion for a less quantity, which the lessee should suffer to be occupied by any other person, without the consent of the landlord, an additional rent shall be paid (*q*); in these and similar cases the additional sums reserved become recoverable, when once the particular stipulation is broken, for the remainder of the term. Where a tenant held under a demise upon the terms not to sell any hay produced on the demised premises, off the said premises, "under the penalty of 2*s.* 6*d.* for each yard of the said hay so sold as aforesaid, to be recovered by distress as for rent in arrear:" it was held, that

(*l*) Lowe *v.* Peers, 4 Burr. 2228; Winter *v.* Trimmer, 1 W. Blac. 395; Harrison *v.* Wright, 13 East, 343; Mercer *v.* Irving, E., B. & E. 563; 6 W. R. 661.

(*m*) See Kemble *v.* Farren, 6 Bing. 141.

(*n*) Dimich *v.* Corlett, 12 Moore, P. C. C. 199.

(*o*) Rolfe *v.* Peterson, 2 Bro. P. C. 436; Bowers *v.* Nixon, 12 Q. B. 546, 558; Denton *v.* Richmond, 1 Cr. & M. 734; Birch *v.* Stephenson, 3 Taunt. 469; Howell *v.* Richards, 11 East, 633; Farrant *v.* Olmius, 3 B. & A. 692.

(*p*) Jones *v.* Green, 3 Y. & J. 298.

(*q*) Greenslade *v.* Tapscott, 1 C., M. & R. 55 (user of small portions of land for raising potato crop).

although this was not strictly a rent, it was not a penalty, but an agreed sum recoverable by distress as for rent (*r*).

Injunction. — Where an increased rent is reserved by way of liquidated damages, an injunction will not be granted to restrain the lessee from committing the breach of covenant in respect of which the increased rent becomes payable (*s*), but where there was a covenant by a lessor not to carry on the business of a saddler within ten miles of the demised premises, and to pay 100*l.* by way of liquidated damages if he did, an injunction was granted (*t*).

Difference between penalty and liquidated damages. — The difference between a penalty and liquidated damages is very great. Although judgment may be obtained, execution cannot issue to levy the amount of a penalty, but only the damages assessed by the jury, with costs; and the judgment will stand as a security for any subsequent breaches (*u*). But liquidated damages constitute a debt of fixed amount, which may be recovered upon proof of the contract and breach, without any evidence as to the amount of damages actually sustained (*x*). In such case the jury is bound to [*392] give their * verdict for the whole sum stipulated to be paid (however disproportionably large), and not for what they find to be the actual amount of damage sustained: otherwise the court will set aside the verdict, and grant a new trial (*y*). But the court will not set aside the award of an arbitrator on this ground, unless the mistake appear on the face of his award (*z*). Increased rent, being in the nature of liquidated damages, may be distrained for (*a*), but a penalty cannot.

How distinguished. — Notwithstanding the important differ-

(*r*) Pollitt *v.* Forrest, 11 Q. B. 949; 1 C. & K. 560.

(*s*) Woodward *v.* Giles, 2 Vern. 119.

(*t*) Jones *v.* Heavens, L. R., 4 Ch. D. 636; 25 W. R. 355.

(*u*) *Ante*, note (*q*).

(*x*) Astley *v.* Weldon, 2 Bos. & P. 351; Rolfe *v.* Peterson, 2 Bro. P. C. 436; Green *v.* Price, 13 M. & W. 695; 16 Id. 346; Galsworthy *v.* Strutt, 1 Exch. 659; Atkyns *v.* Kinnier, 4 Exch. 776; Sainter *v.* Ferguson, 7 C. B. 716; Reynolds *v.* Bridge, 6 E. & B. 528; Mercer *v.* Irving, E., B. & E. 563.

(*y*) Farrant *v.* Olmius, 3 B. & A. 692; Mercer *v.* Irving, E., B. & E. 563; Fletcher *v.* Dyche, 2 T. R. 37.

(*z*) Fuller *v.* Fenwick, 3 C. B. 705.

(*a*) Pollitt *v.* Forrest, 11 Q. B. 449; Bowers *v.* Nixon, 12 Q. B. 546, 558.

ences between a penalty and liquidated damages, it is sometimes difficult to distinguish them: the numerous cases upon this point are somewhat conflicting. If expressly called a "penalty" in the contract, that is not conclusive (*b*); but if *pleaded* as a penalty, that is conclusive against the party so pleading (*c*). On the other hand, if expressly declared in the contract to be "liquidated and ascertained damages, and not a penalty or penal sum or in the nature thereof," it may be held to be a mere penalty (*d*). It not unfrequently happens that the same sum is called both a penalty and liquidated damages in the same sentence; or it is stated to be a penalty or forfeiture to be recovered as liquidated damages (*e*). There is no magic in words. A penalty is a penalty, although called liquidated damages, "the mere alteration of the term cannot alter the nature of the thing" (*f*). The courts are therefore bound, in compliance with the established rules of construction, to collect the meaning of a writing and *the real intention of the parties*, not from any single word or particular expression, but from the whole scope and tenor of the instrument (*g*). If it contains various stipulations for the performance or observance of several things of more or less importance to the parties, and the breach of any one of which gives rise to a *definite amount of damage*, and one large sum is stated at the end to be paid upon *any* omission, neglect or default, such sum must be considered as a penalty (*h*). But it is otherwise where the damage sustained is of an unliquidated nature, and *not of definite amount:* in such cases the full stipulated sum (however large and disproportionate) * may gener- [*393]

(*b*) Sainter *v.* Ferguson, 7 C. B. 716; Hurst *v.* Hurst, 4 Exch. 571; 5 Id. 203; Legge *v.* Horloch, 12 Q. B. 1015; Crux *v.* Aldred, 14 W. R. 656, C. P.

(*c*) Pollitt *v.* Forrest, 11 Q. B. 949, 966.

(*d*) Kemble *v.* Farren, 6 Bing. 141.

(*e*) Davies *v.* Penton, 6 B. & C. 216; Crisdee *v.* Bolton, 3 C. & P. 240; 8 Moo. 252; Horner *v.* Graves, 7 Bing. 735; Boys *v.* Ancell, 5 Bing. N. C. 390; Legge *v.* Horlock, 12 Q. B. 1015.

(*f*) Davies *v* Penton, 6 B. & C. 216; Kemble *v.* Farren, 6 Bing. 141; Horner *v.* Flintoff, 9 M. & W. 678.

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ally be recovered (*i*). The law on the question of penalty or liquidated damages may now be considered, after a great number of decisions, not, perhaps, all of them strictly reconcilable with each other, to be at length satisfactorily settled: and the hinge on which the decision in every particular case turns is *the intention of the parties*, to be collected from the language they have used. The mere use of the term "penalty," or the term "liquidated damages," does not determine that intention; but, like any other question of construction, it is to be determined by the nature of the provisions and the language of the whole instrument. One circumstance, however, is of great importance towards arriving at a conclusion; if the instrument contains many stipulations of varying importance, or relating to objects of small value *calculable in money*, there is the strongest ground for supposing that a stipulation, applying generally to a breach of all or any of them, was intended to be a penalty, and not in the way of liquidated damages (*k*).

Forfeiture of a deposit. —Where a deposit is made to secure the due performance of a written contract, and it is to be *forfeited* in case of any breach, such forfeiture may be enforced, and is not considered as a penalty (*l*); or, instead thereof, the amount of damage actually sustained may be recovered (*m*).

Increased rent for tillage. — Where there is a reservation of 5*l.* per acre during the last twenty years of a term, for every acre of meadow which the tenant shall plough, or convert into tillage during the said last twenty years of the term, and so after that rate for any greater or less quantity than an acre, or less time than a year, it is considered that the rent is due in the last twenty years, if the land is then ploughed, whether it was first ploughed within the last twenty years, or before; and the rent continues payable during the twenty years, though the land be again laid down to permanent grass (*n*). The right to additional rent for

(*i*) *Ante*, 392, note (*y*).
(*k*) *Ante*, 392, note (*y*).
(*l*) Hinton *v.* Sparkes, L. R., 3 C. P. 161; 37 L. J., C. P. 81.
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over tillage is not waived by the acceptance of the reserved rent with a knowledge of the breach (*o*).

Increased rent in publican's lease for not taking lessor's beer. — The provision sometimes inserted in a publican's lease, that the lessee shall take all his beer from the lessor, or else pay an advanced rent, has been much censured by the courts; and, at all events, such a covenant is subject to an implied condition, and cannot be enforced unless the lessee be supplied with good beer (*p*).

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* Sect. 4. — *When Rent is due.* [*394]

Rent is due in morning, must be demanded at sunset, is in arrear after midnight. — The rules of the common law with respect to the time when rent is due, and when it must be demanded, are very curious and precise.[1] It seems that rent is *due* in the morning of the day appointed for payment, but it is not *in arrear* until after midnight (*q*).

Just before and at sunset is the time appointed by law to make a proper demand of it (*r*), to take advantage of a condition of re-entry;[2] the demand should be made such time before sunset as to allow sufficient light to count the

(*o*) Denton *v.* Richmond, 1 C. & M. 734.

(*p*) Cooper *v.* Twibill, 3 Camp. 286; Holcombe *v.* Hewson, 2 Camp. 391; Stancliffe, app., Clarke, resp., 7 Exch. 439; 21 L. J., Ex. 129.

(*q*) Dibble *v.* Bowater, 2 E. & B. 564; Cutting *v.* Derby, 2 W. Blac. 1077; Leftley *v.* Mills, 4 T. R. 473; Bac. Abr. tit. Rent (H.).

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[1] **Rent: when due.** — In lease for year (in absence of different express or implied agreement), it is payable at end of year. Manough's Appeal, 5 W. & S. (Pa.) 432. In lease from year to year, it is payable at end of each year, Duryee *v.* Turner, 20 Mo. App. 34; Ridgley *v.* Stillwell, 27 Mo. 128, 134; likewise in lease for years, Boyd *v.* McCombs, 4 Pa. St. 146.

Rent is not payable (ordinarily) until use and occupation has been enjoyed, Bordman *v.* Osborn, 23 Pick. (Mass.) 295, 299; Wood *v.* Partridge, 11 Mass. 488, and the entire rent period has expired, English *v.* Key, 39 Ala. 113, 116, 117.

[2] Johnston *v.* Hargrove, 81 Va. 118; Connor *v.* Bradley, 1 How. 211, 217; Jackson *v.* Harrison, 17 Johns. (N. Y.) 66, 71; Remsen *v.* Conklin, 18 Id. 447, 450 (*per* Spencer, Ch. J.); Van Rensselaer *v.* Jewett, 2 N. Y. 141; Smith *v.* Whitbeck, 13 Ohio St. 471; Chipman *v.* Emeric, 3 Cal. 283; Gaskill *v.* Trainer, Id. 334; Gage *v.* Bates, 40 Id. 384.

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money (*s*); the person making the demand must remain on the land till the sun has set; and the demand must be actually or constructively continued till that time (*t*). The court will not take judicial notice of the time of sunset on a particular day, that must be proved by evidence (*u*). A demand made on the proper day at one o'clock is clearly bad (*x*), although a tender by the tenant or his agent at any time before or after sunset would be sufficient to save the forfeiture (*y*).

Death of landlord on rent-day. — Where a lessor, tenant in fee, died after sunset and before midnight, it was held that the heir and not the executor was entitled to the rent (*z*); but payment to the lessor or his agent on the morning of the rent-day, the lessor dying before noon, is valid as against the heir, though not against the crown (*a*). Where the rent was reserved payable on Michaelmas-day, and the lessor died on that day between three and four o'clock in the afternoon before sunset, and a question was raised whether the executor or the heir, or, which is the same, the jointress of the lessor, should have the rent, it was held that the rent should go to the heir or jointress (*b*).

Payment of rent in advance. — Payment before the day is voluntary and a payment of a sum in gross, and no satisfaction at law of the rent (*c*); but it seems it will be otherwise in equity, for payment of rent to the tenant in tail or for life, *on* or even *before* the day, where the tenant in tail lived to the rent-day (*d*), will discharge the lessee, though [*395] if the tenant in tail die * on the same day, the re-

(*s*) Co. Lit. 202 a; Maund's case, 7 Co. R. 28 b; Tinckler *v.* Prentice, 4 Taunt. 549.

(*t*) Wood and Chiver's case, 4 Leon. 179; Acocks *v.* Phillips, 5 H. & N. 183.

(*u*) Collier *v.* Nokes, 2 C. & K. 1012.

(*x*) Doe *d.* Wheeldon *v.* Paul, 3 C. & P. 613.

(*y*) Plow. 172 a; Co. Lit. 202 a; Cropp *v.* Humberton, Cro. Eliz. 48.

(*z*) Duppa *v.* Mayo, 2 Salk. 578; 1 Wms. Saund. 287; Clun's case, 10 Co. R. 127; Ld. Rockingham *v.* Penrice, 1 P. Wms. 177; 1 Salk. 578; 1 Swanst. 345, note; *Re* Clulow, 3 Kay & J. 689; 26 L. J., Ch. 513.

(*a*) Clun's case, 10 Co. R. 127 b.

(*b*) Ld. Rockingham *v.* Penrice, 1 P. Wms. 177; 1 Salk. 578; 1 Swanst. 345, note; Bac. Abr. tit. Rent (H.).

(*c*) Clun's case, 10 Co. R. 127 b; Ld. Cromwell *v.* Andrews, Cro. Eliz. 15.

(*d*) Lord Rockingham *v.* Penrice, *supra*; Bac. Abr. tit. Rent (H.).

mainder-man is entitled to recover the rent so paid from his representatives. If a tenant make a payment in advance, and the landlord dies before the rent-day, the payment may be pleaded by way of an equitable defence, to an action by the landlord's executors for the rent (*e*). But a payment of rent in advance is not within 4 Ann. c. 16, s. 10, so as to discharge the tenant from his obligation to pay rent to the assignee of the reversion, in case he received notice of the assignment before the rent is due (*f*).[1]

At what days rent is due. — Where rent is reserved generally, and no mention is made, as is usual, of half-yearly or quarterly payments, nothing is due until the end of the year (*g*): and where, after signing a written agreement which made no mention of the time when the rent was to be paid, the landlord asked the tenant how he would like to pay the rent, and the tenant replied quarterly, and the rent was accordingly paid quarterly, it was held that the rent was still due annually, and not quarterly (*h*). Where there is a general reservation of a yearly rent, a clause to put an end to the term, by notice expiring on any quarter day, will not make the rent payable quarterly (*i*). In a case where an agreement was dated the 21st of January, and a person thereby agreed to become tenant, "at the customary time of entry," at a certain rent to be "paid at the usual time," "as agreed upon;" and he entered at Lady-day, the usual time of entry being the 12th of May, the usual time of rent becom-

(*e*) See Nash *v.* Gray, 2 F. & F. 391.

(*f*) De Nicolls *v.* Saunders, 39 L. J., C. P. 297; Cook *v.* Guerra, 41 L. J., C. P. 89.

(*g*) Cole *v.* Sury, Latch, 264; Com. Dig. Rent (B.), 8; Gray *v.* Chamberlain, 4 C. & P. 260; Coomber *v.* Howard, 1 C. B. 440.

(*h*) Turner *v.* Allnay, Tyr. & G. 819.

(*i*) Collett *v.* Curling, 10 Q. B. 785; 5 D. & L. 605.

[1] **A bona fide payment in advance** is good against a subsequent assignment of reversion, Ala. Gold Life Ins. Co. *v.* Oliver, 78 Ala. 158; Westmoreland *v.* Foster, 60 Id. 448; Stone *v.* Patterson, 19 Pick. (Mass.) 476; Farley *v.* Thompson, 15 Mass. 18; *a fortiori*, if, by the terms of the contract, the rent was payable in advance, Farmers and Mechanics' Bank *v.* Ege, 9 Watts (Pa.) 436.

A prior mortgagee can require lessee to pay rent over again. McDevitt *v.* Sullivan, 8 Cal. 592.

There is a special statute in Pennsylvania which affects judicial sales.

ing payable, being once a year, at Michaelmas, and the rent-day, when it was paid, being the 8th January: it was held, that there was evidence that the rent was payable at Michaelmas, and that it was not necessarily payable at the end of the year, from the time of entry (*k*). When the rent is made payable on certain days in the year, it is due on the first of the days occurring in point of time, without regard to the local order of the words (*l*). If rent is intended to be made payable in advance, such intention should be clearly expressed (*m*). A covenant that a half-year's rent shall remain in the hands of the tenant till the last year, means the "current half-year" (*n*). Where rent was reserved quarterly, *or half-quarterly if required*, and the landlord received the rent quarterly for the first twelve months, it was held, that he could not, without notice, distrain for a half-quarter's rent (*o*).

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*[396] * Sect. 5. — *Payment of Rent.*

Rent a debt of high nature. — Rent is considered as of a higher nature than even a debt due on an instrument under seal, as between the parties themselves. In the case of the death of the tenant, it was, prior to the act 32 & 33 Vict. c. 46, of equal degree with specialty debts, so as, in the distribution of the deceased's estate, to be payable with debts of that degree (*p*); but now, by virtue of that statute, all the creditors of a deceased person are treated as standing in equal degree. Rent in arrear is no part of the reversion; and therefore when rent becomes due after delivery to the sheriff of a writ of elegit against the lessor, but before inquisition taken thereon, it is not payable to the execution creditor (*q*).

Attachment of rent. — Rent due and owing to a judgment debtor may be ordered by a divisional court, a judge, or a

(*k*) Gore *v.* Lloyd, 12 M. & W. 463.
(*l*) Hill *v.* Grange, Plowd. 171.
(*m*) *Ante*, Sect. 1.
(*n*) —— *v.* Nicholls, Lofft, 393.
(*o*) Mallam *v.* Arden, 10 Bing. 299.
(*p*) Thompson *v.* Thompson, 9 Price, 471.
(*q*) Sharp *v.* Key, 8 M. & W. 379; 9 Dowl. 770.

master, to be attached in the hands of his tenant, as a debt, under the Rules of the Supreme Court (Order XLV., Rule 2)(*r*). But accruing rent not due cannot be so attached (*s*). Rent which is overdue cannot be attached under a foreign attachment in London (*t*).

Payments to wrong person. — A payment of rent, by mistake or misrepresentation to a person not entitled to demand it, does not preclude the tenant from showing that the person to whom it was paid was not entitled to it (*u*), but the onus of proof is shifted. Therefore, if A., who is a tenant for life subject to forfeiture, with remainder over to B., lease to C. for a term, and afterwards, apprehending that he has forfeited, acquiesce in B.'s claiming and receiving the rent from C.; his executor may, on showing that he acquiesced under a false apprehension, recover from C. the amount of the rent erroneously paid to B. (*x*). Where an old corporation, before the Municipal Reform Act, were trustees of a charity, and a tenant of the charity paid rent after the new corporation came into office to the secretary of the old corporation, who still continued as charity trustees, it was held that this was a good payment as against the new corporation (*y*).

Allowances by mistake of deductions. — An allowance by way of deduction from the rent, even though made by mistake, operates as payment of the rent, pro tanto: thus * where a tenant paid rent regularly to the landlord's [*397] agent, deducting a sewers rate, which by the terms of the agreement under which the tenant held he ought himself to have paid, it was held, that, in an action to recover the sums so deducted as arrears of rent, a plea of payment was supported by the facts (*z*).

(*r*) Mitchell *v.* Lee, 8 B. & S. 92; L. R., 2 Q. B. 259; decided on s. 62 of the Common Law Procedure Act, 1854, from which Order XLV., Rule 2, differs only in enlarging the discretion of the court.

(*s*) Jones *v.* Thompson, 27 L. J., Q. B. 234; and see for the general principle, Tapp *v.* Jones, L. R., 10 Q. B. 591.

(*t*) Com. Dig. Attachment (D.), cited 8 B. & S. 95.

(*u*) Rogers *v.* Pitcher, 6 Taunt. 202.

(*x*) Williams *v.* Bartholomew, 1 Bos. & P. 326; Gregory *v.* Doidge, 3 Bing. 474; Claridge *v.* Mackenzie, 4 M. & G. 143.

(*y*) Mayor, &c. of Ludlow *v.* Charlton, 9 C. & P. 242.

(*z*) Waller *v.* Andrews, 3 M. & W. 312; Bramston *v.* Robins, 4 Bing. 11.

Rent is payable on the land, except in the case of a covenant. — Rent reserved, payable yearly, or otherwise, is to be paid *on the land*, because the land is the debtor, and that is the place of demand appointed by law:[1] so if a man lease, rendering rent, and the lessee binds himself in a sum to perform the covenants, this does not alter the place of payment of the rent, for it may be tendered on the land without seeking the obligee, except where the condition is for the performance of homage or other corporeal service to the person of the lord (*a*). This, however, which is a rule of the common law, applies only to re-entry for non-payment of rent, and not to an action on the covenant to pay it. Such a covenant (if no particular place of payment be mentioned) is analogous to a covenant to pay a sum of money in gross on a day certain, in which case it is incumbent on the covenantor to seek out the person to be paid, and pay or tender him the money, for the simple reason that he has contracted so to do. So it was held in the considered case of Haldane *v.* Johnson (*b*), where the authorities for this somewhat harsh doctrine (which applies, if only the landlord be intra quatuor maria) will be found carefully examined. The lessee of the crown must pay his rent, without demand, at the Exchequer, wherever it may be; but if the crown grant the reversion, the rent must be demanded on the land before the grantee can enter as for a forfeiture on non-payment (*c*).

Remittance of rent through post. — Like any other species of debt, rent is often paid by a remittance by the post. But remitting through the post is departing from the mode of payment marked out by law, and in the absence of a recognition by the landlord of the use of the post, the loss by post would fall on the tenant. It has been held that if a tenant be directed by his landlord to remit money by the post, and it be lost, the latter must bear the loss (*d*); but even in this

(*a*) Co. Lit. 201 b; Rowe *v.* Young, 2 Brod. & B. 234; Shep. Touch. 378; Crouch *v.* Falstolfe, Sir T. Raym. 418; Com. Dig. Pleader (2 W. 49).

(*b*) 8 Exch. 689; 17 Jur. 937; 22 L. J., Ex. 264.

(*c*) Bac. Abr. tit. Rent (L).

(*d*) Warwick *v.* Noakes, Peake, 67.

[1] See cases cited *ante*, sec. 4, note 2.

ease, it is said, the tenant must show due caution (*e*), such as, in the present day, using a registered letter. It is probable that slight evidence of an implied recognition by the landlord of the use of the post would be held sufficient; but in every case it would be desirable to obtain an express recognition by the landlord, once for all, of the mode of payment. Where a creditor in the country directed his debtor to pay money into a * London banking-house to his [*398] account, and had no account with the house but through a country banker; it was held, that a payment there to the credit of his account with the country banker was a discharge to the debtor (*f*). Generally, a creditor may insist upon payment being made either to himself or his agent; but having authorized payment to his agent, he cannot revoke that authority, if the debtor have given such a pledge to pay pursuant to the authority as would bind him in a court of law (*g*).

Payment by bills or notes. — If the landlord take *a security* for rent in arrear — as if he take a bond, bill of exchange, or promissory note — his so doing will not of itself amount to a payment of the rent, nor bar him of his remedies peculiar to the recovery of rent.[1] So it was held in Davis *v.* Gyde (*h*), it having been previously ruled at nisi prius, that where the tenant gave a note of hand for rent in arrear, and took a receipt, he could not sue the landlord in trespass for a distress, but that, notwithstanding the note, the landlord might distrain, as the note was no alteration of the debt till payment (*i*). In another case, a tenant being indebted for rent, his landlord's agent received from the tenant a bill of exchange for the amount, which he endorsed over, and paid the rent to the landlord, crediting it in his accounts as if the tenant had paid the money. The landlord having distrained for rent, it was held to be a question for the jury whether

(*e*) Hawkins *v.* Rutt, Peake, 186.

(*f*) Breed *v.* Green, Holt, 204.

(*g*) Hodgson *v.* Anderson, 3 B. & C. 842.

(*h*) 2 A. & E. 624; and see Murray *v.* King, 5 B. & A. 165; Smith L. & T. 169 (2nd ed.).

(*i*) Harris *v.* Shipway and Ewer *v.* Lady Clifton, Bull. N. P. 182; Seven *v.* Mihil, 1 Ld. Ken. 370.

[1] See *post*, ch. 11, sec. 10 (a), note, "Distress: when may be made."

the transaction amounted to a discount of the bill by the agent for the tenant, or a mere advance of rent by the agent to the landlord, in which latter case he was entitled to distrain (*k*). Where to covenant for rent against three defendants, it was pleaded that 41*l.* of the rent was paid; that of the residue two of the defendants had paid their shares, and that the other had given the plaintiff a promissory note for his share payable at a banker's; that such note was dishonoured, whereupon the plaintiff sued him and had judgment by default on the note, which judgment was still unsatisfied; it was held, that the judgment was no merger, being obtained on a collateral security, and not having produced actual satisfaction (*l*). In Davis *v.* Gyde, however, which was decided on demurrer, more than one member of the court pointed out that a special agreement, made at the time of the note, for suspending the distress, might have suspended the right to distrain. Davis *v.* Gyde has not been questioned, but it seems to bear very hardly on the tenant, and, although it is not likely to be overruled, it is submitted that it is in-
[*399] correct, on the ground that the acceptance of a * negotiable security constitutes an implied suspension of the right to distrain, and that the substitution of the simple remedy upon a note for the more cumbrous remedy otherwise open to the landlord is a good legal consideration. A similar remark will apply to Skerry *v.* Preston (*m*), in which it was held that an agreement to take interest did not postpone the right of distress.

Stamp duty on receipts for rent. — Receipts or discharges given for the payment of rent required to be stamped with a penny stamp if the sum received amounts to 2*l.* or upwards (*n*).

Where a landlord fraudulently and improperly received various sums of money from several of his tenants, and the evidence of payments by them consisted of memoranda of accounts delivered to the tenants in which the items in

(*k*) Parrott *v.* Anderson, 7 Exch. 93; Griffiths *v.* Chichester, Id. 95.
(*l*) Drake *v.* Mitchell, 3 East, 251.
(*m*) 2 Chit. R. 245.
(*n*) Stamp Act, 1870 (33 & 34 Vict. c. 97), ss. 120–123, and Schedule, tit. Receipt.

question were set down, and to each of which the landlord wrote the word "paid;" it was held, that such memoranda were admissible in evidence without a stamp, when coupled with entries in the steward's books to the same effect (*o*). A paper signed by the lessor in this form — "Mr. J. (the lessee) having written off the sum of 72*l.* from his mortgage debt, being five quarters' rent of his house, I hereby discharge the same rent to the 24th day of July last" — requires a receipt stamp (*p*). A paper in form of a receipt, if it is not given in evidence *as* a receipt, does not require a stamp (*q*); and an unstamped receipt may be used by a witness who can prove the fact independently, to refresh his memory (*r*).

When payment of ground-rent operates as payment pro tanto of the rent. — A payment of ground-rent by the tenant, in default of payment by his mesne landlord, may operate as payment pro tanto of the rent claimed by the latter (*s*); and growing rent may be discharged by such payments as well as rent actually due (*t*). Such payments are not the less compulsory because the ground landlord, on demanding the ground-rent, allows the occupier time to pay (*t*). Where a stranger received rent due to the testator in his lifetime, and, afterwards by desire of the tenant in possession, paid the demand of ground-rent due at the same time for the said premises; it was held, that he might deduct such payment in an action by the executor for the rent, but not a payment of ground-rent arising after the death of the testator (*u*).

Payment of taxes, rates, &c. — A payment of property-tax operates as a payment pro tanto of the rent, notwithstanding any stipulation in the lease to the contrary (*v*). So a payment of land-tax, sewers-rate, rent-charge, in lieu of tithes, * and other charges of the like nature, may, [*400] in the absence of any express stipulation for their

(*o*) Clarke *v.* Hougham, 3 D. & R. 325.

(*p*) Lucre *v.* Jones, 5 Q. B. 949.

(*q*) Brookes *v.* Davies, 2 C. & P. 186; Matheson *v.* Ross, 2 H. L. Cas. 286.

(*r*) Rambert *v.* Cohen, 4 Esp. 213.

(*s*) Doe *v.* Hare, 2 C. & M. 145.

(*t*) Carter *v.* Carter, 6 Bing. 406; Sapsford *v.* Fletcher, 4 T. R. 511.

(*u*) Wilkinson *v.* Cawood, 3 Anst. 905.

(*v*) *Post*, Chap. XV.

payment by the tenant, operate as a payment pro tanto of the rent, and be deducted accordingly on the next payment of rent (*x*).

When other payments may be deducted. — It has been said that wherever a tenant may be ousted from his occupation on default made of a payment by his landlord, he may pay in his discharge and for the redemption of the premises, and deduct such payment from his rent (*y*). Such payments, in event of the tenant being sued for the whole rent, would seem to fall within the scope of the Rules of the Supreme Court, 1883 (Order XIX. Rule 3), by which "a defendant in an action may set off or set up by way of counter-claim against the claims of the plaintiff, any right or claim, whether such set-off or counter-claim sound in damages or not, and such set-off or counter-claim shall have the same effect as a cross action." Even before the Judicature Acts, it was held that in an action for rent the tenant might avail himself of a part payment obtained from him under a distress or a judgment of the County Court for the same rent (*z*), and that where a landlord was bound to repair, and the tenant was obliged by sudden accident to make repairs, in order to prevent further mischief, the tenant might set off the money laid out in the repairs (*a*). It was, however, held that there could be no set-off where the tenant paid as rent a sum to prevent a person ejecting him from a portion of the land to which he claimed title from the lessor prior to the lease (*b*).

Sect. 6. — *Apportionment of Rent.*

(a) *Apportionment in respect of Estate.*

By act of law. — Apportionment of rent in respect of estate takes place by act of law where lands demised at an entire rent become divided among different persons; thus, if freehold and leasehold premises are let together at one rent, an

(*x*) *Post*, Chap. XV.

(*y*) Smith *v.* Pearce, MS., sittings at Guildhall, after M. T. 43 Geo. 3, Lord Ellenborough, C. J.

(*z*) Harmer *v.* Bean, 3 C. & K. 307.

(*a*) Waters *v.* Weigall, 2 Anst. 575.

(*b*) Boodle *v.* Cambell, 7 M. & G. 386; 2 D. & L. 66.

apportionment takes place, at the death of the lessor, among the real and personal representatives.[1]

By alienation of lessor. — Apportionment at common law may also be by act of the parties: thus, if the lessor dispose of the reversion in part of the lands, either by deed or will, the rent is apportionable (*c*);[2] but the lessee's
* concurrence to the apportionment is necessary, un- [*401]
less it be settled by a jury (*d*).[3]

By alienation of lessee. — When the lessee aliens part of the land, the alienee is liable for a proportional part of the rent if the landlord choose to proceed against him (*e*).[4] Although the landlord has received rent from the assignee, the personal contract of the lessee still subsists, and renders him liable for the whole arrears in an action of covenant (*f*).[5]

By surrender. — When the lessee surrenders part of the land to the lessor, the rent for the remainder is apportioned. It would seem that the rent should be apportioned, not according to the quantity, but according to the value of each part as improved by buildings, &c. (*g*).

Eviction of lessee. — Where the lessee is evicted from part of the lands *by title paramount*, he will have to pay a ratea-

(*c*) West *v.* Lascelles, Cro. Eliz. 851; Collins and Harding's case, 13 Co. R. 57 a; Cro. Eliz. 609, 622.

(*d*) Bliss *v.* Collings, 5 B. & A. 876.

(*e*) Stevenson *v.* Lambard, 2 East, 575.

(*f*) Bachelour and Gage's case, Cro. Car. 188; Ipswich (Bailiff) *v.* Martin, 1 Roll. Abr. 235, pl. 17; Orgill *v.* Kemshead, 4 Taunt. 642.

(*g*) Smith *v.* Malings, Cro. Jac. 160; Anon., Moor, 114.

[1] That leasehold property passes to executor or other personal representatives carrying the rents, both accrued and unaccrued, see cases cited *ante*, Chap. VII., sec. 13 (b), note, "Chattels real." That rents accrued, both of freeholds and leaseholds, pass to executors, see note, "Accrued rents," same section. That rents accruing subsequently to decedents' death belong to the heirs, see note, "Rents: when belonging to heirs and devisees" and "Relations to realty," same section.

[2] Assignees of reversion of part of premises are entitled to proportionate part of rent, and assignee of entire reversion to entire rent subsequently accruing. See *ante*, Chap. VII., sec. 3, note, "Severance of reversion," and sec. 2, note, "Assignment of reversion," and sec. 9, note, "Purchase of reversion."

[3] Rose, J., in Boulton *v.* Blake, 12 Ont. 532, 538.

[4] See *ante*, Chap. VII., sec. 6, note, "Severance of term."

[5] See *ante*, Chap. VII., sec. 5, note, "Effect of assignment of term."

ble proportion for the remainder (*h*);[1] but if he be evicted from part of the lands *by his landlord* (or his assigns), no apportionment, but a suspension of the whole rent, takes place (*i*).[1] There is no suspension, however, if the eviction

(*h*) Gilb. Rents, 147; Smith *v.* Malings, Cro. Jac. 160; 1 Roll. Abr. 235; Stevenson *v.* Lambard, 2 East, 575; Boodle *v.* Cambell, 7 M. & G. 386; 2 D. & L. 66; McLoughlin *v.* Craig, 7 Ir. Com. L. R. 117.

(*i*) Smith L. & T. 287 (2nd ed.); but the tenant must perform all his covenants; as to repair, &c., Newton *v.* Allin, 1 Q. B. 517; Morrison *v.* Chadwick, 7 C. B. 283.

[1] **Eviction of lessee.** — (*a*) *Partial eviction by third party*, under title paramount, discharges claim for rent *pro tanto*. Poston *v.* Jones, 2 Ired. Eq. (N. C.) 350; Fillebrown *v.* Hoar, 124 Mass. 580; Dyett *v.* Pendleton, 8 Cow. (N. Y.) 727 (*per* Spencer, Sen.).

(*b*) *Partial eviction by lessor discharges entire rent.* Christopher *v.* Austin, 11 N. Y. 216; Colburn *v.* Morrill, 117 Mass. 262; Fillebrown *v.* Hoar, 124 Id. 580, 583 (*per* Soule, J.); Leishman *v.* White, 1 Allen (Mass.) 489; Shumway *v.* Collins, 6 Gray (Mass.) 227; Royce *v.* Guggenheim, 106 Mass. 201; Smith *v.* Stigleman, 58 Ill. 141; Briggs *v.* Hall, 4 Leigh (Va.) 484; Hayner *v.* Smith, 63 Ill. 430; Halligan *v.* Wade, 21 Id. 470; Lewis *v.* Payn, 4 Wend. (N. Y.) 423.

(*c*) *Entire eviction*, whether by lessor or third party (having paramount title) discharges entire unaccrued rent. Simers *v.* Saltus, 3 Denio, 214; Dyett *v.* Pendleton, 8 Cow. (N. Y.) 727 (reversing Pendleton *v.* Dyett, 4 Id. 581); Cohen *v.* Dupont, 1 Sandf. (N. Y.) 260; Leopold *v.* Judson, 75 Ill. 536, 539 (*per* Craig, J.); Westlake *v.* De Graw, 25 Wend. (N. Y.) 669, 672 (*per* Savage, Ch. J.).

Rent will not (at common law) be apportioned after eviction between rent days. Fitchburg Man. Co. *v.* Melven, 15 Mass. 268.

(*d*) *Accrued rent not barred.* — Eviction is no bar to prior accrued rent. Leary *v.* Meier, 78 Ind. 393.

(*e*) *Actual eviction* is accomplished in divers ways. For example, by taking possession, putting furniture out, requesting family to leave, locking up rooms, &c., &c., Fillebrown *v.* Hoar, 124 Mass. 580; Colburn *v.* Morrill, 117 Mass. 262; Christopher *v.* Austin, 11 N. Y. 216; Hayner *v.* Smith, 63 Ill. 430; Briggs *v.* Hall, 4 Leigh (Va.) 484; also entry by mortgagee, Fitchburg Cotton Man. Co. *v.* Melven, 15 Mass. 268; Smith *v.* Shepard, 15 Pick. (Mass.) 147; Fitzgerald *v.* Beebe, 7 Ark. 310; or delivery of possession by officer under levy, &c., Gore *v.* Brazier, 3 Mass. 523.

(*f*) *Constructive eviction* is accomplished (without actual entry or expulsion) by acts of a permanent character, destroying or injuring the value of the use of the property to the lessee. It will have the same effect as an actual eviction. Mere temporary acts (as trespasses), which do not permanently affect value of lease, do not constituto it. What does constitute it is, sometimes, a very nice question.

(*g*) *Examples of constructive eviction.* — Erection of building under eaves, excluding light and air, Sherman *v.* Williams, 113 Mass. 481; or, on demised premises, cutting off the light and air from two rooms, Royce *v.* Guggenheim, 106 Id. 201; digging under building and rendering it unsafe, Skally *v.* Shute,

has followed upon some wrongful act of the lessee, such as a forfeiture or recovery of part of the lands in an action of waste (*k*).

(*k*) Walker's case, 3 Co. R. 22; 1 Roll. Rep. 331; Moor. 203.

132 Id. 367; threats, by one having paramount title, Merryman *v.* Bourne, 9 Wall. 592; distraining for rent due lessee, Lewis *v.* Payn, 4 Wend. (N. Y.) 423; demand of rent under threat of expulsion, by one having paramount title, Holbrook *v.* Young, 108 Mass. 83; Simers *v.* Saltus, 3 Denio (N. Y.) 214; demand of possession by rightful owner, Greenvault *v.* Davis, 4 Hill (N. Y.) 643; St. John *v.* Palmer, 5 Id. 599; Loomis *v.* Bedel, 11 N. H. 74, 83, 84; ejectment of lessor by stranger prior to entry of lessee, Poston *v.* Jones, 2 Ired. Eq. (N. C.) 350; renting reserved premises for a liquor saloon and part of demised premises to railroad company, Halligan *v.* Wade, 21 Ill. 470; muffling door-bell, making abusive and obscene noises at door, littering stair-carpet, and placing snowballs on windows, Cohen *v.* Dupont, 1 Sandf. (N. Y.) 260; escape of sewer gas, caused by defective plumbing which lessor was bound to repair, Bradley *v.* De Goicouria, 12 Daly (N. Y.) 393, 397.

(*h*) *Dyett* v. *Pendleton.* — In Dyett *v.* Pendleton, 4 Cow. (N. Y.) 581, it was held that bringing lewd women into another tenement under the same roof with lessee, thereby creating (by their loud noises in the night-time, &c.) such a nuisance that he was compelled to leave, constituted a constructive eviction. This case is frequently cited as authority. It has, however, been several times called a doubtful or extreme case, viz.: by Savage, Ch. J., in Etheridge *v.* Osborn, 12 Wend. (N. Y.) 529, 532; by Nelson, Ch. J., in Ogilvie *v.* Hull, 5 Hill (N. Y.) 52, 54; by Bronson, Ch. J., in Gilhooley *v.* Washington, 4 Comst. (N. Y.) 217, 219; by Gray, J., in Royce *v.* Guggenheim, 106 Mass. 201, 204, 205; and by Endicott, J., in De Witt *v.* Pierson, 112 Id. 8, 11.

It is observable that the acts of the lessor in Dyett *v.* Pendleton were voluntary, immoral, and illegal, that they were not committed upon the demised premises, but that they wholly destroyed the value of the lease. The court (*per* Spencer, Senator) say: "Suppose the landlord had established a hospital for the small-pox . . . in the remaining part of his house, . . . can there be any hesitation in saying that . . . he should not recover for the use of that house?"

(*i*) *Eviction by third party need not be by process of law.* — It has been sometimes held that eviction by a third party must be by due process of law, Waldron *v.* M'Carty, 3 Johns. (N. Y.) 471; Kerr *v.* Shaw, 13 Id. 236. The *contrary* is now fully established. See cases previously cited.

(*j*) *Acts not constituting an eviction.* — The following have been so held: Failure to remove from other tenement in same building, after notice, notorious woman who kept disorderly resort and greatly disturbed lessee, De Witt *v.* Pierson, 112 Mass. 8; telling lessee he had no right to use part of demised premises, &c., Fuller *v.* Ruby, 10 Gray (Mass.) 285; erecting fence in front of premises, so that lessee could not enter except by going over land of third party, Boston & Worc. R. R. Co. *v.* Ripley, 13 Allen (Mass.) 421; repeated trespasses (as carrying away crops, cutting down fruit-trees, removing cook stove, &c., Bartlett *v.* Farrington, 120 Mass. 284; removal of chattels of great size, fitted to the room, but not annexed, Kimball *v.* Grand Lodge, 131 Id. 63; erection of building on adjoining land, darkening tenant's windows, Palmer *v.* Wetmore, 2 Sandf. (N. Y.) 316; Myers *v.* Gemmel, 10 Barb. (N. Y.) 537; demand by rightful owner to pay rent and forbidding to pay to lessor, there

Demise of more than lessor entitled to. — Where a person demised, at one entire rent, lands of which he was seised in

being no attornment to the rightful owner, Hawes *v.* Shaw, 100 Mass. 187; mere trespass by lessor, Elliott *v.* Aiken, 45 N. H. 30; Edgerton *v.* Page, 20 N. Y. 281 (permitting waste water to flow down from leaks in pipes in upper stories); Bennet *v.* Bittle, 4 Rawle (Pa.) 339 (putting cattle upon premises, hauling off manure, &c.); entry to repair damages caused by fire, Conn. Mut. Life Ins. Co. *v.* U. S., 21 Ct. of Claims, 195; failure to furnish material for repairs, McFarlane *v.* Pierson, 21 Ill. App. 566, 569 (*per* Lacey, J.); failure to resist sale of premises for mechanics' lien, Leopold *v.* Judson, 75 Ill. 536.

In Ogilvie *v.* Hull, 5 Hill (N. Y.) 52, it was held that lessor's telling lessee's tenant that lease had expired, and advertising premises for lease, thereby causing lessee to lose a sub-tenant, did not constitute an eviction.

(*k*) *Abandonment by lessee; is it essential to a complete eviction?* — By the weight of authority, partial eviction by lessor, even though lessee continue upon remainder of premises, is a complete defence to the entire rent. Christopher *v.* Austin, 11 N. Y. 216; Leishman *v.* White, 1 Allen (Mass.) 489; Colburn *v.* Morrill, 117 Mass. 262. The above cases are strongly but indirectly supported by Shumway *v.* Collins, 6 Gray, 227, 232 (see opinion of Bigelow, J., in which he declines to express an opinion whether a *quantum meruit* would lie as not necessary to the case, but did say that the agreement to pay rent in the lease was entire and could not be severed by the tortious act of the landlord, &c.), and by Fuller *v.* Ruby, 10 Gray (Mass.) 285, 289, in which Justice Metcalf, while not himself giving an opinion (as it was unnecessary to the decision), points out that the English law makes partial eviction without abandonment a complete defence. He shows also that the contrary statement in many text-books originated in an English decision, Stokes *v.* Cooper, 3 Camp. 514 n. since overruled, Upton *v.* Townend, 17 C. B. 30, 64.

They are also supported by the opinion of the English court in the recent case of Boynton *v.* Morgan, 21 Q. B. D. 101, 106, in which Cave, J., said, "If the liability still exists, it must, I think, exist as a whole." He goes on to say that the liability exists by express covenant, and that the law will not imply a modified one.

Leishman *v.* White, 1 Allen (Mass.) 489, squarely decides that lessor after partial eviction (without abandonment) can neither recover rent nor for use and occupation, Bigelow, C. J., saying, "To the claim on the covenant the answer is the eviction; to the demand for use and occupation, the answer is that the defendant holds under his lease."

He also said (which seems to bear materially upon the question of *quantum meruit*), "The lease is not terminated by the unlawful eviction." The lease in this case seems to have been under seal; but in Colburn *v.* Morrill, 117 Mass. 262 (which, however, seems to have been an action for rent only, and not a *quantum meruit*), Endicott, J., says, "The fact that a tenant has no written lease does not affect his rights in this respect. He reviews the English and Massachusetts cases with the same result stated *supra* (that abandonment is not essential to a complete defence). There is, however, considerable contrary dicta in the same state, either inadvertent or intentional. Endicott, J., in De Witt *v.* Pierson, 112 Mass. 8, 10; Morton, J., in Bartlett *v.* Farrington, 120 Mass. 284; Gray, J., in Royce *v.* Guggenheim, 106 Id. 201, 202; and in Lawrence *v.* French, 25 Wend. (N. Y.) 443, 445; and Warren *v.* Wagner, 75 Ala. 188, 204, it was held that the lessor might recover a *quantum meruit*, or that the rent should be apportioned.

fee, and lands of which he was tenant for life with power of leasing; and the lease was void as to the latter lands for want of conformity to the power; the court held, that though the lease as to lands comprised in the power was void, the rent might be apportioned for the remainder (*l*). Similarly, where a lessor professes to grant an exclusive right of sporting, and it turns out that he has no such privilege, an apportionment of rent will be made on that account (*m*).

In Neal *v.* Mackenzie, a lessee of 100 acres of land accepted the lease (which was *not under seal*) and entered upon the land; upon his entry he found eight acres in the possession of a person entitled under a prior lease from the lessor, and that person kept possession of the eight acres until half-a-year's rent became due, the lessee continuing in possession of the remainder; the prior lease was for a term extending beyond the duration of the latter lease: it was held, that the latter demise was wholly void as to the eight acres, and that the rent was not apportionable, the impediment to the lessee taking possession not being analogous to an eviction by title paramount (*n*). But where * the second [*402] demise was under seal, it was held to operate as a grant of the reversion as to the part previously demised (*o*). Where the tenant cannot obtain possession of all the premises demised, an action of *covenant* by the lessor against the lessee for the rent cannot be maintained, as in such action the rent cannot be apportioned (*p*).

Where realty and personalty are let together. — Where lands and goods are let at an entire rent, and the tenant is evicted from the lands, no apportionment can be made for the goods as the rent is held to issue from the land alone (*q*). Although the rent of furnished lodgings issues out of the realty only (*r*): yet where the mortgagor of a house let it fur-

(*l*) Doe *d.* Vaughan *v.* Meylor, 2 M. & S. 276.

(*m*) Tomlinson *v.* Day, 2 Brod. & B. 680.

(*n*) Neale *v.* Mackenzie (in error), 1 M. & W. 747.

(*o*) Ecc. Commrs. of Ireland *v.* O'Connor, 9 Ir. Com. L. R. 242.

(*p*) Holgate *v.* Kay, 1 C. & K. 341, but see Ecc. Commrs. of Ireland *v.* O'Connor, *supra*.

(*q*) Ernot *v.* Cole, Dyer, 212 b, in marg.; Colline *v.* Harding, Cro. Eliz. 606; 13 Co. R. 57; Moor, 544; Cadogan *v.* Kennett, Cowp. 432; Gilb. Rents, 175.

(*r*) Newman *v.* Anderton, 2 Bos. & P. New R. 224.

nished, and the tenant, after notice, paid the whole rent to the mortgagee, it was held, that the mortgagor might still recover for the use of the furniture (*s*). Where A. demised to B. certain mines for thirty years, with licence to use an adjoining railway in common with A., and during the term A. prevented B. from using the railway, it was held, that this created no suspension of the rent, because the rent issued out of the thing demised, *i.e.*, the mines and minerals, and not out of the easement to use the railway (*t*).

Where land is lost by overflowing of sea. — The loss of land to the lessee by the overflowing of the sea appears to be another case in which the tenant may claim apportionment: but the loss must be total pro tanto, for if there be merely a partial irruption of water, the exclusive right of fishing, which the lessee would thereupon have, would be such a perception of the profits of the land as to annul his claim (*u*).

Apportionment under Lands Clauses Act. — Where part of land on lease is taken for public purposes under the powers of the Lands Clauses Consolidation Act, 1845 (8 Vict. c. 18), the 119th section of that act provides that "if any lands shall be comprised in a lease for a term of years unexpired, part only of which lands shall be required for the purposes of the special act, the rent payable in respect of the lands comprised in such lease shall be apportioned between the lands so required and the residue of such lands, and such apportionment may be settled by agreement between the lessor and lessee of such lands on the one part, and the promoters of the undertaking on the other part; and if such apportionment be not so settled by agreement between the parties, such apportionment shall be settled by two justices; and after such apportionment the lessee shall, as to [*403] all future accruing rent, be liable only as to so * much of the rent as shall be so apportioned in respect of the lands not required for the purposes of the special acts; and, as to the lands not so required, and as against the lessee, the lessor shall have all the same rights and remedies for the

(*s*) Salmon *v.* Matthews, 8 M. & W. 827.

(*t*) Williams *v.* Hayward, 1 E. & E. 1040; 28 L. J., Q. B. 374.

(*u*) 1 Roll. Abr. 236, l. 40.

recovery of such portion of rent, as previously to such apportionment he had for the recovery of the whole rent reserved by such lease; and all the covenants, conditions and agreements of such lease, except as to the amount of rent to be paid, shall remain in force with regard to that part of the land which shall not be required for the purposes of the special act, in the same manner as they would have done in case such part only of the land had been included in the lease.

Apportionment under other statutes. — Where part only of lands comprised in a lease for an unexpired term is conveyed, or agreed to be conveyed, for sites for schools for the education of the poor under the 4 & 5 Vict. c. 38, the rent and the fine upon renewal may, by 12 & 13 Vict. c. 49, s. 1, be apportioned between the parties interested. By the 17 & 18 Vict. c. 32, where parts of lands in lease are taken for the purposes of the Church Building Acts, rents and fines on leases and renewals may be apportioned. Under the 17 & 18 Vict. c. 97, for amending and extending the acts for the inclosure, exchange and improvement of land, rents and other certain payments may be apportioned. By 17 & 18 Vict. c. 116, to facilitate the management and improvement of episcopal and capitular estates in England, on the sale or exchange of part of lands comprised in any lease or copy of court roll, the rent must be apportioned.

(b) *Apportionment in respect of Time.*

At common law rent could not be apportioned in respect of time, and therefore when a tenant for life granted a lease for years, and died on any day not being rent-day, the whole rent from the last rent-day became lost, and the lessee retained the land without paying anything for it until the next rent-day (*x*). This injustice has been remedied by a series of statutes culminating in the Apportionment Act,

(*x*) Clun's case, 10 Rep. 127 b; and see id. Tudor's Real Property Cases, at p. 249, where the whole law of apportionment before the Act of 1870 is learnedly discussed. From the preamble to 11 Geo. 2, c. 19, s. 15, it seems that although the executor of the tenant for life could recover nothing, the reversioner could recover in respect of use and occupation.

1870, and as that act does not repeal the preceding statutes, it will be well to consider their effect shortly before setting out at length the provisions of the act which practically supersedes them.

The first statute, 11 Geo. 2, c. 19, s. 15, enacted that where any tenant for life should die before or on the day on which any rent was payable upon any demise, *which deter-*
[*404] *mined on the death of such tenant *for life*, his executors or administrators might, in an action on the case, recover from the subtenant, "if such tenant for life die on the day on which the same was made payable, the whole, or if before such day, then a proportion of such rent, according to the time such tenant for life lived, of the last year or quarter of a year, or other time in which the said rent was growing due, making all just allowances, or a proportional part thereof respectively." It was held, under this statute, that no apportionment of rent took place as between the heir and personal representative of a tenant in fee (*y*). The courts, however, consider it as a beneficial statute, and put a liberal construction upon it, holding, for instance, that the representatives of a tenant in tail, who had demised the entailed estate by a lease which was void against the remainderman, were entitled to an apportionment of the rent, even when the entire amount had been previously paid to the remainderman (*z*).

By 4 & 5 Will. 4, c. 22, s. 1, rents payable on any demise which determined on the death of the person making the same (although such person was not strictly tenant for life thereof), or on the death of the life or lives for which such person was entitled to such hereditaments, were brought within the operation of 11 Geo. 2, c. 19, s. 15.

By sect. 2 of the same act, it was enacted that all rents-service reserved on any lease by a tenant in fee or for any life interest, or by any lease (*a*) granted under any power,

(*y*) *Re* Clulow, 3 Kay & J. 689; 26 L. J. Ch. 513.

(*z*) Whitfield *v.* Pindar, C. P. 1781, cited 8 Ves. 311. See also Symons *v.* Symons, Madd. & Geld. 207; Clarkson *v.* Earl of Scarborough, 1 Swanst. 354, n.; *Ex parte* Smyth, 1 Swanst. 337; Vernon *v.* Vernon, 2 Bro. C. C. 659; Hawkins *v.* Kelly, 8 Ves. 308; Ansley *v.* Wadsworth, 2 V. & B. 331.

(*a*) Granted after the passing of the act, i.e. 16 June, 1834.

and all rents-charge and other rents, and all other payments of every description, in the United Kingdom coming due at fixed periods under any instrument executed after the passing of the act, or (being a will) coming into operation after the passing of the act, should be apportioned so that on the death of any person interested in any such rents, &c., or on the determination by any other means whatsoever of the interest of any such person he, or his executors, administrators or assigns, should be entitled to a proportion of such rents, &c., according to the time which should have elapsed from the commencement or last period of payment thereof respectively, including the day of the death of such person, or of the determination of his interest; and that every such person, his executors, &c., should have the same remedies at law and in equity for recovering the apportioned parts of the said rents, &c., when the entire portion shall become due, as he would have had for recovering the entire rents, &c.

It was held that this act applied to rents and royalties payable *periodically and reserved by leases [*405] granted after the passing of the act, in pursuance of a power created before or since the act (*b*); but not to rents reserved under *oral* demises (*c*); nor as between the heir-at-law and personal representatives of a tenant in fee (*d*); nor as between a mortgagee tenant for life, who had not entered, and remaindermen, so as to give the mortgagee a right to rents which he would not have had until entry if the tenant for life had lived (*e*), and it was said not to apply where the party entitled to the rent himself determined the lease during a current quarter (*f*). But it was held to apply where a lessee of mines, having power to determine the demise by a six months' notice expiring at any time, gave such notice to the lessor (*g*).

(*b*) Plummer *v.* Whiteley, 1 Johns. 585; 29 L. J., Ch. 247; Knight *v.* Broughton, 12 Beav. 312; Wardroper *v.* Cutfield, 33 L. J., Ch. 605; Llewellyn *v.* Rous, L. R., 2 Eq. 27; 35 Beav. 591.

(*c*) Mills *v.* Trumper, L. R., 4 Ch. 320.

(*d*) *Re* Roger's Trusts, 30 L. J., Ch. 153.

(*e*) Paget *v.* Marquis of Anglesea, L. R., 17 Eq. 283; 43 L. J., Ch. 437.

(*f*) Oldershaw *v.* Holt, 12 A. & E. 590; 4 P. & D. 307.

(*g*) Bridges *v.* Potts, 17 C. B., N. S. 314; 33 L. J., C. P. 338.

Apportionment Act, 1870. — The law of apportionment in respect of time has been extended and simplified in recent times by the Apportionment Act, 1870 (33 & 34 Vict. c. 35), which is retrospective (*h*).

All rents accrue from day to day. — By this act, which recites that rents are not at common law apportionable, "and for remedy of *some* of the inconveniences divers statutes have been passed" (being 11 Geo. 2, c. 19, 4 & 5 Will. 4, c. 22, 6 & 7 Will. 4, c. 71, 14 & 15 Vict. c. 25, and 23 & 24 Vict. c. 154), and that "it is expedient to make provision for the remedy of *all* such mischiefs and inconveniences," it is enacted (sect. 1) that "all rents (*i*), 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." [1]

Apportioned part payable when whole due. — By sect. 2, "the apportioned part of any such rent," &c., "shall be payable or recoverable in the case of a continuing rent," &c., "when the entire portion of which such apportioned part shall form part shall become due and payable, and not before; and in the case of a rent," &c., "determined by re-entry, death, or otherwise, when the next entire portion of the same would have been payable if the same had not been so determined, and not before."

Remedies for recovering apportioned part. — By sect. 4, "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 [*406] remedies at law and * in equity for recovering such apportioned parts as aforesaid when payable (allowing

(*h*) Capron *v.* Capron, L. R., 17 Eq. 288; and see note (*p*), *post*.

(*i*) By sect. 5 the word "rents" includes "rent-service, rent-charge, and rent-seek, and also tithes and all periodical payments or renderings in lieu of or in the nature of rent or tithe."

[1] *In Ontario*, rents are apportionable in respect of time as if accruing from day to day. Rev. Sts. Ch. 143 ss. 2–6 (Act 37, Vict. Ch. 10); Boulton *v.* Blake, 12 Ont. 532; Barnes *v.* Bellamy, Id. 542. Also in many cases in Massachusetts (Pub. Sts. c. 121) and California (C. C. P. sec. 1935), &c.

proportionate parts of all just allowances) as they respectively would have had for recovering such entire portions as aforesaid if entitled thereto respectively: provided (*k*) that such 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 from such heir or other person by the executors or other parties entitled under this act to the same."

By sect. 7, "the provisions of this act shall not extend to any case in which it is or shall be expressly stipulated that no apportionment shall take place" (*l*).

Application of Apportionment Act, 1870. — It has been held that this act applies to a specific devise of real estate (*m*), and, *as between landlord and tenant*, to rent under a lease assigned over by a trustee in bankruptcy (*n*); and it is indeed hard to see what is not included in its very comprehensive terms. It has been intimated that the act is not retrospective (*o*), but the preponderance of authority (*p*) points to an opposite conclusion, and to the application of the act to a will made before, but coming into operation after it.

As between landlord and tenant. — The wide terms of the

(*k*) This Proviso substantially follows the corresponding proviso of 4 & 5 Will. 4, c. 22, s. 2.

(*l*) The words "it is" are new; otherwise the section corresponds with 4 & 5 Will. 4, c. 22, s. 3.

(*m*) Hasluck *v.* Pedley, L. R., 19 Eq. 271; 44 L. J., Ch. 143; 23 W. R. 155.

(*n*) Swansea Bank *v.* Thomas, L. R., 4 Ex. D. 94; 48 L. J., Ex. 344; 40 L. T. 558; 27 W. R. 491.

(*o*) In Jones *v.* Ogle, L. R., 8 Ch. 192; 42 L. J., Ch. 334, *per* Lord Selborne, C.

(*p*) Capron *v.* Capron, L. R., 17 Eq. 288; 43 L. J., Ch. 677; 29 L. T. 826; *Re* Cline's estate, L. R., 18 Eq. 213; 30 L. T. 249, *per* Malins, V.-C.; Hasluck *v.* Pedley, L. R., 19 Eq. 271; 44 L. J., Ch. 143; 23 W. R. 155, *per* Jessel, M. R.; Constable *v.* Constable, L. R., 11 Ch. D. 681; Rosemgrave *v.* Burke, 1 Ir. R. Eq. 186.

act seem to allow the recovery of rent pro ratâ in the ordinary case where rent is payable at fixed periods, and the tenancy is determined in the middle of a period. It is clear that such rent is not recoverable at common law (*q*), and it was said not to be recoverable under the Act 4 & 5 Will. 4, c. 22, s. 2 (*r*). But the Act of 1870, in sect. 3, speaks of a rent "determined by re-entry," which seems intended to apply to a forfeiture, and the case is clearly within the words of sect. 2. And although it might be argued that it is not within the purview of the act generally, this argu-
[*407] ment appears * to be disposed of by Swansea Bank *v.* Thomas (*s*), in which case the trustee in liquidation of the lessee, having assigned over during a current quarter, was held liable under the act to pay to the lessor a proportionate part of the quarter's rent up to the time of the assignment over; and by Re South Kensington Stores (*t*), in which case the landlord of a liquidating company, whose business was carried on by the liquidator, was allowed proof for part of a quarter's rent up to date of petition, and distress for the remainder.

Sect. 7. — *Continuance of Lessee's Liability.*

After assigning.— The lessee has both a privity of contract and of estate; and though he assign, and thereby destroy the privity of estate, the privity of contract continues, and he is liable, in an action of covenant, for the rent, notwithstanding the assignment (*u*).[1]

After quitting possession. — A tenant remains liable for rent, unless he deliver up complete possession of the premises, or the landlord accept of another in his room (*x*).[2] But

(*q*) See Slack *v.* Sharpe, 8 A. & E. 366; Grimmin *v.* Legge, 8 B. & C. 324.

(*r*) Oldershaw *v.* Holt, 12 A. & E. 590.

(*s*) L. R., 4 Ex. D. 94. See a form providing for payment *pro ratâ* in case of re-entry, Dav. Prec. vol. 5, pt. 1, p. 108 and note; *post*, Appendix B., Sect. 12.

(*t*) L. R., 17 Ch. D. 161; 44 L. T. 471.

(*u*) Eaton *v.* Jacques, 2 Doug. 455; Auriol *v.* Mills, 4 T. R. 94.

(*x*) Harding *v.* Crethorne, 1 Esp.

[1] See *ante*, Chap. VII., sec. 5, note, "Effect of assignment of term."

[2] See *ante*, Ch. VIII., sec. 3 (b), note, "Surrender by operation of law."

where a lessee quitted, in the middle of his term, apartments which he had taken for a year, and the lessor let them to another tenant, it was held, that she could not recover in an action for use and occupation against the lessee for a subsequent portion of the year, during which the apartments had been unoccupied (*y*): though if a tenant abandon premises without notice, the landlord may recover subsequent rent, notwithstanding he has put up a bill in the window, and otherwise endeavoured to obtain another tenant (*z*). Where a tenant from year to year, at a rent payable half-yearly, without giving any notice to the landlord, quitted the premises at the expiration of the current year; and before the next half-year expired the landlord let the premises to another tenant, who occupied the same; it was held, that the landlord was not entitled to recover rent from the first tenant from the expiration of the current year, when he quitted the premises, to the time when the landlord re-let the same to the second tenant (*a*). If the landlord of lodgings enter into and use the apartments whilst the tenant is in possession, he is deprived of his right to rent; but if the tenant have abandoned the possession during his tenancy, the landlord's lighting fires in the rooms, or even * using [*408] the rooms, will not deprive him of his right to rent (*b*). Where the landlord forcibly turned out a man left in possession by the tenant, and who was personally offensive to the landlord, it was left to the jury to say whether such expulsion was a mere personal trespass, or done for the purpose of turning the tenant out of possession (*c*). Where, during a current quarter, some dispute arose between the lessor and lessee of a first and second floor of a house demised for a year, at a rent payable quarterly; and the lessee having told the lessor that she would quit immediately, the latter answered that she might go when she

57; Ibbs *v.* Richardson, 9 A. & E. 849; and see Henderson *v.* Squire, L. R., 4 Q. B. 170; and Chap. XX., *post*.

(*y*) Walls *v.* Atcheson, 3 Bing. 462; 2 C. & P. 268.

(*z*) Redpath *v.* Roberts, 3 Esp. 225.

(*a*) Hall *v.* Burgess, 5 B. & C. 332.

(*b*) Griffith *v.* Hodges, 1 C. & P. 419.

(*c*) Henderson *v.* Mears, 1 F. & F. 636.

pleased; upon which the lessee did quit, and the lessor accepted possession of the apartments; it was held, that he could neither recover the rent which by virtue of the original contract would have become due at the expiration of the current quarter, nor rent pro ratâ for the actual occupation of the premises for any period short of the quarter (*d*).

Where premises are destroyed by fire. — Where the lessee covenants to pay rent at stated periods (without any exception in case of fire), he is bound to pay it, though the house be burnt down; for the land remains,[1] and he might have provided to the contrary by express stipulation, if both parties had so intended. And this rule applies, although the lessee's covenant to *repair* contain an exception (*e*) in case of fire (*f*). Where premises were destroyed by fire during a tenancy under a written agreement, and rendered no longer habitable, the landlord was held to be still entitled to recover rent, accruing due after the fire, in an action for use and occupation (*g*). So also a tenant from year to year of a second floor, under a parol agreement, has been held liable in the same form of action (*h*): and where the rent

(*d*) Grimman *v.* Legge, 8 B. & C. 324.

(*e*) This exception has been held not "usual." Sharp *v.* Milligan, 23 Beav. 419. As to the construction of the exception in relation to rent, see Bennet *v.* Ireland, E. B. & E. 326; 28 L. J., Q. B. 48.

(*f*) Monk *v.* Cooper, 2 Stra. 763; 1 Ld. Raym. 1477; Belfour *v.* Weston, 1 T. R. 310. And see Weigall *v.* Waters, 6 T. R. 488; Hare *v.* Groves, 3 Anst. 687, and the cases *infra*.

(*g*) Baker *v.* Holtzappfel, 4 Taunt. 45.

(*h*) Izon *v.* Gorton, 5 Bing. N. C. 501.

[1] **Destruction of demised buildings by fire**, Gibson *v.* Perry, 29 Mo. 245; Gates *v.* Green, 4 Paige (N. Y.) 355, 358 (*per* Chan. Walworth); Hallett *v.* Wylie, 3 Johns. (N. Y.) 44; Magaw *v.* Lambert, 3 Pa. St. 444; Hazlett *v.* Powell, 30 Pa. St. 293, 298; Fisher *v.* Milliken, 8 Pa. St. 111, 121 (*per* Gibson, C. J.); Fowler *v.* Bott, 6 Mass. 63; Kingsbury *v.* Westfall, 61 N. Y. 356, *or other cause*, Davis' Adm'r *v.* Smith, 15 Mo. 464, is (at common law) no defence to a suit for rent, except (as is held in America) in case of a demise of part of a building (as a room, chamber, basement, &c.). In latter case rent is discharged because, there being no realty, there is a *total* destruction of the demised thing. See *ante*, Ch. VIII., sec. 1, note, "Termination by total destruction."

In Ohio it is provided by statute that if a building is burned or injured, without fault of tenant, so as to be unfit for occupancy, the rent shall cease and the lessee must surrender the premises. Rev. Sts. (1880) sec. 413. *Louisiana* and *Quebec* also have special provisions for such cases.

for similar lodgings was payable quarterly, he was held liable for rent up to the time of the fire at least (*i*). The tenant in such latter case, to get rid of his liability, should give a regular notice to quit. The reason is, that when *the law* creates a duty, and the party is disabled to perform it without any default in him, and he has no remedy over, the law will excuse him: but when the party, *by his own contract*, creates a duty or charge upon himself he is bound to make it good, notwithstanding any accident by inevitable necessity, because he might have provided against it when making the contract. In some old cases the Court of Chancery relieved the lessee, and granted an injunction to restrain the landlord from bringing an *action [*409] on the covenant for rent (*k*); but the modern practice was clearly otherwise (*l*), so that no equitable defence could be raised by virtue of the Judicature Act. It has even been held that a tenant who has covenanted to rebuild, has no equity to compel his landlord to expend money received by the landlord from an insurance office, on the demised premises being burnt down (*m*). But it seems that the Act 14 Geo. 3, c. 78, s. 83, which requires the governors of an insurance office, "upon the request of any person interested" (*n*), to cause insurance money to be laid out towards rebuilding, may be taken advantage of by tenants as well as by landlords. It is, however, always desirable to provide for the case of fire by special covenants, and this is frequently done (*o*).

After eviction by lessor, rent is suspended.—By an entry of the lessor, or any one claiming through him, into any part of the demised premises to take possession thereof, the rent is suspended (*p*):[1] and therefore, as to subsequently (*q*)

(*i*) Packer *v.* Gibbons, 1 Q. B. 421.

(*k*) Brown *v.* Quilter, Amb. 919; 2 Eden, 210; Camden *v.* Morton, Id. 219; cited 18 Ves. 118; Steel *v.* Wright, cited 1 T. R. 708.

(*l*) Holtzappfel *v.* Baker, 18 Ves. 115.

(*m*) Leeds *v.* Cheetham, 1 Sim. 146; followed with approval in Lofft *v.* Dennis, 1 E. & E. 474; 28 L. J., Q. B. 168.

(*n*) *Post*, Chap. XVII.

(*o*) *Post*, Sect. 8.

(*p*) Morrison *v.* Chadwick, 7 C. B. 266; 6 D. & L. 567.

(*q*) Boodle *v.* Cambell, 7 M. & G. 386.

[1] See *ante*, sec. 6, note, "Eviction of lessee."

accruing rent the eviction will be a bar; but if the lessor enter by virtue of a power reserved, or even a mere trespasser, if the lessee be not evicted, it will be no suspension of the rent (*r*). Where the lessor caused two messuages, let separately, which had been destroyed by fire during the term, to be rebuilt in such a manner as to destroy their identity; it was held, that such alterations in the subject-matter of the demises amounted to evictions, and that the tenants were not liable for subsequent rent (*s*). If a lessor serve a writ in ejectment under a clause that for any breach of covenant the lease shall determine and be void, he cannot maintain an action for rent subsequently accruing or for breaches of covenant (*t*). If a lessor has no title, and the lessee is evicted by title paramount, he may plead that as a defence to an action by the lessor for subsequent rent (*u*). If a party having a paramount legal right to evict a tenant, goes to him and claims his right, on which the tenant attorns to him, it seems to be equivalent to an expulsion (*x*). Where lands were demised by parol, and the lessee only entered on and had possession of part, in consequence of the lessor having previously demised the residue to a third person; it was held, that the want of possession was equivalent to an eviction by the tortious act of the [*410] lessor, and was not in the nature of an eviction * by an elder title, and that therefore the rent was not apportionable, and could not be distrained for (*y*). But where the demise is by indenture it will operate as a grant of the reversion as to such of the lands as are in the possession of a previous tenant, and a demise of the residue of the lands (*z*).

(*r*) Bull. N. P. 165, 177; Hunt *v.* Cope, Cowp. 243; Newton *v.* Allin, 1 Q. B. 518.

(*s*) Upton *v.* Townend and Upton *v.* Greenlees, 17 C. B. 30.

(*t*) Jones *v.* Carter, 15 M. & W. 718.

(*u*) Cuthbertson *v.* Irving, 4 H. & N. 742; 6 Id. 135; 28 L. J., Ex. 306.

(*x*) Mayor, &c., of Poole *v.* Whitt, 15 M. & W. 571; Emery *v.* Barnett, 4 C. B., N. S. 423; but see Delaney *v.* Fox, 2 C. B., N. S. 768.

(*y*) Neale *v.* Mackenzie (in error), 1 M. & W. 747; Watson *v.* Waud, 8 Exch. 335.

(*z*) Eccl. Commrs. of Ireland *v.* O'Connor, 9 Ir. Com. L. R. 242.

Eviction by mere trespass does not suspend rent. — It is essentially necessary, in order to suspension of rent, that such eviction be not the effect of a mere trespass, for in such case the lessee is not excused from the payment of his rent: thus, where in an action of debt for rent the lessee pleaded, that Prince Rupert, an alien born, with an hostile army, had entered upon the lessee, and expelled him out of possession, the Court of King's Bench held, that he was still bound to pay his rent (*a*).

Sect. 8. — *Stipulation for Abatement of Rent, in case of Fire, &c.*

Where there was a proviso that in case the demised premises or any part thereof "should be destroyed or damaged by fire, flood, storm, tempest, or other inevitable accident," the rent should cease or abate, &c., it was held that an exclusion of the tenant from the premises by the landlord executing repairs in pursuance of a covenant in the lease did not fall within the proviso (*b*).

(*a*) Paradine *v.* Jane, Aleyn, 26; Style, 47; and see Tasker *v.* Bullman, 3 Exch. 351.

(*b*) Saner *v.* Bilton, 7 Ch. D. 815; 47 L. J., Ch. 267; 38 L. T. 281; 26 W. R. 394.

* CHAPTER XI.

DISTRESS FOR RENT.

SECT. 1. — *Definition of Distress.*

A DISTRESS is one of the most ancient and effectual remedies for the recovery of rent.[1] It is the taking, without legal

[1] **The law of distress in America.**— (*a*) *Where existing.* — The law of distress with greater or less modifications exists in *Nova Scotia* (regulated by

process, cattle or goods *as a pledge* to compel the satisfaction of a demand, the performance of a duty, or the redress of an injury. The act of taking, the thing taken, and the remedy generally, having been called a distress; an inaccuracy which the older text-writers usually avoided (*a*).

Originally a pledge. — The power of distress appears to have been derived from the ancient feudal law, and to have been substituted for a forfeiture of * the ten- [*412] ant's estate (*b*).[1]

(*a*) See Bullen on the Law of Distress, A.D. 1842. The remedies for wrongful distress are considered *post*, Chap. XII.

(*b*) Gilb. Rent, 5, 92.

Rev. Sts. chap. 125); *New Brunswick* (Cons. Sts. chap. 83); *Ontario* (1 Rev. Sts. chap. 143); *Quebec* (Civil Code, Art. 1619, *et seq.*); *Manitoba; New Jersey* (Rev. Sts. pp. 308, 314); *Pennsylvania* (2 Purdon's Dig. pp. 1011, 1015); *Delaware* (Laws of Del. chap. 120); *Maryland* (Rev. Code, Art. 67, secs. 8–23); *Virginia* (Code, secs. 2790–2795); *West Virginia* (Code, chap. 93, secs. 7–15); *District of Columbia; South Carolina* (Rev. Sts. secs. 1823–1824); *Georgia* (Code, sec. 4082, *et seq.*); *Florida* (Dig. chap. 137); *Mississippi* (Rev. Code, sec. 1301, *et seq.*, in a modified or statutory form); *Louisiana* (Civil Code, Art. 2705–2709; Rev. Laws, secs. 2159–2165); *Texas* (Rev. Sts. chap. 58, Art. 3107–3122 b); *Indiana* (at least it has been in existence, Applegate *v.* Crawford, 2 Ind. 579; Wright *v.* Mathews, 2 Blackf. 187); *Illinois* (Rev. Sts. chap. 80); *Kentucky* (Gen. Sts. chap. 66).

(*b*) *Where not existing.* — It has been abolished by statute in *New York* (Sts. 1846, chap. 274); *Wisconsin* (Rev. Sts. sec. 2181, Laws of 1866, p. 77); *Minnesota* (Sts. chap. 75, sec. 39); and *Utah* (Comp. Laws, chap. 8, Art. 1203).

It is obsolete in *New England* (Potter *v.* Hall, 3 Pick. (Mass.) 368, 373; 374 (*per* Parker, C. J.); Wait Appellant, 7 Id. 100, 105 (*per* Parker, C. J.); 2 Taylor's Land. & Ten. sec. 558); *North Carolina* (2 Taylor L. & T. sec. 558; Dalgleish *v.* Grandy, Com. & Nor. (N. C.) 22; Deaver *v.* Rice, 4 Dev. & B. (N. C.) 431; Harrison *v.* Rick, 71 N. C. 7, 12 (*per* Rodman, J.)); and *Missouri* (Crocker *v.* Mann, 3 Mo. 472; Kamerick *v.* Castleman, 23 Mo. App. 481).

There are no statutory provisions concerning it in Alabama, Tennessee, and Ohio, 2 Taylor's Land. & Ten. sec. 558, except as to the city of Mobile, Dumes' Adm'r *v.* McLosky, 5 Ala. 239, 240 (*per* Ormond, J., under Act of Jan. 17, 1834), and special provision as to landlord's lien on crop in Ohio, 2 Taylor's Land. & Ten. sec. 558.

[1] **American substitutes for distress.** — (*a*) *Attachment on mesne process.* — Taylor says that in "the New England States the law of attachment on *mesne* process has superseded the law of distress (2 Taylor's Land. & Ten. sec. 558), and that the principles of the common law doctrine of distress have been thereby essentially assumed. See Parker, C. J., in Potter *v.* Hall, 3 Pick. (Mass.) 368, 374, and Parsons, C. J., in Bond *v.* Ward, 7 Mass. 123, 128. It is a curious fact (as pointed out in Delano's Law of Landlord & Tenant in Massachusetts) that the colonial laws gave a writ of replevin for

History. — Originally it was not so much a remedy as the means of obtaining one; for when it was made, the chattels distrained remained only as a pledge in the hands of the dis-

goods distrained. See Dig. Mass. Laws, 1675, and Plm. Col. Laws, 1675; see, also, St. 1825, c. 89.

In Wait Appt. 7 Pick. 100, 105, Parker, C. J., said, "We think there is no right of distress in this Commonwealth;" also in Potter *v.* Hall, 3 Pick. 368, 374: "Our legislature seems to have considered the common law in this respect as obsolete, or repealed by usage in the several statutes; they have made exempting articles of small value, but of great necessity from attachment."

(*b*) *Landlord's statutory liens.* — Many of the states have enacted laws giving the landlord a special lien upon the crop of his lessee. For example: *North Carolina* (Code, sec. 1754 *et seq.;* State *v.* Crowder, 97 N. C. 432; Bridgers *v.* Dill, Id. 222; State *v.* Wilbourne, 87 N. C. 529); *South Carolina* (Whaley *v.* Jacobson, 21 S. C. 51); *Georgia* (Code, secs. 1977, &c.; Worrill *v.* Barnes, 57 Ga. 404; Davis *v.* Meyers, 41 Id. 95; Taliaferro *v.* Pry, Id. 622; Hobbs *v.* Davis, 50 Id. 213; Johnson *v.* Emanuel, Id. 590; Ware *v.* Blalock, 72 Id. 804; Benson *v.* Gottheimer, 75 Id. 642); *Alabama* (Civil Code, sec. 3056 *et seq.;* Steinhardt *v.* Bell, 80 Ala. 208; Robinson *v.* Lehman, 72 Id. 401; Lake *v.* Gaines, 75 Id. 143; Stoelker *v.* Wooten, 80 Id. 610; Napier *v.* Foster, Id. 339); *Mississippi* (Rev. Code, ch. 50, sec. 1301 *et seq.;* Cohn *v.* Smith, 64 Miss. 816; Roberts *v.* Sims, Id. 597); *Arkansas* (Digest of Statutes, sec. 4453 *et seq.;* Roth *v.* Williams, 45 Ark. 447; Birmingham *v.* Rogers, 46 Id. 254); *New Mexico* (Comp. Laws, sec. 1537 *et seq.*); *Indiana* (Rev. Sts. ch. 76, sec. 5224; Ry. Co. *v.* Linard, 94 Ind. 324); *Iowa* (Rev. Code, sec. 2017 *et seq.;* Garner *v.* Cutting, 32 Iowa, 547; Grant *v.* Whitewell, 9 Id. 152; Carpenter *v.* Gillespie, 10 Id. 592; Rotzler *v.* Rotzler, 46 Id. 189; Perry *v.* Waggoner, 68 Id. 403; Jarchow *v.* Pickens, 51 Id. 381); *Illinois* (Prettyman *v.* Unland, 77 Ill. 206; Eames *v.* Mayo, 6 Bradw. (Ill.) 334; O'Hara *v.* Jones, 46 Ill. 288; Mead *v.* Thompson, 78 Id. 62; Hunter *v.* Whitfield, 89 Id. 229; Miles *v.* James, 36 Id. 399; Herron *v.* Gill, 112 Id. 247); *Kansas* (Comp. Laws, Art. 3227 *et seq.*); *Missouri* (Haseltine *v.* Ausherman, 87 Mo. 410; Chamberlain *v.* Heard, 22 Mo. App. 416); *Nebraska* (Comp. Sts. sec. 1073). The natures of these liens vary considerably. Generally they are confined to the crop, and are paramount to all other liens.

In Iowa the lien extends not only to crops but to other personal property of tenant which has been used upon the premises during the term; the lien continues (during the tenancy) for one year after each year's or shorter period's rent becomes due, but does not continue more than six months after the expiration of the term, and special statutory provisions are made for its enforcement.

Texas. — There is a special statutory lien in Texas (Rev. Sts. sec. 3122, a) upon all the property of the tenant in residence, storehouse, or other building for all rents due or to become due, and extending in time one month after tenant ceases to occupy. See Couts *v.* Spivey, 66 Tex. 267; H. R. E. B. B. Ass. *v.* Cochran, 60 Tex. 620.

In Maryland it is provided (Rev. Code, Art. 67, sec. 13) that in case a share of crops is reserved as rent, the landlord shall have a lien not to be divested by bankruptcy, insolvency, voluntary sale, or process of law; and in Florida (Dig. ch. 137) he has a superior lien upon agricultural products,

trainer, but could not be sold (*c*); and, as Blackstone observes, "although such a distress put the owner to inconvenience, and was therefore a punishment to him, yet if he continued obstinate, and would make no satisfaction, it was no remedy at all to the distrainer" (*d*). This power, however, became the means of great oppression in the hands of the barons (*e*), and continual enactments were passed up to 1 & 2 Philip and Mary, c. 12, for the protection of tenants (*f*); but the current of legislation afterwards took a turn, and was for a very long time wholly for the benefit of landlords rather than of tenants (*g*); a step in the favour of tenants, however, was taken, in 1871, by the act which protects the goods of lodgers from distress, another step, in 1872, by the act which protects railway rolling stock, and a still further and very considerable step — in relation to agricultural holdings only — by the Agricultural Holdings Act, 1883 (p. 430, *post*).

To what rents incident. — Distress is incident of common right to every *rent-service*,[2] properly so called (*h*). It is also

(*c*) Preamble to 2 W. & M., sess. 1, c. 5.

(*d*) 3 Blac. Com. 14.

(*e*) Barrington on Ancient Statutes, 14.

(*f*) 51 Hen. 3, c. 4; 52 Hen. 3 (Statute of Marlebridge), cc. 1, 2, 4, 15, 21; 3 Edw. 1 (Stat. of Westminster), cc. 16, 17, 23; 13 Edw. 1 (Stat. of Westminster II.), cc. 36, 37; 1 & 2 Ph. & M. c. 12.

(*g*) 17 Car. 2, c. 7; 2 W. & M., sess. 1, c. 5; 8 Ann. c. 14; 4 Geo. 2, c. 28; 11 Geo. 2, c. 19; 56 Geo. 3, c. 50; 3 & 4 Will. 4, c. 42, s. 38; 14 & 15 Vict. c. 25; Bankruptcy Act, 1869, sect. 34, *ante*, 282.

(*h*) *Ante*, 376.

even to those of older date, but upon other property of lessee, sub-lessee, or assigns, it is only superior to subsequent liens.

In Kentucky (Gen. Sts. ch. 66, sec. 12) the landlord has a preferential lien upon produce, fixtures, household furniture, and other personal property of tenant or undertenant; but as it is lost by removal (without fraudulent intent) unless asserted within fifteen days thereafter, it much resembles the landlord's ordinary lien in cases of distress, though in some respects superior to it.

In some of the above states the law of distress also exists. Sometimes the lien is enforcible by distress warrant (Ga. Code, sec. 1977; Worrill *v.* Barnes, 57 Ga. 404) and sometimes by attachment (Comp. Laws of Kans. Art. 3231; Rev. Code of Iowa, sec. 2018; Rev. Code of Miss. sec. 1301; Chamberlain *v.* Heard, 22 Mo. App. 416; Civil Code, Ala. sec. 3061).

[1] **Definitions.** — For rent-service, rent-seck, rents of assize, chief-rents, rent-charge, and fee-farm rent, see *ante*, ch. 10, sec. 1, also 2 Bl. Com. sec. 42, and 3 Kent's Com. secs. 460, 461.

necessarily incident, by special reservation, to every *rent-charge* (*h*). But it was not incident to *rent-seck* (*h*) until the 4 Geo. 2, c. 28, s. 5 (*i*), extended the remedy of distress to rents-seck, rents of assize, and chief-rents, and thereby in effect abolished nearly all material distinction between them (*k*).

On other lands. — Distress for rent may, by agreement, be made upon other lands of the lessee than those out of which the rent issues.[1] This was held by the Exchequer Chamber upon the construction of a mining lease (*l*).

Right to distrain may be postponed. — The right of distress is not so inseparable an incident to rent-service that it cannot be postponed. Therefore a landlord may for good consideration undertake not to distrain for six months (*m*), a mesne landlord may contract not to distrain until after he has produced to his tenant a receipt for the rent for the time being due to the superior landlord (*n*), and a superior landlord may undertake not to distrain on the goods of an intended lodger of his tenant (*o*). From an agreement, to which the landlord of a farm is privy, for a sale by [*413] the tenant of *some eatage of pasture to a third person, the amount produced by the sale to be paid

(*i*) *Ante*, 376; Johnson *v.* Faulkner, 2 Q. B. 925.

(*k*) 2 Blac. Com. 6; Com. Dig. tit. Distress (A. 1).

(*l*) Daniel *v.* Stepney, L. R., 9 Ex. 185, reversing decision below, L. R., 7 Ex. 327; 41 L. J., Ex. 208.

(*m*) Oxenham *v.* Collins, 2 F. & F. 172.

(*n*) Giles *v.* Spencer, 3 C. B., N. S. 244; 26 L. J., C. P. 237.

(*o*) Horsford *v.* Webster, 1 C., M. & R. 696. The Lodger's Goods Protection Act (see *post*, Sect. 9 (f)) renders such undertaking now generally unnecessary.

[1] **Where may distress be made.** — *At common law* only upon the demised premises. Mosby *v.* Leeds, 3 Calls. (Va.) 380; Geiger's Adm'r *v.* Harman's Ex'r, 3 Gratt. (Va.) 130; Bradley *v.* Piggot, Walker (Miss.) 348 (even tenant's goods ordinarily).

In Illinois personal property of tenant may be distrained anywhere in county where he resides (Sts. of Ill. ch. 80, sec. 16; Uhl *v.* Dighton, 25 Ill. 154).

In Kentucky likewise (Gen. Sts. ch. 66, sec. 11; Mitchell *v.* Franklin, 3 J. J. Marsh. (Ky.) 477; Longee *v.* Colton, 9 Dana, 123).

In Georgia the property of tenant may be distrained wherever found (Code, sec. 4082; Hale *v.* Burton, Dudley (Ga.) 105; Holland *v.* Brown, 15 Ga. 113; McMahan *v.* Tyson, 23 Id. 43; Thornton *v.* Wilson, 55 Id. 607).

to the landlord, a contract by him may be inferred not to distrain cattle put on the demised land to consume the eatage (*p*).

Rent under agreement for lease. — Although a distress may be taken for any rent, including that due from tenants at will (*q*), it cannot at common law be made for the rent mentioned in a mere agreement for a lease, not amounting to an actual demise, where no tenancy at an agreed rent has been created expressly or impliedly by the payment of rent or otherwise (*r*). Where a tenant holds over on sufferance only, as there is then no "agreed rent," a distress cannot lawfully be made, but the remedy is by an action for use and occupation (*s*).

Rent reserved in an assignment. — If a mere termor affect to grant a lease for a term exceeding his own in duration, and to reserve an annual rent, that would operate as an assignment of his term (*t*), and the stat. 4 Geo. 2, c. 28, s. 5 (*u*), does not give power to distrain for such a rent (*x*).

Fee farm rents. — With respect to fee farm rents, it has been held that a distress is not incident to them, unless the case be brought to within the 4 Geo. 2, c. 28, s. 5 (*y*).

Rent of incorporeal hereditaments. — A distress cannot generally be made for a rent reserved upon a letting of incorporeal hereditaments, as tithes, commons or tolls (*z*); but a power of distress may be expressly reserved in such lease in like manner as in the grant of a rent-charge.

Furnished apartments. — A distress may be made for the whole rent reserved on a letting of furnished apartments, because in contemplation of law the rent issues out of the

(*p*) Horsford *v.* Webster, *supra*.

(*q*) Lit. s. 72; Doe *d.* Davies *v.* Thomas, 6 Exch. 858; Doe *d.* Dixie *v.* Davies, 7 Exch. 91; Turner *v.* Barnes, 2 B. & S. 435; 31 L. J., Q. B. 170.

(*r*) Dunk *v.* Hunter, 5 B. & A. 322. As to effect of Judicature Act on this doctrine, see Walsh *v.* Lonsdale, L. R., 21 Ch. D. 9, and p. 86, *ante*.

(*s*) Alford *v.* Vickery, Car. & M. 280; Jenner *v.* Clegg, 1 Moo. & R. 213; Williams *v.* Stiven, 9 Q. B. 14.

(*t*) *Ante*, Ch. VII.

(*u*) *Ante*, 377.

(*x*) Langford *v.* Selmes, 3 K. & J. 220; 3 Jur., N. S. 859.

(*y*) Bradbury *v.* Wright, 2 Doug. 624; Musgrave *v.* Emmerson, 10 Q. B. 326; Smith L. & T. 189 (2nd ed.).

(*z*) Co. Lit. 47 a: Jewel's case, 5 Co. R. 3; Smith L. & T. 116 (2nd ed.).

realty only, and not out of the furniture (*a*).[1] But where the owner of a factory lets standings therein for looms, and supplies the power of working them at so much per week (there being no demise of the room), he cannot distrain for the weekly payments as for rent (*b*). It is otherwise where a definite part of the room is demised, with the use of steam-power for working machines, &c. (*c*).

Liquidated damages. — Liquidated damages or forfeitures for breaking up pasture or meadow land, or for carrying hay, straw, &c., off the demised premises, at certain fixed sums in proportion to the extent of the breach, "to be recovered by distress as for rent in arrear," may be distrained for, though the lease is not under seal (*d*).

[*414] * **Double rent.** — Double rent payable under 11 Geo. 2, c. 19, s. 18, may be distrained for (*e*); and the exception, once said to obtain in the case of a weekly tenant (*f*), appears to have been founded on a mistake (*g*).

Manual service. — A distress may be made where the tenant holds by the service of cleaning the parish church, or of ringing the church bell at stated times, or by other manual services (*h*); but in such case the distress cannot be sold.

Sect. 2. — *Conditions precedent to Distress.*

Right to distrain. — Where the right to distrain exists, nothing but payment, or something equivalent to payment, such as a tender of the arrears, or a release under seal, will be sufficient to take it away: even attending upon the land

(*a*) Newman *v.* Anderton, 2 Bos. & P. New R. 224.

(*b*) Hancock *v.* Austin, 14 C. B., N. S. 634; 32 L. J., C. P. 252; and see Edmondson *v.* Nuttall, 17 C. B., N. S. 280.

(*c*) Selby *v.* Greaves, L. R., 3 C. P. 594; 37 L. J., C. P. 251.

(*d*) Pollitt *v.* Forrest, 1 C. & K. 560; 11 Q. B. 949.

(*e*) Johnstone *v.* Hudlestone, 4 B. & C. 922. As to "double rent," see *post*, Chap. XX., Sect. 2 (c).

(*f*) Sullivan *v.* Bishop, 2 C. & P. 359.

(*g*) Bullen on Distress, 116, note; 2 Chit. Pl. 344, note (*v*), (7th ed.).

(*h*) Doe *d.* Edney *v.* Benham, 7 Q. B. 976.

[1] Rents "may issue out of lands . . . and their furniture." Lowrie, J., in Mickle *v.* Miles, 31 Pa. St. 20 (a stocked dairy farm).

on the proper day to pay the rent will not destroy the right to distrain unless a tender be actually made (*i*).

Allowance of deductions. — But where a landlord's receiver allowed the tenant to make a deduction of payments for land tax every year for seventeen years, greater than the landlord was liable to pay, the landlord knowing or having the means of knowing all the facts; it was held, that he could not distrain for the amount erroneously allowed, for such allowance *operated as payments*, though the receipt given every year showed the amount paid and the amount deducted (*k*).

Taking security, &c. — We have already seen that it has been held that neither taking a security for rent (*l*),[1] nor an agreement to take interest (*m*), nor a set-off to an equal or greater amount than the rent in arrear (*n*), can take away the landlord's right to distrain.

Tender before distress. — A distress cannot lawfully be made after the full amount of rent really due has been tendered to the landlord, or to his agent having authority to receive the rent (*o*). If the landlord or his agent sign a distress warrant and deliver it to the broker, but before he can effect an entrance to distrain, the tenant or his agent tenders the rent *without expenses* to the landlord or his agent, it will be illegal afterwards to execute the distress warrant, and all parties concerned * therein will be liable to [*415] an action of trespass (*p*) or trover (*q*).

Tender before impounding. — After the distress has been made, but *before it is impounded*, the tenant may tender to

(*i*) Horne *v.* Lewin, 1 Ld. Raym. 639; 1 Salk. 583; 12 Mod. 352.

(*k*) Branston *v.* Robins, 4 Bing. 11; Waller *v.* Andrews, 3 M. & W. 312.

(*l*) Davis *v.* Gyde, 2 A. & E. 623.

(*m*) Skerry *v.* Preston, 2 Chit. R. 245.

(*n*) Absalam *v.* King, Bull. N. P. 181; Barnes, 450; Andrew *v.* Hancock, 1 Brod. & B. 46, 47; Stubbs *v.* Parsons, 3 B. & A. 521; Wilson *v.* Davenport, 5 C. & P. 531; and see Pratt *v.* Keith, 33 L. J., Ch. 528; 10 Jur., N. S. 305.

(*o*) Branscomb *v.* Bridges, 1 B. & C. 145; 3 Stark. R. 171; Holland *v.* Bird, 10 Bing. 15; Bennett *v.* Bayes, 5 H. & N. 391; 29 L. J., Ex. 391.

(*p*) Bennett *v.* Bayes, 5 H. & N. 391; 29 L. J., Ex. 391.

(*q*) Hatch *v.* Hale, 15 Q. B. 10.

[1] As to effect of taking promissory note, or recovering judgment upon right to distrain, see *post*, sec. 11, note, "Distress, when may be made."

the landlord or his agent the amount of the rent, together with a sufficient sum for the costs of the distress (*r*); after which it will be illegal to proceed further with the distress (*s*).

Tender after impounding. — But a tender of the rent with expenses *after the impounding* is too late to enable the tenant to maintain an action of trespass, trover, detinue or replevin; because the cattle or goods are then in the custody of the law, and not of the landlord or his agent (*t*). The subsequent detention is considered as the act of the law, and not of the distrainer who has neither any property nor even a constructive possession of the cattle or goods distrained (*u*); and although they might be released with his consent, he is not legally bound to give such consent. However, if such tender be made within the five days allowed to the tenant to replevy (although after the impounding), a special action on the case, founded on the equity of the stat. 2 W. & M. sess. 1, c. 5, s. 2, may be maintained if the landlord afterwards proceed to sell the distress (*x*). To avoid this the landlord should, after such a tender, abstain from selling (which he may lawfully do) and merely keep the distress impounded as a pledge, according to the common law, until the arrears of rent, with expenses, are actually satisfied, or the tenant incurs the trouble and expense of a replevin, the costs of which will fall upon him.

What amounts to an impounding. — Whether the distress was "impounded" before the tender was made is sometimes a question of considerable nicety and importance. In one case the landlord's agent had delivered to the tenant a notice of distress, wherein it was stated that the cattle distrained, of which an inventory had been given, were *impounded on the*

(*r*) *Post*, Sect. 8 (c).

(*s*) Vertue *v.* Beasley, 1 Moo. & R. 21; Evans *v.* Elliott, 5 A. & E. 142; Ladd *v.* Thomas, 12 A. & E. 117.

(*t*) Six Carpenters' case, 8 Co. R. 432; 1 Smith L. C. 133 (7th ed.); Firth *v.* Purvis, 5 T. R. 432; Thomas *v.* Harries, 1 M. & G. 695; Ladd *v.* Thomas, 12 A. & E. 117; Ellis *v.* Taylor, 8 M. & W. 415; Tennant *v.* Field, 8 E. & B. 336; Smith L. & T. 238 (2nd ed.).

(*u*) Rex *v.* Cotton, Parker, 121; Turner *v.* Ford, 15 M. & W. 212; Wilbraham *v.* Snow, 2 Wms. Saund. 47 a.

(*x*) Johnson *v.* Upham, 2 E. & E. 250; 28 L. J., Q. B. 252; overruling Ellis *v.* Taylor, 8 M. & W. 415.

premises; it was held, that the impounding was complete so as to make a subsequent tender unavailing (*y*). In another case, a landlord's agent went upon the tenant's premises, and walked round them, and gave a written notice that he had distrained certain goods lying there for an arrear of rent, *all which goods he had left on the said demised premises*, and that unless the rent was paid, or the goods replevied within five days, they would be appraised and sold according to law, and then went away without leaving any person in possession. It was held, that * there was a sufficient distress [*416] and impounding on the premises pursuant to 11 Geo. 2, c. 19, s. 10 (*z*). In a third case, a landlord entered upon a dwelling-house to distrain, but, to prevent inconvenience to the tenant, the landlord, with the tenant's assent, instead of removing the articles of furniture upon which he proposed to distrain, made up from a list given to him by the tenant an inventory of the furniture in the house, put a man into possession, and handed to the tenant a notice of distress referring to the inventory, which was also then handed to the tenant. The landlord did not go into the several rooms in which the articles were, and the notice of distress did not state that the articles were impounded. It was held, that this constituted a distraining of the articles mentioned in the inventory, and an impounding them upon the premises, and that a tender subsequently was too late (*a*).

To whom tender made. — A tender may be made to the landlord himself, notwithstanding he has instructed a broker to distrain and left the matter in his hands (*b*). So it may be made to any agent of the landlord who has express or implied authority to receive rent on his behalf (*c*). Where a landlord gives a warrant to distrain for rent in the usual form, he thereby in effect authorizes the bailiff to receive the rent.

(*y*) Thomas *v.* Harries, 1 M. & G. 695.

(*z*) Swann *v.* Earl of Falmouth, 8 B. & C. 456.

(*a*) Tennant *v.* Field, 8 E. & B. 336. Where sheep are distrained for damage feasant, a tender of amends after the sheep have been put into a private pound, but before they have been sent (as intended) to the public pound, is not too late. Browne *v.* Powell, 4 Bing. 230.

(*b*) Smith *v.* Goodwin, 4 B. & Adol. 413.

(*c*) Bennett *v.* Bayes, 5 H. & N. 391; 29 L. J., Ex. 391.

if tendered: and it seems that in such case he could not prohibit the bailiff from accepting such tender, so as to render a tender to him invalid: at all events, the bailiff cannot refuse a tender on the ground that he was forbidden by the landlord's solicitor to receive the money (*d*). A tender to the landlord's agent, who signed the distress warrant on his behalf, is sufficient (*e*). But a tender to the broker's man, who is merely left in possession under the distress, and has no actual authority to receive the money, is bad (*f*), and so is a tender to a servant (*g*). Where it appeared that the distrainer's wife had been in the usual habit of acting as his agent in such matters, and had in his absence made a distress for damage feasant; it was held, that a tender to her of amends was sufficient (*h*).

Tender must be in full, with expenses. — The tenant must, at his peril, tender the full amount of the rent in arrear, without any deductions, except in respect of actual or constructive *payments* on account thereof (not items of set-off). He must also tender, at his peril, a sufficient sum for the law-
[*417] ful * expenses of the distress (*k*), unless indeed the tender be made before any entry to distrain (*l*). The tender should be made *unconditionally*, so that the party may accept it without prejudice to his right (if any) to recover more. And although where the amount owing is not disputed, the demand of a receipt and refusal to part with the rent without one, would seem, under the present Stamp Act, not to vitiate the tender (*m*), a tender of one quarter's rent, coupled with a demand of a receipt up to a particular day, there being a dispute whether one or two quarters' rent was then due, is not valid (*n*); but sending a certain sum "to

(*d*) Hatch *v.* Hale, 15 Q. B. 10.

(*e*) Bennett *v.* Bayes, *supra*.

(*f*) Boulton *v.* Reynolds, 2 E. & E. 369; 29 L. J., Q. B. 11.

(*g*) Pilkington *v.* Hastings, Cro. Eliz. 813.

(*h*) Browne *v.* Powell, 4 Bing. 250.

(*k*) *Post*, Sect. 8.

(*l*) Bennett *v.* Bayes, 5 H. & N. 391; 29 L. J., Ex. 391.

(*m*) See Richardson *v.* Jackson, 8 M. & W. 298. The prior enactments on the subject, 43 Geo. 3, c. 126, ss. 4, 5 (see Laing *v.* Meader, 1 C. & P. 257); 55 Geo. 3, c. 184, Sch. tit. Receipt, are repealed by 33 & 34 Vict. c. 99, and the law is now governed by the Stamp Act, 1870, s. 123, which see, Appendix A., Sect. 7.

(*n*) Finch *v.* Miller, 5 C. B. 428.

settle one year's rent," does not impose a condition (*o*), nor does a tender "under protest" (*p*).

Detention of distress after payment. — A landlord, who has accepted the rent in arrear and the expenses of the distress after the impounding, cannot be treated as a trespasser merely because he *retains possession* of the goods distrained; although his refusal to deliver them up to the tenant may amount to a conversion so as to render him liable in trover (*q*).

Property in goods distrained. — Notwithstanding a distress, the property in the cattle or goods distrained (whether impounded or not) remains vested in the tenant or owner thereof, until they are *sold* under the distress (*r*); and he may sell or otherwise dispose of them subject to the distress; or whenever the distress is determined (without any sale) he may recover them back (*r*). So a purchaser from him may recover them in trover, where the landlord has not *sold* the goods, but taken them himself at a valuation, which he had no legal right to do (*s*). The landlord or person distraining has no property in the cattle or goods distrained, nor even the possession thereof; therefore, if they are rescued, or unlawfully taken out of the pound, he cannot maintain trover (*t*), but only a special action for rescue or pound breach (*u*).

There must be an actual demise at a fixed rent. — A landlord has, at common law, no right to distrain unless there be an *actual* demise[1] at a *fixed* rent (*x*).[2] A licence to get all the

(*o*) Brown *v.* Owen, 11 Q. B. 130; Bull *v.* Parker, 2 Dowl., N. S. 345.

(*p*) Manning *v.* Lunn, 2 C. & K. 13.

(*q*) West *v.* Nibbs, 4 C. B. 172.

(*r*) Turner *v.* Ford, 15 M. & W. 212; King *v.* England, 4 B. & S. 782; 33 L. J., Q. B. 145.

(*s*) King *v.* England, *supra*.

(*t*) Rex *v.* Cotton, Parker, 121; Wilbraham *v.* Snow, 2 Saund. 47 a.

(*u*) Riddell *v.* Stowey, 2 Moo. & R. 358; Turner *v.* Ford, 15 M. & W. 213; *post*, Sect. 10.

(*x*) Dunk *v.* Hunter, 5 B. & A. 322; Hegan *v.* Johnson, 2 Taunt. 148;

[1] **The relation of landlord and tenant is essential.** — Helser *v.* Pott, 3 Pa. St. 179. A mortgagee, under mortgage prior to lease, cannot distrain. M'Kircher *v.* Hawley, 16 Johns. (N. Y.) 289; Souders *v.* Vansickle, 8 N. J. L. 313; Price *v.* Smith, 2 Green's Ch. (N. J.) 516.

Whether a subsequent mortgagee could distrain would, doubtless, depend upon which theory of mortgages prevailed where property was situated. See *ante*, ch. I, sec. 28, notes.

[2] **Fixed rent.** — Liability for use and occupation is too indefinite. Wells *v.* Hornish, 3 Pa. 30; Smoot *v.* Strauss, 21 Fla. 611.

copperas stone which may be found in part of a manor, for twenty-one years, at the yearly rent of 25*l*., is not a [*418] demise, and will not support a distress *for the agreed rent (*y*). Where a tenant holds over on sufferance only, as there is then no "agreed rent" or actual tenancy, a distress cannot lawfully be made, but the remedy is by action for use and occupation (*z*). Where a lease of tithes and land was granted at an entire rent, and it was void as to the tithes, because it was not under seal; it was held, that a distress for an arrear of rent was altogether unlawful, because there was no distinct rent due for the land (*a*). Where a lease was made *by parol* of 100 acres of land at a certain rent, and the lessee accepted the lease and entered upon the land, but afterwards

Regnant *v.* Porter, 7 Bing. 451; Watson *v.* Waud, 8 Exch. 335; Hancock *v.* Austin, 14 C. B., N. S. 634. As to distress under mere agreement for lease since the Judicature Act, see Walsh *v.* Lonsdale, L. R., 21 Ch. D. 9, and p. 86, *ante*.

(*y*) Ward *v.* Day, 33 L. J., Q. B. 3, 254.

(*z*) Alford *v.* Vickery, Car. & M. 280; Jenner *v.* Clegg, 1 Moo. & R. 213; Williams *v.* Stiven, 9 Q. B. 14.

(*a*) Gardiner *v.* Williamson, 2 B. & Adol. 337; see also Meggison *v.* Lady Glamis and Sells *v.* Same, 7 Exch. 685.

To pay seventy dollars per annum in repairs is sufficient. Smith *v.* Colson, 10 Johns. (N. Y.) 91.

To make repairs (of no estimated value) was held too indefinite in Grier *v.* Cowan, Add. (Pa.) 347.

To pay taxes and daub and chink a house was held a certain rent in proceedings for possession in Shaffer *v.* Sutton, 5 Binn. 228.

It has been many times held that rent payable in kind or specific articles might be distrained for. Owens *v.* Conner, 1 Bibb (Ky.) 605 (rent payable in iron. The court said, "id certum est quod certum reddi potest"); Jones *v.* Gundrim, 3 W. & S. (Pa.) 531 (iron); Fry *v.* Jones, 2 Rawle (Pa.) 11 (tolls of grist mill); Nowery *v.* Connolly, 29 Q. B. (Ont.) 39 (fractional share of crops); Prestons *v.* McCall, 7 Gratt. (Va.) 121 (fractional share of salt).

In Illinois it is expressly provided that rent payable in specific articles, labor, &c., may be distrained for. Sts. ch. 80, sec. 29; Craig *v.* Merime, 16 Ill. App. 214 (broom corn).

In Indiana it has been held in two cases that rent payable in kind cannot be distrained for, not being a certain rent. Bowser *v.* Scott, 8 Blackf. 86 (rent payable by the acre in wheat, corn, oats, &c.); Clark *v.* Fraley, 3 Id. 264 (lease on shares at rental of one-third of the corn). In Purcell *v.* Thomas, 7 Id. 306, held that rent payable in Indiana scrip could not be distrained for.

In Kaufman *v.* Myers, 38 Ga. 133, it was held that rent payable in American gold coin might be distrained for at market value in legal tenders.

found that eight acres had been previously demised by his lessor to another person who was in possession; it was held, that the demise was altogether void as to the eight acres, and that the rent could not be apportioned, and therefore could not be distrained for (*b*): but it would have been otherwise if the demise had been under seal, because that would have operated as a grant of the reversion and its incidents, as to the eight acres, and no apportionment of the rent would have been necessary (*c*). A rent of a certain sum per cube yard of marl dug, and a certain sum per thousand of bricks made from clay dug from land, is a rent which may be ascertained with certainty, and which therefore may be distrained for (*d*). Where the demise was subject to certain rents, provisions, and stipulations, and amongst others that the lessee should not sell hay off the premises, under the penalty of 2*s.* 6*d.* per yard of the hay sold, to be recovered by distress as for rent in arrear; it was held, that this was recoverable by distress as for rent, but was not a rent (*e*).

Agreement for lease. — Where a person is in possession under a mere agreement for a lease, not amounting to an actual demise, and no other circumstances exist from which a tenancy at a fixed rent can be implied and found by a jury; the common law rule is that as no rent (properly so called) is due for the occupation, but only a compensation in the nature of rent, the owner cannot distrain for non-payment (*f*); but that if the agreement goes on to say, that until the lease shall be executed, the rent, covenants and agreements to be therein contained shall be paid and observed, and the several rights and remedies shall be enforced in the same manner as if the same had been actually executed; that will, on entry, create a tenancy at a fixed rent, for which the landlord may distrain when due,* although [*419] no rent has been paid under the agreement (*g*); and

(*b*) Neale *v.* Mackenzie (in error), 1 M. & W. 747; Holgate *v.* Kay, 1 C. & K. 341.

(*c*) Eccl. Commrs. of Ireland *v.* O'Connor, 9 Ir. Com. L. R. 242; Lake *v.* Dean, 28 Beav. 607.

(*d*) Daniel *v.* Gracie, 6 Q. B. 145.

(*e*) Pollitt *v.* Forrest, 11 Q. B. 949; 1 C. & K. 560.

(*f*) Dunk *v.* Hunter, 5 B. & A. 322; Hegan *v.* Johnson, 2 Taunt. 148.

(*g*) Anderson *v.* Midland R. Co., 3 E. & E. 614; 30 L. J., Q. B. 94; Pinero *v.* Judson, 6 Bing. 206; Rollason

similarly that where an intended purchaser, by the contract of sale, admits himself to be tenant from week to week to the vendor, at a specific rent per week payable in advance or otherwise, such rent may be distrained for (*h*). But these cases must now be compared with Walsh *v.* Lonsdale (*i*).

Implied tenancy at fixed rent. — An actual tenancy at a fixed rent may be implied from very slight circumstances; thus where a tenant, who had entered on premises under an agreement for a lease, admitted a charge of half-a-year's rent in an account between him and his landlord; it was held, that this was equivalent to payment, and constituted him a tenant from year to year, and made him liable to a distress (*k*).[1] Where the plaintiff took possession of premises under an agreement for a lease to him for seven years, at a yearly rent payable half-yearly, but no lease was executed, nor was the quantum of rent to be paid ascertained; and the plaintiff occupied under the agreement for three years, and *paid rent* for two; it was held, that this created a tenancy from year to year, and entitled the landlord to distrain for the arrears due at the rate previously paid (*l*). But where a tenant entered under an agreement containing stipulations for a lease at 25*l.* per year, and an engagement by the landlord to complete certain erections, which were never completed, nor any rent paid, and the tenant, on being called on after some years' occupation, said he was ready to pay upon the erections being completed and an allowance made to him for some repairs; it was held, that a demise at a certain rent could not be implied so as to entitle the landlord to distrain (*m*). So where a person let a furnished house at

v. Leon, 7 H. & N. 73; 31 L. J., Ex. 96.

(*h*) Yeoman *v.* Ellison, L. R., 2 C. P. 681; 36 L. J., C. P. 326. In this case the rent was 80*l.* a week.

(*i*) *Ante*, 86.

(*k*) Cox *v.* Bent, 5 Bing. 185; Vincent *v.* Godson, 24 L. J., Ch. 122; Smith L. & T. 27 (2nd ed.).

(*l*) Knight *v.* Bennett, 11 Moore, 222.

(*m*) Regnant *v.* Porter, 7 Bing. 451.

[1] **A tenant from year to year,** at a fixed rent, is liable to distress, Sturdee *v.* Merritt, 3 Kerr's (N. B.) 641; so is a tenant holding over after a term and paying rent, Macgregor *v.* Defoe, 14 Ont. 87; and a lessee at will, if he pays a fixed rent, Buckley *v.* Russell, 24 N. B. 205.

a certain rent from a future day, and agreed that he would furnish it suitably for a school; it was held, that such furnishing was a condition precedent to the right to demand the rent, and therefore that the lessor, not having furnished it, could not distrain (*n*). Where a person entered upon premises subject to the approbation of the landlord, who afterwards did not approve, but upon his agreeing to pay an advanced rent, as well for the time he had been in possession as for the future, allowed him to continue in possession; it was held, that the landlord might distrain for the advanced rent accrued before the agreement as well as for what accrued afterwards — such agreement giving him the same power by relation to his tenant's first entry into possession, as it did to recover his rent in future (*o*).

Acknowledgment. — An *acknowledgment of an [*420] antecedent tenancy at a specified rent, with an agreement to go on on certain terms, is sufficient to authorize a distress (*p*).

Surrender. — If a tenancy has existed, a surrender of the term must be complete (*q*), or the landlord's right to distrain will continue (*r*).

Eviction. — If a tenant is evicted by title paramount, but remains in possession under a new agreement with the person who had evicted him, his original landlord cannot distrain on him for rent (*s*). If a lessor exercise his option that a lease shall be void for breach of covenant, he cannot distrain for subsequent rent (*t*).

Notice to quit. — Where the landlord has given a notice to quit and the tenant holds over, but nothing is done to show that a new tenancy is created, the landlord cannot distrain for rent accruing due after the time when the notice ex-

(*n*) Mechelen *v.* Wallace, 7 A. & E. 49; Vaughan *v.* Hancock, 3 C. B. 766.

(*o*) M'Leish *v.* Tate, Cowp. 781.

(*p*) Eagleton *v.* Gutteridge, 11 M. & W. 465; 2 Dowl., N. S. 1053; Gladman *v.* Plumer, 15 L. J., Q. B. 79; 10 Jur. 109.

(*q*) *Ante*, Ch. VIII.

(*r*) Coupland *v.* Maynard, 12 East, 134.

(*s*) Hopcraft *v.* Keys, 9 Bing. 613.

(*t*) Jones *v.* Carter, 15 M. & W. 718; Franklin *v.* Carter, 1 C. B. 750; 3 D. & L. 213; Bridges *v.* Smyth, 5 Bing. 410; Cole Ejec. 82, 408.

pired (*u*). In a previous case a distress for rent accruing after the expiration of a notice to quit was considered to operate merely as a waiver of the notice (*x*). It should however, be borne in mind that a notice to quit cannot be waived without the express or implied consent of *both* parties, and that it differs in this respect from a forfeiture (*y*).

Prolongation by custom. — Where it appeared that by the custom of the country the tenant was to have the use of the barns, gate-houses, &c., of the farm for a certain period after the end of the term, for the purpose of thrashing out corn and foddering cattle: and the tenancy was determined at Michaelmas, and the landlord in the January following distrained a corn-rick for rent due at Michaelmas, he having in the meantime obtained an injunction to restrain the tenant from carrying off the premises corn in the straw; it was held, that the holding by the tenant under the custom, though involuntary, was a *prolongation of the original term*, and that the landlord was entitled to distrain (*z*).

SECT. 3. — *Restraining Distress by Injunction.*

Injunction against distress. — Before the Judicature Acts a distress could not be restrained by injunction (*a*). But section 25, subs. 8, of the Judicature Act, 1875, which enacts, that "an injunction may be granted by an interlocutory order of the court in all cases in which it shall appear to the court to be just or convenient," extends to [*421] authorize an injunction, and such an * injunction was granted in Shaw *v.* Earl of Jersey (*b*). In that case the plaintiffs were assignees of a mining lease, under which the defendant claimed to be entitled to a certain ad-

(*u*) Alford *v.* Vickery, 1 C. & M. 280; Jenner *v.* Clegg, 1 Moo. & R. 213; Williams *v.* Stiven, 9 Q. B. 14.

(*x*) Zouch *d.* Ward *v.* Willingale, 1 H. Blac. 311.

(*y*) Blyth *v.* Dennett, 13 C. B. 178, 180.

(*z*) Knight *v.* Bennett, 3 Bing. 361; Beavan *v.* Delahay, 1 H. Blac. 5; Nuttall *v.* Staunton, 4 B. & C. 51.

(*a*) Shaw *v.* Jersey (Earl of), L. R., 4 C. P. D. at p. 261, *per* Cotton, L. J.

(*b*) L. R., 4 C. P. D. 359 — C. A., affirming decision below; L. R., 4 C. P. D. 120; 48 L. J., C. P. 308; 27 W. R. 787.

ditional rent. The defendant had distrained twice, and the plaintiffs had sued for unlawful distress. A special case had been stated to determine the construction of the lease. The defendant was restrained from distraining until the determination of this case, by an injunction granted for a fortnight, and to be continued only if the rent should in the meantime be paid into court. An injunction restraining a distress was also granted in Walsh *v.* Lonsdale (*c*) upon the terms that the rent be paid into court. It may be observed that such a *conditional* injunction is more favourable for the landlord than the action of replevin, in which the tenant is *compellable* to give security only, although he may if he please make a deposit instead. (See post, Chap. XII.)

Sect. 4. — *Who may distrain.*

(a) *Reversioners.*

Distress incident to reversion. — The person legally entitled to the immediate reversion on a lease, when any of the rent thereby reserved becomes due, may distrain for such rent by virtue of the common law. But if he afterwards assign the reversion either absolutely or by way of mortgage, the remedy *by distress* for such arrears will be lost (*d*).[1] So the right to distrain for previous arrears of rent may be lost by a severance of the reversion: thus where the plaintiff was tenant to six joint tenants, four of whom conveyed their shares to a third party; it was held, that the six were not entitled to distrain for the arrears of rent due to them before the conveyance (*e*). But a second lease to commence on

(*c*) *Ante*, 86.

(*d*) Bullen, 26, 74; Thrèr *v.* Barton, Moore, 94; Dixon *v.* Harrison, Vaughan, 52; Brown *v.* Metropolitan Counties Life Insurance Society, 1 E. & E. 832; 28 L. J., Q. B. 236; Smith *v.* Torr, 3 F. & F. 505; Smith L. & T. 189 (2nd ed.).

(*e*) Staveley *v.* Alcock, 16 Q. B. 636; 20 L. J., Q. B. 320.

[1] Distress made after date, but before delivery of deed of reversion, is legal. Magher *v.* Coleman, 1 R. & G. (N. S.) 271.

After lessor has assigned reversion in mortgage (or otherwise), the prior accrued rent becomes a mere chose in action, and cannot be distrained for by any one. Dauphinais *v.* Clark, 3 Manitoba, 225.

the expiration of the previous one, creates only an interesse termini during the continuance of the first lease, and does not amount to an assignment of the reversion (*f*). If a lessee for years *assign* his term, reserving a rent, but without an express power of distress, he cannot distrain for it when in arrear, because he has no reversion: his remedy is by an action on the contract (*g*). If a lessee sub-let for a term shorter than his own by one day or more, he has a [*422] * reversion and consequently a right to distrain, which will pass to his executors (*h*); and so has a tenant from year to year, sub-letting from year to year (*i*). A termor after his term has expired, and a demand of possession by the lessor, cannot distrain upon his subtenant continuing in possession (*k*). If a termor surrender his term to the reversioner, reserving to himself a rent, but without an express power of distress, he cannot distrain for the rent when in arrear, because he has no reversion. But if a surrender be made, and a new lease granted, the right to distrain on previous sub-tenants is preserved by the 4 Geo. 2, c. 28, s. 6, and 8 & 9 Vict. c. 106, s. 9 (*l*).

Joint tenants. — One joint tenant may distrain alone; but he must avow or justify such distress in his own right, and as bailiff of the others (*m*). A distress for rent may be authorized by one of several joint tenants (*n*). He may sign a distress warrant, and thereby appoint a bailiff to distrain for rent due to all, if the others do not forbid him; and if when applied to they merely decline to act, that will not prevent him from proceeding (*o*). If some of the joint tenants assign their shares, the right of all the joint tenants to

(*f*) Smith *v.* Day, 2 M. & W. 684; Blachford, app., Cole, resp., 5 C. B., N. S. 514; Doe *v.* Walker, 5 B. & C. 111.

(*g*) —— *v.* Cooper, 2 Wilson, 375; Smith *v.* Mapleback, 1 T. R. 441; Talentine *v.* Denton, Cro. Jac. 111; Parmenter *v.* Webber, 8 Taunt. 593; Preece *v.* Corrie, 5 Bing. 24; Pascoe *v.* Pascoe, 3 Bing. N. C. 898; Bullen, 54.

(*h*) Wade *v.* Marsh, Latch. 211; Bullen, 54.

(*i*) Curtis *v.* Wheeler, Moo. & M. 493; Oxley *v.* James, 13 M. & W. 209.

(*k*) Burne *v.* Richardson, 4 Taunt. 720.

(*l*) *Ante*, Chap. IX., Sect. 5.

(*m*) Pullen *v.* Palmer, 3 Salk. 207; Carth. 328; 5 Mod. 73.

(*n*) *Per* Jervis, C. J., in Morgan *v.* Parry, 17 C. B. 342.

(*o*) Robinson *v.* Hoffman, 4 Bing. 562; 3 C. & P. 234.

distrain for previous arrears of rent is at an end (*p*). A surviving joint tenant may distrain for arrears accrued in the lifetime of his deceased companion (*q*). Where two or more executors or other joint tenants demise to their co-executor or co-tenant their shares at a fixed rent, it seems they may distrain for such rent when in arrear (*r*).

Tenants in common. — Tenants in common are obliged to avow separately (*s*), and should make several distresses, each for his own share (*t*); thus, where land was demised by four persons (whose original title did not appear) at one entire rent, to be divided and paid separately in equal portions; and one of the four distrained upon the tenant for her own share of the rent; it was held, that the distress was regular, for whatever might have been the interest of the landlords as between themselves, as between them and the terre-tenant they were tenants in common, and entitled each to a separate distress (*u*). It seems they may all join in one distress; but in justifying such distress they must avow or justify separately for their respective shares (*x*). It has been held that the survivor of two tenants in common may sue in covenant for *the whole rent due [*423] upon a lease made by them, although the reservation was to both according to their respective interests (*y*). If a rent-charge has been divided by will, or by deed operating under the Statute of Uses, amongst several persons as tenants in common, there may be several distresses without attornment (*z*). After a devise of a reversion to two tenants in common, one of them may distrain for his share of the rent upon the lessee of the devisor, where such lessee has paid the whole rent to the other tenant in common after notice not so to pay (*a*). Where a tenant in common de-

(*p*) Staveley *v.* Alcock, 16 Q. B. 636; 20 L. J., Q. B. 320.

(*q*) Bullen, 47; 2 Roll. Abr. 86.

(*r*) Cowper *v.* Fletcher, 6 B. & S. 464; 34 L. J., Q. B. 187.

(*s*) Pullen *v.* Palmer, 3 Salk. 207.

(*t*) Bradby, 41.

(*u*) Whitley *v.* Roberts, M'Clel. & Y. 107.

(*x*) Bullen, 48.

(*y*) Wallace *v.* M'Laren, 1 Man. & R. 516; Thompson *v.* Hakewill, 19 C. B., N. S. 713; 35 L. J., C. P. 18.

(*z*) Rivis *v.* Watson, 5 M. & W. 255.

(*a*) Harrison *v.* Barnby, 5 T. R. 246; Powis *v.* Smith, 5 B. & A. 850; Doe *d.* Pritchitt *v.* Mitchell, 1 Brod. & B. 11; Bullen, 49.

mises his share to his co-tenant, he may distrain for the rent reserved (*b*).

Heirs in gavelkind. — One of several coheirs in gavelkind may distrain for rent due to himself and his coheirs without express authority from them (*c*).

Coparceners. — Coparceners are considered in law but as one heir, and therefore before partition must join in making a distress (*d*): or one coparcener may distrain alone for the whole rent, each having an estate in every part of it (*e*). No consent from the other coparceners need be previously obtained in order to authorize one coparcener to distrain alone, or alone to appoint a bailiff to distrain for the whole rent (*e*). In the event of a replevin, however, the avowry must be, according to the nature of the estate, joint; or the party distraining alone must avow in her own right for her own share, and make cognizance as bailiff of the other coparceners (*e*). After a partition, coparceners may of common right make several distresses, and their grantees also have the same power (*f*). And even a rent-charge, although entire in its nature, may be divided between coparceners; and thus by act of law the tenant of the land may become subject to several distresses (*g*). But coparceners after they have parted with their estate cannot distrain for previous arrears (*h*).

Tenants in tail. — Although a tenant in tail make leases not conformable to any enabling act (*i*), such leases are good as against himself, and therefore as a reversioner he may distrain even at common law for the rent reserved thereby (*k*).

Tenants by the curtesy. — A tenant by the curtesy may distrain of common right (*l*); but a husband unless he

(*b*) Brennam *v.* Hood, 4 Ir. Com. L. R. 332, Q. B.

(*c*) Leigh *v.* Shepherd, 2 Brod. & B. 465; Bullen, 46.

(*d*) Stedman *v.* Page, 1 Salk. 390; Stedman *v.* Bates, 1 Ld. Raym. 64.

(*e*) Leigh *v.* Shepherd, 2 Brod. & B. 465; Bullen, 44.

(*f*) Butler and Baker's case, 3 Co. R. 22 b; Co. Lit. 164 b; 169 b; Bullen, 45.

(*g*) Co. Lit. 164 b; Rivis *v.* Watson, 5 M. & W. 255.

(*h*) Dixon *v.* Harrison, Vaughan, 52; and see Staveley *v.* Alcock, 16 Q. B. 636.

(*i*) *Ante*, 3.

(*k*) 1 Swanst. 346, note; Bullen, 50.

(*l*) Bradby, 46; Bullen, 51.

be tenant by the curtesy, cannot distrain for rent *which becomes due after the death of his wife [*424] under leases of her freehold made by both of them, or by him on her behalf (*m*).

Tenants in dower. — A widow to whom dowry has been duly assigned by metes and bounds, may distrain for the subsequent rent of that part (*n*). If a rent be assigned to a widow instead of her dower, she may distrain for it, although she has no reversion, and the rent was granted without deed; for such rent is in its nature distrainable of common right (*o*).

Tenants under execution. — An entry under an execution, either by elegit, statute merchant or statute staple, gives so far an estate in the rent of land as to confer the power of distress, although there is but an uncertain interest in the reversion (*p*), and a tenant by elegit may distrain without attornment (*q*).

Lords of manors and commoners. — A lord of a manor may of common right distrain for his copyhold rents (*r*), and by 4 Geo. 2, c. 28, s. 5, he has the same right as if the rent was reserved upon lease. But copyhold rents are not within 32 Hen. 8, c. 37, giving a remedy by distress for arrears of rent to executors and administrators (*s*). Where two commoners agreed, to their mutual advantage, not to exercise their respective rights for a certain term; it was held that one might distrain the other's cattle damage feasant during that time (*t*). In case of a common absolutely stinted in point of number, one commoner may distrain the supernumerary cattle of another; but not if an admeasurement be necessary; or where the stint has relation to the quantity of common land; and a commoner cannot distrain where the owner of cattle has any colour of right to put them on the land, as that would be taking to himself jurisdiction as to the compe-

(*m*) *Ante*, 42.

(*n*) Co. Lit. 29 a, 34 b, 144 b; Stoughton *v.* Leigh, 1 Taunt. 410; Bullen, 52.

(*o*) Co. Lit. 34 b, 169 b; Bullen, 31, 52; Gilb. Rents, 20.

(*p*) Bro. Abr. Distresses, pl. 72; Cubitt's case, 4 Co. R. 7.

(*q*) Lloyd *v.* Davies, 2 Exch. 103.

(*r*) Laugher *v.* Humphrey, Cro. Eliz. 524; Bullen, 57, 58.

(*s*) Appleton *v.* Doily, Yelv. 135; Bull. N. P. 57; Sands *v.* Hempson, 2 Leon. 142.

(*t*) Whiteman *v.* King, 2 H. Blac. 4.

tency of such right; but if there be no pretence or shadow of right, as in the case of the cattle of a stranger, the commoner may always resort to distress (*u*).

Mortgagees. — A mortgagee, after giving notice to the tenant in possession under a lease or tenancy created *prior* to the mortgage, may distrain for the rent in arrear and unpaid at the time of the notice, as well as for rent which may accrue after such notice, although he was not in the actual seisin of the premises, nor in the receipt of the rents and profits thereof at the time the rent became due (*x*); but he may not distrain for rent due upon a lease made by the mortgagor alone *after* the mortgage, unless he has accepted [*425] rent from the * tenant, or has given him notice to pay rent, and the tenant has acquiesced, so as to create a new tenancy (express or implied) as between the mortgagee and the tenant (*y*). Payment of rent by the tenant under a distress does not constitute an acquiescence by relation back to the period when notice was given (*z*). But the tenant may expressly attorn to the mortgagee as from a previous day, at a specified rent, which may accordingly be distrained for (*a*).

A mortgagee may distrain on the mortgagor for rent reserved upon an attornment in the mortgage deed, whether such rent be payable in advance or not, and even where the mortgagee has not executed the deed, if the tenancy be at will only, or for a term not exceeding three years (*b*).

Mortgagors. — A mortgagor may distrain, under a lease granted by himself after the mortgage (*c*): but he cannot distrain for arrears of rent due on a lease made before the mortgage; for by the act of mortgaging the privity of estate is destroyed (*d*). But if a lessor, after mortgaging his re-

(*u*) Hall *v.* Harding, 4 Burr. 2432; 1 W. Blac. 673.

(*x*) Moss *v.* Gallimore, 1 Doug. 279; 1 Smith L. C. 629 (7th ed.); Pope *v.* Biggs, 9 B. & C. 245.

(*y*) Rogers *v.* Humphreys, 4 A. & E. 299; Partington *v.* Woodcock, 6 A. & E. 690, *ante*, 50.

(*z*) Evans *v.* Elliott, 9 A. & E. 342; Brown *v.* Storey, 1 M. & G. 117.

(*a*) Gladman *v.* Plumer, 15 L. J., Q. B. 80; 10 Jur. 109.

(*b*) Morton *v.* Woods, L. R., 3 Q. B. 658; 37 L. J., Q. B. 242.

(*c*) Bradby, 99; Alchorne *v.* Gomme, 2 Bing. 54.

(*d*) Bullen, 74.

version, is permitted by the mortgagee to continue in the receipt of the rents incident to that reversion, he, during such permission, is præsumptione juris authorized, if it should become necessary, to realize the rent by distress, and to distrain for it in the mortgagee's name, as his bailiff: and he may so justify the distress, although it was taken in his own name as for the rent due to himself (*e*). So where a mortgage by demise has been paid off by the assignee of the equity of redemption, who takes from the mortgagee an undertaking to execute a transfer of the mortgage, there is an implied authority to the assignee of the equity of redemption to distrain in the name of the mortgagee (*f*).

Annuitants. — A mere annuity may be distrained for where the deed creating it expressly confers a power to distrain (*g*); but not generally in other cases (*h*). If an annuity be granted out of an estate, and the grantor, to secure the payment, vests the estate in trustees for a term, to the use of the annuitant, and subject thereto continues in possession, the annuitant may distrain for the arrears; for supposing the term to have given him the reversion, the grantor is to be considered as his subtenant, upon whom he might as reversioner distrain at common law (*i*).

Guardians. — Such guardians as may make leases of the infant's lands in their * own names (*k*), may, [*426] during the minority of their wards, distrain in their own names for arrears of rent reserved by such leases (*l*).

(b) *Persons not having the Reversion.*

On exchanges and partitions. — Although a person who has never had the reversion, or has parted with it, cannot generally distrain (*m*), yet in some particular cases the power of

(*e*) Trent *v.* Hunt, 9 Exch. 14.

(*f*) Snell *v.* Finch, 13 C. B., N. S. 651; 32 L. J., C. P. 117.

(*g*) Chapman *v.* Beecham, 3 Q. B. 723.

(*h*) Co. Lit. 32 a; 144 b; Bullen, 51, note (9).

(*i*) Fairfax *v.* Gray, 2 W. Blac. 1326.

(*k*) See Chap. I., Sect. 20.

(*l*) Shopland *v.* Ryoler, Cro. Jac. 55, 98; Bedell *v.* Constable, Vaugh. 179; Bullen, 72.

(*m*) Smith *v.* Mapleback, 1 T. R. 441; Parmenter *v.* Webber, 8 Taunt. 593; Preece *v.* Corrie, 5 Bing. 24; Thorn *v.* Woolleombe, 3 B. & Adol. 586; Pascoe *v.* Pascoe, 3 Bing. N. C.

distress is held to be at common right, even without the reversion. Thus a rent granted upon an exchange may be distrained for without any reversion or express power (*n*), and so may a rent granted by one coparcener to another for equality of partition (*o*). In such cases the grantee of the rent may distrain for it without any express power in the deed: but if such grantee assign over, neither he nor the assignee can distrain for arrears due before the assignment (*p*).

Jointures. — A woman endowed of a rent by way of jointure in lieu of dower may distrain for it, whether it be rent-service, rent-charge or rent-seck, with or without deed (*q*). Although she have not the reversion, she may distrain for such rent of common right (*r*).

The grantee or owner of a rent-charge, although he has no reversion, may distrain for the arrears by virtue of the express power in the deed or will creating the rent-charge (*s*). So may the grantee or owner of a rent-seck, by virtue of 4 Geo. 2, c. 28, s. 5 (*t*).

Lords of manors. — The rents paid by copyholders, as tenants of the manor, to the lord, have always been considered as rent-service, fealty being necessarily incident to this species of tenure, and therefore they are distrainable of common right (*u*).

(c) *Tenants pur autre Vie.*

By 32 Hen. 8, c. 37, s. 4, tenants pur autre vie may sue or distrain for arrears due during the life, and unpaid after the death of the cestui que vie, in like manner as at common law they might have done during his life.

[*427] * (d) *Executors and Administrators.*

By the common law, executors or administrators could not distrain for arrears incurred in the lifetime of the owner of a

898; Langford *v.* Selmes, 3 Kay & J. 220.

(*n*) Lit. ss. 252, 253; Co. Lit. 169 a; Id. 153 a, note (1); Bullen, 31.

(*o*) Lit. ss. 252, 253; Co. Lit. 153 a, note (1); Id. 169 b; Butler and Baker's case, 3 Co. R. 22 b; Stukeley *v.* Butler, Hob. 172; Gilb. Rents, 19; Bullen, 31, 45.

(*p*) *Ante*, Chap. VII.

(*q*) Coll *v.* Bishop of Coventry, Hob. 140, 153.

(*r*) Co. Lit. 169 b; Id. 34 b; Gilb. Rents, 20; Bullen, 31, 52.

(*s*) *Ante*, 412.

(*t*) *Ante*, 412.

(*u*) Laugher *v.* Humphrey, Cro. Eliz. 524; *ante*, 348.

rent (*x*); but by 32 Hen. 8, c. 37, s. 1, the executors and administrators of tenants in fee, fee-tail, or for term of life, of rent-services, rent-charges, rent-seek and fee-farm rents, were empowered to distrain upon the lands chargeable with the payment thereof, so long as such lands remain in the possession of the tenant who ought to have paid them, or of any other person claiming under him by purchase, gift or descent. This statute has been considered a remedial law, extending to all executors of tenants for life, as well those who before the statute were entitled to an action of debt, as those who had no remedy whatever (*y*). By 3 & 4 Will. 4, c. 42, s. 37, "the executors or administrators of *any* lessor or landlord may distrain upon the lands *demised for any term, or at will*, for the arrears of rent due to such lessor or landlord in his lifetime, in like manner as such lessor or landlord might have done in his lifetime;" and by sect. 38, "such arrears may be distrained for after the end or determination of such term or lease at will, in the same manner as if such term or lease had not been ended or determined; provided that such distress be made within the space of six calendar months after the determination of such term or lease, and during the continuance of the possession of the tenant from whom such arrears became due; provided also, that all and every the powers and provisions in the several statutes made relating to distresses for rent shall be applicable to the distresses so made." Where the lessee of lands dies before the expiration of the term, and his administrator continues in possession during the remainder and after the expiration of it, a distress may be taken for all the arrears (*z*), not exceeding six years (*a*). But it is otherwise where a mere tenant at will dies and his widow continues in possession (*b*). Where several executors demise to their co-executor at a fixed rent, it seems they may distrain for such rent when in arrear (*c*). An executor may distrain before probate, and

(*x*) Co. Lit. 162 a.

(*y*) Hool *v.* Bell, 1 Ld. Raym. 172; 3 Salk. 136.

(*z*) Braithwaite *v.* Cooksey, 1 H. Blac. 465.

(*a*) 3 & 4 Will. 4, c. 42, s. 42; Cole Ejec. 27.

(*b*) Turner *v.* Barnes, 2 B. & S. 435; 31 L. J., Q. B. 170.

(*c*) Cowper *v.* Fletcher, 6 B. & S. 464; 34 L. J., Q. B. 187.

may ratify a distress made by a bailiff in the name of the testator immediately after his death (*d*).

(e) *Husbands.*

Husbands in right of wives. — Arrears of rent, arising out of land in which the wife has only a chattel interest, whether accruing before or during the marriage, [*428] * might always by the common law be distrained for by the husband; and by 32 Hen. 8, c. 37, s. 3, the husband was allowed to distrain for arrears accrued before or during the marriage in respect of the wife's freeholds (*e*), but not for subsequently accruing rent, unless he were tenant by the curtesy (*f*). After the death of the wife, the husband might distrain alone for all the rent due in right of the wife in her lifetime, even if it accrued to her in autre droit, as executrix (*g*).

Though the wife might generally join with her husband, in no case whatever could she before the Married Women's Property Act, distrain alone (*h*).

(f) *Corporations.*

Under implied tenancies from year to year. — If a lease be made by or on behalf of a corporation aggregate, not under their common seal, although it be invalid as a lease, yet if the tenant hold under it and pay part of the agreed rent to the corporation or their bailiff or agent, that is sufficient to create a tenancy from year to year at a fixed rent, and to entitle the corporation to distrain for such rent (*i*).

By 4 Geo. 2, c. 28, s. 5 (*k*), bodies politic and corporate are placed on the same footing as other persons with respect to the recovery of rent-seck, chief rents, and rents of assize.

Corporations sole may sue or distrain in like manner as other lessors.

Churchwardens and overseers. — Any one of the church-

(*d*) Whitehead *v.* Taylor, 10 A. & E. 210.

(*e*) Bullen, 56, 57; Ognel's case, 4 Co. R. 51 a.

(*f*) Howe *v.* Scarrott, 4 H. & N. 723; 28 L. J., Ex. 325; *ante*, Chap. VII., Sect. 8.

(*g*) Osborne *v.* Wickenden, 2 Saund. 195; Ankerstein *v.* Clarke, 4 T. R. 617; Parry *v.* Hindle, 2 Taunt. 181.

(*h*) Bullen, 54.

(*i*) Wood *v.* Tate, 2 B. & P., New R. 247.

(*k*) *Ante*, 376.

wardens and overseers of a parish holding property under 59 Geo. 3, c. 12 (*l*), may, on behalf of himself and the others, distrain for rent due in respect of the property (*m*).

(g) *Persons having special Powers.*

Rent-charge. — It is of the very essence of a rent-charge that a power of distress should be given by the deed or will creating the charge (*n*), and a distress may be made accordingly when any of such rent is in arrear. So the assignee of a rent-charge may distrain for arrears thereof which become due after the assignment (*o*), but not for previous arrears (*p*).

Rent-seck. — The grantor or owner of a rent-seck may distrain for arrears by virtue of 4 Geo. 2, c. 28, s. 5 (*q*). So a devisee may distrain for rent devised to him out of land, whether the land be expressly charged * with [*429] a distress or not (*r*). If a lessee for years assign his term, reserving a rent *with no clause of distress*, he cannot distrain for the rent, either by the common law or by the statute (*s*). A person who has possession of land, though he has not the legal estate, may by agreement grant another a power of distress (*t*). A covenant that the grantor of a rent should not replevy the goods distrained until the rent be paid, is void (*u*). Where by an inclosure act a yearly *corn-rent* was substituted in lieu of tithes, and a power of distress was given for the recovery thereof; it was held, that the goods of a tenant, coming in under the owner of land which had remained for several years untenanted, and wholly unprofitable, were liable to be distrained for such corn-rent in arrear (*x*).

(*l*) *Ante*, 31.

(*m*) Gouldsworth *v.* Knights, 11 M. & W. 337.

(*n*) *Ante*, 412.

(*o*) Maund's case, 7 Co. R. 28.

(*p*) Brown *v.* Metropolitan Counties Life Insurance Society, 1 E. & E. 832; 28 L. J., Q. B. 236.

(*q*) *Ante*, 376.

(*r*) Shep. Touch. 429; Buttery *v.* Robinson, 3 Bing. 392; Sallory *v.* Leaver, L. R., 9 Eq. 22.

(*s*) —— *v.* Cooper, 2 Wils. 375; Parmenter *v.* Webber, 8 Taunt. 593; Smith *v.* Mapleback, 1 T. R. 441; Preece *v.* Corrie, 5 Bing. 24; Pascoe *v.* Pascoe, 3 Bing. N. C. 898; Langford *v.* Selmes, 3 Kay & J. 220; 3 Jur., N. S. 859.

(*t*) Chapman *v.* Beecham, 3 Q. B. 723; Pollitt *v.* Forrest, 11 Q. B. 961.

(*u*) 1 Inst. 145 b.

(*x*) Newling *v.* Pearce, 1 B. & C. 437; Bendyshe *v.* Pearce, 4 Moo. 99.

(h) *Receivers and Agents.*

Private Receiver. — A private receiver cannot generally distrain without an express power for that purpose (*y*). In Jolly *v.* Arbuthnot, by a receivership deed executed contemporaneously with a mortgage in fee, which it recited, the mortgagor and mortgagee appointed a receiver, and constituted him their agent and attorney to receive the rents of the mortgaged property, and to use such remedies by way of entry and distress as should be requisite for that purpose. By the same deed the mortgagor attorned as tenant from year to year to the receiver, and there was a proviso that if default should be made in payment of the mortgage money or interest at the times appointed, the mortgagee might enter and avoid the tenancy created by the attornment. There was also a proviso that nothing therein contained should lessen the rights, powers or remedies of the mortgagee under the mortgage (*z*). On the mortgagor being found bankrupt, it was held, that the relation of landlord and tenant had been created between the receiver and mortgagor by the receivership deed, and that the receiver was entitled to distrain, and take the goods which had belonged to the mortgagor on the mortgaged premises (*a*).

Receivers appointed by order of court. — Receivers appointed by the High Court have a power, where they consider it necessary, to distrain, and need not apply first to the Court for a particular order for that purpose (*b*), [*430] because as the * Court never makes an immediate order, but appoints a future day for a tenant to pay, it might be an injury to the estate to wait till that time, as it would give the tenant an opportunity to convey his goods off the premises in the meantime. If, however, there is any doubt who has the legal right to the rent, then the receiver

(*y*) Bullen, 72; Ward *v.* Shew, 9 Bing. 608; 9 Exch. 19.

(*z*) The real object of this was to enable the mortgagee to obtain all the advantages, without subjecting himself to the liabilities, of a mortgagee *in possession*.

(*a*) Jolly *v.* Arbuthnot, 4 De G. & J. 224; 28 L. J., Ch. 547.

(*b*) Pitt *v.* Snowden, 3 Atk. 750; Dancer *v.* Hastings, 4 Bing. 2; Bennett *v.* Robins, 5 C. & P. 379; Brandon *v.* Brandon, 5 Madd. 473.

should make an application to that Court for an order, as he must distrain in the name of the person who has that right (*c*); unless indeed the tenant has attorned for him, and so created a tenancy as between them (*d*), in which case he should of course distrain in his own name (*e*).

Agents. — An authority to tenants to pay rent to a third person, whose receipt shall be a discharge, does not entitle that person to distrain, although he receives the rents for his own benefit (*f*). If a person having express or implied authority to distrain for rent due to another, says at the time that he distrains for rent due to himself, he may nevertheless justify as bailiff of the other (*g*).

(i) *Sequestrators.*

By sequestrators. — By the 12 & 13 Vict. c. 67, a sequestrator is empowered to levy any distress in his own name for the recovery of tithes, tithe rent-charge or rent, &c., payable to the incumbent of the sequestrated benefice. Sequestrators appointed by the High Court appear to stand on the same footing as receivers (*h*).

Sect. 5. — *Distress on Agricultural or Pastoral Holding, or Market Garden.*

Application of Agricultural Holdings Act. — If the Agricultural Holdings Act, 1888, applies, that is, if the demised premises be either wholly agricultural or wholly pastoral, or partly agricultural and partly pastoral, or wholly or partly cultivated as a market garden, held under a landlord for a term of years, or for lives, or for lives and years, or from year to year, and the tenant hold no employment under the

(*c*) Huges *v.* Huges, 3 Bro. C. C. 87; 1 Ves. jun. 161.

(*d*) Evans *v.* Mathias, 7 E. & B. 590, 601; 26 L. J., Q. B. 309; White *v.* Smale, 22 Beav. 72; 26 Id. 191; Barton *v.* Rock, 22 Id. 81.

(*e*) Jolly *v.* Arbuthnot, 4 De G. & J. 224; 28 L. J., Ch. 547.

(*f*) Ward *v.* Shew, 9 Bing. 608.

(*g*) Trent *v.* Hunt, 9 Exch. 14; Snell *v.* Finch, 13 C. B., N. S. 651; 32 L. J., C. P. 117;

(*h*) *Ante*, 429.

landlord (*i*), then the landlord's rights of distress are subject to many special limitations particularly laid down by sections 44 to 52 of the act.

[*431] * **One year's arrears alone recoverable.** — First, it is enacted by s. 44 (with a saving for arrears existing on the 25th August, 1883, which arrears are to be recoverable up to Jan. 1st, 1885, as if the act had not passed) that the six years' arrears which the landlord might otherwise have distrained for shall be reduced to one year's arrears, the words being that "it shall not be lawful to distrain for rent which became due more than one year before the making of such distress;" but a proviso recognizes and encourages the continuance of the very common practice of deferring the collection of rents for a quarter or half-year. (See p. 455, post.)

Exemption of agisted stock, &c. — Secondly, it is enacted by s. 45 that agricultural or other machinery on hire, and live stock on hire for breeding purposes, are to be absolutely exempt from distress, and that agisted cattle, where a fair price is paid by the owner, are to be exempted conditionally, that is, in case other sufficient distrainable goods should be on the premises, and even when in such case distrainable, are to be distrainable only for the amount due to the tenant from the owner for their keep.

Limitation of charges, &c. — Thirdly, it is enacted by s. 49 that the charges upon a distress for more than 20*l.* (which charges, up to 20*l.*, are limited by 57 Geo. 3, c. 93, and beyond that sum have no statutory limit) shall not exceed the charges fixed by the second schedule to the act, and by s. 51 that no person may levy a distress as bailiff unless he be appointed by a county court judge.

Appraisement dispensed with, &c. — Fourthly, it is enacted by s. 50 that the appraisement before sale required by 2 W. & M. c. 5, s. 1, in ordinary cases shall not be obligatory, and that goods distrained shall, if the tenant require, be removed to an auction room or some other place selected by him, and there sold.

(*i*) See ss. 54 and 61 of the act, post, Appendix A., and see the application of the act considered, post, Ch. XXI.

Fifteen days to replevy. — Fifthly, it is enacted by s. 51 that the tenant or owner of goods distrained shall upon his written request have fifteen days, instead of the five days limited by 2 W. & M. c. 5, s. 1 in ordinary cases, within which to replevy the goods.

Determination of dispute. — Sixthly, in regard to procedure in case of an alleged wrongful distress, it is enacted by s. 46 that any dispute relating to a distress may be heard and determined either by a county court or a court of summary jurisdiction, either of which courts, subject to appeal to quarter sessions from a court of summary jurisdiction, may make an order for restoration or "any other order which justice requires." These sections, which present not a few difficulties, will be examined in detail presently (*k*); but the question must at once be shortly considered, whether or not the parties may by special stipulation "contract out of" these sections, and legally, by preventing their taking effect, continue the rights and liabilities of the ordinary law.

[*432] * Upon the general principle *quilibet potest renunciare juri pro te introducto*, there appears to be some reason for saying that the tenant may give up his rights under these sections, and perhaps an additional reason is supplied by the fact that the rights under other sections of the act, those which secure compensation for improvements, can by the express provision of the act in no case be contracted out of. The rule appears to be that a statute can be contracted out of unless it be contrary to public policy to contract out of it (*l*), or unless some third person's rights be damaged (*m*). It can hardly be said to be contrary to public policy to contract out of these sections; but considering the extent to which the rights of third parties may be directly affected, it is submitted on the whole that they cannot be contracted out of.

(*k*) *Post*, Sect. 9, subsections (h) and (k); and Sect. 10, subsection (b).

(*l*) That the Employers' Liability Act can be contracted out of, see Griffiths *v.* Earl Dudley, L. R., 9 Q. B. D. 357.

(*m*) See Broom's Legal Maxims, 6th ed., at p. 668.

SECT. 6. — *Distress in Case of Bankruptcy.*

Landlord may distrain for one year's rent. — The landlord's right to distrain for rent, when the tenant becomes bankrupt, which was always recognized by bankruptcy law (*n*), is limited to one year's rent due prior to the adjudication. If any more arrears be then due, they may be proved for.[1]

No stay of distress. — Such is the effect of s. 42, sub-s. 1, of the Bankruptcy Act, 1883, 46 & 47 Vict. c. 52 (re-enacting without alteration s. 34 of the Bankruptcy Act, 1869), the distress under which section is not "a legal process" within the meaning of s. 10, sub-s. 2, of the Bankruptcy Act, so as to be stayable under that section (*o*); and notwithstanding the possession of a receive, may be begun, continued, and ended without any leave from any Court whatever (*p*).

The cases upon this subject are more fully given and considered in connection with the general rights of the parties in case of bankruptcy (ante, Ch. VII. Sect. 11, subs. (e), p. 282).

SECT. 7. — *Distress upon Company in Liquidation.*

Restriction of right. — Distress upon a joint stock company's goods is restricted by the Joint Stock Companies' Acts, and is not affected by the 10th section of the Judicature Act, 1875, which imports certain bankruptcy [*433] rules *into winding-up (*q*). By sect. 87 of the Joint Stock Companies' Act, 1862 (25 & 26 Vict. c.

(*n*) Goods in the custody of a messenger in bankruptcy were not exempt from distress, as being in the custody of the law. Briggs *v.* Sowry, 8 M. & W. 729.

(*o*) Birmingham Gaslight Co., *Ex parte*, Fanshaw, *In re*, L. R., 11 Eq. 615; 40 L. J., Bank. 52; 24 L. T. 639; 19 W. R. 603.

(*p*) Till, *Ex parte*, Mayhew, *In re*, L. R., 16 Eq. 97; 42 L. J., Bank. 84; 21 W. R. 574.

(*q*) Thomas *v.* Patent Lionite Co., L. R., 17 Ch. D. 250; 50 L. J., Ch. 544; 44 L. T. 392; 29 W. R. 596, C. A.

[1] Order for administration of decedent debtor's estate, not followed by bankruptcy, does not limit power to distrain for rent then accrued. *In re* Fryman's Estate, 38 Ch. D. 468.

89), it is enacted, that "where an order has been made for winding-up a company under this act no suit, action, or *other proceeding* shall be proceeded with or commenced against the company except with leave of the court, and subject to such terms as the court may impose;" and by sect. 163, that "where any company is being wound up by the court, any attachment, sequestration, distress, or execution put in force against the estate or effects of the company after the commencement of the winding-up shall be void to all intents." These two sections are to be read together, and the enactment of sect. 163 that a distress shall be "void" means that it shall be void unless leave be given under sect. 87 (*r*).

Rent due before winding-up order. — It is clearly settled that leave will not be given to distrain for rent accrued due from the company before the winding-up order (*s*); and that the 10th section of the Judicature Act, 1875, which assimilates the rules in bankruptcy to the rules in winding-up as to rights of secured creditors does not so far assimilate them as to allow the landlord to distrain for such rent (*t*). For rent due before the presentation of the petition — to which the winding-up order has relation back (*u*) — the landlord must prove, with the other creditors, in the winding-up.

Rent due after winding-up order. — As to rent accrued due after the winding-up order, "if the company for its own purposes, and with a view to the realization of the property to better advantage, remains in possession of the estate, which the lessor is not therefore able to obtain possession of, com-

(*r*) *Re* Exhall Coal Mining Co. (Limited), 33 L. J., Ch. 595; 10 Jur., N. S. 576; 4 De G., J. & S. 37; 13 W. R. 219; and see Eyton *v.* Denbigh, &c. R. Co., L. R., 6 Eq. 14; Rickman *v.* Johns, Id. 488; Lundy Granite Co., *In re*, Heaven, *Ex parte*, L. R., 6 Ch. 482; 40 L. J., Ch. 588; 24 L. T. 922; 19 W. R. 609.

(*s*) *Re* Progress Assurance Co., L. R., 9 Eq. 370; Traders' North Staffordshire R. Co., L. R., 19 Eq. 60; Thomas *v.* Patent Lionite Co., *supra* (*q*), and Brown, Bailey, and Dixon, *In re*, Roberts and Wright, *Ex parte*, L. R., 18 Ch. D. 649; 50 L. J. Ch. 738, where mortgagees having a right of distress for interest were refused leave to distrain for arrears accrued before the winding-up. For exception in case where landlord not a legal creditor, see 434 (*b*).

(*t*) Coal Consumers' Association, *In re*, L. R., 4 Ch. D. 625; Thomas *v.* Patent Lionite Co., *supra*.

(*u*) South Kensington Stores, *In re*, *infra*.

mon sense and ordinary justice require the court to see that the landlord receive the full value of his property" (*x*) and to give the leave to distrain; nor is the existence of a power of re-entry in the lease any reason for refusing such leave (*y*). The Apportionment Act, 1870 (*z*), may be resorted to for dividing a quarter's rent into a part which may only be proved for and a part which may be distrained for, and the [*434] right to * distrain begins to run, not from the date of the winding-up order, but from the date of the presentation of the winding-up petition (*a*).

Landlord "stranger" to company. — It has been twice held by the Court of Appeal (*b*), that the landlord's common law right of distress is not restricted by the Companies' Act in cases where he is a "stranger" to the company — that is, in cases where the company is not his tenant, but the goods of the company are found upon the premises of a person who is. These decisions proceed upon the ground that in such cases the landlord has no right of proof in the winding-up, not being a creditor of the company.

Review of cases. — All the cases up to 1882 will be found fully reviewed in Oak Pits Colliery Co., In re (*bb*), in which the Court of Appeal appears to have laid down the principles upon which leave is given or refused to the same effect as above stated.

Further rights of landlord. — A landlord who has demised a mine to a company for a term of years, has a right, if, before the expiration of the term, the company is ordered to be

(*x*) *Per* James, L. J., in Lundy Granite Co., *In re*, L. R., 6 Ch. 466, cited with approval by Hall, V.-C., in North Yorkshire Iron Co., *In re*, L. R., 7 Ch. D. 664. See also Silkstone *v.* Dodworth Coal and Iron Co., *In re*, Perkins, *Ex parte*, L. R., 17 Ch. D. 158; 50 L. J., Ch. 444; 44 L. T. 405; 29 W. R. 484, *per* Fry, J.

(*y*) North Yorkshire Iron Co., *In re*, *ubi supra*.

(*z*) *Ante*, Ch. X., Sect. 6.

(*a*) South Kensington Co-operative Stores, *In re*, L. R., 17 Ch. D. 250; 50 L. J., Ch. 446; 44 L. T. 471; 29 W. R. 662, *per* Fry, J.

(*b*) *In re* Lundy Granite Co., *ubi supra* (exhaustively explained by Jessel, M. R., in Traders' North Staffordshire Co., *In re*, *ubi supra*); Regent United Service Stores, *In re*, L. R., 8 Ch. D. 616.

(*bb*) Oak Pits Colliery Co., *In re*, Eyton's Claim, L. R., 21 Ch. D. 322; 51 L. J., Ch. 768; 47 L. T. 7; 30 W. R. 759 — C. A., in which it was held that the mere fact of a liquidator not endeavouring to surrender was not enough for giving leave to distrain.

wound up, to enter a claim against the company in respect of the contingent liability to the future non-payment of rent by the assignee of the lease (*c*). Where a company who were assignees of land granted for a feu duty, came to be wound up, the grantor was held entitled to prove for arrears of feu duties, and also to enter a claim for the capitalized value of future feu duties (*d*).

Sect. 8. — *The Subject-matters of Distress.*

(a) *General Rules and Exemptions.*

Distress is of nature of a pledge. — A distress being anciently considered merely as a pledge in the hands of the lord to compel the tenant to perform the service or duty required, could not at common law be sold; but was to be restored in the same plight to the owner, when such service or duty was performed; and therefore nothing could be distrained unless it could be returned in specie and undamaged (*e*), and in the same state as when * taken (*f*). This is [*435] why tenants' fixtures and the flesh of animals lately slaughtered cannot be distrained (*g*). The right to sell the distress was first given by 2 W. & M. c. 5, but that statute did not, except with respect to sheaves of corn, which were not at common law distrainable, do away with the exceptions founded on the common law rule. Subsequent statutes have further altered the law.

List of things exempted from distress. — The present exceptions, of which the more important will be considered in detail presently, may here be briefly stated as follows: —

Things absolutely privileged —

Fixtures (*h*):

(*c*) *Re* Haytor Granite Co., L. R., 1 Ch. Ap. 77; 35 L. J., Ch. 154; *Re* London and Colonial Co., L. R., 5 Eq. 561.

(*d*) Gartness Iron Co., *In re*, L. R., 10 Eq. 412; 39 L. J., Ch. 814; 23 L. T. 389; 18 W. R. 1103, *per* Bacon, V.-C.

(*e*) Gilb. Distr. 34, 48; Co. Lit. 47 b; Pitt *v.* Shew, 4 B. & A. 207; Darby *v.* Harris, 1 Q. B. 895.

(*f*) Simpson *v.* Hartopp, Willes, 515; 1 Smith L. C. 439 (7th ed.).

(*g*) Morley *v.* Pincombe, 2 Exch. 101; Brown *v.* Shevill, 2 A. & E. 138.

(*h*) Hellawell *v.* Eastwood, 6 Ex. 295, and 438, *post.*

Animals feræ naturæ (*i*):
Goods delivered to a person in the way of his trade (*k*):
Things in actual use (*l*):
Things in the custody of the law (*m*):
The goods of an ambassador (*n*):
The goods of a lodger (*o*):
Frames, looms, or machines used in the woollen, cotton, or silk manufactures (*p*):
Gas-meters, being the property of a gas company incorporated by act of parliament (*q*):
Railway rolling stock in any works not belonging to the tenant of the works (*r*).
If the Agricultural Holdings Act applies, hired machinery and breeding stock.

Things privileged sub modo or conditionally, i.e. privileged only if there be other sufficient distress on the premises —
Beasts of the plough and sheep (*s*):
Tools of trade (*t*):
If the Agricultural Holdings Act applies, agisted stock.

Subject to the above exceptions, all cattle, goods and chattels which are found upon the demised premises[1] may be

(*i*) Co. Lit. 47, and 439, *post*.
(*k*) Swire *v.* Leach, 34 L. J., C. P. 150, and 440, *post*.
(*l*) Simpson *v.* Hartopp, 1 Smith L. C. 439 (7th ed.), and 442, *post*.
(*m*) Page 442, *post*.
(*n*) 7 Ann. c. 12, s. 3.
(*o*) 34 & 35 Vict. c. 79, and 445, *post*.
(*p*) 6 & 7 Vict. c. 40, ss. 18, 19.
(*q*) Gasworks Clauses Act, 1847 (10 Vict. c. 15), s. 14.
(*r*) 35 & 36 Vict. c. 50, s. 3, *post*, 447.
(*s*) Keen *v.* Priest, 4 H. & N. 236, and 449, *post*.
(*t*) Gorton *v.* Falkner, 4 T. R. 565, and 451, *post*.

[1] **Goods of sub-lessees.** — (*a*) *At common law* they are liable, Jimison *v.* Reifsneider, 97 Pa. St. 136; Whiting *v.* Lake, 91 Id. 349; Riddle *v.* Welden, 5 Whart. (Pa.) 9, 16 (*per* Gibson, C. J.); Langton *v.* Bacon, 17 Q. B. (Ont.) 559; but they could not be distrained off the premises, Coles *v.* Marquand, 2 Hill (N. Y.) 447, 449 (*per* Bronson, J.).

(*b*) *In Illinois* it was formerly held (by construction of an early statute) that goods of sub-lessees could not be distrained, Gray *v.* Rawson, 11 Ill. 527, except crops, Uhl *v.* Dighton, 25 Ill. 154, protected by landlord's statutory lien.

The rule has been changed, and goods of sub-lessees are now liable. Sts. Ill. ch. 80, sec. 32.

distrained for rent, whether they be the effects of a tenant or of a stranger (*u*),[1] the reason being that the landlord has a lien on them in respect of the place in which they are found, and not in respect of the person to whom they
* belong. The property must be upon the premises, [*436] except in the case of a fraudulent removal (*x*), or cattle feeding or depasturing upon any common appendant or appurtenant to the demised premises (*y*), and except in the cases of distresses by the crown (*z*). The property must not be in such a situation that the attempt to distrain it would probably lead to a breach of the peace: thus it has been held that a horse cannot be distrained whilst a person is actually riding it (*a*).

Partnership property. — Where a mortgage was made by two partners of a freehold of which they were tenants in common, and each attorned tenant to the mortgagees of one

(*u*) Gilb. Distr. 33; 3 Blac. Com. 7; Smith L. & T. 194 (2nd ed.).
(*x*) *Post*, Sect. 10 (c).
(*y*) 11 Geo. 2, c. 19, s. 8, *post*, 458.
(*z*) Bullen, 76.
(*a*) Storey *v.* Robinson, 6 T. R. 138.

[1] **Goods of strangers.** — (*a*) *At common law.*— The goods of strangers upon the premises (and not privileged) may be distrained. Kleber *v.* Ward, 88 Pa. St. 93 (a piano leased to tenant's wife prior to act of May 13, 1876); Price *v.* McCallister, 3 Grant's Cas. (Pa.) 248 (billiard-table rented to lessee by month); Karns *v.* McKinney, 74 Pa. St. 387; Kessler *v.* M'Conachy, 1 Rawle (Pa.) 435, 441 (*per* Rogers, J.); O'Donnel *v.* Seybert, 13 S. & R. (Pa.) 54, 57 (*per* Duncan, J.); Wright *v.* Matthews, 2 Blackf. (Ind.) 187; Applegate *v.* Crawford, 2 Ind. 579; Stevens *v.* Lodge, 7 Blackf. 594. The wife's separate property is liable, Blanche *v.* Bradford, 38 Pa. St. 344; and the stranger is estopped to deny landlord's authority, Smith *v.* Aubrey, 7 Q. B. (Ont.) 90.

But if the goods are removed from premises they cannot be distrained, Adams *v.* La Comb, 1 Dall. (Pa.) 440; Scott *v.* McEwen, 2 Phila. 176; Sleeper *v.* Parrish, 7 Id. 247; and they may be removed to avoid distress without penalty, Strong *v.* Stebbins, 5 Cow. (N. Y.) 210.

(*b*) *Under statutes.* — In New Jersey (Rev. Sts. pp. 308–314, sec. 8), Illinois (Sts. ch. 80, secs. 16–35), Virginia (Code, sec. 2792), West Virginia (Code, ch. 93, sec. 11), Kentucky (Gen. Sts. ch. 66, sec. 13), Florida (Dig. Laws, ch. 137, sec. 1), South Carolina (Gen. Sts. sec. 1826), &c., goods of strangers are (expressly or by implication) exempted from distress. In Ontario they are exempt, except (under circumstances) those of certain near relatives, and claimants under execution, &c., through tenant (Rev. Sts. ch. 143, sec. 28).

In several states the right to distrain stranger's goods is expressly granted: Delaware (Laws of Delaware, ch. 120, sec. 22), Louisiana (Civil Code, Art. 2705–2709), Quebec (Civil Code, Art. 1622), &c.; and in some states it is left as at common law.

moiety at a separate rent, it was held by Bacon, C. J., who pointed out that his decision was "directly against the common sense and justice of the case," that, under separate distresses for rent in respect of each moiety, the mortgagees could not seize the partnership assets, but only such goods as each partner was separately entitled to (*b*).[1]

Corn and Growing Crops.

Distress of corn and growing crops. — By the common law cocks and sheaves of corn and other farm produce and growing crops could not be distrained, but were absolutely privileged from distress for rent, although there were no other goods on the premises (*c*).[2] But by 2 W. & M. sess. 1, c. 5, s. 3, "any person having rent in arrear and due upon any demise, lease or contract may seize and secure any sheaves

(*b*) Parke, *Ex parte*, Potter, *In re*, L. R., 18 Eq. 381; 30 L. T. 618; 22 W. R. 768. A distress for the whole rent, however, may be made on the goods of any tenants holding under a joint demise, or a demise in common. See Bullen, 80.

(*c*) Simpson *v.* Hartopp, Willes, 512; 1 Smith L. C. 439 (7th ed)

[1] **Property exempt from seizure on execution sometimes exempt from distress.** — In several states property exempt from seizure on execution is exempt from distress; so in Illinois (except crops), and in Ontario (except as otherwise provided), &c.

Unless specially exempted, they are liable. Harley *v.* Weathersbee, 21 S. C. 243.

Waiver of exemption. — Exemption may be waived by provision in the lease. M'Kinney *v.* Reader, 6 Watts (Pa.) 34.

[2] **Crops.** — In several states there are special statutes authorizing distress of growing crops and sheaves, cocks and stocks of corn, grain, and other produce (Laws of Del. ch. 120, sec. 2; Revision of N. J. p. 309, sec. 7; &c.).

Many of the states (see *ante*, sec. 1, note, "American substitutes for distress") give landlords special statutory liens upon the crops (generally paramount to all other liens). These liens frequently exist in conjunction with (though superior to) the landlord's ordinary lien, and frequently, also, where the law of distress does not prevail, special remedies being provided for enforcement.

In *Georgia* and *Texas* a crop cannot be distrained until it is mature. Scott *v.* Russell, 72 Ga. 35; Slay *v.* Milton, 64 Tex. 421.

In Illinois the statutory lien may be enforced by distress, Mead *v.* Thompson, 78 Ill. 62; Miles *v.* James, 36 Id. 399; or in any other convenient way, as by action against lessee's vendee, Prettyman *v.* Unland, 77 Ill. 206; by taking possession of the crop, Hunter *v.* Whitfield, 89 Ill. 229; or replevying it from officer who has levied upon it, Wetsel *v.* Mayers, 91 Ill. 497, &c.

That rent payable in kind or in shares may be distrained for in most states, see *ante*, sec. 2, note, "Fixed rent."

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 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 or sold: but the same must not be removed from such place to the damage of the owner." Under this statute it seems that the landlord *must* sell at the expiration of five days, if the corn be not replevied (*d*).

By 11 Geo. 2, c. 19, ss. 8, 9, the landlord may take and seize, as a distress for arrears of rent, all sorts of corn and grass, hops, roots, fruits, pulse or other product (*e*) whatsoever growing upon any part of the estate demised, as a distress for arrears of rent; and the same may cut, gather, make, cure, carry and lay up, *when ripe*, in the barns or *other proper place on the premises; and if there [*437] should be no barn or proper place on the premises, then in any other barn or proper place which he shall hire or otherwise procure for that purpose, and as near as may be to the premises; and in convenient time appraise, sell, or otherwise dispose of the same, towards satisfaction of the rent, and of the charges of such distress, appraisement and sale; the appraisement thereof to be taken when cut, gathered, cured and made, and not before; provided that notice (*f*) of the place where such distress shall be lodged, shall within the space of one week after the lodging or depositing thereof in such place, be given to the tenant, or left at the last place of his abode; and if the tenant shall pay or tender the arrears of rent and costs of the distress before the corn, &c. be cut, the distress shall cease, and the corn, &c. be delivered up.

By 56 Geo. 3, c. 50, s. 6, entitled "An Act to regulate the Sale of Farming Stock taken in Execution," landlords are

(*d*) Piggott *v.* Birtles, 1 M. & W. 448.

(*e*) These words do not include young trees growing in a nursery ground, but only other things *ejusdem generis* to those enumerated; Clark *v.* Gaskarth, 8 Taunt. 431; Smith L. & T. 206 (2nd ed.).

(*f*) See form of such notice, Appendix D., Sect. 5.

not to distrain for rent "on any corn, hay, straw or other produce," which have been seized in execution and sold by the sheriff or other officer according to provisions of that act, under the contract of the tenant not to take the straw, &c., off the premises, and which at the time of the sale have been severed, "nor on any turnips whether drawn or growing," if sold according to the provisions of the act. By 14 & 15 Vict. c. 25, s. 2 (*g*), growing crops seized and sold under an execution are liable for accruing or subsequent rent.

Cases decided upon the subject. — The grantee of a rent-charge, with power to distrain in the same manner as the law directs in case of rent in arrear, may under such power, and the 2 W. & M. sess. 1, c. 5, and 4 Geo. 2, c. 28, s. 5, distrain oats and hay in stacks or trusses (*h*). Trees, shrubs and plants growing in lands which the defendants had demised to the plaintiffs for a term, and which they had converted into nursery ground, and planted subsequently to the demise, are not distrainable by the landlord under the 11 Geo. 2, c. 19, as it applies only to corn and other products of the land which may become ripe, and are capable of being cut and laid up (*i*). Growing crops cannot be sold before they are ripe (*k*), but where the jury find that no damage has been sustained by the premature sale, the tenant is not entitled to a verdict even for nominal damages (*l*). A tenant's growing crops, taken in execution and sold, and remaining on the premises for the purpose of being reaped, [*438] are distrainable by the *landlord for rent become due after the taking into execution (*m*). A custom that a tenant may leave his away-going crop in the barns, &c. of the farm for a certain time after the lease has expired,

(*g*) This act is set out verbatim in Appendix A., Sect. 4.

(*h*) Johnson *v.* Faulkner, 2 Q. B. 925; Smith L. & T. 207 (2nd ed.). But see Miller *v.* Green, 2 C. & J. 143; 8 Bing. 92.

(*i*) Clark *v.* Gaskarth, 8 Taunt. 431, 742; Clarke *v.* Calvert, 3 Moo. 114; Amos & F. 319 (2nd ed.),

(*k*) Owen *v.* Leigh, 3 B. & A. 470; Proudlove *v.* Twemlow, 1 Cr. & M. 326.

(*l*) Rodgers *v.* Parker, 18 C. B. 112; 25 L. J., C. P. 220; and see Lucas *v.* Tarleton, 3 H. & N. 116.

(*m*) 14 & 15 Vict. c. 25, s. 2; *post*, Appendix A., Sect. 4, where this act is set out verbatim. As to the previ-

operates as a prolongation of the term; and the landlord may distrain the corn so left, for rent in arrear, before six months have expired from the determination of the term (*n*). Corn sown by a tenant at will (who died before harvest), and purchased by another person, cannot be distrained by the landlord for rent due from a subsequent tenant (*o*).

Sect. 9. — *The Exemptions from Distress.*

(a) *Fixtures.*

Fixtures absolutely exempt. — Things annexed to the freehold, such as buildings and fixtures, constitute, for the time being, part of the freehold, and are absolutely exempt from distress, although there are no other goods on the premises. Therefore furnaces, millstones, chimney-pieces, and the like cannot be distrained, because they cannot be taken away without doing damage to the freehold, which the law will not allow (*p*); and because those things only can be distrained for rent which the landlord can afterwards restore in the plight in which they were before the distress, and without injury thereto by the removal (*q*). So also kitchen ranges, stoves, coppers, grates and other fixtures of the like nature put up by the tenant for the more convenient or profitable use of the demised premises, and which he is entitled to sever and remove during the term, are not distrainable for rent (although they may be seized and sold by the sheriff under an execution against the goods of the tenant) (*r*),

ous law, see Wharton *v.* Naylor, 12 Q. B. 673; 6 D. & L. 136.

(*n*) Beavan *v.* Delahay, 1 H. Blac. 5; Lewis *v.* Harris, Id. 7, n.; Knight *v.* Bennett, 3 Bing. 364.

(*o*) Eaton *v.* Southby, Willes, 131.

(*p*) Simpson *v.* Hartopp, 1 Smith L. C. 439 (7th ed.); Amos & F. 314 — 318 (2nd ed.).

(*q*) Co. Lit. 47 b; Pitt *v.* Shew, 4 B. & A. 207; Darby *v.* Harris, 1 Q. B. 895; Dalton *v.* Whittem, 3 Q. B. 961; Thompson *v.* Pettitt, 10 Q. B. 101; Moore *v.* Drinkwater, 1 F. & F. 134; Smith L. & T. 196 (2nd ed.); Bullen, 92.

(*r*) Poole's case, 1 Salk. 368; Place *v.* Fagg, 4 M. & R. 277; Bates *v.* Duke of Beaufort, 8 Jur. N. S. 270, L. J.; Amos & F. 321 (2nd ed.); Smith L. & T. 195 (2nd ed.).

unless the tenant has by his lease or agreement renounced his right to disannex and remove them during the term (*s*).

Railway. — A railway is not distrainable (*t*). Machinery fixed to the freehold, not for the improvement or profitable use of the land, but only for the purpose of being more conveniently used as machinery; for instance, a mule used [*439] for spinning cotton, though sunk into a stone *floor and secured by molten lead, retains its chattel character, and may be distrained for rent (*u*). A mere temporary removal of fixtures for purposes of necessity is not sufficient to destroy the privilege (*x*); thus a smith's anvil on which he works is not distrainable; for it is accounted part of the forge, though it be not actually fixed by nails to the shop (*y*); so a millstone is not distrainable, though it be removed out of its proper place in order to be picked; because such removal is of necessity, and the stone still continues to be part of the mill (*y*); nor a lime-kiln, which is considered not to be a personal chattel, but part of the freehold (*z*).

Keys, &c. — In like manner keys (*a*), windows, and charters concerning the realty, being by construction of law parcel of the freehold, are not liable to be distrained (*b*). If a landlord, under a distress of rent, sever fixtures from the freehold and dispose of them, he is liable in trover; the articles may be described in the statement of claim as goods and chattels; and the plaintiff does not thereby waive his right of maintaining that the distress is illegal because fixtures cannot be distrained for rent in arrear (*c*). In such action their value as chattels only (not as fixtures) can be recovered (*d*). But it seems otherwise in an action of trespass (*e*). No action can be maintained for a mere construc-

(*s*) Dumergue *v.* Rumsey, 2 H. & C. 777; 33 L. J., Ex. 88.

(*t*) Turner *v.* Cameron, L. R., 5 Q. B. 306; 39 L. J., Q. B. 125.

(*u*) Hellawell *v.* Eastwood, 6 Exch. 295; 1 Smith L. C. 391 (6th ed.).

(*x*) Gorton *v.* Faulkner, 4 T. R. 567.

(*y*) Bro. Abr. tit. Distress, pl. 23; Amos & F. 317 (2nd ed.).

(*z*) Niblet *v.* Smith, 4 T. R. 504.

(*a*) 11 Co. R. 50; 6 Exch. 311.

(*b*) Gilb. Distr. 34, 48; Hellawell *v.* Eastwood, 6 Exch. 295.

(*c*) Dalton *v.* Whittem, 3 Q. B. 961; Smith L. & T. 199 (2nd ed.).

(*d*) Clarke *v.* Holford, 2 C. & K. 540.

(*e*) Thompson *v.* Pettitt, 10 Q. B. 101; Moore *v.* Drinkwater, 1 F. & F. 134.

tive seizure of fixtures as a distress, but without any actual seizure or severance or removal thereof (*f*).

(b) *Animals Feræ Naturæ.*

When animals feræ naturæ may be distrained. — Those things wherein no man can have an absolute and valuable property, such as cats, wild rabbits and animals feræ naturæ, cannot be distrained (*g*); but if deer, which are feræ naturæ, are kept in a private inclosure (not being a park) for the purpose of sale or profit, this so far changes their nature, by reducing them to a kind of stock or merchandise, that they may be distrained for rent (*h*). And deer in a park when reclaimed become personal chattels, and cease to be parcel of the inheritance (*i*), so that it seems they also may be distrained for rent (*k*), as likewise may birds kept in cages, as parrots or canaries, and even pheasants and partridges in coops before they can fly, inasmuch as they may be the subject of larceny (*l*).

Dogs. — As for * dogs, they are not indeed the sub- [*440] ject of larceny; and Lord Coke (*m*) thought them not to be distrainable, but the better opinion seems to be that they are (*n*).

(c) *Goods delivered to a Person in the way of his Trade.*

Exemption for benefit of trade. — Things delivered to a person exercising a public trade, to be carried, wrought, worked up or managed in the way of his trade or employ, are absolutely exempt from distress, although there are no other goods on the premises (*o*). Thus a horse standing in a smith's shop to be shod, materials sent to a weaver, or

(*f*) Beck *v.* Denbigh, 29 L. J., C. P. 273.

(*g*) Co. Lit. 47; Bullen, 90.

(*h*) Davies *v.* Powell, Willes, 46.

(*i*) Ford *v.* Tynte, 2 J. & H. 150; 31 L. J., Ch. 177.

(*k*) Morgan *v.* Earl of Abergavenny, 7 C. B. 768; Bullen, 90.

(*l*) Reg. *v.* Cory, 10 Cox, C. C. 23; Reg. *v.* Shickle, L. R., 1 C. C. R. 158; 38 L. J., M. C. 21.

(*m*) Co. Lit. 47 a.

(*n*) Davies *v.* Powell, Willes, 48; Bunch *v.* Kennington, 1 Q. B. 679; Smith L. & T. 203 (2nd ed.); Bullen, 90. And see the question discussed in the notes to Simpson *v.* Hartopp, 1 Smith L. C. 439 (7th ed.).

(*o*) Simpson *v.* Hartopp, Willes, 412; 1 Smith L. C. 439 (7th ed.); Bullen, 95; Smith L. & T. 200 (2nd ed.).

cloth to a tailor to be made up, and the like, are privileged for the sake of trade and commerce, which could not be carried on if such things under these circumstances could be distrained for rent due from the person in whose custody they are (*p*).[1] But although materials delivered by a manufacturer to a weaver, to be by him manufactured at his own house, are privileged from distress for rent due from the weaver to his landlord, yet a frame or other machinery delivered by the manufacturer to the weaver along with the materials, for the purpose of being used in the weaver's house in the manufacture of such materials, is not privileged, unless there are other goods upon the premises sufficient to satisfy the rent due (*q*).

The result of the cases has been said to be, that if articles are sent to a place to remain there, they are distrainable, but that if sent for a particular object, and the remaining at the place be an incident necessary for the completion of that object, they are not (*r*). But this rule will not account for all the decisions, and the exemption seems rather to arise solely for the benefit of trade (*s*). Goods pledged with a pawnbroker are not distrainable for rent due from him, notwithstanding they have remained in his possession above one year without any interest being paid (*t*). Horses and

(*p*) Co. Lit. 47 a; Gisbourn *v.* Hurst, 1 Salk. 249; Gibson *v.* Ireson, 3 Q. B. 39; Smith L. & T. 200 (2nd ed.).

(*q*) Wood *v.* Clarke, 1 C. & J. 484; Gibson *v.* Ireson, 3 Q. B. 39.

(*r*) Parsons *v.* Gingell, 4 C. B. 545; 16 L. J., C. P. 227.

(*s*) See Lyons *v.* Elliott, note (*i*) *infra*.

(*t*) Swire *v.* Leach, 18 C. B., N. S. 479; 34 L. J., C. P. 150.

[1] **Goods delivered in way of trade.** — Examples: A ship at yard for repairs, and the materials, though purchased of the shipbuilder, Gildersleeve *v.* Ault, 16 Q. B. (Ont.) 401; but in Clarke *v.* Millwall Dock Co., 17 Q. B. D. 494, it was held that a ship made by lessee for the owner (and paid for in instalments) was not exempt because, though in hands of lessee, in the way of his trade it was not *delivered* to him.

Logs delivered at mill to be sawed into deals are exempt, Guy *v.* Rankin, 23 N. B. 49, and the deals manufactured from them, Price *v.* Hall, 2 Quebec, L. R. 88. The exemption would be destroyed if tenant were a joint owner (*per* Allen, C. J. and Weldon and King, J. J., in Guy *v.* Rankin, 23 N. B. 49).

It has been held that a horse sent to a livery stable to be fed and taken care of is exempt. Youngblood *v.* Lowry, 2 M'Cords (S. C.) 39.

carriages standing at a livery may be distrained (*u*), but a carriage sent to a coachmaker and commission agent for sale may not (*x*), nor may goods warehoused in the ordinary course of business at a furniture depository (*y*). The privilege has been held not to attach to a boat sent by the * owner to salt works, and left a reasonable [*441] time in a canal on the premises, for the purpose of being loaded with salt (*z*), nor to a ship in the course of being built in a dock (*zz*), nor to brewers' casks sent to a public-house with beer, and left there until the beer is consumed (*a*). But where a butcher had sent a beast to the shop of another butcher to be slaughtered, and after it had been slaughtered the carcass remained in the shop for some time (but how long did not appear), it was held that the carcass was privileged (*b*).

Goods in hands of factor or agent. — Goods of a principal in the hands of a factor for sale are privileged from distress for rent due from such factor to his landlord, on the ground that the rule of public convenience, out of which the privilege arises, is within the exemption of a landlord's general right to distrain (*c*).[1] On the same principle goods landed

(*u*) Francis *v.* Wyatt, 1 W. Bl. 483; 3 Burr. 1498; Parsons *v.* Gingell, *supra*.

(*x*) Findon *v.* M'Laren, 6 Q. B. 891.

(*y*) Miles *v.* Furber, L. R., 8 Q. B. 77; 42 L. J., Q. B. 41; 27 L. T. 756; 21 W. R. 262.

(*z*) Muspratt *v.* Gregory, 1 M. & W. 633; s. c. (in error), 3 M. & W. 677.

(*zz*) Clarke *v.* Millwall Dock Co., 53 L. T. 316, *per* Pollock, B.

(*a*) Joule *v.* Jackson, 7 M. & W. 450.

(*b*) Brown *v.* Shevill, 2 A. & E. 138.

(*c*) Gilman *v.* Elton, 3 Brod. & B. 75.

[1] **Goods deposited or consigned, &c.**, in warehouse, Owen *v.* Boyle, 22 Me. 47; Briggs *v.* Large, 30 Pa. St. 287; Karns *v.* McKinney, 74 Id. 387, 389 (*per* Mercur, J.) or for sale in store of commission merchant, McCreery *v.* Clafflin, 37 Md. 435; Howe Machine Co. *v.* Sloan, 6 W. N. C. (Pa.) 265 and (Supreme Court) 87 Pa. St. 438, are exempt from distress.

It has been held that goods taken on storage by an ordinary merchant are exempt. Brown *v.* Sims, 17 S. & R. (Pa.) 138; Connah *v.* Hale, 23 Wend. (N. Y.) 462.

If goods are deposited for sale by one not a commission merchant, it must appear for what purpose they were deposited, Bevan *v.* Crooks, 7 W. & S. (Pa.) 452; and it has been held in Ontario that if a consignee is paid otherwise than by a commission, the goods consigned are not exempt, Hurd *v.* Davis, 23 Q. B. (Ont.) 123.

at a wharf and consigned to a broker as agent of the consignor, for sale, and placed by the broker in the wharfinger's warehouse over the wharf for safe custody until an opportunity for selling them should occur, were held not distrainable for rent due in respect of the wharf and warehouse (*d*). Similarly, corn sent to a factor for sale, and deposited by him in the warehouse of a granary-keeper, he not having any warehouse of his own, is under the same protection against a distress for rent as if it were deposited in a warehouse belonging to the factor himself (*e*).

Auctioneer. — Goods sent to an auctioneer to be sold on premises occupied by him, or in an open yard belonging to premises in his occupation, are privileged (*f*), though the place of sale is merely hired for the occasion, or the occupation has been acquired by the auctioneer by an act of trespass (*g*). But there must be a de facto occupation by the *auctioneer*, otherwise the privilege is lost. Therefore where an auction was held on a tenant's premises of the tenant's goods, and the goods of the plaintiff were for convenience being sold along with them, it was held, both on authority (*h*) and principle, that, as the auctioneer was in no sense the occupier of the premises, the goods of the plaintiff might be distrained along with those of the tenant (*i*).

Goods at an inn. — The cattle and goods of guests [*442] at an inn,[1] so long as they remain on * the premises, are exempt from a distress for rent due from the

(*d*) Thompson *v.* Mashiter, 1 Bing. 283.

(*e*) Matthias *v.* Mesnard, 2 C. & P. 353. But wine sent to a warehouse merely to be *matured* has been held not exempt. *Ex parte* Russell, 18 W. R. 753.

(*f*) Adams *v.* Grane, 1 Cr. & M. 380; Brown *v.* Arundell, 10 C. B. 54; Williams *v.* Holmes, 8 Exch. 861.

(*g*) Brown *v.* Arundell, *supra*.

(*h*) Crosier *v.* Tomkinson, *infra*.

(*i*) Lyons *v.* Elliott, L. R., 1 Q. B. D. 210; 45 L. J., Q. B. 159; 33 L. T. 806; 24 W. R. 296. This decision has been not a little criticised (see Redman and Lyon, L. & T. 2nd ed., p. 164); but it seems that, as the goods of third parties have never been exempted generally, the burden of proof is upon each third party to bring himself within the benefit of the exemption he sets up.

[1] **Goods of boarders.** — *It is held in Pennsylvania* (and was in New York while the law of distress prevailed there) that goods of boarders, in their use and possession at hotels or private boarding-houses, are exempt from distress. Riddle *v.* Welden, 5 Whart. (Pa.) 9; Matthews *v.* Stone, 7 Hill, 428.

innkeeper (*k*). But they must be actually within the premises of the inn itself, and not in any place to which the innkeeper may have removed them for his convenience: thus, where a racehorse was distrained for rent at the stable half a mile distant from the inn, the distress was determined to be a good one, and that the plaintiff had no remedy but against the innkeeper (*l*). It was once held that the consent of the landlord to the goods being upon the premises would not avail to prevent his power of distress; but if such consent were fraudulently given for the purpose of obtaining a distress, equity would relieve upon the ground of fraud: thus, where the servants of a grazier driving a flock of sheep to London, were encouraged by an innkeeper to put the sheep into the pasture gounds belonging to the inn, and the landlord, seeing the sheep, consented that they should stay there for one night, and then distrained them for rent, the grazier was relieved against the distress (*m*)

(d) *Things in actual Use.*

May not be distrained. — Things in actual use are absolutely privileged from distress for rent, or even for damage feasant, because of the danger to the public peace (*n*). Therefore a horse, whilst a man is riding upon him, or an

(*k*) Bac. Abr. Inns and Innkeepers (B.); Crozier *v.* Tomkinson, 2 Ld. Ken. 439; Smith L. & T. 204 (2nd ed.).

(*l*) Crosier *v.* Tomkinson, 2 Ld. Ken. 439.

(*m*) Fowkes *v.* Joyce, 2 Vern. 129; 3 Lev. 260; 2 Wms. Saund. 290, n. (7).

(*n*) Smith L. & T. 202 (2nd ed.).

Whether the goods must be in actual possession and use was doubtful.

In Erb *v.* Sadler, 8 W. N. C. (Pa.) 13, and Jones *v.* Goldbeck, Id. 533, it was held by the Court of Common Pleas that they must be, and goods furnished lessee for use in other parts of house were distrainable.

It was so held also in Matthews *v.* Stone, 1 Hill (N. Y.) 565, reversed by Stone *v.* Matthews, 7 Id. 428 (by divided court).

In Maryland formerly goods of boarders were held not exempt at common law, Trieber *v.* Knabe, 12 Md. 491, by Act of 1868, ch. 173; they are now exempt, but the exemption only applies to goods in possession and use of boarder, Leitch *v.* Owings, 34 Md. 262.

In Delaware property of boarders in boarding-houses is exempt by statute. Laws of Del. ch. 120, sec. 22.

Lodgers. — The goods of lodgers, if they are not also boarders, are not exempt. Lane *v.* Steinmetz, 9 W. N. C. (Pa.) 574 unless by special statute. See *ante*, (f), note, "Lodgers."

axe in a man's hand cutting wood, or the like, cannot be distrained (*o*). But a dog used for sporting purposes, or permitted to run into the woods, and not led by a string, is not exempt from a distress for damage feasant (*p*). Horses, whilst drawing a cart, and the harness thereon, are exempt from a distress, even for damage feasant (*q*). Yarn being carried on a man's shoulders to be weighed cannot be distrained any more than a net in a man's hand, or a horse on which a man is riding (*r*).

Wearing apparel. — It seems that wearing apparel, though taken off for natural repose only, is liable to distress, but that clothes actually in wear are exempt (*s*).

(e) *Goods in the Custody of the Law.*

Cannot be taken. — Goods in the custody of the law are not distrainable for rent; for it would be repugnant that it should be lawful to take goods out of the custody of the law (*t*)[1] Therefore cattle or goods already taken

(*o*) Co. Lit. 47 a; Storey *v.* Robinson, 6 T. R. 138; Field *v.* Adames, 12 A. & E. 649.

(*p*) Bunch *v.* Kennington, 1 Q. B. 679.

(*q*) Field *v.* Adames, 12 A. & E. 649.

(*r*) Read's case, Cro. Eliz. 594.

(*s*) Bissett *v.* Caldwell, Peake, 50; Baynes *v.* Smith, 1 Esp. 206.

(*t*) Co. Lit. 47 a; Gilb. Distr. 44; Rex *v.* Cotton, Parker, 120; Eaton *v.* Southby, Willes, 131; Bullen, 84; Smith L. & T. 204 (2nd ed.).

[1] **Goods in custodia legis** are not distrainable. Brown *v.* Fay, 6 Wend. (N. Y.) 392 (taken on execution); Noe *v.* Gibson, 7 Paige (N. Y.) 513 (goods in hands of receiver, landlord should apply to be examined *pro interesse suo*).

In Illinois, where the landlord has a paramount statutory lien upon the crop, it is held that he may distrain, though goods are in *custodia legis*, Mead *v.* Thompson, 78 Ill. 62; Thompson *v.* Mead, 67 Id. 395; Hadden *v.* Knickerbocker, 70 Id. 677 (*per* Scott, J.); Miles *v.* James, 36 Id. 399; although he cannot other goods, Hadden *v.* Knickerbocker, 70 Ill. 677; Herron *v.* Gill, 112 Id. 247; Rogers *v.* Dickey, 1 Gilm. (Ill.) 636.

Though the goods cannot be distrained, yet the landlord has claim to share in proceeds of the goods up to amount of a year's rent in arrears at the time of the seizure, Binns *v.* Hudson, 5 Binn (Pa.) 505; Moss's Appeal, 35 Pa. St. 162; Shirreff *v.* Vye, 24 N. B. 572; Thomas *v.* Mirehouse, 19 Q. B. D. 563; and he may sue the officer therefor if he does not voluntarily pay it, Thomas *v.* Mirehouse, and Shirreff *v.* Vye, *supra*.

It has been held that the landlord may distrain goods taken on execution, if they are released upon interpleader at instance of third party claiming them, the landlord's claim being held superior to the claimant's in interpleader. Gilliam *v.* Tobias, 11 Phila. 313.

In Illinois a landlord may replevy crops upon which he has lien from officer who has levied an execution upon them. Wetsel *v.* Mayers, 91 Ill. 497.

* damage feasant, or by the sheriff under an execution, attachment or extent, cannot be distrained for rent whilst in such custody (*u*). [*443]

But by 8 Ann. c. 14, s. 1, no goods taken on any lands leased for life, years, at will, or otherwise, shall be *taken in execution*, unless the *party at whose suit* execution issued, *before removal* of the goods, pay to the landlord the arrears of rent, if not exceeding one year's rent; and if more, then the amount of one year's rent, due at the time of the execution (*x*). There are similar enactments, with variations, in the acts relating to the County Courts (*y*), and the Court of Admiralty (*z*).

Fraudulent and irregular executions. — If the sale of goods under an execution be fraudulent, as where a fictitious bill of sale is made, and the goods remain on the premises, they may be distrained for rent (*a*). And where the execution was irregular, as where a sheriff's officer executed a writ of fieri facias by going to the house and informing the debtor he came to levy on his goods, and laying his hand on a table, said, "I take this table," and then locked up the warrant in the table-drawer, took the key and went away, without leaving any person in possession — and after the writ was returnable the landlord distrained; it was held, that it was a lawful distress (*b*). The goods may be distrained if the execution has been waived (*c*). Where a sheriff's officer, being in possession of a tenant's effects under an outlawry, made a distress on them for rent, and on the request of the landlord sold the goods distrained, and afterwards the outlawry was reversed, the officer was held liable to pay the produce of the goods to the landlord, for they were not in custodiâ legis, the judgment being mere waste paper (*d*).

Messenger in bankruptcy. — Goods seized by a messenger

(*u*) Peacock *v.* Purvis, 2 Brod. & B. 362; Wright *v.* Dewes, 1 A. & E. 641; Wharton *v.* Naylor, 12 Q. B. 673; 6 D. & L. 136; Smith L. & T. 204 (2nd ed.).

(*x*) See *post*, Sect. 11 (a).

(*y*) 19 & 20 Vict. c. 108, s. 75; *post*, Sect. 11 (b).

(*z*) 24 Vict. c. 10, s. 16; *post*, Sect. 11 (c).

(*a*) Smith *v.* Russell, 3 Taunt. 400.

(*b*) Blades *v.* Arundale, 1 M. & S. 711.

(*c*) Seven *v.* Mihil, 1 Ld. Ken. 370.

(*d*) St. John's College, Oxford *v.* Murcott, 7 T. R. 259.

under a bankruptcy have been held not to be privileged as being in the custody of the law (*e*).[1]

Receiver. — In Sutton *v.* Rees, a receiver in a legatees' suit advertised furniture in a leasehold house for sale. The superior landlord claimed rent, but took no other steps, and the furniture was sold. It was held, that the landlord had no lien on the proceeds of the sale, but must come in with the other creditors, and it was said that he should have distrained, first obtaining leave of the court so to do (*f*).

In cases of extents. — A distinction has been taken between proceedings at the suit and for the benefit of the [*444] Crown, and an outlawry in a civil suit (*g*). An * immediate extent against a Crown debtor tested after a distress taken for rent justly due to the landlord with notice of the tenant being the Crown debtor, and appraisement of the goods and chattels, but before sale, prevails against the distress (*h*) : so where a man was outlawed and an extent issued thereupon, and his goods were seized, although the landlord distrained three days before the extent, it was held that he was not entitled to any part of the rent due, under 8 Ann. c. 14 (*i*). Where an officer entered under an extent, and improperly continued on the premises for a longer period than he ought, the court would not permit the rent accruing subsequently to the seizure to be paid out of the proceeds; but left the landlord to his action against either the tenant for use and occupation, or the officer for wrongfully continuing on the premises (*k*). The landlord of premises on which goods have been seized under an extent in aid is not entitled, under 8 Ann. c. 14, s. 1, to call on the sheriff to pay a year's rent due before the teste of the writ (*l*).

(*e*) Briggs *v.* Sowry, 8 M. & W. 279; Newton *v.* Scott, 9 M. & W. 434; 10 Id. 471; Phillips *v.* Shervill, 6 Q. B. 944.

(*f*) *In re* Sutton and Sutton *v.* Rees, 32 L. J., Ch. 437; 9 Jur., N. S. 456.

(*g*) Imp. Sheriff, 171; St. John's College, Oxford *v.* Murcott, 7 T. R. 259.

(*h*) Rex *v.* Cotton, Parker, 112.

(*i*) Rex *v.* Sotherby, Bunb. 5.

(*k*) Rex *v.* Hill, 6 Price, 19; Lane *v.* Crockett, 7 Id. 566; Harrison *v.* Barry, 7 Id. 690.

(*l*) Rex *v.* Decaux, 2 Price, 17.

[1] Under the late United States bankruptcy law, property held by an assignee was not liable to distress. Morgan *v.* Campbell, 22 Wall, 381.

Growing corn seized and sold under a fi. fa. — Formerly, where a tenant's growing corn was seized and sold under a fi. fa. pursuant to 2 W. & M. c. 5, s. 3 (*m*), and the vendee permitted it to remain till it was ripe, and then cut it, the landlord could not distrain on it for rent before the expiration of a reasonable time for the vendee to remove and carry it away; such corn, whilst in the possession of the sheriff's vendee, being considered as in the custody of the law (*n*). So the landlord could not distrain for rent on any corn, hay, straw or other agricultural produce, sold by the sheriff under an execution, subject to a special agreement with the purchaser for him to use and consume the same on the demised premises according to the terms of the lease or agreement, or the custom of the country (*o*).

14 & 15 Vict. c. 25, s. 2. Crops sold under fi. fa. liable, so long as on farm. — Now, by 14 & 15 Vict. c. 25, s. 2, "in case all or any part of the growing crops of the tenant of any farm or lands shall be seized and sold by any sheriff or other officer by virtue of any writ of fieri facias, or other writ of execution, such crops, so long as the same shall remain on the farms or lands, shall, in default of sufficient distress of the goods and chattels of the tenant, be liable to the rent which may accrue and become due to the landlord *after* any such seizure and sale, and to the remedies by distress for recovery of such rent; and that notwithstanding any bargain and sale or assignment which may have been made or executed of such growing crops by any such sheriff or other officer." In consequence of this enactment, * which was passed in order to reverse the law as [*445] laid down in Wharton *v.* Naylor (*p*), the tenant's crops can only be sold under an execution for their value *minus the rent* to which they may become liable, and the costs of a distress; but the landlord may afterwards abstain

(*m*) *Ante*, 436.

(*n*) Wharton *v.* Naylor, 12 Q. B. 673; 6 D. & L. 136; Peacock *v.* Purvis, 2 Brod. & B. 362; Wright *v.* Dewes, 1 A. & E. 641.

(*o*) 56 Geo. 3, c. 50; *ante*, Chap. XI., Sect. 6 (b). This act does not apply to sales under distresses for rent; Ridgway *v.* Ld. Stafford, 6 Exch. 404.

(*p*) 12 Q. B. 673.

from distraining, and so in effect benefit the purchaser pro tanto at the tenant's expense; after which he may sue the tenant for such rent, or distrain upon his other goods for the amount.

(f) *The Goods of Lodgers.*

Lodgers' Goods Protection Act. — At common law, as we have seen, the goods of third persons are liable to be distrained for rent, subject to the exceptions in the case of goods delivered to a person in the way of his trade, and other cases. An important statutory exception has been made in favour of lodgers by an act passed in 1871, 34 & 35 Vict. c. 79.[1] By this act, which does not extend to Scotland (*q*), after reciting that "lodgers are subjected to great loss and injustice by the exercise of the powers possessed by the superior landlord to levy a distress on their furniture, goods and chattels, for arrears of rent due to such superior landlord by his immediate lessee or tenant," it is enacted (sect. 1), that "if any superior landlord shall levy or authorize to be levied a distress on any furniture, goods, or chattels of any lodger for arrears of rent due to such superior landlord by his immediate tenant, such lodger may serve such superior landlord, or the bailiff or other person employed by him to levy such distress, with a declaration in writing (*r*) made by such lodger, setting forth that such 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 lodger; and also setting forth whether any and what rent is due and for what period from such lodger to his immediate landlord; and such lodger

(*q*) Sect. 4.

(*r*) See Form of Declaration, Appendix D., No. 12.

[1] **Lodgers.** — The goods of lodgers are liable to distress in most of the American states.

In Nova Scotia and Ontario there are special provisions for the protection of lodgers whose goods are distrained upon their giving written notice, and paying their rent in arrear to the superior landlord (Rev. Sts. Nova Scotia, ch. 125, sec. 6; Rev. Sts. Ontario, ch. 143, sec. 44). See as to property of boarders, *ante*, (c), notes.

may pay to the superior landlord, or to the bailiff or other person employed by him as aforesaid, the rent, if any, so due as last aforesaid, or so much thereof as shall be sufficient to discharge the claim of such superior landlord (*s*).

Inventory. — "And to such declaration shall be annexed a correct inventory, subscribed by the lodger, of the furniture, goods, and chattels referred to in the declaration; and if any lodger shall make or subscribe such declaration and inventory, knowing the same or either of * them to [*446] be untrue in any material particular, he shall be deemed guilty of a misdemeanor."

Declaration inoperative against subsequent distress. — A declaration under this section is no protection unless it has been made after the distress has been levied or authorized or threatened, and it is inoperative against a distress subsequently levied which has not been authorized or threatened before the declaration is made So it was held by the Court of Appeal in Thwaites *v.* Wilding (*t*), on the very reasonable ground — though the decision may seem rather hard upon lodgers — that the conditions of the statute must be rigidly complied with by the lodger, in order to deprive the landlord of his remedy at common law. The declaration need not state that no rent is owing, if such be the case, nor even that the declarant is a lodger. Ex parte Harris, 34 W. R. 132; 53 L. T. 655.

If distress proceeded with. — By sect. 2, "if any superior landlord, or any bailiff or other person employed by him, shall, after being served with the before-mentioned declaration and inventory, and after the lodger shall have paid or tendered to such superior landlord, bailiff, or other person, the rent, if any, which by the last preceding section such lodger is authorized to pay, shall levy or proceed with a distress on the furniture, goods, or chattels of the lodger,

(*s*) By sect. 3, "any payment made by any lodger pursuant to the first section of this act shall be deemed a valid payment of any rent due from him to his immediate landlord."

(*t*) Thwaites *v.* Wilding, L. R., 12 Q. B. D. 4; 53 L. J., Q. B. 1; 49 L. T. 396; 32 W. R. 80, C. A., affirming decision below, L. R., 11 Q. B. D. 421; 52 L. J., Q. B. 734; 49 L. T. 201.

such superior landlord, bailiff, or other person shall be deemed guilty of an illegal distress, and the lodger may apply to a justice of the peace for an order for the restoration to him of such goods; and such application shall be heard before a stipendiary magistrate, or before two justices in places where there is no stipendiary magistrate, and such magistrate or justices shall inquire into the truth of such declaration and inventory, and shall make such order for the recovery of the goods or otherwise as to him or them may seem just, and the superior landlord shall also be liable to an action at law at the suit of the lodger, in which action the truth of the declaration and inventory may likewise be inquired into."

Who is a "lodger." — It is clear that "lodger" in this act cannot mean "sub-tenant." On the other hand, every lodger is to some extent a "tenant," and a person occupying by far the greater part of a house under a contract in writing was held to be a "lodger" within the act in Phillips *v.* Henson (*u*), where the only rooms retained by the mesne landlord were "a housekeeper's room on the basement and two or three empty attics and a stable." Nor is it necessary that the mesne landlord should even reside on the premises; it is enough if he retain by himself or an agent such control and dominion over them as the master of a house usually has (*x*). The [*447] question whether the party claiming * under the act is a "lodger" or not ought not to be left to the jury (*y*) in an action for illegal distress; though it is a question for determination by justices upon the hearing of an application for an order under the statute (*z*).

The lodger must sleep on the premises. — The lodger must sleep and reside on the premises, and a person occupying the premises in daytime only for the purpose of his business is not a "lodger" within the statute (*a*).

(*u*) L. R., 3 C. P. D. 26; 47 L. J., C. P. 273; 26 W. R. 214, *per* Grove and Lindley, JJ.; the latter learned judge is reported as observing that "probably the act would not apply to an under-tenant who has the exclusive possession of the whole house."

(*x*) Morton *v.* Palmer, 51 L. J., Q. B. 7; 45 L. T. 426; 30 W. R. 115, C. A.; Ness *v.* Stevenson, L. R., 9 Q. B. D. 245.

(*y*) Ib.

(*z*) Ness *v.* Stephenson, *supra*, note (*x*).

(*a*) Heawood *v.* Bone, L. R., 13 Q. B. D. 179; 51 L. T. 125.

A lodger may sue for selling before five days. — If the landlord sell before the five days within which by the statute of William and Mary [post, Sect. 8] the tenant has the power to replevy, the lodger has a right of action against him, and this although the declaration under the statute may not have been served till after the sale (*b*).

(g) *Railway Rolling Stock.*

Marked with owner's name, exempt. — Upon a principle similar to that of the Lodgers' Goods Protection Act, 1871, railway rolling stock is protected from distress, in cases where it is not the actual property of the tenant, by the Railway Rolling Stock Protection Act, 1872 (35 & 36 Vict. c. 50). By sect. 3 of this act, "rolling stock (*c*) being in a work (*d*) shall not be liable to distress for rent (*e*) payable by a tenant (*f*) of the work, if such rolling stock is not the actual property of such tenant, and has upon it a distinguishing metal plate affixed to a conspicuous part thereof, or a distinguishing brand or other mark conspicuously impressed or made thereon, sufficiently indicating the actual owner thereof."

Restoration. — By sect. 4, "where any such rolling stock as aforesaid is distrained, a court of summary jurisdiction (*g*) may make against the landlord such summary order for restoration of the rolling stock, or for payment of the real

(*b*) Sharp *v.* Fowle, L. R., 12 Q. B. D. 385; 53 L. J., Q. B. 309; 50 L. T. 758; 32 W. R. 539. Here the damages had been agreed upon as 17*l.*, but the action would be for irregular distress, and proof of special damage would be necessary. See Rodgers *v.* Parker, 18 C. B. 112.

(*c*) By sect. 2, this "includes wagons, trucks, carriages of all kinds, and locomotive engines used on railways."

(*d*) By sec. 2, this "includes any colliery, quarry, mine, manufactory, warehouse, wharf, pier, or jetty in or on which is any railway siding."

(*e*) By sect. 2, this "includes royalty or other reservation in the nature of rent."

(*f*) By sect. 2, this "includes a lessee, sublessee, or other person having an interest in a work under a lease or agreement, or by use and occupation, or being otherwise liable to pay rent in respect of a work."

(*g*) By sect. 2, this "means any justices of the peace, metropolitan police magistrate, stipendiary magistrate, sheriff, sheriff substitute, or other magistrate or officer, by whatever name called, who is capable of exercising jurisdiction in summary proceedings for the recovery of penalties."

value thereof, and respecting costs or otherwise, and may make against the person distraining such order in the matter and respecting costs as to the court seems just."

Tenant's interest not protected. — By sect. 5, "this act shall not extend to protect from distress the interest which any tenant may have in any rolling stock otherwise [*448] * protected under this act, but such interest may be distrained upon by the landlord, and disposed of in the same manner as the whole interest of such tenant, if he had possessed the same; and, in case of disagreement between the landlord and the parties claiming such rolling stock as to the mode of disposing of such interest, the same shall be settled by the court of summary jurisdiction; and the court shall, on the application of either party, make such order therein as to the court shall seem fit."

Appeal to quarter sessions. — By sect. 6, "If any party thinks himself aggrieved by any order or adjudication of a court of summary jurisdiction under this act, or by dismissal of his complaint by any such court, he may appeal therefrom, subject to the conditions and regulations following; that is to say: —

(1) The appeal shall be made to some court of general or quarter sessions for the county or place in which the cause of appeal arises, holden not less than fifteen days and (unless adjourned by the Court of Appeal) not more than four months after the decision of the court of summary jurisdiction:

(2) The appellant shall, within seven days after the cause of appeal has arisen, give notice to the other party and to the court of summary jurisdiction of his intention to appeal, and the ground thereof:

(3) The appellant shall, immediately after such notice, enter into a recognizance before a justice of the peace, with two sufficient sureties conditioned personally to try such appeal, and to abide the judgment of the court thereon, and to pay such costs as may be awarded by the court, or give such other security by deposit of money or otherwise, as the justice thinks fit to allow."

Exclusion of certiorari. — By sect. 7, "no order or conviction of a court of summary jurisdiction under this act shall be quashed for want of form, or be removed by certiorari or otherwise (at the instance either of the Crown or of any private party) into any superior court."

(h) *Hired Machinery and Breeding Stock.*

If the Agricultural Holdings Act applies (*h*), there is an absolute exemption of hired machinery and breeding stock. For it is provided by the second paragraph of s. 45 of that act that "agricultural or other machinery which is the bonâ fide property of a person other than the tenant, and is on the premises of the tenant under a bonâ fide agreement with him for the hire or use thereof in the conduct of his *business, and live stock of all kinds which is the [*449] bonâ fide property of a person other than the tenant, and is on the premises of the tenant solely for breeding purposes, shall not be distrained for rent in arrear." These words will, it is conceived, protect such machinery as is, in accordance with a common practice, on the premises under an agreement that it be paid for, it shall be and remain the property of the person letting it out (*i*).

(i) *Cattle, Beasts of the Plough, and Sheep.*

By 51 Hen. 3, stat. 4, no man "shall be distrained by his beasts that gain his land, nor by his sheep, while there is another sufficient distress to be found (except for damage feasant)" (*k*). This is in affirmance of the common law (*l*). Cart colts and young steers, not broken in or used for harness or the plough, are not privileged from distress as beasts which gain the land (*m*). Beasts of the plough may be distrained if the only other subject of distress is growing crops, because the landlord is entitled to distrain whatever is immediately available, and to hold the growing crops for the

(*h*) Sect. 5, p. 430, *ante*.

(*i*) See form, Lely and Pearce-Edgcumbe's Ag. Hold. Act, p. 299.

(*k*) Davies *v.* Aston, 1 C. B. 746; 3 D. & L. 188.

(*l*) 2 Inst. 132.

(*m*) Keen *v.* Priest, 4 H. & N. 236; 28 L. J., Ex. 157.

residue (*n*). If a landlord distrain, inter alia, his tenant's cattle and beasts of the plough for rent in arrear, and it appear after the sale that there would have been sufficient to satisfy the arrears and expenses without taking or selling such cattle, such distress is not thereby proved to be an illegal distress, contrary to the above statute, if there were reasonable grounds for supposing (as from the appraisement of proper and competent persons at the time of the taking) that without the taking of the beasts of the plough there would not have been a sufficient distress (*o*); and where beasts of the plough are lawfully taken on a distress, the sale of them need not be postponed to that of other goods (*o*).

Sheep of sub-tenant privileged. — The sheep of a *sub-tenant* are privileged from distress for rent if there are other goods on the premises sufficient to satisfy the rent, whether belonging to such subtenant or to any other person (*p*). The owner of sheep seized and sold under a distress for rent, which was unlawful because there were other goods on the premises belonging to him which might have been distrained for the same rent, is entitled to recover from the distrainer, not merely nominal damages, but the full value of the sheep so seized (*p*).

[*450] * **When cattle may be distrained.** — Cattle which are upon land by way of agisting may be distrained for rent (*q*): and where a stranger put in his beasts to graze for a night, by the consent of the lessor and licence of the lessee, it was held, that the lessor might distrain them for rent due out of those lands which he consented that the beasts should graze on; because such consent was no waiver of his right to distrain, unless it had been expressly agreed to; and being but a parol agreement, it could not alter the original contract between the lessor and lessee, from which the power to distrain arises (*r*). It seems to have been held in one case that cattle which are being driven to a market or fair, and are put

(*n*) Piggott *v.* Birtles, 1 M. & W. 441.

(*o*) Jenner *v.* Yolland, 2 Chit. R. 167; 6 Price, 5.

(*p*) Keen *v.* Priest, 4 H. & N. 236; 28 L. J., Ex. 157.

(*q*) Roll. Abr. 669.

(*r*) Fawkes *v.* Joyce, 3 Lev. 260; 2 Vent. 50; 2 Wms. Saund. 290, n. 7.

into pasture on the way for one night, are privileged from distress (*s*). If the landlord come to distrain, and the tenant, seeing him, drive cattle off the land, the landlord may follow the beasts and distrain them out of the premises, if he had once a view of the cattle on his land; but if the beasts go off the land of themselves before he observes them, he cannot distrain them afterwards (*t*); though if the distrainer once enter the premises to distrain the cattle, it seems that they cannot afterwards be driven off to prevent a distress (*u*).

Defects of fences. — Where beasts escape, and come upon land by the negligence or default of their owner, and are trespassers there, they may be distrained immediately by the landlord for rent in arrear (*x*); but where they come upon land by the insufficiency of fences, which the tenant or his landlord ought to repair, the lessor cannot distrain such beasts till they have been levant and couchant; that is, they must be lying down and rising up on the premises for a night and a day without pursuit made by the owner of them, — and after actual notice has been given to the owner that they are there, and he has neglected to remove them (*y*). Where cattle passing along a public highway stray into an adjoining field through defect of fences, the owner of the cattle is bound to remove them within a reasonable time, until the expiration of which they cannot lawfully be distrained for damage feasant (*z*). What is a reasonable time is a question for the jury with reference to all the surrounding circumstances (*z*).

In Singleton *v.* Williamson, the plaintiff was owner of a close A., and the defendant was owner of closes B. and C. Between A. and B. there was a fence which, as against the owner of A., the owner of B. was bound to keep in repair, but which he had neglected to do. Between B. and C. * there was a sufficient fence. The cattle of the [*451] plaintiff strayed from A. through a gap into B., and

(*s*) Tate *v.* Gleed, 2 Wms. Saund. 290, n. (*f*).

(*t*) Co. Lit. 161 a.

(*u*) Clement *v.* Milner, 3 Esp. 95.

(*x*) Gilb. Distr. 45; Co. Lit. 47 a, note (301); Kemp *v.* Crawes, 2 Lutw. 1577; 1 Ld. Raym. 168; Bullen, 103.

(*y*) Poole *v.* Longueville, 2 Saund. 289; Smith L. & T. 204 (2nd ed.).

(*z*) Goodwin *v.* Cheveley, 4 H. & N. 631; 28 L. J., Ex. 298.

there breaking down the fence between B. and C., were distrained by the defendant as, he alleged, damage feasant in C. It was held, in trover to recover the cattle, that the defendant had no right to distrain the cattle, as the first wrongful act had been committed by himself in leaving the fence between B. and A. insufficiently repaired, the natural result of which wrongful act was the damage complained of; and that the jury were properly directed that the state of the fence between B. and C., and whether or not the cattle were damage feasant, was immaterial (*a*).

It may be added here that by 11 Geo. 2, c. 19, s. 8, every landlord may take and seize, as a distress for arrears of rent, any cattle or stock of his tenant feeding or depasturing *upon any common* appendant or appurtenant, or any ways belonging to any part of the premises demised; and that by 56 Geo. 3, c. 50, s. 6, cattle feeding on crops sold under the provisions of that act cannot be distrained (*b*).

(j) *The Tools of Trade.*

Tools of trade. — The tools and implements of a man's trade are absolutely privileged from distress for rent, if they be in actual use at the time (*c*). If they be not in actual use, they are only privileged, in case there be no other distress upon the premises (*d*). But the distrainer is a trespasser ab initio only as to those particular goods which were not distrainable; the distress may be valid as to the residue, and a satisfaction pro tanto of the rent (*e*). Ledgers, day-books, vouchers and other business papers seem not to be distrainable. In one case the plaintiff recovered 40*s.* damages in trespass against the landlord and his broker for an illegal seizure thereof under a distress (*f*).

Books. — In commenting upon the dictum of Lord Coke, that the books of a scholar would be privileged from distress,

(*a*) Singleton *v.* Williamson, 7 H. & N. 410; 31 L. J., Ex. 17.

(*b*) See this act, *post*, Appendix A.

(*c*) Simpson *v.* Hartopp, Willes, 512; 1 Smith L. C. 439 (7th ed.); Gorton *v.* Faulkner, 4 T. R. 565.

(*d*) Nargett *v.* Nias, 1 E. & E. 439; 28 L. J., Q. B. 143.

(*e*) Harvey *v.* Pocock, 11 M. & W. 740; Davies *v.* Aston, 1 C. B. 746; 3 D. & L. 188.

(*f*) Gauntlett *v.* King, 3 C. B., N. S. 59.

Mr. Smith expresses an opinion that this exemption would include a lawyer's books also (*g*).

Threshing machine. — A threshing machine, which is not a fixture, is liable to a distress, unless in actual use at the time, or there be other sufficient distress (*h*). If a man has two mill-stones, and one only is in use, and the other lies by not used, it may be distrained for rent (*i*).

* (k) *Agisted Stock.*[1] [*452]

Conditional exemption. — If the Agricultural Holdings Act applies (*k*), agisted stock, that is stock taken in by the tenant to be fed, in some parts of the country called "tacks,", is conditionally exempt from distress under some circumstances. For it is provided by s. 45 of that act that "Where live stock [i.e. by s. 61 'any animal capable of being distrained' (*l*)] belonging to another person has been taken in by the tenant at a fair price, such stock shall not be distrained where there is other sufficient distress to be found." As to the "fair price" it has been held not to be necessary that there should be a price in money, and that an agreement "milk for meat" as it is termed, i.e. that the tenant should keep for his own use and by way of payment, the milk of agisted cows, is within the section (*m*).

Limit on amount recoverable. — The section goes on to provide that if the live stock be distrained by reason of other sufficient distress not being found, "there shall not be recovered by such distress a sum exceeding the amount of the price so agreed to be paid for the feeding, or if any part of such price has been paid, exceeding the amount remaining unpaid."

(*g*) Smith L. & T. 205 (2nd ed.).

(*h*) Fenton *v.* Logan, 9 Bing. 676. As to absolute exemption, if on agricultural holding, see sub-s. (*h*), *ante*, 448.

(*i*) Year Book, Easter T. 14 H. 8, pl. 6, cited in Simpson *v.* Hartopp, *ubi supra*.

(*k*) Sect. 5, *ante*, 430.

(*l*) See Sub-s. (*b*), *ante*, 439.

(*m*) London & Yorkshire Bank *v.* Belton: Ross and Smith, Claimants, L. R., 15 Q. B. D. 457.

[1] **Agisted stock.**—Cattle taken under exclusive right to feed the grass are not exempt by the Agricultural Holdings Act. Masters *v.* Green, 20 Q. B. D. 807.

In Pennsylvania cattle received to be pastured are exempt from distress. Cadwalader *v.* Tindall, 20 Pa. St. 422.

Power of owner to redeem. — Moreover the owner of the stock, who at common law would be subject to the common loss of third persons, has a special statutory privilege, it being further enacted that "it shall be lawful for him to redeem the stock at any time before it is sold (*n*) by paying to the distrainer a sum equal to such price as aforesaid," and that "any payment so made to the distrainer shall be in full discharge as against the tenant of the like amount which would be otherwise due from the owner of the stock to the tenant in respect of the price of the feeding." A proviso is added that so long as any portion of the stock shall remain on the holding, the right to distrain such portion shall continue to the full extent of the price agreed to be paid (or of the part, if any, remaining unpaid), for the feeding of the whole.

SECT. 10. — *Proceedings in Distress.*

(a) *When to be made.*

Must be between sunrise and sunset. — A distress for rent cannot be made after sunset and before sunrise, however light it may be (*o*) [1] — because the tenant would not [*453] have * any notice to make a tender of his rent, which possibly he might do in order to prevent the distress (*p*). It seems doubtful whether, for the purposes of a distress, sunrise commences with the first beams of the sun above the horizon, or when the middle of the sun is upon the horizon, or when the sun has completely emerged; "persons who distrain should bear in mind that a distress is to be made in the daytime, and they ought not to go so near the limits as to raise any doubt on the subject" (*q*). An almanack is not evidence of the time of sunrise or sunset on a particular day, nor will the court take judicial notice of

(*n*) As to time of sale, see Sect. 10, sub-s. (*h*), *post*.

(*o*) Tutton *v.* Darke and Nixon *v.* Freeman, 5 H. & N. 647; Keen *v.* Priest, 4 H. & N. 240, Watson, B.; Smith L. & T. 219 (2nd ed.).

(*p*) Gilb. Distr. 50; Co. Lit. 142 a; Aldenburgh *v.* Peaple, 6 C. & P. 212.

(*q*) Tutton *v.* Darke and Nixon *v.* Freeman, *supra*.

[1] Russell *v.* Buckley, 25 N. B. 264.

such time (*r*). It was ruled in one case, where rent being due to the defendant from the plaintiff, who was about to remove her goods, the defendant entered the house after sunset, and for some hours prevented her from so doing, and locked some of the doors, that the plaintiff was entitled to a verdict, but only for the actual damage (*s*), but it seems that the full value for the goods distrained ought to have been given (*t*).

Must not be till after rent-day. — A distress cannot be made the same day on which the rent becomes due, for it is not in arrear until the next day (*u*).[1] The custom of a place or an

(*r*) 5 H. & N. 647, 649, *per* Pollock, C. B.; Collier *v.* Nokes, 2 C. & K. 1013.

(*s*) Lamb *v.* Wall, 1 F. & F. 503.

(*t*) Edmondson *v.* Nuttall, 17 C. B., N. S. 280; Attack *v.* Bramwell, 3 B. & S. 520; 32 L. J., Q. B. 146.

(*u*) Duppa *v.* Mayo, 1 Saund. 287; 2 Salk. 578; Co. Lit. 47 b, note (b); Bullen, 119; Dibble *v.* Bowater, 2 E. & B. 564.

[1] **Distress; when may be made.** — (*a*) *At common law* not till rent is in arrears. Slay *v.* Milton, 64 Tex. 421; Scott *v.* Russell, 72 Ga. 35; M'Kinney *v.* Reader, 6 Watts (Pa.) 34, 41; Evans *v.* Herring, 27 N. J. L. 243; Bailey *v.* Wright, 3 M'Cord (S. C.) 484. A distress made on last day of term at noon is too soon. Johnson *v.* Owens, 2 Cranch C. Ct. 160.

Rent payable in advance may be distrained for as soon as payable. Conway *v.* Starkweather, 1 Denio (N. Y.) 113; Beyer *v.* Fenstermacher, 2 Whart. 95; Anderson's Appeal, 3 Pa. St. 218; Williams *v.* Howard, 3 Munf. (Va.) 277; Peters *v.* Newkirk, 6 Cow. (N. Y.) 103; Russell *v.* Doty, 4 Id. 576, 581 (*per* Sutherland, J.).

Taking a promissory note suspends, but does not destroy, the right of distress, Judge *v.* Fiske, 2 Speers (S. C.) 436; Fife *v.* Irving, 1 Rich. L. (S. C.) 226; Snyder *v.* Kunkleman, 3 Pa. 487; even though lessor negotiates the note if he takes it up, Giles *v.* Hays, 10 Md. 333; unless the note was taken in satisfaction instead of security, as it would be *primâ facie* presumed to be in some states. It has also been held that landlord, after he has recovered judgment, may distrain if it is unsatisfied. Chipman *v.* Martin, 13 Johns. (N. Y.) 240.

Goods transferred or levied upon before rent is in arrears are ordinarily thereby exempted from the landlord's preference lien. A voluntary assignee, under assignment prior to accruing of rent, can hold the assigned property as against the landlord, Burchard *v.* Rees, 1 Whart. (Pa.) 377; Belknap *v.* Hastings, 1 Denio (N. Y.) 190; and landlord has no valid claim to be paid one year's rent out of proceeds of goods levied upon prior to the accruing of the rent, McWillie *v.* Hudson, Treadw. Const. (S. C.) 119; even though goods after levy are left on premises, Ayres *v.* Depras, 2 Speers (S. C.) 367.

Goods removed *bonâ fide* from premises, before rent accrued, are thereby ordinarily discharged from landlord's lien. Brown *v.* Duncan, Harper's L. (S. C.) 337.

agreement between the landlord and tenant, if there be no objection to it in point of law, may indeed empower the landlord to distrain for it earlier, for *conventio vincit legem;* as where a person took a shop, and agreed to pay a year's rent in advance (*x*). So where, by the custom of the country, half-a-year's rent became due on the day on which the tenant entered, it was held that the landlord might distrain before the half-year had expired (*y*). On the other hand, the right to distrain may be *postponed* by agreement, ex. gr. until the landlord has produced his receipt for the rent due from him to the superior landlord (*z*). So a power of distress may be granted *after* demand of the rent from the tenant personally, or in some other specified manner; but where the rent is to be paid, "being lawfully demanded," the distress itself is a sufficient demand (*a*).

May be within six months after lease determined. — At common law a distress could not have been made after the expiration of the lease (*b*). But by 8 Ann. c. 14, ss. 6, 7, "any person or persons having any rent in arrear or due [*454] upon any lease for life or * lives, or for years, or at will, ended or determined (*c*), may distrain for such

(*x*) Jenner *v.* Clegg, 1 Moo. & R. 213; Lee *v.* Smith, 9 Exch. 662.

(*y*) Buckley *v.* Taylor, 2 T. R. 600; M'Leish *v.* Tate, Cowp. 781; Tracey *v.* Talbot, 6 Mod. 214; Jenner *v.* Clegg, 1 Moo. & R. 213; Lee *v.* Smith, 9 Exch. 662.

(*z*) Giles *v.* Spencer, 3 C. B., N. S. 244; 26 L. J., C. P. 237.

(*a*) Browne *v.* Dunnery, Hob. 208; Kind *v.* Ammery, Hutton, 23.

(*b*) Co. Lit. 47 b; Pennant's case, 3 Co. R. 64; Williams *v.* Stiven, 9 Q. B. 14; Bullen, 120.

(*c*) Semble, *per* Willes, J., in Grimwood *v.* Moss, 42 L. J., C. P. at p. 240, that this does not include determination by *forfeiture*.

In Pennsylvania it is held that landlord has claim upon goods levied upon prior to accruing of the rent, for rent up to the time of seizure, which may be apportioned, though in the middle of the rent period, Anderson's Appeal, 3 Pa. St. 218; West *v.* Sink, 2 Yeates (Pa.) 274; Binns *v.* Hudson, 5 Binn. (Pa.) 505; though it is there considered (*per* Gibson, C. J., in Anderson's Appeal, *supra*) that the court of Pennsylvania have stretched the statute in the interest of equity.

(*b*) *Under statutes.* — *In Illinois* (Sts. ch. 80, sec. 35) if tenant remove or is about to remove his crops from the demised premises before the rent accrues, the landlord may distrain, or if the tenant himself remove (sec. 33).

In Mississippi landlord may have an attachment upon affidavit, that tenant is about to remove his effects from demised premises (Rev. Code, ss. 1304–1347).

In Georgia likewise (Code, sec. 2285).

arrears after the determination of the said respective leases, in the same manner as they might have done if such lease or leases had not been ended or determined:" "provided that such distress be made within the space of *six* calendar 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." [1]

Before this act, if rent had been reserved payable, say at Lady-day and Michaelmas, the lord would have lost his remedy by distress for his last half-year's rent; for he could not have distrained for it until it was in arrear, and before then the term would have ended (*d*).

Distress on part after lease determined. — Where the tenant is allowed to hold over part of the demised property, the landlord may distrain on that part (*e*). And where the term is prolonged as to part by the custom of the country the landlord may distrain although the six months have expired (*f*). Nor does six months' limit apply to a case where the landlord was a tenant for the life, and the term is prolonged till the end of the current year, under the statute 14 & 15 Vict. c. 25, s. 1, in lieu of emblements (*g*).

(*d*) Co. Lit. 47 b; Bullen, 120; Smith L. & T. 222 (2nd ed.).

(*e*) Nuttall *v.* Staunton, 4 B. & C. 51.

(*f*) Beavan *v.* Delahay, 1 H. Blac. 5; Knight *v.* Bennett, 3 Bing. 364; Griffiths *v.* Puleston, 13 M. & W. 358.

(*g*) Haines *v.* Welch, L. R., 4 C. P. 91; 38 L. J., C. P. 118.

[1] **Distress after expiration of tenancy.** — The statutory right of distraining within six months exists generally in America. Distress in most of the states cannot be made after more than six months. Werner *v.* Ropiequet, 44 Ill. 522. In case of a lease from year to year, the first year's rent may be distrained for more than six months after the end of the year. McClenaghan *v.* Barker, 1 Q. B. (Ont.) 26.

In Pennsylvania the time is unlimited. (Act of Mar. 21, 1772; 2 Purdon's Dig. p. 1011; Moss's Appeal, 35 Pa. St. 162; Lewis's Appeal, 66 Id. 312.)

After expiration of landlord's interest distress cannot be made. Hartley *v.* Jarvis, 7 Q. B. (Ont.) 545.

After tenant has abandoned possession distress cannot be made, Bukup *v.* Valentine, 19 Wend. (N. Y.) 554; Williams *v.* Terboss, 2 Id. 148, except in the cases provided by statute. If tenant surrenders between rent days, the right of distress as well as rent for that quarter is extinguished, Greider's Appeal, 5 Pa. St. 422; though landlord is entitled to the emblements, Bain *v.* Clark, 10 Johns. (N. Y.) 424.

In case of death of tenant, &c. — Where the original tenant dies and his representative enters, the landlord may distrain upon the latter within six months after the end of the term (*h*). But where a tenant at will dies and his widow remains in possession, no distress can be made, because not only the tenancy but also the possession of the tenant from whom the arrears became due has ceased (*i*). Where the tenant of a farm remained a few days after the expiration of his term, and, after entry by a new tenant, went away, leaving a cow and some pigs, but giving no further intimation of a purpose to return or to continue holding any part of the farm, it was held, that the landlord could not justify distraining the goods so left for arrears of rent, under this statute, inasmuch as the possession of the tenant had ceased (*k*).

(b) *What arrears recoverable.*

Only six years' arrears of rent are recoverable by distress in ordinary cases, and if the Agricultural Holdings Act applies (*l*), only one year's arrears are so recoverable.[1]

By 3 & 4 Will. 4, c. 27, s. 42, "no arrears of rent [*455] or interest in * respect of money charged on rent, or damages in respect of arrears, shall be recovered by distress, action or suit, but within *six* years next after the same shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto or his agent, signed by the person by whom the same was payable or his agent." This section

(*h*) Braithwaite *v.* Cooksey, 1 H. Blac. 465; Smith L. & T. 220 (2nd ed.).

(*i*) Turner *v.* Barnes, 2 B. & S. 435; 31 L. J., Q. B. 170.

(*k*) Taylerson *v.* Peters, 7 A. & E. 100.

(*l*) *Ante*, Sect. 5, and *post*.

[1] **Limit of time to distrain in America.** — In most of the states there is no express statutory limit as to the time within which a distress must be made.

In Ontario it must be within ten years of the time the right to distrain accrues (Rev. Sts. ch. 111, sec. 4); in *Virginia*, within five years (Code, sec. 2790); in *West Virginia*, one year (Code, ch. 93, sec. 10); in *Delaware*, two years (Laws of Del. ch. 120, sec. 44).

In Kentucky the landlord (to secure his superior lien for one year's rent) must distrain upon ordinary personalty within ninety days, or upon crops within one hundred and twenty days (Gen. Sts. ch. 66, secs. 12, 13).

applies to rents reserved on ordinary leases (*m*). But it is well observed by Mr. Smith (*n*) that the power to distrain for this limited amount is not lost *by reason of the mere non-payment of rent* for any time short of the period after the lapse of which the right to recover the land is gone; and we shall see presently that, although only six years of rent can be recovered by distress, twenty years' arrears may be recovered in an action of covenant (*o*).

Right must have accrued within 12 years.— By the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 1, "no person shall make an entry or distress, or bring an action or suit to recover any land or rent, but within twelve years next after the time at which the right to make such entry or distress, or to bring such action or suit, shall have first accrued to some person through whom he claims; or if such right shall not have accrued to any person through whom he claims, then within twelve years next after the time at which the right to make such entry or distress, or to bring such action or suit, shall have first accrued to the person making or bringing the same." The subsequent sections show when the right is to be deemed to have first accrued. It has been established, however, by authority, that the repealed second section of 3 & 4 Will. 4, c. 27, with which the above section is substantially identical, excepting that the period of twelve is substituted for the period of twenty years, *does not apply to rent reserved on a demise* (which is a mere incident to the reversion), but to rents wherein a distinct estate may be had independently of any title to the land out of which the rent issues (*p*), ex. gr. an ancient quit rent (*q*), a fee farm rent reserved in letters patent (*r*). The right to distrain, therefore — for six years' arrears — subsists as long as the relation

(*m*) Humfrey *v.* Gery, 7 C. B. 567; Manning *v.* Phelps, 10 Exch. 59.

(*n*) Smith L. & T. (2nd ed. p. 190), citing Doe *v.* Oxenham, 7 M. & W. 131.

(*o*) *Post*, Chap. XIII., Sect. 1, "Action on Covenant for rent;" Paget *v.* Foley, 2 Bing. N. C. 679.

(*p*) Grant *v.* Ellis, 9 M. & W. 113; Archbold *v.* Scully, 9 H. L. 360. See criticism of the decisions in the Jurist Newspaper, 9 Jur., N. S., Pt. II., p. 315.

(*q*) Owen *v.* De Beauvoir, 16 M. & W. 547; 5 Exch. 166.

(*r*) Humfrey *v.* Gery, 7 C. B. 567.

of landlord and tenant subsists, and for the whole length, however long, of a term created by deed, notwithstanding the non-payment of the rent for any number of years (*s*).

Distress on Agricultural Holding. — If the Agricultural Holdings Act applies (*t*), only one year's arrears of rent are recoverable by distress. For it is enacted by s. 44 of [*456] that * Act that "it shall not be lawful for any landlord entitled to the rent of any holding to which the Act applies to distrain for rent which became due more than one year before the making of such distress." But in order to provide for the continuance without loss to the landlord, of the very common practice of deferring the collection of rents from the day at which they became due to a day later by a quarter or half-year than such day, this important proviso is added: —

Deferring collection. — "Where it appears that according to the ordinary course of dealing between the landlord and tenant, the payment of the rent has been allowed to be deferred until the expiration of a quarter of a year or half a year after the date at which such rent legally became due, then *for the purpose of this section* the rent shall be deemed to have become due at the expiration of such quarter or half-year as aforesaid, and not at the date at which it legally became due."

The words "for the purpose of this section" are important as showing that the proviso does not turn the deferred date into a legal date absolutely, but merely for the purpose of fixing the time for a distress. With regard to the exact periods of quarters and half-years, it seems that if a longer period than these shall have been allowed, the landlord will be able to count from the end of the quarter or half-year forming part of such longer period, but that if a shorter period shall have been allowed, such shorter period cannot be taken into account at all.

(*s*) See Grant *v.* Ellis, 9 M. & W. 113; Doe *d.* Davey *v.* Oxenham, 7 M. & W. 131. As to ejectment, see *post*, Chap. XX., Sect. 1 (b).

(*t*) *Ante*, Sect. 5.

(c) *Where Distress must be made.*[1]

By the Statute of Marlebridge (52 Hen. 3, c. 15), "it shall be lawful for no man from henceforth for any manner of cause to take distresses *out of his fee*, nor in the king's highway, nor in the common street, but only to the king and his officers having special authority to do the same."

Distress must be on land. — As a general rule, the distress must be made on the land from whence the rent issues, and elsewhere (*u*), except in the case of the king (or queen regnant), who may distrain on any of his tenants' lands wherever situate (*x*), and except in the case of fraudulent removals (*y*), and distresses for gale rents of quarries in the Forest of Dean (*z*). A further important exception, that the parties may by agreement arrange for a right of distress upon land other than that out of which the rent issues, was established by the Exchequer Chamber in Daniel *v.* Stepney (*a*).

*** Two separate demises, &c.** — Where two pieces of [*457] land are let by two separate demises, although both are contained in one deed, a joint distress cannot be made for them; as that would be to make the rent of one issue out of the other (*b*). Where a single rent issues out of land in the occupation of several tenants, a distress may be made for the whole amount upon the land of any one of them (*c*).

Distress on part. — The distress may be made upon *any part* of the land, as the entire rent issues out of the whole and every part (*d*). Where the tenant of a farm holds over part of it after the expiration of the term, pursuant to some clause in the lease or the custom of the country, a distress

(*u*) Co. Lit. 161 a; Gilb. Distr. 40; Bullen, 124; Com. Dig. Distress (A. 3), (B. 1); Capel *v.* Buzzard, 6 Bing. 150; 3 B. & J. 334; Smith L. & T. 211 (2nd ed.).

(*x*) 2 Inst. 132; Com. Dig. Distress (A. 3); Smith L. & T. 211 (2nd ed.).

(*y*) *Post*, 467.

(*z*) 59 Geo. 4, c. 86, s. 7.

(*a*) L. R., 9 Exch. 185.

(*b*) Rogers *v.* Birkmire, 2 Stra. 1040; Rep. temp. Hardw. 245.

(*c*) 1 Roll. Abr. 671; Bullen, 125; Woodcock *v.* Titterton, 12 W. R. 685, Q. B.

(*d*) Com. Dig. tit. Distress (A. 3); Bullen, 125; Woodcock *v.* Titterton, *supra*.

[1] See *ante*, sec. 1, notes

may be made on that part for all the arrears within six months after the expiration of the tenancy (*e*). Where by indenture A. demised to B. a wharf, next the River Thames, described by abutments, together with all ways, paths, passages, easements, profits, commodities and appurtenances whatsoever to the said wharf belonging; and by the indenture the exclusive use of the land of the river Thames opposite to and in front of the wharf between high and low water mark, as well when covered with water as dry, for the accommodation of the tenants of the wharf, was demised as appurtenant to the wharf, but the land itself between high and low water mark was not demised: it was held that the lessor could not distrain for rent in arrear barges the property of B. lying in the space between high and low water mark, and attached to the wharf by ropes (*f*). But where a tenant rented a stable, and was in the habit of keeping his cart on a part of the road adjoining the stable, which had been paved for that purpose by his landlord: held, that a distress for rent might be made of the cart whilst on the paved part of the road, which must be considered as part of the demised premises (*g*).

Lands in different counties. — Where lands lying in different counties are held under one demise at one entire rent, a distress may be lawfully taken in either county for the whole rent in arrear, and chasing a distress over is a continuance of the taking; but where the counties do not adjoin, a distress cannot be chased out of one county into the other (*h*).

Distress on highway. — By the Statute of Marlebridge (52 Hen. 3, c. 15) no person can make a distress on the highway, it being privileged for the convenience of passengers and the encouragement of commerce (*i*): but it [*458] * would seem that where a farm adjoins a highway, goods standing in the highway, within the middle of

(*e*) Nuttall *v.* Staunton, 4 B. & C. 51; Beavan *v.* Delahay, 1 H. Blac. 5; Lewis *v.* Harris, Id. 7, note (*a*); Knight *v.* Bennett, 3 Bing. 361; Bullen, 121, 125.

(*f*) Capel *v.* Buszard, 6 Bing. 150; 3 Y. & J. 344; 8 B. & C. 141; Bullen, 124.

(*g*) Gillingham *v.* Gwyes, 16 L. T. 640, *per* Lush, J.

(*h*) Walter *v.* Rumball, 1 Ld. Raym. 55; 12 Mod. 77; 1 Salk. 247.

(*i*) Co. Lit. 160 b; Gilb. Distr. 51; Bullen, 125.

it, and on that part of it next the demised premises, may be distrained (*k*). If the landlord or his agent come to distrain cattle which he sees upon the land, and the tenant or any other person drives the cattle off the land, the landlord or his agent may then follow them and distrain them, even on the highway: but if he have no view of the cattle whilst on the land, although the tenant drive them off purposely to prevent a distress; or if the cattle themselves, after the view, go out of the fee, or the tenant or any other person, after the view, remove them for any other purpose than that of preventing a distress; in these cases the landlord or his agent cannot distrain them (*l*). Cases of fraudulent removal to avoid a distress are considered hereafter (*m*).

Distress on commons. — By 11 Geo. 2, c. 19, s. 8, landlords are enabled to take as a distress for rent any cattle or stock belonging to their tenants depasturing upon any common appendant or appurtenant or in any way belonging to the premises demised. This enactment does not extend to a distress for a rent-charge (*n*).

(d) *Of the Mode of a Distress, and of the Distress Warrant.*

By whom, and who may be bailiff. — A distress may be made either by the landlord himself, or, as is now the usual practice, by his authorized agent or bailiff (*o*).[1] The Statute of Westminster 2nd (13 Edw. 1, stat. 1, c. 37), which enacts that no distress shall be taken except by bailiffs "sworn and

(*k*) Hodges *v.* Lawrence, 18 Just. Peace, 347, Ex.

(*l*) Co. Lit. 161 a; 2 Inst. 132; Clement *v.* Milner, 3 Esp. 95; Bullen, 125, 126; Smith L. & T. 212 (2nd ed.).

(*m*) Sect. 8 (d).

(*n*) Bullen, 126.

(*o*) Smith L. & T. 222 (2nd ed.); Bullen, 129.

[1] **Distress, how made in America.** — In many of the American states a landlord cannot issue a distress warrant, but must apply to a magistrate or court therefor. Maryland (Rev. Code, Art. 67, sec. 8); Virginia (Code, sec. 2790); West Virginia (Code, ch. 93, sec. 10); Kentucky (Gen. Sts. ch. 66, sec. 4); Georgia (Code, sec. 4082); Florida (Dig. ch. 137, sec. 2); Mississippi (Rev. Code, sec. 1302); Texas (Rev. Sts. secs. 3112, 3114), &c.; and generally in those states the warrant must be served by a legally qualified officer.

In several of the provinces and states the landlord may still issue his own warrant.

known," does not apply to distresses taken for rent in arrear (*p*). It would seem that an infant cannot be a bailiff (*q*). A person employed as a distraining broker, if engaged in the service of the landlord only, and paid a salary by him, is a servant within the meaning of 24 & 25 Vict. c. 96, s. 67, and may be found guilty of embezzlement (*r*).

Distress on agricultural holding by certificated bailiff. — If the Agricultural Holdings Act applies (*s*), the distress must be levied by a certificated bailiff. For it is enacted by s. 52 of that act that "no person shall act as a bailiff to *levy* any distress" on a holding subject to the act "unless he shall be authorized to act as a bailiff by a certificate in writing under the hand of the judge of a county court." Upon a strict reading of s. 61 of the act, this would mean the county court of the district in which the holding is situate, but it has been held that the certificate of any county court [*459] judge is sufficient (*t*). A *certificated bailiff may, by the same section, be moved by the judge for extortion.

Effect of levy by uncertificated bailiff. — An uncertificated bailiff would, by levying, perhaps render himself liable to indictment, and would certainly render a landlord knowingly employing him liable to an action for irregular distress. It appears that if a landlord choose to levy himself, there is nothing in the section to prevent an uncertificated bailiff working out the distress by sale. An isolated transaction, as well as engaging in the business generally, seems to be within the section (*u*).

Landlord liable for irregular acts. — Care should be taken to select a proper bailiff, for the landlord is personally responsible for all *irregular* acts committed by his bailiff in the making of a distress: ex. gr. for distraining goods to an excessive

(*p*) Begbie *v.* Hayne, 2 Bing. N. C. 124; Child *v.* Chamberlain, 6 C. & P. 213.

(*q*) Cuckson *v.* Winter, 2 Man. & R. 313.

(*r*) Reg. *v.* Flanagan, 10 Cox C. C. 561.

(*s*) Sect. 5, *ante*.

(*t*) Sanders, *In re*, *Ex parte* Sergeant, 54 L. J., Bank. 331.

(*u*) See Lely & Pearce-Edgecumbe's Agricultural Holdings Act, p. 130.

amount; for selling without five days' notice; for selling without a proper appraisement; for not selling for the best price; for making extortionate charges; for not leaving the overplus in the hands of the sheriff, under-sheriff or constable; and the like (*x*).

Landlord not liable for unauthorized illegal acts. — But the landlord is not liable for *illegal* acts committed by his bailiff, which are not authorized by the warrant of distress or otherwise (*y*), especially where he disclaims and repudiates such acts immediately they come to his knowledge (*z*). A slight recognition by the landlord of what has been illegally done on his behalf may amount to an adoption and ratification of such illegal acts, and so render him personally liable for them (*a*).[1]

(*x*) Haseler *v.* Lemoyne, 5 C. B., N. S. 530; 28 L. J., C. P. 103; Ward *v.* Shew, 9 Bing. 608; Dawe *v.* Cloud, 14 L. T. 155.

(*y*) Freeman *v.* Rosher, 13 Q. B. 780.

(*z*) Hurry *v.* Rickman, 1 Moo. & R. 126.

(*a*) Haseler *v.* Lemoyne, 5 C. B., N. S. 530; 28 L. J., C. P. 103.

[1] **Liability for illegal distress.** — Aside from special statutory remedies, landlord is liable in trespass if distress is wholly illegal, as, if no rent is due, Benson *v.* Anderson, 4 H. & J. (Md.) 315; Fretton *v.* Karcher, 77 Pa. St. 423; or if landlord abandon distress without consent of lessee and distrain again, Everett *v.* Neff, 28 Md. 176.

Trespass ab initio. — He becomes a trespasser *ab initio* if he sells the goods without first appraising and advertising them, Kerr *v.* Sharp, 14 S. & R. (Pa.) 399; Quinn *v.* Wallace, 6 Whart. (Pa.) 460; or if he appraise them prematurely, Brisben *v.* Wilson, 60 Pa. St. 452.

Mere failure to give notice of distress without sale does not make him a trespasser. M'Kinney *v.* Reader, 6 Watts (Pa.) 34; Keller *v.* Weber, 27 Md. 660; Johnson *v.* Black, 9 W. N. C. (Pa.) 438.

Distraining or completion of sale after tender of balance of rent renders the landlord liable as a trespasser *ab initio*. Rees *v.* Emerick, 6 S. & R. (Pa.) 286; Richards *v.* McGrath, 100 Pa. St. 389.

Liability of officer. — The landlord's bailiff is also liable for distraining illegally (as, for example, when no rent was due). Wells *v.* Hornish, 3 Penn. 30.

Of course, if officer have warrant issued by magistrate and *want of authority did not appear*, he would be protected (except for his own wrongful acts).

Trespass will lie against landlord and officer for breaking and entering. Cate *v.* Schaum, 51 Md. 299.

Trover lies against landlord for distraining exempted goods, Briggs *v.* Large, 30 Pa. St. 287; or for distraining off premises, Fraser *v.* McFatridge, 1 Russ. & Geld. (N. S.) 28, &c.

Distress warrant. — Where the bailiff distrains he should properly have a warrant or authority in writing from his employer, which is commonly called a "warrant of distress" or a "distress warrant" (*b*). The warrant did not require a stamp under the old Stamp Acts (*c*), nor does it under the Stamp Act, 1870. One of several joint-tenants may sign a warrant of distress, and appoint a bailiff to distrain for rent due to all, if the others do not forbid him: and if, when applied to, they merely decline to act, that will not prevent him from proceeding (*d*). Tenants in common may distrain, each for his own share, but have no implied authority to distrain for each other: they may, however, join in a warrant to distrain for rent due to all of them (*e*): coparceners are more like joint-tenants; either they should all sign (*f*), or any one may sign on behalf of herself and the others (*g*). So one of several co-heirs in gavelkind may sign the distress warrant on behalf of himself and his co-heirs without [*460] express authority from them (*g*). * A mortgagor, who is permitted to remain in possession and to receive the rents and profits, has implied authority to distrain for the arrears as to the bailiff or agent of the mortgagee; and he may so justify the distress notwithstanding he took it in his own name as for rent due to himself (*h*).

Ratification of authority to distrain. — A man may distrain without any express previous authority; and if he afterwards obtain the assent of the person in whose right the distress was made, such assent will be equivalent to a previous command, and will have relation to the time of the distress

(*b*) See forms, Appendix D, No. 1.

(*c*) Pyle *v.* Partridge, 15 M. & W. 20.

(*d*) Robinson *v.* Hoffman, 4 Bing. 562; 3 C. & P. 234; *ante*, 422.

(*e*) *Ante*, 422; Bullen, 48.

(*f*) Stedman *v.* Page, 1 Salk. 390; Horne *v.* Lewin, 1 Ld. Raym. 639.

(*g*) Leigh *v.* Shepherd, 2 Brod. & B. 465; Bullen, 44, 130; *ante*, 422.

(*h*) Trent *v.* Hunt, 9 Exch. 14; Snell *v.* Finch, 13 C. B., N. S. 651; 32 L. J., C. P. 117.

Replevin lies in all cases where distress is illegal. Dent *v.* Hancock, 5 Gill (Md.) 120; Russell *v.* Buckley, 25 N. B. 264.

Excessive distress. — Distraining for more than is due does not constitute trespass, M'Kinney *v.* Reader, 6 Watts (Pa.) 34, though it is actionable.

Double damages. — The special statutory remedy of action for double damages exists in many of the states. The officer also is liable. McElroy *v.* Dice, 17 Pa. St. 163.

taken (*i*).[1] Where, in replevin against a broker, it is proved that the landlord employs the solicitor to defend the broker, that is sufficient evidence of the broker's authority to distrain in the absence of any written warrant (*k*). So where a distress was made in the name of a person who was dead, a recognition of it by the executor was held good (*l*). Where a warrant of distress was addressed to Messrs. T., or their agent, and their clerk erased the name of T. and substituted that of W., by whom the distress was made, and the landlord's agent who had signed the warrant knew of the distress being so made, and communicated with W. respecting it: it was held, that the employment of W. was sufficiently authorized by the agent to make the latter liable on an indemnity given by him to T. (*m*).

Indemnity to broker. — Generally speaking, a warrant of distress creates an express or implied indemnity to the bailiff and his assistants against actions (in any form) which are maintainable on the ground that the landlord had no legal right to distrain. But the indemnity does not extend to illegal acts, nor to those irregular acts for which the landlord is responsible to the tenant (*n*). On the contrary, the landlord has a remedy over against the bailiff for any loss or damage he may have sustained by reason of such negligence or misconduct (*o*). Where a landlord gave authority to a broker to distrain the goods of his tenant, and an indemnity against all costs and charges that he might be at "on that account," and upon making the distress, the broker's men, being told by the son of the tenant that a cask contained spent liquor of no value, took the cask to pieces and let the liquor run off, when in fact it was cochineal dye belonging to a third person, who for wasting it recovered damages in trover against the broker: it was held, that he could not recover

(*i*) Gilb. Distr. 32; Bro. Abr. tit. Traverse, 3; Lamb *v.* Mills, 4 Mod. 378; Trevillian *v.* Pine, 11 Mod. 112.

(*k*) Duncan *v.* Meikleham, 3 P. & C. 172.

(*l*) Whitehead *v.* Taylor, 10 A. & E. 210.

(*m*) Toplis *v.* Grane, 5 Bing. N. C. 636; 7 Scott, 620.

(*n*) *Ante*, 459.

(*o*) 2 Chit. Pl. 503 (7th ed.).

[1] Jean *v.* Spurrier, 35 Md. 110.

the amount of those damages from the landlord in an action on the indemnity; and that such an indemnity could apply only to such cases where the distress was illegal, because the landlord had no right to distrain (*p*). Where the [*461] landlord's agent employed a broker to levy * a distress on the premises of an auctioneer, and urged him to make the levy forthwith as there was a large quantity of furniture in the auction room, and by the warrant he directed him to distrain the several goods and chattels on the premises, whereupon the broker seized all the goods, but some of them turned out to be privileged from distress: it was held, that an indemnification of the broker was implied to be given by the agent (*q*). But it seems that in ordinary cases a broker, who takes goods which are privileged from distress, cannot look for an indemnity from his employer (*q*). Where the warrant of distress contained the following clause: — "And for your so doing this shall be your sufficient warrant and authority and indemnification against all costs and charges in respect of any law expenses, action or actions, that may arise, as well as any other and all other charges or expenses which you or your agent may be at or be brought against you or your agent on this account:" it was held, that the indemnity extended to the costs of defending an action of trover wrongfully brought by the tenant (who admitted the tenancy and the rent being due) against the landlord's agent for goods taken under the distress, in which action the tenant was nonsuited (*r*).

Outer door may not be broken open. — The outer door of the tenant's house cannot lawfully be broken open in order to make a distress (*s*);[1] but if the outer door be open, the person distraining may justify breaking open an inner door

(*p*) Draper *v.* Thompson, 4 C. & P. 84.

(*q*) Toplis *v.* Grane, 5 Bing. N. C. 636.

(*r*) Ibbett *v.* De La Salle, 6 H. & N. 233; 30 L. J., Ex. 44.

(*s*) Semayne's case, 5 Co. R. 91; 1 Smith L. C. 114; Smith L. & T. 223 (2nd ed.).

[1] **Entry, how made.** — (*a*) *At common law*, if landlord or bailiff break and enter outer door, he is guilty of trespass. Mayfield *v.* White, 1 Bro. (Pa.) 241; Russell *v.* Buckley, 25 N. B. 264, overruling Myers *v.* Smith, 4 Allen (N. B.) 207.

or lock to find any goods which are distrainable (*t*). A landlord is not justified in breaking open the outer door of a stable, though not within the curtilage (*u*), nor in forcibly opening a padlock on a barn door (*x*), nor in breaking open gates or breaking down enclosures (*y*). But in order to distrain he may climb over a fence and so gain access to the house by an open door (*z*); he may also open the outer door by the usual means adopted by persons having access to the building, as by turning the key, lifting the latch, or drawing back the bolt (*a*): but he may not put his hand through a hole in the door, or through a broken pane of glass, and remove a bar, window-latch, or other fastening, those not being the usual or accustomed modes of obtaining admission to the premises (*b*).

Distress through open window. — An entry to make a distress through an open window is lawful (*c*).

*But if the distrainer break open a window, or [*462] even unfasten a hasp, or open an unfastened window (*d*), it is illegal, and the distress void *ab initio* (*e*) It is

(*t*) Browning *v.* Dann, Bull. N. P. 81; Co. Lit. 161 (*a*); Smith L. & T. 223 (2nd ed.).

(*u*) Brown *v.* Glenn, 16 Q. B. 254.

(*x*) 9 Vin. Abr. 128, Distress (E. 2), pl. 6.

(*y*) Co. Lit. 161 a; cited 16 Q. B. 255, 257, and in 7 Exch. 73.

(*z*) Eldridge *v.* Stacey, 15 C. B., N. S. 458; 12 W. R. 51; see *contra*, Scott *v.* Buckley, 16 L. T. 573, Byles, J., after consulting the other judges of the Common Pleas, but Eldridge *v.* Stacey was not cited in that case.

(*a*) Ryan *v.* Shilcock, 7 Exch. 72; 21 L. J., Ex. 55.

(*b*) Fitz. Abr. tit. Distress, pl. 21; cited 7 Exch. 76; Hancock *v.* Austin, 14 C. B., N. S. 634; 32 L. J., C. P. 252.

(*c*) Nixon *v.* Freeman, 5 H. & N. 647, 652; 29 L. J., Ex. 271.

(*d*) Nash *v.* Lucas, L. R., 2 Q. B. 590; 8 B. & S. 531.

(*e*) Attack *v.* Bramwell, 3 B. & S.

Entry through gate fastened by hook and staple on inside is a trespass. Cate *v.* Schaum, 51 Md. 299.

Landlord may open door of house or barn in ordinary way, by lifting latch, or, if some one else has forcibly broken it open, he may enter thereafter. Dent *v.* Hancock, 5 Gill (Md.) 120.

(*b*) *Under statutes.* — Several states have special statutes, authorizing officers serving distress warrants to forcibly break open doors, as *Virginia* (Code, sec. 2793) and *West Virginia* (Code, ch. 93, sec. 13). In *New Jersey*, if goods are carried away to avoid rent, landlord may, with aid of a constable, break and enter a house, barn, stable, &c., first making oath that there is reasonable ground to suspect such goods are therein. Revision of N. J. pp. 311, 312, sec. 16.

legal, however, further to open an already partly-open window, for the purpose of effecting an entry to distrain (*f*), even if the window be open but two or three inches (*g*).[1]

Re-entry to distrain. — Generally speaking, a second distress for the same rent cannot lawfully be made where the first has been abandoned (*h*).

"Abandonment." — But "abandonment" does not always take place by a mere leaving of the premises, otherwise the distrainer would lose his remedy by a forcible ejectment. Thus where the defendant, having with him a constable, had entered the plaintiff's house to make a distress for rent; and after he had stated his business and began to take an inventory, the plaintiff's wife tore his paper, beat him and the constable out, and then blocked up the door; upon which, about an hour afterwards, the defendant, with several others, returned and demanded admittance, which, being refused, he broke open the doors: it was held by Wilmot, J., that the distress having been lawfully begun and not deserted, but the defendant having been compelled to quit by violence, there was a recontinuance of the first taking, and so the second entrance was lawful, though the defendant could not, when he first came, have so broken open the door (*i*). When a person has once peaceably entered to distrain, and has been forcibly put out, he may legally break open a door or window to re-enter and complete the distress: but if he has merely got his foot or arm between the door and lintel, or by putting a pair of shears, or a stick, between the door and lintel, and so preventing the door being closed, that is not a sufficient entry to entitle him afterwards to break open a door or window to distrain (*k*). Where a man put in possession under a distress left the house for a purpose not necessay, but reasonably convenient, for a short time, and being forcibly kept

520; 32 L. J., Q. B. 146; Hancock *v.* Austin, *supra*.

(*f*) Crabtree *v.* Robinson, L. R., 15 Q. B. D. 313; 33 W. R. 936, *per* Manisty and Field, JJ.

(*g*) Ib.

(*h*) As to "second distress," see *post*, Sect. 11.

(*i*) Esp. N. P. 382.

(*k*) Boyd *v.* Profaze, 16 L. T. 431, *per* Mellor, J.

[1] **Opening a window**, shut, but not fastened, was held unlawful in Cate *v.* Schaum, 51 Md. 299.

out, broke the outer door: it was held, that there was not an abandonment of the distress, and that he was justified in breaking the outer door for the purpose of re-entering (*l*). But where a broker's man, having taken possession of property under a distress, and remained two days, left the house in a state of excitement bordering on insanity; and the landlord, thinking that his leaving had been procured by the drugging of his liquor by the parties in the house (which was not proved), six * days afterwards broke [*463] into the house and took away the goods without any previous demand of admission; it was held, that he had no right to enter again after so long a delay, and that the owner of the goods might maintain trover for them (*m*).

Abandonment is a question for the jury. — It is always a question for the jury whether there has or not been an abandonment (*n*). There is no abandonment of a distress where the distrainer, having seized the goods of a stranger on the premises without having given him notice of the distress, permits him to take them away for a temporary purpose, the distrainer intending that they shall be returned, which is done (*o*). Where a bailiff or broker, after having been ejected from a distress, re-enters to distrain, he should confine himself to the same goods (*p*). After a lawful entry to distrain the broker may, if necessary, break open the outer door to get out and remove the distress (*q*). In making a distress for rent, circumstances may occur which may require the presence of a police officer. But to justify the landlord in calling him in, it must be shown that his presence was rendered necessary either from threats of resistance or the apprehension of violence (*r*).

Practical directions. — The most proper manner of making a distress is for the person distraining, whether the landlord himself or his bailiff (accompanied by a man to be left in

(*l*) Bannister *v.* Hyde, 2 E. & E. 627; 29 L. J., Q. B. 141; Eldridge *v.* Stacey, 15 C. B., N. S. 458.

(*m*) Russell *v.* Rider, 6 C. & P. 416.

(*n*) Eldridge *v.* Stacey, 15 C. B., N. S. 458. Here the expulsion was forcible, but the distrainer did not return for three weeks.

(*o*) Kerby *v.* Harding, 6 Exch. 234.

(*p*) Smith *v.* Farr, 3 F. & F. 505.

(*q*) Pugh *v.* Griffith, 7 A. & E. 827.

(*r*) Skidmore *v.* Booth, 6 C. & P. 777.

possession), to go into the house, or upon any part of the premises out of which the rent issues, and there select and seize articles, *not privileged from distress* (*s*), of sufficient value to raise, on a broker's sale, the amount for which the distress is made, and the expenses of the distress; or, if necessary, to seize the whole, by taking hold of some piece of furniture or other article and saying, "I distrain this in the name of all the goods on the premises" (*t*), or to that effect. There could be no harm in adding, "except those privileged from distress." There need not be an *actual seizure* of the property distrained on (*u*), any expression of intention to distrain being sufficient (*x*). Thus, where a landlord to whom rent was in arrear, on hearing his tenant and a stranger disputing about removing a lathe, entered the house, and laying his hands on the machine, said, "I will not suffer this, or any of the things, to go off the premises till my rent is paid," the distress was held to be sufficiently made (*y*). Where a landlord's agent went upon the tenant's premises, walked round them without touching anything, and gave the usual notice of distress as to certain of the goods [*464] (of much *more than sufficient value), and then went away without leaving any one in possession, it was held that this was a sufficient seizure to enable the tenant to sue the landlord for an excessive distress (*z*). Where a broker went to the tenant's house and pressed for payment of rent alleged to be due, and of a sum for the expense of the levy, but touched nothing and made no inventory, and the tenant then paid the rent and expenses under protest, on which the broker withdrew: it was held, in an action against the landlord for an excessive distress, that he could not say there had been no actual distress (*a*). But a declaration by a landlord as against the grantee of a bill of sale that the landlord means not to allow goods to be removed until his

(*s*) *Ante*, Sect. 8, p. 435.

(*t*) Dodd *v.* Morgan, 6 Mod. 215; Draper *v.* Thompson, 4 C. & P. 84; Bullen, 131.

(*u*) Smith L. & T. 224 (2nd ed.).

(*x*) Cramer *v.* Mott, L. R., 5 Q. B. 357; 39 L. J., Q. B. 172.

(*y*) Wood *v.* Nunn, 5 Bing. 10.

(*z*) Swann *v.* Earl of Falmouth, 8 B. & C. 456.

(*a*) Hutchins *v.* Scott, 2 M. & W. 809.

rent be paid, and that he is prepared to use force to prevent their removal, has been held not to be a conversion by the landlord (*b*).

Things privileged, not to be taken. — In making the seizure care must be taken not to distrain on anything absolutely privileged from distress, ex. gr. tenants' fixtures (*c*), nor anything privileged *sub modo*, i. e. provided there be other sufficient distress on the premises, ex. gr. the tools of a man's trade (*c*).

Nor an excessive quantity. — Nor must the goods distrained be *excessive* in quantity or value, i. e. much beyond what is necessary to satisfy the actual arrears of rent, and the costs of the distress (*d*). The value of the goods should be estimated at what they will probably produce at a broker's sale and not according to their value to the tenant (*e*). The broker's appraisement is not evidence against the tenant as to the value (*f*). The broker who made it should be called. If there be no other distress on the premises, the taking of one entire thing, though of considerably greater value than the rent, is not excessive (*g*). An action lies for an excessive distress of growing crops, the probable produce of which is capable of being estimated at the time of seizure (*h*): provided the tenant thereby sustains actual loss and damage, but not otherwise (*i*). The distress should not extend to the whole crop, where part would suffice.

Amount to be distrained for. — The distress should not be

(*b*) England *v.* Cowley, L. R., 8 Ex. 126; 42 L. J., Ex. 80; 28 L. T. 67, diss. Martin, B.

(*c*) For a list of things privileged absolutely and *sub modo* respectively, see *ante*, 435.

(*d*) 52 Hen. 3, c. 4 (Statutes of Marlebridge); 2 Inst. 107, cited 6 C. B. 430; Wells *v.* Moody, 7 C. & P. 59; Field *v.* Mitchell, 6 Esp. 71; Willoughby *v.* Backhouse, 2 B. & C. 821; Biggins *v.* Goode, 2 C. & J. 364; Knight *v.* Egerton, 7 Exch. 407; Whitworth *v.* Maden, 2 C. & K. 517; Smith *v.* Ashforth, 29 L. J., Ex. 259.

(*e*) Wells *v.* Moody, 7 C. & P. 59.

(*f*) Smith *v.* Ashford, 29 L. J., Ex. 259.

(*g*) Avenell *v.* Croker, Moo. & M. 172; Field *v.* Mitchell, 6 Esp. 71; Sells *v.* Hoar, 1 Bing. 401; 1 C. & P. 28; explained 11 Exch. 876; Roden *v.* Eyton, 6 C. B. 427; Tancred *v.* Leyland (in error), 16 Q. B. 667, Maule, J.

(*h*) Piggott *v.* Birtles, 1 M. & W. 441.

(*i*) Proudlove *v.* Twemlow, 1 Cr. & Mee. 326; Owen *v.* Leigh, 3 B. & A. 470; Rodgers *v.* Parker, 18 C. B. 112; but see Chandler *v.* Doulton, 3 H. & C. 553; 34 L. J., Ex. 89, where nominal damages were held recoverable.

made for more rent than is really owing: but if there be any doubt or dispute on that point, and no tender has [*465] *been made by the tenant, the landlord may, with comparative safety, distrain for all that he claims, although in the result it appears to be more than is really in arrear and unpaid. No action can be maintained against him merely for distraining for *too much rent*, unless it appear by the evidence that the goods seized and sold were excessive with reference to the amount of the actual arrears (*k*); not even where it is alleged that the distress was made maliciously (*l*). The reason is, that the landlord is legally *entitled to distrain* for something, although perhaps not for all that he claims: and there is no duty on his part to inform the tenant for what he distrains: on the contrary, it is the duty of the tenant, who is presumed to know what rent he owes, to tender at his peril a sufficient sum to satisfy the amount, with or without expenses as the case may require, and until he has done *that* he has no cause of complaint (*m*). Upon the same principle, when the amount of a simple contract debt is disputed, the debtor must, at his peril, make a sufficient tender; otherwise the creditor, although he claims too much, may recover what is really due to him, with costs.

The broker should show the cause of his making the distress, if required to do so, but if not required, he may distrain generally (*n*). The landlord or his agent or bailiff is not bound by any notice of distress given, but may show that more rent was due than is therein stated (*o*). The tenant must prove that his goods to an excessive amount or value were distrained, but it is not necessary to show that they were sold or actually taken away; the seizure as a distress is a suffi-

(*k*) Crowder *v.* Self, 2 Moo. & R. 190; Tancred *v.* Leyland (in error), 16 Q. B. 669; Glynn *v.* Thomas, 11 Exch. 870; 25 L. J., Ex. 125; French *v.* Phillips, 1 H. & N. 564; 26 L. J., Ex. 82; Loring *v.* Warburton, E., B. & E. 507; 28 L. J., Q. B. 31; overruling Taylor *v.* Henniker, 12 A. & E. 488.

(*l*) Stevenson *v.* Newnham (in error), 13 C. B. 285, 297; 22 L. J., C. P. 110.

(*m*) Glynn *v.* Thomas, 11 Exch. 873, Erle, J.; Tancred *v.* Leyland, 16 Q. B. 669.

(*n*) Buller's case, 1 Leon. 50.

(*o*) Gwinnet *v.* Phillips, 3 T. R. 643; Crowther *v.* Ramsbottom, 7 T. R. 658; Gambrell *v.* Earl of Falmouth, 4 A. & E. 73; Trent *v.* Hunt, 9 Exch. 14.

cient cause of action (*p*). And it will be no defence that after the excessive distress was made the tenant authorized the defendant to sell, and gave him other powers with regard to the goods seized (*q*).

Impounding. — As soon as possible after the goods have been distrained they should be impounded (*r*); especially where there is any dispute between the parties as to the amount of arrears really due. Until such impounding the tenant may tender what he admits to be due, with expenses, and if such tender be sufficient it will be *illegal* to proceed further with the distress (*s*). But when the goods are impounded * they are in the custody of the law, [*466] and a tender is too late to make the subsequent proceedings illegal (*t*). Nevertheless, if a tender be made after the impounding, but within the five days allowed the tenant to replevy, and the landlord afterwards proceeds to sell the distress, the tenant may maintain a special action on the case, founded on the equity of the statute 2 W. & M. sess. 1, c. 5, s. 2 (*u*). To avoid this the landlord should abstain from selling (after such a tender), and leave the tenant to obtain his goods by a replevin (which is the only remedy), in which the tenant will have to pay all that is really due, with the costs of and incident to the distress, replevy and action. If no tender be made, the landlord should *not sell* for more than the actual arrears of rent, with expenses, notwithstanding he may have claimed more in his notice of distress. He now has the opportunity of correcting any mistake previously made on that point, although perhaps he may be liable to some damages for having taken an excessive quantity of goods as a distress.

(*p*) Sells *v.* Hoare, 1 Bing. 401; 8 Moo. 453; Baylis *v.* Usher, 4 M. & P. 790.

(*q*) Willoughby *v.* Backhouse, 2 B. & C. 821; Sells *v.* Hoar, *supra*.

(*r*) *Post*, 473.

(*s*) Vertue *v.* Beasley, 1 Moo. & R. 21; Branscomb *v.* Bridges, 1 B. & C. 145; Holland *v.* Bird, 10 Bing. 15; Ladd *v.* Thomas, 12 A. & E. 117; Evans *v.* Elliott, 5 A. & E. 142.

(*t*) Six Carpenters' case, 8 Co. R. 146 a; 1 Smith, L. C. 183 (7th ed.); Firth *v.* Purvis, 5 T. R. 432; Thomas *v.* Harries, 1 M. & G. 695; Ladd *v.* Thomas, 12 A. & E. 117; Ellis *v.* Taylor, 8 M. & W. 415; Tennant *v.* Field, 8 E. & B. 336; Bullen & L. Pl. 318 (3rd ed.).

(*u*) Johnson *v.* Upham, 2 E. & E. 250; 28 L. J., Q. B. 252; overruling Ellis *v.* Taylor, 8 M. & W. 415.

Inventory. — After a seizure has been made, as above pointed out, it is proper for the landlord or his bailiff to make an inventory (*x*) of as many goods as are judged sufficient to cover the rent distrained for, and also the charges of the distress. Although an inventory need not be as exact and minute as a specification, yet it ought to mention the goods taken, in such a manner that the tenant, and others, may know what is intended to be distrained. The following inventory, "one clock and weights, &c., and any other goods and effects that may be found in and about the said premises, to pay the said rent and expenses of this distress," was considered by the court objectionable, and was held sufficient only on the ground that the distress was in fact meant to include all the goods on the premises (*y*). A notice of distress stating that the landlord had distrained the several goods, chattels and effects specified in the schedule: which schedule, after enumerating certain goods, concluded thus: — "and all other goods, chattels and effects on the said premises, *that may be required in order to satisfy* the above rent, together with all necessary expenses:" was held to be too vague and uncertain to justify the sale of goods of a stranger which he had deposited on the premises (*z*).

Notice of distress, &c. — After the inventory is taken it is necessary to give a notice[1] *in writing* (*a*) to the ten-
[*467] ant of the fact of the distress having been made * and

(*x*) See Form, Appendix D., No. 3.

(*y*) Wakeman *v.* Lindsey, 14 Q. B. 625.

(*z*) Kerby *v.* Harding, 6 Exch. 234; 20 L. J., Ex. 162.

(*a*) Wilson *v.* Nightingale, 8 Q. B. 1034, *post*, 477; see the Form, Appendix D., No. 4.

[1] **Notice of distress.** — Notice given to tenant will bind owner. Caldcleugh *v.* Hollingsworth, 8 W. & S. (Pa.) 302. In computing time, day on which distress is made is to be excluded. Brisben *v.* Wilson, 60 Pa. St. 452; M'Kinney *v.* Reader, 6 Watts (Pa.) 34. Sunday (being *dies non juridicus*) is to be excluded. Same.

Notice is essential to validity of appraisal and sale. Briggs *v.* Large, 30 Pa. St. 287.

In several cases it has been held that failure to give notice, if there is no sale, does not make landlord a trespasser *ab initio*. M'Kinney *v.* Reader, 6 Watts (Pa.) 34; Keller *v.* Weber, 27 Md. 660. The first-named case was where the property was replevied by the lessee, and the last case a case of distress made after death of lessee.

the time when the rent and charges must be paid or the goods replevied. This is usually done by writing such notice at the bottom of the inventory (*b*). A true copy of the inventory and notice must then be served personally upon the tenant or the owner of the goods, or left at the house, or if there be no house on the premises, upon the most notorious place. There should in all cases be a witness present to prove the regularity of the proceedings. When the distress has been thus made, it is the safest way to remove the goods immediately, and in the notice to acquaint the tenant where they are removed to. The place to which they are so removed must be mentioned in the notice (*c*). In many cases, however, the tenant for his own convenience requests the landlord to permit them to remain on the premises, and consents to allow him to retain possession beyond the five days; and in such cases a written consent should be procured (*d*), and some person left in possession of the goods upon the premises. No stamp is necessary to such written consent, or to a licence to re-enter and resume possession in consideration of the distress being withdrawn for a time (*e*).

(e) *Distress on Goods fraudulently removed.*[1]

Fraudulent removal. — To prevent the clandestine removal of goods off the demised premises by tenants, to avoid distress for rent, the 8 Ann. c. 14, s. 2, authorized landlords to follow and distrain them within *five* days after such removal.

Goods may be seized within thirty days. — And by 11 Geo. 2, c. 19, s. 1, this term was extended to *thirty* days, with a power to break open places of concealment, but a saving for

(*b*) See Forms, Appendix D., Nos. 4, 5.

(*c*) 11 Geo. 2, c. 19, s. 9.

(*d*) See Form, Appendix C., Sect. 3.

(*e*) Hill *v.* Ramm, 5 M. & G. 789; Fishwick *v.* Milnes, 4 Exch. 825; Cox *v.* Bailey, 6 M. & G. 193.

[1] **Distress on goods fraudulently removed.** — The time limited in New Jersey, Pennsylvania, Virginia, and West Virginia is thirty days; in Nova Scotia, twenty-one days; in Quebec, eight days; in Delaware, forty days; in Maryland, twenty days; in Louisiana, fifteen days; and special provisions exist in New Brunswick, Illinois, Georgia, Kentucky, Texas, and, *perhaps*, in other states, for protecting the landlord's interests.

bonâ fide sales. By sect. 1, it is enacted that "in case any tenant or tenants, lessee or lessees 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 or shall be reserved, due or made payable, shall fraudulently or clandestinely convey away, or carry off or from such premises, his, her or their goods or chattels to prevent the landlord or lessor, landlords or lessors from distraining the same for arrears of rent so reserved, due or made payable, it shall and may be lawful to or for every landlord, &c., or any person or persons by him, her or them for that purpose lawfully empowered, *within the space of* 30 *days* next ensuing such conveying away or carrying off such goods or chattels as aforesaid, to 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 to sell or otherwise dispose of, in such manner as if the said goods [*468] and *chattels had actually been distrained by such landlord, &c., in and upon such premises for such arrears of rent."

Saving for bonâ fide sale. — Sect. 2 provides, "that 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 bonâ fide and for a valuable consideration, before such seizure made, to any person or persons not privy to such fraud as aforesaid" (*f*).

Power to break open places of concealment with aid of constable, &c. — Sect. 7 enacts,[1] "that where any goods or chattels fraudulently or clandestinely conveyed or carried away by any tenant or tenants, lessee or lessees, his, her or their servant or servants, agent or agents, or other person or persons 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

(*f*) Sections 3–6 are stated, *post*, 470.

[1] In several of the states there are special statutory provisions authorizing the officer or landlord, with the aid of an officer, to break and enter to procure goods fraudulently removed. See *ante*, note, "Entry, how made."

goods or chattels from being taken and seized as a distress for arrears of rent; it shall and may be lawful for the landlord or landlords, lessor or lessors, his, her or their steward, bailiff, receiver, or other person or persons empowered, to take and seize as a distress for rent such goods and chattels (first calling to his, her or their assistance the constable, headborough, borsholder or other peace-officer of the hundred, borough, parish, district or place where the same shall be suspected to be concealed, who are hereby required to aid and assist therein); and, in case of a dwelling-house (oath being also first made before some justice of the peace of a reasonable ground to suspect that such goods or chattels are therein) in the day time, to break open and enter into such house, barn, stable, out-house, yard, close and place, and to take and seize such goods and chattels for the said arrears of rent, as he, she or they might have done by virtue of this or any former act, if such goods and chattels had been put in any open field or place." The subsequent proceedings under a distress after a fraudulent removal are precisely the same as in ordinary cases.

What cases are within statutes as to "fraudulent removal." — To justify a distress under this statute the defendant was bound to plead specially, even before the Judicature Act (*g*). Where the removal has been after the landlord has conveyed away his reversion, he cannot seize under the statute (*h*). The removal must have taken place *after* the rent became due (*i*), and as rent becomes *due* on the morning of the day on which it is payable, but it is not *in arrear* until the following day (*k*), if the tenant fraudulently removes his goods on the very day the rent becomes due, the landlord may on the next day (but not before), or within thirty days after such removal, follow and distrain upon them pursuant to the statute (*k*).

* But after the tenant has given up possession [*469]

(*g*) Fletcher *v.* Marillier, 9 A. & E. 457; West *v.* Nibbs, 4 C. B. 172; Williams *v.* Roberts, 7 Exch. 618.

(*h*) Ashmore *v.* Hardy, 7 C. & P. 501.

(*i*) Watson *v.* Main, 3 Esp. 15; Rand *v.* Vaughan, 1 Bing. N. C. 767; Bullen, 127.

(*k*) Dibble *v.* Bowater, 2 E. & B. 564.

upon the expiration of a tenancy, the landlord cannot follow and seize, inasmuch as the statute of Anne (8 Anne, c. 14, ss. 6 and 7), which allows a distress after the expiration of a tenancy, allows it only when the tenant continues in actual possession (*l*).

The act applies to all cases where a landlord is, by the conduct of his tenant in removing goods from premises for which rent is due, turned over to the barren right of bringing an action for his rent. Thus where a tenant openly, and in the face of day, and with notice to his landlord, removed his goods without leaving sufficient on the premises to satisfy the rent then due, and the landlord followed and distrained the goods, it was held, that although the removal might not be *clandestine*, yet if it was *fraudulent* (which was a question for the jury), the landlord was justified under the statute (*m*).

It is to be observed that the words of the act are "fraudulently *or* clandestinely." The mere removal is not of itself fraudulent as against the landlord: to justify him in following them he must show that the goods were removed with a view to elude a distress, and also that sufficient goods were not left upon the premises (*n*). It would seem that it is a question for the jury whether the removal be fraudulent within the statute, although it be admitted at the trial that the removal was to avoid a distress (*o*).

Statute applies to goods of tenant only. — The statute applies to the goods of the *tenant* only, and not to those of a stranger or lodger; therefore a defence justifying the following goods off the premises, and distraining them for rent in arrear, must show that they were the tenant's goods (*p*);[1]

(*l*) Gray *v.* Stait, L. R., 11 Q. B. D. 668; 52 L. J., Q. B. 412; 49 L. T. 288; 31 W. R. 662 — C. A.

(*m*) Opperman *v.* Smith, 4 D. & R. 33; Bach *v.* Meats, 5 M. & S. 200.

(*n*) Parry *v.* Duncan, 7 Bing. 243; Inkop *v.* Morchurch, 2 F. & F. 501. But see Gilham *v.* Arkwright, 16 L. T. 88, where it was ruled by Patteson, J. (Parry *v.* Duncan being cited), that the landlord need not prove that a sufficient distress was not left on the premises.

(*o*) John *v.* Jenkins, 1 C. & M. 227; Inkop *v.* Morchurch, 2 F. & F. 501.

(*p*) Thornton *v.* Adams, 5 M. & S.

[1] See *ante*, sec. 8, note, "Goods of strangers." It matters not with what intention they were removed, they cannot be followed.

but the trustees of a bankrupt lessee are considered as the actual tenants (*q*). It is not necessary that the party upon whose land the goods are seized after removal there should himself be party or privy to the fraud (*r*).

Presence of constable. — The presence of a constable is required and must be stated in the defence where doors or gates are broken open (*s*). The presence of a special constable appointed for the occasion is sufficient (*t*).

Metropolitan Police District. — In the Metropolitan Police District, by virtue of 2 & 3 Vict. c. 47, s. 67, any constable is empowered to stop and detain, until due inquiry can be made, all carts and carriages which he shall find
* employed in removing the furniture of any house [*470]
or lodging between the hours of eight in the evening and six in the following morning, *or* whenever the constable shall have good grounds for believing that such removal is made for the purpose of evading the payment of rent. It is also provided, by further sections of the same statute, that both the tenant fraudulently removing goods, and also all persons assisting him, shall forfeit to the landlord double the value of the goods distrained, to be recovered before justices if the goods be worth less than 50*l*., or by an action of debt if they be worth more.

Forfeiture of double value. — By 11 Geo. 2, c. 19, s. 3, "to deter tenants from such fraudulently conveying away their goods and chattels, *and others from wilfully aiding or assisting therein or concealing the same*," it is enacted, "that if any tenant or lessee shall fraudulently remove and convey away his or her goods or chattels as aforesaid, or if any person or persons 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 or her goods or chattels, or in concealing the same, all and every person or persons so offending shall forfeit and pay to the landlord or landlords, lessor or lessors,

38; Postman *v.* Harrell, 6 C. & P. 225; Fletcher *v.* Marillier, 9 A. & E. 457; Foulger *v.* Taylor, 5 H. & N. 202.

(*q*) Welch *v.* Myers, 4 Camp. 368.

(*r*) Williams *v.* Roberts, 7 Exch. 618.

(*s*) Rich *v.* Woolley, 7 Bing. 651.

(*t*) Cartwright *v.* Smith, 1 Moo. & R. 284.

from whose estates such goods and chattels were fraudulently carried off as aforesaid, double the value of the goods by him, her or them respectively carried off or concealed as aforesaid, to be recovered by action of debt."

Where goods worth less than 50*l.* — Sect. 4 provides, "that where the goods and chattels so fraudulently carried off or concealed shall not exceed the value of 50*l.*, it shall and may be lawful for the landlord or landlords, from whose estates such goods or chattels were removed, his, her or their bailiff, servant or agent, in his, her or their behalf, to exhibit a complaint in writing against such offender or offenders, before two or more justices of the peace of the same county, riding or division of such 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 parties concerned, examine the fact and all proper witnesses upon oath, or if any such witness be one of the people called Quakers, upon affirmation required by law; and in a summary way determine whether such person or persons be guilty of the offence with which he or they are charged; and to inquire in like manner of the value of the goods and chattels by him, her or them respectively 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 may and shall adjudge the offender or offenders to pay double the value of the said goods and chattels to such landlord or landlords, his, her or their bailiff, servant or agent, at such time as such justices shall appoint; and, in case the offender or offenders, having notice of such [*471] 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 or offenders; and for want of such distress may commit the offender or offenders to the house of correction, 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.*"

Appeal to quarter sessions. — The words printed in italics

are repealed by the Summary Jurisdiction Act, 1884 (47 & 48 Vict. c. 43). Sections 5 and 6 provide, "that it shall be lawful for any person, who thinks himself aggrieved by such order of the said two justices, to appeal to the next general or quarter sessions for the same county, who may and shall hear and determine such appeal, and give such costs to either party as they shall think reasonable, whose determination therein shall be final;" and that "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 or quarter sessions, the order of the said two justices shall not be executed against him in the meantime."

Decisions on statute providing for recovery of double value. — The third section of the above act is so far penal, that it is incumbent, in an action by the landlord against a third party, for assisting the tenant in such fraudulent removal, to bring the case by strict proof within the words of the first section (*u*); and the landlord must not only prove that the defendant assisted the tenant in such fraudulent removal, but also that he was privy to the fraudulent intent of the tenant (*x*). But a creditor, with the assent of his debtor, may take possession of the goods of the latter, and remove them from the premises for the purpose of satisfying a bonâ fide debt, without incurring the penalty inflicted by the third section, although the creditor takes possession knowing the debtor to be in distressed circumstances, and under an apprehension that the landlord will distrain (*y*). In an action on that section against the tenant for fraudulently removing his goods from off the premises to avoid a distress for rent, it is not necessary to show an actual participation in the act, if the removal was with his privity (*z*); and in such a case it seems that it is immaterial whether the removal took place by night or with any particular concealment. In an action upon the statute against a defendant for aiding and assisting

(*u*) *Ante*, 467.

(*x*) Brooke *v.* Noakes, 8 B. & C. 537; Reg. *v.* JJ. of Radnor, 9 Dowl. 90.

(*y*) Bach *v.* Meats, 5 M. & S. 200.

(*z*) Lister *v.* Brown, 1 C. & P. 121; 3 D. & R. 501.

a tenant in removing and concealing his cattle, to hinder the landlord from distraining, the acts and orders of the tenant are admissible evidence of his own fraud, and of knowledge on the part of the defendant, if by other evidence he is proved to have contributed to the facility of it. Circumstances of suspicion may be laid before the jury to [*472] prove such a fraudulent co-operation as the * legislature contemplated, and it is not necessary, to support such an action, that it should be proved that a distress was in progress, or about to be put in execution, or even contemplated; it is enough if the rent be shown to be in arrear, and that the goods have been removed afterwards (*a*). A variance in stating the amount of rent in arrear was held immaterial even before the Judicature Act (*b*).

Decisions on sect. 4. — The fourth section, which gives a summary remedy before two magistrates, provided the value of the goods shall not exceed 50*l*., does not take away the jurisdiction of the High Court in cases where the goods are of less than that value (*c*). And the fact that the landlord in the first instance made his complaint before a magistrate will not preclude him from afterwards maintaining an action; for the remedy given by that section is cumulative, and therefore the landlord may elect at his option which course may be most convenient to himself (*d*). Justices may determine whether the goods have been fraudulently removed, even in cases where there are conflicting claims to the premises (*e*). Justices, either of the county from which tenants fraudulently remove goods, or of that in which they are concealed, may convict the offenders in their own counties (*f*). The goods need not be enumerated or specified in the order of the justices; it is sufficient if they find the value (*g*). The adjudication of the justices is an order and not a convic-

(*a*) Stanley *v.* Wharton, 9 Price, 301; 10 Id. 138; Woodgate *v.* Knatchbull, 2 T. R. 154.

(*b*) Gwinnet *v.* Phillips, 3 T. R. 643.

(*c*) Horsfall *v.* Davy, Holt, 147; 1 Stark. R. 169; Basten *v.* Carew, 3 B. & C. 649; Stanley *v.* Wharton, 9 Price, 301; 10 Id. 138; Bromley *v.* Holder, 1 Moo. & M. 175.

(*d*) Stanley *v.* Wharton, 9 Price, 301; 10 Id. 138.

(*e*) Coster *v.* Wilson, 3 M. & W. 411.

(*f*) Rex *v.* Morgan, Cald. 157.

(*g*) Rex *v.* Rabbitts, 6 D. & R. 343; Burn's Justice, tit. Distress.

tion, and cannot therefore, like a conviction, be returned to the sessions in an amended form (*h*). It must show on the face of it that the party removing the goods was tenant; and that is not sufficiently shown by stating, that on complaint duly made, the party was charged with having fraudulently removed his goods from certain premises to prevent A. B. from distraining them for arrears of rent due to him for the said premises, and that, it appearing that he did so remove, &c., he is convicted thereof. It would seem, also, that the order should state that the complainant was the party's landlord, or the bailiff, servant or agent of such landlord (*i*). An order of justices convicting a person aiding and abetting a fraudulent removal of goods to avoid a distress, must show that the defendant acted wilfully and knowingly (*k*). An order, which states that the witnesses were examined upon oath, is not bad because it omits to state that they were examined on oath as to the value * of the goods removed; nor is the warrant on such [*473] an order invalid for omitting to state that the witnesses were examined upon oath (*l*).

Decision on sect. 5 as to appeal. — It has been held that the appeal under section 5 is subject to the conditions of the Summary Jurisdiction Act, 1879 (42 & 43 Vict.), c. 49, ss. 31 and 32, and that therefore notice of appeal must be given within seven days after the decision appealed against (*m*).

(f) *How Distress impounded.*

Of impounding at common law. — At common law, where a distress was made, the cattle or goods were to be kept in a pound; which is nothing more than a prison for that purpose, and is either *overt*, that is, public and open overhead, or *covert*, that is, private and covered or protected from

(*h*) Reg. *v.* JJ. of Cheshire, 5 B. & Adol. 439; Rex *v.* Bissex, Sayer, 304; 3 Burn's Justice, 1109 (30th ed.).

(*i*) Rex *v.* Davis, 5 B. & Adol. 551.

(*k*) Reg. *v.* JJ. of Radnorshire, 9 Dowl. 90.

(*l*) Coster *v.* Wilson, 3 M. & W. 411.

(*m*) Reg. *v.* Justices of Shropshire, L. R., 6 Q. B. D. 669; 50 L. J., M. C. 72; 29 W. R. 567.

the rain, &c. (*n*). Household goods and other things liable to damage from the weather, or which may be easily carried away, should be put in a pound covert (*o*). But all animals distrained should regularly be put into a pound overt, because at common law the owner was at his peril to sustain them, wherefore they ought to be put into such open place as he could resort to for the purpose: and if they were placed in a private pound, the distrainer was bound to supply them at his peril with provision, for which he had no satisfaction, and if they died for want of sustenance, he was considered answerable for them (*p*).

Persons impounding animals to provide food and water. — By 12 & 13 Vict. c. 92, s. 5, "every person who shall impound or confine, or cause to be impounded or confined, in any pound or receptacle of the like nature, any animal, shall provide and supply, during such confinement, a sufficient quantity of fit and wholesome food and water to such animal; and every such person who shall refuse or neglect to provide and supply such animal with such food and water as aforesaid shall for every such offence forfeit and pay a penalty of twenty shillings." The penalty imposed by this section falls not upon the keeper of the pound, but upon the distrainer (*q*).

Power to any one to supply food and water. — By sect. 6, "in case any animal shall at any time be impounded or confined as aforesaid, and shall continue confined without fit and sufficient food and water for more than twelve successive hours, it shall and may be lawful to and for any person whomsoever, from time to time, and as often as shall be necessary, to enter into and upon any pound or other receptacle of the like nature in which any such [*474] animal *shall be so confined, and to supply such animal with fit and sufficient food and water during so long a time as such animal shall remain and continue

(*n*) Co. Lit. 47 b; 3 Blac. Com. 13; Bullen, 142; Smith L. & T. 233 (2nd ed.).

(*o*) Co. Lit. 47 b; Bullen, 143.

(*p*) 1 Inst. 4; Co. Lit. 47 b; Bullen, 143.

(*q*) Dargan *v.* Davies, L. R., 2 Q. B. D. 118; 46 L. J., M. C. 122; 35 L. T. 810.

confined as aforesaid, without being liable to any action of trespass or any other proceeding by any person whomsoever for or by reason of such entry for the purposes aforesaid: and the reasonable cost of such food and water shall be paid by the owner of such animal, before such animal is removed, *to the person who shall supply the same*, and the said cost may be recovered in like manner as herein provided for the recovery of penalties under this act," i.e. by summary proceedings before a justice.

Expenses of food and water — how recovered. — By 17 & 18 Vict. c. 60, s. 1, "every person who since the passing of the said act of the twelfth and thirteenth years of her Majesty has impounded or confined, or hereafter shall impound or confine as in the said act mentioned, any animal, and has provided and supplied, or shall hereafter provide and supply such animal with food and water as therein mentioned, shall and may and he is hereby authorized to recover of and from the owner or owners of such animal not exceeding double the value of the food and water so already or hereafter to be supplied to such animal, in like manner as is by the said last-mentioned act provided for the recovery of penalties under the same act; and every person who has supplied or shall hereafter supply such food and water shall be at liberty, if he shall so think fit, instead of proceeding for the recovery of the value thereof as last aforesaid, after the expiration of seven clear days from the time of impounding the same, to sell any such animal openly at any public market (after having given three days' public printed notice thereof) for the most money that can be got for the same, and to apply the produce in discharge of the value of such food and water so supplied as aforesaid, and the expense of and attending such sale, rendering the overplus (if any) to the owner of such animal." Where several animals are distrained for rent, one of them may be sold for the expenses of all — and this may be repeated *toties quoties* (*r*).

Liability of distrainer. — A distrainer is liable for any injury which animals distrained receive in consequence of the wet,

(*r*) Leyton *v.* Hurry, 8 Q. B. 811.

muddy or otherwise unfit state of the pound at the time of impounding (*s*). The distrainer cannot tie or bind a beast in the pound, though it be to prevent its escape (*t*); for any act of his which tends to the injury of the thing distrained is done at his peril; but if animals distrained die in the pound, or are stolen, without any fault of the distrainer or insufficiency of the pound, in such case he who made the distress is not answerable, but has an action of tres-
[*475] pass, if the distress was for damage feasant, or *may distrain again if the distress was for rent (*u*). The distrainer cannot work or use the thing distrained, whether it be in pound overt or covert: because the distrainer has only the custody of the thing as a pledge. An exception to this rule exists in respect to milch kine, which may be milked by the distrainer, because it may be necessary to their preservation, and consequently of benefit to the owner (*x*).

Liability of pound-keeper. — A pound-keeper is bound to receive everything offered to his custody, and is not answerable whether the thing were legally impounded or not (*y*): an action of trespass, therefore, will not lie against him merely for receiving a distress, though the original taking be tortious; for the pound being the custody of the law, if the distress be wrongfully taken, the distrainer is answerable, not he. When the cattle are once impounded he cannot let them go without a replevin or the consent of the party (*z*). Neither can a pound-keeper bring an action if the pound be broken, but it must be brought by the party interested (*a*).

Cattle may not be driven more than 3 miles, &c. — By 1 & 2 Ph. & M. c. 12, s. 1, no distress of cattle is to be driven out of the hundred, rape, wapentake or lathe, where the same is taken, except it be to a *pound overt within the same shire*, nor above three miles from the place where the same is taken,

(*s*) Wilder *v.* Speer, 8 A. & E. 547; Bignell *v.* Clarke, 5 H. & N. 485; 29 L. J., Ex. 257.

(*t*) Gilb. on Distr. 65; Smith L. & T. 234 (2nd ed.).

(*u*) Vasper *v.* Eddows, 1 Salk. 248; 1 Ld. Raym. 719; Holt, 256.

(*x*) Cro. Jac. 148; Bac. Abr. tit. Distress (D. 2).

(*y*) Badkin *v.* Powell, Cowp. 476, 478; Branding *v.* Kent, 1 T. R. 62.

(*z*) Badkin *v.* Powell, Cowp. 476, 478.

(*a*) Id. 479; Fitz. N. B. 228; 2 Chit. Pl. 549 (7th ed.).

nor impounded in several places, whereby the owner may be constrained to sue several replevins, on pain of forfeiting to the party grieved one hundred shillings and treble damages.

Fee on impounding. — By sect. 2, no person shall take for keeping in pound or impounding any distress above four-pence for any one whole distress; and where less has been used, there to take less, on pain of forfeiting 5*l.* to the party grieved, besides what he should take above four-pence.

Decisions. — On this statute it has been held that where lands lying in two adjoining counties were let under one demise at one entire rent, and the landlord distrained cattle in both counties for rent in arrear, he might chase them all into one county; but that if the counties had not adjoined it would have been otherwise (*b*). The offence created by this statute for impounding a distress in a wrong place is but a single offence, and satisfied with one forfeiture, though three or four are concerned in doing the act, as the offence cannot be severed so as to make each offender separately liable to the penalty: the meaning of the statute being, that the penalty shall be referred to the offence, not to the person (*c*): thus where three persons distrained * a [*476] flock of sheep, and severally impounded them in three several pounds, it was held, that they should forfeit but one 5*l.* and one treble damages (*d*). The second section does not extend to cases where the goods are impounded on the premises by virtue of the statute next mentioned (*e*), which is the statute usually resorted to, as it is obviously for the advantage of both landlord and tenant that the distress should remain in a situation equally and easily accessible to both (*f*).

Impounding on the premises. — By 11 Geo. 2, c. 19, s. 10, "any person lawfully taking any distress for any kind of rent may impound or otherwise secure the distress so made,

(*b*) Walter *v.* Rumball, 1 Ld. Raym. 53; 1 Salk. 247; Woodcroft *v.* Thompson, 3 Lev. 48; Gimbart *v.* Pelah, 2 Stra. 1272; Bullen, 145.

(*c*) Rex *v.* Clarke, Cowp. 612.

(*d*) Partridge *v.* Naylor, Cro. Eliz. 480; Moor, 453.

(*e*) Child *v.* Chamberlain, 5 B. & Adol. 1049.

(*f*) Smith L. & T. 237.

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 the like directions and restraints to all intents and purposes as any person taking a distress for rent may now do off the premises, by virtue of 2 W. & M. sess. 1, c. 5, or 4 Geo. 2, c. 28; and any person whatsoever may 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 rescous 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 rescous is given and provided by the said statute." The distrainer ought either to put all the goods distrained into one room, and keep possession of that only, or to remove such goods out of the house, in the absence of any consent to the contrary; but very slight evidence of such a consent will be sufficient (*g*). Two or three rooms may be used, if necessary, as may appear most fit and convenient (*h*).

An open field is a sufficient pound for cattle (*i*). The agent of a landlord went into a field where the tenant's cattle were feeding, and placing his hands on one of the beasts, said he distrained them all, counted them, and took a note of them, which he left with the tenant, and then went away, doing nothing further with the beasts; the next morning he left with the tenant a notice, stating he had distrained the cattle, and had impounded them in the place or [*477] *places therein mentioned, and the notice afterwards stated they were impounded "on the premises;" it

(*g*) Washborn *v.* Black, 11 East, 405; Tennant *v.* Field, 8 E. & B. 336; Smith L. & T. 238 (2nd ed.).

(*h*) Woods *v.* Durrant, 16 M. & W. 149.

(*i*) Castleman *v.* Hicks, 1 C. & M. 266.

was held, that this impounding was sufficient to make a tender of the rent and costs afterwards too late (*k*).

Tenant may not be excluded. — It has been ruled, that if necessary to secure a distress in a cottage, it might be locked up so as to exclude the tenant altogether (*l*). But it would rather seem that the landlord is never entitled to lock up the whole of the demised premises, so as to exclude the tenant therefrom, except with his express consent; rather than do that he must remove the goods distrained (*m*).

Corn may not be removed. — Corn loose or in the straw, hay, &c., which is distrained by virtue of 2 W. & M. sess. 1, c. 5 (*n*), cannot be removed from the premises, but must be impounded where found (*o*). And growing corn, &c., distrained under 11 Geo. 2, c. 19, s. 8, must, after it is cut, be placed in a proper place on the premises, and cannot be removed except in default of there being such proper place (*p*).

(g) *Notice of Distress.*

Notice, sale and appraisement. — The distress, being considered merely as a pledge, could not at the common law be sold (*q*). But by 2 W. & M. sess. 1, c. 5, s. 2, "where any goods shall be distrained for 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* (*r*) *days next after such distress taken, and notice thereof* (with the cause of such taking) left at the chief mansion-house or other most notorious place on the premises, replevy the same, in such case, the person distraining shall *cause the goods so distrained to be appraised by two appraisers*, and *after such appraisement* (*s*) *may sell the same* for the best price that can be gotten for them, towards satisfaction of the

(*k*) Thomas *v.* Harries, 1 M. & G. 695.

(*l*) Cox *v.* Painter, 7 C. & P. 767.

(*m*) Smith *v.* Ashforth, 29 L. J., Ex. 259; Bullen, 147.

(*n*) *Ante*, 436.

(*o*) Sect. 3; Bullen, 141, note (2): 12 Q. B. 674.

(*p*) *Ante*, 436.

(*q*) *Ante*, 412.

(*r*) Or fifteen days, if the Agricultural Holdings Act applies. See s. 51 of that act, and *post*.

(*s*) If the Agricultural Holdings Act applies, appraisement is unnecessary. See s. 50 of that act.

rent and charges of the distress, appraisement and sale; leaving the overplus (if any) for the owner's use."

Appraisers need not be sworn. — This statute also required the appraiser to be sworn, by a sheriff, under-sheriff or constable, on the spot, but the Parish Constables Act, 1872 (35 & 36 Vict. c. 92), s. 13, has repealed that part of it. The 11 Geo. 2, c. 19, s. 9, requires that the tenants have notice of *the place* where the distress is lodged when it is removed.

[*478] * **What is a sufficient notice of distress.** — The notice of distress must be in writing (*t*), and its object being to enable the distrainer to sell under 2 W. & M. sess. 1, c. 5, s. 2, it ought to inform the tenant or the person whose effects are taken what goods are distrained, and the amount of rent in arrear (*u*). A notice stating that the distrainer had distrained the goods, chattels and things mentioned in the inventory thereunder written, — which inventory was "one clock and weights, &c., &c., *and any other goods and effects that may be found* in and about the said premises, to pay the said rent and expenses of this distress," — has been held sufficient in a case where it appeared that the distress was in fact meant to include all the goods on the premises (*x*). But where a notice stated a distress of the several goods specified in the schedule, which, after enumerating certain goods, concluded thus — "and *all other goods that may be required*, in order to satisfy the above rent, together with all necessary expenses;" it was held, that this notice was too vague and uncertain to justify the sale of the goods of a stranger which he had deposited on the premises (*y*). No defect in the notice, nor even the total omission to give any such notice, will render the distress itself invalid or illegal; the notice is only required by the statute to entitle the landlord to *sell* under the distress (*z*). It is only *irregular* to sell without due notice (*a*). The notice need

(*t*) Wilson *v.* Nightingale, 8 Q. B. 1034; see Form, Appendix D., No. 4.

(*u*) Kerby *v.* Harding, 6 Exch. 234; 20 L. J., Ex. 163.

(*x*) Wakeman *v.* Lindsey, 14 Q. B. 625.

(*y*) Kerby *v.* Harding, *supra*.

(*z*) Trent *v.* Hunt, 9 Exch. 14.

(*a*) Lucas *v.* Tarleton, 3 H. & N. 116; Wilson *v.* Nightingale, 8 Q. B. 1034; Robinson *v.* Waddington, 13 Q. B. 753.

not set forth at what time the rent became due for which the distress is made, nor the correct amount of the arrears really due, as the tenant is supposed to know all this and must tender the proper amount at his peril (*b*). Any defect or mistake in the notice on the above or similar points is immaterial, for a man may distrain for one cause and avow or justify for another (*c*). Notice to the owner of the goods distrained (not being the tenant) is sufficient as against him, unless a replevin has been sued by the tenant (*d*). In all cases personal notice is sufficient, and indeed preferable to notice left at the mansion-house or other notorious place, on account of the difficulty of proof (*d*).

Time of removing and selling. — The landlord cannot sell the goods distrained until after the expiration of the five days (or fifteen days, if the Agricultural Holdings Act applies,) allowed by the statute for the tenant to replevy, and those days must be calculated exclusively of the day of taking and notice, and also exclusively of the day of sale. Therefore where a distress is taken *and [*479] notice thereof given on a Saturday, the five days expire on the following Thursday, and the goods cannot lawfully be sold before Friday (*e*). A distress taken on Monday or Tuesday cannot lawfully be sold until the following Monday (*f*). But no action will lie for selling too soon unless actual damage be shown (*g*). The landlord should remove the goods from the tenant's premises at the end of the five days allowed the tenant to replevy, or within a reasonable time afterwards, otherwise he may be deemed a trespasser for keeping them there (*h*): thus where A. entered under a warrant of distress for rent in arrear, and continued in possession of the goods upon the premises fifteen

(*b*) *Ante*, 416.

(*c*) Crowther *v.* Ramsbottom, 7 T. R. 654; Etherton *v.* Popplewell, 1 East, 139; Wootley *v.* Gregory, 2 Y. & J. 536; Trent *v.* Hunt, 9 Exch. 14; 22 L. J., Ex. 318; Phillips *v.* Whitsed, 2 E. & E. 804; 29 L. J., Q. B. 164.

(*d*) Walter *v.* Rumball, 1 Ld. Raym. 53; 1 Salk. 247.

(*e*) Robinson *v.* Waddington, 13 Q. B. 753; overruling Wallace *v.* King, 1 H. Blac. 13; and see Harper *v.* Taswell, 6 C. & P. 166.

(*f*) Lucas *v.* Tarleton, 3 H. & N. 116.

(*g*) Lucas *v.* Tarleton, *supra*; Rodgers *v.* Parker, 18 C. B. 112.

(*h*) Griffin *v.* Scott, 2 Stra. 716; 2 Ld. Raym. 1424.

days, during the last four of which he was removing the goods, which were afterwards sold under the distress; it was held, that he was liable to an action of trespass for continuing on the premises, and disturbing the plaintiff in the occupation of his house, after the time allowed by law (*i*); but a reasonable time after the expiration of the five days from the time of the distress is allowed by law to the landlord to remain on the premises for appraising and selling the goods distrained (*k*). It is usual for the tenant to give a consent for the landlord to remain beyond the five days, as it is for the tenant's advantage that the goods be not sold, or, at all events, not sacrificed by hurrying on the sale; if such consent be given, it is prudent, although not absolutely necessary, to have it in writing (*l*). If a landlord has distrained for rent, but by an arrangement between him and the tenant does not sell immediately after the five days, that is no proof per se of collusion (*m*); and the request of the tenant will justify the landlord in detaining the goods of a lodger upon the premises beyond the proper time of selling, if he did not know which were the goods of the lodger, and which were those of the tenant (*n*). Standing corn and growing crops, seized as a distress for rent, cannot be sold before they are ripe, for the tenant may tender the rent before they are ripe (*o*). But no action can be maintained for selling them prematurely, if the jury find that the tenant thereby sustained no damage (*p*).

(h) *Appraisement and Sale.*

Who may act as appraisers. — Before the distress [*480] can be sold, it must, unless the Agricultural * Holdings Act applies (*q*), be appraised by *two* appraisers (*r*), who must be reasonably competent, but need not be profes-

(*i*) Winterbourne *v.* Morgan, 11 East, 395; 2 Camp. 117, n.; Etherton *v.* Popplewell, 1 East, 139.

(*k*) Pitt *v.* Shew, 4 B. & A. 208.

(*l*) See Form, Appendix D., No. 7.

(*m*) Harrison *v.* Barry, 7 Price, 690.

(*n*) Fisher *v.* Algar, 2 C. & P. 374.

(*o*) Owen *v.* Leigh, 3 B. & A. 470; Proudlove *v.* Twemlow, 1 Cr. & M. 326.

(*p*) Lucas *v.* Tarleton, 3 H. & N. 116; Rodgers *v.* Parker, 18 C. B. 112.

(*q*) See Sect. 5, *ante*.

(*r*) 2 W. & M. sess. 1, c. 5, s. 2; *ante*, 477; Allen *v.* Flicker, 10 A. & E. 640; Bishop *v.* Bryant, 6 C. & P. 484.

sional appraisers (*s*): it must not be appraised by the party making it (*t*), for he is interested in the business. A landlord, who was a broker, having distrained goods for rent, was sworn one of the appraisers, and together with another broker valued them to the plaintiff, who became the purchaser according to such valuation; it was held, that the sale was irregular (*u*). So the landlord cannot sell the goods to himself (*x*). It has been held, that if the tenant, to save expense, requests that appraisers may not be called in, and in consequence the broker who made the seizure values the goods, the tenant cannot in an action complain of that which was done as an irregularity (*y*).

The appraisers proceed to appraise the goods, and usually write their appraisement upon the inventory (*z*).

Stamp on appraisement. — By the Stamp Act, 1870 (33 & 34 Vict. c. 97), s. 38, and Sched. tit. "Appraisement or Valuation," the following stamp duties are made payable on appraisements and valuations made on and after 1st January, 1871: —

Where the amount of the appraisement or	£	s.	d.
valuation does not exceed 5*l.*	0	0	3
Exceeds 5*l.* and does not exceed 10*l.* . . .	0	0	6
" 10*l.* " 20*l.* . . .	0	1	0
" 20*l.* " 30*l.* . . .	0	1	6
" 30*l.* " 40*l.* . . .	0	2	0
" 40*l.* " 50*l.* . . .	0	2	6
" 50*l.* " 100*l.* . . .	0	5	0
" 100*l.* " 200*l.* . . .	0	10	0
" 200*l.* " 500*l.* . . .	0	15	0
" 500*l.*	1	0	0

Where goods are distrained, and at the end of the five days appraised but not sold, the act of appraisement does

(*s*) Roden *v.* Eyton, 6 C. B. 427; Clarke *v.* Holford, 2 C. & K. 540; Child *v.* Chamberlain, 6 C. & P. 213. They need not be sworn; *ante*, 477.

(*t*) Westwood *v.* Cowne, 1 Stark. R. 172.

(*u*) Lyon *v.* Weldon, 2 Bing. 334.

(*x*) King *v.* England, 4 B. & S. 782; 33 L. J., Q. B. 145.

(*y*) Bishop *v.* Bryant, 6 C. & P. 484.

(*z*) See Form, Appendix D., No. 3.

not take away the tenant's right to replevy them (*a*). Until they are duly sold, the property in them remains vested in the tenant or other owner (*b*).

A bailiff who seizes goods under a distress warrant, if his authority to sell on behalf of the landlord is afterwards withdrawn, has no right to go on and sell for his expenses (*c*).

[*481] ***Procedure under Agricultural Holdings Act.** — If the Agricultural Holdings Act applies (*d*), appraisement is unnecessary by s. 50 of that act, the effect of which is that the landlord, if he has an appraisement, cannot throw the expenses of it upon the tenant; and by the same section, for the purposes of sale the goods "shall," at the request in writing of the tenant or owner, be removed "at the expense of the party requesting removal to a public auction room, or to some other fit and proper place specified in such request, and be the resold," not necessarily, it will be observed, by auction.

Mode of selling. — Before any sale takes place, the county court registrar's office should be searched to see if the goods have been replevied; if that is not the case, and the rent and charges remain unpaid at the end of the five days allowed by law, the goods should be sold for the best price which can be got for them. If the distress is for less than 20*l*., a person selling the goods by auction need not have an auctioneer's licence (*e*). It seems that there is no order required by law to be observed on the sale of goods distrained, — as that beasts of the plough should be postponed to other goods (*f*).

Landlord may not buy. — The landlord cannot sell the goods to himself or take them at the appraised price (*g*). It is not unusual for the appraisers to buy them at their own valuation. A distress sold at the appraised value was taken, when appraisers were sworn, to have been sold at the best price, since the law *relied* upon the appraisers having been sworn (*h*); but it was held, that upon a count for not selling

(*a*) Jacob *v.* King, 5 Taunt. 151.
(*b*) Moore *v.* Pyrke, 11 East, 52, 54; King *v.* England, *supra*, note (*x*).
(*c*) Harding *v.* Hall, 14 W. R. 646; 14 L. T., N. S. 410.
(*d*) Sect. 5, *ante*, 485.
(*e*) 8 & 9 Vict. c. 15, s. 5.
(*f*) Jenner *v.* Yolland, 6 Price, 5; 2 Chit. R. 167.
(*g*) King *v.* England, *supra*, note (*y*).
(*h*) Walter *v.* Rumball, 1 Ld. Raym. 53; 1 Salk. 247; Bullen, 160.

goods distrained at the best prices, the plaintiff might go into evidence to show that the goods were allowed to stand in the rain, and that they were improperly allowed (*i*). Where a tenant is under a covenant not to carry hay and straw off the premises, a distraining landlord is not entitled to sell it too cheap, on the condition that the purchaser shall consume it on the premises (*k*). If goods on the tenant's lands be sold under a distress with a condition, to which the tenant is a party, that they may remain on the land up to a certain day, and that the buyer may enter and take the goods, the tenant cannot revoke this licence to enter on the land (*l*). But such a licence is not implied by law, though the goods may have remained on the land with the tenant's assent (*m*). The whole produce of the sale may, if necessary, be applied in or towards satisfaction of the rent and expenses of the distress; but if the produce be more than sufficient for that purpose, the residue should be left in the hands of the sheriff, * under-sheriff, or con- [*482] stable — usually the latter — for the use of the owner of the goods distrained (*n*). And if the goods have been removed for sale, the surplus thereof remaining unsold (if any) should be returned to the premises from which they were taken (*o*).

(i) *Costs of Distresses.*

Fixed limit where distress for 20*l.* or less. — By 57 Geo. 3, c. 93, for regulating the costs of distresses levied for payment of small rents, after reciting that divers persons acting as brokers, and distraining on the goods and chattels of others, or employed in the course of such distresses, had of late made excessive charges, to the great oppression of poor

(*i*) Poynter *v.* Buckley, 5 C. & P. 512.

(*k*) Ridgway *v.* Ld. Stafford, 6 Exch. 404; overruling Abbey *v.* Petch, 8 M. & W. 419; and followed in Hawkins *v.* Walrond, 45 L. J., C. P. 772; see also Frusher *v.* Lee, 10 M. & W. 709; Roden *v.* Eyton, 6 C. B. 427; Smith L. & T. 210 (2nd ed.).

(*l*) Wood *v.* Manley, 11 A. & E. 34; Wood *v.* Leadbitter, 13 M. & W. 838.

(*m*) Williams *v.* Morris, 8 M. & W. 488.

(*n*) *Post*, 485.

(*o*) Evans *v.* Wright, 2 H. & N. 527; 27 L. J., Ex. 50.

tenants and others, and that it was expedient to check such practices, it was enacted, sect. 1, "that no person making any distress for rent, where the sum demanded and due *shall not exceed* 20*l.* for and in respect of such rent, nor any person whatsoever employed in any manner in making such distress, or doing any act whatsoever in the course of such distress, or for carrying the same into effect, shall have, take or receive out of the product of the goods or chattels distrained upon and sold, or from the tenant distrained on, or from the landlord, or from any other person whatsoever, any other or more costs and charges for and in respect of such distress, or any matter or thing done therein, than such as are fixed and set forth in the schedule" annexed and appropriated to each act which shall have been done in the course of such distress; and no person or persons whatsoever shall make any charge for any act, matter or thing mentioned in the schedule, unless such act shall have been really done.

Party aggrieved by extortion may apply to justice of the peace. — By sect. 2, "if any person shall in any manner levy, take or receive from any person whatsoever, or retain or take from the product of any goods sold for the payment of such rent, any other (*p*) or greater costs and charges than are mentioned and set down in the schedule, or make any charge whatsoever for any act, matter or thing mentioned in the schedule, and not really done, the party aggrieved by such practices may apply to any one justice of the peace for the county, city or town, and acting for the division where such distress shall have been made, or in any manner proceeded in, for redress; whereupon such justice shall summon the person complained of to appear before him, and shall examine into the matter of such complaint, and hear the defence of the person complained of; and if the fact shall appear to such justice, he shall order and adjudge treble the amount of the monies so unlawfully taken to be paid, by the person so having acted, to the party who shall [*483] have made complaint * thereof, together with full costs; and, in case of non-payment, shall issue his

(*p*) Nott *v.* Bound, L. R., 1 Q. B. 405.

warrant to levy the same by distress and sale of the goods and chattels of the party ordered to pay, rendering the overplus (if any) to the owner; and in case no sufficient distress can be had, he shall commit the party to prison, there to remain until such order or judgment be satisfied."

Landlord liable only in case of personal levy. — Sect. 4 provides, that nothing contained in the act "shall empower such justice to make any order or judgment against the landlord for whose benefit any such distress shall have been made, unless such landlord shall have personally levied such distress; and that no person who shall be aggrieved shall be debarred from any legal or other suit or remedy which he might have had before the passing of the act, excepting so far as such complaint shall have been determined by the order and judgment of the justice, and which may be given in evidence under the plea of the general issue in all cases where the matter of such complaint shall be made the subject of any action."

Schedule of expenses for distresses not exceeding 20*l.* — The schedule of expenses referred to in the above act is as follows: —

	£	*s.*	*d.*
Levying distress	0	3	0
Man in possession, per day	0	2	6
Appraisement, whether by one broker or more, 6*d.* in the pound on the value of the goods.			
Stamp, the lawful amount thereof.			
All expenses of advertisements, if any such	0	10	0
Catalogues, sale and commission, and delivery of goods, 1*s.* in the pound on the net produce of the sale.			

The statute does not apply to a case of distress taken for more than 20*l.*, though made upon goods which are appraised at and sold for less than 20*l.* (*q*).

Copy of broker's charges to be delivered, &c. — By sect. 6 of

(*q*) Child *v.* Chamberlain, 5 B. & A. 1049; 6 C. & P. 213.

the same statute "every broker or other person who shall make and levy *any distress whatsoever*, shall give a copy of his charges, and of all the costs and charges of any distress whatsoever, signed by him. to the person or persons on whose goods and chattels any distress shall be levied, although the amount of the rent demanded shall exceed the sum of twenty pounds." This section, which, it will have been seen, is of general application, does not apply where the goods have not been sold (*r*), and where it does apply, the landlord, not personally interfering in the distress, is not liable for the omission of the broker to give a copy of his charges (*s*).

[*484] *** Costs of distresses for more than 20*l*.** — Where the sum distrained for exceeds 20*l*., the above act does not apply, and unless the Agricultural Holdings Act applies, the only rule is that the charges must be reasonable (*t*). It is to be regretted that some reasonable scale of charges in such cases has not been sanctioned by the legislature, to prevent extortion, and because tenants ought to know accurately how much to tender (with the arrears of rent) for the expenses of the distress. The general practice appears to be, to charge 1*s*. in the pound for the levy, and 2*s*. 6*d*. per day for the man in possession, if the tenant keep him, and 3*s*. 6*d*. per day if he keep himself (*u*), besides the usual charges for appraisement, advertisements, catalogues, &c. The 1 & 2 Ph. & M. c. 12, s. 2 (*x*), allowing only 4*d*. for impounding any one whole distress, does not extend to cases where the goods are impounded on the premises, pursuant to 11 Geo. 2, c. 19, s. 10. A bailiff has no right to go on with the distress, and sell for his expenses, after his authority has been withdrawn by the landlord (*y*).

Costs of distresses for more than 20*l*. on agricultural holding.

(*r*) Hills *v.* Street, 5 Bing. 39.

(*s*) Hart *v.* Leach, 1 M. & W. 560.

By 7 & 8 Geo. 4, c. 17, all the clauses, &c., in the above act (57 Geo. 3, c. 93) contained are extended to any distress for any rates or taxes, &c., in all cases where the sum demanded and due for such rates or taxes, &c., does not exceed 20*l*.

(*t*) Lyon *v.* Tomkies, 1 M. & W. 603.

(*u*) Bullen, 164, 165.

(*x*) *Ante*, 441.

(*y*) Harding *v.* Hall, 14 W. R. 646; 14 L. T., N. S. 410.

— If the Agricultural Holdings Act applies (*z*), a special scale is provided by s. 49 and sched. 2 of that act, which scale may not be exceeded, but is applicable only to distresses for more than 20*l*., distresses for less than 20*l*. being still left to be regulated by 57 Geo. 3, c. 93. The scale is as follows: —

Levying distress. — Three per centum on any sum exceeding 20*l*. and not exceeding 50*l*. Two and a half per centum on any sum exceeding 50*l*.

To bailiff for levy, 1*l*. 1*s*.

To man in possession, if boarded, 3*s*. 6*d*. per day; if not boarded, 5*s*. per day.

For advertisements, the sum actually paid.

To auctioneer. — For sale, five pounds per centum on the sum realized not exceeding 100*l*., and four per centum on any additional sum realized not exceeding 100*l*., and on any sum exceeding 200*l*. three per centum. A fraction of 1*l*. to be in all cases considered 1*l*.

Reasonable costs and charges where distress is withdrawn, or where no sale takes place, and for negotiations between landlord and tenant respecting the distress; such costs and charges, in case the parties differ, to be taxed by the registrar of the county court of the district in which the distress is made (*a*).

Negotiations. — At common law the landlord has no right to charge the tenant with the costs of any such "negotiations respecting distress," but these words in the schedule seem impliedly to confer such a right.

* (j) *Surplus Proceeds and Unsold Goods.* [*485]

Overplus to be paid to tenant. — By 2 W. & M. sess. 1, c. 5, s. 2, landlords are authorized, after giving five days' notice of the distress (*b*), to cause the goods and chattels distrained to be appraised and sold (*c*), "towards satisfaction of the

(*z*) See sect. 5, *ante*.

(*a*) This scale is almost identical with that proposed by Mr. Waugh, M. P. for Cockermouth, a solicitor of forty years' experience, to the Select Committee of the House of Commons on the law of distress, which made its report in 1882.

(*b*) *Ante*, 477 (f).

(*c*) *Ante*, 479 (g).

rent for which the said goods and chattels shall be distrained, and of the charges of such distress, appraisement and sale, *leaving the overplus (if any) in the hands* of the said sheriff, under-sheriff or constable, for the owner's use." If the overplus be not so left, and the tenant or owner of the goods thereby sustains actual damage (but not otherwise), a special action on the case is maintainable (*d*), but not an action for money had and received, to recover the amount of such overplus (*e*). The "overplus" means what remains after payment of the rent, and the *reasonable charges* of the distress, which may be questioned in such special action (*f*). Whether the amount deducted for rent can be questioned in such action, is not clear. Although the tenant or owner of the goods has received the balance from the broker, it is a question for the jury whether it was accepted in full satisfaction: and if not, then whether it was sufficient to satisfy the real balance (*g*).

No action for rent till sale. — And although the distress be insufficient, no action can be maintained for the rent until a sale has been had (*h*), after which the landlord may sue for the balance (*i*). Where goods distrained for rent in arrear have been removed to a convenient place for sale, and sufficient sold to satisfy the distress, including the expenses, the proper course is for the broker to leave the surplus money with the sheriff, under-sheriff or constable (generally the constable), and return the surplus goods to the premises from whence he took them (*k*).

SECT. 11. — *Second Distress.*

Second distress in case of insufficiency on first. — By 17 Car. 2, c. 7, s. 4, "in all cases where the value of the cattle

(*d*) Lyon *v.* Tomkies, 1 M. & W. 603.

(*e*) Yates *v.* Eastwood, 6 Exch. 805; 20 L. J., Ex. 303; Evans *v.* Wright, 2 H. & N. 527; 27 L. J., Ex. 50; 2 Chit. Pl. 544 (7th ed.).

(*f*) Lyon *v.* Tomkies, 1 M. & W. 603; Knight *v.* Egerton, 7 Exch. 407 (5th issue, and verdict thereon).

(*g*) Lyon *v.* Tomkies, *supra*.

(*h*) Lehain *v.* Philpott, L. R., 10 Ex. 242; 44 L. J., Ex. 225.

(*i*) Philpott *v.* Lehain, 35 L. T. 855.

(*k*) Evans *v.* Wright, 2 H. & N. 527; 27 L. J., Ex. 50.

distrained shall not be found to be of the full value of the arrears distrained for, the party to whom such arrears are due, his executors or administrators, may from time to time distrain again for the residue of the said arrears." This enactment, which appears intended to provide for the cases where a tenant after an insufficient distress *has subsequently brought fresh goods upon the [*486] premises, is wholly repealed by the Statute Law Revision and Civil Procedure Act, 1881, 44 & 45 Vict. c. 59, but the object of that act was to expressly repeal enactments impliedly repealed already, and 17 Car. 2, c. 7, s. 4, does not appear to have been impliedly repealed. Perhaps, too, the enactment is saved from repeal by s. 4 (b) of the Act of 1881, which provides that the general repeal shall not affect any right or privilege acquired by any enactment repealed by the Act of 1881.

Illegality of second distress for same rent in case of sufficiency on first. — However this may be, a second distress for the same rent cannot be justified where there is enough which might have been taken upon the first distress, if the distrainer had then thought proper; for it was his folly that he did not take sufficient at first (*l*); and a man who has an entire duty (as rent, for example) may not split the entire sum, and distrain for one part of it at one time, and for the other part of it at another time, and so toties quoties for several times; for that is great oppression (*m*). It is not illegal, however, in cases where many gales of rent are due, to distrain firstly for gales firstly due, and secondly for gales subsequently due, although the distress firstly made was made at a date when the gales secondly distrained for might have been distrained for by the first distress. That a second distress to be illegal must be *for the same rent* is recognized by all the authorities (*n*).

(*l*) Com. Dig. Distress (A. 1); Bagge, app. Mawby, resp., 8 Exch. 641; Smith L. & T. 191, 192 (2nd ed.).

(*m*) Gambrell *v.* Earl of Falmouth, 4 A. & E. 73; Lear *v.* Caldecott, 4 Q. B. 123; Owen *v.* Wynne, 4 E. & B. 579; Smith L. & T. 192 (2nd ed.).

(*n*) And see *per* Brown, J., Moore, 7, pl. 26, cited in Dawson *v.* Cropp, 1 C. B. 961. The appropriation of the first distress to the first rent will appear from the distress warrant and notice of distress.

An action will lie against a landlord for the goods taken on a second distress, where he might have taken sufficient on the first, or where he has voluntarily abandoned it (*o*). Where a landlord, having distrained a tenant who had committed an act of bankruptcy, withdrew the distress in consequence of a creditor of the tenant stating that he was proceeding in bankruptcy against the tenant, and warning the landlord not to sell, it was held, that such notice or warning ought not to have been regarded, and that a second distress was illegal (*p*). If a man, however, seize for the whole sum that is due to him, and only mistake the value of the goods seized, which may be of uncertain or imaginary value, as pictures, jewels, race-horses, &c., there is no reason why he should not afterwards complete his execution by making a further seizure (*q*). So if he withdraw the distress at the request of the tenant and for his accommodation (*r*), or is induced to do so by a false statement made by the [*487] tenant (*s*). So if he be forcibly prevented * by the tenant from selling the goods distrained, or from delivering them to the purchaser, whereby the distress is defeated (*t*). But the re-entry in such cases does not amount to a second distress; it is merely a continuance of the original taking, and it should be confined to the goods previously taken and not extend to any others (*u*).

Second distress in case of replevin. — If a plaintiff in replevin be nonsuited, the defendant may again distrain the same goods for rent subsequently accrued, previously to executing his retorno habendo, without waiving his action against the sureties on the bond (*x*). Where to a cognizance for rent in arrear there was a plea in bar, that the defendant, on a former occasion, made a distress for the same rent, and took

(*o*) Smith *v.* Goodwin, 4 B. & Adol. 413; Dawson *v.* Cropp, 1 C. B. 961; 3 D. & L. 225; Lear *v.* Caldecott, 4 Q. B. 123; Piggott *v.* Birtles, 1 M. & W. 441.

(*p*) Bagge, app., Mawby, resp., 8 Exch. 641.

(*q*) Hutchins *v.* Chambers, 1 Burr. 579; 1 Wms. Saund. 201, n. 1.

(*r*) See Form of Request, Appendix D., No. 6.

(*s*) Woollaston, app., Stafford, resp., 15 C. B. 278.

(*t*) Lee *v.* Cooke, 2 H. & N. 584; 3 Id. 203; 27 L. J., Ex. 337.

(*u*) Smith *v.* Torr, 3 F. & F. 505; and see Sect. 4.

(*x*) Hefford *v.* Alger, 1 Taunt. 218.

goods liable to distress sufficient to discharge the rent in arrear and the costs of the distress, and might thereby have paid the arrears of rent, but neglected so to do and wrongfully made a second distress for the same rent; it was held ill on special demurrer, assigning for cause that the plea did not show that the rent was satisfied by the former distress (*y*). And where to an avowry by executors, for rent due in the lifetime of their testator, there was a plea in bar that the testator took as a distress for the same rent goods of a sufficient value to satisfy such rent and the costs of taking the distress; it was held insufficient, as it should have shown that such distress produced a satisfaction of the rent (*z*).

Sect. 12. — *Rescue and Pound-Breach.*

What amounts to a rescue. — Rescue is where the owner, or other person, by force takes away a thing distrained from the person distraining, after the latter has been actually in possession; but if he never in fact had possession — as when disturbed in making the distress — it is no rescue (*a*). It is also called rescous, from *recourser* (*recuperate*), to take from or recover. It is defined by Lord Coke to be a taking away and setting at liberty against law a distress taken, or a person arrested by the process or course of law (*b*). If cattle distrained go on to the premises of the owner while being driven to the pound, and he refuse to deliver them up upon demand by the distrainer, it is a rescue in law (*c*): but where the plaintiff distrained the defendant's cattle damage feasant, and went to apprise the defendant, and during his absence the cattle escaped for half an hour into the defendant's grounds, from whence the plaintiff on his return drove them to his own yard; it was held, that the *defendant [*488] having taken them from thence, it was no rescue (*d*). Where the landlord employed a sheriff's officer, who took

(*y*) Hudd *v.* Ravenor, 2 Brod. & B. 662; Dawson *v.* Cropp, 1 C. B. 961; 3 D. & L. 225.

(*z*) Lingham *v.* Warren, 2 Brod. & B. 36; Bullen, 206.

(*a*) Bullen N. P. 84.

(*b*) Co. Lit. 160.

(*c*) Co. Lit. 161 a.

(*d*) Knowles *v.* Blake, 5 Bing. 499.

possession under the distress, and then, on receiving a fi. fa., sold the goods under it, this, though done by the same person, was held to be a rescue and pound-breach (*e*). The following facts, however, were held insufficient to enable the plaintiff to maintain an action for a pound-breach or rescue. The plaintiff levied a distress for rent in arrear, and impounded the goods upon the premises; the superior landlord afterwards distrained for rent due to him from the plaintiff: whilst the plaintiff's bailiff was removing the goods, the defendant, a sheriff's officer, came into the house, and said that he had a fi. fa. against the plaintiff, and that he would not allow the goods to be removed: plaintiff's tenant thereupon ejected plaintiff's bailiff, and brought back the goods which had been removed (*f*).

When a rescue may be made. — If a distress be taken without cause, the party may lawfully make a rescue before it is impounded (*g*); but if it is impounded, he cannot justify a breach of the pound to take it out; because the distress is then in the custody of the law (*h*). Whenever the distrainer abandons and quits possession of the distress, the re-taking of it by the tenant or owner is not a rescue (*i*). So if a distrainer takes the distress out of the place where it was originally impounded, for the purpose of making an unlawful use of it, the owner may interfere and take it out of his possession, without rendering himself liable either for a rescue or for pound-breach (*k*).

Remedies for rescue and pound-breach. — By the common law, if a man broke the pound, or the lock of it, or any part of it, he "greatly offended against the peace, and committed a trespass against the king, and to the lord of the fee, the sheriffs and hundredors in breach of the peace, and to the party in delay of justice: wherefore hue and cry was levied

(*e*) Reddell *v.* Stowey, 2 Moo. & R. 358; Turner *v.* Ford, 15 M. & W. 212.

(*f*) Story *v.* Finnis, 6 Exch. 123; 2 L., M. & P. 198.

(*g*) Co. Lit. 47 b; 161 a; Bevil's case, 4 Co. R. 11 b; Case of Avowry, 9 Co. R. 23 b; Keen *v.* Priest, 4 H. & N. 240, Bramwell, B.; Bullen, 207.

(*h*) Cotsworth *v.* Bettison, 1 Salk. 247; 1 Ld. Raym. 105.

(*i*) Dod *v.* Monger, 6 Mod. 216; Bradley, 282.

(*k*) Smith *v.* Wright, 6 H. & N. 821; 30 L. J., Ex. 313.

against him as against those who broke the peace; and the party who distrained might take the goods again wheresoever he found them, and again impound them" (*l*).

Recovery of treble damages. — By 2 W. & M. sess. 1, c. 5, s. 4, on any pound-breach or rescous of goods distrained for rent, the person grieved thereby shall, in a special action upon the case, recover treble damages and costs against the offender, or against the owner of the goods, if they be afterwards found to come into his use or possession. If a distrainer abuse a distress by working it, the owner may interfere and prevent it, and no *action is maintainable [*489] against him for pound-breach or rescue (*m*). Where goods fraudulently removed and distrained on the premises of a third party are rescued by him, it may be a question whether an action in respect of such rescue can be maintained under this section (*n*). In an action on this statute it has been held that it is no answer that the rent and demand were tendered after the distress and impounding (*o*). Trover is not maintainable by the landlord for goods distrained by him, he having no property in them, nor even the constructive possession of them (*p*).

Costs. — Treble costs as well as treble damages are given by this statute, but treble costs were abolished by Pollock's Act (6 & 7 Vict. c. 97), which substituted "a full and reasonable indemnity as to all costs and charges in and about the action" (*q*).

The act 6 & 7 Vict. c. 30, amending the "Law relating to Pound-Breach and Rescue in certain Cases," does not extend to distress for rent, but applies only to distress of cattle "damage feasant."

Note on Distress Damage Feasant. — Although the right of distress damage feasant does not arise out of the relation between landlord and tenant, it may be useful to add here a few words respecting that kind of distress,

(*l*) 1 Inst. 47.
(*m*) Smith *v.* Wright, *supra*.
(*n*) Harris *v.* Thirkeld, 20 L. T. 98.
(*o*) Firth *v.* Purvis, 5 T. R. 432.
(*p*) Turner *v.* Ford, 15 M. & W. 212; Wilbraham *v.* Snow, 2 Saund. 47 a.
(*q*) It is doubtful whether Pollock's Act is not repealed by R. S. C. Order LXV. See Garnett *v.* Bradley, L. R., 3 App. Ca. at pp. 961, 970.

which resembles distress for rent in many of its incidents, but not in all. It is laid down in Bullen on Distress (where the law of the subject is fully discussed (see pp. 227–242)), that a distress damage feasant may be made of any cattle or other things animate or inanimate which are wrongfully upon a man's land or in his house, incumbering it or otherwise doing damage. This right is founded on the principle of recompense, which justifies a person in retaining that which occasions injury to his property till amends be made by the owner. The thing distrained must be taken in the act (Wormer *v.* Biggs, 2 C. & K. 31). There is this difference between a distress for rent and a distress damage feasant, that in the former case a man may distrain any cattle he finds on the premises, but in the other case they must be actually doing damage, and are only distrainable for the damage they are then doing and continuing: for if they have done damage to-day and have gone off, and come again at another time and are doing damage, and are taken for that, and the owner tenders amends for the latter damage, the party cannot justify keeping them for the first damage (Vaspor *v.* Edwards, 12 Mod. 658, 660; 1 Ld. Raym. 719; 1 Salk. 248; Co. Lit. 161 a). Each beast taken can be seized and detained for the damage which has actually been done by itself only, and not for the general damage, or any part of it which has been done by the others (Id.). To justify a distress damage feasant it is sufficient, however, that the distrainer entered the locus in quo whilst the cattle were in it (Clement *v.* Milner, 3 Esp. 95); but if it appear that the party distraining had not actually got into the locus in quo before the cattle had got out of it, the justification cannot be supported (Id.). The remedy is not confined to the mere owner of the soil upon which they may be found, but extends to all who may receive injury, such as commoners or other persons entitled to the use or produce of the land merely (Hall *v.* Harding, 4 Burr. 2432). Where A. demised to B. the milk of twenty-two cows to be provided by A. and to be fed at A.'s expense on certain closes belonging to A.; A. covenanting that B. might turn out a mare, and that no other cattle should be fed there; it was held, that the separate herbage and feeding of those closes passed to B., and that B. might [*490] distrain other cattle of A. doing * damage there (Burt *v.* Moore, 5 T. R. 329). A tenant holding over after the expiration of his term cannot lawfully distrain the landlord's cattle put upon the premises by way of taking possession (Taunton *v.* Costar, 7 T. R. 431; Butcher *v.* Butcher, 7 B. & C. 399). No kind of thing which is capable of being damage feasant and not in actual use is exempt from distress for such damage. For damage feasant the party grieved or his agent may distrain in the night, otherwise it may be the beasts will be gone before he can take them (Co. Lit. 142 a). If a sufficient tender be made of damages before the taking, the taking is unlawful; if after the taking, and before the impounding, then although the taking is lawful, the detainer after the tender is unlawful; and in either case replevin may be maintained (Evans *v.* Elliott, 5 A. & E. 142; Gulliver *v.* Cozens, 1 C. B. 788; West *v.* Nibbs, 4 C. B. 172). A distress damage feasant cannot be sold for the damage done (Layton *v.* Hurry, 8 Q. B. 811). By 6 & 7 Vict. c. 30, power is given to two justices, where cattle are distrained, to convict persons releasing or attempting to release them; and the justices may award any part of the penalty to the person on whose behalf the distress is made. The justices cannot act in cases of disputed title and other cases.

Sect. 13.—*Satisfaction of Arrears of Rent by Execution Creditor.*

(a) *Execution in High Court.*

Goods in the custody of the law under an execution cannot at common law be distrained for rent (*r*). But to prevent collusion between tenants and their judgment creditors to defeat the landlord's remedy by distress, 8 Ann. c. 14, s. 1, enacts, that "no goods or chattels whatsoever lying or being in or upon any messuage, lands or tenements which are or shall be leased for life or lives, term of years, at will or otherwise, shall be *liable to be taken* by virtue of any execution on any pretence whatsoever, *unless the party at whose suit* the said execution is sued out, shall, *before the removal* of such goods from off the said premises, by virtue of such execution, or extent, pay to the landlord of the said premises or his bailiff all such sum or sums of money as are or shall be due for rent for the said premises at the time of the taking 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 said 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 the act; and the sheriff or other officer is hereby empowered and required to levy and pay to the plaintiff as well the money so paid for rent as the execution money."

Saving for crown debts. — Section 8 provides, that nothing in the act contained shall extend, or be construed to extend, to let, hinder or prejudice her Majesty, her heirs or successors, in the levying, recovering or seizing any debts, fines, penalties or forfeitures due, payable or answerable to
* her, but that it shall and may be lawful for her to [*491]
levy, recover and seize the same in the same manner
as if the act had never been made.

(*r*) *Ante*, 442; Co. Lit. 47 a; Wharton *v.* Naylor, 12 Q. B. 673; 6 D. & L. 136.

Tenancies for less than a year. — By 7 & 8 Vict. c. 96, s. 67, "no landlord of any tenement let at a weekly rent shall have any claim or lien upon any goods taken in execution under the process of any court of law for more than four weeks' arrears of rent; and if such tenement shall be let for any other term less than a year, the landlord shall not have any claim or lien on such goods for more than the arrears of rent accruing during four such terms or times of payment."

County court executions. — The 19 & 20 Vict. c. 108, s. 75, enacts that the 3 Ann. c. 14, s. 1, "shall not apply to goods taken in execution under the warrant of a county court," and provides a special process for such a case (*s*).

Application of statute of Anne. — The 8 Ann. c. 14, s. 1, is to be construed liberally (*t*) i.e. in favour of landlords. It does not, however, apply to executions at the suit of the landlord (*u*). The words "party at whose suit the execution is sued out" are not confined to plaintiffs, but have been held to apply where a defendant sued out execution for his costs of defence (*x*), and to a seizure under an outlawry in a civil suit (*y*), or under a sequestration from the Court of Chancery (*z*). Where there are two or more executions the landlord cannot have a year's rent on each (*a*). If the goods remain on the demised premises after a fictitious bill of sale made of them under an execution, they are liable to be distrained (*b*). Notwithstanding a fraudulent bill of sale by the tenant the property remains vested in him, so as to be liable to an execution against *his* goods, or a distress (*c*). The act applies to all goods and chattels whatsoever upon the demised premises, whether belonging to the tenant or not (*d*): and whether liable to a distress or not (*e*).

No goods may be removed, &c. — None of the goods may

(*s*) *Post*, 496.

(*t*) Henchett *v.* Kimpson, 2 Wils. 141.

(*u*) Taylor *v.* Lanyon, 6 Bing. 536.

(*x*) Henchett *v.* Kimpson, *supra*.

(*y*) St. John's College, Oxford *v.* Murcott, 7 T. R. 259; Watson on Sheriff, 277 (2nd ed.); Atkinson on Sheriff, 311 (5th ed.).

(*z*) Dixon *v.* Smith, 1 Swanst. 457.

(*a*) Dod *v.* Saxby, 2 Stra. 1024.

(*b*) Smith *v.* Russell, 3 Taunt. 400.

(*c*) Reed *v.* Thoyts, 6 M. & W. 410; 8 Dowl. 410.

(*d*) Forster *v.* Cookson, 1 Q. B. 419; Duck *v.* Braddyll, M'Clel. 217; 13 Price, 455.

(*e*) Riseley *v.* Ryle, 11 M. & W. 16, 22.

be *removed* from off the demised premises until the rent is paid, otherwise the sheriff will be personally liable to an action founded on the statute (*f*); or to a summary application to the Division of the High Court out of which the execution issued, or to a judge, to compel him to pay the arrears of rent (not exceeding one year's rent) and the costs of the application (*g*), but an actual removal * is [*492] necessary: the mere execution of a bill of sale by the sheriff to a purchaser is not sufficient (*h*). No action lies against the execution creditor for any such removal, it being the act of the sheriff (*i*).

There must be a subsisting tenancy. — The act only applies to a subsisting tenancy, and the landlord's statutory right to be paid arrears of rent ceases on determination of the lease (*k*). Where in an agreement for the sale of certain premises there was a stipulation that "in the mean time and until the assignment was made, the purchaser should pay and allow to the vendor at the rate of 100*l.* per annum, from the time of taking possession of the premises until the completion of the purchase, in equal half-yearly payments;" the purchaser having taken possession, and one half-yearly payment being due, it was held that it was due *as rent*, and that the vendor was entitled to it, under the statute of Anne, before the removal of any of the goods which had been seized under an execution after it became due (*l*).

Forehand rents. — The act applies to forehand rents, pay-

(*f*) Levy *v.* Godson, 4 T. R. 687; Calvert *v.* Joliffe, 2 B. & Adol. 418; Wintle *v.* Freeman, 11 A. & E. 547; Riseley *v.* Ryle, 1 Dowl., N. S. 660; 10 M. & W. 101; 11 Id. 16; Forster *v.* Cookson, 1 Q. B. 419; Bible *v.* Hussey, 2 Ir. Com. L. R. 308; 16 W. R. 710; Watson on Sheriff, 277 (2nd ed.).

(*g*) West *v.* Hedges, Barnes, 211; 6 M. & G. 1004, note; Henchett *v.* Kimpson, 2 Wils. 140; Arnett *v.* Garnett, 3 B. & A. 440; Yates *v.* Rutledge, 5 H. & N. 249.

(*h*) Smallman *v.* Pollard, 6 M. & G. 1001; 1 D. & L. 901; White *v.* Binstead, 13 C. B. 304.

(*i*) Palgrave *v.* Windham, 1 Stra. 212; Riseley *v.* Ryle, 11 M. & W. 16, 20; Cocker *v.* Musgrove, 9 Q. B. 230.

(*k*) Cox *v.* Leigh, L. R. 9 Q. B. 333; 43 L. J., Q. B. 123; 30 L. T. 494; 22 W. R. 730. See too Cook *v.* Cook, Andrews, 219; Hodgson *v.* Gascoigne, 5 B. & Ald. 88; Riseley *v.* Ryle, 10 M. & W. 101; 11 Id. 16.

(*l*) Saunders *v.* Musgrave, 6 B. & C. 524; 2 C. & P. 294; Anderson *v.* Midland R. Co., 3 E. & E. 614; 30 L. J., Q. B. 94.

able in advance (*m*), even when reserved in a mortgage deed by way of further security for the interest (*n*), also to cases of lessee and subtenant of apartments (*o*) but not as between the ground landlord and a sublessee of his tenant (*p*).

Executors and administrators. — The executor or administrator of a deceased landlord who might, but for the execution, distrain for arrears of rent, is entitled to claim such rent (not exceeding one year's rent) from the sheriff (*q*); but not an administrator who first obtains letters of administration after the goods have been removed and sold, and the proceeds paid over to the execution creditor (*r*).

Liability of sheriff. — The sheriff is liable to an action at the suit of the landlord, for not paying a year's rent, though the sheriff ought not to have seized the goods on account of the tenant having become bankrupt, and may therefore be liable also to an action at the suit of the assignees (*s*). Where a sheriff seized and sold goods under a fi. fa., he was held to be liable to pay the whole of the proceeds to the assignees of the tenant, though he had paid a year's rent to the landlord (*t*). In order to enforce a landlord's claim for a year's rent against trustees of a bankrupt tenant, after a seizure under a fieri facias which is illegal [*493] as *against them, there must be an actual distress: unless, perhaps, the sheriff has paid the amount before he had notice of the bankruptcy (*u*). Where the sheriff seizes and removes, under a fi. fa., goods which are not the property of the judgment debtor, and afterwards pays the whole of the proceeds of the sale to the real owner, he is still liable under the statute for not paying a year's rent to the landlord (*x*). Under a fi. fa. against A., the sheriff seized the goods of B.; B. claiming them, the sheriff

(*m*) Harrison *v.* Barry, 7 Price, 690; Duck *v.* Braddyll, M'Clel. 217; 13 Price, 455.

(*n*) Yates *v.* Ratledge, 5 H. & N. 249.

(*o*) Thurgood *v.* Richardson, 7 Bing. 428; 4 C. & P. 481.

(*p*) Bennett's case, 2 Stra. 787.

(*q*) Palgrave *v.* Windham, 1 Stra. 212.

(*r*) Waring *v.* Dewberry, 1 Stra. 97.

(*s*) Duck *v.* Braddyll, M'Clel. 217; 13 Price, 455.

(*t*) Lee *v.* Lopes, Bart., 15 East, 230.

(*u*) Gethin *v.* Wilks, 2 Dowl. 189.

(*x*) Forster *v.* Cookson, 1 Q. B. 419.

obtained an order under the Interpleader Act, and C., the landlord, claimed 25*l.* for a quarter's rent. The goods were sold under the order, and the amount, after deducting the 25*l.*, was paid by the sheriff into court. On the trial of the issue, B. established his claim; it was held, that, under the circumstances, the sheriff was not justified in paying the rent (*y*).

Landlord entitled to full year's rent. — The landlord is entitled to a full year's rent (if so much is in arrear) notwithstanding he has usually remitted some portion of it to the tenant (*z*). But he can only claim from the sheriff the rent which was due at the time of the taking the goods in execution, and not that which accrued after the taking and during the continuance of the sheriff in possession (*a*). This used to be so where growing crops were seized under an execution and remained in the custody of the sheriff or his vendee until they became ripe and were cut and carried within a reasonable time in that behalf (*b*).

Growing crops seized liable for rent due after seizure. — But now, by 14 & 15 Vict. c. 25, s. 2, "in case all or any part of the growing crops of the tenant of any farm or lands shall be seized and sold by any sheriff or other officer by virtue of any writ of fieri facias or writ of execution, such crops, so long as the same shall remain on the farms or lands, shall, in default of sufficient distress of the goods and chattels of the tenant, be liable to the rent which may accrue and become due to the landlord after any such seizure and sale, and to the remedies by distress for recovery of such rent, and that notwithstanding any bargain and sale or assignment which may have been made or executed of such growing crops by any such sheriff or other officer." In consequence of this enactment, the execution creditor can only make sure of being able to sell the crops, under an execution for their value, *minus the accruing rent;* and the landlord may after-

(*y*) White *v.* Binstead, 13 C. B. 304.

(*z*) Williams *v.* Lewsey, 8 Bing. 28.

(*a*) Hoskins *v.* Knight, 1 M. & S. 245; Reynolds *v.* Barford, 7 M. & G. 449; 2 D. & L. 327.

(*b*) Wharton *v.* Naylor, 12 Q. B. 673; 6 D. & L. 136.

wards favour the purchaser to the detriment of the tenant by abstaining from distraining upon the crops so sold, and suing the tenant for such rent, or distraining for it on other goods.

Whether actual notice to the sheriff is necessary. — It is not clear whether the statute of Anne requires notice to be given to the sheriff of the arrears of rent due and claimed [*494] by the *landlord. Such notice is not required in express terms; and it has been held that knowledge by the sheriff of the arrears due is equivalent to actual notice thereof (*c*). In more recent acts in pari materia notice is expressly required (*d*). And under 8 Anne it has been held that the landlord must demand, or the sheriff is not bound to secure, the rent, for he cannot take notice what the arrears are; but if the landlord comes and acquaints him with them, then and not till then is he obliged to see the year's rent satisfied before removal of the goods (*e*). Where an action was brought against the sheriff by the execution debtor for seizing and selling more goods than were necessary to satisfy two executions, the court decided against the sheriff expressly on the ground that he had no right to levy for rent without a claim being first made by the landlord (*f*). In an action against the sheriff, founded on the statute, notice is always alleged, and should not be omitted (*g*). But after verdict, an allegation that the sheriff, "well knowing the premises," removed the goods without paying the rent, seems to be sufficient upon motion in arrest of judgment or on appeal (*h*). Notice from the landlord to the execution creditor is clearly unnecessary (*i*).

(*c*) Andrews *v.* Dixon, 3 B. & A. 645; Riseley *v.* Ryle, 11 M. & W. 20; Bible *v.* Hussey, 2 Ir. Com. L. R. 308; 16 W. R. 710.

(*d*) 19 & 20 Vict. c. 108, s. 75; *post*, 496; 24 Vict. c. 10, s. 16; *post*, 497.

(*e*) Waring *v.* Dewberry, 1 Stra. 97; and see Colyer *v.* Speer, 2 Brod. & B. 67; Smith *v.* Russell, 3 Taunt. 400.

(*f*) Gawler *v.* Chaplin, 2 Exch. 503, 507.

(*g*) Arch. L. & T. 255; Bullen & L. Pl. 403 (3rd ed.); Thurgood *v.* Richardson, 7 Bing. 428; 4 C. & P. 481; Reed *v.* Thoyts, 6 M. & W. 410; 8 Dowl. 410; Bible *v.* Hussey, 2 Ir. Com. L. R. 308; 16 W. R. 710.

(*h*) See Lane *v.* Crockett, 7 Price, 566; Palgrave *v.* Windham, 1 Stra. 212, 214.

(*i*) Palgrave *v.* Windham, *supra*.

Such notice should always be given. — The notice to the sheriff is only for the purpose of establishing beyond all doubt his knowledge of the landlord's claim (*k*), and should always be given by or on behalf of the landlord (*l*). As the statute has not specified any particular form, there can be no dispute about the terms (*m*). A notice to the sheriff stating that the rent is due to J. S. and the mortgagees of his estate, and signed by a person who is not the receiver appointed by the mortgage deed, is sufficient (*n*). The notice may be given before or after the goods have been removed from the demised premises, and even after they have been sold, but before the proceeds have been actually paid over to the execution creditor (*o*).

Sheriff's duty on receiving notice. — When the sheriff has notice or knowledge of rent due to the landlord, he should endeavour to secure legal evidence on that point, and if possible inspect the lease (*p*). He should also forthwith give notice to the execution creditor or his solicitor of the rent in arrear, and * request him to pay the [*495] same to the landlord or his bailiff pursuant to the statute, in default whereof the sheriff will withdraw from possession of the goods seized (*q*). In case of non-compliance with this notice, within a reasonable time, the sheriff should withdraw from possession and make a return of nulla bona (*r*); unless, indeed, there are other goods within his bailiwick, in which case the levy should be confined to them. "The sheriff," it is observed, in Cocker *v.* Musgrove, "is not called upon by law to advance money to pay the rent; it is plain that such advance must be made by the execution creditor; and if he neglects to make it, after notice of the rent being due at all events (and it is not necessary now to say whether notice be requisite), the sheriff cannot be called

(*k*) Andrews *v.* Dixon, 3 B. & A. 645.

(*l*) See Form, Appendix D., No. 9.

(*m*) Colyer *v.* Speer, 2 Brod. & B. 67.

(*n*) Colyer *v.* Speer, *ante.*

(*o*) Arnitt *v.* Garnitt, 3 B. & A. 440; Yates *v.* Ratledge, 5 H. & N. 249; Bible *v.* Hussey, 2 Ir. Com. L. R. 308; 16 W. R. 710.

(*p*) See Augustein *v.* Challis, 1 Exch. 279.

(*q*) See Form, Appendix D., No. 10.

(*r*) Cocker *v.* Musgrove, 9 Q. B 223, 235.

upon to sell the goods *let their value be what it will.* Until the rent be paid, there are *no goods out of which the sheriff is bound to levy*, that is, which he is bound to sell" (*s*). The statute says that the goods shall not be "liable to be taken," i.e. taken and sold under the execution, "unless the party at whose suit the said execution is sued out, shall before the removal" pay the rent (*t*). "It is clear the statute does not mean the original taking, but that there shall not be a substantial taking for the satisfaction of the debt, that is, by the removal and sale of the goods, without payment of the rent" (*u*). Prior to the decision in Cocker *v.* Musgrove (*x*), the usual practice was for the sheriff to sell the goods under the execution and out of the proceeds to pay the landlord's rent, and to apply the surplus (minus expenses) in or towards satisfaction of the debt or damages and interest, with costs of the execution, &c., as indorsed on the writ (*y*); and he may still adopt that course if he thinks fit, and so secure his poundage fees, &c. He is entitled to poundage upon the amount of rent levied and paid (*z*); but not to deduct it from the landlord's rent (*a*). By proceeding to sell and remove with notice or knowledge that rent is due, he sometimes runs considerable risk: for instance the property seized may belong to a third person (*b*); or to the trustees of the tenant who has become a bankrupt (*c*), or the goods when sold may not produce sufficient to satisfy the rent (*d*). The amount of rent claimed may be disputed, especially where a large sum is claimed for a penal [*496] rent of so much * per acre (*e*). Moreover, when the landlord makes a claim for rent, the sheriff cannot

(*s*) Cocker *v.* Musgrove, 9 Q. B. 235; Calvert *v.* Joliffe, 2 B. & Adol. 421.

(*t*) *Ante*, 490.

(*u*) *Per* Parke, B., in Riseley *v.* Ryle, 11 M. & W. 21.

(*x*) 9 Q. B. 223, 235.

(*y*) 1 Chit. Arch. 640 (11th ed.).

(*z*) Davies *v.* Edmonds, 12 M. & W. 31; 1 D. & L. 395.

(*a*) Gore *v.* Gofton, 1 Stra. 643.

(*b*) Forster *v.* Cookson, 1 Q. B. 419; Beard *v.* Knight, 8 E. & B. 865; 27 L. J., Q. B. 359; Foulger *v.* Taylor, 5 H. & N. 202; White *v.* Binstead, 13 C. B. 304.

(*c*) Duck *v.* Braddyl, M'Clel. 217; 13 Price, 455; Lee *v.* Lopes, 15 East, 230.

(*d*) Henchett *v.* Kimpson, 2 Wils. 141; Calvert *v.* Joliffe, 2 B. & Adol. 418; Groombridge *v.* Fletcher, 2 Dowl. 353.

(*e*) Bateman *v.* Farnsworth, 29 L. J., Ex. 365.

obtain any relief against such claim under the Interpleader Act (*f*). And it was held, before the Judicature Act, that the tenant could not sustain a bill of interpleader in equity against his landlord, unless the title was affected by some act done by the landlord subsequently to the lease (*g*). All these difficulties may generally be avoided by the sheriff giving notice to the execution creditor, and proceeding as before suggested (*h*). But in such case he should carefully abstain from a *removal* of any of the goods from off the premises until the rent has been actually paid (*i*). He should also secure legal evidence of the tenancy, and of the arrears of rent due (*k*).

Remedy against sheriff. — The remedy which a landlord has in cases where the sheriff proceeds to levy the execution and remove the goods without payment of the rent, is by a summary application to the court or to a judge at chambers, founded upon affidavits, to compel the sheriff to pay the rent due (not exceeding one year's rent) and the costs of the application (*l*); or by a special action on the case against the sheriff, founded on the statute (*m*); but not an action for money had and received (*n*).

(b) *Under County Court Process.*

Rent may be claimed in 5 days. — If goods be taken in execution under a County Court Warrant, the statute 8 Ann. c. 14, s. 1, does not apply, but a special procedure is substituted for it by the County Court Act, 1856, under which the landlord may claim rent within five days from the execution, and so get the county court bailiff to distrain for him.

The words of the act (19 & 20 Vict. c. 108, s. 75) are these: — "Section one of the act of the eighth year of the

(*f*) 1 & 2 Will. 4, c. 58, s. 6; Watson's Sheriff, 282–288 (2nd ed.); Haythorn *v.* Bush, 2 Cr. & M. 869; 2 Dowl. 641; Bateman *v.* Farnsworth, 29 L. J., Ex. 365.

(*g*) Cook *v.* Earl Rosslyn, 1 Giff. 167; 28 L. J., Ch. 833.

(*h*) *Ante*, 493.

(*i*) Smallman *v.* Pollard, M. & G. 1091; 1 D. & L. 901; White *v.* Binstead, 13 C. B. 304.

(*k*) Augustein *v.* Challis, 1 Exch. 279; Keightley *v.* Birch, 3 Camp. 521.

(*l*) *Ante*, 491.

(*m*) *Ante*, 491.

(*n*) Green *v.* Austin, 3 Camp. 260.

reign of Queen *Anne*, chapter fourteen, shall not apply to goods taken in execution under the warrant of a county court, but the landlord of any tenement in which any such goods shall be so taken *may claim the rent* thereof at any time within five clear days from the date of such taking, or before the removal of the goods, by delivering to the bailiff or officer making the levy any writing signed by himself or his agent, which shall state the amount of rent claimed to be in arrear, and the time for and in respect of which such rent is [*497] due (*o*), and if such claim be made, the bailiff or * officer making the levy shall *in addition thereto distrain for the rent so claimed and the costs of such distress*, and shall not within five days next after such distress sell any part of the goods taken unless they be of a perishable nature, or upon the request in writing of the party whose goods shall have been taken; and the bailiff shall afterwards sell such of the goods under the execution and distress as shall satisfy, first, the costs of and incident to the sale, next the claim of such landlord not exceeding the rent of four weeks where the tenement is let by the week, the rent of two terms of payment where the tenement is let for any other term less than a year, and the rent of one year in any other case, and lastly, the amount for which the warrant issued; and if any replevin be made of the goods so taken, the bailiff shall, notwithstanding, sell such portion thereof as will satisfy the costs of and incident to the sale under the execution, and the amount for which the warrant issued: and in either event the overplus of the sale, if any, and the residue of the goods, shall be returned to the defendant: and the poundage of the high bailiff and broker for keeping possession, appraisement and sale under such distress shall be the same as would have been payable if the distress had been an execution of the county court, and no other fees shall be demanded or taken in respect thereof."

If the bailiff seize under a warrant of the county court, on the defendant's premises, goods belonging to a stranger, he cannot distrain such goods under this enactment for the rent

(*o*) See Form, Appendix D., No. 11.

of the landlord; and if he does so the true owner is entitled to have his goods back (*p*). The notice to the bailiff does not constitute him the landlord's agent to distrain: but in doing so he acts as an officer of the court pursuant to the statute (*q*). It seems that the Interpleader Act applies to a landlord's claim for rent; and that where the landlord appears upon the hearing of an interpleader summons in a county court, he as well as the execution creditor and the claimant, has a right of appeal (*r*).

(c) *Under Admiralty Process.*

Notice to sheriff. — If a claim for rent be made upon goods seized under Admiralty process, the judges of the Probate, Divorce and Admiralty Division will adjudicate upon the claim. It was enacted by the Admiralty Court Act, 1861 (24 Vict. c. 10), s. 16, as follows: — "If any claim shall be made to any goods or chattels taken in execution under any * process of the High Court of Admiralty, [*498] or in respect of the seizure thereof, or any act or matter connected therewith, or in respect of the proceeds or value of any such goods or chattels, *by any landlord for rent*, or by any person not being the party against whom the process has issued, the registrar of the said court may, upon application of the officer charged with the execution of the process, whether before or after any action brought against such officer, issue a summons calling before the said court both the party issuing such process and the party making the claim, and thereupon any action which shall have been brought in any of her Majesty's superior courts of record, or in any local or inferior court, in respect of such claim, seizure, act or matter as aforesaid, shall be stayed, and the court in which such action shall have been brought, or any judge thereof, on proof of the issue of such summons, and that the

(*p*) Beard *v.* Knight, 8 E. & B. 865; 27 L. J., Q. B. 359; Foulger *v.* Taylor, 5 H. & N. 202; White *v.* Binstead, 13 C. B. 304.

(*q*) Gage *v.* Collins, L. R., 2 C. P. 381; 36 L. J., C. P. 144.

(*r* Wilcoxon *v.* Searby, *In re* Foulger *v.* Taylor, 5 H. & N. 202; 29 L. J., Ex. 154; Gage *v.* Collins, *supra.*

goods and chattels were so taken in execution, may order the party bringing the action to pay the costs of all proceedings had upon the action after issue of the summons out of the said Admiralty Court, and the judge of the said Admiralty 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 shall seem fit, and such order shall be enforced in like manner as any order made in any suit brought in the said court. Where any such claim shall be made as aforesaid the claimant may deposit with the officer charged with the execution of the process either the amount or value of the goods claimed, the value to be fixed by appraisement in case of dispute, to be by the officer paid into court to abide the decision of the judge upon the claim, and the sum which the officer shall be allowed to charge as costs for keeping possession of the goods until such decision can be obtained, and in default of the claimant so doing the officer may sell the goods as if no such claim had been made, and shall pay into court the proceeds of the sale, to abide the decision of the judge." And by the Judicature Act of 1873, sect. 34, matters within the exclusive cognizance of the High Court of Admiralty before the passing of that act are assigned to the Probate, Divorce and Admiralty Division of the High Court of Justice.

REMEDIES FOR WRONGFUL DISTRESS.

We will now consider the remedies which the law provides for the tenant in cases where the distress levied by the landlord is illegal, irregular, or excessive.[1] The peculiar remedy by the act of the party termed "rescue," which is only available before impounding, and, therefore, of little or no practical value, has been already considered (*a*).

Sect. 1. — *Replevin.*

(a) *Nature of a Replevin, and in what Cases applicable.*

Nature of a replevin. — Replevin is a remedy for the owner of goods or cattle which have been *wrongfully taken* under a distress for rent (*b*), whereby he obtains them back in a

(*a*) *Ante*, Ch. XI., Sect. 10.

(*b*) Replevin has been said not to be confined strictly to distresses, but to extend to all wrongful takings of goods or cattle; George *v.* Chambers, 11 M. & W. 149; 7 Jur. 836; Allen *v.* Sharp, 2 Exch. 352; 17 L. J., Ex. 209; Mellor *v.* Leather, 1 E. & B. 619; 22 L. J., M. C. 76; but see Mennie *v.* Blake, 6 E. & B. 842; 25 L. J., Q. B. 399. It applies to distress damage feasant.

[1] See *ante*, ch. 11, sec. 10, (d), note, "Liability for illegal distress."

summary manner, through the registrar of the County Court of the district within which the goods or cattle were taken, *upon giving security to try the validity of the distress or taking*, in an action of replevin to be forthwith commenced [*500] by him against the distrainer * and prosecuted with effect (*c*), and without delay (*d*), either in the County Court or in the High Court, and to return the goods or cattle, if such return shall be awarded (*e*).

When replevin lies. — The essence of proceedings in replevin being, that the tenant enjoys the subject-matter of the distress in specie pending the trial of the action, it is material to consider when this action lies. It may be said briefly that replevin lies in case of a distress which is wholly illegal, and not merely irregular or excessive. Thus, it lies where no rent is due, or where the rent was tendered in time, or where goods exempt by law from distress are seized (with the exceptions, however, of animals feræ naturæ (*f*), and perhaps fixtures (*g*)). The proceeding consists of two distinct parts, viz.: 1. The replevy, whereby the goods or cattle are obtained back: 2. The subsequent action of replevin to try the legality of the distress or taking. But it is in effect no remedy where the distress was originally lawful (*h*); unless it has become illegal by a sufficient tender of the rent or damage done, with expenses, being made before the impounding, and a subsequent wrongful detention which in effect and construction of law amounts to a new wrongful taking (*i*): and, therefore, the fact alone that the distress is for more than the sum due, does not

(*c*) This is to say "with success"; Morgan *v.* Griffith, 7 Mod. 380; Turnor *v.* Turner, 2 Brod. & B. 107; Perreau *v.* Beavan, 5 B. & C. 284, 300; Jackson *v.* Hanson, 8 M. & W. 477; 1 Dowl., N. S. 69; Tunnicliffe *v.* Wilmot, 2 C. & K. 626; Tummons *v.* Ogle, 6 E. & B. 571; 25 L. J., Q. B. 403.

(*d*) That is to say, with "due diligence"; as to what is improper delay, see Gent *v.* Cutts, 11 Q. B. 288; Harrison *v.* Wardle, 5 B. & Adol. 146; Axford *v.* Perrett, 4 Bing. 586.

(*e*) 19 & 20 Vict. c. 108, ss. 63–71; 23 & 24 Vict. c. 126, s. 22.

(*f*) Bac. Abr. tit. Replevin (F.).

(*g*) Niblet *v.* Smith, 4 T. R. 504.

(*h*) See *per* Lord Campbell, C. J., in Johnson *v.* Upham, 28 L. J., Q. B. 256.

(*i*) *Ante*, Ch. XI.

entitle the tenant to replevy the goods, but only to bring an action for an excessive distress (*k*).

Replevin only an optional remedy. — Replevin is only an optional remedy; the tenant may, in any case where replevin lies, waive his right to replevy, and bring his action for damages instead.

Within what time must be made. — The tenant may avail himself of the right to replevy at any time, notwithstanding the goods have been removed after five days, and appraised, so long as they remain unsold (*l*).

Notice, &c., before action unnecessary. — The stat. 24 Geo. 2, c. 44, s. 6, which enacts that no action shall be brought against a constable acting in obedience to the warrant of a justice of the peace till demand of a copy of the warrant and refusal thereof; and statutes 2 & 3 Vict. c. 93, s. 8, and 1 & 2 Will. 4, c. 41, s. 19, which require a calendar month's notice of action to be given to any constable for anything done in the execution of his office, and similar protecting statutes, do not apply to actions of replevin (*m*).

* **Replevy made per incuriam.** — If the replevy be [*501] made *per incuriam* or mistake of the officer, it by no means follows that the subsequent action of replevin cannot be maintained (*n*). *Quod fieri non debet, factum valet.* The remedy for such mistake is by a summary application to the court to set aside the replevy, or to attach the officer, or the party, or both, for the contempt (*o*). Where goods taken under a warrant of distress granted by Commissioners of Sewers were replevied, and the proceedings removed into the King's Bench, that court refused to quash them on a summary application, leaving the defendant in replevin to put his objection in a more formal manner upon the

(*k*) See 1 Chit. Pl. 184 (7th ed.).

(*l*) Jacob *v.* King, 5 Taunt. 451; Griffiths *v.* Stephens, 1 Chit. R. 196.

(*m*) Fletcher *v.* Wilkins, 6 East, 283; Jones *v.* Johnson, 6 Exch. 133; 20 L. J., M. C. 11; Gay *v.* Matthews, 32 L. J., M. C. 58; in Ex. Ch., 4 B. & S. 425. See, however, Mellor *v.* Leather, 1 E. & B. 619; 22 L. J., M. C. 76, as to the protection of constables.

(*n*) Allen *v.* Sharp, 2 Exch. 361; 17 L. J., Ex. 209.

(*o*) As to attachment, see Rex *v.* Burchet, 8 Mod. 209; Willes, 673, n.; Rex *v.* Monkhouse, 2 Stra. 1184; Rex *v.* Oliver, Bunbury, 14; Bull. N. P. 53; and as to setting aside the proceedings, Rhymney R. Co. *v.* Price, 16 L. T. 394.

record (*p*). Where a replevin cannot legally be made, the registrar should on that ground refuse to act, but an action will lie against him for refusing to replevy in a proper case (*q*).

(b) *Mode of Proceeding to Replevy.*

Preliminary matters to be considered. — Before proceeding to replevy the following points should be considered, viz.: 1. Whether the distress or taking was wholly illegal, and not merely excessive or irregular, or taken for the wrong cause (as stated in the notice of distress) instead of the right one. 2. Whether it is practicable and expedient to make a tender of the rent or damage, with costs of the distress, which tender cannot be made after the impounding. 3. Whether, considering the value of the goods taken with reference to the amount of the rent or damage claimed, it is worth while to replevy, seeing that whatever may be the value of the goods, security must be given for such an amount as the registrar shall deem sufficient to cover the alleged rent or damage in respect of which the distress was taken, and the probable costs of the cause in the County Court, or in the High Court, as the case may be. 4. Whether the action of replevin should be commenced and prosecuted in the County Court for the district within which the distress was taken, or in the High Court, or in the court of the lord of any honor or franchise having exclusive jurisdiction to grant replevies (*r*). It is not optional to bring replevin in the High Court unless the rent or damage claimed exceeds 20*l*., or the title to some corporeal or incorporeal hereditament, or to some toll, market, fair or franchise is in question. In all other cases the action must be brought in the County Court. Even where any title is in question the action *may* be brought in the County Court, subject to the power of removal [*502] by *the defendant under 19 & 20 Vict. c. 108, s. 67 (*s*); and to an appeal were the rent claimed

(*p*) Pritchard *v.* Stephens, 6 T. R. 522.

(*q*) Sabourin *v.* Marshall, 3 B. & Ad. 440.

(*r*) Mounsey *v.* Dawson, 6 A. & E. 752.

(*s*) *Re* Fordham *v.* Ackers, 4 B. & S. 578; 33 L. J., Q. B. 67; s. c.,

exceeds 20*l.* (*t*). 5. By whom the replevy should be made and the action brought. It should be brought by the party whose goods have been distrained (*u*); i.e. by him who has *the property*, absolute or qualified, in the goods (*x*), a mere possessory right having been said to be not sufficient (*y*). It was, in the case of Fenton *v.* Logan (*z*), apparently assumed that replevin would lie at the instance of the real owner of the goods seized, although he was a person other than the tenant distrained upon; and if the point, whether replevin was a remedy open to others than tenants, were distinctly raised, it would be probably so decided. If goods of A. and B., the separate property of each, be unlawfully distrained, they cannot join in a replevin, but each may replevy his own goods (*a*). Joint owners and tenants in common may and should join in a replevin (*b*). Coparceners are joint owners (*b*). Executors may maintain replevin for goods of their testator wrongfully taken in this lifetime (*c*). If the goods of a feme sole be taken, and she afterwards marries, the husband alone may replevy (*d*) without joining his wife, and, indeed, if the goods are taken after the marriage, she ought not to sue either alone (*e*) or with her husband (*f*). 6. Against whom the proceedings should be adopted. It may be against him who took or commanded the taking, or both (*g*). The landlord or person who caused the distress to be made is generally best able to pay damages and costs; but to fix him with liability his authority to make the distress

nom. Reg. *v.* Gurdon, 12 W. R. 201.

(*t*) This was done in White, app., Greenish, resp., 11 C. B., N. S. 209.

(*u*) 19 & 20 Vict. c. 108, s. 64.

(*x*) Com. Dig. tit. Pleader (3 K. 1); Co. Lit. 145 b; Bro. Repl. fol. 8, 20; 1 Chit. Pl. 182, 183 (7th ed.); 2 Selw. N. P. 1150 (13th ed.).

(*y*) Templeman *v.* Case, 10 Mod. 25. But see Fell *v.* Whitaker, L. R., 7 Q. B. 120, and *post*, p. 525.

(*z*) 9 Bing. 676.

(*a*) Co. Lit. 145 b; Bro. Abr. tit. Replevin, Pl. 12; Gilb. Repl. 152; 2 Selw. N. P. 1150 (13th ed.).

(*b*) Year Bk. 3 Hen. 4, 16 a; Co. Lit. 145 b; Bull. N. P. 53; 1 Chit. Pl. 183 (7th ed.); 2 Selw. N. P. 1150 (13th ed.).

(*c*) Bro. Abr. tit. Replevin, pl. 59; Arundell *v.* Trevill, Sid. 82; Bull. N. P. 53; Gilb. Repl. 156.

(*d*) Fitz. N. B. 69 k; Gilb. Repl. 156; 2 Selw. N. P. 1150 (13th ed.).

(*e*) Clarke *v.* Davies, 7 Taunt. 72.

(*f*) Bern *v.* Mattaire, Cas. Temp. Hardw. 119; 2 Selw. N. P. 1150 (13th ed.).

(*g*) Com. Dig. tit. Pleader (3 K. 1); 2 Roll. Abr. 431, l. 5; Gilb. Repl. 152; Jones *v.* Johnson, 5 Exch. 862.

must be proved (*h*); and if only some of the goods or cattle were illegally taken (being privileged from distress), and the replevin is confined to them, it must be proved not merely that he signed a distress warrant in the usual form, but that he authorized the taking of those goods or cattle which were so illegally taken: or that, knowing what had been done in his behalf, he ratified and adopted such illegal act (*i*). He should always be made a defendant where the plaintiff intends to pay money into court (*k*). The agent who signed [*503] the distress warrant, or who directed *the distress, may be made a defendant; as may also the broker (*l*). But although they *may* be made defendants, it does not follow that they *should be*, in any particular case: that is matter of discretion, with reference to the acts done, and other incidental facts, including the evidence and the pecuniary ability of the parties. The pound-keeper, it seems, is not liable (*m*). It has been said that replevin cannot be maintained against a corporation aggregate, but only against their bailiff or agent (*n*), but this seems inconsistent with several recent cases (*o*). It has been long since decided that a corporation may appoint a bailiff to distrain, without a warrant under their common seal (*p*); and there seems no reason why they should not be responsible for acts so authorized; for otherwise they might, by appointing a pauper to act for them, avoid all liability direct or indirect. 7. It should further be considered whether *all* the goods or cattle should be replevied, or only some of them, on the ground that they were legally exempt from the distress (*q*). The value of such goods or

(*h*) *Ante*, 459.

(*i*) *Ante*, 459.

(*k*) The C. L. P. Act, 1860, 23 & 24 Vict. c. 126, s. 23, which specially allowed payment into Court by a plaintiff in replevin, is repealed by the Statute Law Revision and Civil Procedure Act, 1883, 46 & 47 Vict. c. 49, apparently being superseded by R. S. C. Order XXII. rule 9.

(*l*) Gilb. Repl. 152.

(*m*) Badkin *v.* Powell, 2 Cowp. 476.

(*n*) 1 Kyd on Corporations, 223; Bac. Abr. tit. Corporations (E. 2).

(*o*) See Eastern Counties R. Co. *v.* Broom (in error), 6 Exch. 314, which decides that trespass lies against a corporation aggregate for an act done by their agent within the scope of his authority; and see Green *v.* London General Omnibus Co., 7 C. B., N. S. 290; 29 L. J., C. P. 13.

(*p*) Cary *v.* Matthews, cited 1 Salk. 191; 6 Vin. Abr. 287.

(*q*) *Ante*, 435.

cattle need not be ascertained, for whatever may be their value (whether more or less than the rent or damage claimed), the security must be for such an amount as the registrar of the County Court shall deem sufficient to cover the alleged rent or damage in respect of which the distress was made and the probable costs of the cause in the County Court, or in the High Court, as the case may be (*r*), and does not, as formerly, depend upon the value of the goods distrained, which had to be ascertained upon the oath of some competent person (*s*). Whether a bond with two sufficient sureties shall be given pursuant to 19 & 20 Vict. c. 108, ss. 65, 66 (*t*), and who are competent and willing to become such sureties; or whether a deposit, with a memorandum, shall be made pursuant to sect. 71 (*u*).

Replevy made by registrar of County Court. — Formerly replevies were made by the sheriff of the county within which the distress was taken, or by his under-sheriff or deputy (*x*); and the sheriff of each county was bound to appoint four deputies at least, dwelling not above twelve miles from each other, for the purpose of making replevies (*y*). But by 19 & 20 Vict. c. 108, s. 63, * "the powers and [*504] responsibilities of the sheriff with respect to replevin bonds and replevins shall henceforth cease; and the registrar of the County Court of the district in which *any distress subject to replevin shall be taken* shall be empowered, subject to the regulations hereinafter contained, to approve of replevin bonds, and to grant replevins, and to issue all necessary process in relation thereto, and such process shall be executed by the high bailiff."

Replevin to be granted on security given. — By sect. 64, "such registrar shall, at the instance of the party whose goods shall have been distrained (*z*), cause the same to be replevied to such party, on his giving one or other of such

(*r*) 19 & 20 Vict. c. 108, ss. 65, 66, 71.

(*s*) See 11 Geo. 2, c. 19, s. 23, Middleton *v.* Bryan, 3 M. & S. 155.

(*t*) *Post*, 504.

(*u*) *Post*, 506.

(*x*) 52 Hen. 3, c. 21; 2 Inst. 138.

(*y*) 1 P. & M. c. 12, s. 3; see Faulkner *v.* Johnson, 11 M. & W. 581; Plumer *v.* Brisco, 11 Q. B. 46.

(*z*) A replevin can be had only by or on behalf of the actual or construc-

securities as are mentioned in the next two succeeding sections." (See below.)

It may be here stated that by 23 & 24 Vict. c. 126, s. 22, the provisions of 19 & 20 Vict. c. 108, "which relate to replevin, shall be deemed and taken to apply to all cases of replevin, in like manner as to cases of replevin of goods distrained for rent or damage feasant."

The action of replevin is primâ facie to be brought in the County Court, but under certain restrictions it may be brought also in the High Court of Justice.

Replevins in high court. Conditions of security. — By 19 & 20 Vict. c. 108, s. 65, "an action of replevin may be commenced in any superior court in the form applicable to personal actions therein, and such court shall have power to hear and determine the same; and if the replevisor shall wish to commence proceedings in any superior court, he shall, at the time of replevying, give security, to be approved of by the registrar, for such amount as such registrar shall deem sufficient to cover the alleged rent or damage in respect of which the distress shall have been made, and the probable costs of the cause in a superior court, conditioned to commence an action of replevin against the distrainer in such superior court as shall be named in the security, *within one week* from the date thereof, and to prosecute such action with effect (*a*) and without delay (*b*); and, unless judgment therein be obtained by default, to prove before such superior court that he had good ground for believing either that the title to some corporeal or incorporeal hereditament, or to some toll, market, fair or franchise was in question, *or that such rent or damage exceeded twenty pounds*, and to make return of the goods, if a return thereof shall be adjudged" (*c*).

Replevin in County Court. Conditions of security. — By sect. 66, "if the replevisor shall wish to commence pro-
[*505] ceedings * in a County Court, he shall at the time of replevying give security, to be approved of by the

tive owner of the goods; not by one who merely has the possession of them (without more); *ante*, 502; but see Fell *v.* Whitaker, *post*, 525.

(*a*) *i.e.*, with success; *ante*, 500 (*c*).

(*b*) *Ante*, 500 (*d*).

(*c*) See Form of Bond, Appendix E., Sect. 1, No. 5; of Memorandum of Deposit in lieu of Bond, Id., No. 6.

registrar, for such an amount as such registrar shall deem sufficient to cover the alleged rent or damage in respect of which the distress shall have been made, and the probable costs of the cause in the County Court, conditioned to commence an action of replevin against the distrainer in the County Court of the district in which the distress shall have been taken, *within one month* (*d*) from the date of the security, and to prosecute such action with effect (*e*) and without delay (*f*), and to make return of the goods, if a return thereof shall be adjudged" (*g*).

Removal of replevins into high court by certiorari. — By sect. 67, "any action of replevin brought in a County Court shall be removed into any superior court by writ of certiorari, if the defendant shall apply to such superior court or to a judge there for such writ, and shall give security, to be approved of by the master of such superior court, for such amount, not exceeding one hundred and fifty pounds, as such master shall think fit, conditioned to defend such action with effect (*h*); and unless the replevisor shall discontinue or shall not prosecute such action, or become nonsuit therein, to prove before such superior court that the defendant had good ground for believing, either that the title to some corporeal or incorporeal hereditament, or to some toll, market, fair or franchise was in question, or that the rent or damage in respect of which the distress shall have been taken *exceeded twenty pounds;* and every such superior court shall have power to determine the same action" (*i*).

Security by bond. — By sect. 70, "where by this act, or any act relating to the County Courts, a party is required to give security, such security shall be at the cost of the party giving it, and in the form of a bond (*k*), with sureties, to the other party or intended party in the action or proceeding: provided always, that the court in which any action on

(*d*) *i.e.*, one calendar month; 13 Vict. c. 21, s. 4.

(*e*) With success; *ante*, 500 (*c*).

(*f*) *Ante*, 500 (*d*).

(*g*) See Form of Bond, Appendix E., Sect. 1, No. 7; of Memorandum of Deposit in lieu of Bond, Id., No. 8.

(*h*) *i.e.*, with success; Tummons *v.* Ogle, 6 E. & B. 571; *ante*, 500 (*c*).

(*i*) See Form of Bond, Appendix E., Sect. 3, (b) 4; Memorandum of Deposit in lieu of Bond, Id., No. 5.

(*k*) See Forms.

the bond shall be brought, may, by rule or order, give such relief to the obligors as may be just, and such rule or order shall have the effect of a defeasance of such bond."

Joint-stock companies and infants may give such bonds. — It seems that a bond of the above nature may be entered into by a joint-stock company, or even by an infant, with sufficient sureties, and that the registrar cannot refuse to receive such bond, on the ground that the principal obligor is disqualified to execute it; for otherwise such parties would lose the benefit of the statute (*l*), and be thereby deprived of the right to replevy.

[*506] * **Security by deposit.** — By sect. 71, "where by this act, or any act relating to the County Courts, a party is required to give security, he may in lieu thereof deposit with the registrar, if the security is required to be given in a County Court, or with a master of the superior court if the security is required to be given in such court, a sum equal in amount to the sum for which he would be required to give security, *together with a memorandum* (*m*), to be approved of by such registrar or master, and to be signed by such party, his attorney or agent, setting forth the conditions on which such money is deposited, and the registrar or master shall give to the party paying a written acknowledgment of such payment; and the judge of the County Court, when the money shall have been deposited in such court, or a judge of the superior court, when the money shall have been deposited in a superior court, may, on the same evidence as would be required to enforce or avoid such bond, as in the last preceding section is mentioned, order such sum so deposited to be paid out to such party or parties as to him shall seem just."

Notices of proposed sureties. — By the County Court Rules of 1875, Order XXX., it is provided that, "in all cases where a party proposes to give a bond by way of security, he shall serve by post, or otherwise, on the opposite party and the registrar, at his office, notice of the proposed sureties, accord-

(*l*) See Young *v.* Brompton, Chatham and Gillingham Waterworks Co., 1 B. & S. 675; 31 L. J., Q. B. 14; and dicta therein.

(*m*) See Form, Appendix E., Sect. 1, No. 8.

ing to the form in the schedule (*n*); and the registrar shall forthwith give notice to both parties of the day and hour on which he proposes that the bond shall be executed, and shall state in the notice to the obligee that should he have any valid objection to make to the sureties, or either of them, that it must then be made" (*r.* 1) (*o*).

Affidavit by sureties. — "The sureties shall make an affidavit of their sufficiency according to the form in the schedule (*p*), unless the opposite party shall dispense with such affidavit" (*r.* 2).

Bond, how executed. — "The bond shall be executed in the presence of the judge or registrar, or a commissioner of the Supreme Court of Judicature" (*r.* 3).

Notice of security by deposit. — "Where a party makes a deposit of money in lieu of giving a bond, he shall forthwith give notice to the opposite party by post, or otherwise, of such deposits having being made" (*r.* 4).

Bond to be deposited with registrar. — "In all cases where the security is by bond, the bond shall be deposited with the registrar until the action be finally disposed of" (*r.* 5).

"No registrar, deputy registrar, registrar's clerk, bailiff, broker, or * other office of the court shall [*507] become surety in any case where by the practice of the court security is required" (*r.* 6).

The sureties should be two freeholders or housekeepers.

The opposite party should make inquiries as to the sufficiency of the proposed sureties, in like manner as where bail is put in in a superior court; and if he has reason to think them insufficient, he should attend before the registrar at the time and place appointed, and object to them, and, if necessary, examine them before the registrar, who, after hearing all parties, will decide whether or not the sureties are sufficient. It seems that the registrar is not liable (as the sheriff formerly was) to an action for taking insufficient sureties on a replevy (*q*). Therefore the distrainer must,

(*n*) See Form, Id., Sect. 1, Nos. 1 & 2.

(*o*) See Form, No. 301 in Schedule to C. C. Rules.

(*p*) See Form, Appendix E., Sect. 1, No. 4.

(*q*) Pollock & Nicol, C. C. Prac. (8th ed.), p. 21; Bullen & L. Pl. 235

at his peril, avail himself of this opportunity to make any objections to them.

Where action may be brought. — It is to be observed, with reference to the foregoing enactments and rules, that *all* actions of replevin, without any exception, may be commenced and prosecuted to final judgment and execution in the County Court of the district within which the distress was taken, whatever may be the amount of rent or damage claimed, and notwithstanding the title to some corporeal or incorporeal hereditament, or to some toll, market, fair or franchise is in question (*r*). In many cases it may be expedient for the replevisor to sue in the County Court, rather than in the High Court, even where he has the option of suing in either court, and especially where there is any doubt whether he has such option; or where he expects to fail in the action, and to have to pay all the costs (which are much less in the County Court than in the High Court).

Costs in County Court. — It seems, however, that if successful in the County Court he will only recover costs as in an action for less than 5*l.* (*s*), notwithstanding the distress was taken for more than 20*l.* (or even 50*l.* or 500*l.*), and the value of the goods replevied was more than sufficient to satisfy the distress; or however important or difficult may be the question of law or fact involved, the damages recoverable in the action being always under 5*l.* (*t*), unless indeed the judge award costs on the higher scale, under s. 7 of the County Courts (Costs and Salaries) Act, 1882 (45 & 46 Vict. c. 57). But it does not appear to be finally settled in the County Courts whether the value of the goods replevied ought not to be proved and taken into consideration, as part of the damages recovered, with a view to costs.

(3rd ed.); see, however, 2 Chit. Arch. 904 (13th ed.); Young *v.* Brompton, &c., Co., *ante*, 505 (*l*). Even the sheriff was not liable where the sureties were apparently responsible, and he exercised a reasonable discretion in accepting them; Hindle *v.* Blades, 5 Taunt. 225; Jeffery *v.* Bastard, 4 A. & E. 823.

(*r*) Reg. *v.* Raines, 1 E. & B. 855; 22 L. J., Q. B. 223; *Re* Fordham *v.* Ackers, 4 B. & S. 578; 33 L. J., Q. B. 67.

(*s*) As to what costs are included in such cases, see the County Court Acts and Rules.

(*t*) Pease *v.* Chaytor, 3 B. & S. 634.

When action should be in High Court. — Supposing the distress to have been wholly illegal, the replevisor *cannot safely bring replevin in the High Court, [*508] unless he can prove before such court that he has good ground for believing either that the title to some corporeal or incorporeal hereditament, or to some toll, market, fair or franchise is in question, or, that the rent or damage in respect of which the distress was made exceeded twenty pounds. In some cases, where the replevisor has good ground for so believing, he may not be able to prove it to the satisfaction of the High Court (*u*), and where there is any doubt on this point, it is safer to sue in the County Court. In many cases, where the replevisor clearly has the option to sue in either court, it may be expedient for him to sue in the County Court rather than in the High Court. But the point above mentioned as to costs should not be overlooked, as it may make a great difference.

Replevisor having once elected. — After the replevisor has once elected to sue in a County Court, he cannot afterwards remove the action into the High Court. He might have done so under 9 & 10 Vict. c. 95, s. 121, but that section was repealed by 19 & 20 Vict. c. 108, s. 2. The defendant in replevin cannot safely remove the action from the County Court into the High Court by certiorari unless he can prove before the High Court that he has good ground for believing, either that the title to some corporeal or incorporeal hereditament, or to some toll, market, fair or franchise is in question, or that the rent or damage in respect of which the distress was taken exceeded twenty pounds (*x*); and even in such cases, he must give security for such amount not exceeding 150*l*., as the master shall think fit, conditioned to defend such action with effect (*y*).

Within what time to be brought. — Where the action of replevin is to be brought in the High Court, it must be commenced by a writ of summons in the usual form issued out

(*u*) See the declaration in Tummons *v.* Ogle, 6 E. & B. 571, 575; 25 L. J., Q. B. 403.

(*x*) Tummons *v.* Ogle, *supra*.

(*y*) *Ante*, 500 (*c*); Tummons *v.* Ogle, *supra*.

of the proper court, within one week from the date of the replevin bond or of the memorandum of deposit (*z*).

Where the action of replevin is to be brought in the County Court, a plaint must be entered there within one calendar month from the date of the replevin bond, or of the memorandum of deposit (*a*).

The amount of the security, whether by bond or deposit, we have seen does not depend upon the value of the cattle or goods to be replevied, but upon the amount of the alleged rent or damage and the probable costs of the cause in the High Court or in the County Court, as the case may be (*b*).

Probably nearly all actions of replevin would be commenced and determined in the County Courts, but [*509] for the objection as to costs before *mentioned (*c*).

That however is so serious a drawback, as to render it generally unadvisable for the plaintiff to bring his action of replevin in the County Court where he can possibly avoid doing so, except where he knows that he is in the wrong, and will have to pay all the costs of the action.

Fees payable on a replevy. — The fees payable at the County Court, on making a replevy, are as follows (*d*):

	£	*s.*	*d.*
For a warrant to replevy	0	2	6
For a replevin bond, where the alleged rent or damage (*e*) does not exceed 20*l.* . . .	0	10	6
For a replevin bond, where the alleged rent or damage (*e*) exceeds 20*l.*	1	1	0
For notice to the distrainer	0	2	6
For delivering the goods	1	1	0
Together with 6*d.* a mile from the court house to the place where the goods are.			

Other fees in replevin.

For making a return to a writ of certiorari, 6*d.* in the pound, so long as total does not exceed	0	10	0

(*z*) 19 & 20 Vict. c. 108, s. 55.
(*a*) Id. s. 66.
(*b*) *Ante*, p. 503.
(*c*) *Ante*, p. 471.
(*d*) 19 & 20 Vict. c. 108, s. 78, Sched. (C), as altered by Treasury Order of October, 1875; Pollock & Nicol, C. C. Prac. 26–35 (8th ed.).
(*e*) The words "or damage" apply to a claim for damage feasant.

	£	s.	d.
For costs out of pocket in the same . . .	0	15	0

The fees payable in an action of replevin in the County Court are the same as those in other actions (*f*).

In replevins all poundage, except as aforesaid, shall be estimated on the amount of the alleged rent or damage, to be fixed by the registrar.

The poundage is 1*s.* in the pound; fractions of a pound are to be reckoned as one pound.

In every case where the poundage would, but for this direction, be estimated on an amount exceeding 20*l.*, it shall be estimated at 20*l.* only.

(c) *Action of Replevin in the County Court.*

Replevin without writ — By the County Court Act (9 & 10 Vict. c. 96), s. 119, "all actions of replevin in cases of distress for rent in arrear, or damage feasant (*g*), which shall be brought in the County Court, shall be brought *without writ* in a court held under this act."

By plaint. — By sect. 120, "in every such action of replevin the *plaint* shall be *entered in the court [*510] holden under this act for the district wherein the distress was taken."

Within one month. — By 19 & 20 Vict. c. 108, s. 66, the action must be brought within one [calendar] month from the date of the security (whether by bond or memorandum of deposit), and must be prosecuted with effect (*h*), and without delay (*i*).

Entry of plaint. — The action is commenced by entering a plaint in the usual form at the office of the registrar of the County Court, which is generally open from ten till four, except on *Saturday* (*k*), when the office closes at one o'clock.

(*f*) See Pollock & Nicol, C. C. Prac.

(*g*) Extended to all cases of replevin whatever, by 23 & 24 Vict. c. 126, s. 22.

(*h*) *i.e.*, with success; *ante*, 500 (*c*).

(*i*) *Ante*, 500 (*d*).

(*k*) When Saturday is the market-day of the town in which the court is

C. C. Rules, Order XXII. — By the County Court Rules of 1875, Order XXII., provision is made for the regulation of actions of replevin.

No other cause of action to be joined. — By Rule 1 of that order, "in an action of replevin no other cause of action shall be joined in the summons" (*l*). This operates as a great protection to landlords and their bailiffs (*m*), and also prevents confusion in the subsequent proceedings, wherein both parties are considered as actors, or plaintiffs, and the judgment differs from other actions, being frequently for the defendant *with damages* for the amount of the rent, or damage done, and costs.

Particulars of cattle or goods to be replevied. — By Rule 2, "on entering a plaint in replevin the plaintiff must specify and describe in a statement of particulars the cattle, or the several goods and chattels taken and of the distress, or other taking of which he complains" (*n*). Such particulars must have been prepared when an application was made to the registrar to replevy (*o*) because the particular cattle or goods intended to be replevied are mentioned in the warrant to the bailiff (*p*).

Fees. — The registrar, or his clerk, enters the plaint upon being furnished with such particulars, and upon payment of the usual fees (*p*).

Summons to defendant. — Upon the plaint being entered a summons issues in the usual form, with particulars annexed, and a copy is served on the defendant by the bailiff, in like manner as in other actions (*q*).

Trial and judgment in a summary way. — By Rule 3, "all actions of replevin in cases of distress for rent in arrear, or for damage feasance (*r*), shall be tried in a summary way as other actions in the courts holden under the authority of the County Courts Act, 1846, and the judgment therein,

holden, some other day is fixed by order of the judge.

(*l*) See *per* Pollock, C. B., in Mungean *v.* Wheatley, 6 Exch. 88; 20 L. J., Ex. 106.

(*m*) As to practice in High Court, see 513, *post*.

(*n*) See Form, App. E., Sect. 3 (*a*) 1, *post*.

(*o*) *Ante*, 503.

(*p*) Id.

(*q*) Pollock & Nicol, C. C. Prac. 205 (8th ed.).

(*r*) See 23 & 24 Vict. c. 126, s. 22.

in ordinary cases, whether for plaintiff or defendant, shall be according to the forms set forth in the schedule" (*s*).

*** Right to jury.** — By Order XVI., Rule 3, cases [*511] of replevin may, at the instance of either party, be tried by jury.

Evidence for plaintiff. — The plaintiff must prove the distress or taking of which he complains, and that the defendant was the person who took it or caused it to be taken (*t*); and that the defendant, or his bailiff or agent, took or had the goods or cattle at the place within the jurisdiction of the court mentioned in the plaint. In replevin the alleged place at which the goods were taken is material (*u*); but the plaint may be amended by leave of the judge, whenever it can be done without prejudice to the real question intended to be tried upon the merits (*x*). The plaintiff must prove that at the time of the taking he had an absolute or qualified property in the cattle or goods taken (*y*). He should also state the amount of expenses incurred in making the replevy; but where no evidence on that point is given, the usual amount will be awarded if the plaintiff obtain the verdict. No special damage can be recovered unless it be expressly mentioned in the plaint, and sufficiently proved. The plaintiff may either anticipate by evidence and negative the defendant's right to distrain, or he may reserve his evidence on that point until after the defendant has adduced his evidence (*z*).

Evidence for defendant. — The defendant may contend that the plaintiff's evidence is insufficient on some material point; ex. gr. — 1. That he, the defendant, was the person who took or caused to be taken the goods or cattle. He may dispute or deny any alleged authority given by him for the distress. If a distress warrant be put in evidence by or on behalf of the plaintiff, the landlord may contend that it was not signed by him, nor by any person authorized to sign

(*s*) See Forms, App. E., Sect. 3 (a) 2, 3.

(*t*) *Ante*, 502.

(*u*) Potter *v.* North, 1 Wms. Saund. 347; Potten *v.* Bradley, 2 Moo. & Payne, 78.

(*x*) 19 & 20 Vict. c. 108, s. 57; C. C. Rules, 1875, Order XVII.; Pollock & Nicol, C. C. Prac. 170–173 (8th ed.).

(*y*) *Ante*, 502.

(*z*) See evidence in reply, *post*.

it as his agent — and that he has never adopted or ratified it in any manner. He may contend (if the fact be so) that the warrant was expressly confined to the goods of the tenant, and did not extend to the goods of any other person (where a subtenant or lodger or third person sues) — or that the warrant expressly prohibited the taking of anything not legally liable to be taken as a distress for rent (where the replevin is for cattle or goods legally exempt from such a distress). 2. That he neither took nor had the goods or cattle at the place, within the jurisdiction of the court, mentioned in the plaint; although this may sometimes be cured by an amendment, where the defendant took or had the goods at some other place within the jurisdiction. 3. That the goods or cattle were not at the time of the taking the property of the plaintiff (*a*). Upon any [*513] of *these points he may produce contradictory evidence. He may also prove a right to distrain, either on his own behalf or as the bailiff or agent of any other person (*b*), for all or any part of the rent claimed (*c*), or for damage feasant, or for any other lawful cause. He need not prove a right to distrain for the particular cause alleged at the time of the taking; because, as we have seen, a man may distrain for one thing and afterwards avow or justify for another (*d*). It is therefore sufficient if he prove a legal right to distrain for any cause whatever. The amount of rent in arrear, and the value of goods distrained, should also be proved (*e*).

The plaintiff may in reply dispute and disprove anything attempted to be proved by the defendant in justification of the act complained of, but the usual practice (where the lease or agreement is duly stamped) is for the plaintiff to produce all his evidence in the first instance, rather than as evidence in reply.

(*a*) *Ante*, 502.

(*b*) See Trevillian *v.* Pine, 11 Mod. 112; 1 Wms. Saund. 347 d, note; Trent *v.* Hunt, 9 Exch. 14; 22 L. J., Ex. 318; Snell *v.* Finch, 13 C. B., N. S. 651; 32 L. J., C. P. 117.

(*c*) See Cobb *v.* Bryan, 3 B. & P. 348; Roskruge *v.* Caddy, 7 Exch. 840; 22 L. J., Ex. 16; White *v.* Greenish, 11 C. B., N. S. 209; 8 Jur., N. S. 563.

(*d*) *Ante*, 478.

(*e*) See Sheape *v.* Culpeper, 1 Lev. 255; see, too, C. C. Rules, 1875. Order XXII., Rule 4, *infra*.

The judgment in ordinary cases. — The judgment in replevin in ordinary cases, whether for plaintiff or defendant, is in the usual form, as in other actions. Where the plaintiff succeeds he is only entitled to a verdict for the expenses of the replevy (*f*) as proved or as estimated on the usual scale (*g*). His solicitor's charges (if any) connected with the replevy must be proved, otherwise nothing will be allowed in respect of them, but only the fees paid to the registrar (*h*). As to the plaintiff's costs of the action it is provided by County Court Rules, Order XXXVI., Rule 10, that "costs in actions of replevin may, where the fees of court are paid on 5*l.* and upwards, be allowed to solicitors upon the scale applicable to actions on contract where the amount claimed exceeds 20*l.* if the judge shall so order." Unless the fees be so paid on 5*l.* or upwards, the plaintiff it seems is still left to his position under 9 & 10 Vict. c. 95, s. 91, and can get no costs of professional assistance, as the damages will be always or nearly always under 5*l.* (*i*).

Judgment for defendant on distress for rent. — By Order XXII., Rule 4, of the Rules of 1875, "where the distress is for rent, or for any other claim for which a distress may be lawfully taken and the defendant succeeds in the action, if the defendant require, the court shall, if the action be tried without a jury, and the jury shall, if the action be tried with a jury, find the value of the goods distrained, and if the value be less than the amount of rent or otherwise of money in arrear, judgment shall be given for the amount of such value, but * if the amount of the rent or such [*513] other sum of money in arrear be less than the value so found, judgment shall be given for the amount of such rent or other sum of money, and may be enforced in the same manner as any other judgment of the court" (*k*).

Execution. — A judgment for either party in replevin is enforced in the same manner as in other actions (*l*).

(*f*) *Ante*, 507.
(*g*) *Ante*, 507.
(*h*) *Ante*, 507.
(*i*) See, however, 19 & 20 Vict. c. 108, s. 36, and 45 & 46 Vict. c. 57, s. 5.
(*k*) See Form of such Judgment, *post*, Appendix E., Sect. 3, (a) 3.
(*l*) Pollock and Nicol, C. C. Prac. p. 191 *et seq.* (8th ed.).

Appeal on question of law to High Court. — Either party to an action of replevin, "where the amount of rent or damage exceeds twenty pounds" (*m*), who is dissatisfied with the determination or direction of the said court, "in point of law, or upon the admission or rejection of any evidence" (but not on any question of fact), may appeal from the same to any of the superior courts of common law at Westminster, upon the same terms and conditions and in like manner as in other actions (*n*). The party desiring to appeal must *within ten days* after the decision give notice of appeal to the other party or his solicitor, and also give security, to be approved by the registrar, for the costs of the appeal, whatever be the event of the appeal, and for the amount of the judgment, if he be the defendant (*o*). The court cannot entertain any such appeal where the condition of giving security for costs, &c., imposed by 13 & 14 Vict. c. 61, s. 14, has not been strictly complied with (*p*). The appeal may be either in the form of a special case settled and transmitted pursuant to 13 & 14 Vict. c. 61, s. 15, or by motion under the County Courts Act, 1875, s. 6 (*q*), in which case the motion will be for a rule nisi in the first instance. In either mode of appeal the matter will be heard by a Divisional Court of the Queen's Bench Division of the High Court as may be appointed, at such times as such court sit to hear appeals from inferior courts (*r*). When the appeal is by motion, the application for a rule nisi may, when no court is sitting for the hearing of such matters, be made to a judge at chambers (*q*).

(*m*) As a general rule the right to appeal depends on the amount of the plaintiff's claim for rent and not on the amount for which judgment is given; Pollock *v.* Nicol, C. C. Prac. 235 (8th ed.); Dreesman *v.* Harris, 9 Exch. 485; 23 L. J., Ex. 210; Mayor *v.* Burgess, 4 E. & B. 655; 24 L. J., Q. B. 67; Vallance *v.* Nash, 2 H. & N. 712.

(*n*) 13 & 14 Vict. c. 61, ss. 14, 15, 16; 19 & 20 Vict. c. 108, ss. 68, 71 C. C. Rules, Order XXIX.; Pollock *v.* Nicol, C. C. Prac. Chap. XII. (8th ed.). In White, app., Greenish, resp., 11 C. B., N. S. 209, the appellants succeeded on appeal, although they were entitled to distrain for only one moiety of the rent for which the distress was taken.

(*o*) 13 & 14 Vict. c. 61, s. 14.

(*p*) Norris *v.* Carrington, 16 C. B., N. S. 10.

(*q*) 38 & 39 Vict. c. 53, s. 6.

(*r*) Jud. Act, 1873, s. 45; R. S. C. Order LIX., Rule 11.

(d) *Action of Replevin commenced in the High Court.*

Jurisdiction of High Court in replevin. — By 19 & 20 Vict. c. 108, s. 65, "an action of replevin may be commenced in any superior court in the form applicable to personal *actions therein, and such court shall have power to [*514] hear and determine the same; and if the replevisor shall wish to commence proceedings in any superior court, he shall, at the time of replevying, give security, to be approved by the registrar, for such an amount as such registrar shall deem sufficient to cover the alleged rent or damage in respect of which the distress shall have been made, and the probable costs of the cause in a superior court, conditioned to commence an action of replevin against the distrainer in such superior court as shall be named in the security, *within one week from the date thereof*, and to prosecute such action *with effect* (*s*), and *without delay* (*t*); and, unless judgment therein be obtained by default, to prove before such superior court that he had *good ground for believing* either that the title to some corporeal or incorporeal hereditament, or to some toll, market, fair or franchise was in question, or that such rent or damage *exceeded twenty pounds*, and to make return of the goods, if a return thereof shall be adjudged."

Commencement of action. — The action must be commenced *within one week* from the date of such security, excluding the day of such date. And it must be prosecuted "with effect" (*u*), and "without delay" (*x*), otherwise the bond or deposit will be forfeited.

Writ of summons. — The action is commenced by writ of summons as in other cases, which will be indorsed thus — "The plaintiff's claim is in replevin for goods wrongfully distrained" (*y*).

Joinder of other causes of action. — Under the Common Law Procedure Acts no other cause of action could be joined with replevin, but this restriction is no longer in force,

(*s*) *i.e.*, with success; *ante*, 500.

(*t*) *i.e.*, with due diligence; *ante*, 500.

(*u*) *Ante*, 500 (*c*).

(*x*) *Ante*, 500 (*d*).

(*y*) R. S. C. Appendix A., Part II., s. 4.

although separate trials may be ordered if the court or a judge think the various causes of action cannot conveniently be disposed of together (*z*).

Old declaration. — The declaration used to be, as a rule, in a technical form, which, after alleging the taking of the goods, &c., in a certain place by the defendant, went on to allege that he "unjustly detained the same against sureties and pledges, until, &c., whereby the plaintiff has sustained damage." This form has been used by some practitioners since the Judicature Acts, but it would seem very doubtful whether a statement of claim in such form would be held good on a summons to set it aside or amend it, as the statement ought to be a narrative of facts and not a mere technical form (*a*).

What damages recoverable. — The only damages recoverable in this action are the expenses to which the plaintiff has been put to replevy his goods (*b*).

[*515] * **Defences, avowry and cognizance.** — The defences to an action of replevin were formerly distinguished as pleas, avowries and cognizances, the two latter of which terms were used when the defendant justified the taking of the goods, &c., under a right to distrain, and also claimed their return and damages; the former being used when the person having such right was the defendant, the latter when the defendant was bailiff or agent of the person having the right. These terms no longer exist as technicalities, a defence now being a statement of facts, and the defendant being able to counter-claim the return and damages; but they will perhaps be still occasionally used for the sake of convenience.

Former law of avowry. — In former editions of this work will be found a full account of the law, statutory and otherwise, upon the subject of avowry and cognizance. Such account is now wholly omitted, inasmuch as the statutes upon the subject, 13 Ed. 1, c. 2 (West. 2), 21 Hen. 8, c. 19,

(*z*) R. S. C. Order XVIII., Rule 1.

(*a*) See R. S. C. Order XIX., Rule 4.

(*b*) Pease *v.* Chaytor, 3 B. & S. 634; 32 L. J., M. C. 121; Connor *v.* Bentley, 1 Jebb & S. 246. See, too, Wilkinson on Replevin, 85.

17 Car. 2, c. 7, and 11 Geo. 2, c. 19, ss. 22, 23, are now repealed by the Civil Procedure Acts Repeal Act, 1879, 42 & 43 Vict. c. 59, and the Statute Law Revision Act, 1881, 44 & 45 Vict. c. 59, as being inconsistent with or superseded by the practice under the Rules of the Supreme Court made in pursuance of the Judicature Acts.

These rules make no distinction between replevins and ordinary actions. The following special points, however, should still be mentioned:—

Judgment for plaintiff; damages recoverable. — If a verdict be found for the plaintiff he is not entitled to damages for the value of the goods or cattle taken, if they were returned to him when the replevin was made (as is usually the case); nor to any special damage for their wrongful taking or detention; nor to any compensation for the insult, annoyance and inconvenience to the plaintiff and his family by the distress; nor for any injury thereby occasioned to his trade or business, credit or reputation; but only the costs and expenses incurred by him on obtaining the replevy, including the fees paid at the County Court (*c*). Now, however, as other causes of action may be joined with the replevin (*d*), the plaintiff should claim further damages in the first instance as for a substantive cause of action. The expenses of the replevin were formerly 2*l.* 2*s.* in London and Middlesex, and in some other places, and 2*l.* 10*s.* elsewhere, being the supposed expense of the replevin bond; but now the amount varies according to the sum distrained for. And if the plaintiff incurred further expenses than the fees paid at the County Court (his own solicitor's charges, for instance) he should prove them and also the fees so paid; otherwise the lowest usual amount will be awarded.

* If the goods or cattle have not been delivered to [*516] the plaintiff on the replevy, he is entitled to recover the value of the goods or cattle distrained (*e*), and also his damages for their detention, &c. (as in an action of detinue), together with the costs and expenses of the replevy; and

(*c*) Wilk. Repl. 85; Gibbs *v.* Cruikshank, L. R., 8 C. P. 454; and 516, *post*.

(*d*) R. S. C. Order XVIII., Rule 1.

(*e*) 2 Chit. Arch. 1082 (11th ed.).

perhaps also any special damage occasioned by the distress, which is properly alleged in the declaration and sufficiently proved. In such case the jury should by their verdict separate the damages, and find so much for the value of the goods or cattle, and so much for the detention, &c. (*f*). The jury may find a special verdict in an action of replevin (*g*).

Proof of special reason. — By the condition of the replevin bond, where the action is brought in the High Court, unless judgment be obtained by default, the plaintiff must "prove before such superior court that he had good ground for believing either that the title to the same corporeal or incorporeal hereditament, or some toll, market, fair or franchise was in question, or that such rent or damage exceeded 20*l*." (*h*). It would seem that the plaintiff should apply upon affidavit to the court or a judge in chambers (*i*) for leave to enter a suggestion on the roll, that the plaintiff has proved before this court that, &c. And when the rule absolute or order for such leave is obtained to make an entry accordingly on the roll; otherwise, perhaps, the plaintiff and his sureties may be troubled with an action on the replevin bond, notwithstanding he obtained a verdict and judgment in his favour.

When judgment a bar to other action. — A judgment for the plaintiff in replevin is a bar to an action for damages for the same taking of the goods in respect of which the replevin was brought (*k*).

Costs. — Under 11 Geo. 2, c. 19, s. 22, where a defendant avowed or made cognizance upon any distress for rent, quit-rents, reliefs, heriots or other *services*, and the plaintiff became nonsuit, discontinued his action, or had judgment against him, the defendant in replevin recovered *double costs*.

(*f*) Ash *v.* Wood, Cro. Eliz. 59.

(*g*) See the case of Jones *v.* Johnson, 5 Exch. 862; 7 Exch. 452.

(*h*) 19 & 20 Vict. c. 108, s. 65; *ante*, 504.

(*i*) Not to the judge at nisi prius; Tunnicliffe *v.* Wilmot, 2 C. & K. 626, but in this case a certificate was refused because the plaintiff had not obtained the verdict.

(*k*) Gibbs *v.* Cruikshank, L. R., 8 C. P. 454; 42 L. J., C. P. 273; 28 L. T. 735; 21 W. R. 734.

But now in lieu of such double costs he is entitled to receive such full and reasonable indemnity as to all costs, charges and expenses incurred in and about the suit as shall be taxed by the proper officer in that behalf (*l*).

Costs of distress not recoverable. — Under 17 Car. 2, c. 7, a successful defendant in replevin is not * entitled to the costs of making the distress (*m*); and the term "full costs" in that statute has been held to mean ordinary costs as between party and party, and not costs as between solicitor and client (*m*). [*517]

Execution for defendant. — If the defendant have judgment, he has execution by a writ de retorno habendo, to have a return of the goods or cattle distrained, and a fi. fa. for his costs (*n*). It seems that the writ of retorno habendo and a fi. fa. for damages and costs may be included in one writ (*n*).

Writ de retorno habendo. — The sheriff, under the writ of retorno habendo, might, under the old practice (which would seem to be still in force, if the proceedings should be carried so far), cause the goods or cattle which were replevied to be taken from the plaintiff and re-delivered to the defendant; but this was seldom done. The usual practice was for the sheriff to return *elongata*, viz., that the goods or cattle were eloigned and removed to places unknown.

Capias in withernam. — Upon this return being filed the defendant might have a "capias in withernam," by which the sheriff was commanded to take the cattle, goods, and chattels of the plaintiff, to the value of the cattle, goods, and chattels before taken, to be delivered to the defendant, to be kept by him till the sheriff can cause to be returned the cattle, goods, and chattels before taken, &c. (*o*). If this was returned nihil the defendant might sue out an alias, and after that a pluries (*p*): but if these all proved unsuccessful he had to sue the plaintiff and his sureties on the replevin bond.

(*l*) 5 & 6 Vict. c. 97, s. 2. But see Garnett *v.* Bradley, *ante*, 489 (*g*).

(*m*) Jamieson *v.* Trevelyan, 10 Exch. 748; 24 L. J., Ex. 74.

(*n*) See Chit. Forms, 12th ed., vol. 2, p. 625 *et seq.*

(*o*) The meaning of "in withernam" seems to be "by way of reprisal." See Steph. Com. (7th ed.), Vol. III., p. 423, and for form, see Chit. Forms (12th ed.), Vol. 2, p. 627.

(*p*) 2 Chit. Arch. 1086 (11th ed.).

The sheriff was not bound to execute a writ de retorno habendo by actually delivering the goods or cattle therein mentioned to the defendant, unless the defendant or some person on his behalf attended to point out the particular goods or cattle and to receive the same. If that were not done the sheriff might make a return to the writ that no person did so attend (*q*).

The writ of retorno habendo was generally sued out for the purpose of founding proceedings on the replevin bond; but this is unnecessary, for as such bond is condition to prosecute the suit "with effect," and also to make a return, if return be awarded, the bond is forfeited by the plaintiff not prosecuting his suit *with success* (*r*). The bond is considered as a further and better security for such return, &c. (*s*).

New trial. — In replevin, where the verdict is for [*518] the plaintiff, the court will not *in general grant a new trial, even on payment of costs, without very clear grounds; for the landlord has other remedies for his rent, and a new trial would renew the liability of the sureties, and the plaintiff's risk of paying full costs, charges and expenses (*t*).

(e) *Action of Replevin removed by Certiorari from County Court into the High Court.*

Not by plaintiff. — A plaintiff who has elected to bring an action of replevin in the County Court cannot afterwards remove it into the High Court (*u*).

By defendant. — The defendant in an action of replevin commenced in the County Court may sometimes cause such action to be removed by writ of certiorari into the High Court, pursuant to 19 & 20 Vict. c. 109, s. 67 (*x*).

Application for certiorari. — The application for such writ

(*q*) 2 Wms. Saund. 74 b, c; 2 Chit. Arch. 1086.

(*r*) Watson, Sheriff, 421.

(*s*) Turnor *v.* Turner, 2 Brod. & B. 107.

(*t*) Parry *v.* Duncan, 7 Bing. 243. But see Edgson *v.* Cardwell, L. R., 8 C. P. 647; 28 L. T. 819.

(*u*) *Ante*, 508.

(*x*) See Mungean *v.* Wheatley, 6 Exch. 88; 20 L. J., Ex. 106.

should generally be made to a judge at chambers, and not to the court except under special circumstances (*y*).

Affidavit in support. — It should be supported by an affidavit entitled in the court to which, or to the judge of which the application is made; but not in any cause or matter (*z*). It must show the special facts on which the defendant relies in support of the application, and particularly that he has good ground for believing either that the title to some corporeal or incorporeal hereditament, or to some toll, market, fair or franchise is in question, or that the rent or damage in respect of which the distress was taken *exceeded* 20*l*. (*a*).

Order or summons. — The judge may in his discretion order the writ to issue upon an ex parte application; but more frequently only a summons to show cause is granted in the first instance (*b*).

Stay of proceedings. — The court or judge may direct that the rule nisi or summons shall operate as a stay of proceedings (*c*).

Service thereof. — It should be drawn up and served without delay, on the opposite party and on the registrar of the County Court. If not so served two clear days before the day fixed for the hearing of the cause the judge of the County Court may, in his discretion, order the party who obtained the rule or summons to pay all the costs of the day, or so much thereof as he shall think fit, unless the High Court or a judge thereof shall have made some order respecting such costs (*d*). Where the writ has been granted on an ex parte application, and the party who obtained it shall not lodge it with the registrar, and give notice to the opposite party, two clear days before the day fixed for hearing the cause to which it shall relate, the judge of the County Court may, in his * discretion, order the [*519] party who obtained the writ to pay all the costs of the day, or so much thereof as he shall think fit, unless the

(*y*) Bowen *v.* Evans, 3 Exch. 111; 6 D. & L. 193.
(*z*) 2 Chit. Arch. 1088 (11th ed.).
(*a*) See forms of affidavit, Chit. Forms, 583 (9th ed.).
(*b*) 2 Chit. Arch. 1088.
(*c*) 19 & 20 Vict. c. 108, s. 40.
(*d*) 19 & 20 Vict. c. 108, s. 40.

High Court or a judge thereof shall have made some order respecting such costs (*e*).

No renewed application; unless, &c. — By 19 & 20 Vict. c. 108, s. 44, "when any superior court or a judge thereof shall have refused to grant a writ of certiorari [&c.] "no other superior court or judge thereof shall grant such writ" [&c.]: "but nothing herein shall affect the right of appealing from the decision of the judge of the superior court to the court itself, or prevent a second application being made for such a writ" [&c.] "to the same superior court or a judge thereof, on grounds different from those on which the first application was founded."

The summons or rule nisi is heard and determined in like manner as in other cases.

Order or rule absolute. — When an order or rule absolute is obtained, the writ of certiorari may be issued (*f*). The defendant must thereupon give security, to be approved of by one of the masters, for such amount, not exceeding 150*l*., as such master shall think fit, conditioned as pointed out in 19 & 20 Vict. c. 108, s. 67 (*g*). The security is in the form of a bond, with two sureties, to the plaintiff (*h*). Or instead of a bond, a deposit may be made with a memorandum (*i*). The writ is then delivered to the judge or registrar of the County Court, with such bond or memorandum annexed, who will thereupon make a return to the writ (*k*); and when such writ and return are filed at the master's office the proceedings are removed into the superior court.

Appearance. — The defendant should then enter an appearance in the High Court in the usual form (*l*), and give notice thereof to the plaintiff or his solicitor. It seems, however, that if the defendant will not enter an appearance, there may be considerable difficulty in compelling him to do so, but it will probably be always possible to obtain an order at cham-

(*e*) Id. s. 41.
(*f*) Form, Chit. Forms, 584 (9th ed.).
(*g*) *Ante*, 505.
(*h*) Sect. 70, *ante*, 505.
(*i*) Sect. 71, *ante*, 506.
(*k*) For forms of bond, deposit, and return, see *post*, Appendix E., Sect. 3, (b), 4, 5, 7.
(*l*) See Appendix to Rules of Supreme Court.

bers for the purpose (*m*); and, on the other hand, the defendant could not non pros. the plaintiff for not declaring, because no day is given by the writ of certiorari to the parties to appear in the superior court (*n*), but this will not now prevent an order being made to dismiss for want of prosecution under Order XXVII. of the Rules of the Supreme Court. And it must not be forgotten that if the plaintiff do not proceed in the action with due diligence he will forfeit the condition of his bond given when the goods or cattle were replevied, notwithstanding the removal of the cause into a superior court: at all events, * this [*520] was so when the proceedings were removed by re. fa. lo., in which the parties had a day given them to appear in the superior court (*o*).

Subsequent proceedings. — The subsequent proceedings are in all respects similar to those where the action is commenced in the High Court (*p*). If the defendant succeed in the action, he must (unless the plaintiff discontinues, or does not prosecute the action, or becomes nonsuited therein) prove before the High Court that he, the defendant, had good ground for believing either that the title to some corporeal or incorporeal hereditament, or to some toll, market, fair or franchise was in question, or that the rent or damage in respect of which the distress was taken exceeded 20*l.* (*q*). The mode of doing this has been already suggested (*r*).

(f) *Proceedings on the Replevin Bond.*

The condition of a replevin bond varies according to the court in which the action of replevin is to be commenced and prosecuted (*s*).

An action on the bond may be brought immediately on the condition being broken (*t*). It must be brought in the

(*m*) See 2 Chit. Arch. 1089 (11th ed.); Chit. Forms, 587 (9th ed.).

(*n*) See Clerk *v.* Mayor, &c. of Berwick, 4 B. & C. 649; Garton *v.* Great Western R. Co., 1 E. & E. 258; 28 L. J., Q. B. 103; 2 Chit. Arch. 1316.

(*o*) Morris *v.* Matthews, 2 Q. B. 293; Gent *v.* Cutts, 11 Q. B. 288; Evans *v.* Bowen, 7 D. & L. 320.

(*p*) *Ante*, 513.

(*q*) 19 & 20 Vict. c. 108, s. 67; *ante*, 469.

(*r*) *Ante*, 505.

(*s*) *Ante*, 501.

(*t*) Gilb. Repl. 225; see Waterman

name of the obligee, his executors or administrators. It may be brought against all the obligors jointly, or against any one of them separately; but not against any two, unless the other be dead. The court in which the action is brought may by rule or order give such relief to the obligors as may be just, and such rule or order shall have the effect of a defeasance of such bond (*u*). The obligees are liable only to the amount of the penalty on the bond and the costs of the action thereon (*x*). Therefore proceedings in such suit may be stayed on payment of the penalty and costs, though the plaintiff's costs in the replevin suit much exceed the penalty (*y*). A judge at chambers may order the stay of proceedings (*y*). The sureties are liable only to the amount of the rent in arrear at the time of the distress, and the costs of the action of replevin and of the action on the bond; but not for any subsequent rent.

[*521] * (g) *Proceedings to obtain Sum deposited in lieu of a Bond.*

Where a sum of money has been deposited with a memorandum pursuant to 19 & 20 Vict. c. 108, s. 71 (*a*); "the judge of the County Court, when the money shall have been deposited in such court, or a judge of the superior court, when the money shall have been deposited in a superior court, may, on the same evidence as would be required to enforce or avoid such bond, order such sum so deposited to be paid out to such party or parties as to him shall seem just" (*a*). The application should be founded on a sufficient affidavit or affidavits of the facts, showing a breach or breaches of the condition or full performance thereof, as the case may be.

v. Yea, 2 Wils. 41; Turnor *v.* Turner, 2 Brod. & B. 107; 2 Chit. Arch. 1101 (12th ed.).

(*u*) 19 & 20 Vict. c. 108, s. 70; *ante*, 505.

(*x*) Hefford *v.* Alger, 1 Taunt. 218; Branscombe *v.* Scarborough, 6 Q. B. 13.

(*y*) Ward *v.* Henley, 1 Y. & J. 285.

(*a*) *Ante*, 506.

Sect. 2. — *Damages for Wrongful Distress.*

(a) *Summary Remedy within the Metropolitan Police District.*

By 2 & 3 Vict. c. 71, "An Act regulating the Police Courts in the Metropolis," it is enacted (sect. 39), "That on complaint made to any of the said magistrates by any person who shall, *within the metropolitan police district*, have occupied any house or lodging *by the week or month*, *or* whereof the rent does not exceed the rate of *fifteen pounds by the year*, that his goods have been taken from him by an unlawful distress, or that the landlord, or his broker or agent, has been guilty of an irregularity or excess in respect of such distress, it shall be lawful for such magistrate to summon the party complained against; and if upon the hearing of the matter it shall appear to the magistrate that such distress was improperly taken, or unfairly disposed of, or that the charges made by the party having distrained, or having attempted to distrain, are contrary to law, or that the proceeds of the sale of such distress have not been duly accounted for to the owner thereof, it shall be lawful for the magistrate to order the distress so taken, if not sold, to be returned to the tenant on payment of the rent which shall appear to be due at such time as the magistrate shall appoint; or if the distress shall have been sold, then to order payment to the said tenant of the value thereof, deducting thereout the rent which shall so appear to be due, such value to be determined by the magistrate; and such landlord or party complained against, in default of compliance with any such order, shall forfeit to the party *aggrieved the value of such distress, [*522] not being greater than fifteen pounds, such value to be determined by the magistrate."

This enactment (which is permissive only, and does not prevent a tenant suing for double value where he can) is confined to distresses for rent made within the metropolitan police district, the limits whereof are defined in the schedule to 10 Geo. 4, c. 44; also to cases where the rent does not exceed 15*l.* per annum, *or* the tenancy was by the week or month. It would seem that it might be very beneficially

extended to the whole kingdom, and to larger tenancies, and also to be made applicable to distresses for damage feasant, &c.

(b) *Action for Double Value under* 2 *Will. & Mary, sess.* 1, *c.* 5.

Case of sale where no rent owing. — In cases where no rent was owing, and the distress has been sold, the owner may recover double the value of the goods distrained. This very full remedy is given by 2 Will. & Mary, sess. 1, c. 5, s. 4 (*b*); which provides that "in case any such distress and sale as aforesaid [i.e. sale after five days, failing a replevy] shall be made by virtue and colour of this present act for rent pretended to be in arrear and due, where in truth no rent is in arrear and due to the person or persons distraining, or to him or them in whose name or names or right such distress shall be taken as aforesaid, then the owner of such goods or chattels distrained and sold as aforesaid, his executors or administrators, shall and may, by action of trespass, or upon the case, to be brought against the person or persons so distraining, any or either of them, his executors or administrators, recover double of the value of the goods or chattels so distrained and sold, together with full costs of suit (*c*). If such an action be brought, the jury must be directed to give double value as damages, and cannot give nominal damages (*d*).

(c) *Ordinary Action for Damages.*

Ordinary action for wrongful distress. — Upon the system of procedure in the superior courts of law under the Common Law Procedure Acts, the action differed according as the act of the landlord in distraining was (1) wrongful and illegal, or (2) excessive only, or (3) merely irregular. In the first case the tenant might have recourse to an action of trespass or trover or detinue; in the second to an action on the case for damages under the statute of Marlebridge, 52 Hen. 3, c. 4,

(*b*) Mere distress is not enough; there must be a sale for the statute to operate.

(*c*) As to costs, see now R. S. C., 1883, Order LXV.

(*d*) Mastero *v.* Farris, 1 C. B. 715.

unless the distress was plainly excessive on the face of it, in which case it was illegal, and the tenant might * bring an action of trespass (*e*); or in the third case [*523] the tenant might maintain an action on the case against the landlord, or trover against a purchaser of the goods. But it must be remembered that, where the distress is only irregular and does not amount to a trespass, and is not excessive, the right of action depends upon the fact of the tenant having suffered actual damage, and he cannot maintain any action answering to the old actions of trespass or trover (*f*).

One form of indorsement. — By the Judicature Acts and the Rules of the Supreme Court these distinctions are for the most part swept away. There is now one form of indorsement of writ provided for all claims for damages arising from wrongful distress, whether illegal, excessive, or only irregular (*g*). The statements of claim and defence must set out the facts so far as they are necessary to show that the plaintiff has a good cause of action and that the defendant has a good defence respectively, care being taken to set out such circumstances as will make the distress wrongful in some of the ways pointed out in the earlier part of this chapter. There is, however, no technical distinction between the forms of action. There is no specimen statement given in the Appendix to the Rules of the Supreme Court.

Against whom action brought. — It is, however, still material to distinguish the various kinds of wrongful distress in relation to the question against what persons a tenant can proceed. In the case of an illegal distress, the action should be brought against the person actually committing the illegal act, and not against the landlord, unless it can be shown that he expressly authorized the act or adopted and ratified it afterwards (*h*), of which his presence on the premises immediately after the committal of the wrongful act is evi-

(*e*) Moir *v.* Munday, cited in 1 Burr. 582, 590.

(*f*) Robinson *v.* Waddington, 13 Q. B. 753; Lucas *v.* Tarleton, 3 H. & N. 116; 37 L. J., Ex. 246; Whitworth *v.* Smith, 5 C. & P. 250; Carter *v.* Carter, 5 Bing. 406.

(*g*) R. S. C. App. A., Part II., s. 4; *post*, App. D.

(*h*) Lewis *v.* Read, 13 M. & W. 834;

dence (*i*), though the mere receipt of the proceeds without proof of knowledge of the illegal act is not so (*k*).

Damages. — When the distress is illegal and therefore void from the commencement, the tenant is entitled to recover the full value of the goods distrained (or of such part of them as were not subject to distress (*l*)), and any damages sustained by him, nor need any deduction be made for the rent due from him (*m*). If, however, the landlord seize, among others, things not liable to distress, and on payment of rent and costs withdraws, the tenant can only [*524] recover the actual damage sustained * by him by the seizure of the particular privileged goods (*n*). If no rent be in arrear and the goods have been sold, the tenant may recover double the value of the goods and full costs of suit (*o*).

Action of trover, &c. — In addition to proceeding for damages for the illegal distress, the tenant may, if he prefer it, proceed in what may still be called an action of trover or detinue against the person who has by purchase or otherwise come into possession of the goods; for which cases forms of indorsement of writs are provided (*p*). The tenant will have the same rights as to the amount of damages he may recover as in the former mode of action (*q*).

Similar actions may be maintained by others whose goods are taken who are not tenants of the landlord purporting to distrain, but those cases would not be properly noticed here, as, in regard to them, there could be no relation of landlord and tenant.

Action for overplus. — Where the only complaint against

Freeman *v.* Rosher, 13 Q. B. 780; 6 D. & L. 517; Gauntlett *v.* King, 3 C. B., N. S. 59; Haseler *v.* Lemoyne, 5 C. B., N. S. 530; but see Hurry *v.* Rickman, 1 Mood. & Rob. 126.

(*i*) Moore *v.* Drinkwater, 1 F. & F. 134.

(*k*) Green *v.* Wise, W. N. 1877, p. 130.

(*l*) Keen *v.* Priest, 4 H. & N. 236; 28 L. J., Ex. 157; Swire *v.* Leech, 18 C. B., N. S. 497; 34 L. J., C. P. 150.

(*m*) Attack *v.* Bramwell, 3 B. & S. 520; 32 L. J., Q. B. 156; Edmondson *v.* Nuttall, 17 C. B., N. S. 280. See, too, Tutton *v.* Darke, and Nixon *v.* Freeman, 5 H. & N. 647.

(*n*) Hurry *v.* Pocock, 11 M. & W. 740; 12 L. J., Ex. 434.

(*o*) *Ante*, 522.

(*p*) R. S. C. App. A., Part II., s. 2.

(*q*) *Ante*, 523.

the landlord is that the sale has produced more than the amount due, and the overplus has not been left in the hands of the sheriff, under-sheriff or constable, as directed by 2 Will. & Mary, sess. 1, c. 5, the tenant should sue in tort, as for a breach of the statute, and not for a return of the balance as money received to his use (*r*).

Excessive or irregular distress. — Prior to 11 Geo. 2, c. 19, any irregularity in a distress made the distress unlawful, so that the full value of the rent for which the distress was taken might be recovered by action (*s*). But this hardship upon landlords was remedied by sect. 19 of that statute, which enacts that, "where any distress shall be made for any kind of rent justly due, and any irregularity or unlawful act shall be afterwards done by the party or parties distraining or by his, her or their agents, the distress itself shall not be deemed to be unlawful, nor the party or parties so making it be therefore deemed a trespasser or trespassers ab initio; but the party or parties aggrieved by such unlawful act or irregularity shall or may recover full satisfaction for the special damage he, she or they shall have sustained thereby, and no more, in any action of trespass, or on the case at the election of the plaintiff or plaintiffs; provided always, that where the plaintiff or plaintiffs shall recover in such action, he, she or they shall be paid his or their full costs of suit, and shall have all the like remedies for the same as in other cases of costs."

By sect. 20 of the same statute, "no tenant," &c. "shall recover in any action for any such unlawful act or irregularity, if tender of *amends hath been made [*525] by the party distraining, or his agent, before action brought." If amends be tendered under this section, the landlord need not in the case of action pay the money into court (*t*). Nor can the person in possession of the goods be

(*r*) Yates *v.* Eastwood, 6 Exch. 805; 20 L. J., Ex. 303; Evans *v.* Wright, 2 H. & N. 527.

(*s*) See preamble of 11 Geo. 2, c. 19, s. 19; Six Carpenters' case, 1 Sm. L. C.

(*t*) See Jones *v.* Gooday, 9 M. & W. 736 (decided on a local act).

sued for a conversion of them (*u*). Whether the distress was excessive is for the jury (*x*).

A right of action for an excessive distress will not be defeated by a subsequent arrangement made by the tenant with the landlord to prevent a sale of the goods (*y*); but a recovery in replevin is a bar to any subsequent action for an excessive distress (*z*).

Property of plaintiff. — The plaintiff must of course show that he has such a property in the goods as will allow him to maintain an action, and it has been held that the mere enjoyment of the use of the goods by a person who is neither legal nor equitable owner will entitle him to sue (*a*).

"Not guilty by statute." — With regard to the defences to actions for illegal, excessive or irregular distresses, the statement of defence must contain such matters as will show the defendant's action to have been lawful, and the only matter to be particularly noticed is that by 11 Geo. 2, c. 19, s. 21, the defendant was allowed to plead not guilty by statute, and give the special matter in evidence (*b*), a right in all cases in which it existed, preserved under the Judicature Acts (*c*), subject only to the conditions that no other defence can be pleaded with it except by leave of the court or a judge, and that the defendant must state the statute in the margin of his pleading (*c*); and it may be as well to point out that in one case at least a plea of not guilty by statute, together with a special plea of justification, under a right to distrain, was, under the old practice, disallowed, as setting up matters which could be disposed of under the one defence of the general issue (*d*).

Section 21 of 11 Geo. 2, c. 19, is as follows:

(*u*) Whitworth *v.* Smith, 5 C. & P. 250; 1 Moo. & R. 194.

(*x*) See Smith *v.* Ashford, 29 L. J., Ex. 259.

(*y*) Willoughby *v.* Backhouse, 2 B. & C. 821; Peles *v.* Hoare, 1 Bing. 401; 1 C. & P. 28; and see this case commented on in Glynn *v.* Thomas, 11 Exch. 870, 876.

(*z*) Phillips *v.* Berryman, 3 Doug. 286; White *v.* Willis, 2 Wils. 87; Pease *v.* Chaytor, 1 B. & S. 658, 662; 3 B. & S. 620; 32 L. J., M. C. 121.

(*a*) Fell *v.* Whitaker, L. R., 7 Q. B. 120; 41 L. J., Q. B. 73; 25 L. T. 880; 20 W. R. 317.

(*b*) 11 Geo. 2, c. 19, s. 21. See Nash *v.* Lucas, L. R., 2 Q. B. 590.

(*c*) R. S. C. Order XIX., Rule 12; Order XXII., Rule 19.

(*d*) Neale *v.* Mackenzie, 1 C. M. & R. 61; 2 Dowl. 702.

"In all actions of trespass, or upon the case, to be brought against any person or persons entitled to rents or services of any kind, his, her or their bailiff or receiver, or other person, relating to any entry by virtue of this act, or otherwise, upon the premises chargeable with such rents or services, or to any distress or seizure, sale or disposal, of any goods or chattels thereupon, it shall and may be lawful to and *for the defendant or defendants in such actions to [*526] plead the general issue and give the special matter in evidence, any law or usage to the contrary notwithstanding; and in case the plaintiff or plaintiffs shall become nonsuit, discontinue his or their action, or have judgment against him, her or them, the defendant or defendants shall recover double costs of suit."

This section is very wide, but it would seem to include cases of irregular and excessive distress only, and not to apply to unlawful distress.

The defendant is not bound to avail himself of the section, but may, it is conceived without leave, enter a defence in the ordinary form. If the defendant has not previously so tendered and pays money into court, the plaintiff is entitled only to his ordinary costs of suit, and not to the full costs, &c., which are given by 5 & 6 Vict. c. 97, s. 1, in lieu of the double costs given by 11 Geo. 2, c. 19, s. 21 (*e*).

Under the defence of "not guilty by statute" the tenancy and ownership of the goods, as well as other matter of justification, is put in issue (*f*).

Measure of damages. — The measure of damages appears to be, in cases of excessive distress, the fair value of the goods (not merely what they would have fetched at a broker's sale), minus, however, the rent due and the cost of the distress (*g*); and although the plaintiff fail to prove that he has sustained actual damage, yet on proof only that the distress was exces-

(*e*) Handcock *v.* Foulkes, 9 M. & W. 431; 1 Dowl., N. S. 658. 11 Geo. 2, c. 19, s. 21 is repealed by 5 & 6 Vict. c. 97, s. 1, so far as costs are concerned.

(*f*) Williams *v.* Jones, 11 A. & E. 643; Ross *v.* Clifton, Id. 631.

(*g*) See Biggins *v.* Goode, 2 C. & J. 364; Knight *v.* Egerton, 7 Exch. 407; Piggott *v.* Birtles, 1 M. & W. 441; and at nisi prius, Knotts *v.* Curtis, 5 C. & P. 322; Wells *v.* Moody, 7 C. & P. 59; Whitworth *v.* Madden, 2 C. & K. 517.

sive he is entitled to recover some damages (*h*). If, however, the distress be merely irregular the defendant must succeed, unless actual damage be proved (*i*).

SECT. 3. — *Remedy by proceedings before Justices or County Court, under Agricultural Holdings Act.*

Summary determination of dispute. — If a distress has been made upon a holding to which the Agricultural Holdings Act applies (*k*), a special and summary mode of determining any dispute arising out of such distress may, but need not of necessity, be resorted to. For it is provided by sect. 46 of that act that "where any dispute arises," either (a) [*527] as to a distress having * been levied contrary to the act (*l*), or (b) as to the ownership of live stock distrained or as to the price for feeding (*m*), or (c) as to any other matter or thing relating to a holding to which the act applies, "such dispute may be heard and determined by the county court (*n*), or a court of summary jurisdiction" (*o*), either of which courts may make an order for restoration, &c., "or may make any other order which justice requires." By the same section there is an appeal from the court of summary jurisdiction, but none from the county court, and it is further provided by sect. 49 that no order of the county court or of a court of summary jurisdiction shall be removed by certiorari.

Application of s. 46. — This section appears to be open to any party, whether landlord, tenant or other, to a dispute within its meaning. It gives a cumulative remedy, and no party is bound to have recourse to it. By having recourse to it, a party would not be legally bound to carry his com-

(*h*) Chandler *v.* Doulton, 3 H. & C. 553; 34 L. J., Ex. 89.

(*i*) Lucas *v.* Tarleton, 3 H. & N. 116; 27 L. J., Ex. 246; Rodgers *v.* Parker, 18 C. B. 112; 25 L. J., C. P. 220.

(*k*) See Chap. XI., Sect. 5, *ante*.

(*l*) See s. 44 of the act, Sect. 5, *ante*, 430.

(*m*) See s. 44 of the act, *ante*, 452.

(*n*) That is by s. 61 the county court within the district within which the larger part thereof is situate.

(*o*) That is by justices of the peace, presumably of the petty sessional division, but the act is silent as to this.

plaint through up to decision, but would, it is conceived, be bound by any decision arrived at. The words "*may* be heard and determined" would seem to have a compulsory force, so as not to admit of the courts named declining jurisdiction (*p*).

(*p*) See Maxwell on Statutes, 2nd ed., p. 218. citing Reg. *v.* Adamson, L. R., 1 Q. B. D. 201, and other cases.