A

CONCISE VIEW

OF THE LAW OF

LANDLORD AND TENANT,

INCLUDING THE

PRACTICE IN EJECTMENT.

SECOND EDITION.

BY

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PREFACE

TO THE SECOND EDITION.

A LARGE First Edition of this Work having been exhausted within two years of its publication, and it having been now for some time out of print, the Authors are encouraged to hope that, with the additions and corrections embodied in this Edition, it may meet with the approval of the profession and the public.

TEMPLE,
June, 1879.

PREFACE

TO THE FIRST EDITION.

Questions as to the law governing the relationship of landlord and tenant are matters which every lawyer in practice is required to advise upon almost daily. As he is often bound to form and act upon an opinion at once, it is of the greatest importance that he should have at hand the means of informing himself quickly what the law, as modified by statutes or decisions, then is. The Authors, therefore, venture to hope that, in consequence of the recent alterations effected by statutes and by the decisions of the courts in this branch of the law, a new work upon the subject may be acceptable to the public.

They have endeavoured, while avoiding as much as possible merely historical statements of law, to deal concisely with every portion of the subject which is of practical importance and fairly within the scope of a work of this description. Their aim has been to produce a work not too elaborate or bulky to be easily referred to, and not too meagre to be useful when referred too. How far they have succeeded the profession and the public must decide.

5, Essex Court, Temple, E.C.,
June, 1876.

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A CONCISE VIEW

OF THE

Law of Landlord and Tenant.

CHAPTER I.

INTRODUCTORY.

Tenures generally.

According to the theory of English law no subject can acquire the absolute ownership of land. Every interest in real estate is held by some tenure. The person possessed of the highest estate known to the law, that of a fee simple, is a "tenant" in fee simple, and "holds" to him and his heirs for ever, the sovereign being the supreme lord. Whoever, therefore, possesses any interest in real estate is, in the eye of the law, a *tenant;* the lands or other possessions he holds are *tenements*, and the manner in which they are held the *tenure*. In dealing with the subject of landlord and tenant, however, we propose only to treat of the incidents of that branch of it which is included in the relationship popularly known as a tenancy—in fact, the hiring of land, houses and other tenements. The relationship, therefore, which we mean is, that which arises where one person (the landlord) entitled to real estate for any interest or period of duration permits another person (the tenant) for a

The tenancy of hiring land defined.

less period to use and enjoy such real estate upon certain conditions, express or implied, and generally including a recompense in the shape of rent or other consideration.

Varieties of tenancies.

A tenant, in the limited sense in which we shall use that word, holds either as (1) tenant at sufferance, (2) tenant at will, (3) tenant from year to year, or (4) as lessee for a term of years.

At sufferance.

A tenancy at sufferance has been defined as the lowest estate which can subsist. It arises where a person has held by a lawful title and continues the possession after his title has determined without either the agreement or disagreement of the person then entitled to the property. (Watk. Conv. 23, n.) Thus, if a tenant for years or his assignee holds over after the expiration of the term (*Butler* v. *Duckmanton*, Cro. Jac. 169; *Doe* v. *Beaufort*, 6 Ex. 498, 503), or a tenant from year to year holds over after the determination of the tenancy by notice to quit, or by the death of the lessor who was only tenant for life (*Doe* v. *Roberts*, 16 M. & W. 780), or a tenant at will holds over after the determination of that estate (*Doe* v. *Turner*, 7 M. & W. 226; 9 M. & W. 643), in every such case the person so holding over is a tenant at sufferance; so is an undertenant who, being in possession at the determination of the original lease, is permitted by the reversioner to hold over. (*Simpkin* v. *Ashurst*, 4 Tyrw. 781.) A tenancy at sufferance arises by implication of law, and cannot be created by contract between the parties. (Watk. Conv. 24.) It is an estate which cannot be assigned or conveyed, and is in fact a mere invention of the law to prevent the continuance of possession acting as a trespass. (Smith, L. & T. 31, 2nd ed.) The tenant may be ejected at any time without demand of possession. If the landlord assents to his possession, he becomes tenant

at will; if he receives rent, tenant from year to year. (*Doe* v. *Morse*, 1 B. & Ad. 365.)

A tenancy at will is an estate determinable at any time at the will either of the landlord or tenant (Co. Litt. 55 a); but to create such a tenancy there must be a distinct reservation of a right so to determine it. Thus, "I give you Broadacre to enjoy as long as I please, and to take again when I please," or "to hold henceforth at the will and pleasure of B. at the yearly rent of 25*l.* 4*s.* payable quarterly" (*Doe* v. *Cox*, 17 L. J., Q. B. 3; 11 Q. B. 122); or if the agreement be to let premises so long as both parties like, reserving a compensation accruing *de die in diem*, and not referable to a year or any aliquot part of a year, in such cases the tenancy is a tenancy at will. (*Richardson* v. *Langridge*, 4 Taunt. 128.) This estate may either be created by express words, as in the cases above mentioned, or it may arise by implication—it arises in the latter mode whenever a person enters or remains in possession of premises with the consent of the landlord, but without having his tenancy secured by an operative lease, and before he pays or agrees to pay rent. Such is a person who holds rent free by permission of the owner, as in the case of a dissenting minister put into possession by trustees of a congregation (*Doe* v. *Jones*, 10 B. & C. 718; *Doe* v. *M'Kaeg*, 10 B. & C. 721; *Collier* v. *King*, 11 C. B., N. S. 14), or one who enters under an agreement for a purchase or a lease, if he have paid no rent (*per* Parke, B., *Howard* v. *Shaw*, 8 M. & W. 118; *Anderson* v. *Midland Rail. Co.*, 30 L. J., Q. B. 94; *Goodtitle* v. *Herbert*, 4 T. R. 680); although in the case of a purchase he may have paid interest. (*Doe* v. *Chamberlaine*, 5 M. & W. 14; *Howard* v. *Shaw*, *supra*.) A payment of rent, however, would generally make him

At will.

tenant from year to year. (*Mann* v. *Lovejoy*, Ry. & M. 355; and see notes to *Clayton* v. *Blakey*, 2 Sm. L. C. 104, 7th ed.; and *Richardson* v. *Langridge*, Tu. L. C. R. P. 11.) Entry under a void lease, until payment of rent, constitutes a person a tenant at will. (*Doe* v. *Bell*, 5 T. R. 471; 2 Sm. L. C. 98, 7th ed.; and see *infra*, "Tenancy from year to year.") A tenancy at will may be determined by either party, at any time, and without any notice, as by a mere demand of possession by the landlord, or by the tenant quitting. So it may be determined by either of them doing any act inconsistent with the continuance of the tenancy. (Co. Litt. 55 b; *Doe* v. *Turner*, 9 M. & W. 646.)

Tenancy from year to year.

A tenancy from year to year is a term certain for twelve months from the date of its commencement. (*Legg* v. *Strudwick*, 2 Salk. 414; *How* v. *Kennett*, 3 A. & E. 662.) Its distinctive feature is that it can only (in the absence of express stipulation) be determined by a six months' notice to quit, which must expire on the anniversary of the commencement of the tenancy. At the end of each year, if not determined by proper notice, another twelvemonth is added to the term. So that if at or before the end of six months no proper notice is given, it continues for two years; if at the end of eighteen months no notice, then for three years, and so on. Instead of six months' notice a shorter notice may be stipulated for, but it must always expire at the end of some year from the commencement. If the tenancy were determinable by notice at some time other than the anniversary of its commencement, it would not be a yearly holding. (*Kemp* v. *Derrett*, 3 Camp. 510.)

How it arises.

A tenancy from year to year may arise either by an express agreement, or lease from year to

year, by a general letting or by implication of law.

By express contract.

Where the parties expressly agree upon a tenancy from a given date "from year to year," such a tenancy is created and may be determined by notice at the end of the first or any subsequent year (*Doe* v. *Mainby*, 10 Q. B. 473); but if "for one year certain, and so on from year to year," a tenancy not determinable until the end of the second year is created. (*Doe* v. *Green*, 9 A. & E. 658; *Reg.* v. *Chawton*, 1 Q. B. 247; *Denn* v. *Cartright*, 4 East, 31.) A demise for "one year," or for "one year certain" merely, is not a tenancy from year to year, but determines at the end of the first year without any notice to quit. (*Cobb* v. *Stokes*, 8 East, 358; *Johnstone* v. *Hudlestone*, 4 B. & C. 937.)

By a general letting.

Whenever a landlord lets property and a tenant takes it without stipulation as to the duration of the tenancy, it is a letting at will; but if the landlord accepts yearly rent, or rent measured by any aliquot part of a year, a letting from year to year arises, such being the construction which the law puts upon the fact of the relation of landlord and tenant, unless there be some agreement between the parties to the contrary. (*Per* Parke, B., *Doe* v. *Wood*, 14 M. & W. 682, 687; *Richardson* v. *Langridge*, 4 Taunt. 128; *Hunt* v. *Allgood*, 10 C. B., N. S. 253.) This must be taken as limited to those lettings not by deed; for a grant or lease by deed, without limitation as to time, confers on the lessee an estate for his own life, where the lessor is competent to grant such an interest. (Co. Litt. 42 a; *Doe* v. *Browne*, 8 East, 166; but see *Doe* v. *Gardener*, 21 L. J., C. P. 222.) Moreover, a general letting for a purpose, extending beyond one year, as the raising of crops not matured in that time, would be enlarged accord-

ing to the purpose of the letting. (*Roe* v. *Lees*, 2 W. Bla. 1171.)

By implication of law.

A tenancy from year to year arises by implication of law, where, without any agreement for letting, or with an instrument of letting inoperative to pass any interest in the property, there has been occupation and payment of rent. Payment of rent will convert a tenant at sufferance holding over after the expiration of his lease into one from year to year, the terms of his holding in the absence of stipulation to the contrary being the same as those in his original lease, so far as they are applicable. (*Kelly* v. *Patterson*, 43 L. J., C. P. 320; *Thomas* v. *Packer*, 26 L. J., Ex. 207; 1 H. & N. 669; *Hyatt* v. *Griffiths*, 17 Q. B. 505; *Digby* v. *Atkinson*, 4 Camp. 275; *James* v. *Dean*, 11 Ves. 395; *Bishop* v. *Howard*, 2 B. & C. 100.)

In case of tenant holding over,

If the parties have expressly agreed for a tenancy at will, payments of rent in whatever manner will not change it to one from year to year. (*Doe* v. *Cox*, 11 Q. B. 122; 17 L. J., Q. B. 3; *Doe* v. *Davies*, 21 L. J., Ex. 60; 7 Ex. 89.) But where the tenancy at will arises by implication of law, and not by contract, payment of rent will convert it into one from year to year. Thus, where a person is let into possession under a mere agreement for a lease or a void lease, *e. g.*, a lease for more than three years not under seal, and pays or agrees to pay any part of the annual rent, he thereby becomes tenant from year to year upon all the terms of the instrument which are not inconsistent with such a tenancy. (*Martin* v. *Smith*, L. R., 9 Ex. 50; 43 L. J., Ex. 42; *Doe* v. *Bell*, 2 Sm. L. C. 98, 6th ed.; *Lee* v. *Smith*, 23 L. J., Ex. 198; *Tress* v. *Savage*, 4 E. & B. 36; 23 L. J., Q. B. 339; *Bennett* v. *Ireland*, 28 L. J., Q. B. 48; *Beale* v. *Sanders*, 3 Bing. N. C. 850; *Richardson* v. *Gifford*, 1 A. & E. 52; *Berrey* v. *Lindley*, 3 M. &

or entering under an inoperative contract for letting,

G. 498; *Knight* v. *Benett*, 3 Bing. 361; *Chapman* v. *Towner*, 6 M. & W. 100; *Doe* v. *Amey*, 12 A. & E. 476; *Hamerton* v. *Stead*, 3 B. & C. 478; *Braythwayte* v. *Hitchcock*, 10 M. & W. 494.) And should the relationship of landlord and tenant be permitted to continue during the term contemplated by the inoperative instrument, it will then cease without notice to quit, as if the term had in fact been created. (*Doe* v. *Stratton*, 4 Bing. 446; *Tress* v. *Savage*, *supra*.)

or entry upon a purchase which goes off.

A person who enters under an agreement for a purchase which goes off, if he pays rent will generally become tenant from year to year. (*Saunders* v. *Musgrave*, 6 B. & C. 524; *Clayton* v. *Blakey*, 2 Sm. L. C. 103, 7th ed.)

Implication by payment or admission of rent;

Payment of rent in these cases raises the implication, but actual payment of rent is not necessary; it is sufficient if the tenant either agrees to pay it, or admits that it is due. (*Cox* v. *Bent*, 5 Bing. 185; and see *Vincent* v. *Godson*, 24 L. J., Ch. 121.)

in case of corporations.

The presumption arising from the acceptance of rent is the same in the case of a corporation as in that of a private individual, so that a parol lease by a corporation after payment of rent creates a tenancy from year to year. (*The Ecclesiastical Commissioners* v. *Merral*, L. R., 4 Ex. 162; 38 L. J., Ex. 93; *Doe* v. *Taniere*, 12 Q. B. 998; 18 L. J., Q. B. 49.)

Mere occupation will not create.

But where there has been no rent paid, and no circumstances from which a tenancy can be implied, mere occupation will not make the occupier a tenant from year to year. (*Doe* v. *Pullen*, 2 Bing. N. C. 749.) Thus, where there was a negotiation for a letting, and the agreement was drawn and approved of by the tenant, but he was to find a surety, and he neither found the surety nor executed the agreement, it was held that there was no

implied tenancy. (*Doe* v. *Cartwright*, 3 B. & Al. 326.) And so in the case of one who entered without leave, and afterwards there was a treaty for lease, upon the terms of which the parties disagreed. (*Doe* v. *Quigley*, 2 Camp. 505; and see *Dawes* v. *Dowling*, 22 W. R. 770.)

Implication from payment of rent not conclusive.

Payment of rent will not always create a tenancy from year to year, for it is competent for either receiver or payer of rent to prove the circumstances under which the payments were made, and by such circumstances to repel the legal implication which would result from the receipt of rent unexplained. (*Doe* v. *Crago*, 6 C. B. 90; *Oakley* v. *Monck*, L. R., 1 Ex. 159; *Cousins* v. *Phillips*, 35 L. J., Ex. 84.) And the law will not raise the relationship of landlord and tenant if, looking to all the circumstances of the case, it appear that it was not the intention of the parties to create that relationship, notwithstanding the payment is described as rent (*Camden* v. *Batterbury*, 7 C. B., N. S. 864; 28 L. J., C. P. 335; *Williams* v. *Bartholomew*, 1 B. & P. 326); and recently the receipt of rent of an inadequate amount purporting to be paid under an invalid lease was held not to constitute a tenancy from year to year. (*Smith* v. *Widlake*, 47 L. J., C. P. 282; 26 W. R. 52.)

Occupation of servant not a tenancy.

There are occupations which, from the relative position of the parties, do not create a tenancy. A servant or agent who occupies a house belonging to his master or principal for the more convenient performance of his duties, whether or not with less wages on that account, is not a tenant, and acquires no estate in the house though he use it to carry on his own business. (*Doe* v. *Derry*, 9 C. & P. 494; *White* v. *Bayley*, 10 C. B., N. S. 227; 30 L. J., C. P. 253; *Bertie* v. *Beaumont*, 16 East, 33; *Mayhew* v. *Suttle*, 23 L. J., Q. B. 372; 24 ib. 54; *Fox* v. *Dalby*, L. R., 10 C. P. 285.)

Such an occupation is on the footing of that of a servant occupying a room in his master's house; the occupation is that of the master by his servant. The right to occupy is divested immediately the service is determined, no notice to quit or proceedings in ejectment being necessary to evict the servant. (*Rex* v. *Cheshunt*, 1 B. & Ald. 473; *Rex* v. *Kelstern*, 5 M. & S. 136.) And as he takes no estate he cannot maintain an action for trespass against the master for entering and evicting him. (*White* v. *Bayley*, *supra*.)

Tenancies for parts of a year.

If an annual rent is reserved, the holding is from year to year, although the contract for demise provides that the tenant shall quit at a quarter's notice, provided that notice is to expire at the same time of the year as the tenancy commenced. If it is agreed that it may be determined *at any time*, on six or three months' notice, that creates a half-yearly or quarterly tenancy, as the case may be (*Doe* v. *Grafton*, 21 L. J., Q. B. 276; *Kemp* v. *Derrett*, 3 Camp. 510); if on one month's notice, then a monthly tenancy. (*Doe* v. *Gower*, 17 Q. B. 589.) In the letting of lodgings or houses, an agreement to pay rent monthly or weekly affords a presumption of a monthly or weekly tenancy. (*Huffell* v. *Armitstead*, 7 C. & P. 56; and see *Towne* v. *Campbell*, 3 C. B. 921; *Wilson* v. *Abbott*, 3 B. & C. 88.)

Lease for years.

A demise for years is a contract for the exclusive possession and profits of lands and tenements for some determinate period, whereby the lessor lets them to the lessee for a certain term of years agreed upon between the parties, and thereupon the lessee enters. Such an estate is denominated a *term*, which word signifies not only the limitation of time, but the estate and interest that pass for such time. (Co. Litt. 45 b.)

CHAPTER II.

CAPACITY OF THE CONTRACTING PARTIES.

SECT. 1.—*Who may be Lessors.*

Generally. EVERY person not under any legal disability may grant a lease of his lands, houses and other tenements for any period not exceeding in duration his own estate in the property leased; but, except in certain cases hereafter noticed, a lease for a longer term will determine upon the cessation of the original interest, in accordance with the general rule that no man can carve out of his own estate an interest which is to extend beyond it. If, therefore, a tenant for life, independently of any statutory or other power so to do, execute a lease for ninety-nine years or create a tenancy from year to year, such lease or tenancy, though valid during his life, will expire at his death (*Bragg* v. *Wiseman*, Brownlow & G. 22; *Doe* v. *Roberts*, 16 M. & W. 778); or, if land, at the expiration of the then current year of the tenancy. (14 & 15 Vict. c. 25, s. 1.)

There are, however, cases where tenants in tail or for life or trustees are expressly empowered in settlements and wills to grant leases exceeding in duration the extent of their own interests; where persons ordinarily unable to contract are enabled to grant leases for limited terms, subject to certain conditions and restrictions, and even where persons, possessing no estate at all, are nevertheless able

to make leases by deed, which although inoperative as against the real owner, will, in accordance with the rule that no man is permitted to allege or prove anything in contradiction of his own deed (*Lyon* v. *Reed*, 13 M. & W. 285), create a tenancy by estoppel as between the lessor and lessee; that is to say, the lessor will not (unless he be a trustee for the public, deriving his authority from an act of parliament (*Fairtitle* v. *Gilbert*, 2 T. R. 169; but see *Doe* v. *Horne*, 3 Q. B. 757) be allowed during the continuance of the lease to aver that he had no interest in the property (*Darlington* v. *Pritchard*, 4 M. & G. 783; *Green* v. *James*, 6 M. & W. 656); nor can the lessee, if he have executed, or entered into possession under, the lease, so long as he retains possession, dispute the lessor's title (*Phipps* v. *Sculthorpe*, 1 B. & Al. 50; *Cuthbertson* v. *Irving*, 28 L. J., Ex. 306; 29 L. J., Ex. 485; *Levy* v. *Lewis*, 28 L. J., C. P. 304; 30 L. J., C. P. 141), even where the lease is not under seal (*Agar* v. *Young*, Car. & M. 78; *Doe* v. *Foster*, 3 C. B. 229), except to show that such title has been determined by effluxion of time or by act of law. (*England* v. *Slade*, 4 T. R. 682; *Doe* v. *Ramsbotham*, 3 M. & S. 516; *Mountney* v. *Collier*, 22 L. J., Q. B. 124.) Recent decisions seem to establish that even where it appears on the face of the deed that the lessor has no estate in the premises, an estoppel arises. (*Morton* v. *Woods*, L. R., 3 Q. B. 658; L. R., 4 Q. B. 293; 37 L. J., Q. B. 242, 249; 38 L. J., Q. B. 81, 85.) But a tenant who has attorned to a person from whom he did not receive possession is not estopped from showing want of title in such person. (*Cornish* v. *Searell*, 8 B. & C. 475.) Should the lessor of lands in which he has no estate afterwards acquire an estate, the lease which before operated by estoppel only, becomes a lease

Leases by estoppel.

in interest (Bac. Ab. (O.) 189; Co. Litt. 47 b; *Smith* v. *Low*, 1 Atk. 489; *Webb* v. *Austin*, 7 M. & G. 701; *Sturgeon* v. *Wingfield*, 15 L. J., Ex. 212; *Doe* v. *Ongley*, 20 L. J., C. P. 26), so as to bind the heirs or assigns of the lessor; for an estoppel is not confined to the parties to the lease, but is annexed to the estate, and binding alike on all persons claiming under them. (*Trevivan* v. *Lawrence*, 2 Salk. 276; *Goodtitle* v. *Morse*, 3 T. R. 371; *Doe* v. *Thompson*, 9 Q. B. 1043; *Barwick* v. *Thompson*, 7 T. R. 488; *L. & N. W. Rail. Co.* v. *West*, 36 L. J., C. P. 245.) An estoppel must be reciprocal and binding on both parties (Co. Litt. 352 a): hence, leases by infants and married women are exempt from the operation of the doctrine for want of mutuality (*James* v. *Landon*, Cro. Eliz. 37); nor is the crown bound by estoppel. Moreover, if any estate or interest passes from the lessor, there can be no estoppel. (*Cuthbertson* v. *Irving*, 28 L. J., Ex. 306; 29 L. J., Ex. 485.)

Tenants in fee.

A tenant in fee simple possesses the most extensive estate in land recognized by the law of England. He may grant a lease for any number of lives or term of years without limitation or restraint. (Com. Dig. "Estates" (G. 2); Bac. Ab. "Leases," c. 1, s. 1.) A lease of lands, of part of which the lessor was tenant in fee and of part tenant for life, was held good after his death for those lands only of which he was seised in fee. (*Doe* v. *Meyler*, 2 M. & S. 276.)

Tenants in tail.

A tenant in tail could not formerly make any lease to endure longer than his own life, for, at his decease, any outstanding lease made by him was absolutely void as against remaindermen and reversioners, and voidable at the election of the issue in tail. (Com. Dig. "Estates" (G. 2); Bac. Ab. "Leases" (D. 1); Co. Litt. 45 b.) The letting value of the property being thus obviously im-

paired, an act of Parliament, passed in the reign of Henry VIII., empowered tenants in tail to grant leases under certain restrictions for any term not exceeding twenty-one years or three lives from the date thereof. But leases under this statute were not binding on the reversioner or remainderman (2 Bl. Com. 319), and it was repealed, except as "to leases made by persons having an estate in right of their churches," in 1856. (19 & 20 Vict. c. 120, s. 35.) Tenants in tail are now empowered to dispose of the lands entailed for an estate in fee simple absolute or for *any less estate* (which words include a lease for any number of years or for a life or lives) by a deed enrolled, and even without enrolment they may make leases by deed equally binding as against the issue in tail, remaindermen or reversioners, for any period not exceeding twenty-one years from the date or from any time not exceeding twelve calendar months from the date thereof, reserving a rack rent, or not less than five-sixth parts of a rack rent. (3 & 4 Will. 4, c. 74, ss. 15, 40, 41.) If the tenant in tail making the lease be a *feme covert*, the concurrence of her husband is necessary, and the deed must be acknowledged by her in manner directed by the act (s. 40). If a tenant in tail be incompetent, by reason of infancy, lunacy or other cause, to make leases under this act, the lands entailed, or any part thereof, may be demised on application to, and by special direction of, the Chancery Division of the High Court of Justice. (40 & 41 Vict. c. 18, ss. 3, 49.) Under the 19 & 20 Vict. c. 120, s. 17, every application to the court required the concurrence or consent of *all* parties beneficially entitled, which requirement proved frequently prejudicial to the estate (see *Re Merry*, 15 W. R. 307; but see also *Re Hutchinson*, 14 W. R. 473);

The enabling statute, 32 Hen. 8, c. 28.

The act for the abolition of fines and recoveries.

Settled Estates Act, 1877.

but now by the Settled Estates Act, 1877 (40 & 41 Vict. c. 18, s. 26, re-enacting 37 & 38 Vict. c. 33, s. 2), persons whose concurrence or consent shall not have been obtained may be required, by notice served as therein specified, to notify their assent or dissent. In the case of persons of unsound mind not so found, service of this notice should be effected personally on them as well as on the persons having charge of them. (*Re Crabtree's Settled Estates*, L. R., 10 Ch. 201; 44 L. J., Ch. 261.) Infants may be served by delivering a copy of the notice to their father. (*Re Dendy*, L. R., 4 Ch. D. 881; 46 L. J., Ch. 417; 25 W. R. 410. As to service in other cases, see also *Re Slack's Settled Estates*, W. N. 1875, p. 224; *Re Chamberlain*, 23 W. R. 852; *Re Rylar*, 24 W. R. 949.) In default of such notification, the person objecting to the lease shall be deemed to have submitted his right and interest to be dealt with by the court (40 & 41 Vict. c. 18, s. 26); and the court may dispense with consent, having regard to the number and interests (*i.e.* "number and value," *per* Jessel, M. R., *Taylor* v. *Taylor*, 25 W. R. 280; L. R., 3 Ch. D. 145; 45 L. J., Ch. 848) of the parties (sect. 28), and also with the notice, if there be circumstances rendering it inconvenient or unnecessary. (Sect. 27.) Tenants in tail may also, without any application to the court, make leases for any term not exceeding twenty-one years, pursuant to 40 & 41 Vict. c. 18, s. 46, in the same manner as tenants for life; but a lease made by a tenant in tail *not* in pursuance of these statutes, or of a power to lease, though not absolutely determined by his death, may then be affirmed or avoided at the pleasure of the issue in tail. (Bac. Ab. "Leases," D. 18.) Bringing an action of waste, or for rent or acceptance of rent, by the

issue in tail, have been considered acts of confirmation. (*Doe* v. *Jenkins*, 5 Bing. 469; Bac. Ab. "Leases," D. 19.)

Tenants for life.

Unless specially empowered by statute or by the deed under which he holds, a tenant for life cannot make any disposition of the lands to take effect after his decease, and any lease for years that he may make will be absolutely void at his death (Bac. Ab. "Leases" (I.); *Adams* v. *Gibney*, 6 Bing. 656), or at the end of the then current year of the tenancy (14 & 15 Vict. c. 25, s. 1), and cannot be confirmed by the reversioner (*Doe* v. *Butcher*, 1 Doug. 50); although such acts as acceptance of rent will be evidence of a new tenancy from year to year upon such of the terms of the void lease as are applicable to that tenancy (*Doe* v. *Morse*, 1 B. & Ad. 365; see *Cornish* v. *Stubbs*, L. R., 5 C. P. 334; 39 L. J., C. P. 202, 205), so as to entitle the tenant to notice to quit. (*Doe* v. *Watts*, 7 T. R. 83.) And where the succeeding owner knowingly permits the tenant to expend money in improvements the courts will not allow him subsequently to controvert the lease. (*Jackson* v. *Cator*, 5 Ves. 688; *Dann* v. *Spurrier*, 7 Ves. 231.)

Prior to the passing of the Leases and Sales of Settled Estates Act, 1856, persons entitled to the possession of settled estates were obliged to go to Parliament for a private act before they could make the most advantageous leases. (See *per* Giffard, L. J., *Beioley* v. *Carter*, 4 L. R., Ch. 230, 240.) A tenant for life could, of course, join with the remainderman or reversioner in making a lease which, during his life, operated both as his lease and the confirmation of the remainderman or reversioner, and after his death as the lease of the succeeding owner. (Co. Litt. 45 a; *Treport's case*, 6 Co. 14.) The Act of 1856, itself a manifest

improvement in the law, was amended by Acts passed in 1858, 1864, 1874 and 1876, and now the whole of these acts have been repealed and their provisions and useful amendments beneficially consolidated in "The Settled Estates Act, 1877" (40 & 41 Vict. c. 18). By that act it is provided that as to settlements made after 1st November, 1856 (sect. 57), not containing an express declaration to the contrary, a tenant for life entitled to the rents and profits of any "settled" estates (*Re Chamberlain*, 23 W. R. 852) may demise by deed the premises or any part thereof (except the principal mansion-house and demesnes thereof, and other lands usually occupied therewith) without application to the Court of Chancery, for any term not exceeding twenty-one years, so far as relates to estates in England, and thirty-five years so far as relates to estates in Ireland, to take effect in possession, at the best rent reasonably obtainable, subject to certain restrictions and conditions contained in the act. (Sect. 46; see *Taylor* v. *Taylor*, L. R., 20 Eq. 297; 23 W. R. 947.) But leases of copyhold purposed to be made pursuant to this act must have the licence or consent of the lord. (Sect. 56.) Even now, however, a tenant for life must apply to the Chancery Division of the High Court of Justice in the numerous instances in which he may desire, for the benefit of the estate, to grant a lease for a term exceeding twenty-one years (see *post*, "Leases by trustees of settled estates"), and it may even be necessary to obtain a private act of Parliament to extend the leasing power affecting a settled estate. (*Savile* v. *Bruce*, 29 Beav. 557.) It has, therefore, been usually found convenient in settling estates to insert in any settlement made by deed, will or otherwise, an express provision empowering tenants in tail or

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for life or trustees to grant leases for terms of years subject to such limitations as may be deemed advisable. Whatever conditions and restrictions are thus attached to the power must be strictly observed; but the intention of the parties collected from the words of the instrument according to their ordinary and common acceptation, will govern the courts in its construction. (*Ren* v. *Bulkeley*, 1 Doug. 292; *Taylor* v. *Horde*, 1 Burr. 60, 120; 2 Sm. L. C. 584, 7th ed.; *Pomery* v. *Partington*, 3 T. R. 665; *Griffith* v. *Harrison*, 4 T. R. 737; *Jegon* v. *Vivian*, L. R., 2 C. P. 422; L. R., 3 H. L. Cas. 285.) As a general principle a person acting under a power may do *less* than the power authorizes, and if he do *more* it will be good to the extent of the power (*Isherwood* v. *Oldknow*, 3 M. & S. 382; *Edwards* v. *Milbank*, 29 L. J., Ch. 45; *Easton* v. *Pratt*, 33 L. J., Ex. 233; Sug. Pow. 746, pl. 26), and valid as between lessor and lessee by way of estoppel (*Yellowly* v. *Gower*, 24 L. J., Ex. 289), but void against the remainderman or reversioner, unless the defective execution of the power be cured by the provisions of comparatively recent acts, which have provided that, except in cases of leases made by ecclesiastical corporations (12 & 13 Vict. c. 26, s. 7), leases made *bonâ fide* under powers, and under which the lessees have entered, but which are invalid by reason of some deviation from the terms of the power, are to be deemed in equity contracts for such leases as might have been properly granted (id. s. 2); and that if the person against whom such leases are invalid accept rent, and before or upon its acceptance sign any receipt, memorandum or note in writing confirming the lease, they are to be deemed to be confirmed as against them. (13 & 14 Vict. c. 17, s. 2; see *Ex parte Cooper*, 34 L. J., Ch. 378.)

Relief on defective execution of powers. 12 & 13 Vict. c. 26.

13 & 14 Vict. c. 17.

A person who has an estate *pur autre vie*, *i. e.*,

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for the life of another, is in the same position as an ordinary tenant for life, except that leases made by him will determine, not at his own, but on the death of the *cestui que vie*, or person for whose life the land is holden (*Blake* v. *Foster*, 8 T. R. 487; Co. Litt. 47 b; 6 Co. 15 a), or at the expiration of the then current year of the tenancy (14 & 15 Vict. c. 25, s. 1), so that he may make a lease to commence after his own death. (*Utty Dale's case*, Cro. Eliz. 182.)

Tenants in tail after possibility of issue extinct.

Tenants in tail after possibility of issue extinct, whose estate can only be created by the act of God, *i. e.*, by the death of the wife of a tenant in *special* tail without issue, or having left issue, that issue becoming extinct; and tenants by the curtesy and in dower, whose estates are created by act of the law, are alike regarded in law as possessing estates for life only. They may grant leases under 40 & 41 Vict. c. 18, in the same manner as tenants for life, and are similarly restricted in the disposal of their respective lands.

Trustees of settled estates.

Where no express power of leasing was given by the settlement, there was, prior to the 19 & 20 Vict. c. 120, no general rule as to what leases might be granted by trustees, who were authorized to do what was reasonable in any particular case, the burthen of proving its reasonableness devolving on the trustee and the lessee claiming under him. (*Att.-Gen.* v. *Owen*, 10 Ves. 555, 560.) As owner of the legal estate a trustee could grant any lease justified by the quantity of his estate; but it was unsafe to rely on a lease by a trustee without the concurrence of the *cestui que trust*, if competent to join, or, if otherwise, the sanction of the Court of Chancery. The Settled Estates Act, 1877, embodying the provisions of the Act of 1856, now empowers the Chancery Division by order to vest powers of leasing in

40 & 41 Vict. c. 18.

trustees (s. 13), in conformity with the provisions of the act (s. 10), which authorize leases for terms of years not exceeding, for an agricultural or occupation lease, twenty-one years so far as relates to estates in England, and thirty-five years so far as relates to estates in Ireland; for a mining lease or lease of water, watermills, wayleaves, waterleaves or other rights or easements, forty years; for a repairing lease sixty years; and for a building lease ninety-nine years; or, if satisfied that it is the usual custom of the district and beneficial to the inheritance, any of the above (except agricultural leases) may be granted for such terms as the court shall direct (s. 4); but the court cannot authorize any lease which the settlor could not have authorized (40 & 41 Vict. c. 18, s. 39), nor any contract by trustees who have leasing powers to grant in one lease several properties held upon distinct trusts. (*Tolson* v. *Sheard*, L. R., 5 Ch. D. 19; 25 W. R. 667.) Leases made under powers vested by order pursuant to the 13th section (*supra*) need not be settled by the court or made conformable with a model lease, unless the parties desire or there is some special reason. (40 & 41 Vict. c. 18, s. 14; *Re Hoyle*, 12 W. R. 1125; *Re Dorning*, 14 W. R. 125.) It is obviously dangerous for a trustee to grant, or any person to accept from a trustee, a lease neither warranted by an express power contained in the settlement or authorized by the court, although such lease will be valid if justified by the estate of the trustees, and good against any *cestui que trust* who concurs therein.

A power of leasing given to trustees, "their executors, administrators and assigns," is not annexed to the estate (Sug. Pow. 131—133); so, where a testator devised real estate to trustees in fee, with a power to grant leases, and the trustees

disclaimed, it was held that the power could not be exercised by the heir, though he held the estate subject to the trusts of the will, such a power being committed by the testator to the trustees by reason of his personal confidence in their discretion. (*Robson* v. *Flight*, 34 L. J., Ch. 226.) A lease from year to year or for a short term at a rack rent may be granted by trustees out of their legal estate *without* application to the Chancery Division, the expense of which would be obviously disproportioned to the transaction. In *Naylor* v. *Arnitt*, 1 Russ. & M. 501 (see Lewin, 388) the court allowed such a lease to be granted for a term not exceeding ten years; but in a case stated for the opinion of the court, the late Sir John Wickens, V.-C., declined to follow that case (*In re Shaw's Trusts*, L. R., 12 Eq. 124); and in the case of a simple trust, where the *cestui que trust* is in possession, the trustee cannot make any lease without his concurrence. (Lewin, 388; see *Malpas* v. *Ackland*, 3 Russ. 272.) The court may dispense with consents (formerly required by 19 & 20 Vict. c. 120, s. 17), having regard to the number and interests of the parties. (40 & 41 Vict. c. 18, s. 28; see *Taylor* v. *Taylor*, L. R., 1 Ch. D. 433; *S. C.*, L. R., 3 Ch. D. 146; 25 W. R. 280; *Re Thorp*, W. N. 1876, p. 251.)

Tenants for years.

A tenant for years may, unless restrained by express agreement, make an underlease for any part of his term, and any assignment for less (though but a single day) than his own term is in effect an underlease (Sug. Conc. Vend. 482; *Cottee* v. *Richardson*, 7 Ex. Rep. 143; Bac. Ab. "Leases;" *R.* v. *Wilson*, 5 Man. & R. 157, n.; *R.* v. *Aldborough*, 1 East, 597); but if it comprise the whole term, though it purport to be an underlease, it is in effect an assignment, by virtue of which his assignee will at once displace him

and become tenant to the original lessor. (*Hicks* v. *Downing*, 1 Ld. Ray. 99; *Beardman* v. *Wilson*, L. R., 4 C. P. 57.) In some cases, indeed, it has been held that where the parties intend to create the relation of landlord and tenant a parol demise for all the residue of the assignor's interest may be construed to be a lease, so that the lessor, though he cannot distrain, not having any reversion, may maintain an action for the rent (*Poultney* v. *Holmes*, 1 Stra. 405; *Baker* v. *Gostling*, 1 Bing. N. C. 19; *Preece* v. *Corrie*, 5 Bing. 24); but the authorities differ considerably on the point (1 Platt on Leases, 19; *Barrett* v. *Rolph*, 14 M. & W. 348), and the better opinion would seem to be that where there is no reversion and no distress can be made for the rent the attempted disposition *cannot* operate as an underlease.

Tenants from year to year.

A tenant from year to year, whose estate is in fact a lease for a year certain with a growing interest during every succeeding year springing out of and parcel of the original contract (*Legg* v. *Strudwick*, 2 Salk. 414), may grant a lease for a term of years, which will subsist until defeated by the determination of his own estate (*Mackay* v. *Mackreth*, 4 Doug. 213; *Oxley* v. *James*, 13 M. & W. 209), or he may underlet from year to year; for such a letting is in legal operation a demise from year to year during the continuance of the original demise, and in either case he will have a reversion sufficient to enable him to distrain for rent. (*Pike* v. *Eyre*, 9 B. & C. 909; *Curtis* v. *Wheeler*, Moo. & M. 493.) In his case also the general rule applies. He may assign or underlet the premises for any period less than his own term.

Tenants for less than years.

In like manner a tenant for a less period than for years, as, for one year certain or any agreed part of a year, is at liberty to create a sub-tenancy by sub-letting to another, unless re-

stricted from doing so by the terms of his agreement. (Shep. Touch. 268; *R.* v. *Aldborough*, 1 East, 597.) Indeed, all tenants, except tenants at will and at sufferance (ante, pp. 2, 3), may sub-let, and even these by demising may create a tenancy by estoppel as between themselves and their lessees in manner already noticed. (Cole, Ejec. 217; *per* Patteson, J., in *Doe* v. *Carter*, 9 Q. B. 865.)

Tenants at will.
Tenants by sufferance.

Joint tenants.

Although joint tenants holding, as it is said in the technical Norman French, *per mie et per tout*, together possess but one freehold and constitute but one owner, each of them has an exclusive right and dominion over his own share. They may therefore join or sever in leasing the whole estate or their respective shares to a stranger or to each other (Co. Litt. 186 a; Com. Dig. "Leases" (I. 5); *Cowper* v. *Fletcher*, 34 L. J., Q. B. 187) by leases which may be made to commence *in præsenti* or *in futuro* (Bro. Ab. "Grant," 154). But a lease by one of two joint tenants of the whole will simply pass his own moiety (Co. Litt. 186 a; *Bellingham* v. *Alsop*, Cro. Jac. 52), though it purports to be made by both (*Cartwright's case*, cited 1 Vent. 136); and a lease by two of three joint tenants in like manner will pass their two undivided thirds of the property. (*Philpott* v. *Dobbinson*, 3 Mo. & P. 320.) If a joint tenant die after making a lease for years of his share, it will bind the survivor, though made to commence after the lessor's death, and the lessee's interest will subsist until the term expires. (Litt. s. 289; *Grute* v. *Locroft*, Cro. Eliz. 287; *Clerk* v. *Clerk*, 2 Vern. 323.) So, where joint tenants concur in granting a lease, they make but one lessor, for the lease is the joint demise of all (Com. Dig. "Estates" (G. 6); *Jurdain* v. *Steere*, Cro. Jac. 83); and on the death of one of the lessors, the

lessee's interest will continue, even though the lease be at will, as tenant to the survivor or survivors, who will, of course, be entitled to the whole rent. (*Henstead's case*, 5 Co. R. 10; *Doe* v. *Summersett*, 1 B. & Ad. 135, 140.) But their joint demise operates both as a demise by each of his own share and a demise by all of the whole; and, therefore, if joint tenants jointly demise from year to year, each of them, on giving due notice to quit, may recover his several share in ejectment (*Doe* v. *Chaplin*, 3 Taunt. 119), or put an end to the tenancy as to the whole, so that ejectment may be maintained although the notice to quit be given by one of the lessors only (*Doe* v. *Summersett*, *supra*), for the tenant holds the premises only so long as *he and they all* shall agree.

Tenants in common.

Unlike joint tenants who have one *joint* freehold, tenants in common have *several* freeholds. They hold by several titles, and not by a joint title (Litt. s. 292); or, as Lord Coke expressed it, by one title and several rights. (Co. Litt. 189 a.) A tenant in common may therefore lease his undivided share for any interest commensurate with his own either to a stranger or his companion (*Story* v. *Johnson*, 2 Yo. & Coll., Ex. 586; *Snelgar* v. *Henston*, Cro. Jac. 611); or with his co-tenants may concur in one lease, which although inoperative as a joint demise of the whole of their estate, their interests being several and distinct (Com. Dig. "Estates" (K. 8); *Heatherley* v. *Weston*, 2 Wils. 232; *Burne* v. *Cambridge*, 1 Moo. & Rob. 539), will operate as a distinct demise by each of his own part and a cross confirmation of each for the part of the other, without any estoppel, an interest passing from each lessor. (*Mantle* v. *Wollington*, Cro. Jac. 166; *Brooks* v. *Foxcraft*, Clayt. 137; *Jurdain* v. *Steere*, Cro. Jac. 83; Bac. Ab.

"Joint Tenants" (H. 1); and see *per Cur.* in *Thompson* v. *Hakewell*, 35 L. J., C. P. 18.)

Coparceners.

Where two or more females or female heirs of females together form an heir to lands or tenements of inheritance, they are called in law coparceners, or more briefly parceners. (Litt. s. 254, 170 a; Bac. Ab. "Coparceners;" Com. Dig. "Parceners" (A. I. 3.) Their estate, "the rarest kind of inheritance that is in the law" (Co. Litt. 164 a), partakes of the properties both of a joint tenancy and of a tenancy in common. They constitute one heir, possessing, as to strangers, like joint tenants, but one freehold; but for the purpose of leasing they, like tenants in common, have several freeholds (Vin. Ab. "Parceners;" Litt. s. 241; Co. Litt. 163 b, 164 a), and may make leases precisely in the same manner. (*Milliner* v. *Robinson*, Moore's cases, 682.)

Lords of manors.

When a copyhold tenement escheats, is surrendered or becomes forfeited to the lord, he may make a new grant of it by copy, in fee, or for any less estate, provided there be within the manor a custom for that purpose. (*R.* v. *Hornchurch*, 2 B. & Al. 189; *Badger* v. *Ford*, 3 B. & Al. 153; *R.* v. *Wilby*, 2 M. & S. 504; Cole, Ejec. 632.) But the custom, which is the life of a copyhold assurance, must be strictly followed. The ancient rent and services must be reserved, or the grant will be void as against the lord's successor. (*Doe* v. *Strickland*, 2 Q. B. 792.) By custom the lord may lease for years portions of the wastes of a manor (*Lord Northwick* v. *Stanway*, 3 Bos. & P. 346); but a custom to lease without restriction is bad (*Arlett* v. *Ellis*, 7 B. & C. 346; *Badger* v. *Ford*, *supra*), being inconsistent with the rights of the commoners. By statute, lords of manors may, with the consent of three-fourths of the com-

13 Geo. 3, c. 81.

moners, lease any part, not exceeding one-twelfth, of the wastes, for any period not exceeding four years, for the best rent that can be got at public auction, the same to be applied in draining, fencing, and improving the residue. (13 Geo. 3, c. 81, s. 15.)

Copyholders.

Unless authorized by the custom of the manor (*Wells* v. *Partridge*, Cro. Eliz. 469; 6 Vin. Ab. 118), or the express licence of the lord (*Jackman* v. *Hoddesden*, Cro. Eliz. 351; *Kensey* v. *Richardson*, id. 728), a copyholder cannot lease his copyhold tenement for more than a year, or make a lease evading or exceeding the custom or licence, if there be one, without forfeiting his estate (1 Watk. Cop. 327; 1 Scriv. Cop. 544; Cole, Ejec. 615); but he may lease for a shorter term than that permitted by the licence or custom, in accordance with the rule, *omne majus continet in se minus* (*Goodwin* v. *Longhurst*, Cro. Eliz. 535; *Easton* v. *Pratt*, 33 L. J., Ex. 233); and a lease not warranted by the custom or licence will be good against all but the lord (*Doe* v. *Tressider*, 10 L. J., Q. B. 160), who may enforce or waive the forfeiture at his option (*Doe* v. *Bousfield*, 14 L. J., Q. B. 42), whilst the privilege of leasing for one year without licence is allowed to copyholders by the general custom of the kingdom. (*Frosel* v. *Welch*, Cro. Jac. 403.) There are probably exceptions (1 Prest. Abs. 202); and in many manors a special custom authorizes leases for years or for life, and a certain number of years after. (1 Scriv. 457.) All the powers to authorize and grant leases contained in the Settled Estates Act, 1877 (40 & 41 Vict. c. 18, s. 46, *ante*, pp. 14, 16) are extended to the lords of settled manors to give licences to their copyhold and customary tenants to grant such leases as may be granted of freehold hereditaments under that act. (Id. sect. 9.)

But to grant or refuse a licence is entirely in the discretion of the lord (*Reg.* v. *Hall*, 9 A. & E. 339); though in that case *Ballard* v. *Agard* (6 Vin. Ab. 240, "Copyholds," Y, e), was cited, as deciding that a suit would lie in equity to compel a lord to grant a licence to lease; but that authority is not satisfactory.

Reversioners and remaindermen.

Persons having a present right to the future enjoyment of an estate as remaindermen or reversioners, expectant either upon an estate for years, for life, or in tail, may make leases which will take effect in possession on the determination of the preceding estate. (*Palmer* v. *Thorpe*, Cro. Eliz. 152.)

The crown.

In consequence of the improvident grants of preceding monarchs, it was found necessary, in the reign of Queen Anne, to restrain the demising power of herself and successors. It was accordingly enacted that all leases of crown lands or tenements (except advowsons or vicarages) should be void, unless made for a term not exceeding thirty-one years or three lives, or some term of years determinable upon one, two or three lives (1 Anne, stat. 1, c. 7, s. 5); or, in the case of building or repairing leases, fifty years or three lives (id. s. 6), subject to certain conditions and restrictions, none of which apply to her Majesty's private estates. (25 & 26 Vict. c. 37, s. 2.) Comparatively recent legislation has vested most of the crown lands in the Commissioners of Woods and Forests, who are empowered to grant leases for any term not exceeding thirty-one years, or building leases ninety-nine years (10 Geo. 4, c. 50, ss. 22—26), subject to certain conditions. (Id. ss. 27—33.)

1 Anne, stat. 1, c. 7.

Government departments.

Government departments, authorized to acquire, sell, exchange or demise lands for public purposes, may make leases, the terms of which are in strict

compliance with the particular statute under which they act.

Leases of lands belonging to the Duchy of Cornwall are regulated by 26 & 27 Vict. c. 49; to the Duchy of Lancaster by 48 Geo. 3, c. 73; 1 & 2 Geo. 4, c. 52. And leases of mines, minerals and quarries belonging to the crown in Dean Forest by 1 & 2 Vict. c. 43, as amended by 24 & 25 Vict. c. 40.

Corporations.

Unless restrained by statute (public or private), or by their several bye-laws, corporations may grant leases (which must be by deed under their common seal, *Finlay* v. *Bristol and Exeter Railway Company*, 21 L. J., Ex. 117; and by their proper title of incorporation, 1 Kyd, Corp. 234—237), which will be binding on their successors for any term consistent with their own estate. (*Smith* v. *Barrett*, Sid. 161.) And although a lease by a corporation not under its common seal is void, yet occupation and payment of rent under the void instrument by the tenant will create an implied tenancy from year to year upon such of the terms of the instrument as may be applicable to such a tenancy, and the corporation may maintain an action for a breach thereof. (*Wood* v. *Tate*, 2 B. & P., N. R. 247; *Ecclesiastical Commissioners* v. *Merral*, 38 L. J., Ex. 93.) So, specific performance of a parol contract for a lease by a corporation will be decreed if there have been part performance. (*Steeven's Hosp.* v. *Dyas*, 15 Ir. Ch. Rep. 405.)

Ecclesiastical and eleemosynary.

By the common law, ecclesiastical corporations *aggregate*, as the dean and chapter of a cathedral, and eleemosynary corporations *aggregate*, as the master and fellows of a college, were capable of granting leases for any term without the consent or confirmation of any person whomsoever. But ecclesiastical corporations *sole*, consisting of one

person, as a bishop, could only make leases co-durable with their own estate, except with the consent or confirmation of such person as the law required, *concurrentibus hiis quæ in jure requiruntur* (Co. Lit. 44 a; 2 Bla. Com. 318—321; Shep. Touch. 281), which being obtained they could exercise equally unlimited powers. (*Grindal's case*, 4 Leon. 78.)

This unreasonable power of leasing tending to the impoverishment of their successors, the salutary control of parliament was exercised in confining within more reasonable limits the latitude allowed by the common law. Hence originated numerous statutes known to lawyers as enabling and disabling or restraining acts. The first of these, known as the enabling statute of 32 Hen. 8, c. 28, empowered all corporations sole (except parsons and vicars) to make leases by deed *indented*, to commence from the day of making, of lands most commonly let for twenty years before, for a term not exceeding twenty-one years or three lives (not for both), which, without confirmation, were binding upon their successors: the usual and customary rent for the preceding twenty years being reserved, any old lease in being being first absolutely surrendered or within a year of its expiration, and such leases not to be without impeachment of waste. (32 Hen. 8, c. 28, ss. 1, 2, 4; see also 5 Geo. 3, c. 17, s. 1.) With confirmation, long leases made by corporations sole continued, as far as that act was concerned, to be good against their successors, as they had been at common law. (Gibs. 744.) Accordingly, by disabling statutes of Elizabeth, first archbishops and bishops (1 Eliz. c. 19, s. 5), and next, all other corporations, whether sole or aggregate, were disabled altogether from leasing ecclesiastical property for more than twenty-one years or three lives.

Enabling Act, 32 Hen. 8, c. 28.

Disabling Acts, 1 Eliz. c. 19; 13 Eliz. c. 10.

(13 Eliz. c. 10, s. 3.) But the 14 Eliz. c. 11, ss. 17—19, excepted out of the restrictions of the 13 Eliz. c. 10, leases of houses (not being the capital or dwelling-houses of the lessors) situate in cities, boroughs, corporate or market towns, which, subject to certain conditions to be strictly observed, all ecclesiastical and eleemosynary corporations sole (except bishops) may demise, with not more than ten acres of land appurtenant, for any term not exceeding forty years. It should be observed that, although all leases not made in accordance with the two above-mentioned disabling statutes were thereby declared "utterly void," the courts construing void to mean "void at election," have held such leases valid during the life of the corporation sole (2 Shep. Touch. 283; *Salisbury's case*, 10 Co. R. 58 b, 60 b), or of the head of the corporation aggregate (Co. Lit. 45 a), by whom they were granted, and voidable only by the successors, who have equal power to confirm them. (*Per* Holroyd, J., *Edwards* v. *Dick*, 4 B. & Al. 217; *Doe* v. *Bancks*, 4 B. & Al. 407; *Pennington* v. *Cardale*, 27 L. J., Ex. 438; *Doe* v. *Taniere*, 18 L. J., Q. B. 49.) But the Statute of Limitations (3 & 4 Will. 4, c. 27) runs against the successors from the grant of the lease, and not from their election to avoid it. Where the governors of a hospital granted a lease in 1783 for ninety-nine years, an action to set the lease aside in 1876 was held barred by the statute. (*Governors of Magdalen Hospital* v. *Knotts*, L. R., 8 Ch. D. 709; 26 W. R. 640.) Such leases are, however, binding upon the lessees who, having accepted them, are justly estopped from repudiating them. By another statute all the ecclesiastical and other persons mentioned in the 13 Eliz. c. 10 (which did not, as we have seen, include archbishops and bishops), were restrained from making any new

Exception under 14 Eliz. c. 11, s. 17.

Statute of Limitations. 3 & 4 Will. 4, c. 27.

18 Eliz. c. 11, s. 2.

lease where the old one was not to be expired, surrendered or ended within three years after the making of such new lease (18 Eliz. c. 11, s. 2); the object being clearly to restrain leases in reversion. Confirmation, being excluded in cases within the disabling statutes of Elizabeth, became of practical use only to (1) parsons, vicars (specially excepted out of 32 Hen. 8, c. 28, by sect. 4), and perpetual curates who have received Queen Anne's bounty (held within same exception, *Doe* v. *Thomas*, 9 A. & E. 556), who cannot, nor ever could, make *any* lease without confirmation; and (2) to bishops who, not being included in the restraint of 18 Eliz. c. 11, upon concurrent leases, may still in some cases make such leases with the consent of the dean and chapter. At common law, therefore, the incumbent of a benefice could not grant any lease which would operate as a valid demise for a longer term than his own incumbency (*Wheeler* v. *Heydon*, Cro. Jac. 328; *Price* v. *Williams*, 1 M. & W. 6; *Doe* v. *Carter*, Ry. & Moo. 237; *Doe* v. *Yarborough*, 1 Bing. 24), until the 5 & 6 Vict. c. 27. 5 & 6 Vict. c. 27 empowered all incumbents, with the consent of the bishop and patron, and in the case of copyhold lands, where a lease cannot be made without his licence, with the consent of the lord of the manor, to lease the lands belonging to their benefices (except the parsonage and ten acres of glebe) on farming leases for fourteen, or in cases where the lessee shall covenant to improve the demised premises at his own expense, twenty years, subject to certain restrictions imposed in the interests of their successors. This act does not extend to glebe lands, which have been usually let on lease by incumbents (*Jenkins* v. *Green*, 28 L. J., Ch. 822); so that a rector, with the consent of the patron and bishop, may still exercise his common law power of leasing his glebe, subject to the pro-

visions of 13 Eliz. c. 10. Further powers, in addition to existing powers of leasing, have been given by the Ecclesiastical Leasing Act, 1842, as amended in 1858, to all ecclesiastical corporations, aggregate or sole (except any college or corporation of vicars choral, priest vicars, senior vicars, custos, and vicars or minor canons, and except any ecclesiastical hospital, or the master thereof), who may, with certain consents, grant building, repairing or improving leases for ninety-nine years, and leases of mines or quarries, running water, way-leaves and other rights and easements for sixty years, subject to certain restrictions and conditions (5 & 6 Vict. c. 108, ss. 1—9, 18, 20—32); or where the Ecclesiastical Commissioners are satisfied that it is to the permanent advantage of the estate, in such manner as the commissioners may think proper. (21 & 22 Vict. c. 57, s. 1.)

5 & 6 Vict. c. 108, amended by 21 & 22 Vict. c. 57.

By 14 & 15 Vict. c. 104 (continued and amended by 17 & 18 Vict. c. 116; 19 & 20 Vict. c. 74; 20 & 21 Vict. c. 74; 22 & 23 Vict. c. 46; 23 & 24 Vict. c. 124; 24 & 25 Vict. cc. 105, 131; 30 & 31 Vict. c. 143; 31 & 32 Vict. cc. 111, 114; 32 & 33 Vict. c. 85; 38 & 39 Vict. c. 72), ecclesiastical corporations, sole or aggregate, with the written approval of the Church Estate Commissioners, may lease lands acquired under that act from year to year, or for any term not exceeding fourteen years; or mining and building leases upon such terms as the commissioners may think fit. (Sect. 9.) A similar provision as to acquired lands is contained in the 9th section of the Ecclesiastical Leasing Act, 1858.

Episcopal and Capitular Estates Act. 14 & 15 Vict. c. 104.

By 23 & 24 Vict. c. 124, s. 8, no lease of lands assigned as the endowment of any see under this act can be granted by the archbishop or bishop, otherwise than from year to year, or for any term not exceeding twenty-one years, subject to similar

23 & 24 Vict. c. 124.

conditions to those contained in the "Act for better enabling Incumbents of Ecclesiastical Benefices to demise" (5 & 6 Vict. c. 27, *ante*, p. 30); but with the approval of the estates committee of the Ecclesiastical Commissioners, mining, building or other leases may be granted upon such terms as they may think fit.

None of the previous disabling or restraining acts (except 5 & 6 Vict. c. 27) extended to copyholds belonging to ecclesiastical benefices, which the rectors, vicars, &c., having power so to do, were accustomed to grant and lease for lives and long terms of years to the prejudice of their successors; and therefore by the 24 & 25 Vict. c. 105, amended by 25 & 26 Vict. c. 52, it was rendered unlawful for any rector, vicar, &c., who after 6th August, 1861, should become possessed of any manors, lands, &c., belonging to any ecclesiastical benefice, to make any grant or lease thereof in any other way than pursuant to 5 & 6 Vict. cc. 27, 108; or 21 & 22 Vict. c. 57. By section 2, leases made and rights acquired before this act are expressly protected.

24 & 25 Vict. c. 105, amended by 25 & 26 Vict. c. 52.

In every instance it is most necessary to turn to the acts themselves for details.

Civil corporations.

By the Universities and College Estates Acts, 1858 and 1860, the universities of Oxford, Cambridge, Durham, and their respective colleges, together with the colleges at Winchester and Eton, which are lay or civil corporations aggregate (*Rex* v. *Cambridge*, 3 Burr. 1656), are empowered to grant leases, generally, for any term not exceeding twenty-one years; building and repairing leases, ninety-nine years; running water, way-leaves, other rights and easements and mining leases, sixty years, without the consent of any other person or persons whomsoever, but subject to conditions imposed for the protection of their successors. But they are not restrained from

21 & 22 Vict. c. 44; 23 & 24 Vict. c. 59.

granting any leases which they might legally have granted before these acts. The power of leasing possessed by the University of London and other colleges is regulated by their private statutes, charters and bye-laws.

Municipal corporations cannot demise their lands for more than thirty-one years, without the consent of the Lords of the Treasury (5 & 6 Will. 4, c. 76, s. 94), except in the case of renewed leases (s. 95; *Att-Gen.* v. *Yarmouth*, 21 Beav. 625), and building leases for terms not exceeding seventy-five years. (Sect. 96.)

Municipal corporations. 5 & 6 Will. 4, c. 76.

The many inconveniences caused by the difficulty of making valid leases of parish property to create a tenancy other than from year to year (*Doe* v. *Terry*, 4 A. & E. 274), neither churchwardens or overseers (except in London, *Warner's case*, Cro. Jac. 532), jointly or severally, having any legal interest to demise, were to some extent remedied by 59 Geo. 3, c. 12, which vests all real property belonging to the parish in the churchwardens and overseers in succession, as a corporation (s. 17), and empowers them jointly (*Woodcock* v. *Gibson*, 4 B. & C. 462), with the consent of the vestry, to let portions of land, not exceeding twenty acres each, at such rent and for such terms as the vestry shall determine. (Sect. 12.) This act does not apply to copyhold lands (*Doe* v. *Foster*, 3 C. B. 215); its provisions must be strictly observed (*Doe* v. *Gower*, 21 L. J., Q. B. 57), and "applies to those cases only where the rents are applicable solely to parochial purposes which are under the control of the parish officers." (*Per* Parke, B., *Uthwatt* v. *Elkins*, 13 M. & W. 777.)

Parish officers. 59 Geo. 3, c. 12.

Prior to the passing of the Charitable Trusts Act, 1853, which, with amending acts, now regulates the estates of charities, trustees of charities might grant such leases as were beneficial to the

Trustees of charities. 16 & 17 Vict. c. 137, amended by 18 & 19 Vict. c. 124, and

23 & 24 Vict. c. 136.

lasting interests of the charity; if otherwise, as where there was inadequacy of rent, unreasonableness of term, absence of necessary covenants, &c., the Court of Chancery, as paramount trustee, would set them aside at any distance of time (*Att.-Gen.* v. *Cross*, 3 Mer. 524; *Att.-Gen.* v. *Owen*, 10 Ves. 555; *Att.-Gen.* v. *Brooks*, 18 Ves. 319; *Att.-Gen.* v. *Hotham*, 3 Russ. 415), until protected by the Statute of Limitations (3 & 4 Will. 4, c. 27, ss. 24—27), which extends to charities. (*Mag. Coll., Oxon* v. *Att.-Gen.*, 26 L. J., Ch. 620.)

Now, by 16 & 17 Vict. c. 137, leases authorized by any two of the Charity Commissioners sitting as a board (sect. 6), have the like effect and validity as if authorized by the express terms of the trust affecting the charity.

By 18 & 19 Vict. c. 124, all lands, &c. then vested in the "Treasurer of Public Charities," became vested in like manner and upon the same trusts in the secretary of the board as a corporation sole, under the name of "The Official Trustee of Charity Lands." (Sect. 15.) By sect. 16, the acting trustees of every charity were empowered to grant all such leases of land belonging thereto, and vested in the official trustee, as they could duly have granted if the same land were legally vested in themselves.

By 23 & 24 Vict. c. 136, a majority of two-thirds of the trustees of any charity assembled at a meeting of their body, duly constituted, having power to lease any property of the charity, have power, on behalf of their trustees and of the official trustee, where his concurrence would be otherwise required, to do all things requisite for carrying such lease into legal effect.

Trustees of bankrupts. 32 & 33 Vict. c. 71.

Prior to the Bankruptcy Act, 1869, power to grant leases of the bankrupt's estate vested in his assignees. Now, by 32 & 33 Vict. c. 71, the pro-

perty of the bankrupt, divisible amongst his creditors, which comprises the capacity to exercise all such powers over property as might have been exercised by the bankrupt for his own benefit (s. 15, § 4), vests in the person for the time being filling the office of trustee (s. 17), who is expressly authorized to exercise any powers, the capacity to exercise which is vested in him under this act. (Sect. 25, § 5.) The trustee has, therefore, exactly the same power to grant leases as the bankrupt had at the commencement of his bankruptcy.

Receivers. Receivers in chancery may demise under the direction of the court, but not otherwise. (*Morris* v. *Elme*, 1 Ves. jun. 139; *Durnford* v. *Lane*, cited 2 Madd. Ch. Pr. 244; *Cooke* v. *Cooke*, 2 Mol. 371.) They must let the estate to the best advantage. (*Wynne* v. *Newborough*, 1 Ves. jun. 164.)

Bailiffs. A mere bailiff has no interest, and cannot lease his employer's lands otherwise than at will (*Shopland* v. *Ryoler*, Cro. Jac. 55; *Drury* v. *Fitch*, Hutt. 16; *Knipe* v. *Palmer*, 2 Wils. 130); but a power may be conferred on him for the purpose. A farm bailiff, accustomed to let from year to year upon the ordinary terms, and to receive rents, has no authority in law to let upon unusual terms unknown to the owner (*Turner* v. *Hutchinson*, 2 F. & F. 185); and a steward has no general authority enabling him to grant leases of farms for terms of years. (*Collen* v. *Gardner*, 21 Beav. 540.)

Agents. An agent, acting under a power of attorney as manager of property, may make a lease binding on his principal (*Hamilton* v. *Clanricarde*, 1 Bro. P. C. 341), if it be within the scope of his authority (*Fenn* v. *Harrison*, 3 T. R. 757), which must be by deed if the lease be by deed (*Harrison* v. *Jackson*, 7 T. R. 207), but need not even be in writing if the lease be by parol. (*Coles* v. *Treco-*

thick, 9 Ves. 250.) If an agent make a lease without sufficient authority, his principal may subsequently adopt his act by ratification in writing (*Fitzmaurice* v. *Bayley*, 6 E. & B. 868), or without writing (*Rodwell* v. *Eden*, 1 F. & F. 542); but if he do not do so, the agent, having executed a lease professedly as attorney for another, may be sued for a breach of his warranty that he had sufficient authority: such a warranty being implied. (*Simons* v. *Patchett*, 7 E. & B. 568; *Pow* v. *Davis*, 30 L. J., Q. B. 257.) An agent should always sign as agent to avoid personal liability (*Clay* v. *Southen*, 21 L. J., Ex. 202; *Parker* v. *Winlow*, 7 E. & B. 942), and in the name of his principal. (*White* v. *Cuyler*, 6 T. R. 176; *Cooke* v. *Wilson*, 26 L. J., C. P. 15.) It seems doubtful whether an agent employed to let a house has implied authority to let persons into possession; though on principle it is submitted he ought to have, and slight evidence will be sufficient to prove that he has express authority. (*Slack* v. *Crewe*, 2 F. & F. 59.) An agent's authority, though under seal, may be revoked without deed, (*Rex* v. *Wait*, 11 Price, 518; *Manser* v. *Back*, 6 Hare, 443.)

Executors and administrators.

An executor or administrator may demise the property which devolves on him in either of those capacities (Bac. Ab. "Leases," (I 7); but whilst an executor may do so *before* probate (*Roe* v. *Summerset*, 2 W. Bl. 692), an administrator cannot, until *after* he has obtained the letters of administration which alone constitute his title. (1 Wms. Exors. 354.) A lease by one of several executors (*Doe* v. *Sturges*, 7 Taunt. 222, *sub nom. Doe* v. *Hayes*) or administrators (*Jacomb* v. *Harwood*, 2 Ves. sen. 265) is good. If a term of years has been specifically bequeathed, a person proposing to take a lease from the executor ought to satisfy

himself that the executor has not assented to the bequest, as in such case his power of leasing is at an end, and the legatee may maintain ejectment. (*Doe* v. *Guy*, 4 Esp. 154; *Johnson* v. *Warwick*, 17 C. B. 516; *Fenton* v. *Clegg*, 9 Ex. 680; 2 Wms. Exors. 1275, 6th ed.) The marriage of an executrix or administratrix transfers to the husband the *whole* right of administration, and he must be the demising party in all leases. (*Thrustout* v. *Coppin*, 2 W. Bl. 801.) Leases by executors or administrators are voidable in equity, unless shown by the lessees to be a due administration of the assets. (*Drohan* v. *Drohan*, 1 Ball & B. 185; *Keating* v. *Keating*, Lloyd & Gov. Ca. *temp.* Sugden, C. 133.) An administrator, *durante minoritate*, may demise during the non-age of the executor, who on attaining his majority may avoid the lease for the residue of the term granted. (*Finch's case*, 6 Rep. 68 a; *Prince's case*, 5 Rep. 29 a; 38 Geo. 3, c. 87, s. 6.) Executors who have refused to administer cannot demise after administration has been granted to another. (*Broker* v. *Charter*, Cro. Eliz. 92.)

Mortgagors and mortgagees.

Leases by a mortgagor are binding on the mortgagee, if made prior to the mortgage (*Moss* v. *Gallimore*, 1 Sm. L. C. 636, 7th ed.; *Rogers* v. *Humphreys*, 4 A. & E. 299); if made subsequently, except under an express power in the mortgage deed (*Bevan* v. *Habgood*, 30 L. J., Ch. 107), though good by way of estoppel between the parties (*Doe* v. *Thompson*, 9 Q. B. 1037; *Cuthbertson* v. *Irving*, 28 L. J., Ex. 306), they are void against the mortgagee, who may at once, without notice or demand, eject the lessee (*Thunder* v. *Belcher*, 3 East, 449; *Keech* v. *Hall*, 1 Doug. 21; *per* Littledale, J., *Pope* v. *Biggs*, 9 B. & C. 253), unless he adopt the act of the mortgagor in giving the lease by acts, other than mere notice to

the lessee, evidencing the creation of a tenancy between the mortgagee and tenant. (*Evans* v. *Elliott*, 9 A. & E. 342; *Brown* v. *Storey*, 1 M. & G. 117.) If, without any express power, the mortgagor grant a lease, the tenant, during his possession, may not dispute the mortgagor's right to demise. (*Alchorne* v. *Gomme*, 2 Bing. 54.) So long as the equity of redemption is not foreclosed, the mortgagee cannot demise so as to bind the mortgagor, unless to avoid an apparent loss (*Hungerford* v. *Clay*, 9 Mod. 1; *Franklinski* v. *Ball*, 34 L. J., Ch. 153); so that where lands in mortgage are to be demised, both mortgagor and mortgagee ought to concur in the lease for the security of the tenant. (*Doe* v. *Adams*, 2 Cr. & J. 232; *Doe* v. *Bucknell*, 8 C. & P. 566; *Carpenter* v. *Parker*, 3 C. B., N. S. 206.)

Guardians.

Guardians by nature (father or mother until child attains twenty-one) or for nurture (also father or mother until child attains fourteen, where there is no testamentary guardian, *Roach* v. *Garvan*, 1 Ves. 158) have only the care of the infant's person, and cannot make any lease of his land, except, *perhaps*, a lease at will. (*Pigot* v. *Garnish*, Cro. Eliz. 678.) But guardians appointed by the common law in respect of lands descended to an infant until he attains fourteen (called guardians in socage, Bac. Ab. "Leases," (I 9), guardians appointed by will under 12 Car. 2, c. 24, (called testamentary guardians,) and guardians by election, (*i. e.*, elected by an infant of fourteen, seised of socage land, and unprovided with a testamentary guardian,) have not merely a bare authority over but an actual interest in the infant's estate, and as *domini pro tempore* have the power of making leases during the continuance of their guardianship (*Dugar* v. *Norton*, 1 Freem. 102; *Wade* v. *Baker*, 1 Ld. Raym. 130; *Rex* v. *Sutton*, 3 A. &

E. 597); but a demise for a longer period than the ward's minority would be voidable by him on his coming of age. (Bac. Ab. "Leases," (I 9.) Guardians appointed by the Lord Chancellor are in the nature of receivers in chancery, and must obtain the sanction of the court to enable them to grant leases. (*Rex* v. *Sutton*, 3 A. & E. 608; *Re James*, L. R., 5 Eq. 334.)

Persons under disability: (a) Infants.

A lease made by an infant is voidable by him on his attaining his majority (*Ketsey's case*, Cro. Jac. 320; *Ashfield* v. *Ashfield*, Sir W. Jo. 157), or by his heirs if he die within age. (Co. Litt. 45 b.) It has been said that a lease which is clearly for the infant's benefit is not voidable (*per* Buller, J., *Maddon* v. *White*, 2 T. R. 161); but the better opinion would seem to be that the infant is never precluded from disputing the lease on attaining twenty-one (2 Prest. Conv. 248), except it be made by him in his corporate capacity. (Bro. Ab., tit. "Age," pl. 80.) By custom, in some places, an infant is of full age at fifteen to make binding leases (Co. Lit. 45 b), and the crown can never avail itself of the plea of infancy to avoid its leases. (*Re Duchy of Lancaster*, Plowd. 212.) Whilst some act of notoriety, as ejectment, entry, demand of possession, or at *least* express notice is necessary, and the execution of a new lease to another lessee is insufficient, to *avoid* (*Slater* v. *Brady*, 14 Ir. C. L. R., Ex. 66), very slight acts, where the lease was for the benefit of the infant (*Ex parte Grace*, 1 B. & P. 377), have been held to amount to a confirmation. The act of confirmation may be by deed (*Anon.*, 2 Leon. 220), by parol (4 Leon., 4 pl. 15), inferred from acceptance of rent (*Ashfield* v. *Ashfield*, *ubi supra*), or implied from mere words of congratulation, as "God give you joy of your lease." (Bac. Ab. "Estate," B.)

The Infant's Relief Act, 1874 (37 & 38 Vict. c.

62), provides (sect. 2) that no action shall be brought upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age; but it is conceived that this enactment, although it applies to ratifications made after the passing of the act of contracts made before that time (*Ex parte Kibble*, L. R., 10 Ch. App. 373), does not prevent that ratification which has always been implied from the receipt or payment, after full age, of rent reserved on a lease made to or by a person during his minority. The lease, to be good, must be the infant's own personal act. Neither a lease by his agent nor his own ratification thereof will bind him. (*Doe* v. *Roberts*, 16 M. & W. 781.)

By statute, infants are empowered to grant renewable leases under the direction of the Court of Chancery, *i. e.*, Chancery Division of the High Court of Justice (Judicature Act, 1873, s. 34); and, subject to the same authority, they may grant building, farming and other leases without fine, and reserving the best rent. (11 Geo. 4 & 1 Will. 4, c. 65, ss. 16, 17.) The court may also authorize leases of infants' estates for the terms and subject to the provisions contained in the Settled Estates Act, 1877 (40 & 41 Vict. c. 18, s. 49). By this section guardians on behalf of infants may execute all powers given and make all applications, and give all consents and notifications required under this act, but in the case of an infant tenant in tail a special direction of the court is necessary.

(b) Married women.

A married woman may make a valid lease of property (1) acquired by her in any employment, occupation or trade, or by the exercise of any literary, artistic or scientific skill carried on sepa-

rately from her husband, since the passing of the Married Women's Property Act, 1870 (33 & 34 Vict. c. 93); (2) settled to her separate use without restraint on alienation; or (3) which she is expressly empowered to demise. (Sug. Pow. c. 4, s. 1.) With these exceptions, a lease made by a wife *alone* is absolutely void. (*Goodright* v. *Straphan*, Cowp. 201.) But if her husband concur in the deed and the wife acknowledge it before a judge or two perpetual commissioners (or before a county court judge, 19 & 20 Vict. c. 108, s. 73), she may make a lease for any term consistent with her estate; and by the Settled Estates Act, 1877, husbands entitled to settled estates in right of their wives, or to unsettled estates as tenants by the curtesy, or in right of a wife who is seised in fee, may, without application to the court, make leases thereof (except the principal mansion-house and the demesnes thereto attached) for any term not exceeding twenty-one years, to take effect in possession, and subject to provisions contained in that act. (Sects. 46—48.) Longer leases of settled estates, in which the wife has only a life interest, for building, repairing or mining purposes, must be authorized by the Chancery Division of the High Court, pursuant to 40 & 41 Vict. c. 18, unless the settlement contains some express power authorizing such leases.

3 & 4 Will. c. 74.

40 & 41 Vict. c. 18.

Leases of the wife's freeholds, made by husband and wife, or by the husband alone, not in pursuance of these statutes or of an express power, if *by deed*, are good during coverture (*Wiscot's case*, 2 Co. R. 60; *Bateman* v. *Allen*, Cro. Eliz. 438; Bac. Ab. "Leases," (C 1); 2 Wms. Saund. 180, n. 9), but voidable by wife on the husband's death, unless she accepts rent subsequently due or otherwise confirms them. (*Doe* v. *Weller*, 7 T. R. 478; *Toler* v. *Slater*, 37 L. J., Q. B. 33.)

If *by parol*, such leases absolutely determine upon the husband's decease (*Walsall* v. *Heath*, Cro. Eliz. 656; *Parry* v. *Hindle*, 2 Taunt. 181), and of course the term must not exceed three years. (29 Car. 2, c. 3, ss. 1, 2; 8 & 9 Vict. c. 106, s. 3.) If the husband survives his wife, and becomes tenant by the curtesy (having had issue by her born alive, that might by possibility inherit the estate as her heir), the lease will absolutely determine at his death (*Miller* v. *Maynwaring*, Cro. Car. 397); if he does not become tenant by the curtesy the lease becomes void upon the wife's death as against her heir at law. (*Hoice* v. *Scarrott*, 28 L. J., Ex. 325; *Hill* v. *Saunders*, 2 Bing. 112; S. C. (in error), 4 B. & C. 529.) The husband has the sole dominion during his life over his wife's leaseholds (Co. Lit. 46 b, 351 a; *Manby* v. *Scott*, 2 Sm. L. C. 429; but see the Married Women's Property Act, 1870), which he may underlet for a term to commence immediately or subsequent to his death. (*Grute* v. *Locroft*, Cro. Eliz. 287; *Anon.*, Poph. 4.) Leaseholds held by the wife in *autre droit* as executrix or administratrix may be disposed of by the husband, who has the whole right of administration. (*Thrustout* v. *Coppin*, 2 W. Bl. 801.)

(c) Lunatics.

A lunatic may make a lease binding upon him; but if it be proved that the lessee knew and took advantage of the lessor's incapacity, the lease will be void. (*Dane* v. *Kirkwall*, 8 C. & P. 679; *Molton* v. *Camroux*, 2 Ex. 487; S. C., in error, 4 Ex. 17; *Beavan* v. *McDonnell*, 23 L. J., Ex. 94, 326; *Elliott* v. *Ince*, 7 De G., M. & G. 475.) The Lord Chancellor may authorize the committee of the estate of a lunatic to grant building, repairing or farming leases (16 & 17 Vict. c. 70, s. 129); or leases of mines, quarries, &c. already opened (id. s. 130), or even unopened, if necessary or expe-

dient (id. s. 131); also to exercise leasing powers vested in the lunatic (id. s. 133), and to accept the surrender of old leases and grant new ones. (Id. s. 134.) The Chancery Division of the High Court of Justice may also authorize leases of lunatics' settled estates, upon application of committees on behalf of lunatics, for the terms of years, and subject to the provisions and restrictions contained in the 40 & 41 Vict. c. 18. In the case of lunatic tenants in tail the special direction of the court is required. (Id. s. 49.)

(d) Aliens.

Aliens may now acquire and dispose of any property whatsoever as freely as natural-born British subjects. (33 Vict. c. 14, s. 2.)

(e) Persons under duress or intoxicated.

A lease extorted from a person while illegally restrained of his liberty, or in fear of loss of life or limb, is voidable at his election when the duress has ceased. (5 Rep. 119.) A lease made by a person so intoxicated as not to know what he is doing is void. (*Gore* v. *Gibson*, 13 M. & W. 623.)

(f) Convicts.

Any person who has been convicted of treason or felony, and sentenced to death or penal servitude, is precluded by 33 & 34 Vict. c. 23, s. 8, from leasing any property, unless when he is lawfully at large under any licence (id. s. 30), or has suffered his punishment, or received a pardon. (Id. s. 7.) During his disability, the administrator of his property, appointed pursuant to section 9, may let any part thereof at his discretion. (Id. s. 12.)

Sect. 2.—*Who may be Lessees.*

All persons, except alien enemies (*Calvin's case*, 7 Co. R. 17), may be lessees (4 Cruise's Dig., Tit. xxxii. "Deed," c. 5, § 86); but demises to persons under disability may be by them avoided

Infants.

upon removal of the disability. Thus, an infant may accept a lease and avoid it on attaining his majority (*Ketsey's case*, Cro. Jac. 320), if he elect to do so within a reasonable time thereafter, otherwise he will be liable to pay rent, including arrears (Bac. Ab. "Leases," (B), and perform all other obligations of the tenancy, even though it be disadvantageous to him. (*N. W. Rail. Co.* v. *M'Michael*, 20 L. J., Ex. 97.) If at full age he annuls a lease, he cannot recover a premium paid for it (*Holmes* v. *Blogg*, 8 Taunt. 35); and during infancy he will be liable for rent of necessary lodgings (*Hands* v. *Slaney*, 8 T. R. 578), though not for rent of a house taken for trading purposes. (*Lowe* v. *Griffiths*, 1 Scott, 458.) Leases to infants may be surrendered and renewed under direction of the Chancery Division of the High Court. (11 Geo. 4 & 1 Will. 4, c. 65, s. 12; 36 & 37 Vict. c. 66, s. 34.) The disability of infants is for their benefit only; so if an infant's partner obtain the renewal of an advantageous lease to himself *only*, the infant shall share the benefit, though he may repudiate any loss if the lease turn out disadvantageous. (*Ex parte Grace*, 1 B. & P. 376.)

Married women.

A *feme covert* may likewise take a lease, but it will be voidable by her husband (*Swaine* v. *Holman*, Hob. 204; Co. Litt. 3 d), and (unless she has assented to it) by herself or her heirs after his death. (*Ib.*) A married woman living apart from her husband may take a lease, and become liable for payment of rent and performance of covenants out of her separate estate (*Gaston* v. *Frankum*, 2 De G. & Sm. 561), or property acquired by her under the Married Women's Property Act, 1870. (33 & 34 Vict. c. 93.) A lease made to husband and wife jointly may be avoided by the wife *after* the death of her husband only; but if she then acquiesce she may become liable on the lease for rent and waste

committed during the coverture (2 Inst. 303; Com. Dig., tit. "Baron and Feme," s. 2), though not perhaps on any *special* covenants. (1 Roll. Ab. 349, pl. 2; Brownl. 31; Dyer, 13 b.) Leases to married women may be surrendered and renewed by direction of the Chancery Division of the High Court of Justice. (11 Geo. 4 & 1 Will. 4, c. 65, s. 12; 36 & 37 Vict. c. 66, s. 34.)

Persons *non compos.*

Idiots and lunatics may take leases for their benefit (Co. Litt. 2 b); but a lessor may not profit by taking advantage of their incapacity. (*Dane* v. *Kirkwall*, 8 C. & P. 679; *Browne* v. *Joddrell*, M. & M. 105.) A lease granted fairly by the lessor, and accepted aud enjoyed by the lunatic, cannot be set aside. (*Molton* v. *Camroux*, 18 L. J., Ex. 68, 356; *Beavan* v. *M'Donnell*, 23 L. J., Ex. 94; *Campbell* v. *Hooper*, 24 L. J., Ch. 644.) The committee of a lunatic may, on his behalf and for his benefit, surrender and renew leases under direction of the Lord Chancellor, and be admitted tenant of copyholds. (16 & 17 Vict. c. 70.)

Persons under duress or intoxicated.

Leases executed by persons under duress, in fear of loss of life or limb, or so totally intoxicated as not to know the nature and quality of the act they are doing, are not binding upon them.

Aliens.

An alien (not being alien enemies, *ante*, p. 43) may become a lessee as freely as a natural-born British subject. (33 Vict. c. 14, s. 2.)

Convicts.

The administrator of the property of a person who has been convicted of treason or felony, and sentenced to death or penal servitude, may take such leases as may become necessary to the proper management of the convict's property. (33 & 34 Vict. c. 23.)

Corporations.

Corporations aggregate may take leases in their corporate capacity (Bac. Ab. "Corporations," (E 4), which will go in succession, unlike leases to a corporation sole, which at his death (in the absence of

contrary custom, Bac. Ab. "Corporations," (E 4), devolve on his executors. (Co. Litt. 4 b). Leases to corporations, if for immoderate and unusual terms, as 100 years (*Rowles* v. *Mason*, 2 Brownl. 197), 81 years (*Hemming* v. *Brabazon*, Bridg. 7), may bring the land into mortmain and incur forfeiture. (See also *Jesus Coll.* v. *Gibbs*, 1 Y. & C., Ex. 145.) One of its members can not become lessee to a corporation. (*Salter* v. *Grosvenor*, 8 Mod. 303.)

Trustees for charitable uses.

Trustees for charitable uses may take leases of lands in England and Wales. These must, in accordance with the Mortmain Acts (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), be by deed sealed and delivered in presence of at least two credible witnesses (*Wickham* v. *Marquis of Bath*, 35 L. J., Ch. 5), twelve calendar months before the lessor's death, and enrolled in Chancery within six calendar months after execution thereof. They must take effect in possession within one year from the date (26 & 27 Vict. c. 106), without any power of revocation other than is specially permitted by the acts. A colourable lease, made in evasion of the Mortmain Acts, is void as against the heir of the lessor. (*Doe* v. *Lloyd*, 5 Bing. N. C. 741.)

Trustees of friendly societies.

Trustees of friendly societies are empowered, with the consent of a majority of the members, to take leases of buildings and land (not exceeding one acre in extent) in trust for the use of the society. (18 & 19 Vict. c. 63, s. 16.)

Trustees of public baths and washhouses.

Municipal corporations and commissioners appointed for the purpose may, with the sanction of the vestry, take leases of baths and washhouses for the public use. (9 & 10 Vict. c. 74, s. 27.)

Trustees for religious, educational,

Leases made to trustees of any society for religious purposes, or for the promotion of education,

art, literature, and science, of not more than two acres of land, for full rent or value, are exempt from the Mortmain Acts. (31 & 32 Vict. c. 44, s. 1.) Literary, and scientific societies.

Trustees of bankrupts may not take leases of the bankrupt's estate for their own benefit. (*Ex parte Bennett*, 10 Ves. 381; *Ex parte Badcock*, M. & Mac. 231; *Ex parte Wright*, 2 Rose, 244.) If they do so they may be removed. (*Ex parte Reynolds*, 5 Ves. 707; *Ex parte Alexander*, 2 M. & A. 492.) But, acting for the benefit of the creditors generally, they may either take, or, with leave of the court, disclaim leaseholds vested in the bankrupt at the date of his bankruptcy (32 & 33 Vict. c. 71, s. 23), including parol leases, leases from year to year, and agreements for leases. (*Slack* v. *Sharpe*, 8 A. & E. 366; *Ex parte Hopton*, 2 M., D. & D. 347; *Ex parte Benecke*, 2 M. & A. 700; *Ex parte Llynvi Coal Co.*, L. R., 7 Ch. 28.) Upon electing to keep the lease, the trustee becomes personally liable for the rent and covenants, whilst the act does not in express terms relieve the bankrupt lessee from future liability in respect of the lease, though his discharge under the bankruptcy will, it is assumed, do so. (See ss. 31, 49, and *Ex parte Llynvi Coal Co.*, *supra*.) If the trustee disclaim, the lease reverts to the lessor, whose remedy is to prove for the difference between the then letting value and the rent reserved in the lease, calculated for the residue of the term. (Sect. 23.) Trustees of bankrupts.

Spiritual persons performing the duties of any ecclesiastical office may not take leases for occupation of more than eighty acres of farming land without the written permission of their bishop. (1 & 2 Vict. c. 106, s. 28.) If they do, the lease is voidable. Ecclesiastics.

Parish officers.

Churchwardens and overseers may take leases of houses and lands for parish purposes (59 Geo. 3, c. 12, ss. 12, 17); and guardians of the poor, with the approval of the Poor Law Board, may take leases temporarily, or for not more than five years, of lands and buildings for the relief or employment of the poor, and for their own use. (30 & 31 Vict. c. 106, s. 13.)

CHAPTER III.

WHAT MAY BE DEMISED.

ALMOST every sort of tenements and hereditaments, incorporeal as well as corporeal, advowsons (3 Dyer, 323), annuities (Co. Lit. 144 b), corrodies (Bac. Ab. "Leases," (A), estovers (*ib.*), ferries (*Rex* v. *Nicholson*, 12 East, 330; *Peter* v. *Kendal*, 6 B. & C. 703), fisheries (*Somerset* v. *Fogwell*, 5 B. & C. 875), franchises (*ib.*), rights of common (*Smey* v. *Brown*, Latch, 99), rights of herbage (*Tottel* v. *Howel*, Noy, 54), rights of way (*Newmarch* v. *Brandling*, 3 Swanst. 99; *Osborn* v. *Wise*, 7 C. & P. 761), tithes (*Cox* v. *Brain*, 3 Taunt. 95), tolls (*Oldroyd* v. *Crampton*, 4 Bing. N. C. 24; *Bridgland* v. *Shapter*, 5 M. & W. 375; *Harris* v. *Morrice*, 10 M. & W. 260; *Walker* v. *Richardson*, 2 M. & W. 882), goods, furniture (Bac. Ab. "Leases," (A), sheep and other live animals (*Spencer's case*, 5 Co. 16 b), and almost all else, even offices of trust, save those connected with the public revenue and justice, may be let on lease for a term of years. But none of the properties enumerated in the above formidable list fall properly within the scope of a work so elementary as the present, in which, as we have said, we propose to treat simply of the letting of lands, houses and other tenements.

CHAPTER IV.

THE DEMISE—ITS REQUISITES AND NATURE.

SECT. 1.—*Leases.*

Leases and licences distinguished.

IT is desirable at the outset to distinguish between a lease and a licence. A lease or demise entitles the tenant to the *exclusive* possession, for some definite period, of the matter demised; but if a person is not to have the exclusive possession of, or sole dominion over the matter, then his limited right to use and enjoyment is a licence. Thus, where permission is given to a man to use a building or a field for a given purpose, but the building or field remains under the control of the owner, a licence and not a lease is created. (*Hancock* v. *Austin*, 14 C. B., N. S. 634; 32 L. J., C. P. 252; *Reg.* v. *Morrish*, 32 L. J., M. C. 245; *Watkins* v. *Gravesend*, L. R., 3 Q. B. 350; 37 L. J., M. C. 73; *Roads* v. *Trumpington*, L. R., 6 Q. B. 56; 40 L. J., M. C. 35.) It is of some importance that this distinction should be borne in mind, since the relationship of landlord and tenant not being created, there is neither the right in the licensor to distrain (*Hancock* v. *Austin*, *supra*), nor liability on the part of the licensee to pay rates as an occupier. (*Reg.* v. *Morrish*, *supra*.)

Common law requirements for leases.

No property in incorporeal property separate from corporeal could ever be passed except by deed; and, therefore, a lease of such,—as, for example, of the right of hunting, shooting or fishing;

a right of way or passage for water; a lease of tithes, or the like,—has necessarily been by deed to be valid. (*Somerset* v. *Fogwell*, 5 B. & C. 875; *Bird* v. *Higginson*, 2 A. & E. 696; 6 A. & E. 824; *Gardiner* v. *Williamson*, 2 B. & Ad. 336.) Moreover, a corporation can only bind itself by a deed under its common seal, and with that formality only grant leases. (*Partridge* v. *Ball*, 1 Ld. Raym. 136; but see *Ecclesiastical Commissioners* v. *Merral*, L. R., 4 Ex. 162.) With these two exceptions, leases were not required by the common law to be in writing.

Alterations by Statute of Frauds.

By the Statute of Frauds (29 Car. 2, c. 3), it is enacted, s. 1, that "all leases, estates, interests 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 by the parties so making or creating the same, or their agents thereunto lawfully authorized by writing, shall have the effect of leases or estates at will [but enlarged into a tenancy from year to year by payment of rent; *ante*, p. 5], any consideration for making any such parol leases or estates notwithstanding." But by sect. 2, leases not exceeding three years, whereupon the reserved rent amounts to two-thirds of the full improved value, are excepted. By the 8 & 9 Vict. c. 106, s. 3, it is provided that "a lease required by law to be in writing, of any tenements or hereditaments made after the 1st of October, 1845, shall be void unless made by deed."

8 & 9 Vict. c. 106, s. 3.

Leases exceeding three years by deed.

As to corporeal property, therefore, it follows that all leases for more than three years must be by deed; but leases for three years from the making thereof, and not from a future day (*Rawlins* v. *Turner*, 1 Ld. Raym. 736), or from a future day to a day not more distant than three years from

the making (*Ryley* v. *Hicks*, 1 Stra. 651; *Edge* v. *Strafford*, 1 Tyr. 294), reserving a rent of not less than two-thirds the full annual value, may be made by a verbal letting or by writing not under seal. And a lease for less than three years does not require to be by deed by reason of its giving the tenant an option to prolong the tenancy for more than three years from the date of making the lease. (*Hand* v. *Hall*, 25 W. R. 734; L. R., 2 Ex. D. 355; 46 L. J., Ex. 603.)

Short leases under 8 & 9 Vict. c. 124.

To facilitate and shorten leases the statute 8 & 9 Vict. c. 124, was passed, giving a short form which may be adopted if desired. The form is not very satisfactory and is seldom used.

Essentials of lease.

It is necessary that a lease should contain (1) proper parties; (2) words of present demise; (3) a description of the premises to be demised; (4) the commencement and duration of the term; and (5) the rent; and, of course, when the term is more than three years, execution as a deed. An instrument containing these matters is a lease (*Wright* v. *Trezevant*, Moo. & M. 231); it is immaterial in what order they are placed, or in what language expressed. A lease not required to be by deed may even be constituted by the letters of the parties. (*Chapman* v. *Bluck*, 4 Bing. N. C. 187, 194.) When required to be by deed, it may either be by indenture or deed-poll. Though the above-mentioned matters are the essentials of a lease, the agreement of the parties often necessitates the insertion of other matters. It is therefore proposed to consider in detail, not only the before-mentioned matters, but other points necessary to be borne in mind in the construction of leases.

Date.

A date is not necessary to a lease. When by deed it takes effect from the date of delivery. So that if there be no date, or an impossible one, as

the 30th of February, it takes its date and operation from the day of delivery. (*Styles* v. *Wardle*, 4 B. & C. 908.) If the date be a sensible one, the delivery will be assumed to have been on that day, in the absence of proof to the contrary. But either party may give parol evidence that the date is false, and so give the lease operation from the delivery only. (*Steele* v. *Mart*, 4 B. & C. 272, *post*, p. 65.)

The parties.

The full christian and surnames of the parties, with their residence and profession or trade, are usually inserted; but any description is sufficient which clearly distinguishes a party from all others. (Shep. Touch. 233.) It has been held that a party need not be otherwise named than by signing and sealing the deed. (*Nurse* v. *Frampton*, 1 Ld. Raym. 28.) When the lease is executed by the agent or attorney of the landlord, the landlord and not the agent must be named and described as the party to the deed. (*Berkeley* v. *Hardy*, 5 B. & C. 355.)

Words of demise.

The usual words of demise are "demise" or "lease." But there is no magic in these particular words. Formerly nice questions arose as to whether an instrument was a lease or merely an agreement for a lease, the leaning of the courts being to construe every instrument which showed an intention that the relation of landlord and tenant should arise as an actual lease. Since the passing of 8 & 9 Vict. c. 106, requiring (sect. 3) leases for more than three years to be by deed, it has been the practice of the courts to regard instruments which cannot operate as leases, although in terms present demises, as agreements for leases. (*Parker* v. *Taswell*, 27 L. J., Ch. 812; *Tidey* v. *Mollett*, 16 C. B., N. S. 298; 33 L. J., C. P. 235; *Martin* v. *Smith*, L. R., 9 Ex. 50; 43 L. J., Ex. 42.) Subject to this qualification, any words which are sufficient to explain the intention of

the parties that the one shall divest himself of possession, and the other come into it for a determinate time, whether such words 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 used. (Bac. Ab. "Lease" (K.) Thus the words, "A. doth let" (*Harrington* v. *Wise*, Cro. Eliz. 486); "A. agrees to let and B. to take" (*Doe* v. *Ries*, 8 Bing. 178; *Poole* v. *Bentley*, 12 East, 168); "You shall have a lease of," &c. (*Maldon's case*, Cro. Eliz. 33); "A. agrees to pay to B. a certain rent for," &c. (*Wright* v. *Trezevant*, Moo. & M. 231); or a covenant that another shall have, hold, and enjoy (*Tisdale* v. *Essex*, Hob. 34; *Drake* v. *Munday*, Cro. Car. 207), followed by the entry of the tenant, would amount to a lease. (*Staniforth* v. *Fox*, 7 Bing. 590; *Doe* v. *Ashburner*, 5 T. R., 168; *Hancock* v. *Caffyn*, 8 Bing. 358; 1 Platt on Leases, 579—611.)

Instrument operates as lease or agreement according to the intent.

In determining whether an instrument is a lease or merely an agreement for a lease, the courts endeavour to give effect to the apparent intention of the parties (*Morgan* v. *Bissell*, 3 Taunt. 65); and while, on the one hand, the most informal words, showing that the parties have finally determined that one person is to give and the other to take possession, and the terms of his possession, will operate as a demise (*Bicknell* v. *Hood*, 5 M. & W. 104, *per* Parke, B.); yet, on the other hand, if the most proper words are made use of whereby to describe and pass a present lease for years, and upon the whole instrument there appears no such intent, but that they are only preparatory and relative to a future lease to be made, the law will rather do violence to the words than break through the intent of the parties. (Bac. Ab. "Leases" (K.) However, a

mere agreement for or reference to a lease to be drawn up at some future time will not, in itself, reduce an instrument containing words of demise and the terms of the tenancy to an agreement. (*Doe* v. *Groves*, 15 East, 244; *Baxter* v. *Browne*, 2 W. Bl. 973; *Warman* v. *Faithfull*, 5 B. & Ad. 1042; *Chapman* v. *Bluck*, 4 Bing. N. C. 187.) But an express stipulation that the instrument shall not operate as a lease will overrule words of demise (*Perring* v. *Brook*, 1 M. & Rob. 510); so will any clause which shows the parties do not intend to be placed in the position of landlord and tenant until something further has been done, *e. g.*, a clause that a third person shall ascertain the manner of working the products of a mine agreed to be let (*Jones* v. *Reynolds*, 1 Q. B. 506; 10 L. J., Q. B. 193), or that the tenancy shall commence on performance of a condition. (*Doe* v. *Clark*, 7 Q. B. 211; 14 L. J., Q. B. 233.) For the reason above stated, however, questions of this description seldom occur now in practice.

Description of property demised.

The lease should describe with reasonable certainty the property demised, in order to avoid dispute afterwards. A demise of property is *primâ facie* to be taken as including that, and that only, which answers the description at the date of the lease. (*Kerslake* v. *White*, 2 Stark. 508; *Doe* v. *Burt*, 1 T. R. 701; *Kooystra* v. *Lucas*, 5 B. & Ald. 830.) But it would include any portion of the property severed for a mere temporary purpose, as the doors or locks of a house; it would include also, without specific mention, all rights and privileges necessary for its enjoyment.

Any general description is sufficient which clearly ascertains what was intended to pass by the lease, *e. g.*, "the farm called A;" "the house being No. 185, Fleet Street;" "the cottage at B. now in the occupation of C.," or the like. And

it may be shown by parol evidence what was and what was not intended to be included in a description. (*Goodtitle* v. *Southern*, 1 M. & S. 299; *Baird* v. *Fortune*, 10 W. R. 2.) But however general a description may be, if all its terms fit some particular property, you must not construe it to take in anything but that property. (*Per* Lord Selborne, *Hardwick* v. *Hardwick*, L. R., 16 Eq. 168; 42 L. J., Ch. 636.) Therefore a lease of "all mills, &c. in the parish of A.," will not pass a mill at B., though both be under the same roof (*Hall* v. *Combes*, Cro. Eliz. 368; *Pedley* v. *Dodds*, L. R., 2 Eq. 819), and a lease of a messuage and two-yard land in B. in the possession of G. was held to pass only such of the two-yard land as was in the possession of G., although part not in his possession had from time out of mind been parcel of the two-yard land. (*Bartlett* v. *Wright*, Cro. Eliz. 299; *Dyne* v. *Nutley*, 14 C. B. 122; and see *Webber* v. *Stanley*, 33 L. J., C. P. 217; 16 C. B., N. S. 698.) But if property be described as lying in A. and B., it is not necessary it should lie in both; it is sufficient if it lie in either. As to property described as "at or within" a certain place, "at" may be construed "near." (*Homer* v. *Homer*, L. R., 8 Ch. D. 758; 47 L. J., Ch. 635.) Where there was in a lease a precise description by metes and bounds and a plan of a house and premises, but a stable occupied with the house for many years previously was not included in the metes and bounds or on the plan, it was held not to pass under the general words of "all stables to the said premises hereby demised, belonging or appertaining" (*Maitland* v. *Mackinnon*, 32 L. J., Ex. 49); for it may be that something not within the boundary set out would pass if necessarily a part of the premises, as, for instance, a front

area; but the stable could not pass on that principle, because, undoubtedly, it was not *necessarily* a part of the dwelling-house and land as described. (*Ibid.*, per Pollock, C. B.)

Where several means of identifying the property are used, and all the terms of description do not fit with accuracy any particular property, it becomes a question to what extent words of particular explanation may qualify words of general description. "The rule," observes Parke, J., in *Doe* v. *Galloway* (5 B. & Ad. 51), "is clearly settled that, when there is a sufficient description set forth of premises by giving the particular name of a close or otherwise, we may reject a false demonstration; but that, if premises be described in general terms and a particular description be added, the latter controls the former." It matters not, however, which description is placed first, and which last, in the sentence (Taylor, Evidence, s. 1104); for the whole facts must be considered to see which was the leading and which the subordinate description. (*Hardwick* v. *Hardwick*, *supra*.) Thus in a demise of the meadow called B., described as containing ten acres, but in truth containing 20 acres, the whole 20 acres will be included. (Shep. Touch. 248.) So, in a lease of all that part of the park called B., situate and being in the county of O., lying within certain specified abuttals, with all houses, &c. thereto belonging, and now in the occupation of S., the reference to the occupancy of S. was rejected in favour of a house answering the rest of the description. (*Doe* v. *Galloway*, *supra*.) In like manner in a lease of "the Trogues farm, now in the occupation of C.," the reference to the occupation of C. was rejected. (*Goodtitle* v. *Southern*, 1 M. & S. 299; *Morrell* v. *Fisher*, 19 L. J., Ex. 273; 4 Ex. 591; *Griffithes* v. *Penson*, 11 W. R.

313; and see *Hardwick* v. *Hardwick, supra; Whitfield* v. *Langdale*, 45 L. J., Ch. 177; L. R., 1 Ch. D. 61; *Travers* v. *Blundell*, 36 L. T. 341.) So it is said, if a landlord having but one house in a street, were to describe it in the lease by a wrong number, and then let a tenant into possession under it, the number would be rejected as an immaterial part of the description. (*Hutchins* v. *Scott*, 2 M. & W. 816, *per* Lord Abinger, C. B.)

When a plan is used it should be perfectly correct; for unless its effect be restrained by express provision in the deed, it will probably control any description contained in the body of the lease. (*Llewellyn* v. *Earl of Jersey*, 11 M. & W. 183; *Barton* v. *Dawes*, 10 C. B. 261; 19 L. J., C. P. 302; *Lyle* v. *Richards*, 35 L. J., Q. B. 214; *Davis* v. *Shepherd*, L. R., 1 Ch. 410; 35 L. J., Ch. 581; *Manning* v. *Fitzgerald*, 29 L. J., Ex. 24.)

When the property is described, and professedly demised, by an admeasurement, followed by the words "more or less" (*Day* v. *Fynn*, Owen, 133; *Neale* v. *Parkin*, 1 Esp. 229), or "thereabouts" (*Davis* v. *Shepherd*, *supra*), or similar terms, they must be taken to be confined to a *reasonable* difference in quantity from that stated. And if let at a specified rental per acre, the admeasurement would, it seems, have to include all comprised in the lease, not excepting the half of a public highway, brook, or drain forming the boundary of the property. (See *Re Popple and Barratt's Contract*, 25 W. R. 248.)

There are some words of description which signify more than at first sight they seem to import. Thus "farm" includes the farm-house and all the land used therewith (Co. Litt. 5 a); "messuage" includes a dwelling-house, with orchard, garden and curtilage, or land attached

(*Smith* v. *Martin*, 2 Saund. 400); "house" has a like significance (*Ib.*; *Cole* v. *West London and Crystal Palace Rail. Co.*, 28 L. J., Ch. 767); and "mill" includes everything belonging to the mill. (*Thorpe* v. *Milligan*, 5 W. R. 336.) "Land" includes not only the land, but houses and everything growing on or attached to the land. (Co. Litt. 4 a.) "Water" does not extend to land under it, though "pool" does. (Ad. Eject. 19.) The proper description of a piece of water is "land covered with water." (*Challenor* v. *Thomas*, Yelv. 143; 2 Bl. Com. 18.)

A demise of the "issues and profits" of land is the same as the demise of the land itself. (*Parker* v. *Plummer*, Cro. Eliz. 190.) A grant of the pasture of land will be taken as a grant not only of the feeding on the land, but the land itself; and so the grant of a wood will pass the soil as well as the timber. (Co. Litt. 4 b.)

In informal leases a vague description is often attempted to be eked out by such words as "with all appertaining thereto," or "thereunto belonging;" and inasmuch as the parcels to be included depend upon the intention of the parties, these words will generally be construed as "usually occupied with," or "lying to." (*Hill* v. *Grange*, 1 Plowd. 170; *Ongley* v. *Chambers*, 1 Bing. 496.) But in a recent case, on an agreement for a lease of a furnished house "and premises, with gardens, pleasure grounds, coach-house and stabling thereto belonging," it was held that a meadow adjoining the said premises did not pass, and that evidence to show that it was the intention of the parties that the meadow should pass was not admissible. (*Minton* v. *Geiger*, 28 L. T., N. S. 449.) When general words are intended to be relied upon, they should be such as "and all the premises usually or at any time heretofore demised, occupied, held or

enjoyed with the same or any part thereof." (See *Kay* v. *Oxley*, L. R., 10 Q. B. 360; 44 L. J., Q. B. 210.)

"Appurtenances," signification of.

It is said that "appurtenances" has a very comprehensive signification (2 Platt on Leases, 33); but it seems very doubtful whether under that term anything will pass that would not pass without it by operation of law, as part of the property demised. (*Watts* v. *Kelson*, L. R., 6 Ch. 174; 40 L. J., Ch. 126; *Polden* v. *Bastard*, L. R., 1 Q. B. 156; 35 L. J., Q. B. 92; *Worthington* v. *Gimson*, 29 L. J., Q. B. 116.)

Implied easements over adjoining property.

Questions sometimes arise, where the lessor is the owner of property adjoining that demised, as to what easements over the property retained pass by implication of law under the demise. It seems that there will pass without mention all easements necessary for the beneficial enjoyment of the property demised and all such easements as are continuous and apparent (see *Watts* v. *Kelson*, *supra*), but restricted in duration to the period for which the lessor had power to grant at the date of the lease. (*Booth* v. *Alcock*, 42 L. J., Ch. 557; L. R., 8 Ch. 663.)

Rights of tenant in respect of lights.

It is a rule of law that a grantor shall not derogate from his grant; and therefore in the absence of any express provision upon the point, if a man, possessed of a piece of land and a house adjoining, sell the house, retaining the land, he may not by any new or altered erections interfere with the lights of the sold property existing at the time of sale. (*Swansborough* v. *Coventry*, 9 Bing. 305; *Robinson* v. *Grave*, 21 W. R. 569.) If on the other hand he sell the land, retaining the house, the purchaser may put up what erections he please, although by so doing he stop up the ancient lights of the vendor. (*Ellis* v. *Manchester Carriage Co.*, L. R., 2 C. P. D. 13; 25 W. R. 229;

Curriers' Co. v. *Corbett*, 2 Dr. & Sm. 360.) In either case a subsequent purchaser from, or other person claiming under, the vendor, is in the same position as himself. A lease is a sale *pro tanto* (*Shepheard* v. *Beetham*, 46 L. J., Ch. 763; 25 W. R. 764), and therefore the same principles apply in the letting as upon the sale of two adjoining premises, the lessee prior in date having the same rights as a purchaser prior in date. Thus a lessor having granted a lease to A., neither he nor his subsequent lessee of adjoining premises could by alteration obstruct the lights existing at the time of demise. (*Reviere* v. *Bower*, Ry. & M. 24; *Coutts* v. *Gorham*, Moo. & M. 396.) On the other hand, the first lessee would be entitled to make alterations in his premises notwithstanding by so doing he interfered with the lights of adjoining premises subsequently let to another tenant. (*Warner* v. *McBryde*, 36 L. T. 360; and see *Master* v. *Hansard*, 46 L. J., Ch. 505; L. R., 4 Ch. D. 718.)

Exceptions and reservations.

A demise is often made subject to certain exceptions and reservations in favour of the landlord. An exception is a restriction by which the landlord retains to himself a part of the parcels which would otherwise pass to the tenant under the general terms of the description; a reservation is a creation in the landlord's favour of something not part of the parcels, but issuing out of them, as a rent or services.

The most important essentials of an exception are that it should be in favour of the landlord, and not of a stranger; that it should be part only of the property, and not the greater part, and that it should be of a particular thing out of property comprised in general words or under a general denomination, and must not be of any of the matters which have in express terms been de-

mised. Therefore, in a demise of a house and shops, excepting the shops; or of certain tenements, excepting a moiety; or of twenty acres of land excepting ten acres; in each case the exception is bad. And though parcels are granted in general terms, an exception which tends to frustrate the grant cannot be maintained. (2 Platt on Leases, 37.)

The most usual exceptions are of woods, timber trees, mines and minerals.

The rule of construction as to what is included in an exception is the same as in that of the thing demised; and, therefore, an exception of "all woods" includes the soil intervening between the trees (*Ive* v. *Sams*, Cro. Eliz. 521; *Whistler* v. *Paslow*, Cro. Jac. 487; 5 Dav. Conv. 225); so of "all underwoods" (*Legh* v. *Heald*, 1 B. & Ad. 622); but by an exception of "timber trees," nothing but the soil they occupy will be included. (*Whistler* v. *Paslow*, *supra;* Co. Litt. 4 B.) "Wood and underwood" does not include fruit trees (*Wyndham* v. *Way*, 4 Taunt. 316); and "timber trees and other trees, but not the annual fruit thereof," does not include apple trees. (*Bullen* v. *Denning*, 5 B. & C. 842.) An exception of "mines and minerals" includes 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 the nature of the transaction to induce the court to give it a more limited meaning (*Hext* v. *Gill*, L. R., 7 Ch. 699; 41 L. J., Ch. 761), that is, everything except the mere surface which is used for agricultural purposes. (*Midland Rail. Co.* v. *Checkley*, L. R., 4 Eq. 19.)

When anything is excepted, all things depending on it and necessary for the obtaining it are excepted also; as, for example, the right to go on the land to cut the trees excepted, or to sink

shafts to get the minerals. (Shep. Touch. 100; *Cardigan* v. *Armitage*, 2 B. & C. 207; *Proud* v. *Bates*, 34 L. J., Ch. 406.)

Exceptions, so called, but not satisfying the strict requirements of an exception, are sometimes supported upon the equitable ground of giving effect to the intention of the parties. Thus, where there was an agreement to let a farm, except thirty-seven acres, not specifying which, and the tenant took possession, but before the lease was granted, disputes arose respecting the land to be excepted, it was held a good exception, and that as the lease had not been executed, the landlord had the right to select, but that if it had been executed, the tenant would have had the right to select the land to be excepted. (*Jenkins* v. *Green*, 27 Beav. 437; 28 L. J., Ch. 817; but see *Pearce* v. *Watts*, 23 W. R. 771.)

The terms "reservation" and "exception" are often used in respect of that which is neither. This frequently occurs in respect of rights of way and other easements, and rights of shooting, fishing and other privileges. When the landlord purports to "except" or "reserve" to himself an easement, it is in fact a re-grant from the tenant of such easement. (*Durham Rail. Co.* v. *Walker*, 2 Q. B. 940; 11 L. J., Ex. 442.) And so the "reservation" to the landlord of the right of sporting, hunting, fowling or fishing is a re-grant by the tenant of a privilege in the nature of a profit *à prendre*. (*Wickham* v. *Hawker*, 7 M. & W. 63; *Doe* v. *Lock*, 2 A. & E. 743; *Bird* v. *Higginson*, 6 A. & E. 824; *Ewart* v. *Graham*, 29 L. J., Ex. 88; *Rogers* v. *St. Germans Union*, 35 L. T. 332.) As these grants can only be effectual when by deed, a "reservation" of an easement or of the right of sporting must be in a lease under seal which is executed by the tenant. (*Durham Rail. Co.* v.

Walker, supra.) Provided, however, the lease be by deed and executed by the tenant, it is immaterial that what is a re-grant is called an exception or a reservation. (*Graham* v. *Ewart*, 11 Ex. 326; 25 L. J., Ex. 42.)

Parol reservation of game.

It seems that for the purposes of the Game Act (1 & 2 Will. 4, c. 32), there may, in a parol demise, be a parol "reservation" of the game. (*Reg.* v. *Thurlstone*, 28 L. J., M. C. 106; *Jones* v. *Williams*, 46 L. J., M. C. 270; 36 L. T. 559; *Coleman* v. *Bathurst*, L. R., 6 Q. B. 366; 40 L. J., M. C. 131.) An agreement by the tenant not to destroy but to preserve game, does not operate either way, and the right of sporting remains during the tenancy in abeyance. (*Coleman* v. *Bathurst*, *supra.*)

The habendum.

A lease must show with certainty the commencement and duration of the term. This is done in formal leases by the habendum.

Leases commence from a present, future, or past date.

Leases may be made to commence either presently or at a future date, as at Michaelmas next or ten years after, or after the death of A. B. The date from which to compute the term may be a past day, as in a lease dated the 19th of July, 1851, "to hold from the 25th of December, 1849, for the term of fourteen years," the term runs from the latter date (*Bird* v. *Baker*, 28 L. J., Q. B. 7; 1 E. & E. 12); and it is only the same as saying that it is a term for so much as is now to come of a period of fourteen years from the 25th of December, 1849. (*Cooper* v. *Robinson*, 10 M. & W. 694.) But as this is only a method of estimating the duration of the term, no interest passes under it until, and then only from, the date of the lease; nor is the tenant liable in respect of breaches of covenant before that date. (*Shaw* v. *Kay*, 1 Ex. 412; 17 L. J., Ex. 17; *Jervis* v. *Tomkinson*, 26 L. J., Ex. 41.)

Meaning of "from" a given date.

If the date of commencement be named either in terms or by reference to the date of the instrument, and that is a sensible date, it will commence accordingly. A lease "from" a given date, as "from the 25th of March," or "from the date hereof," is generally considered exclusive of the day mentioned (Co. Litt. 46 b; *Ackland* v. *Lutley*, 9 A. & E. 879; *Wilkinson* v. *Gaston*, 9 Q. B. 137; *Isaacs* v. *Royal Insurance Co.*, 39 L. J., Ex. 189), though it may be construed either as exclusive or inclusive, according to the context and apparent intention of the parties. (*Pugh* v. *Duke of Leeds*, Cowp. 714) The words "from the day of the date" and "from henceforth" mean the same thing. (*Llewelyn* v. *Williams*, Cro. Jac. 258.)

Commencement when no date, in case of a deed, from delivery.

If no date is named for the commencement, and the lease is by deed, its commencement dates from the delivery of the deed. (Co. Litt. 46 b; *ante*, p. 52.) And so if the lease is to hold "from the making hereof," or "from henceforth," or from any date to be ascertained by relation to the time when the lease is to commence to operate, in each case the reference must be taken to be to the delivery; for a deed has no operation until delivery. (Co. Litt. 46 b.) Thus, where a lease was dated the 25th day of March, 1783, but was not executed until some time after, and the habendum was "from the 25th of March now last past," this was held to mean the 25th of March (1783) preceding the execution, and not the one (1782) preceding the date of the lease. (*Steele* v. *Mart*, 4 B. & C. 279.) Where a deed has no date, or an impossible date, a lease from the date shall begin from the delivery; but if the lease have a sensible date, the word "date" means the actual date of the lease, and not of the delivery. (*Styles* v. *Wardle*, 4 B. & C. 908; *Doe* d. *Ulph*, 13 Q. B. 204; *ante*, p. 53.)

In case of a parol letting from entry.

If no date is mentioned, and the letting is not

by deed, the tenancy will commence from the day of entry. (*Kemp* v. *Derrett*, 3 Camp. 510; *Doe* v. *Matthews*, 11 C. B. 675.) But where a tenant, having entered in the middle of a quarter, paid rent for that half quarter on the next quarter day, and from that time paid rent from quarter to quarter, it was held that his tenancy commenced on the quarter day succeeding his entry. (*Doe* v. *Stapleton*, 3 C. & P. 275; *Doe* v. *Johnson*, 6 Esp. 10; *Doe* v. *Grafton*, 18 Q. B. 496.) And where an agreement for a tenancy was dated the 20th of December (on which day the tenant entered), and the rent was only reserved from Christmas-day,—that is, the first payment was to be made on the 25th of March,—it was held that the tenancy commenced at Christmas. (*Sandill* v. *Franklin*, L. R., 10 C. P. 377; 44 L. J., C. P. 216.)

It is said that a lease from a date which is not impossible but is uncertain is bad,—thus, from the 20th day of November, not saying in what year. (*Anon.*, 1 Mod. 180.) But it is submitted that this would not be so held now, but that according as it was a lease or an agreement for a lease, the tenant or landlord might elect which was to be the year referred to. (*Anon.*, Leon. 227; *Jenkins* v. *Green*, 28 L. J., Ch. 817.)

The day of commencement need not be expressly stated; it may be fixed by reference to a contingency which must happen, though the time of happening is uncertain.

Duration of term must be ascertained.

The duration of the term must be rendered certain, either by express limitation or by reference to some collateral date, which may with equal certainty measure the continuance of it, otherwise it is void. (Bac. Ab. "Leases" (L. 3.) Thus, where B. agreed to take certain premises, paying sums varying in amount up to a certain date, and after that date a rent of 97. until the lease, and no mention

was made of the period of duration of the lease, it was held a good demise up to the time previous to the commencement of the rent of 9*l.* (*Gwynne* v. *Mainstone*, 3 C. & P. 302.) A lease to one during the minority of J. S. is good, and if J. S. die before majority the lease is determined. And equally good is a lease for twenty-one years, if the coverture between A. and B. shall so long continue, or if J. S. shall so long continue parson of Dale. (Bac. Ab. "Leases" (L. 3.) If a man make a lease for so many years as A. shall live, no certain number being named, the lease as for a term will be void. (Shep. Touch. 275.) A lease to two for years, if they so long live, will determine by the death of one of them, but not if the contingency be, if they or *either* of them so long live. (*Daniel* v. *Waddington*, 1 Roll. R. 309; *Vaux' cases*, Cro. Eliz. 269.)

A lease for years, not saying how many, is a lease for two years; because for more there is no certainty; for less no sense in the words. (Bac. Ab. "Leases" (L. 3.) A demise for one year, and so on from year to year, is a lease for two years certain. (*Doe* v. *Green*, 9 A. & E. 658.) Where A. who was lessee of a shop for a term, of which ten years was unexpired, agreed to let it to B. at a specified rental, and further agreed not to give B. notice so long as he continued to pay the rent when due, it was held that B. was not merely yearly tenant, but that he had a right to remain in possession upon paying the rent for the unexpired residue of the term. (*Re King's Leasehold*, 21 W. R. 881; L. R., 16 Eq. 521; *Kusel* v. *Watson*, 26 W. R. 653, varied on app., 23 Sol. Jour. 382; but see *Wood* v. *Beard*, 46 L. J., Q. B. 100; L. R., 2 Ex. D. 30; and, *quære* what construction would have been adopted if the landlord owned the fee.)

Option to determine

A lease for a given period, determinable earlier

at end of a portion of term.

at the option of the parties, *e. g.*, a lease for twenty-one years, determinable at the end of seven or fourteen years, is good. Where the option is given to each party, either or his representatives may determine it at one of the stated periods. (*Goodright* v. *Mark*, 4 M. & S. 30; *Roe* v. *Hayley*, 12 East, 464; *Bird* v. *Baker*, 1 E. & E. 12.) If the lease be silent as to who is to have the option, the lessee alone has it (*Dann* v. *Spurrier*, 3 B. & P. 399; *Price* v. *Dyer*, 17 Ves. 356; *Doe* v. *Dixon*, 9 East, 15); and this, notwithstanding the lessor supposed he had the same option. (*Powell* v. *Smith*, L. R., 14 Eq. 85.) But a lease for twenty-one years, "determinable nevertheless in seven or fourteen years, if the parties shall so think fit," is determinable only by both. (*Fowell* v. *Franter*, 3 H. & C. 458; 34 L. J., Ex. 6.)

The reddendum.

The lease should define the amount of rent to be paid, to whom, at what time, and how. This, in formal leases, is by the reddendum commencing, "yielding and paying."

Rent defined.

A rent is a certain profit issuing yearly out of lands and tenements corporeal. (Co. Litt. 144.) Though usually so, it is not necessarily, money; but it cannot be part of the profits of the demised premises, as the herbage or vesture. It must be certain, or capable of being rendered certain, so that rent after the rate of 18*l.* per annum was held void. (*Parker* v. *Harris*, 1 Salk. 262.) It is sufficient, however, if the amount, though not fixed in the reservation, is ascertainable by it. Thus, where a tenant agreed to pay so much a quarter for every yard of marl he might get, and an additional sum for every thousand bricks he might make, this was held to be sufficiently certain. (*Daniel* v. *Gracie*, 6 Q. B. 145.) It must be reserved out of something to which the lessor can have recourse to distrain. Therefore it cannot be reserved out of

Necessary incidents of rent.

incorporeal hereditaments (*Buszard* v. *Capel*, 8 B. & C. 141); but a grant of rent in respect of things incorporeal may operate as a personal contract, and so bind the grantor. (Co. Litt. 47 a.) The rent should be reserved to the lessor, and not to a third party. Where the lessor is the owner of the fee, the reservation ought to be to himself, his heirs and assigns, and not to his heirs, executors, administrators and assigns; but it will nevertheless go to his heirs, because it follows the reversion. (Co. Litt. 47 a.) If rent be reserved generally by the lessor, without saying to whom, it will follow the nature of the lessor's interest, and, if he have an estate of freehold, will, after his death, go to the heir; if he have only a chattel interest, to the executor or administrator. (*Whitlock's case*, 8 Co. 71; *Sacheverel* v. *Frogate*, 1 Vent. 161.)

Covenant defined.

By the consent and to effect intention of the parties leases usually contain covenants, provisoes and conditions. These vary with the nature of the property and its locality, and very often follow a common form in use by the landlord. A covenant is merely a promise or agreement by deed. No precise form of words is necessary to constitute it. (Platt on Covenants, 28.) It may be inserted in any part of the deed, and may be either an express covenant or in the form of a condition, a proviso, an exception, or even a recital. (*Rigby* v. *Great Western Rail. Co.*, 14 M. & W. 811; *Sampson* v. *Easterby*, 9 B. & C. 512; *Saltoun* v. *Houston*, 1 Bing. 433; *Carr* v. *Roberts*, 5 B. & Ad. 78; *Brookes* v. *Drysdale*, L. R., 3 C. P. D. 52; 26 W. R. 331.) If it clearly appear that it was the intention of the party to bind himself for the performance, it will be construed as a covenant. (*Ib.*; *Knight* v. *Gravesend Waterworks Co.*, 2 H. & N. 6; 27 L. J., Ex. 73.) Thus, where a lessee

covenanted that he would at all times plough, sow, manure, and cultivate the demised premises, *except* the rabbit-warren and sheep-walk, this was held a covenant not to plough the rabbit-warren and sheep-walk. (*St. Albans* v. *Ellis*, 16 East, 352.) But it must be clear that the words are intended to operate as an agreement, for a mere proviso at the end of a covenant by the one party will not be construed as a covenant by the other party. (*Treloar* v. *Bigge*, 43 L. J., Ex. 95; L. R., 9 Ex. 151; *Smith* v. *Mayor of Harwich*, 2 C. B., N. S. 651; 26 L. J., C. P. 257.)

What covenants are implied.

Covenants are either express or implied. If a lease contains no express covenants, the law implies what are termed "usual" covenants. These are (1) to pay rent; (2) to pay taxes (except landlord's taxes); (3) to keep and deliver up premises in repair; (4) to cultivate land in accordance with good husbandry; (5) to permit the landlord to enter and view the state of repairs; and (6) for quiet enjoyment until default. (See 2 Platt on Leases, 155—162; *infra*, Sect. 2.)

An express covenant qualifies the generality of an implied one. Thus, an implied covenant for quiet enjoyment will be restrained by an express covenant for quiet enjoyment. (*Merrill* v. *Frame*, 4 Taunt. 329; *Line* v. *Stephenson*, 4 Bing. N. C. 678.) Every covenant is to be expounded with regard to its context, and such exposition must be upon the whole instrument, *ex antecedentibus et consequentibus*, and according to the reasonable sense and construction of the words. (*Iggulden* v. *May*, 7 East, 241.)

Provided they are not illegal or impossible, the parties may attach such conditions as they deem fit to a demise, and secure the observance of those conditions by covenants. (*Jones* v. *Jones*, 12 Ves. 189.) The rights and duties of the parties under

covenants will be dealt with in the subsequent parts of the work relating to those matters which the covenants affect.

Lease by deed must be sealed and delivered.

To make an instrument of demise a deed, it must be sealed and delivered by the lessor and the lessee; but according to the balance of authority, the first section of the Statute of Frauds, requiring leases to be signed, does not apply to leases by deed. (*Cooch* v. *Goodman*, 2 Q. B. 580; *Aveline* v. *Whisson*, 4 M. & Gr. 801; and see *Cherry* v. *Heming*, 4 Ex. 631.) It is not necessary to constitute sealing that there should be either wax or wafer, or any actual impression; the deed may be sealed by using a bit of paper, or by the end of a ruler, without making any impression or mark. And where an instrument is in the form of a deed, and on proper stamps, and it is stated in the attestation to have been sealed and delivered in the presence of the witnesses, it will, in the absence of proof to the contrary, be presumed to have been sealed, though no impression appear. (*Re Mayer*, 40 L. J., C. P. 201; S. C., *sub nom. Re Sandilands*, L. R., 6 C. P. 411; Sug. Powers, 232, 8th ed.) In modern practice the kind of seal made use of is not regarded; and the mere placing the finger on a seal already made is equivalent to sealing (Shep. Touch. 57); and the words "I deliver this as my act and deed," which are spoken at the same time, are regarded as equivalent to delivery, even if the party keep the deed himself. (*Doe* v. *Knight*, 5 B. & C. 671; *Xenos* v. *Wickham*, L. R., 2 H. L. 296; 36 L. J., C. P. 313.) Where a delivery is conditional, and only to take effect upon the happening of some event, or the performance of some act, it is a mere escrow; but on the performance of the condition it takes effect as a deed. (Co. Litt. 36 a.) Possession by a party of a deed executed to him is *primâ facie* evidence

of its having been delivered to him as a deed. (*Hare* v. *Horton*, 5 B. & Ad. 715.)

Execution by attorney.

A lease executed by an attorney must be in the name of the principal, and not of the attorney. (*Frontin* v. *Small*, 2 Ld. Raym. 1418; *Berkeley* v. *Hardy*, 5 B. & C. 355.) The correct form would be, "In witness whereof A. B. by C. D., his attorney, has hereunto set his hand and seal." But it does not matter in what form of words the execution may be if in the name of the principal; thus, "for J. B. (the principal), M. W. (the attorney)," was held sufficient. (*Wilks* v. *Back*, 2 East, 142.) The attorney must have an authority in writing, and when the lease is by deed the authority must be under seal. (Co. Litt. 486; *Berkeley* v. *Hardy*, *supra*.)

Effect of non-execution of lease by lessor.

An instrument which is not executed by the lessor is no lease. (*Soprani* v. *Skurro*, Yelv. 19; *Doe* v. *Wiggins*, 4 Q. B. 367.) If there are two or more lessors, they should all execute, for no more than the shares of those who do will pass. (Co. Litt. 192 a.) And though in an ordinary indenture a covenantee may sue the covenantor, although the former has not executed the deed (*Morgan* v. *Pike*, 14 C. B. 473), yet in the case of a lease not executed by the lessor, the covenants on the part of the lessee will not be binding upon him, though he has executed it (*Swatman* v. *Ambler*, 8 Ex. 72; 22 L. J., Ex. 81; *Pitman* v. *Woodbury*, 3 Ex. 4), unless perhaps in the event of his being allowed to enjoy during the whole contemplated term. (*Cooch* v. *Goodman*, 2 Q. B. 580.) But the lease would regulate the holding as a tenancy from year to year. (See *Bolton* v. *Tomlin*, 5 A. & E. 856.)

Non-execution by lessee.

If a lessee has neither sealed and delivered the indenture of lease, nor entered and taken possession, he cannot be made responsible upon the

covenants; but if he enters and takes possession by force of the lease he is deemed to have covenanted to hold upon the terms of the indenture, and to observe the conditions of the lease. (*Brett* v. *Cumberland*, Cro. Jac. 521; *Mayor, &c. of Lyme* v. *Henley*, 1 Bing. N. C. 237.)

Indorsements.

An indorsement upon a deed will, in the absence of proof, be presumed to have been made before the execution of the deed, and so to be parcel of it. (*Brewster* v. *Kidgell*, Carth. 438; *Flint* v. *Brandon*, 1 B. & P. N. R. 73.) And if made after the signing of the deed, but before delivery, it will be taken as part of the deed. (*Lyburn* v. *Warrington*, 1 Stark. 162.)

Variations of terms of a lease.

As a deed can only be varied by an instrument of as high a nature as itself, after it is once delivered, any variation of its terms or additions thereto, by indorsement or otherwise, must be by a fresh deed duly stamped (*West* v. *Blakeway*, 2 M. & Gr. 751; *Roe* v. *Harrison*, 2 T. R. 425; *Cordwent* v. *Hunt*, 8 Taunt. 596); and in such case the alterations will be taken as a new lease incorporating such of the terms of the old lease as are not expressly varied. (See *Doe* v. *Geekie*, 5 Q. B. 841.)

Mistake.

If in a lease there is a discrepancy between the habendum and the reddendum, the habendum will prevail. If the lease and the counterpart differ, the lease overrides the counterpart. (Shep. Touch. 52, 53.) But the first rule does not apply where it appears upon the face of the lease, construed with the counterpart, that the habendum is wrong; and the second rule does not apply where the lease is inconsistent with itself, and the counterpart is consistent throughout. (*Burchell* v. *Clark*, 46 L. J., C. P. 115; L. R., 2 C. P. D. 88; 25 W. R. 334.) Therefore, where the term mentioned in the reddendum of a lease differed from

that stated in the habendum, but the counterpart throughout stated the term as in the reddendum, the habendum was corrected so as to agree with the reddendum. (Ib.) Where a lessor by mistake inserted in the draft lease a less sum for the rent than that agreed upon, and it was in that form engrossed and executed, it was held that the lessee was entitled to retain or reject the lease, but, if retained, it must be reformed by the insertion of the higher rent agreed upon. (*Garrard* v. *Frankel*, 31 L. J., Ch. 604; 30 Beav. 445; and see *Mackenzie* v. *Hesketh*, L. R., 7 Ch. D. 675; 26 W. R. 189.)

Sureties for the lessee.

Very often the payment of rent and the performance of the lessee's covenants or stipulations are secured by sureties, either by a bond (*Holme* v. *Brunskill*, 47 L. J., C. P. 81, 610; L. R., 3 Q. B. D. 495), by a separate guarantee (*Tayleur* v. *Wildin*, 37 L. J., Ex. 173; L. R., 3 Ex. 303), or more frequently by their joining in the lease. (*Toler* v. *Slater*, 37 L. J., Q. B. 33; L. R., 3 Q. B. 42.) However created, the liability of the surety will be strictly construed (*Whitcher* v. *Hall*, 5 B. & C. 269), and will not make him liable beyond the original tenancy, when a new tenancy is created by waiver of a notice to quit. (*Tayleur* v. *Wildin*, *supra*.) The surety will also be discharged by any new arrangement between the landlord and tenant, not assented to by the surety, varying the original agreement, unless it is self-evident that the alteration cannot prejudice the surety. (*Holme* v. *Brunskill*, *supra*.) If a demise is to two persons jointly, evidence is not admissible of intention that one only should be tenant, and the other a surety.

Registration.

In some cases leases of property in Middlesex and Yorkshire require to be registered. By 7 Anne, c. 20, as regards Middlesex; by 2 & 3

Anne, c. 4, and 5 Anne, c. 18, as regards the West Riding of Yorkshire; by 6 Anne, c. 35, as regards the East Riding and Kingston-upon-Hull, by 8 Geo. 2, c. 6, as regards the North Riding (and as to all, see 37 & 38 Vict. c. 78), a memorial of all deeds and conveyances, and of all wills and devises in writing, concerning and whereby any hereditaments may be in any way affected in law or equity, shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration, unless such 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. The acts (except the West Riding Act) do not extend to any copyhold estates, leases at rack rent or for a term not exceeding twenty-one years, when the actual possession and occupation go with the lease, or to any chambers in Serjeant's Inn or the Inns of Court or Chancery in Middlesex. It is, however, considered advisable, though not clearly necessary, to register leases of copyholds where leases of freeholds would be registered, the leases being a common law interest. (Sug. V. & P. 732, 14th ed.) Although Serjeant's Inn is within the city of London, it is considered that the exception of it from the operation of the act was an error, and does not imply that assurances within the city must generally be registered, and this understanding is usually acted upon in practice. (*Ibid.*) Registering an assignment is not registering the lease. (*Honeycomb* v. *Waldron*, 2 Stra. 1064; *Rowe* v. *Brenton*, 8 B. & C. 755.) By 15 Car. 2, c. 17, leases in the Bedford Level, "except leases for seven years or under, in possession," must be registered.

38 & 39 Vict. c. 87, s. 11.

By 38 & 39 Vict. c. 87, s. 11, registration is extended to leaseholds in whatever part of England situated. But the registration is optional, and is only possible where the lease is for a life or lives, or determinable on a life or lives, or for a term of years of which more than twenty-one years are unexpired, and the lease must not contain an absolute prohibition against alienation. And it is provided by s. 127, that lands within the jurisdiction of the before-mentioned local registries (other than the Bedford Level), if registered under that act, shall, from the date of registration, be exempt from the jurisdiction of such local registries.

Expenses of lease and counterpart.

In the absence of express stipulation, a lease is always prepared by the solicitor of the lessor at the expense of the lessee. The expense of the counterpart is borne by the lessor. (2 Platt on Leases, 539.) The lessor cannot insist on the counterpart being executed in the presence of himself or his agent. (*Borradaile* v. *Smart*, 5 W. R. 270.)

Custody of lease.

During the continuance of the demise, the tenant is entitled to the custody of the lease, and he continues so entitled even after the term created has expired, whether by effluxion of time or forfeiture. (*Hall* v. *Ball*, 10 L. J., C. P. 285; *Elworthy* v. *Sandford*, 34 L. J., Ex. 42; 3 H. & C. 330.) Where there is a lease, executed by both parties, and no counterpart, the tenant who has custody of it is bound to produce it for the landlord to inspect and take copies, even for the purpose of an ejectment. (2 Platt, 542.)

Sect. 2.—*Agreements for Leases.*

A very great number of tenancies, especially agricultural holdings, are under mere agreements,

or under instruments purporting to be leases, but void as such by reason of not being under seal. It is now proposed to consider the essentials and effect of such instruments.

All agreements for leases to be in writing.

By sect. 4 of the Statute of Frauds (29 Car. 2, c. 3), it is provided, "that no action shall be brought to charge any person upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them, unless the agreement or some memorandum or note thereof shall be in writing signed by the party to be charged, or some other person thereunto by him lawfully authorized." This includes all agreements for leases of "any interest in lands or hereditaments," and for however short a period the same may be they must be in writing; so that, although a *lease* for three years or under may be an oral one, an agreement for such a lease must be in writing. (*Edge* v. *Strafford*, 1 Tyr. 295.)

though for a term of less than three years.

An agreement to take furnished lodgings is not within the statute (*Wright* v. *Stavert*, 2 E. & E. 721; 29 L. J., Q. B. 161); but a contract to procure for a person the assignment of a lease is, although by a person who has no interest in the lease. (*Horsey* v. *Graham*, L. R., 5 C. P. 9; 39 L. J., C. P. 58.) So is an agreement to assign rent not yet due. (*Ex parte Hall, Re Whitting*, 27 W. R. 385; 40 L. T. 179.)

Agreement must ascertain the parties and all the essential terms.

An agreement to satisfy the statute must contain, either expressly or by reference to other documents, all the terms, or provide the compulsory means of determining all the terms, of the contract between the parties. (1.)—It must specify both the lessor and the lessee (*Warner* v. *Willington*, 25 L. J., Ch. 662; 3 Drew. 523; *Williams* v. *Jordan*, L. R., 6 Ch. D. 517; 46 L. J., Ch. 681), either by name (*Williams* v. *Lake*, 29 L. J., Q. B. 1), or by some description or reference which sufficiently points out the person referred to. (*Sale* v. *Lam-*

bert, 43 L. J., Ch. 470; L. R., 18 Eq. 1; *Potter* v. *Duffield*, 43 L. J., Ch. 472; *Commins* v. *Scott*, L. R., 20 Eq. 11; 44 L. J., Ch. 563; *Thomas* v. *Brown*, 45 L. J., Q. B. 811; L. R., 1 Q. B. D. 714; *Rossiter* v. *Miller*, 26 W. R. 865; *Catling* v. *King*, 46 L. J., Ch. 384; L. R., 5 Ch. D. 660.) (2.)—It must describe the property to be leased (*Lancaster* v. *De Trafford*, 31 L. J., Ch. 554); but a very general description is ordinarily sufficient (*M'Murray* v. *Spicer*, L. R., 5 Eq. 527; 37 L. J., Ch. 505), as "my house" (*Cowley* v. *Watts*, 17 Jur. 172); "the property in Cable Street" (*Bleakley* v. *Smith*, 11 Sim. 150); "the house in Newport" (*Owen* v. *Thomas*, 3 My. & K. 353); or the like. (1 Dart, V. & P. 219.) The use of the words "*et cetera*," should be avoided as ambiguous (*Price* v. *Griffith*, 1 De G., M. & G. 80; *Naylor* v. *Goodall*, 47 L. J., Ch. 53; 26 W. R. 162); and "the property" was held an insufficient description of colliery plant and stock. (*Vale of Neath Colliery Co.* v. *Furness*, 45 L. J., Ch. 276.) (3.)—It must state the length of the proposed lease. (*Fitzmaurice* v. *Bayley*, 9 H. L. Ca. 78; 27 L. J., Q. B. 143; *Clinan* v. *Cooke*, 1 Sch. & Lef. 22; *Gordon* v. *Trevelyan*, 1 Price, 64; *Cox* v. *Middleton*, 23 L. J., Ch. 618.) (4.)—It must state the time at which the term is to commence (*Nesham* v. *Selby*, 41 L. J., Ch. 173; ib. 551; L. R., 7 Ch. 406; *Hersey* v. *Giblett*, 23 L. J., Ch. 818; *Davis* v. *Jones*, 25 L. J., C. P. 91; *Cartwright* v. *Miller*, 36 L. T., N. S. 398); but in *Jaques* v. *Millar* (47 L. J., Ch. 544; 25 W. R. 846; L. R., 6 Ch. D. 153), where the date of commencement was not stated, it was held to commence from the date of the agreement; and in *Wesley* v. *Walker* (26 W. R. 368; 38 L. T., N. S. 284), from the commencement of the rent;—and (5) it must specify the amount of rent to be paid.

Agreement not necessarily in one document.

It is not necessary the agreement should be a formal instrument, or be contained in a single

paper. It may be contained in a letter or a correspondence (*Kennedy* v. *Lee*, 3 Mer. 441; *Cayley* v. *Walpole*, 39 L. J., Ch. 609), or even in receipt for consideration money. (*Dolling* v. *Evans*, 36 L. J., Ch. 474; *Wesley* v. *Walker*, *supra*; *Evans* v. *Prothero*, 21 L. J., Ch. 772.) Any number of documents, written or printed, provided they contain in themselves clear reference to each other, may be used to evidence the agreement. (*Warner* v. *Willington*, 25 L. J., Ch. 662; *Baumann* v. *James*, L. R., 3 Ch. 508; *Pierce* v. *Corf*, L. R., 9 Q. B. 210; 22 W. R. 299; *Dobell* v. *Hutchinson*, 3 A. & E. 355; *Clinan* v. *Cooke*, *supra*; *Nene Valley Drainage Co.* v. *Dunkley*, L. R., 4 Ch. D. 1.) But they must on the face of them be connected with each other. (*Rishton* v. *Whatmore*, L. R., 8 Ch. D. 467; 47 L. J., Ch. 629; *Williams* v. *Jordan*, L. R., 6 Ch. D. 517; 46 L. J., Ch. 681.) Parol evidence cannot be given to show that two or more documents relate to the same transaction; but where one document refers to other documents by a vague description, parol evidence may be given to identify those documents. (*Owen* v. *Thomas*, 3 My. & K. 353; *Naylor* v. *Goodall*, 37 L. T., N. S. 422.)

A letter containing the terms of the agreement written to a third party (*Gibson* v. *Holland*, L. R., 1 C. P. 1; 35 L. J., C. P. 5), or written to the other party to repudiate the contract upon insufficient grounds (*Bailey* v. *Sweeting*, 9 C. B., N. S. 843; 30 L. J., C. P. 150; and see *Buxton* v. *Rust*, L. R., 7 Ex. 279), the minutes of a limited company containing the terms of an agreement and signed by the chairman (*Jones* v. *Victoria, &c. Dock Co.*, 46 L. J., Q. B. 219; L. R., 2 Q. B. D. 314), or indeed any other writing by which a party *admits* that an agreement has been entered into, and what the terms are, will be sufficient. (*Hammersley* v. *De*

Biel, 12 Cl. & F. 45; and see 1 Dart, V. & P. 207 *et seq.*, 5th ed.) But a solicitor of one party, without express authority to conclude an agreement, has no power to make a binding admission of the terms of the agreement. (*Smith* v. *Webster*, 45 L. J., Ch. 528; L. R., 3 Ch. D. 49.)

Distinction between a treaty and a concluded agreement.

When an agreement is to be made out from a correspondence, it must be clear that there is a concluded assent to all the terms, and not a mere treaty. A proposal met with a simple and unqualified acceptance will be sufficient (*Gretton* v. *Mess*, L. R., 7 Ch. D. 839; 26 W. R. 607); but if the acceptance be subject to some new terms, or otherwise qualified, there will be no agreement until both parties have clearly assented to one and the same set of terms. (*Nesham* v. *Selby*, L. R., 7 Ch. 406; 41 L. J., Ch. 551; *Cartwright* v. *Miller*, 36 L. T. 398; *Cowley* v. *Watts*, 17 Jur. 172; *Watts* v. *Ainsworth*, 1 H. & C. 83; 31 L. J., Ex. 448; *Routledge* v. *Grant*, 4 Bing. 653; *Hussey* v. *Payne*, 47 L. J., Ch. 751; L. R., 8 Ch. D. 670; on appeal, 27 W. R. 585, H. L.) But if in any informal documents the parties have assented conclusively to the same terms, a mere provision that they shall be embodied in a more formal or detailed instrument will not prevent their operating as a concluded agreement (*Ridgway* v. *Wharton*, 6 H. L. Ca. 238; 27 L. J., Ch. 46; *Cayley* v. *Walpole*, 39 L. J., Ch. 609; *Rossiter* v. *Miller*, 48 L. J., Ch. 10; 26 W. R. 865 (H. L.); *Lewis* v. *Brass*, 26 W. R. 152; 37 L. T. 738); unless it clearly appears that the terms have been assented to only conditionally upon their being embodied in a formal instrument (*Chinnock* v. *Marchioness of Ely*, 4 De G., J. & S. 638; 34 L. J., Ch. 399; *Winn* v. *Bull*, L. R., 7 Ch. D. 29; 47 L. J., Ch. 139); or that there is some other condition precedent to the contract becoming binding.

(*Hudson* v. *Buck*, L. R., 7 Ch. D. 683; 47 L. J., Ch. 247.) Where all the terms are assented to subject to a condition, the contract upon the performance of that condition becomes absolute. (*Bonnewell* v. *Jenkins*, L. R., 8 Ch. D. 70; 47 L. J., Ch. 758.) But there must be a final assent to all the terms (*Stanley* v. *Dowdeswell*, 23 W. R. 389), and nothing to manifest that the writings contain only part of the terms, and that the parties have left something to be determined by future agreement. (*Holland* v. *Eyre*, 2 Sim. & S. 194; *English Credit Co.* v. *Arduin*, 40 L. J., Ex. 108; *Vale of Neath Colliery Co.* v. *Furness*, 45 L. J., Ch. 276; *Bertel* v. *Neveux*, 39 L. T. 257.) A proposal may be withdrawn or varied at any time before it is accepted (1 Dart, V. & P. 230), even although a time be named for its acceptance, which time has not expired. (*Dickinson* v. *Dodds*, 45 L. J., Ch. 777; L. R., 2 Ch. D. 463; *Graham* v. *Campbell*, L. R., 7 Ch. D. 490; 47 L. J., Ch. 593.)

Signed by the party to be charged.

It is sufficient if the agreement be signed by the party against whom it is sought to be enforced, or his agent. It need not be signed by the other party. (*Warner* v. *Willington*, 25 L. J., Ch. 662; *Reuss* v. *Picksley*, L. R., 1 Ex. 342; 35 L. J., Ex. 218.)

How signed.

As to signature, all that is necessary is that a person should, by writing his name, testify that he has entered into the contract. (*Propert* v. *Parker*, 1 Russ. & M. 625; *Jones* v. *Victoria, &c. Dock Co.*, 46 L. J., Q. B. 219.) Thus, writing at the head of the document, "Mr. W. P. has agreed," &c. would be sufficient. (*Ib.*) It must, however, be introduced into the document in such a manner as to govern and authenticate the whole instrument. (*Caton* v. *Caton*, L. R., 2 H. L. 127; *Kronheim* v. *Johnson*, L. R., 7 Ch. D. 60; 47 L. J., Ch. 132.) Provided it have that effect, it is immaterial

whether it is at the beginning, in the middle, or at the end. If there be an apparent intention to sign at the foot of the instrument, as by using the words "as witness our hands," there is no signing unless the names be subscribed. (*Hubert* v. *Treherne*, 3 M. & Gr. 743.) A man may sign by stamping his name (*Bennett* v. *Brumfitt*, L. R., 3 C. P. 28; 37 L. J., C. P. 25), or by his initials (Sug. V. & P. 144, 14th ed.), or by adopting a previous signature, as by altering or assenting to an alteration made after signature. (*Hudson* v. *Stuart*, 22 W. R. 534; *Bluck* v. *Gompertz*, 7 Ex. 862.) The signature may be in ink or in lead. (*Geary* v. *Physic*, 5 B. & C. 234.)

Agent need not be appointed by writing.

If an agreement be signed by an agent, he need not be authorized to do so by writing (*Heard* v. *Pilley*, L. R., 4 Ch. 548; *Cave* v. *Mackenzie*, 46 L. J., Ch. 564); but he must, in fact, have the authority of his principal to sign a binding contract. (*Vale of Neath Colliery Co.* v. *Furness*, 45 L. J., Ch. 276; 24 W. R. 631; *Smith* v. *Webster*, L. R., 3 Ch. D. 49; 45 L. J., Ch. 528.) And a house agent, with instructions to find a tenant for property, would not be authorized to enter into a binding agreement with a person willing to become tenant. (*Hamer* v. *Sharp*, 44 L. J., Ch. 53.)

"Usual" covenants.

Agreements for leases are often very concise and informal documents, and it is frequently an important question, what terms the parties really have attached to their relationship of landlord and tenant. Thus it is often agreed that a lease shall contain "all usual covenants and clauses," and, indeed, a bare contract for a lease imports that there should be proper covenants, and, according to Lord Eldon, the law implies what they are. (*Church* v. *Brown*, 15 Ves. 265; *Propert* v. *Parker*, 3 My. & K. 280; and see *per* Jessel, M. R., *Hampshire* v. *Wickens*, 47 L. J., Ch. 243; L. R., 7 Ch. D.

555.) It has, however, often been treated as a question of fact properly left to a jury to say what covenants are "usual" (*Bennett* v. *Womack*, 3 C. & P. 96); and was so left in the recent case of *Brookes* v. *Drysdale* (L. R., 3 C. P. D. 52; 26 W. R. 331). It is submitted that the true distinction is, that the covenants mentioned below as usual and proper in any lease, would be so regarded as matter of law; and that other covenants claimed to be usual from custom, particular trade, or other circumstances, would be a question of fact for a jury.

In ascertaining what are usual covenants, clauses and provisoes, it must be borne in mind that the fact of a covenant or proviso being usually inserted in leases of a similar kind will not bring it within the legal acceptation of the term "usual." (5 Dav. Conv. 51, 3rd ed.) Thus, in the absence of an express stipulation, the court, under an agreement for "usual and customary clauses," will only allow to be inserted in the lease a proviso for re-entry on non-payment of rent, and not a general proviso for re-entry on breach of any covenant, although the latter may be usually inserted in similar leases in the locality. (*Hodgkinson* v. *Crowe*, 44 L. J., Ch. 680; L. R., 10 Ch. 622.) In that case there was an agreement for a lease to contain "usual and customary *mining* clauses:" it was held to mean not usual clauses in a mining lease, but usual clauses for carrying on mining operations. (*Hodgkinson* v. *Crowe*, 44 L. J., Ch. 238; L. R., 19 Eq. 591.)

What are "usual."

Covenants by the lessee for payment of rent (*Taylor* v. *Horde*, 1 Burr. 60, 125); for payment of such taxes as are not expressly payable by the landlord (5 Dav. Conv. 51, 3rd ed.); to keep the premises in repair (*Doe* v. *Withers*, 2 B. & Ad. 903); to give them up in that condition at the expiration

or determination of the term; to permit the lessor to enter and view the state of repairs (*Blakesley* v. *Wheldon*, 1 Hare, 181); to cultivate lands according to the approved rules of husbandry; and a covenant by the lessor for quiet enjoyment as against himself and those claiming through him (*Hall* v. *City of London Brewery Co.*, 31 L. J., Q. B. 257), may be treated as usual and proper covenants in any lease. (*Hampshire* v. *Wickens*, L. R., 7 Ch. D. 555; 47 L. J., Ch. 243.) Custom and the particular circumstances may render other covenants proper, but they cannot be considered as usual ones in a legal sense. Thus, in an agreement for a lease to contain "all covenants usual and ordinary in farming leases," the local custom in respect of such leases may be looked to (*Bell* v. *Barchard*, 21 L. J., Ch. 411; 16 Beav. 8), or previous leases between the same parties.

Covenants against alienation.

Clauses as to forfeiture on bankruptcy, and in restraint of assignment without licence, are not usual (*Henderson* v. *Hay*, 3 Bro. C. C. 632; *Jones* v. *Jones*, 12 Ves. 186; *Hampshire* v. *Wickens*, 47 L. J., Ch. 243; L. R., 7 Ch. D. 555; *Hyde* v. *Warden*, L. R., 3 Ex. D. 72; 47 L. J., Ex. 121; *Church* v. *Brown*, 15 Ves. 258; *Buckland* v. *Papillon*, L. R., 2 Ch. 67; 36 L. J., Ch. 81); even in a mining district where such clauses are customary. (*Hodgkinson* v. *Crowe*, L. R., 19 Eq. 591; 44 L. J., Ch. 239.) Neither is a proviso that underleases, assignments, and evidence of devolutions of the premises shall be left with the solicitor of the lessor within two calendar months from the date thereof for registration, and a fee paid for registration "common and usual" in leases of public-houses. (*Brookes* v. *Drysdale*, L. R., 3 C. P. D. 52; 26 W. R. 331.) Such provisoes are, however, common in leases in the county of Middlesex,—a fact to be borne in mind in dealing with property so situate.

In restraint of trade.

Covenants in restraint of trade in a trading district (*Wilbraham* v. *Livesey*, 18 Beav. 206), or restraining the lessee from carrying on a particular trade without the licence of the lessor, are not "usual" (*Propert* v. *Parker*, 3 My. & K. 280); and an agreement that a house shall not be converted into a school, will not authorize a restriction against the carrying on of other trades. (*Van* v. *Corpe*, 3 My. & K. 269.) Neither will an agreement not to carry on any but a given trade authorize the insertion of affirmative covenants to carry on that trade. (*Doe* v. *Guest*, 15 M. & W. 160.)

It is not a usual proviso that if the premises demised be blown down or burned by accidental fire, the lessor shall repair or rebuild, or in default the lessee shall be at liberty to quit the premises, and be forthwith discharged from payment of rent. (*Doe* v. *Sandham*, 1 T. R. 705.) And upon an agreement "for usual and necessary covenants and provisoes, and particularly a covenant on the part of the lessee to keep the premises in good tenantable repair," it was held that he was not entitled to introduce into the covenant the words "damages by fire or tempest only excepted." (*Sharp* v. *Milligan*, 23 Beav. 419.) It seems that upon the letting of a public-house a covenant that the tenant shall do no act whereby the licence shall become forfeited, is not an implied, and therefore not a usual, covenant. (*Maw* v. *Hindmarsh*, 28 L. T., N. S. 644.) And where a lease of a public-house contained covenants by the lessee to keep up the licences, and after its expiration the lessor agreed to grant a new lease to contain covenants "similar to" those of the former lease, and under this agreement the lessee retained possession and suffered a forfeiture of his licence, the lessor having sought specific performance, it was held that he was not entitled to insert a covenant to keep up the licence, but only a covenant that the lessee would

use his best endeavours to obtain a licence, and, if obtained, would keep up the same in the terms of the old covenant. (*Shepheard* v. *Walker*, 34 L. T., N. S. 230.)

The only safe course in an agreement is to set out verbatim the covenants intended to be inserted in the lease; for questions in respect of "usual" clauses will otherwise arise upon an attempt to enforce specific performance of the agreement, or in any legal proceedings in respect of the duties and liabilities of the parties thereunder.

Void leases construed as agreements.

As no formal words are requisite to make a demise, it was frequently a question before 8 & 9 Vict. c. 106, which provided in effect that leases for more than three years should be void unless by deed, whether a document was an actual lease or only an agreement for one. In *Stratton* v. *Pettit* (16 C. B. 420), it was held that a lease void as such was void altogether. But this decision has been overruled; and it has been determined that a lease in writing not under seal, though void as a lease, will operate as an agreement for the term and upon the conditions therein specified (*Bond* v. *Rosling*, 30 L. J., Q. B. 227; *Rollason* v. *Leon*, 31 L. J., Ex. 96; *Tidey* v. *Mollett*, 33 L. J., C. P. 235; 16 C. B., N. S. 298), and it may be specifically enforced. (*Parker* v. *Taswell*, 2 De G. & J. 559; *Drury* v. *Macnamara*, 5 E. & B. 616; 25 L. J., Q. B. 5.) Moreover, if a tenant enters under a void lease and pays rent, he becomes tenant from year to year upon all the terms of the lease not inconsistent with such a tenancy. (*Martin* v. *Smith*, L. R., 9 Ex. 50; 43 L. J., Ex. 42; *ante*, p. 6.) As to what terms in such an instrument would be inconsistent with a yearly tenancy, it has been held that a stipulation for a two years' notice is so (*Tooker* v. *Smith*, 1 H. & N. 732); as is a covenant to build or to do such material repairs as are not usually done

by tenants from year to year. (*Bowes* v. *Croll*, 6 E. & B. 264.) But stipulations to keep the premises in good tenantable repair (*Richardson* v. *Gifford*, 1 A. & E. 52); or to keep open the shop, and use best endeavours to promote the trade of it during the tenancy (*Sanders* v. *Karnell*, 1 F. & F. 356); or a proviso for re-entry on non-payment of rent or non-performance of covenants (*Thomas* v. *Packer*, 1 H. & N. 669); or that the tenant shall be paid for his tillages on the expiration of his tenancy (*Brocklington* v. *Saunders*, 13 W. R. 46), are applicable to such a tenancy. And where the tenant holds during the whole of the contemplated term, he will be bound by a stipulation that he shall paint during the last year of the term. (*Martin* v. *Smith*, L. R., 9 Ex. 50; 43 L. J., Ex. 42.) But where there was a lease by a tenant for life, and after his death the tenant paid rent to and became yearly tenant to the reversioner, who was ignorant of the terms of the lease, the yearly tenancy was held to be one according to the custom of the country, and not upon the special covenants of the lease. (*Oakley* v. *Monck*, 35 L. J., Ex. 87.)

When a tenancy is actually created by entry on the land and payment of rent, the terms of the tenancy may be proved by oral testimony. And a document read over at the treaty for the taking may be used by a witness to refresh his memory as to the stipulations. (*Bolton* v. *Tomlin*, 5 A. & E. 856.)

Specific performance of written agreements for leases.

An agreement to grant a lease is in equity a lease (*Warner* v. *M'Bryde*, 36 L. T., N. S. 360, *per* Malins, V.-C.); and if there be a proper agreement in writing for a lease, a suit for specific performance of it may generally be maintained, the same as in the case of other agreements. But performance will not be enforced of

an agreement for a lease from year to year (*Clayton* v. *Illingworth*, 10 Hare, 451); nor where the term agreed upon has expired, or will expire before a decree can be obtained (*Nesbit* v. *Meyer*, 1 Swanst. 226; *Walters* v. *Northern Coal Co.*, 25 L. J., Ch. 633, 638; 5 De G., M. & G. 629); nor where, if granted, it might be determined at once for breach of a covenant which the plaintiff has already broken (*Jones* v. *Jones*, 12 Ves. 188; but see *Lillie* v. *Legh*, 3 De G. & J. 204; *Poyntz* v. *Fortune*, 27 Beav. 393); nor after an unreasonable delay (*Davenport* v. *Walker*, 34 L. T., N. S. 168), even though there may have been possession and payment of rent during the period. (*Powis* v. *Dynevor*, 35 L. T., N. S. 940.)

Of oral agreements after part performance.

Even where there has been only an oral agreement for a lease it may be enforced specifically, where there has been a sufficient part performance of the contract to take it out of the operation of the Statute of Frauds, and the terms of the agreement can be distinctly shown. (*Lester* v. *Foxcroft*, 1 Wh. & Tu. L. C. 693.) To amount to part performance, an act must be unequivocally referable to the agreement (*Morphett* v. *Jones*, 1 Swanst. 181), and such as in itself to infer some agreement, and then parol evidence is admitted to show what the agreement was. (*Frame* v. *Dawson*, 14 Ves. 386.) Thus, where a person enters into possession under a parol agreement, and with unequivocal reference to such agreement (*Morphett* v. *Jones*, *supra*; *Ungley* v. *Ungley*, L. R., 5 Ch. D. 887; 25 W. R. 733); *à fortiori* where such person has, upon the faith of the agreement, and with the landlord's acquiescence, expended money in building, or other improvements (*Gregory* v. *Mighell*, 18 Ves. 328; *Sutherland* v. *Briggs*, 1 Hare, 26; *Mundy* v. *Jolliffe*, 5 My. & C. 167; *Shillibeer* v. *Jarvis*, 8

De G., M. & G. 79), or otherwise acted in reliance on and in execution of the agreement, so that non-performance would be a fraud upon him (*Phillips* v. *Alderton*, 24 W. R. 8), specific performance will be enforced (*per* Lord Kingsdown, *Ramsden* v. *Dyson*, L. R., 1 H. L. 170; *Bankart* v. *Tennant*, 39 L. J., Ch. 809; *Lindsay* v. *Lynch*, 2 Sch. & Lef. 1); and possession and a special expenditure by the tenant on the faith of a parol agreement for a lease was held sufficient to entitle him to specific performance, although the agreement was denied by the landlord. (*Farrall* v. *Davenport*, 3 Giff. 363.) And so, where there has been such an expenditure or possession given, the court will decree specific performance of an agreement by a corporation which is not under the corporate seal. (*Crook* v. *Seaford*, L. R., 6 Ch. 551; *Wilson* v. *West Hartlepool Rail. Co.*, 34 L. J., Ch. 241.) But it is essential that the possession should be given according to the contract, and not obtained wrongfully. (*Cole* v. *White*, cited 1 Bro. C. C. 409.)

Payment of consideration money is not an act of part performance (*Clinan* v. *Cooke*, 1 Sch. & Lef. 40); neither are payments introductory to an agreement, such as making a survey, valuation, or appraisement, or preparing an instrument of demise. Ordinarily, when the tenant is in possession at the date of the parol agreement, merely continuing in possession does not of itself amount to part performance. (*Morphett* v. *Jones*, 1 Swanst. 181; *Wills* v. *Stradling*, 3 Ves. 378; but see *Dowell* v. *Dew*, 1 Y. & C. C. C. 345.) He must do some act purporting to be in pursuance of the new contract. Thus, where the lessee in possession paid an increased rent (*Nunn* v. *Fabian*, L. R., 1 Ch. 35; 35 L. J., Ch. 140), and again, where he expended money in repairing the buildings (*Wil-*

liams v. *Evans*, 44 L. J., Ch. 319), in accordance with the terms of the agreement for a further lease, these were held to amount to acts of part performance. But merely doing acts which he would be liable to do if there were no agreement would not amount to part performance. (See *Frame* v. *Dawson*, 14 Ves. 386.) But in all cases it must be shown plainly and distinctly what the terms of the agreement are, and that the acts done are referable to that agreement alone. (*Per* Lord Romilly, *Price* v. *Salusbury*, 32 L. J., Ch. 447.)

When in an action for specific performance, a person has been directed to execute a lease, but refuses to do so, the court can only enforce the order for its execution by attachment, the Trustee Act not applying to such a case. (*Grace* v. *Baynton*, 25 W. R. 506.)

If money has been expended upon the alteration of premises upon the faith of a treaty for a lease not amounting to a concluded agreement, and which lease the defendant refuses to grant, the money so expended may be recovered back as upon a failure of consideration. (*Pulbrook* v. *Lawes*, 45 L. J., Q. B. 178; L. R., 1 Q. B. D. 284.)

Oral agreement collateral to one in writing supported.

It often happens during the treaty for, and before a formal lease or agreement is drawn up, certain matters are agreed upon which are not afterwards embodied in the formal instrument, and a question arises whether they can be enforced by the one party against the other; and the test would seem to be, first, whether the alleged agreement is concerning "an interest in lands or tenements," and if not, then, secondly, whether it amounts to a variation of the terms of the written agreement, or forms an independent collateral contract. In the latter case it may be supported,

though not in writing. (*Lindley* v. *Lacey*, 17 C. B., N. S. 578; 34 L. J., C. P. 7.) Thus, where a tenant entered on land on the understanding that a lease should be executed at a future time, when the lease was presented he refused to sign unless the landlord would agree to destroy the rabbits. The landlord then verbally consented, and the tenant signed the lease, which contained a clause by which the tenant agreed not to shoot, hunt, sport or destroy any game, but to use his best endeavours for the preservation of the same. In an action by the tenant upon the landlord's verbal agreement to destroy the rabbits, it was held that this agreement, though oral, was binding, since it was collateral to, and did not alter or vary, the written contract. (*Morgan* v. *Griffiths*, L. R., 6 Ex. 70; 40 L. J., Ex. 46; *Erskine* v. *Adeane*, 42 L. J., Ch. 849; *Mann* v. *Nunn*, 43 L. J., C. P. 241.) But evidence cannot be given to set up a prior parol agreement in lieu of a written one. (*Angell* v. *Duke*, 32 L. T., N. S. 320.)

Agreement incorporated with a lease.

Where there has been a written agreement for a lease, followed by an actual lease, the two may be read and construed together, and the general terms of the latter may be controlled by the particular provisoes of the former. (*Salaman* v. *Glover*, 23 W. R. 722; but see *Sanderson* v. *Graves*, 23 W. R. 797.)

Right to call for lessor's title.

By 37 & 38 Vict. c. 78, s. 2, it is provided 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 of the freehold." This does not prevent the grantee or purchaser of an underlease calling for the title of his immediate lessor. (1 Dart, V. & P. 167, 290, 5th ed.) In any case where the intended

lessee proposes to expend money in improvements or building, it is imprudent to take a lease without investigating the lessor's title (see *Besley* v. *Besley*, 38 L. T. 844), for he is bound by all the infirmities in such lease, notwithstanding he may have been excluded by express condition from investigating it.

Sect. 3.—*Stamps.*

Unstamped instruments not admissible in evidence.

Leases and agreements for leases must be duly stamped. The want of a proper stamp, however, does not affect the validity or legal operation of an instrument, but merely renders it inadmissible in evidence until duly stamped, except in *criminal* proceedings (33 & 34 Vict. c. 97, s. 17; see *Clarke* v. *Roche*, L. R., 3 Q. B. D. 170; 47 L. J., Q. B. 147),—which would include proceedings for offences against the game laws or the like (see *Cattell* v. *Ireson*, E. B. & E. 91; *Parker* v. *Green*, 2 B. & S. 299),—or for a collateral purpose, *e. g.* to show that the instrument is void by reason of fraud. (*Holmes* v. *Sixsmith*, 21 L. J., Ex. 312.)

May be stamped on payment of penalty.

An instrument not stamped or insufficiently stamped at the time of execution may be stamped at any time afterwards on payment of the duty and a penalty of 10*l.*; and if the duty exceeds 10*l.*, then by way of further penalty, interest on such duty at the rate of 5*l.* per cent. per annum from the date of execution. The payment of any penalty or penalties is to be denoted on the instrument by a particular stamp. The commissioners have the power, within twelve months after the first execution, to remit the penalty. (33 & 34 Vict. c. 97, s. 15.) If an unstamped or insufficiently stamped instrument is produced as evidence in court, it may, on payment to the officer of the court of the

amount of the unpaid duty and the penalty payable by law on stamping the same as aforesaid, and a further sum of 1*l.*, be received in evidence. (Sect. 16.) By former acts fourteen days were allowed for stamping agreements without any penalty, and where the subject-matter of the agreement was under 20*l.* the penalty was reduced to 1*l.*; but neither of these provisions are contained in the act now in force. The practice of the commissioners is still, however, to allow fourteen days for the stamping of agreements.

If an unstamped instrument in writing has been lost (*Rex* v. *Castle Morton*, 3 B. & Ald. 588), or destroyed, even by the party who objects to the evidence (*Rippiner* v. *Wright*, 2 B. & Ald. 478), parol evidence of the contents is inadmissible, even in an action for specific performance. (*Smith* v. *Henley*, 1 Phill. 391.)

Amount of duty regulated by act in force at date of stamping.

When an unstamped or improperly stamped instrument is afterwards stamped, the amount of the stamp will be that required by the act in force at the date of stamping, although a greater one would have been required at the date of the instrument. (*Buckworth* v. *Simpson*, 1 C. M. & R. 834; *Deakin* v. *Penniall*, 17 L. J., Ex. 217.)

The duties now payable in respect of leases and agreements for leases are set forth in Appendix A., from which it will be seen that for a term not exceeding thirty-five years, a lease and an agreement for a lease require the same stamp.

Instruments having a double operation to be stamped in respect of each matter.

An instrument containing or relating to several distinct matters is to be separately and distinctly charged, as if it were a separate instrument, with duty in respect of each of such matters. (33 & 34 Vict. c. 97, s. 8; but see s. 98.) Thus a demise of two distinct properties to two several tenants by the same instrument would require stamps on the several rents, and not on the aggregate amount

Distinct rents.

of such rents. But a demise to the same person of two properties for terms commencing at different dates and at distinct rents for each (*Boase* v. *Jackson*, 3 B. & B. 185); or of two farms for terms of different duration, with distinct rents and varying covenants (*Blount* v. *Pearman*, 1 Bing. N. C. 408), but contained in one instrument, would be held one transaction, and a stamp applicable to the aggregate rent sufficient. Nor would a matter for which the rent was the consideration require a separate stamp. So that a lease is not subject to an agreement stamp in respect of its reserving an option to the lessee to purchase the demised premises. (*Worthington* v. *Warrington*, 5 C. B. 635.) But where a demise of a house contained an agreement to sell it *and other houses* for a certain sum within seven years, it was held to require both a lease and an agreement stamp. (*Lovelock* v. *Frankland*, 16 L. J., Q. B. 182; 8 Q. B. 371.)

Option to purchase.

Building leases.

A covenant on the part of the tenant to lay out money in building does not render an *ad valorem* duty payable on the amount to be so expended. (*Nicholls* v. *Cross*, 14 M. & W. 42; and see 33 & 34 Vict. c. 97, s. 98, sub-s. 2.)

Penalty rents.

When in a farming or building lease additional rents are made payable for ploughing up old meadow land, or building more than the specified number of houses or the like, these being rather penalties than rent, and depending upon a contingency which may not happen, do not seem of necessity to involve an additional stamp. If the additional rents should, however, become payable, it might be questionable whether the lease could be received in evidence without the additional stamp being impressed. (See 2 Platt on Leases, 556.)

An instrument having a double operation can-

not be used unless sufficiently stamped for both. Thus, where a lease in writing contained a contract for the purchase of fixtures, but stamped only as an agreement (but as such sufficiently for the fixtures), it was held that it could not be used in evidence in an action for the price of the fixtures unless it had a lease stamp. (*Corder* v. *Drakeford*, 3 Taunt. 382; see 33 & 34 Vict. c. 97, s. 97.)

Stamp according to operation.

Whatever its form, an instrument must be stamped according to its actual legal operation (*Limmer Asphalte Co.* v. *Inland Revenue*, L. R., 7 Ex. 211; 41 L. J., Ex. 106); and, accordingly, a bill of exchange expressing the terms of an agreement between a landlord and incoming tenant was held inadmissible until stamped as an agreement. (*Nicholson* v. *Smith*, 3 Stark. 128.)

Must cover aggregate rent.

An instrument of demise must be stamped in respect of the whole amount of rent reserved or payable under it, whether expressed in terms or by reference. (*Parry* v. *Deere*, 5 A. & E. 551; *Wilson* v. *Smith*, 12 M. & W. 401.) And where there was a lease reserving one rent for a house and land, and another rent for furniture and fixtures, a stamp in respect of the former rent alone was held insufficient. (*Coster* v. *Cowling*, 7 Bing. 456.)

Leases for three years.

Though a lease for three years is not required to be in writing, if it is, it must be stamped. (*Prosser* v. *Phillips*, Hereford Assizes, 1765, Bull. N. P. 269.)

Instrument increasing rent reserved by another instrument.

The statute 39 Vict. c. 16, s. 11, enacts as follows:—"An instrument whereby the rent reserved by another instrument chargeable with stamp duty as a lease or tack and duly stamped accordingly is increased, shall not be chargeable with stamp duty otherwise than as a lease or tack

in consideration of the additional rent thereby made payable."

Alterations requiring fresh stamps.

After an instrument has become operative, if it is altered in any material point by consent, it must have a new stamp affixed. (*Reed* v. *Deere*, 7 B. & C. 261.) If the alteration is not material no fresh stamp is necessary. Thus, an agreement for a lease with a proviso for giving up a farm at a certain time, to which the words "houses and buildings" were added by consent of the parties, was held not to require a new stamp, the alteration merely expressing what was previously implied. (*Doe* v. *Houghton*, 1 Man. & R. 208.) Where, after one party has executed a deed, another party present objects to a clause, which is struck out, and the deed is re-executed, it is *in fieri*, and does not require a fresh stamp. (*Jones* v. *Jones*, 1 Cr. & M. 721; *Hall* v. *Chandless*, 4 Bing. 123.) An agreement to let premises, a portion of which (in the adverse possession of an undertenant) it was afterwards agreed to exclude from the letting, would amount to a new demise (*Watson* v. *Waud*, 8 Ex. 335); but not so a mere agreement to accept a less rent (*Crowley* v. *Vitty*, 7 Ex. 319; *Doe* v. *Geekie*, 5 Q. B. 841); even if accompanied by a giving up of portion of the demised premises. (*Holme* v. *Brunskill*, L. R., 3 Q. B. D. 495; 47 L. J., P. 610.)

Deeds presumed to be properly stamped.

The presumption is always in favour of the validity and regularity of a deed, and an old deed which bore the marks of having had some stamp was presumed to have been properly stamped. (*Doe* v. *Coombs*, 12 L. J., Q. B. 36.) And the court will, in the absence of circumstances inducing a supposition to the contrary, presume that a lost instrument was duly stamped; and so when the instrument is in the custody of the opposite party

who refuses to produce it. (*Crisp* v. *Anderson*, 1 Stark. 35.)

The production of a counterpart lease is sufficient to raise the presumption that there was an original lease duly stamped. (*Hughes* v. *Clark*, 10 C. B. 905; *Houghton* v. *Kœnig*, 18 C. B. 235.)

CHAPTER V.

RIGHTS AND LIABILITIES OF THE PARTIES DURING THE CONTINUANCE OF THE TENANCY OTHER THAN THOSE CONNECTED WITH DISTRESS.

SECT. 1.—*Quiet Enjoyment.*

Every letting implies a covenant for quiet enjoyment.

To enable a tenant to derive any benefit from his tenancy, it is necessary (he fulfilling his own obligations) that he be permitted quietly to possess and enjoy the property demised. Therefore the law implies in every letting, whether under seal with proper words of demise (*Iggulden* v. *May*, 9 Ves. 330; *Adams* v. *Gibney*, 6 Bing. 666), or by parol merely (*Bandy* v. *Cartwright*, 8 Ex. 913; 22 L. J., Ex. 285; *Hall* v. *City of London Brewery Co.*, 31 L. J., Q. B. 257), a covenant on the part of the landlord for quiet enjoyment; for whatever words create an estate have a secondary operation, and form a covenant for the quiet enjoyment of such estate as they have already created (*per* Tindal, C. J., *Williams* v. *Burrell*, 1 C. B. 429); but in leases not under seal only to the extent of the estate *actually* created, and not to so much as is in excess of the landlord's power to create; for the implied covenant is only co-extensive with the interest which the lessor has (*per* Coltman, J., *Messent* v. *Reynolds*, 3 C. B. 194; *Besley* v. *Besley*, 38 L. T. 844; 27 W. R. 184), since the law does not imply a covenant on the part of the landlord for good title. (*Bandy* v. *Cartwright*,

Co-extensive only with the lessor's interest.

supra; *Granger* v. *Collins*, 6 M. & W. 458.) But in the case of *Line* v. *Stephenson*, 5 Bing. N. C. 183 (and see *Burnett* v. *Lynch*, 5 B. & C. 609), it was held that the effect of the word "demise" in a lease by deed was to create not only an implied covenant for quiet enjoyment, but also one that the lessor had a good title, and, still more recently (*Mostyn* v. *West Mostyn Coal Co.*, 45 L. J., C. P. 405; L. R., 1 C. P. D. 145), that the word "let," or any equivalent word in a lease by deed, would have the same effect. These decisions are, however, in conflict with the views expressed in other cases. (*Penfold* v. *Abbott*, 32 L. J., Q. B. 67; *Adams* v. *Gibney*, 6 Bing. 666; *Messent* v. *Reynolds*, 3 C. B. 194.)

Words of demise in deed implying good title.

In an agreement for a lease there is no implied promise for quiet enjoyment (*Brashier* v. *Jackson*, 6 M. & W. 549); nor does an agreement for a lease to commence at a future day imply in itself a promise to give possession on that day (*Drury* v. *Macnamara*, 25 L. J., Q. B. 5), though the agreement might be specifically enforced. An agreement which operates as an actual demise amounts to an agreement to give possession. (*Coe* v. *Clay*, 5 Bing. 440; *Jinks* v. *Edwards*, 11 Ex. 775.) Moreover, an agreement to grant a lease contains an implied undertaking that the lessor has title to grant such lease; and if he has not, he is liable to an action at the suit of the intended lessee. (*Stranks* v. *St. John*, 36 L. J., C. P. 118; L. R., 2 C. P. 376.)

Agreement for a lease raises no implied promise for quiet enjoyment;

but amounts to an undertaking for title.

A lease is a sale *pro tanto*, and as upon a sale the maxim *caveat emptor* applies, so upon taking a lease it is caveat the lessee. Therefore, where the lessor is himself a termor, the lessee must at his peril ascertain that the lessor has power to create the proposed term (*Besley* v. *Besley*, 38 L. T. 844), and that he can grant a lease unfettered by restric-

On taking a lease it is caveat lessee.

tive covenants. (*Parker* v. *Whyte*, 32 L. J., Ch. 520.) And a lessee must bind his lessor by express stipulation to do any act he may require to be done, even although without it the premises may not be available for the purposes for which they were known to be taken. (*Newby* v. *Sharpe*, L. R., 8 Ch. D. 39; 47 L. J., Ch. 617.) A covenant for quiet enjoyment affords no remedy in such cases.

No warranty as to condition on a lease of real estate.

There is no implied warranty on the letting of real estate, that is, unfurnished houses or land, that it is or shall be reasonably fit for habitation, occupation, or cultivation; nor is there any implied contract that it is fit for the purpose for which it is let. (*Hart* v. *Windsor*, 12 M. & W. 68.) Before taking a farm or house the tenant should go and see the state it is in (*Erskine* v. *Adeane*, 42 L. J., Ch. 835; L. R., 8 Ch. 756), and if he neglect to do so he must still take the property as he finds it; although in the case of land it may not be fit for the purpose for which it was taken by reason of being partly manured with a poisonous substance (*Sutton* v. *Temple*, 12 M. & W. 52), or not being free from noxious plants (*Erskine* v. *Adeane*, *supra*); and in the case of an unfurnished house, though it may be ruinous, uninhabitable, or dangerous. (*Hart* v. *Windsor*, *supra*; *Keates* v. *Earl Cadogan*, 20 L. J., C. P. 76; 10 C. B. 591.)

Otherwise on a lease of furnished houses.

In the letting of furnished houses or apartments the rule is different. That is a mixed contract for realty, and for goods and chattels, and in such a letting there is an implied condition that the house is reasonably fit for occupation and comfortable habitation on and from the day on which the tenancy is to commence down to the day on which it is to terminate. (*Wilson* v. *Finch-Hatton*, 46 L. J., Ex. 489; L. R., 2 Ex. D. 336.) And the condition is equally broken whether the unfit-

ness arise from defects in the house itself, as bad drainage (*ib.*), or from the furniture being unfit for use, or the place becoming uninhabitable by reason of dirt or vermin. (*Smith* v. *Marrable*, 11 M. & W. 5; and see 12 M. & W. 60, 87; *Campbell* v. *Wenlock*, 4 F. & F. 716.) In such case the tenant is entitled to throw up house and furniture at the earliest moment the defect is discovered and to take proceedings for breach of contract.

Express covenant for quiet enjoyment co-extensive with the term professed to be created.

The operation of an implied covenant is superseded by an express covenant for quiet enjoyment. (*Merrill* v. *Frame*, 4 Taunt. 329.) Under an express covenant for quiet enjoyment, the lessee is entitled to enjoy the premises during the whole of the term mentioned in the demise; and if it should turn out that the lessor had no title to make a lease for so long, the lessee is entitled to so much damages as will compensate him for the injury sustained by breach of covenant. (*Lock* v. *Furze*, 19 C. B., N. S. 96; 35 L. J., C. P. 141.)

Covenants limited to lawful evictions,

Both implied and express general covenants for quiet enjoyment are confined to lawful, and do not extend to wrongful, evictions, unless the lessor himself be the disturber; for the law will never adjudge that a lessor covenants against the wrongful acts of strangers, except his covenant be express for that purpose. (*Dudley* v. *Folliott*, 3 T. R. 584; *Wotton* v. *Hele*, 2 Wms. Saund. 178 (8.)

unless particular individuals named.

But a covenant against the acts of particular individuals extends to all their acts, whether by lawful or wrongful title. (*Nash* v. *Palmer*, 5 M. & S. 374; *Fowle* v. *Welsh*, 1 B. & C. 29.)

Where lawful evictions included in terms of a covenant.

The extent of the lessor's liability under an express covenant for quiet enjoyment, for the acts of persons having rightful title, will be measured by the terms of the covenant. If it be for quiet enjoyment "against all persons whatsoever lawfully claiming the same" (*Williams* v. *Burrell*, 1

C. B. 402), or that the lessee "shall peaceably and quietly enjoy during the term" (*Onions* v. *Cohen*, 34 L. J., Ch. 338), it will extend to all persons who have or acquire a rightful title to the property during the continuance of the term; and a covenant against all persons claiming or *pretending* to claim a right in the premises extends to tortious as well as legal interruptions. (*Chaplain* v. *Southgate*, 10 Mod. 384.) If it be as against the lessor and all persons claiming "by, from or under him," it will not extend to an eviction by a person claiming a title paramount to him (*Merrill* v. *Frame*, 4 Taunt. 329); and the terms persons claiming "by, from and under" the lessor do not include a person claiming *against* him, as in the case of a distress for land tax due from the landlord before the demise. (*Stanley* v. *Hayes*, 3 Q. B. 105.) But a person claiming under a settlement made by the lessor would be a person claiming under the lessor (*Evans* v. *Vaughan*, 4 B. & C. 261; *Carpenter* v. *Parker*, 3 C. B., N. S. 206); so would a person claiming under a lease from him prior in date to that of the lessee. (*Ludwell* v. *Newman*, 6 T. R. 458; *Rolph* v. *Crouch*, 37 L. J., Ex. 8.)

The covenant is to secure possession; not a particular mode of enjoyment.

Any proceeding in a court of law interfering with the title and possession of the land amounts to a breach of a covenant for quiet enjoyment; on the other hand, such a proceeding interfering only with a particular mode of enjoyment of the land or part of it, but not of the title or possession, is not a breach. It is to be regarded as intended to secure title and possession, and not to guarantee the tenant that he may lawfully use the property for any purpose not provided against by restrictive covenants. (*Dennett* v. *Atherton*, 41 L. J.. Q. B. 165, *per* Willes, J.) And in that case it was decided, where a person who held under a lease

containing covenants restrictive of the user of the premises, sub-let to a lessee (without notice of those covenants), by a lease containing some only of the original restrictions, that there was no guarantee that the sub-lessee might use the premises for any purposes other than those mentioned.

How broken.

The covenant is broken by any act done in the assertion of a right which prevents the lessee having full enjoyment of the property demised. (*Lloyd* v. *Tomkies*, 1 T. R. 671.) Thus, if the lessor covenant that the lessee shall enjoy a certain close, and afterwards put up a gate by which the lessee is obstructed in passing to it (*Andrews* v. *Paradise*, 8 Mod. 318); or lease a watercourse and afterwards stop it up; or a house and estovers and destroy all the wood (*Pomfret* v. *Ricroft*, 1 Wms. Saund. 321); or let a seam of coal, and afterwards work minerals in the stratum above so as to cause the roof of the mine to fall in (*Shaw* v. *Stenton*, 2 H. & N. 858); or build on his own adjoining land, so as to darken the lessee's windows (but see *Potts* v. *Smith*, 38 L. J., Ch. 58; L. R., 6 Eq. 311; *Booth* v. *Alcock*, L. R., 8 Ch. 663; 42 L. J., Ch. 557); so such a covenant is broken by any disturbance resulting from a person enforcing a charge which the lessor ought to have satisfied. (*Hancock* v. *Caffyn*, 8 Bing. 358.) But any mere annoyance or trespass not in the assertion of a right, as by hunting, is not a breach. (*Lloyd* v. *Tomkies*, 1 T. R. 671.) And a covenant that the lessor had not "done, or permitted or suffered to be done, any act, &c.," was held not to be broken by his having assented to an act which he could not prevent. (*Hobson* v. *Middleton*, 6 B. & C. 295.)

In a licence to sport.

A covenant for quiet enjoyment of a right of sporting, is not broken by destroying rabbits or coverts (*Jeffryes* v. *Evans*, 19 C. B., N. S. 246);

or cutting down trees (*Gearns* v. *Baker*, 44 L. J., Ch. 334; L. R., 10 Ch. 355) in the proper course of management of the property, or by offering the property for sale in lots as building premises. (*Pattison* v. *Gilford*, 43 L. J., Ch. 524; L. R., 18 Eq. 259.)

Breach of, only suspends rent.

A breach of covenant for quiet enjoyment does not discharge the tenant from any liability under his lease, except the liability to pay rent. (*Morrison* v. *Chadwick*, 18 L. J., C. P. 189; 7 C. B. 283; *Newton* v. *Allin*, 1 Q. B. 519.) For the measure of damages for breach of covenant for quiet enjoyment, see *Child* v. *Stenning*, 40 L. T. 302.

Sect. 2.—*Repairs.*

Implied undertaking to repair.

In the absence of any express stipulation, there results from the relationship of landlord and tenant an implied undertaking on the part of the tenant to use the property demised in a tenant-like manner—doing proper repairs, the extent of which will depend upon the duration of his term.

In case of tenant from year to year.

The implied obligation of a tenant from year to year is to keep the premises wind and water tight (*Anworth* v. *Johnson*, 5 C. & P. 239), and to make fair and tenantable repairs (*Cheetham* v. *Hampson*, 4 T. R. 318; *Gregory* v. *Mighell*, 18 Ves. 331), as by putting fences in order, or replacing windows or doors that are broken during his occupation, or cleansing drains and sewers. (*Russell* v. *Shenton*, 3 Q. B. 449.) But he is not answerable for the mere wear and tear of the premises (*Torriano* v. *Young*, 6 C. & P. 8), nor answerable if they are burnt down, nor bound to rebuild if they become ruinous by any other accident (*Horsefall* v. *Mather*, Holt, N. P. 7), nor to replace doors and sashes worn out by time, to put a new roof on, or to make similar substantial and lasting repairs (*Fer-*

guson v. ——, 2 Esp. 590), or do what are called general repairs.

Of tenant for years.

The obligation to repair of a tenant for a term of years has never been clearly defined, as the question so seldom arises in practice, since leases for years usually contain an express covenant to repair. His duty would seem to be to make such timely reparations as would enable him to give up the premises in the same tenantable condition as when he entered upon them, allowance being made for the natural decay of time. For this purpose, and to prevent them becoming ruinous, it might be his duty to replace principal rafters and timbers; supply new window and door frames; and to repair the main walls, and do other like substantial repairs. But he would not be liable to make good any injuries resulting from extraordinary causes, as the act of God by storm or flood.

In case of accidental fire.

Neither would he be responsible for destruction by accidental fire, since it is provided by 14 Geo. 3, c. 78, s. 86, that "no action, suit or process whatsoever shall be maintained against any person in whose house, chamber, stable, barn, or other building, or on whose estate any fire shall accidentally begin; nor shall any recompense be made by such person for any damage suffered thereby, any law, usage, or custom to the contrary notwithstanding: provided that no contract or agreement made between landlord or tenant shall be hereby defeated or made void." By accidental fire is meant one not traceable to any cause, and does not include wilful fires or those caused by negligence. (*Filliter* v. *Phippard*, 17 L. J., Q. B. 89.)

No implied obligation for landlord to repair,

In the absence of contract there is no obligation on the part of a landlord to put premises into a habitable condition (*Chappell* v. *Gregory*, 34 Beav. 250), or to do any repairs whatever upon them (*Gott* v. *Gandy*, 23 L. J., Q. B. 1; 2 E. & B.

845), though by neglecting to do so they become uninhabitable. (*Arden* v. *Pullen*, 10 M. & W. 321.) Neither is there any implied covenant by the lessor of two adjoining houses—the occupiers of which are under covenant to repair—that he will keep either house in such state as to enable the covenants with respect to the other to be performed. (*Colebeck* v. *Girdlers' Co.*, 45 L. J., Q. B. 225; L. R., 1 Q. B. D. 234.) A landlord is not bound to rebuild in case of destruction by fire (*Pindar* v. *Ainsley*, cited 1 T. R. 312), though he may have covenanted for quiet enjoyment. (*Brown* v. *Quilter*, Amb. 619.) In fact, the landlord has no right to go upon the premises if he desired to make repairs. (*Barker* v. *Barker*, 3 C. & P. 557.)

unless the letting is of part of a building.

Where the owner and occupier of a building lets only a portion of it, there would be an implied undertaking to keep the other portions of the building in a proper state of repair. (*Carstairs* v. *Taylor*, L. R., 6 Ex. 217; 40 L. J., Ex. 129; and see *Ross* v. *Feddon*, L. R., 7 Q. B. 661; 41 L. J., Q. B. 270; 1 Wms. Saund. 322.) And where there is an agreement for a lease with repairing covenants of a new house, the landlord must finish and deliver the house in a proper state of repair. (*Tildesley* v. *Clarkson*, 31 L. J., Ch. 362.)

Covenant to repair

A lease generally contains an express covenant to repair, usually to be performed by the tenant. Such covenants vary with the ingenuity of the draftsmen, and the construction of each must depend upon its particular terms. Moreover, the covenant must be construed in connection with the surrounding circumstances, and is satisfied by a substantial compliance with its terms (*Harris* v. *Jones*, 1 M. & Rob. 173), having regard to the age and nature of the buildings (*Stanley* v. *Towgood*, 3 Bing. N. C. 4; *Mantz* v. *Goring*, 4 Bing. N. C. 451), and the state of repair at the time the

controlled by the state and nature of the property,

tenant entered. (*Haldane* v. *Newcomb*, 12 W. R. 135.) If there were a lease of a new house for a hundred years, with a general covenant to repair, and at the end of fifty years a person take an underlease in the same words, the latter covenant must be construed with reference to the state of the premises at the time; for the two covenants, though identical in terms, would not have the same effect. (*Walker* v. *Hatton*, 10 M. & W. 257, *per* Parke, B.) Where a very old building is demised, and the lessee covenants to repair, it is not meant that the old building is to be restored in a renewed form at the end of the term, or of greater value than it was at the commencement. The lessee is not responsible for such dilapidations as result from the natural operation of time and the elements. (*Gutteridge* v. *Munyard*, 1 M. & Rob. 334.) But if at the time of demise the premises are old and out of repair, and the tenant agree to keep and deliver up the same in good repair, he is bound to put them in repair as old premises, for he cannot "keep" without putting them in repair, and he is not justified in keeping them in bad repair because he found them so (*Payne* v. *Haine*, 16 M. & W. 541; *Easton* v. *Pratt*, 2 H. & C. 676; *Saner* v. *Bilton*, 47 L. J., Ch. 267; L. R., 7 Ch. D. 815); and if he covenant to "put" them in habitable repair, this obviously means better repair than when he found them, and binds him to put them into a state that they may be occupied, not only with safety but with reasonable comfort for the purpose for which they are taken. (*Belcher* v. *McIntosh*, 2 M. & Rob. 186.)

of which evidence may be given.

In an action upon a covenant to repair the tenant may give evidence as to the state they were in at the time of the demise. (*Burdett* v.

Withers, 7 A. & E. 136; *Mantz* v. *Goring*, 4 Bing. N. C. 451.)

To what repairs the covenant applies.

A covenant to keep in repair premises which include ornamental water would only bind the covenantor to keep the water from bursting its banks, or to keep its sluices in working order, and not to cleanse it. (*Bird* v. *Elwes*, 37 L. J., Ex. 91; L. R., 3 Ex. 225.) A covenant to repair a house would not include laying a new floor on an improved plan (*Soward* v. *Leggatt*, 7 C. & P. 613); but a covenant to repair the "external parts" of a house includes its boundary walls (*Green* v. *Eales*, 2 Q. B. 225); and one to "substantially repair, uphold, and maintain" a house, includes painting the inside. (*Monk* v. *Noyes*, 1 C. & P. 265.)

To what buildings.

A general covenant to repair and keep in repair extends to all buildings erected on the demised premises during the term; but where there is a particular covenant to repair *the buildings demised*, this does not extend to newly erected buildings. (*Cornish* v. *Cleife*, 34 L. J., Ex. 19, *per* Channell, B.) A general covenant to repair all buildings then standing or to be erected during the term, was held to extend to buildings erected on the waste lands of the landlord not included in the lease, the court implying a contract that the encroachment of the tenant was to be upon the terms of the original lease. (*White* v. *Wakley*, 26 Beav. 17; 28 L. J., Ch. 77.)

When to fixtures.

A general covenant to repair extends not only to buildings, but to fixtures which the tenant is not allowed to remove (*Thresher* v. *East London Waterworks Co.*, 2 B. & C. 608); and the covenant is broken by the removal of such fixtures. (*Penry* v. *Brown*, 2 Stark. 403.)

How broken.

A covenant to repair is broken by opening a

door through the wall into an adjoining house, and keeping it open is a continuing breach. (*Doe* v. *Jackson*, 2 Stark. 293; *Gange* v. *Lockwood*, 2 F. & F. 115.) But it is not a breach to enlarge windows, open new external doors, and take down an internal partition, where the terms of the lease imply that additions and improvements are to be made. (*Doe* v. *Jones*, 4 B. & Ad. 126.)

Covenantor bound to rebuild in case of fire.

If a lessee covenant generally to repair, he must rebuild the premises if burned down by accidental fire, or destroyed by lightning or tempest (*Bullock* v. *Dommitt*, 6 T. R. 650; *Pym* v. *Blackburn*, 3 Ves. 34); and if he has also covenanted to insure to a certain amount, his liability to repair is not limited to that amount. (*Digby* v. *Atkinson*, 4 Camp. 275.) If the lessor has insured, he will not be compelled to contribute the insurance money to the rebuilding of the premises, or restrained from suing for his rent until they are rebuilt. (*Leeds* v. *Cheetham*, 1 Sim. 146; *Lofft* v. *Dennis*, 1 E. & E. 474; 28 L. J., Q. B. 168.) But the insurance office may, upon any grounds of suspicion that the persons effecting the insurance have been guilty of fraud or incendiarism, cause the insurance money to be laid out in rebuilding. (14 Geo. 3, c. 78, s. 83; *Ex parte Gorely*, 34 L. J., Bkcy. 1.) But to entitle the landlord to have the insurance money applied in rebuilding the premises, he must make a distinct request to that effect to the insurance office, before they have settled with the tenant. (*Simpson* v. *Scottish Union Insurance Co.*, 32 L. J., Ch. 329; 1 H. & M. 618.)

Title to insurance moneys under lease with option to purchase.

Inasmuch as in the absence of express provision in the contract, a purchaser of real estate is not entitled to the benefit of a policy of insurance, although the premises be burnt down between the

date of the contract and completion (*Poole* v. *Adams*, 33 L. J., Ch. 639), neither is a lessee with an option to purchase, upon exercising his option, so entitled. (*Edwards* v. *West*, 47 L. J., Ch. 463; L. R., 7 Ch. D. 858.) But where a lessee, with an option to purchase, in pursuance of a covenant in the lease, insured the premises, which were also insured by the lessor without the lessee's knowledge in a different office, and upon the premises being burnt down, the loss was apportioned between the two offices, it was held upon the lessee electing to purchase, that the insurance money received by the lessor should be taken as part of the purchase-money. (*Reynard* v. *Arnold*, 23 W. R. 804; L. R., 10 Ch. 386.) In that case, however, it will be observed, the lessor had by his own act diminished the sum which the lessee would otherwise have received. (*Edwards* v. *West*, *supra*.)

Lessee must pay rent notwithstanding no occupation.

It is usual to insert in leases a proviso relieving the tenant from liability to repair in case of fire or other inevitable accident. But this does not bind the lessor to repair (*Weigall* v. *Waters*, 6 T. R. 488), or release the lessee from payment of rent (*Monk* v. *Cooper*, 2 Stra. 763), which must be paid, whether or not there is any liability to repair, or any beneficial occupation. (*Holtzapffel* v. *Baker*, 18 Ves. 115; *Izon* v. *Gorton*, 5 Bing. N. C. 501.)

Covenant subject to condition precedent.

If a tenant covenant to repair the premises, the same being first put into such repair by the landlord, this creates a condition precedent, and a covenant on the part of the landlord to put them into repair, until the performance of which no liability attaches to the tenant (*Coward* v. *Gregory*, 36 L. J., C. P. 1; L. R., 2 C. P. 153; *Neale* v. *Ratcliff*, 15 Q. B. 916); and if the covenant is to repair with materials to be supplied by the

landlord, he must be ready to supply the necessary materials. (*Martyn* v. *Clue*, 18 Q. B. 661.)

Covenant to repair after notice.

Where the covenant is to repair after notice, the tenant does not become liable until the notice has been given. (*Horsefall* v. *Testar*, 7 Taunt. 385.) But if there be a covenant to repair generally, and a distinct covenant to repair after notice, the two are independent (*Baylis* v. *Le Gros*, 4 C. B., N. S. 537), and the landlord is not bound to give the notice mentioned in the second covenant before suing on the general covenant. Where, however, the second covenant was to repair after three months' notice, and the landlord gave notice to repair *within three months*, he was held to have waived his right under the general covenant (*Doe* v. *Meux*, 4 B. & C. 606); but no such waiver would be caused by a notice to repair "forthwith" (*Roe* v. *Paine*, 2 Camp. 520), or "in accordance with the covenants." (*Few* v. *Perkins*, 36 L. J., Ex. 54; L. R., 2 Ex. 92.)

Tenant liable to third persons for nuisance or damage,

The rule of law is that the occupier, and not the owner of premises, is *primâ facie* liable for damages resulting from a nuisance arising upon the demised premises, or for injury to third persons or adjoining property from the same being in a ruinous or dangerous condition (*Russell* v. *Shenton*, 3 Q. B. 449; *Terry* v. *Ashton*, 45 L. J., Q. B. 260; L. R., 1 Q. B. D. 314; *Broder* v. *Saillard*, 45 L. J., Ch. 414; L. R., 2 Ch. D. 692; *Humphreys* v. *Cousins*, 46 L. J., C. P. 438; L. R., 2 C. P. D. 239; *Firth* v. *Bowling Ironworks Co.*, L. R., 3 C. P. D. 254; 47 L. J., C. P. 358); although as between himself and the landlord he is not compellable to repair. (*Reg.* v. *Watson*, 2 Ld. Raym. 856.) There are only two ways in which a landlord can be made liable for injury to a stranger by the defective state of premises which are let to a tenant; first, when he has contracted

with the tenant to repair; or, secondly, when he has let the premises in a ruinous and improper state. (*Nelson* v. *Liverpool Brewery Co.*, 47 L. J., C. P. 675; 25 W. R. 877; *Payne* v. *Rogers*, 2 H. Bl. 349; *Pretty* v. *Bickmore*, L. R., 8 C. P. 401; *Gwinnell* v. *Eamer*, 32 L. T., N. S. 835.) But if the tenant was under no obligation to repair, and the defect to the knowledge of the landlord existed at the time of letting, he would be liable (*Todd* v. *Flight*, 30 L. J., C. P. 21), though probably not if the tenant had covenanted to repair. (*Per* Brett, J., *Gwinnell* v. *Eamer*, *supra*.) It has been held that, if the tenant is not bound to repair, and the tenancy is one from year to year, the landlord is liable for damage caused by a permanent nuisance, if it be shown that since the nuisance, and before the damage, he might have determined the tenancy and did not; for to continue a yearly tenancy is equivalent to a reletting at the end of each year. (*Gandy* v. *Jubber*, 33 L. J., Q. B. 151; 5 B. & S. 78; 9 *ib.* 15, n.) But a landlord by letting premises in a ruinous condition does not become liable for any damage to the tenant or his guests or customers. (*Robbins* v. *Jones*, 15 C. B., N. S. 240.)

unless the lease is an authority to create a nuisance.

If premises are let for a fixed and definite purpose, the landlord is liable for any nuisance that arises of necessity from the use of the premises as contemplated by the demise (*Harris* v. *James*, 45 L. J., Q. B. 545; 35 L. T., N. S. 240); but the landlord would not be liable for a nuisance created by a negligent use of the premises, if it appear that they might be used for the contemplated purposes of the demise, without creating a nuisance. (*Rich* v. *Basterfield*, 4 C. B. 783; 16 L. J., C. P. 273.)

Covenant by landlord.

When a landlord covenants to repair the interior of demised premises, notice of want of

repairs (though not stipulated for) is necessary before he can be sued on his covenant. (*Makin* v. *Watkinson*, 40 L. J., Ex. 33; L. R., 6 Ex. 25; approved in *London & S. W. Rail. Co.* v. *Flower*, 45 L. J., C. P. 54; L. R., 1 C. P. D. 77.) And such a covenant carries with it a licence to the landlord to enter on the premises, and there remain for a reasonable time to do that which he contracted to do. (*Saner* v. *Bilton*, 47 L. J., Ch. 267; L. R., 7 Ch. D. 815.) If the landlord covenants to repair there is no implied condition that the tenant may quit if the repairs are not done (*Surplice* v. *Farnsworth*, 7 M. & Gr. 576), or that he may do the repairs and deduct the amount from his rent. (*Weigall* v. *Waters*, 6 T. R. 488.) And a covenant by the landlord in case of fire to rebuild the premises, and place the same in the state they were in before the fire, only makes him liable to rebuild what he let, and not any additions by the tenant. (*Loader* v. *Kemp*, 2 C. & P. 375.)

Remedies for non-repair.

A landlord's remedies for breach are either by action upon the covenant or agreement, or by re-entry for forfeiture, if the lease contains an express proviso for re-entry upon such a breach, but not otherwise. The courts will not decree specific performance of a covenant to repair (*Mosely* v. *Virgin*, 3 Ves. 184), nor relieve against forfeiture for breach thereof. (*Hill* v. *Barclay*, 18 Ves. 56; *Nokes* v. *Gibbon*, 3 Drew. 681.)

A covenant to *put in repair* can only be broken once for all, and damages thereupon having been recovered, no further action can be brought. (*Coward* v. *Gregory*, L. R., 2 C. P. 153; 36 L. J., C. P. 1.) But if the covenant be to *keep* in repair, the tenant must have the premises in repair at all times during the term (*Luxmore* v. *Robson*, 1 B. & Ald. 584), and the recovery of damages in

one action upon such a covenant is no bar to a subsequent action for a continuing breach. (*Coward* v. *Gregory*, L. R., 2 C. P. 153; 36 L. J., C. P. 1.)

Measure of damages.

The measure of damages in an action for non-repair is not the cost necessary to put the premises into repair, but the injury to the marketable value of the reversion (*Mills* v. *Guardians of East London Union*, 42 L. J., C. P. 46; L. R., 8 C. P. 79; *Williams* v. *Williams*, L. R., 9 C. P. 659; 43 L. J., C. P. 382), notwithstanding that the landlord may immediately proceed to demolish the buildings. (*Rawlings* v. *Morgan*, 18 C. B., N. S. 776.)

Sect. 3.—*Cultivation.*

Obligation to farm according to the custom of the country.

There is an implied promise on the part of every tenant of a farm to manage it in a husband-like manner in accordance with the custom of the country (*Powley* v. *Walker*, 5 T. R. 373), and an injunction would be granted to restrain a tenant from farming otherwise. (*Onslow* v. ———, 16 Ves. 173.)

Custom of country defined.

The obligation to farm in accordance with the custom of the country means that the tenant must conform to the approved usages of husbandry in the district where the land lies, under circumstances of a like nature. (*Legh* v. *Hewett*, 4 East, 154.) By "custom" is not meant something satisfying the strict legal meaning of that term, *e. g.*, it need not be immemorial; it is sufficient if it be shown to be the usage of the neighbourhood at the time of the alleged breach (*Dalby* v. *Hirst*, 1 B. & B. 224); but mere usage on a particular estate, or the property, however extensive, of a particular individual, will not be sufficient. (*Womersley* v. *Dally*, 26 L. J., Ex. 219.) And the custom must be proved actually and not in-

ferentially; for it is not enough to show a custom eight miles away, unless it be proved to extend to the place in question. (Co. Litt. 270 b (n. 228).

To show the custom of the country in a particular place, it is not necessary to prove an *uniform* course of husbandry there established; for it is contrary to the custom for a tenant to till half his farm in a district where no other farmer tills more than a third, and many till only a fourth. (*Legh* v. *Hewett*, *supra*.)

Must be certain and reasonable.

A custom to be supported must be certain and reasonable in itself. The reasonableness of a custom is a matter of law for the court, not one of fact for a jury. (*Tyson* v. *Smith*, 9 A. & E. 421; *Bradburn* v. *Foley*, L. R., 3 C. P. D. 129; 47 L. J., C. P. 331.)

Custom attaches unless excluded by stipulation.

Where a custom is proved to exist it is applicable to all tenancies in whatever way created, whether verbal or in writing, unless expressly or impliedly excluded by the written terms themselves. (*Wilkins* v. *Wood*, 17 L. J., Q. B. 319.) It is, however, excluded by any stipulations in the instrument of demise, which are inconsistent with the custom (*Webb* v. *Plummer*, 2 B. & Ald. 750; *Roberts* v. *Barker*, 1 Cr. & M. 808; *Clarke* v. *Roystone*, 13 M. & W. 752), but only so far as those stipulations are inconsistent with it. (*Hutton* v. *Warren*, 1 M. & W. 466; *Holding* v. *Pigott*, 7 Bing. 465; *Muncey* v. *Dennis*, 26 L. J., Ex. 66.) Where by a lease the tenant had the use of depasturing cows on certain lands described as "summer leazes," and "after grass," respectively, from 2nd February to 17th November, evidence was held admissible of a custom of the country that the lessor should, notwithstanding such a lease, put cattle of his own on the lands called "summer leazes," up to the 12th May, it being regarded as evidence of what meaning the term

"summer leazes" had according to the custom of the country. (*Tudgay* v. *Sampson*, 30 L. T., N. S. 262.)

It would be entirely outside the scope of this work to give the customs which obtain in various parts of the country. The more important will be found stated in Cooke on Agricultural Tenancies, 53 *et seq.*

Tenant's duty to preserve boundaries.

It is the tenant's duty to preserve the ancient boundaries of the land demised to him; and not by the removal of walls, fences, or the like, to confuse the landlord's property with his own. (*Att.-Gen.* v. *Fullerton*, 2 Ves. & B. 263; *Att.-Gen.* v. *Stephens*, 6 De G., M. & G. 111; *Brown* v. *Wales*, L. R., 15 Eq. 142.) If the tenant fail to keep the boundaries distinct, the landlord may bring an action to ascertain the boundaries, even during the continuance of the demise. (*Spike* v. *Harding*, L. R., 7 Ch. D. 781; 47 L. J., Ch. 323.)

All encroachments made by the tenant during his tenancy are presumed to be made for the landlord's benefit, unless the contrary appear (*Whitmore* v. *Humphries*, L. R., 7 C. P. 1); and this rule applies even to encroachments made by a copyhold tenant upon the wastes of the manor. (*Att.-Gen.* v. *Tomline*, L. R., 5 Ch. D. 750; 46 L. J., Ch. 654.)

To maintain fences.

Under the obligation to farm in a husbandlike manner is included the duty of maintaining the fences of the property demised. (*Cheetham* v. *Hampson*, 4 T. R. 318; *Whitfield* v. *Weedon*, 2 Chitt. 685.) For this purpose the tenant is entitled to reasonable estovers (Co. Litt. 41 b), and may cut timber to keep the walls, pales, fences, hedges, and ditches as he found them, but he can make no new ones.

The hedge dividing two fields is presumed at law to belong to the owner of the field in which

the ditch is not; for the ditch, and not the hedge, marks the extremities of adjoining properties. (*Vowles* v. *Miller*, 3 Taunt. 138; Hunt on Fences, 43.) If there are two cross ditches, one on each side, the right to the hedge must be determined by acts of ownership. (*Ib.*) Such hedges, therefore, as by these tests belong to the property he holds, the tenant should keep in repair; and where there is a prescriptive right (for there is no such right at common law) of adjoining owners or occupiers to have fences kept in repair (*Lawrence* v. *Jenkins*, 42 L. J., Q. B. 147; L. R., 8 Q. B. 274), the tenant would be liable for any damage resulting from their being out of repair (*Cheetham* v. *Hampson*, 4 T. R. 318) and could have no claim for damages and trespasses resulting from inefficient hedges being maintained. (*Wiseman* v. *Booker*, 38 L. T. 292; L. R., 3 C. P. D. 184.)

There is no obligation thrown by law upon a landlord, as between himself and his tenants, to keep up his fences, so as to prevent the tenants' cattle from straying into the landlord's adjoining property. (*Erskine* v. *Adeane*, L. R., 8 Ch. 756; 42 L. J., Ch. 835.)

Stipulations as to cultivation in leases.

Binding on sheriff upon execution.

Usually a tenant's obligation in respect of cultivation is defined by his lease, the terms of which are often in accordance with the custom of the country; and where, either by the terms of a written demise, or the custom of the country, a tenant is bound to consume on the premises the straw, grass, and other produce, a sheriff, seizing under a process of any court, can only sell the same to be consumed on the premises. (56 Geo. 3, c. 50, ss. 1—5.) No assignee of any bankrupt, nor any assignee under any bill of sale, nor any purchaser of the goods or crop of any person employed in husbandry on any lands let to farm, shall take, use, or dispose of any hay or other

produce, or any manure or other dressings intended for such lands and being thereon, in any other manner than such bankrupt or other person so employed in husbandry ought to have taken, used, or disposed of the same. (Sect. 11.) This latter section is not confined to sales under an execution, but applies to an ordinary sale by the tenant himself, and a purchaser from the tenant is bound by the terms of the lease under which the tenant holds. (*Wilmot* v. *Rose*, 23 L. J., Q. B. 281; 3 E. & B. 563.) But notwithstanding a tenant may, by the terms of his lease, be bound to consume hay, straw, and other crops on the premises, this statute does not entitle the landlord selling under a distress to sell subject to a condition that they shall be so consumed. (*Hawkins* v. *Walrond*, 45 L. J., C. P. 772; L. R., 1 C. P. D. 280.)

Enforced by injunction.

An injunction will be granted against any acts done in violation of farming covenants (*Drury* v. *Molins*, 6 Ves. 328), or of the terms of an agreement upon which the tenant impliedly holds (*Crosse* v. *Duckers*, 21 W. R. 287); but not a mandatory injunction to compel a lessee to cultivate in a husbandlike manner, in accordance with the covenants in a lease. (*Musgrave* v. *Horner*, 23 W. R. 125.)

Remedies for breach of, under 38 & 39 Vict. c. 92.

The statute 38 & 39 Vict. c. 92, s. 19, entitles the landlord, when claims are made by the tenant for compensation under that act, to obtain, by counterclaim, compensation for breach of a covenant or other agreement connected with the contract of tenancy. (See *post*, Chap. IX., Sect. 4.)

Sect. 4.—*Waste.*

Waste defined.

Waste is defined as the spoil or destruction in houses, gardens, trees, or other corporeal heredita-

ments, to the disherison of him that hath the remainder or reversion in fee simple or fee tail. (2 Bl. Com. 281.) It can only be committed of the thing demised, and, therefore, cutting trees excepted from the demise is not waste. (*Goodright* v. *Vivian*, 8 East, 190.) It may be either voluntary, consisting of the tenant doing something which he ought not to do, or permissive, consisting of his omitting to do something which he ought to do. Tenants of all kinds are liable for voluntary waste. Tenants for life and for years are liable for permissive waste (*Yellowly* v. *Gower*, 11 Ex. 294; *Harnett* v. *Maitland*, 16 M. & W. 257); but tenants at will (*ib.*), and tenants from year to year (*Torriano* v. *Young*, 6 C. & P. 8), are not. A lessee liable for waste is liable by whomsoever it is done, for he had the power to withstand it. (*Greene* v. *Cole*, 2 Wms. Saund. 259 b (n.)

Voluntary waste.

Any lasting damage to the freehold or inheritance, or anything which alters the nature of the property, so as to render the evidence of ownership more difficult, or destroys or weakens the proof of identity, is in strictness voluntary waste. (See judgment in *Phillipps* v. *Smith*, 14 M. & W. 589; *Smyth* v. *Carter*, 18 Beav. 78.) Therefore, if a lessee pulls down a house demised to him, or removes any part thereof, as the windows, doors, wainscot, or other fixtures, which, though affixed by himself, are not at law removeable, or if he unroof buildings, or alter one kind of building into another, as a corn mill into a fulling mill, or a hall into a stable, or throw two rooms into one, or pull down a building and rebuild it on a greater or less scale than before, even though of greater value (*Cole* v. *Green*, 1 Lev. 309), or build a new house where none was before (but see *Jones* v. *Chappell*, L. R., 20 Eq. 539; 44 L. J., Ch. 658), or having built it suffers it to decay, in each of these cases he is guilty of waste. (2 Roll. Abr. 815; Co. Litt.

In respect of buildings.

53 a; 2 Bl. Com. 282.) It has been held that the erection of new buildings is not waste, if the terms of the lease show that such erection was contemplated, as where there is a covenant to keep all future buildings in a state of repair. (*Jones* v. *Chappell*, L. R., 20 Eq. 539; 44 L. J., Ch. 658.)

Unless there is a negative covenant not to do the act complained of, the courts will not grant an injunction against meliorating waste, but leave the reversioner to his claim for damages. (*Doherty* v. *Allman*, 26 W. R. 513; L. R., 3 App. Cas. 709.)

Of land.

It is waste to sow land with any pernicious crop. (*Pratt* v. *Brett*, 2 Madd. 62.) So to dig and carry away the soil, to dig clay, to *open* mines, gravel pits, or the like, or to essentially change the face of the soil, or the nature of its products, as by converting arable land into pasture, or pasture to arable, turning gardens into tillages, sowing grain in hop gardens, or the like. (Com. Dig. "Waste," (D 4); *Simmons* v. *Norton*, 7 Bing. 648.) But if pasture be converted into tillage for the improvement of the soil, it is not waste; nor is it if the lands have been sometimes pasture and sometimes tillage. (2 Roll. Abr. 815.) Nor is it waste to dig trenches for drawing off water (*Moyle* v. *Mayle*, Owen, 67), or to dig in mines or pits already opened, unless old and abandoned, or abandoned for the benefit of the estate (*Bagot* v. *Bagot*, 32 Beav. 509; 33 L. J., Ch. 116), nor to open new mines where mines are expressly named in the demise. But if there be a lease of land and mines, and there be a mine open and another unopen, the lessee cannot work or open the unopened mine. (*Clegg* v. *Rowland*, L. R., 2 Eq. 160; 35 L. J., Ch. 396.)

Of trees.

Oak, ash and elm trees of twenty years' growth are in all places timber (*Aubrey* v. *Fisher*, 10 East, 446; *Whitty* v. *Dillon*, 2 F. & F. 67),

and other trees are by the custom of the country in some places considered timber, as being there used for building purposes. (*Chandos* v. *Talbot*, 2 P. Wms. 606.) It is waste in a tenant to cut down timber trees, or such as by custom are accounted timber trees (Co. Litt. 53 a), or to lop them so as to cause them to decay, or after cutting underwood to suffer the young germens to decay, or to cut trees growing for the shelter of the house (*Dunn* v. *Bryan*, Ir. Rep., 7 Eq. 143; 21 W. R., Dig. 119), or to remove or injure a quickset fence. But it is not waste to cut trees which are not timber either by the general law or by custom, and if timber trees are dead they may be cut down, and so may the underwood. Moreover, a tenant (unless restrained by covenants or exceptions, which is usual) may cut down timber for necessary botes, as house-bote, hedge-bote, &c. (2 Bl. Com. 281), but not to make new houses or new fences. It is waste in the tenant to cut down fruit trees; but if they are thrown down by tempest, he may afterwards root them up. (2 Roll. Abr. 817.) So it has been held waste for an outgoing tenant to remove a border of box planted by him (*Empson* v. *Soden*, 4 B. & Ad. 655), or to plough up strawberry-beds in full bearing for which he had paid the person who occupied before him. (*Watherell* v. *Howells*, 1 Camp. 227.)

Of animals.

Waste may be done in respect of animals, &c., by taking so many of them as to unstock the park, warren, dove-cote, fish-pond or pool in which they are kept, or doing any act by reason of which the stock is diminished. (Co. Litt. 53 b.)

Permissive waste.

A tenant commits permissive waste in omitting to keep the buildings in tenantable repair, as by suffering the house to be uncovered, whereby the timbers decay, or permitting the walls to decay for want of plastering (*Vane* v. *Barnard*, cited in

Pyne v. *Dor*, 1 T. R. 55), or the foundations to be sapped by leaving a moat or ditch unscoured. Merely suffering the house to remain unroofed (provided it were so at the commencement of the tenancy) will not be waste (Co. Litt. 53 a); but then the tenant must take the consequences of any other part thereby becoming ruinous or decayed. To permit walls built to exclude water to remain in such a dilapidated state as to cause the lands to be overflowed and injured, is waste. (Co. Litt. 53 b.)

Non-cultivation not waste.

It is not waste, either voluntary or permissive, to leave land uncultivated (*Hutton* v. *Warren*, 1 M. & W. 472, *per* Parke, B.), but it would be bad husbandry.

Remedies for waste.

The landlord's remedy for waste is either by action for damages or for an injunction; but it seems that an injunction will not be granted against permissive waste. (*Powys* v. *Blagrave*, 24 L. J., Ch. 143.) The proper remedy in such a case is by an action for damages; and an action will lie for acts of waste done by the tenant while holding over after the expiration of a notice to quit. (*Burchell* v. *Hornsby*, 1 Camp. 360.)

Under 38 & 39 Vict. c. 92.

By 38 & 39 Vict. c. 92, s. 19, where a tenant who commits or permits waste claims compensation under that act, the landlord is entitled to obtain by counterclaim compensation for waste committed or permitted not more than four years before the determination of the tenancy. (See *post*, Chap. IX., Sect. 4.)

Sect. 5.—*Restrictions on User of the Premises.*

Covenant to reside on the premises.

A covenant by the lessee that he and his family will reside on the demised premises during the continuance of the term is good (*Ponsonby* v.

Adams, 2 Bro. P. C. 431; *Doe* v. *Clarke*, 8 East, 185), and is broken by the lessee doing any act whereby his residence there may become impossible. (See *Doe* v. *Hawke*, 2 East, 481.) So a covenant is valid binding the lessee to carry on a specific trade on the premises (*Wadham* v. *Postmaster-General*, 40 L. J., Q. B. 310; L. R., 6 Q. B. 644), or to keep a building open at all times of the year as an inn or a shop for the sale of a particular class of goods. But a covenant not to carry on any other than a certain trade on the premises does not amount to an affirmative covenant to carry on that trade (see *Doe* v. *Guest*, 15 M. & W. 160); neither would the fact of premises being taken for a public-house imply a covenant to use the premises so as not to produce a forfeiture of the licence. (*Maw* v. *Hindmarsh*, 28 L. T., N. S. 644.) And even an express covenant by the lessee of a public-house that she would not "do, omit, or permit or suffer to be done any act, matter, or thing whatsoever that could or might affect, lessen, or make void either or any of the licences for the time being granted to the public-house," was held not to be broken by a conviction under the Licensing Acts which was not indorsed on the licence. (*Wooler* v. *Knott*, L. R., 1 Ex. D. 124, 265; 45 L. J., Ex. 313, 884.) To meet such a case the lease should expressly provide for a forfeiture if the lessee "shall commit any offence against the laws for the time being affecting innkeepers. (*Ib.*; 24 W. R. 1004.) A covenant by a lessee to "use his best endeavours to extend the custom" of a beerhouse does not bind him to live on the premises and continually conduct the business in person. (*Moore* v. *Robinson*, 48 L. J., Q. B. 156.)

To carry on a specific trade there.

In a lease of unopened mines it is usual to bind the lessee to make due search for the minerals, and it is a matter of fact for a jury whether he has done so. (*Harrison* v. *Boothman*, 13 East, 22.)

To work mines.

Where a tenant agreed to work a coal mine so long as it was fairly workable, and there were coals in the mine, but of such a description that it would not pay to work them, it was held that the tenant was not bound to work the mine (*Jones* v. *Shears*, 7 C. & P. 346; *Quarrington* v. *Arthur*, 10 M. & W. 335); but it would be otherwise if there was an absolute and unqualified covenant to work the mine. (*Jervis* v. *Tomkinson*, 1 H. & N. 195; 26 L. J., Ex. 41.) A covenant to work continuously will not be implied from a covenant to work properly (*Jegon* v. *Vivian*, 40 L. J., Ch. 389; L. R., 6 Ch. 742), and a covenant to work in "the best and most effectual manner, to the best advantage and according to the usual practice of carrying on collieries with effect," is satisfied by adopting the usual practice, whether the best possible mode or not. (*Abinger* v. *Ashton*, L. R., 17 Eq. 358.)

Meaning of "trade" and "business" in restrictive covenants.

The words "trade" and "business" in a covenant restrictive of the use of premises are not synonymous. A trade is limited to buying and selling (*Doe* v. *Bird*, 2 A. & E. 161), but business is much more extended. (*Doe* v. *Keeling*, 1 M. & S. 100.) Thus, keeping a school (*Ib.*; *Kemp* v. *Sober*, 1 Sim. N. S. 517) or a private lunatic asylum (*Doe* v. *Bird*, *supra*) is a business, though not a trade. (And see *Bramwell* v. *Long*, 27 W. R. 463.)

"Offensive" trades.

The meaning of a covenant not to carry on an "offensive" or "noisome" trade, without enumerating any in particular, would depend in a great measure upon the situation of the premises, and those words would not comprehend any of such trades as were carried on upon the premises at the time of granting the lease. (*Gutteridge* v. *Munyard*, 1 M. & Rob. 334.) The trade of a coachmaker is not an "offensive" one (*Bonnett* v. *Sadler*, 14 Ves. 526); and it is doubtful whether a mock auction can be so considered. (*Moses* v. *Taylor*, 11 W. R. 81.) A covenant not to carry on "any offensive" trade was held not

to be broken by using the premises for depositing large quantities of lucifer matches; but this would come within the term "dangerous." (*Hickman* v. *Isaacs*, 4 L. T., N. S. 285.)

Covenant against "nuisances."

The establishment of a national school is not a breach of a general covenant against doing or suffering anything to be done which should be a nuisance (*Harrison* v. *Good*, 40 L. J., Ch. 294; L. R., 11 Eq. 338); neither is a brewhouse necessarily a nuisance, though it may be so used as to become one. (*Gorton* v. *Smart*, 1 Sim. & S. 66.)

General words following a specific enumeration.

An enumeration of a number of trades and businesses followed by general words, as "or any other offensive trade," would usually be regarded as limiting those words to trades *ejusdem generis* with the ones enumerated. (*Doe* v. *Bird*, 2 A. & E. 161.) And it was held that converting a dwelling-house into a public-house was no breach of a covenant not to carry on "any other trade or business that might grow or lead to be offensive or any annoyance or disturbance to any of the lessor's tenants or of the neighbourhood," various other trades having been prohibited, but that of a licensed victualler not specified. (*Jones* v. *Thorne*, 1 B. & C. 715.)

Meaning of word at date of covenant governs;

Where there is a covenant against carrying on a certain trade, the meaning of the word at the date of the covenant must be regarded. (*London and North Western Rail. Co.* v. *Garnett*, 39 L. J., Ch. 25, *per* James, V.-C.) And a covenant not to carry on the trade of a seller of wines or spirits by retail was held not to be broken by a grocer selling wines and spirits across the counter, as that would not have been a selling by retail at the date the covenant was entered into, the power to so sell having been given by a statute passed since (*Jones* v. *Bone*, 39 L. J., Ch. 405; L. R., 9 Eq. 674); but such a selling would be a breach of a covenant

not to permit the premises to be used for the sale of spirituous liquors. (*Fielden* v. *Slater* 38 L. J., Ch. 379.) Looking to the meaning of the word at the date of the covenant, a sale of beer not to be consumed on the premises was held not a breach of a covenant not to use the premises as a "beer house" (*London and North Western Rail. Co.* v. *Garnett*, 39 L. J., Ch. 25; L. R., 9 Eq. 26; and see *Pease* v. *Coates*, 36 L. J., Ch. 57; L. R., 2 Eq. 688); but recently it was held that "beer-shop" would include sales for consumption off the premises, and would mean any place for the sale of beer, as no more restricted meaning could be assigned to it at the date of the covenant. (*Bishop of St. Albans* v. *Battersby*, 47 L. J., Q. B. 571; L. R., 3 Q. B. D. 359.)

not extended beyond ordinary significance.

The words of a covenant are restrained to their ordinary significance, so that a covenant not to carry on the trade of a common brewer or retailer of beer is not broken by carrying on the business of a retail brewer. (*Simons* v. *Farren*, 1 Bing. N. C. 126.)

"Private dwelling-house only."

A covenant to use a house as "a private dwelling-house only" is broken by using it as an office to receive orders for coal with the words "coal office" exhibited in front (*Wilkinson* v. *Rogers*, 12 W. R. 119, 284), or by using it as a school (*Wickenden* v. *Webster*, 25 L. J., Q. B. 264; 6 E. & B. 387), even though for gratuitous education (*German* v. *Chapman*, L. R., 7 Ch. D. 271; 47 L. J., Ch. 250); but not by a sale by auction of furniture belonging to the house (*Reeves* v. *Cattell*, 24 W. R. 485), though it would if the furniture was brought on for the purpose of sale. (*Ib.*; and see *Evans* v. *Davis*, 27 W. R. 285; 39 L. T. 391.)

Any branch of prohibited trade a breach.

It is not necessary to constitute a breach that the tenant should carry on every branch of a prohibited trade; thus a covenant prohibiting the

trade of a butcher is broken by selling raw meat, though not slaughtered on the premises. (*Doe* v. *Spry*, 1 B. & Ald. 617; *Doe* v. *Elsam*, Moo. & M. 189.) But it was held no breach of a covenant not to carry on the business of a confectioner for a grocer and tea dealer to sell a particular kind of sweetmeat in which a confectioner may happen to deal. (*Lumley* v. *Metropolitan Rail. Co.*, 34 L. T., N. S. 774.)

Covenants for right to supply beer.

Covenants in a lease that the landlord or a particular brewer shall have the exclusive right to supply beer to any house erected or to be erected on the demised premises is valid (*Catt* v. *Tourle*, 38 L. J., Ch. 665; L. R., 4 Ch. 654); but it cannot be enforced unless the brewer supply the lessee with good beer. (*Thornton* v. *Sherratt*, 8 Taunt. 529; *Cooper* v. *Twibill*, 3 Camp. 286, n.; *Luker* v. *Dennis*, L. R., 7 Ch. D. 227; 47 L. J., Ch. 174.)

Covenants not to carry on trades without licence of the lessor.

Restrictive covenants are often against carrying on particular trades without the licence of the lessor. In such a case permission to carry on one trade will not sanction the carrying on of any other forbidden trade, whether more or less offensive than that licensed. (*Macher* v. *Foundling Hospital*, 1 V. & B. 188.)

Distance, how measured.

Where there is a covenant by the assignor of a lease of premises used for a particular business, that he will not be concerned in that business within a certain distance of the assigned premises, the distance is to be measured in a straight line, and not along the nearest practicable route. (*Mouflet* v. *Cole*, L. R., 8 Ex. 32; 42 L. J., Ex. 8.) The same rule would apply to the measurement of distances generally in a restrictive covenant.

Loss of right to enforce restrictive covenants

A lessor does not lose his right to enforce restrictive covenants by merely lying by and witnessing the act for some time, unless there is

by acquiescence in breaches.

an implied assent or actual waiver, as by receipt of rent. (*Doe* v. *Allen*, 3 Taunt. 78.) But if he permit the tenant to expend money in alteration, there would be evidence of his assent to the alteration (*ib.*); and receipt of rent for twenty years, with knowledge of the breach and no objection taken, would raise a presumption of a licence under seal. (*Gibson* v. *Doeg*, 2 H. & N. 615; 27 L. J., Ex. 37.) Mere acquiescence in trifling breaches will not prevent his right to prevent more extensive ones. (*Richards* v. *Revitt*, L. R., 7 Ch. D. 224; 47 L. J., Ch. 472.) Where a lessor lets a number of properties adjoining or forming parts of one estate under similar restrictive covenants, designed for the benefit of all the tenants, and afterwards waives or relaxes one or more of those covenants in favour of some of the tenants, he may lose his right to restrain breaches of the same covenants by other tenants (*Roper* v. *Williams*, T. & R. 18; *Duke of Bedford* v. *Trustees of British Museum*, 2 My. & K. 552; *Peek* v. *Matthews*, L. R., 3 Eq. 515), but only where the whole character of the estate is so changed by the waiver that the object of the covenant is substantially at an end. (*German* v. *Chapman*, 47 L. J., Ch. 253, *per* James, L. J.)

Restrictive covenants by the landlord.

A personal covenant by the landlord not in terms extended to bind his assigns, that he will not let adjoining premises for carrying on a specific trade intended to be carried on by the tenant, does not bind the person to whom he may let those premises not to carry on that particular trade; nor is the covenant broken if the landlord does not let for the purpose of that particular trade (*Kemp* v. *Bird*, 46 L. J., Ch. 828; L. R., 5 Ch. D. 974; and see *Master* v. *Hansard*, 46 L. J., Ch. 505; L. R., 4 Ch. D. 718.)

Restrictions by law as

In addition to the restrictions as to the user of

the premises imposed upon the tenant by the terms of his lease, there is the further legal restriction imposed by law to so use the premises as not to cause substantial annoyance to his neighbours. (*Ball* v. *Ray*, L. R., 8 Ch. 467; 21 W. R. 282; *Broder* v. *Saillard*, 24 W. R. 1011; *Heather* v. *Pardon*, 37 L. T., N. S. 393.) regards neighbours.

Sect. 6.—*Insurance.*

A lease often contains a covenant on the part of the lessee to insure, and a covenant "to insure and keep insured during the term in some sufficient insurance office," without naming the office, is not void for uncertainty. (*Doe* v. *Shewin*, 3 Camp. 134.) A covenant to insure does not bind the lessee to insure before the lease is executed, and an insurance within a very short time after would seem to be a compliance with the covenant (*per* Patteson, J., *Doe* v. *Ulph*, 18 L. J., Q. B. 106; 13 Q. B. 204); but, subject to this qualification, the covenant is broken by the premises being left uninsured for any part, however small, of the term, even though no fire occur, and proper insurances be afterwards effected. (*Doe* v. *Shewin*, *supra*; *Penniall* v. *Harborne*, 11 Q. B. 368; 17 L. J., Q. B. 94; *Wilson* v. *Wilson*, 14 C. B. 616; 23 L. J., C. P. 137.) So if the covenant be to insure in the joint names of the lessor and lessee, and the insurance be in the name of the lessee alone, the covenant is broken (*Doe* v. *Gladwin*, 6 Q. B. 953); and a covenant to insure in the name of the lessor alone is broken by the lessee adding his own name. (*Penniall* v. *Harborne*, *supra*.) But a covenant to insure in the joint names of the lessor and lessee is well performed by insuring in the name of the Covenant to insure. How broken.

lessor alone. (*Havens* v. *Middleton*, 22 L. J., Ch. 746.)

Forfeiture for breach relieved against.

The courts have power to relieve (but only once) against a forfeiture for breach of a covenant to insure, where no loss or damage by fire has happened, and the breach has been committed through accident or mistake, and an insurance has been duly effected at the time of application. (22 & 23 Vict. c. 35, ss. 4, 5, 6; 23 & 24 Vict. c. 126, ss. 2—11; 36 & 37 Vict. c. 66, s. 24.) The court shall have no power to grant any relief where a forfeiture shall have been already waived out of court in favour of the person seeking the relief. (22 & 23 Vict. c. 35, s. 6.) This means an actual waiver, and it is not necessary there should have been a formal document expressly waiving the previous forfeiture. (*Mills* v. *Griffiths*, 45 L. J., Q. B. 771.)

Continuing breach.

The breach of a covenant to insure continues so long as a state of things exists inconsistent with the terms of the covenant, and waiver of a breach by receipt of rent applies only to what is past. (*Doe* v. *Gladwin*, 6 Q. B. 953.)

Sect. 7.—*Rates and Taxes.*

Property tax payable by landlord.

Of the burdens in the nature of taxes imposed upon real estate, the property tax alone may not be made the subject of direct contract. It is to be borne by the owner, and if the occupier pay it, he may deduct it from his next payment of rent, and the landlord must allow the deduction under a penalty of 50*l.*; and any stipulation between landlord and tenant for payment of rent in full, without allowing such deduction, will be void. (5 & 6 Vict. c. 35, ss. 73, 103.) But a proviso for reducing

the rent in the event of the property tax being repealed is good. (*Colbron* v. *Travers*, 12 C. B., N. S. 181; but see *Beadel* v. *Pitt*, 13 W. R. 287.) And an agreement that if the tenant pay the rent in full without deducting income tax, the landlord will pay him the amount of the tax, is not illegal. (*Lamb* v. *Brewster*, 48 L. J., Q. B. 277; 27 W. R. 395, 478.)

What taxes payable by landlord.

Some taxes, in the absence of any agreement upon the subject, are payable by the landlord, and if paid by the tenant are to be allowed out of his rent. Of this description are land tax (38 Geo. 3, c. 5, ss. 17, 18), sewers rate (Callis on Sewers, 140; *Palmer* v. *Earith*, 14 M. & W. 431; and see 38 & 39 Vict. c. 55, s. 13), one-half the cattle plague rate (32 & 33 Vict. c. 70, s. 89), and the poor rates, where hereditaments are let for a term not exceeding three months. (32 & 33 Vict. c. 41, s. 1.) In like manner the rent-charge in lieu of tithes—which is charged directly upon the land, and may be recovered by distress, but is not a personal charge upon either landlord or tenant—if paid by the tenant, may be deducted from his rent. (See 6 & 7 W. 4, c. 71, ss. 67, 80, 81; *Griffenhoofe* v. *Daubuz*, 4 E. & B. 230; 5 *ib.* 746; 25 L. J., Q. B. 237.) But the landlord and tenant may enter into any contract they think fit for varying this liability.

Tithe rent-charge.

To provide a remedy against a tenant who, having agreed to pay the tithe rent-charge, may have left without doing so, it is provided by 14 & 15 Vict. c. 25, s. 4, that "if any occupying tenant of land shall quit, leaving unpaid any tithe rent-charge for or charged upon such land which he was, by the terms of his tenancy or holding, legally or equitably liable to pay, and the tithe owner shall give or have given notice of proceeding by distress upon the land for recovery thereof, it shall be lawful for the landlord, or the succeeding tenant or occupier, to pay such tithe rent-charge and any

14 & 15 Vict. c. 25, s. 4.

expenses incident thereto, and to recover the amount or sum of money which he may so pay over, against such first-named tenant or occupier or his legal representatives, in the same manner as if the same were a debt by simple contract due from such first-named tenant or occupier to the landlord or tenant making such payment."

Rates payable by tenant.

Other rates, such as house duties, poor rates, paving, watching, lighting, highway and county and borough rates and similar impositions, are charged upon the occupier, and are to be borne by him in the absence of any agreement to the contrary.

Payment of taxes implied from "net" rent.

The liability to pay and bear the landlord's taxes is very often by the lease shifted to the tenant. And this may be done by any terms in the lease implying that no deductions are to be made from the rent; thus a reservation of a "net" rent (*Bennett* v. *Womack*, 7 B. & C. 627), or a rent "free of all outgoings" (*Parish* v. *Sleeman*, 1 De G., F. & J. 326; 29 L. J., Ch. 96), imposes upon a tenant the burden of all rates and taxes, except property tax.

Covenant to pay

In a covenant for the payment of taxes, it is sometimes a question of difficulty as to what burdens are included in the terms used. The enumeration of particular liabilities, followed by general words, as "other charges," will be limited to matters *ejusdem generis*. (*Bird* v. *Elwes*, 37 L. J., Ex. 91.)

"all taxes;"

A covenant to pay "all taxes," extends to all parliamentary taxes given to the crown, and therefore includes land tax (*Amfield* v. *White*, Ry. & Moo. 246; *Hopwood* v. *Barefoot*, 11 Mod. 237);

"parliamentary taxes."

so does a covenant to pay all "parliamentary taxes." (*Manning* v. *Lunn*, 2 C. & K. 13.) And "parliamentary taxes" includes a rent-charge in lieu of land tax (*Christ's Hospital* v. *Harrild*, 2 M. & G. 707), but does not extend to a liability to repair a bridge *ratione tenuræ;* although a local act authorizes a rate for the repair of the bridge. (*Baker* v. *Greenhill*, 3 Q. B. 149.) A covenant to

pay "taxes" does not seem to extend beyond parliamentary taxes, so as to include parochial or sewers rates, or others of the like kind (*Arran* v. *Crisp*, 12 Mod. 55; *Brewster* v. *Kitchell*, 1 Salk. 198; 1 Ld. Raym. 317); and "all taxes, parochial and parliamentary," does not comprise a sewers rate, for it is neither parochial nor parliamentary. (*Palmer* v. *Earith*, 14 M. & W. 428.) "Taxes on the land" does not include poor and church rates, for these are personal charges. (*Theed* v. *Starkey*, 8 Mod. 314.)

What words include tithe rent-charge.

It has been decided that tithe rent-charge is not included in a covenant to pay "taxes and assessments" (*Jeffrey* v. *Neale*, L. R., 6 C. P. 240; 40 L. J., C. P. 191); but it is included under the word "charges" (*Lockwood* v. *Wilson*, 43 L. J., C. P. 179), and under "outgoings." (*Parish* v. *Sleeman*, 29 L. J., Ch. 96.)

"Rates."

The word "rates" seems to include all parochial rates; and "public taxes, charges, and assessments," includes poor rates (*Rex* v. *Scot*, 3 T. R. 602); and "parochial taxes and assessments" seems to extend to a county rate. (*Reg.* v. *Aylesbury*, 9 Q. B. 261.)

Future impositions, how far included.

Unless the covenant is extended to future outgoings, it includes all subsequently imposed taxes of the same nature as those in existence at the date of covenant, but not to those of a different nature (*Brewster* v. *Kitchell*, 1 Salk. 198); but it may be extended to all future outgoings (*Hurst* v. *Hurst*, 4 Ex. 571), and may even be extended to charges imposed in respect of the permanent improvement of the demised premises. (*Sweet* v. *Seagar*, 2 C. B., N. S. 119.) Thus a covenant to pay "outgoings," to be charged or imposed upon the premises, or upon the landlord or tenant in respect thereof, includes the costs recoverable by a

local board for works done under the Sanitary Act, 1866 (29 & 30 Vict. c. 90), s. 10 (*Crosse* v. *Raw*, 43 L. J., Ex. 144); so a covenant to pay all "duties" which, during the demise, shall be imposed on the landlord of the premises, was held to include the costs of paving a street payable under the Metropolis Local Management Acts, 18 & 19 Vict. c. 120, s. 105; 25 & 26 Vict. c. 102, ss. 77, 96. (*Thompson* v. *Lapworth*, L. R., 3 C. P. 149; 37 L. J., C. P. 74.) But where the tenant covenanted to pay all rates, charges and impositions charged or imposed "on the premises thereby demised, or in respect thereof, or of the said rent," it was held not to throw upon him the expense of drainage works ordered to be done by the local authorities under the Public Health Act, 1875, since such expenses are by the act imposed upon the landlord personally, and are not a charge upon the premises. (*Rawlins* v. *Biggs*, L. R., 3 C. P. D. 368; 47 L. J., C. P. 487; *Tidswell* v. *Whitworth*, L. R., 2 C. P. 326; 36 L. J., C. P. 103.)

37 & 38 Vict. c. 54, s. 8.

Prior to 37 & 38 Vict. c. 54, certain mines were exempt from poor rates, but this act abolishes the exemption, and by sect. 8 provides for the case of existing leases of such mines, that the lessee "may (unless he has specifically contracted to pay such rate in the event of the abolition of the said exemption) deduct from any rent, royalty, or dues, payable by him, one-half of any such rate paid by him." Upon the construction of this section it has been held that the specific contract to throw the whole burden of the rate upon the tenant must be one expressly referring to future legislation, and will not be affected by the terms of a lease by which rent is to be paid "free from all rates, taxes, expenses, and deductions, parliamentary, parochial, or of any other nature." (*Duke of Devonshire* v.

Barrow Hæmatite Steel Co., 46 L. J., Q. B. 435; L. R., 2 Q. B. D. 286; *Chaloner* v. *Bolckow*, 47 L. J., C. P. 562; 26 W. R. 531.)

Landlord's liability to pay land tax limited by the rent reserved.

Under a covenant by a landlord to pay land tax, he is liable only in respect of the actual rent reserved; so that where the landlord covenanted to pay land tax and save the tenant harmless, he was held to have satisfied his covenant by paying the tax at the rate of 120*l.*, the rent he actually received, though the premises were taxed at 150*l.* (*Yaw* v. *Leman*, 1 Wils. 21; *Whitfield* v. *Brandwood*, 2 Stark. 440); and if the tenant be underrated he can only deduct *pro ratâ*. (*Sherington* v. *Andrews*, Comb. 483.) And where a tenant was to deduct sewers rate and land tax, and he built on the land so as to increase the rateable value, it was held that he was only entitled to deduct the rate and tax on the original rent. (*Smith* v. *Humble*, 15 C. B. 321.)

His liability to pay other taxes not extended to increased value.

And where the landlord covenanted to pay all taxes "already charged or to be charged upon or in respect of the demised premises," there being a covenant by the tenant not to build without licence, and the tenant at the time of the lease received such licence, and afterwards built so as to increase the annual value of the premises, it was held that the landlord was only liable to pay the taxes on the original value. (*Watson* v. *Home*, 7 B. & C. 285.) Indeed, a covenant by the landlord as to payment of rates and taxes, whether present or future, must generally be taken to apply to those which are or would be payable in respect of the premises in the state in which they are at the time of demise. (*Watson* v. *Atkins*, 3 B. & Ald. 647.)

Tenant's remedies for recovery of taxes.

Where a tenant pays a tax which his landlord is bound to pay, he may deduct the amount from his next rent (*infra*, sect. 8); or, before payment of the next rent, but not afterwards, he may bring

an action against his landlord and recover the amount. (*Graham* v. *Tate*, 1 M. & S. 609; *Cumming* v. *Bedborough*, 15 M. & W. 438. And see *Lamb* v. *Brewster*, 48 L. J., Q. B. 277; 27 W. R. 395, 478.)

SECT. 8.—*Rent.*

General obligation to pay rent.

The relation of landlord and tenant raises an obligation to pay rent. The words "yielding and paying" in a lease by deed create an implied covenant to pay the rent; but any words indicative of the intention of the parties that a specified rent shall be paid, amount to an implied agreement on the part of the tenant to pay it. Instruments of demise usually contain express provision for the times of payment, generally by half-yearly or quarterly payments.

Where by the stipulation of the parties there is a condition precedent to the recovery of the rent, it must be performed before the rent is payable. (*Brook* v. *Fletcher*, 37 L. T. 100.)

On what day payable.

If rent is reserved generally, *e.g.* "at a rent of 10*l.*," without saying annually, it will nevertheless become payable yearly (2 Roll. Abr. 449; 3 Cruise, Dig. Title 28, c. 1, s. 49), and if no time is mentioned for payment, it is only payable at the end of each year. (*Cole* v. *Sury*, Latch, 264; *Collett* v. *Curling*, 16 L. J., Q. B. 390.) And where a house was let at a yearly rent of 50*l.*, and the instrument, after containing certain clauses as to the house, ended, "likewise the stable and loft now occupied by H. at a further rental of 25*l.* per annum, to be paid on the usual quarter days," it was held that the quarterly payment applied only to the latter rent. (*Coomber* v. *Howard*, 1 C. B. 440.) Where the reservation was general in a written agreement of demise, but the landlord afterwards asked the

tenant how he would like to pay, and he replied quarterly, it was held that the rent was still due annually and not quarterly, although rent had been actually paid quarterly. (*Turner* v. *Allday*, Tyr. & Gr. 819.) If the rent be made payable yearly, without saying "during the said term," yet the payment must be made every year during the term. (*Harrington* v. *Wise*, Cro. Eliz. 486.) If payable on "the two most usual feast days," Lady-day and Michaelmas will be understood, and the rent will be payable in equal portions. (2 Roll. Abr. 450.) But if the rent is made payable half-yearly or quarterly, and no specific days are mentioned, the payment will be in equal portions on the half-yearly or quarterly days, computed from the date of the lease. If payable quarterly or half-yearly on certain specified days, the first payment will become due on the first of those days happening after the execution of the lease, though it may not be the first in the order of the arrangement of the words. (*Hill* v. *Graunge*, Plowd. 171; Co. Litt. 217, b; 2 Platt on Leases, 114.) Where the reservation was "quarterly or half-quarterly if desired," it was held that the landlord having received the rent quarterly for the first twelve months, a previous notice of his intention to change was necessary to make it payable half-quarterly. (*Mallam* v. *Arden*, 10 Bing. 299)

Forehand rent.

Rent may be reserved payable in advance, even in the case of a lease under a power (*Rutland* v. *Doe*, 12 M. & W. 355), and so recovered by action or distress. (*Lee* v. *Smith*, 9 Ex. 662; 23 L. J., Ex. 198; *Buckley* v. *Taylor*, 2 T. R. 600; *Ex parte Hale*, L. R., 1 Ch. D. 285; 45 L. J., Bkcy. 21; *Harrison* v. *Barry*, 7 Price, 690.) But there must be a clear intention that it is to be payable in advance during the whole of the tenancy, for where there was a reservation of rent, "to commence at

Michaelmas, and to be paid three months in advance," it was regarded as limited to the first quarter. (*Holland* v. *Palser*, 2 Stark. 161; and see *Hopkins* v. *Helmore*, 8 A. & E. 463.) It is very usual, especially in farming leases, to reserve the last half-year's rent payable in advance; and where it was provided that the tenant should pay the last half-year's rent in advance, "which last-mentioned half-year's rent should be considered as reserved and due on the said 29th day of September preceding, if the landlord should see cause for such a demand," it was held that the rent became due on the 29th of September, and that the landlord was entitled to make such a demand and distrain, although the day was past. (*Witty* v. *Williams*, 12 W. R. 755; *Williams* v. *Holmes*, 22 L. J., Ex. 283.)

Rent paid before due not a discharge.

Payment before the time when the rent becomes due, though good as against the landlord himself (*Nash* v. *Gray*, 2 F. & F. 391), does not discharge the tenant as against any person who, before the actual date of payment, acquires the landlord's estate, unless the tenant has no notice before the date of payment that the landlord has parted with his estate. (4 Anne, c. 16, ss. 9, 10.) Therefore where a lessor let his land at a rent payable quarterly, and afterwards mortgaged it, but remained in possession and obtained from the lessee who had no notice of the mortgage a year's rent in advance, it was held that the payment of rent in advance was not a good payment as against the mortgagee, who, before the rent became due, gave the lessee notice to pay the rent to him (*De Nicholls* v. *Saunders*, L. R., 5 C. P. 589; 39 L. J., C. P. 297); and the same rule applies where the lessor grants away the reversion. (*Cook* v. *Guerra*, L. R., 7 C. P. 132; 41 L. J., C. P. 89.)

Time of day when due.

Rent is *due* at the first moment of the morning of the day appointed for payment, but is not *in arrear* until the first moment of the next day. (*Dibble* v. *Bowater*, 2 E. & B. 564; 22 L. J., Q. B. 396.) The older cases held that rent was not due until midnight of the day of reservation (*Cutting* v. *Derby*, 2 W. Bl. 1077; *Norris* v. *Harrison*, 2 Madd. 268), but the distinction was chiefly important as to questions of the right to rent as between the heir and personal representatives of the landlord, which have been removed by 33 & 34 Vict. c. 35.

To be demanded.

In order to entitle the lessor to re-enter and avoid the estate for forfeiture for breach of the condition for payment of rent, it must be demanded a sufficient time before sunset to allow of the money being counted; and if payment is not made on demand, the person must remain until the sun has set, that there may be a constructive continuing demand up to that time. (*Ex parte Smyth*, 1 Swanst. 343, note; *Duppa* v. *Mayo*, 1 Wms. Saund. 287 (m.) So that a demand at half-past ten in the morning of the last day (*Acocks* v. *Phillips*, 5 H. & N. 183), or at one o'clock (*Doe* v. *Paul*, 3 C. & P. 613), is not good.

Where rent is payable.

Except where the crown is the lessor, rent, unless otherwise provided, is payable upon the land, and no forfeiture is worked unless so demanded. (*Boroughes' case*, 4 Co. 72 a.) But if there be a covenant to pay rent, and the landlord sues upon it, it is no defence that the rent was not demanded upon the land; for a covenant for payment of rent at a time and in manner reserved, when no particular place is mentioned, is analogous to a covenant to pay a certain 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 tender the money. (*Haldane* v. *Johnson*, 22 L. J., Ex. 264.)

How payable.

Rent may be paid in the same manner as any other debt. Thus, payment in silver, gold, or Bank of England notes would be unexceptionable, and the landlord might refuse to be paid in any other way. But he may waive this right, and then the payment may be in anything which the parties treat as money. Country bank notes or the tenant's cheque, unless objected to by the landlord, will amount to a conditional payment. (*Ward* v. *Evans*, 2 Ld. Raym. 928; *Pearce* v. *Davis*, 1 M. & Rob. 365.) If, however, the country bank fail, or the cheque be dishonoured, the landlord's remedies remain entire. (*Everett* v. *Collins*, 2 Camp. 515; *Cohen* v. *Hale*, 47 L. J., Q. B. 496; L. R., 3 Q. B. D. 371; Byles on Bills, 24, 9th ed.) But in the case of a note, or a cheque not on the drawer's own account, it must be presented for payment within a reasonable time; for otherwise if the bank or person who ought to pay it becomes insolvent, the landlord must bear the loss because he prevented the tenant from receiving the money by detaining the note in his custody. (*Ward* v. *Evans*, *supra*; *Camidge* v. *Allenby*, 6 B. & C. 373; *Lichfield Union* v. *Greene*, 26 L. J., Ex. 140; *Hopkins* v. *Ware*, L. R., 4 Ex. 268; 38 L. J., Ex. 147.) Where the plaintiff and defendant each kept an account with one banker, and in October the plaintiff authorized the defendant to pay into his account a sum due for rent, the defendant wrote saying it was done, and the plaintiff sent him a receipt; the sum, owing to a mistake, was not transferred until the 9th of December, when a notice was sent to plaintiff of the transfer, but it did not reach him until the 11th, and in the meanwhile, on the 10th, the bankers failed; it was held that this was a sufficient payment. (*Eyles* v.

Notes or cheques.

Ellis, 4 Bing. 112.) A remittance by post, if authorized by the landlord or previously sanctioned by him, would be a sufficient payment (*Warwicke* v. *Noakes*, Peake, 98); and where there was a request so to remit, it would be remitted at the peril of the landlord, if the tenant had used due caution in delivering it at the post office. (*Hawkins* v. *Rutt*, Peake, 248.) A landlord by taking a security does not merge his original claim in respect of rent; and therefore a bond, bill of exchange, or promissory note, taken for rent (*Harris* v. *Shipway*, Bull. N. P. 178; *Davis* v. *Gyde*, 2 A. & E. 623; *Palfrey* v. *Baker*, 3 Price, 572), whether the rent be reserved by deed or by parol (*Willett* v. *Earle*, 1 Vern. 490; *Gage* v. *Acton*, 1 Salk. 325), will not, until actual payment under the bond, bill, or note, unless there be a distinct agreement to that effect, operate as a satisfaction of the rent, or even suspend the landlord's right to distrain or his other remedies for the recovery of the rent.

Remittance by post.

Rent not merged by security.

Payment or tender of rent should be to the landlord himself, or his duly authorized agent (*Goodland* v. *Blewith*, 1 Camp. 477); that is, (1) a person the tenant has been expressly directed to pay (*Roper* v. *Bumford*, 3 Taunt. 76); (2) one whom the tenant has previously paid with the approval of the landlord; or, (3) one who would be entitled to give receipts for the same in the ordinary course of his duties, as the steward or estate agent of the landlord. If made to the landlord's wife, her agency must be established like any other agency, *e.g.* by like payments previously sanctioned. (*Browne* v. *Powell*, 4 Bing. 230; *Offley* v. *Clay*, 2 M. & G. 172.) Payment to an agent whose authority has been revoked (*Venning* v. *Bray*, 31 L. J., Q. B. 181; 2 B. & S. 502), or to a person not entitled to receive it, with the ac-

To whom payable.

quiescence (under a false impression) of the person really entitled (*Williams* v. *Bartholomew*, 1 B. & P. 326), is not good. Where the lessors are joint tenants, payment to either one is sufficient (*Robinson* v. *Hofman*, 4 Bing. 562, *per* Burrough, J.); so, in the case of tenants in common, for though their interests are separate, the one would be regarded as the agent of the other. (But see *Thompson* v. *Hakewell*, 35 L. J., C. P. 18.) The tenant may not, however, continue to pay the whole rent to one tenant in common after notice from the other not to do so. (*Harrison* v. *Barnby*, 5 T. R. 246; *Powis* v. *Smith*, 5 B. & Ald. 850.)

If a lessor after granting a lease mortgage the reversion, the tenant may continue to pay rent to him until notice from the mortgagee to the contrary (*Trent* v. *Hunt*, 22 L. J., Ex. 318; 9 Ex. 14); so if the lease be granted after the mortgage, but by the mortgagor alone. (*Pope* v. *Biggs*, 9 B. & C. 251, *per* Bayley, J.) After notice from the mortgagee to pay rents to him, the mortgagor cannot give a receipt for any unpaid arrears or future rent. (*De Nicols* v. *Saunders*, 39 L. J., C. P. 297; *Rogers* v. *Humphreys*, 4 A. & E. 299; *Waddilove* v. *Barnett*, 2 Bing. N. C. 538.)

Rent ascertained or ascertainable.

The rent may be a sum ascertained and certain in amount, or it may be fluctuating in amount, but ascertainable by some rule of calculation contained in the lease—the latter is especially the case in mining leases, in which a fixed minimum or dead rent is reserved, with a further rent or royalty upon the quantity of minerals sold or got. If the minerals demised are not worth the working, or the lessee is prevented from working by accidents, faults or defects, he must still pay the minimum rent (*Bute* v. *Thompson*, 13 M. & W. 487; *Rex* v. *Bedworth*, 8 East, 387; *Jefferys* v. *Fairs*, L. R., 4 Ch. D. 448; 46 L. J., Ch. 113); nor will

Minimum rents notwithstanding no beneficial working.

the courts, on equitable grounds, relieve from the payment of such minimum rents. (*Phillips* v. *Jones*, 9 Sim. 519; *Ridgway* v. *Sneyd*, Kay, 627.) But where the thing let is a nonentity, the lessee is not bound to pay rent. (*Gowan* v. *Christie*, L. R., 2 Sc. & Div. 273.) A covenant to pay a proportion of all such sums of money as the coals gotten should sell for at the pit's mouth, was held not to make the lessee liable to pay any such proportion in respect of coals sold elsewhere than at the pit's mouth. (*Clifton* v. *Walmesley*, 5 T. R. 564.)

If a person enter at a rent to be fixed in future, no distress can be made, but an action may be brought on the rent for a *quantum valebat* (*Hamerton* v. *Stead*, 3 B. & C. 478); but a single payment makes it certain, so that it can thenceforth be distrained for.

Penal rents.

A gross sum in the nature of a penalty agreed to be paid for breach of *any* covenant in a lease, cannot be recovered as rent; but where additional rents are reserved for the non-observance of *particular* covenants or stipulations, to be calculated according to the extent of such non-observance—*e. g.* a rent of 5*l.* per acre for land ploughed or cultivated contrary to the terms of the lease—such rents are regarded not as penalties, but as liquidated damages, and are to be paid exactly as reserved (*Farrant* v. *Olmius*, 3 B. & Ald. 692; see as to distinction between penalties and liquidated damages, *Magee* v. *Lavell*, 43 L. J., C. P. 131; L. R., 9 C. P. 107; *Re Newman*, *Ex parte Capper*, L. R., 4 Ch. D. 724; 46 L. J., Bkcy. 57; Chit. Con. 807 *et seq.*, 10th ed.), and as liquidated damages may be recovered by distress. (*Rolfe* v. *Peterson*, 2 Bro. P. C. 436; *Pollitt* v. *Forrest*, 11 Q. B. 949; *Bowers* v. *Nixon*, 18 L. J., Q. B. 35.) Neither would the courts on equitable grounds relieve against such a covenant. (*Rolfe* v. *Peterson*, *supra.*) Where the reservation was of an additional rent

In respect of what acts payable.

during the last twenty years of a term, for every acre of meadow which should be ploughed, broken up, or converted into tillage during the said last twenty years of the term, it was held that the rent was due in the last twenty years if the land was then ploughed, whether it was first ploughed in the last twenty years or before, and that the rent continued payable during the twenty years, though the land was again laid down in permanent grass. (*Birch* v. *Stephenson*, 3 Taunt. 469.) But lands ploughed shortly before the commencement of a term are not rendered pasture, so as to prevent the tenant breaking them up, by his having for thirty years of the term allowed them to continue as pasture. (*Goring* v. *Goring*, 3 Swanst. 661.) A landlord does not waive his right to additional rent by having knowledge of the breach and subsequently accepting the original rent, for liquidated damages cannot be waived. (*Denton* v. *Richmond*, 1 Cr. & M. 734.)

Deductions for payments to preserve tenant's possession.

Where the tenant has paid, on behalf of the landlord, sums which it was the landlord's duty to pay, and which were charged upon the land, so that the failure to pay them would prevent the tenant's peaceable possession of the property, the tenant is considered as authorized by the landlord to make such payments, and treat the same as having been made in satisfaction or part satisfaction of his rent. (*Graham* v. *Allsopp*, 3 Ex. 186; 18 L. J., Ex. 85; *Jones* v. *Morris*, 18 L. J., Ex. 477.) Of this description are payments of rent made by the tenant to the superior landlord of his own lessor to prevent his own goods being taken in distress (*Sapsford* v. *Fletcher*, 4 T. R. 511; *Wheeler* v. *Branscombe*, 5 Q. B. 373; *O'Donoghue* v. *Coalbrook Co.*, 26 L. T., N. S. 806), notwithstanding the superior landlord may not have threatened to distrain, but only have demanded the rent, or may have allowed the occupying tenant time to pay.

(*Carter* v. *Carter*, 5 Bing. 406; *Valpy* v. *Manley*, 1 C. B. 594.) So, payments of an annuity, or a legacy secured by powers of distress (*Taylor* v. *Zamira*, 6 Taunt. 524), and interest due on a mortgage created before the tenancy (*Johnson* v. *Jones*, 9 A. & E. 809; *Dyer* v. *Bowley*, 2 Bing. 94); but in the latter case there must have been an actual payment on demand to the mortgagee. (*Wilton* v. *Dunn*, 17 Q. B. 294; 21 L. J., Q. B. 60.)

Or in respect of landlord's taxes.

Property tax being payable by the landlord, notwithstanding any contract, if it be paid by the tenant it may be deducted from his rent. (*Franklin* v. *Carter*, 1 C. B. 750.) There are some taxes also which, in the absence of agreement between the parties, though payable in the first instance by the tenant, may be deducted from his rent. Of these are land tax, sewers rate, tithe rent-charge, &c. (*Ante*, p. 131.) Such deductions in respect of taxes must be made from the next rent due after such payment, as they cannot afterwards be retained, or recovered by action from the landlord. (*Cumming* v. *Bedborough*, 15 M. & W. 438; *Andrew* v. *Hancock*, 1 B. & B. 37.) Nor can they be retained until they have been actually paid (*Ryan* v. *Thompson*, 37 L. J., C. P. 134); and the tenant upon making the deduction should be prepared to produce the receipt for the tax.

Suspension of rent during eviction.

Upon an eviction by the landlord from the whole or any part of the premises, there is a suspension of the entire rent until the tenant re-enters and resumes possession (*Salmon* v. *Smith*, 1 Wms. Saund. 204, n. (2); *Neale* v. *Mackenzie*, 1 M. & W. 747); and an eviction of an undertenant is an eviction of the tenant. (*Burn* v. *Phelps*, 1 Stark. 94.) To constitute an eviction which will operate as a suspension of rent, it is not necessary there should be an actual physical expulsion from any

part of the premises; but any act of a *permanent* character done by the landlord, or by his procurement, with the intention of depriving the tenant of the enjoyment of the premises as demised, or any of them, will operate as such an eviction. (*Upton* v. *Townend*, 25 L. J., C. P. 44; 17 C. B. 30.) But there must be an actual dispossession of the tenant, and not a mere constructive eviction or temporary trespass. (*Henderson* v. *Mears*, 28 L. J., Q. B. 305; *Wheeler* v. *Stevenson*, 30 L. J., Ex. 46; 6 H. & N. 158.) Rent is not suspended by the destruction of the premises (*ante*, p. 110), or by reason of their becoming uninhabitable through the neglect of the landlord to repair. (*Ante*, p. 113.) And where there is a proviso for abatement of rent in case the premises become uninhabitable through "flood, fire, storm, tempest *or other inevitable accident*," the latter words mean accidents *ejusdem generis* with those specified. (*Saner* v. *Bilton*, L. R., 7 Ch. D. 815; 47 L. J., Ch. 267.)

Evictions by title paramount or act of law.

If the tenant be evicted from the premises by a title paramount to the landlord's (*Stevenson* v. *Lambard*, 2 East, 575), or by act of law, as by a railway company under the powers of its act, the tenant is discharged from the accruing rent, but not from rent due and in arrear. If in either of those cases there is an eviction from part only of the property, there will be an apportionment of rent between that taken and that remaining in the tenant's possession, such apportionment in the case of property taken by a railway to be by the agreement of the parties, or by two justices, or by a jury. (8 & 9 Vict. c. 18, s. 119; *In re Ware*, 9 Ex. 395.) An apportionment also takes place where the landlord resumes possession of part of the property demised under 38 & 39 Vict. c. 92, s. 52.

38 & 39 Vict. c. 92, s. 52.

Apportionment of rent

By the common law when a person having a

limited interest in land, as a tenant for life, without power of leasing, granted a lease which endured beyond his interest, and died during the interval between two of the rent days, the whole rent from the last day of payment was lost, because the lease determined by the lessor's death, and rent was not apportionable in respect of time. For this state of things a remedy was provided by 11 Geo. 2, c. 19, s. 15, and 4 & 5 Will. 4, c. 22, ss. 1, 2, the combined effect of which was to provide that where the lessor's interest determined by his own death or that of another person, or by any other means, before or on the rent day, the personal representatives of the lessor, or the lessor himself, as the case might be, should be able to recover from the tenant by action a proportionate part of such rent in respect of the time which elapsed between the last rent day and the day of determination of the lease. (See *Clun's case*, Tu. L. C. R. P. 249.)

in respect of time.

Under 11 Geo. 2, c. 19, and 4 & 5 Will. 4, c. 22.

These acts, however, applied only where the interest of the person entitled was terminated by the death of himself or another, and not as between the real and personal representatives of a person dying seised in fee (*Browne* v. *Amyot*, 3 Hare, 173; *Re Clulow's Estates*, 3 K. & J. 689); nor to demises not in writing. (*Re Markby*, 4 My. & C. 484.) However, the statute 33 & 34 Vict. c. 35, now provides that rent and all other periodical payments in the nature of income (whether reserved or made payable under an instrument in writing or otherwise) shall be considered as accruing from day to day, and shall be apportionable in respect of time. (Sect. 2.) This enactment comprehends all persons, whatever their interest, and however determined, so that the personal representatives of an owner in fee are entitled as against his heir or devisee to an apportionment of

Under 33 & 34 Vict. c. 35.

rents reserved to him. (*Capron* v. *Capron*, L. R., 17 Eq. 288; 43 L. J., Ch. 677; *Hasluck* v. *Pedley*, 44 L. J., Ch. 143; *Pollock* v. *Pollock*, L. R., 18 Eq. 329.) And the act is retrospective, applying to all cases, whether the instrument comes into operation before or after the passing of the act (*ib.*; *Re Cline's Trust*, 22 W. R. 512); but not where it has been expressly stipulated that there shall be no apportionment. (Sect. 7.) The apportioned part of the rent shall be recoverable when the next entire portion shall become due (sect. 3); and persons shall have the same remedies for recovering apportioned parts as for entire portions: provided that persons liable to pay rents reserved out of or charged on lands or other hereditaments of any tenure, and the same lands or other hereditaments, shall not be resorted to for any such apportioned part forming part of an entire or continuing rent as aforesaid specifically, but the entire or continuing rent, including such apportioned part, shall be recovered and received by the heir or other person who, if the rent had not been apportionable under this act, or otherwise, would have been entitled to such entire or continuing rent, and such apportioned part shall be recoverable from such heir or other person by the executors or other parties entitled under this act to the same by action at law or suit in equity. (Sect. 4. See *Swansea Bank* v. *Thomas*, 27 W. R. 491.)

Remedies for recovering apportioned shares.

Apportionments in respect of estate take place whenever the estate of the landlord becomes vested by conveyance or devolution, or by act of law, in several distinct persons, for then the rent may be divided between the severed parts; but unless the lessee consents to an apportionment it must be made by a jury. (*Bliss* v. *Collins*, 5 B. & Ald. 876; and see *ante*, p. 146.)

Apportionments in respect of estate.

Of the remedies possessed by a landlord for the

Remedies for recovery of rent.

recovery of rent, the most important, because the most summary, is that of distress, which will be fully considered in subsequent chapters. He may, however, instead of exercising his right of distress, proceed to recover the rent by action, or, having distrained, if the distress be not sufficient to satisfy the rent, he may then proceed by action for the residue (*Efford* v. *Burgess*, 1 M. & Rob. 23; *Lear* v. *Edmonds*, 1 B. & Ald. 157; *Lingham* v. *Warren*, 2 B. & B. 36; *Philpott* v. *Lehain*, 35 L. T., N.S. 855); but, having distrained, he cannot bring an action until he has realized the distress, even though it be insufficient to satisfy the rent. (*Lehain* v. *Philpott*, L. R., 10 Ex. 242; 44 L. J., Ex. 225.)

Arrears of rent.

The statute 3 & 4 Will. 4, c. 27, s. 42, enacts that no arrears of rent shall be recoverable by any distress, action or suit, but within six years next after the same shall have become due, or after a written acknowledgment. (*Post*, p. 161.) The act 3 & 4 Will. 4, c. 42, s. 3, enacts that all actions of debt for rent upon an indenture of demise shall be commenced within twenty [now twelve, 37 & 38 Vict. c. 57] years after the cause of action. The result of these two enactments is that, where the lease is not by deed, no arrears of rent beyond six years can be recovered; that if it is by deed with a covenant to pay rent, the landlord, as to arrears not due more than six years, has his remedy by distress, and as to the remainder of the arrears, he has his remedy by action upon the tenant's covenant. (*Paget* v. *Foley*, 2 Bing. N. C. 679; *Hunter* v. *Nockolds*, 19 L. J., Ch. 177; Shelford's R. P. Stats. 249—259, 8th ed.; 2 Dav. Conv. 571, 3rd ed.)

Landlord's right in case of execution

The statute 8 Anne, c. 14, s. 1, provides that no goods or chattels in or upon any messuage, lands, or tenements leased for lives, terms of years, or at will, or otherwise, shall be liable to be

taken by virtue of any execution, unless the party at whose suit the execution is sued out shall, before the removal of the goods from off the premises, pay to the landlord all such sum or sums of money as are, or shall be, due for rent at the time of taking such goods, provided the said arrears do not exceed one year's rent; and in case they do, the judgment may be executed after paying one year's rent. The act does not apply to executions under the warrant of a county court, a distinct remedy having been provided for such cases by 19 & 20 Vict. c. 108, s. 75. Neither does the act apply, unless at the time of the execution there is an existing tenancy, or enable the landlord to claim arrears of rent due under a lease which has expired or been determined by notice to quit, or by ejectment. (*Cox* v. *Leigh*, 43 L. J., Q. B. 123; L. R., 9 Q. B. 333; *Hodgson* v. *Gascoigne*, 5 B. & Ald. 88.)

to one year's rent,

No landlord of any tenement let at a weekly rent shall have a 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. (7 & 8 Vict. c. 96, s. 67.)

or to four periodical payments where letting for less than a year.

The sheriff's duty is to levy, first, for the rent, and then for the execution (*Colyer* v. *Speer*, 2 B. & B. 67); and he must satisfy the rent if he know it to be due, though he may not have had express notice from the landlord. (*Riseley* v. *Ryle*, 11 M. & W. 16, 20.)

A landlord is not entitled in the administration of the estate of a deceased tenant to be paid his rent in priority to other creditors, whether the rent is reserved by deed or by parol. (*Shirreff* v.

No priority for rent in administration suit.

Hastings, 47 L. J., Ch. 137; 25 W. R. 842; 32 & 33 Vict. c. 46, s. 1; 2 Wms. on Exors. 1010, 7th ed.)

Action for use and occupation.

If a person enters and occupies the lands or premises of another, and there is no lease by deed, the owner of the property can bring an action for compensation for the use and occupation. This is not only a common-law right (*Gibson* v. *Kirk*, 1 Q. B. 850), but the 11 Geo. 2, c. 19, s. 14, enacts, that, "it shall be lawful for the landlord, where the agreement is not by deed, to recover a reasonable satisfaction for the lands, tenements or hereditaments held or occupied by the defendant, in an action on the case, for the use and occupation of what were so held or enjoyed; and if in evidence on the trial of such action any parol demise, or any agreement (not being by deed), whereon a certain rent was reserved, shall appear, the plaintiffs shall not thereupon be non-suited, but may make use thereof as an evidence of the quantum of the damages to be recovered." The action will lie when there is a lease by a deed only intended as an escrow (*Gudgen* v. *Besset*, 6 E. & B. 986), or an agreement under seal not amounting to a demise. (*Elliott* v. *Rogers*, 4 Esp. 59.)

Actual or constructive occupation

There must have been an occupation or holding of premises by the defendant, and not merely an agreement to take them. (*Edge* v. *Strafford*, 1 Cr. & J. 391; *Towne* v. *D'Heinrich*, 22 L. J., C. P. 219.) But a person may have constructive occupation of premises, where he locks them up and goes away. (*Conolly* v. *Baxter*, 2 Stark. 527.) And if A. agree to let lands to B., who permits C. to occupy them, B. may nevertheless be sued for use and occupation (*Bull* v. *Sibbs*, 8 T. R. 327), unless A. recognize and accept C. as tenant. (*Harding* v. *Crethorn*, 1 Esp. 57.)

under an undertaking to pay.

The occupation must have been under an ex-

press or implied undertaking to pay for it. (*Birch* v. *Wright*, 1 T. R. 387; *Churchward* v. *Ford*, 2 H. & N. 446.) Where a person is let into possession of premises, in contemplation of a lease to be granted, which he afterwards refuses to execute, he is liable for use and occupation. (*Dawes* v. *Dowling*, 22 W. R. 770.) And generally the mere fact of the plaintiff's ownership of the property, and the occupation by the defendant, is sufficient *primâ facie* evidence of such an undertaking. (*Hellier* v. *Silleox*, 19 L. J., Q. B. 295; *Churchward* v. *Ford*, *supra*.) But the presumption from such evidence may be rebutted, by showing that the possession was adverse to the consent of the plaintiff, and was that of a mere trespasser, or was under a contract with a third party, a stranger to the plaintiff, or any other circumstances which are inconsistent with a contract between plaintiff and defendant (*ib.*; *Knight* v. *Cox*, 18 C. B. 645; *Sloper* v. *Saunders*, 29 L. J., Ex. 275; *Levy* v. *Lewis*, 30 L. J., C. P. 141); or that it was the occupation of an intended purchaser pending a treaty for sale, which went off (*Winterbottom* v. *Ingham*, 7 Q. B. 611; but see *Metropolitan Rail. Co.* v. *Defries*, L. R., 2 Q. B. D. 387; 36 L. T. 494), unless he continued to occupy after it had gone off. (*Howard* v. *Shaw*, 8 M. & W. 118.) As soon as the occupation ceases, the implied contract ceases; and since no express time is limited for payment, the compensation accrues from day to day.

Who may maintain action for.

The assignee of the reversion can maintain an action for use and occupation (*Rennie* v. *Robinson*, 1 Bing. 147; *Standen* v. *Chrismas*, 10 Q. B. 135) in respect of the occupation since the assignment. (*Mortimer* v. *Preedy*, 3 M. & W. 602.) So can the assignee of a mortgagor who has let the tenant into possession after the mortgage, notwith-

standing a notice from the mortgagee to pay rent (*Hickman* v. *Machin*, 28 L. J., Ex. 310); so can a corporation. (*Rochester* v. *Pierce*, 1 Camp. 466.) And the action will lie against a corporation which has occupied under a parol contract (*Lowe* v. *London & North Western Rail. Co.*, 18 Q. B. 632), but not against the assignee of a tenancy created by simple contract, who has not occupied the premises. (*How* v. *Kennett*, 3 A. & E. 659).

Such an action lies for the enjoyment of a licence, or of incorporeal hereditaments, as for the use of a water-course (*Davis* v. *Morgan*, 4 B. & C. 8), or of a right of shooting (*Dawes* v. *Dowling*, 22 W. R. 770); so for the pasture and eatage of grass (*Sutton* v. *Temple*, 12 M. & W. 52), and for the use of veins of minerals. (*Jones* v. *Reynolds*, 4 A. & E. 805.)

CHAPTER VI.

DISTRESS.

Circumstances necessary to a distress.

THE landlord's right to distrain is one given by common law, without any stipulation upon the subject, whenever there is a demise of corporeal hereditaments, at a rent certain, payable on a certain day, and such rent is in arrear. But to give the common law right all those circumstances must be present. By the contract of the parties, a power of distress may be given where the common law requisites to give such a right are absent. (*Pollitt* v. *Forest*, 16 L. J., Q. B. 424.)

An actual demise.

There must be an actual existing demise. A mere licence, as of standing room for machines with driving power, is not a demise, and does not carry the right of distress. (*Hancock* v. *Austin*, 14 C. B., N. S. 634; 32 L. J., C. P. 252; but see *Selby* v. *Greaves*, L. R., 3 C. P. 594.) No right to distrain arises in respect of rent accruing before the relation of landlord and tenant is complete, or after it has determined. Therefore, if a person have entered and occupied under an agreement for a lease, but no actual tenancy from year to year has been created, he is not liable to distress. But as soon as by payment or acknowledgment of rent or otherwise a tenancy from year to year has been created (Chap. I., *ante*, p. 7), the landlord may distrain for subsequent rent. (*Hegan* v. *Johnson*, 2 Taunt. 148; *Regnart* v. *Porter*, 7 Bing. 451; *Dunk* v. *Hunter*, 5 B. & Ald. 322; *Watson* v. *Ward*, 22 L. J., Ex. 161.)

Where a tenancy has determined by notice to quit, and the tenant holds over after the notice has expired, the landlord cannot distrain for the rent of the period for which the tenant holds over, without some evidence of a renewal of the tenancy. (*Jenner* v. *Clegg*, 1 M. & Rob. 213; *Williams* v. *Stiven*, 9 Q. B. 14.) Neither can the landlord distrain after treating the tenant as a trespasser by bringing an ejectment for forfeiture. (*Bridges* v. *Smyth*, 5 Bing. 410; and see *Grimwood* v. *Moss*, 41 L. J., C. P. 239.) But a landlord may distrain under a tenancy at will at a fixed rent, as where there was an agreement for a lease of premises at a specified rent, with a proviso that until the lease should be executed the rent, covenants, and agreements agreed to be therein reserved and contained should be paid and observed. (*Anderson* v. *Midland Rail. Co.*, 30 L. J., Q. B. 94.)

Corporeal hereditaments.

There can be no distress for a payment in the nature of rent reserved upon a letting of incorporeal hereditaments (Co. Litt. 47 a), or of personal chattels. (See 5 Dav. Conv. 114.) But a landlord may distrain for the rent of ready furnished lodgings. (*Newman* v. *Anderton*, 2 B. & P., N. R. 224.)

Rent certain,

A distress can only be taken for a rent which is certain. It is sufficiently certain where, although fluctuating, it may be reduced to a certainty by computation, as a rent of so much per thousand for bricks made. (*Daniel* v. *Gracie*, 6 Q. B. 145; 13 L. J., Q. B. 309.) And where a tenant entered under an agreement for a lease which did not ascertain the amount of rent to be paid, and no lease was ever executed, but the tenant paid a certain rent for two years, it was held that the landlord might distrain for the like rent subse-

quently becoming due. (*Knight* v. *Benett*, 3 Bing. 361.) If a lease of premises, at one entire rent, is void as to part of the premises, the rent is not apportionable so as to enable the lessor to distrain for part. (*Neale* v. *Mackenzie*, 1 M. & W. 747; *Gardiner* v. *Williamson*, 2 B. & Ad. 336.)

and in arrear.

A landlord cannot distrain until rent is in arrear, that is, until the day after the day on which it is made payable. (*Dibble* v. *Bowater*, 22 L. J., Q. B. 396.) But being in arrear his right is not suspended by taking a security for the rent. (*Ante*, p. 141.)

Who may distrain.

In order that the landlord may, without express agreement, have the right to distrain, he must have a reversion in himself, though it is immaterial how short that reversion be. If a tenant underlet, even though he be a tenant from year to year, underletting from year to year (*Curtis* v. *Wheeler*, M. & M. 493), he may distrain; but not if he assign his term or interest. (*Preece* v. *Corrie*, 5 Bing. 24; *post*, Chap. X.) If a tenant underlet, reserving a reversion, he cannot distrain after his term has expired, though his tenant continues to hold. (*Burne* v. *Richardson*, 4 Taunt. 720.) The want of a reversion may sometimes be supplied by estoppel. If a person attorns or acknowledges himself the tenant of another, or is let into possession under a demise by him, he is estopped from denying that a reversion exists. (*Evans* v. *Matthias*, 26 L. J., Q. B. 309; *Jolly* v. *Arbuthnot*, 28 L. J., Ch. 552.)

On assignment of the reversion.

If a landlord assign his reversion, he loses his right to distrain for arrears of rent due at the date of assignment. The assignment gives the assignee the title to the rent to become due on the next day for payment of rent after the assignment, but not for the antecedent rent, for it had been

severed from the reversion and was a mere chose in action. (*Flight* v. *Bentley*, 7 Sim. 149; *Staveley* v. *Alcock*, 20 L. J., Q. B. 320.)

On death lessor.

If a lessor die, the person who in law is entitled to the reversion may distrain for rent subsequently becoming due, the lessor's executors or administrators for that which accrued in his lifetime; it having been provided by 3 & 4 Will. 4, c. 42, s. 37, that it shall be lawful for the executors or administrators of any lessor or landlord to distrain upon 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, that 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 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; and all the provisions in the several statutes relating to distresses for rent shall be applicable to the distresses so made. An executor may distrain before obtaining probate (*Whitehead* v. *Taylor*, 10 A. & E. 210); but an administrator cannot distrain until after grant of letters of administration. (*Woolley* v. *Clark*, 5 B. & Ald. 745.)

3 & 4 Will. 4, c. 42, ss. 37, 38.

Husband in right of wife.

Where a husband has a freehold interest in right of his wife in any rents, and the same shall not be paid in the wife's lifetime, the husband, after the death of the wife, may have an action or distrain for such arrears in the same manner as he might have done in his wife's lifetime. (32 Hen. 8, c. 37, s. 3.)

Mortgagee.

A mortgagee, after giving notice to the tenant in possession under a lease made prior to the

mortgage, may distrain for the rent in arrear at the time of the notice, as well as for rent accruing due after such notice. (*Moss* v. *Gallimore*, 1 Sm. L. C. 629, 7th ed.; 1 Fisher on Mortgages, 463, 2nd ed.) But where the tenant became such to the mortgagor after the mortgage, the mortgagee cannot distrain unless he has received rent from the tenant, or the tenant has acknowledged a tenancy between himself and the mortgagee. (*Rogers* v. *Humphreys*, 4 A. & E. 299; *Doe* v. *Boulter*, 6 A. & E. 675.) A mere notice by the mortgagee to the tenant to pay rent to him will not give the former the right to distrain, unless the tenant acquiesce in it. (*Evans* v. *Elliot*, 9 A. & E. 342.) If after notice, however, the tenant refuse to pay rent, the mortgagee may evict him and recover the rent in arrear in the form of mesne profits. (*Pope* v. *Biggs*, 9 B. & C. 245.) In the case of a mortgagor in possession the mortgagee cannot distrain, unless by attornment or otherwise the relation of landlord and tenant is clearly established between them (*Morton* v. *Woods*, 37 L. J., Q. B. 242; L. R., 3 Q. B. 658; *Ex parte Parke, Re Potter*, 22 W. R. 768); and under a stipulation that upon default of certain payments (which happened) the mortgagor should hold the premises as yearly tenant, it was held that the mortgagee was not entitled to treat the mortgagor as tenant until he had given him notice of his intention so to do. (*Clowes* v. *Hughes*, 39 L. J., Ex. 62; L. R., 5 Ex. 160; and see *Gibbs* v. *Cruikshank*, 28 L. T., N. S. 104, 735; 21 W. R. 734.)

Mortgagor. A mortgagor may distrain for rent due under a lease granted by himself after the mortgage by virtue of the estoppel. (*Alchorne* v. *Gomme*, 2 Bing. 54; *Wilkinson* v. *Hall*, 3 Bing. N. C. 508.) But for arrears of rent due under a lease granted

by the mortgagor prior to the mortgage, the mortgagor cannot distrain, as the privity of estate between himself and the tenant is destroyed; he can only do so in the name of the mortgagee, and as his bailiff. (*Moss* v. *Gallimore*, 1 Sm. L. C. 629, 7th ed.) But he may justify the distress as bailiff, although he said at the time of taking that he distrained for rent due to himself. (*Trent* v. *Hunt*, 9 Ex. 14; 22 L. J., Ex. 318.) And where the mortgage is paid off by an assignee of the equity of redemption, who takes an undertaking from the mortgagee to execute a transfer, there is an implied authority to the assignee to distrain in the name of the mortgagee. (*Snell* v. *Finch*, 32 L. J., C. P. 117; 11 W. R. 341.)

Joint tenants.

If the lessors be joint tenants all must join in the distress, but one may distrain in the names of all, or appoint a bailiff on behalf of all. (*Robinson* v. *Hofman*, 4 Bing. 562.) So, coparceners must all join in the distress, though in that case also one may distrain in the names of all. (*Leigh* v. *Shepherd*, 2 B. & B. 465.)

Tenants in common.

But tenants in common, as they have several titles, may distrain severally, each for his own share of the rent (*Whitley* v. *Roberts*, M'Clel. & Y. 107); or one may distrain in the names of all if not forbidden by the others to do so. (*Culley* v. *Spearman*, 2 H. Bl. 386.) But if a tenant pay the whole rent to one of two tenants in common after being forbidden to do so by the other, the latter may distrain for his share of rent. (*Harrison* v. *Barnby*, 5 T. R. 246.)

Receivers.

A receiver appointed by the High Court of Justice may distrain without application to the court; but he must distrain in the name of the person entitled to the rent, and if there be any doubt upon the point he may apply to the court for an order. (*Pitt* v. *Snowden*, 3 Atk. 750; *Brandon* v. *Brandon*, 5 Madd. 473.) If he have

granted the lease himself he may distrain in his own name. (*Dancer* v. *Hastings*, 12 Moore, 34.) A person merely authorized to receive rents cannot distrain (*Ward* v. *Shew*, 9 Bing. 608); but a receiver appointed by mortgagor and mortgagee, with express power to distrain, may do so. (*Jolly* v. *Arbuthnot*, 28 L. J., Ch. 547; 4 De G. & J. 224.)

Parish officers.

Any one churchwarden or overseer may authorize a distress for rent under 59 Geo. 3, c. 12, s. 17. (*Gouldsworth* v. *Knight*, 11 M. & W. 337.)

When distress may be made.

A distress for rent must be made in the daytime, that is, after sunrise and before sunset. (*Aldenburgh* v. *Peaple*, 6 C. & P. 212; *Tutton* v. *Darke*, 5 H. & N. 647; 29 L. J., Ex. 271.)

After the tenancy has expired.

At common law a landlord could not distrain after the termination of the tenancy. To remedy this it was provided by 8 Anne, c. 14, that any person having any rent in arrear or due upon any lease for life or lives, or for years, or at will, ended or determined, might distrain for such arrears after the determination of the said respective leases, in the same manner as they might have done if such lease had not been ended or determined (sect. 6), provided that such distress be made within 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. (Sect. 7.) It is not necessary, in order to give the landlord this statutory right, that the tenant should continue in possession of the whole of the demised premises. (*Nuttall* v. *Staunton*, 4 B. & C. 51.) Where by the custom of the country (*Beavan* v. *Delahay*, 1 H. Bl. 5), or the agreement of the parties (*Knight* v. *Benett*, 3 Bing. 364), the tenant leaves his away-going crop in the barns or stacked on the premises, this is considered as a prolongation of the tenancy, and not a mere continuance in

possession (*post*, Chap. IX., Sect. 3), and entitles the landlord to distrain after the six months have expired. Where the tenant gave up possession to the incoming tenant, and without the latter's permission left some cattle on the premises, it was held that this was not a continuance in possession so as to entitle the landlord to distrain. (*Taylerson* v. *Peters*, 7 A. & E. 110.) Where the lessee of a term dies before the expiration of the term, his personal representatives continuing in possession after the expiration of the term are liable to distress for arrears of rent due in the lessee's lifetime (*Braithwaite* v. *Cooksey*, 1 H. Bl. 465); but not where the tenancy is at will and determines by death, for then both the tenancy and the possession of the tenant from whom the rent accrued are at an end. (*Turner* v. *Barnes*, 2 B. & S. 435.)

For what arrears.

No distress for arrears of rent can be made except within six years next after they became due, or next after a written acknowledgment of the same shall have been made. (3 & 4 Will. 4, c. 27, s. 42; *Strachan* v. *Thomas*, 12 A. & E. 536; *ante*, p. 149.)

In case of tenant's bankruptcy.

A further limitation is provided in the case of a tenant who becomes bankrupt. By 32 & 33 Vict. c. 71, s. 34, 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 and effects of 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 may prove under the bankruptcy for the overplus due, and also for a proportionate part from the last day of payment to the day of adjudication. (Sect. 35.) The 34th section only

gives this remedy to a person in the position of a landlord, and "rent" only includes money payable to him in that capacity (*Re Roberts, Ex parte Hill*, 46 L. J., Bkcy. 116; 25 W. R. 785), and does not sanction a distress under an attornment clause in a mortgage where the attornment is at a sham rent and merely a device to secure a charge upon chattels (*Re Thompson, Ex parte Williams*, 47 L. J., Bkcy. 26; L. R., 7 Ch. D. 138); but not if the attornment were at a fair letting value. (*Re Stockton Iron Co.*, 27 W. R. 433.) The landlord need not obtain the leave of the court before distraining. (*Ex parte Till*, L. R., 16 Eq. 97; 42 L. J., Bkcy. 84; *Ex parte Cochrane*, 23 W. R. 726.) The provision extends to a liquidation as well as a bankruptcy. (And see *Ex parte Birmingham, &c. Gaslight Co.*, L. R., 11 Eq. 615; 40 L. J., Bkcy. 52.) If the trustee remain in possession, not having disclaimed the lease, the landlord may without leave of the court distrain goods upon the premises for rent accruing due after the commencement of the liquidation, even though it be payable in advance. (*Ex parte Hale*, L. R., 1 Ch. D. 285; 45 L. J., Bkcy. 21.)

What may be distrained.

Unless privileged under some exception established at law, all personal chattels upon the premises to whomsoever belonging are liable to be distrained. Chattels privileged from distress are of two classes: (1) those which are absolutely privileged; and (2) those which are conditionally privileged, *i. e.* are only to be distrained upon the supposition that there is no sufficient distress besides.

Chattels absolutely privileged from distress.

Fixtures.

Of the class of chattels absolutely exempt from distress are chattels so attached to the freehold as to become fixtures. (*Post*, Chap. IX., Sect. 1.) Nor does a temporary disunion suspend the privilege. (*Gorton* v. *Falkner*, 4 T. R. 567.) Even fixtures, which, as between landlord and tenant, are removable by the latter, are exempt

from distress (*Darby* v. *Harris*, 1 Q. B. 895; *Pitt* v. *Shew*, 4 B. & Ald. 206); though they may be taken under an execution. (*Poole's case*, 1 Salk. 368; *Beaufort* v. *Bates*, 31 L. J., Ch. 481.) But merely including fixtures in a notice of distress, if no actual seizure and severance take place, will not make the landlord liable as for an unlawful distress. (*Beck* v. *Denbigh*, 29 L. J., C. P. 273.)

Goods delivered to persons to be dealt with in the way of their trades.

For the benefit of trade, to encourage which is for the public advantage, goods delivered to a man carrying on a public trade to be wrought, managed or dealt with in the way of his trade and for the purpose of having labour or skill bestowed upon them, are privileged from distress; as, for example, a horse standing in a smith's shop to be shod; sacks of corn delivered to a miller to be ground (Co. Litt. 47 a); yarn or silk intrusted to a weaver for manufacture (*Wood* v. *Clarke*, 1 Cr. & J. 484; *Gibson* v. *Ireson*, 3 Q. B. 39); cattle sent to a butcher to be slaughtered (*Brown* v. *Shevill*, 2 A. & E. 138); goods delivered to a carrier for carriage (*Gisbourn* v. *Hurst*, 1 Salk. 250); to a factor (*Gilman* v. *Elton*, 3 B. & B. 75); or a commission agent (*Findon* v. *M'Laren*, 6 Q. B. 891); for sale; or to an auctioneer for sale at auction (*Adams* v. *Grane*, 1 Cr. & M. 380; *Williams* v. *Holmes*, 8 Ex. 861); although he have acquired the occupation of the place of sale by trespass (*Brown* v. *Arundell*, 10 C. B. 54; but see *Lyons* v. *Elliott*, 24 W. R. 296; L. R., 1 Q. B. D. 210; 45 L. J., Q. B. 159, *infra*); goods pledged with a pawnbroker (*Swire* v. *Leach*, 18 C. B., N. S. 479); or warehoused with a wharfinger (*Thompson* v. *Mashiter*, 1 Bing. 283); or a granary keeper (*Matthias* v. *Mesnard*, 2 C. & P. 353), for safe keeping, and furniture warehoused at a furniture depository (*Miles* v. *Furber*, L. R., 8 Q. B. 77; 42 L. J., Q. B. 41), all of which are privileged.

Lyons v. *Elliott.*

Considerable confusion has, however, been imported into the law of exemption from distress by the recent case of *Lyons* v. *Elliott* (*supra*), which certainly seems irreconcileable with the cases of *Adams* v. *Grane*, and *Brown* v. *Arundell* (*ubi supra*), which have hitherto been considered good law. In *Lyons* v. *Elliott*, the Queen's Bench Division held that the exemption from distress of goods sent to an auctioneer for sale extends only to goods deposited on premises *de facto* in the occupation of the auctioneer. Some plated goods having been delivered to an auctioneer for sale, he removed them from his own premises to a house (not in his own occupation), where he was about to conduct a sale of furniture and effects, and the court held, it is submitted, contrary to principle, that they were distrainable for rent due to the landlord of the house. The attention of the court seems not to have been drawn to the case of *Read* v. *Burley* (Cro. Eliz. 549), in which a clothier having gone with his horse to fetch yarn from a weaver's to whom he had delivered it to be spun, and because the weaver had no beam or weights to weigh the yarn, carried it to the private house of a neighbour to be weighed; it was held that the horse and yarn were privileged from being distrained by the neighbour's landlord. But the court seems to have relied upon *Crosier* v. *Tomkinson* (2 Ld. Ken. 439), the facts of which are thus stated—"An innkeeper had obtained leave to put horses in the stable of a stranger. The plaintiff's horse was intrusted to the innkeeper to take charge of, and he put it in the stable which did not belong to the inn. The horse was distrained for the rent of the stable, and was held not to be privileged from distress, because where property is taken from premises to which a privilege attaches, and placed on unprivileged premises, the owner of

it cannot claim the privilege." (*Per* Blackburn, J., in *Lyons* v. *Elliott*, L. R., 1 Q. B. D. 210; 45 L. J., Q. B. 159; 24 W. R. 296.) As to *Crosier* v. *Tomkinson* (*supra*), there is the eminent authority of Pollock, C. B., that if the case were *res nova* it would be decided differently. (*Williams* v. *Holmes*, 22 L. J., Ex. 284.) This view would especially apply if the facts were not as stated above by Blackburn, J.; but if, as stated by Mr. Serjeant Nares, in his argument in *Francis* v. *Wyatt* (3 Burr. 1500), the stable was "let to the innkeeper for a guinea," so that the innkeeper was in fact occupier and undertenant of the premises. There is also some slight danger of confusion in the use by so eminent a judge as Lord Blackburn, of the expression in connection with the matter of "privileged premises." According to previous cases the privilege is to the trade, not the premises (*Adams* v. *Grane*, 1 Cr. & M. 380), and for the protection of the public, not the auctioneer or trader, so that "the public who choose to become their customers are to have the full benefit of those trades in the mode in which the traders choose to carry on their trade, and have held themselves out to the public as carrying it on." (*Per* Parke, B., *Muspratt* v. *Gregory*, 1 M. & W. 657.) However, in the present state of the authorities, and considering that auctioneers constantly hold auctions upon premises in the actual occupation of other persons, and almost as constantly "make up" sales, consisting not entirely of the furniture of the house where the auction is held, but also of other property delivered to them for sale, the decision in *Lyons* v. *Elliott* seems likely to render it necessary for persons intrusting articles to auctioneers for sale, to stipulate that they shall not be removed from the premises in the actual occupation of the auctioneer, in the way of his trade.

Articles on the premises for a mere casual pur-

pose, and not placed under the charge of the tenant, are not privileged, as in the case of a boat sent to and lying at salt works for the purpose of receiving and carrying away salt bought by the owner. (*Muspratt* v. *Gregory*, 3 M. & W. 677.) And so, although casks left with a cooper for repair would be privileged, casks sent with beer to a public-house to be left until the beer is consumed, are not. (*Joule* v. *Jackson*, 7 M. & W. 450.) In *Parsons* v. *Gingell* (4 C. B. 545), it was held that horses and carriages standing at livery were not exempt, but this cannot be reconciled with later decisions. (See *Miles* v. *Furber*, L. R., 8 Q. B. 77; 42 L. J., Q. B. 41.) Wine deposited at a wine warehouse to mature was held not to be exempt. (*Ex parte Russell*, 18 W. R. 753.)

Guest at an inn.

The goods and cattle of a guest at an inn are exempt from distress. (*Crosier* v. *Tomkinson*, 2 Ld. Ken. 439.)

Cattle of a stranger.

The cattle of a stranger are exempt in certain cases. In *Miles* v. *Furber* (*supra*), Mellor, J., observed: "That with regard to agisters of cattle it may be that in rural districts, where there is nothing to distinguish the cattle from those of the occupier, there may be no privilege; but I should be inclined to think that it might apply in the case of fields near a large town which are notoriously let out for grazing purposes." Cattle on their way to a market, and turned into a field for the night with the privity of lessor or lessee, are privileged. (*Poole* v. *Longueville*, 2 Wms. Saund. 290.) Where the cattle of a stranger break through the tenant's fence, and enter the tenant's land, they are distrainable; but if the fence be defective, and it is one which the tenant is bound to repair, the cattle cannot be distrained unless the owner after notice neglects to remove them. (*Ib.*)

Articles of a perishable nature, such as butchers'

meat and the like (*Morley* v. *Pincombe*, 2 Ex. 101), and any other chattels which are incapable of being restored within five days in the same condition as when taken (*Simpson* v. *Hartopp*, 1 Sm. L. C. 439, 7th ed.), animals *feræ naturæ*, and other things in which there is no valuable property (*ib.*), and things in actual use, such as the horse which a man is riding, and the tools with which he is working (*ib.*), are privileged.

Goods in the custody of the law.

Goods already in the custody of the law, such as property taken damage feasant, or in execution, are exempt. (Co. Litt. 47 a; *Wright* v. *Dewes*, 1 A. & E. 641.) This is subject to an exception created by statute. By 14 & 15 Vict. c. 25, s. 2, growing crops seized and sold under an execution shall, so long as they remain on the land, be liable, if there is no other sufficient distress, to be distrained for the rent which became due after the seizure and sale.

Goods of a lodger.

The goods of a lodger are also privileged under certain conditions. By 34 & 35 Vict. c. 79, it is provided that, if any superior landlord levies or authorizes 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, 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 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; and to such declaration shall be annexed a correct inventory, subscribed by the lodger, of the furniture, &c. referred to in the declaration. Making a false declaration shall be deemed a misdemeanor. (Sect. 1.) If the superior landlord, or any bailiff or other person employed by him, shall, after being served with such declaration and inventory, and payment or tender of rent, if any, as aforesaid, levy or proceed with a distress on the furniture, &c. of the lodger, such superior landlord, bailiff or other person shall be guilty of an illegal distress, and the lodger may apply for an order for the restoration of such goods, such application to be heard before a stipendiary magistrate or two justices of the peace, who 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 the suit of the lodger, in which the truth of the declaration and inventory may likewise be inquired into. (Sect. 2.) An undertenant may be a lodger within the meaning of the act, the test being whether the immediate tenant of the landlord continues to occupy any part of the house, retaining his character of master of it. (*Phillips* v. *Henson*, L. R., 3 C. P. D. 26; 47 L. J., C. P. 273.)

Goods of an ambassador.

The goods of an ambassador or public minister of any foreign prince or state, and the domestic servants of such ambassador or minister, are privileged. (7 Anne, c. 12, s. 3.)

Railway rolling stock.

Rolling stock of a railway company being in a

work shall not be liable to distress for rent payable by the tenant of the work, if such rolling stock is not the actual property of the tenant, and have upon it a distinguishing metal plate, brand or other mark conspicuously impressed, sufficiently indicating the actual owner. (35 & 36 Vict. c. 50, s. 3.)

Chattels conditionally privileged.

There are other chattels which, though not absolutely privileged, are not to be distrained if there be other sufficient distress. Of this class are "beasts that gain the land," or beasts of the plough, and sheep and instruments of husbandry. (51 Hen. 3, stat. 4; *Davies* v. *Aston*, 1 C. B. 746; *Keen* v. *Priest*, 4 H. & N. 236; 28 L. J., Ex. 157.) This does not include cart colts and young steers not broken in. (*Ib.*) The tools and implements of a man's trade not in actual use are also conditionally exempt. (*Nargatt* v. *Nias*, E. & E. 439; 28 L. J., Q. B. 143.) If there is a reasonable ground for supposing that without taking these chattels there would not be a sufficient distress, they may be taken, and the sale of them need not be postponed to the other goods. (*Jenner* v. *Yolland*, 6 Price, 3.)

Corn, straw and hay distrainable.

On the other hand, growing crops and other farm produce which were not distrainable at common law are made so by statute. By 2 Wm. & M., sess. 1, c. 5, s. 3, any person having rent in arrear and due upon any demise may distrain sheaves or cocks of corn, or corn loose or in the straw, or hay in any barn or granary or upon any hovel, stack or rick, or otherwise upon any part of the land charged with the rent, and detain the same in the place where it shall be found, as a distress until replevied or sold. Five days are to be allowed to the tenant for replevying before the same is sold.

Growing crops.

By 11 Geo. 2, c. 19, ss. 8 and 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 whatsoever growing upon any part of the estate demised, and the same may cut, gather, make, cure, carry and lay up, *when ripe*, in the barns or other proper places on the premises; and if there should be no barn or proper place on the premises; then in any other barn or proper place which he shall procure 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; notice of the place where such distress shall be lodged shall, in one week after lodging thereof, be given to the tenant or left at the last place of his abode. If the tenant shall pay or tender the arrears of rent and costs of distress before the corn, &c. be cut, the distress shall cease and the corn, &c. be delivered up. This statute does not give the right to seize young trees in a nursery garden, "other products" being confined to things *ejusdem generis* (*Clark* v. *Gaskarth*, 8 Taunt. 431); neither does it compel the landlord to resort to growing crops before distraining things conditionally privileged. (*Piggott* v. *Birtles*, 1 M. & W. 448.) Although growing crops are not to be sold until ripe (*Owen* v. *Legh*, 3 B. & Ald. 470), yet 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. (*Rodgers* v. *Parker*, 18 C. B. 112; 25 L. J., C. P. 220.)

Distress upon goods of a company being wound up.

Where a company is being wound up by the court or subject to the supervision of the court, any distress put in force against the estate or effects of the company after the commencement of the winding up shall be void. (25 & 26 Vict.

c. 89, s. 163.) The court may, under sect. 87 of the act, give leave to proceed with a distress if it think fit. (*Re Exhall Coal Mining Co.*, 33 L. J., Ch. 596, n.; 4 De G., J. & S. 377.) Leave will not be given to distrain for rent which has accrued due before the winding up; as to such the landlord must prove in the winding up. (*Re North Yorkshire Iron Co.*, L. R., 7 Ch. D. 661; 47 L. J., Ch. 333; *Re Coal Consumers' Association*, L. R., 4 Ch. D. 625; 46 L. J., Ch. 501.) As to rent accrued after the order for winding up, leave has been refused where upon the evidence it was considered the liquidator had retained possession of the premises for the benefit of all parties, but granted where the liquidator has retained possession merely for the convenience of winding up. (*Re Lundy Granite Co.*, L. R., 6 Ch. 462; 40 L. J., Ch. 588; *Re North Yorkshire Iron Co.*, *supra*.) But the court has power to restrain a distress only where the company is the tenant of the person distraining and not where the company is merely in possession by leave of the tenant, or the company's goods are upon the tenant's premises and are there taken in distress, unless the party distraining is a creditor of the company. (*Re Lundy Granite Co.*, *supra; Re Traders' North Staffordshire Carrying Co.*, 44 L. J., Ch. 172; L. R., 19 Eq. 60; *Re Regent United Service Stores Association*, 47 L. J., Ch. 677; L. R., 8 Ch. D. 616.)

Where the company being wound up is the lessee of property for an unexpired term, the landlord's claim in respect of future rent is a claim of a certain and ascertained amount (25 & 26 Vict. c. 89, s. 158); and where the company is solvent the landlord is entitled to have set apart to indemnify him such a sum as by means of principal and interest will cover all future payments of rent during the term. (*Oppenheimer* v. *British and*

Foreign Exchange, &c. Bank, 46 L. J., Ch. 882; L. R., 6 Ch. D. 744; *Re Haytor Granite Co.*, L. R., 1 Ch. 77; 35 L. J., Ch. 154.)

Where distress may be made.

By agreement the tenant may give the landlord the power to distrain upon other lands of the tenant than those out of which the rent issues, and such agreement will bind both the tenant and his assigns. (*Daniel* v. *Stepney*, L. R., 9 Ex. 185; 22 W. R. 662.) But independently of contract the general rule is that a distress can only be made of goods found upon some part of the premises out of which the rent issues. Thus, where there was a demise of a wharf on the river Thames, but not of any soil of the river, it was held that the landlord was not entitled to distrain barges lying in the river and fastened to the demised premises by ropes, as they were not upon the premises. (*Capel* v. *Buszard*, 6 Bing. 150; but see *Gillingham* v. *Gwyer*, 16 L. T., N. S. 640.) But upon any part of the demised premises distress may be taken for the whole rent. If several parcels of land are let to the same person under separate demises, and rent is due upon more than one, a joint distress cannot be taken. (*Rogers* v. *Birkmire*, 2 Stra. 1040.) A distress cannot be taken "on the king's highway nor in the common street." (52 Hen. 3, c. 15.)

To the general rule above stated there are three exceptions:—

Cattle on common.

1. A landlord may distrain for arrears of rent the cattle or stock of his tenant feeding upon any common appendant or appurtenant or in any way belonging to the premises demised. (11 Geo. 2, c. 19, s. 8.)

Cattle driven off to avoid distress.

2. If the landlord coming to distrain see the tenant's cattle on the premises, and the tenant, to prevent the distress, drive them off the premises, the landlord may make fresh pursuit and seize

them in the highway or in any other place off the lands demised. But if the cattle of their own accord go out of the lands demised or into the highway within his view he cannot pursue them; neither can he if they be driven off the lands for any other purpose than to avoid distress. (Co. Litt. 161 a.)

Fraudulent removal.

3. Where the tenant of any messuages, lands, tenements or hereditaments in respect of which any rent is reserved shall fraudulently or clandestinely convey away or carry off or from such premises his goods or chattels to prevent the landlord from distraining the same for arrears of rent so reserved, the landlord or any person by him empowered may, *within the space of thirty days* next ensuing the removal of the goods, take and seize them as a distress wherever they may be found (11 Geo. 2, c. 19, s. 1): provided, however, that they have not before such seizure been sold *bonâ fide* and for a valuable consideration. (Sect. 2.) If it be necessary to break open any door in order to seize them, the landlord in the daytime may do so, first calling to his assistance the constable or other peace officer of the hundred, parish or place where the goods are concealed, and, in the case of a dwelling-house, oath being first made before a justice of the peace of a reasonable ground to suspect that such goods are therein. (Sect. 7.)

Cases to which 11 Geo. 2, c. 19, applies.

The statute only applies where the removal took place on or after the day when the rent became due (*Rand* v. *Vaughan*, 1 Bing. N. C. 767; *Dibble* v. *Bowater*, 2 E. & B. 564); where the goods were those of the tenant, and not of a stranger (*Thornton* v. *Adams*, 5 M. & S. 38; *Fletcher* v. *Marillier*, 9 A. & E. 457); and where no sufficient distress remained on the premises, after the removal of which the onus of proof lies on the landlord. (*Parry* v. *Duncan*, 7 Bing. 243; *ib.*, M. & M. 533;

but see *Gillam* v. *Arkwright*, 16 L. T. 88.) The statute, however, applies where the removal, though not clandestine, is fraudulent, which is a question for the jury. (*Opperman* v. *Smith*, 4 D. & R. 33.) The landlord must show that the goods were removed with a view to elude a distress (*Parry* v. *Duncan*, *supra*); and even if the tenant admit that, it would seem to be still a question for the jury whether the removal was fraudulent or not within the statute. (*John* v. *Jenkins*, 1 Cr. & M. 227.) If the landlord have parted with his reversion, he cannot distrain under the statute. (*Ashmore* v. *Hardy*, 7 C. & P. 501.)

By the same statute it is further provided, that if the tenant shall fraudulently remove his goods as aforesaid, or if any person shall wilfully and knowingly aid or assist such tenant in such fraudulent conveying away of goods, or in concealing the same, all and every the person so offending shall forfeit and pay to the landlord double the value of the goods by him carried off or concealed, to be recovered by action. (11 Geo. 2, c. 19, s. 3.) Where the value of the goods so removed does not exceed 50*l.*, the landlord may take summary proceedings for recovering double value, by complaint before two justices of the peace. (Sect. 4.) This latter remedy is alternative, and does not prevent the landlord proceeding by action though the value of the goods be under 50*l.* (*Bromley* v. *Holden*, M. & M. 175), and although he has made complaint before the magistrates, which he afterwards abandoned. (*Horsefall* v. *Davy*, 1 Stark. 169.) If a creditor, with the consent of the debtor, remove goods from the premises in payment of his debt, although with knowledge of the rent being in arrear, he does not incur the penalty. (*Bach* v. *Meats*, 5 M. & S. 200.)

How a distress is made.

The landlord may distrain personally or by his

agent or bailiff. It is usual, but, except in the case of a corporation aggregate, not necessary, that the bailiff have a written authority. (*Cary* v. *Matthews*, 1 Salk. 191; *Randle* v. *Deane*, 2 Lutw. 1496.) Neither is it necessary even that the bailiff have an antecedent authority; it is sufficient if the landlord recognize and adopt his act. (*Trevillian* v. *Pine*, 11 Mod. 112.)

Entry.

The person distraining may open an outer door in the usual manner of access, as by lifting a latch, turning a key, or drawing back a bolt (*Ryan* v. *Shilcock*, 21 L. J., Ex. 55; 7 Ex. 72); but if the door is fastened, it cannot, except in the case of a fraudulent removal (*ante*, p. 173), be broken open. (*Semayne's case*, 1 Sm. L. C. 105, 7th ed.) Even the outer door of a barn or stable may not be broken open. (*Brown* v. *Glenn*, 16 Q. B. 254; 20 L. J., Q. B. 205.) But if the outer door is open, an inner door or lock may be broken open. (*Browning* v. *Dann*, Bull. N. P. 81.) Where, however, an entry has once been made, the distrainer, if forcibly expelled, may procure the assistance of a peace officer and break open the outer door to renew the distress, even after the lapse of three weeks. (*Eldridge* v. *Stacey*, 15 C. B., N. S. 458; 12 W. R. 51.) So also, where the man in possession voluntarily goes away for a temporary purpose, and on his return finds the door locked (*Bannister* v. *Hyde*, 2 E. & E. 627; 29 L. J., Q. B. 141); but not after the lapse of several days. (*Russell* v. *Rider*, 6 C. & P. 416.) Entry may be made through an open window, but not through a window which is shut, although not fastened. (*Nash* v. *Lucas*, L. R., 2 Q. B. 590; *Hancock* v. *Austin*, 32 L. J., C. P. 252.) The person distraining may climb over a fence to gain access by an open door. (*Eldridge* v. *Stacey*, *supra*.)

Seizure.

To complete the distress a seizure is necessary. This is usually done by taking hold of some personal chattel, and declaring that it is taken as a distress in the name of all the goods, or so much thereof as may be necessary to satisfy the rent. (*Dod* v. *Monger*, 6 Mod. 215.) But any act or words expressive of an intention to distrain will suffice (*Hutchins* v. *Scott*, 2 M. & W. 809); thus, refusing to allow goods to be removed until the rent be paid (*Wood* v. *Nunn*, 5 Bing. 10; *Cramer* v. *Mott*, 39 L. J., Q. B. 172); and walking round the premises and leaving a written notice that certain goods lying there are distrained, and will be appraised and sold if not replevied, and going away without leaving anyone in possession (*Swann* v. *Falmouth*, 8 B. & C. 456), have been held sufficient to constitute a seizure.

Notice of distress.

After the seizure an inventory should be made of the goods intended to be comprised in the distress. A copy of this, with a notice (usually written at the foot of the inventory) of the fact of the distress having been made, with the cause of such taking, must be served on the tenant personally, or left at the chief mansion-house or other most notorious place on the premises charged with the rent distrained for. (2 Wm. & M. sess. 1, c. 5, s. 2.) This notice must be in writing (*Wilson* v. *Nightingale*, 8 Q. B. 1034), and should state the amount of rent due (though the landlord is not bound by that statement), and distinctly specify the goods distrained (*Kerby* v. *Harding*, 6 Ex. 234; *Wakeman* v. *Lindsey*, 14 Q. B. 625), the time when they will be appraised and sold unless replevied or the rent and charges satisfied, and, if the distress be impounded off the premises, the place where impounded. It need not state when the rent became due (*Moss* v. *Gallimore*, 1 Doug. 279); and omitting to state that the goods are

impounded will not make the impounding void. (*Tennant* v. *Field*, 8 E. & B. 336.) The want of notice does not render the distress invalid, but it makes it irregular to sell. (*Trent* v. *Hunt*, 22 L. J., Ex. 318.)

Impounding.

As five days must elapse before appraisement and sale of the distress, it is the landlord's duty to keep the goods safely, and for this purpose to impound them. They may generally be either removed to a pound off the premises or impounded on the premises. The exceptions to this general rule are, sheaves or cocks of corn, or corn loose or in the straw or hay, in which case a removal from the premises is prohibited (2 W. & M. sess. 1, c. 5), and growing crops which can only be removed when ripe and cut, and there is no proper place on the premises wherein they can be placed. (11 Geo. 2, c. 19, ss. 8, 9.)

Pound must be sufficient to secure the safety of the distress.

A pound is either overt (open overhead) or covert (close overhead). Cattle may be impounded in a pound overt, but furniture and goods liable to be damaged by wet or weather, or be stolen, must be placed in a house or other pound covert. (Co. Litt. 47 h.) As impounding is for safe custody, the landlord is bound at his peril to take care that the place in which he impounds the distress (even though it be in a public pound) is in a fit and proper state, and he is liable for the loss of or injury to the distress if it is not. (*Bignell* v. *Clark*, 29 L. J., Ex. 257; *Wilder* v. *Speer*, 8 A. & E. 547.) If cattle are tied in the pound and strangle themselves, the landlord will be liable; but he is not liable if they die by the act of God, and in that case he may distrain again. (*Vasper* v. *Eddowes*, 1 Ld. Raym. 719; Bac. Abr. "Distress" (D.)

Distress not to be used.

The landlord acquires no property in the distress, and it is an abuse of his power if he use the

distress, except in the case of milch cows, which may be milked. If the landlord abuse a distress by working it the owner may interfere to prevent it, without being liable for poundbreach or rescue. (*Smith* v. *Wright*, 6 H. & N. 821; 30 L. J., Ex. 313.)

Impounding on the premises.

Formerly a distress could only be impounded on the premises with the consent of the tenant; but by 11 Geo. 2, c. 19, s. 10, it was enacted that it shall be lawful for any person lawfully taking any distress for any kind of rent to impound or otherwise secure the distress so made, of what nature or kind soever it may be, in such place or on such part of the premises chargeable with the rent as shall be most fit and convenient for the impounding and securing such distress. And now distresses are usually impounded on the premises. The landlord ought not to deprive the tenant of the whole house, but should put all the goods seized into one or more rooms and lock them up, unless the tenant consent to their being left in their ordinary position, of which consent very slight evidence will be sufficient. (*Washborn* v. *Black*, 11 East, 405, n.; *Woods* v. *Durrant*, 16 M. & W. 149.) The whole of the premises cannot be locked up; the goods ought rather to be removed. (*Smith* v. *Ashforth*, 29 L. J., Ex. 259.) Cattle may be impounded in the open field (*Castleman* v. *Hicks*, 1 Car. & M. 266); and where the landlord's agent went into a field where the tenant's cattle were feeding, and placed his hand upon one of the beasts, saying he distrained the whole for the rent due, counted them, and went away, and next morning left with the tenant a notice stating that he had distrained the cattle thereunder mentioned, and had impounded them on the premises, this was held to constitute an impounding. (*Thomas* v. *Harries*, 1 M. & Gr. 695.)

Cattle not to be driven out of the hundred.

By the common law the landlord in removing the distress might have impounded it where he liked. But by 1 & 2 Ph. & M. c. 12, s. 1, no distress of cattle shall be driven out of the hundred, rape, wapentake or lathe where taken, except to a pound overt within the same shire, not above three miles distant; and no cattle or other goods distrained shall be impounded in several places on pain of a penalty of 5*l.* and treble damages. If for an entire rent out of contiguous lands in different counties the landlord distrain cattle in both counties, he may drive them all into one county; though it is otherwise if the two counties do not join. (*Walter* v. *Rumbal*, 1 Ld. Raym. 53.)

Liability of person impounding for food and water of animals.

By 12 & 13 Vict. c. 92, every person who impounds or causes to be impounded in any pound or receptacle of the like nature any animal, is bound under a penalty of twenty shillings to provide and supply during the confinement a sufficient quantity of fit and wholesome food and water to such animal. (Sect. 5; *Dargan* v. *Davies*, 46 L. J., M. C. 122; L. R., 2 Q. B. D. 118.) If the animal continues to be confined without fit and sufficient food for more than twelve successive hours, any person may from time to time, as often as necessary, enter into the pound and supply the animal with fit and sufficient food and water without being liable to any action or proceeding by reason of the entry; the reasonable cost of the food and water is to be paid by the owner before it is removed to the person supplying it, and is recoverable as a penalty under the act by summary proceedings. (Sect. 6.) It was doubtful whether this act gave any remedy *to the person impounding* for the recovery of compensation for food and water provided, and moreover it gave no power to sell the animal; and therefore 17 & 18 Vict. c. 60, s. 1, provides that every person who

impounds or confines any animal, and supplies it with food and water as in 12 & 13 Vict. c. 92, mentioned, shall be entitled to recover from the owner not exceeding double the value of the food and water in the manner provided by that act for the recovery of penalties; and every person who supplies such food and water may, if he think fit, instead of proceeding for the recovery of the value of it, sell any animal impounded openly at any public market (after seven clear days from the impounding, and after having given three days' public printed notice) for the most money that can be got for the same, and may apply the produce in discharge of the value of the food and water, and the expenses of the sale, rendering the overplus to the owner. When more animals than one are impounded there may be a sale from time to time of so many as may be necessary. (*Layton* v. *Hurry*, 8 Q. B. 811.)

Rescue and pound-breach.

If a distress be taken without good cause, the owner may rescue it before it is impounded. But when once goods are impounded they are in the custody of the law, and if the tenant retake them he will be guilty of poundbreach (Co. Litt. 47 b), and will be liable to an action for treble damages (2 Wm. & M. sess. 1, c. 5, s. 4), and the costs incurred about the action. (5 & 6 Vict. c. 97, s. 2.) This applies whether the impounding is on or off the premises (11 Geo. 2, c. 19, s. 10), and notwithstanding the distress may have been wrongful or irregular. The landlord may seize the goods again wherever he may happen to find them. (*Rich* v. *Woolley*, 7 Bing. 651.)

How distress must be disposed of.

Formerly a distress could not be sold, but only retained as a pledge. Neither is it now regular to sell unless the notice hereinbefore mentioned (*ante*, p. 176) has been given. But such notice having been given, and the tenant failing within

five days to replevy, then after such distress and notice aforesaid and expiration of the said five days, the person distraining may cause the goods and chattels to be appraised by two appraisers, and after such appraisement may lawfully sell the goods and chattels so distrained for the best price that can be gotten for the same towards satisfaction of the rent for which the said goods and chattels shall be distrained, and of the charges of such distress, appraisement and sale, leaving the overplus, if any, in the hands of the sheriff, under-sheriff or constable for the owner's use. (2 Wm. & M. sess. 1, c. 5, s. 2.)

Appraisement.

The statute also required that the sheriff or under-sheriff, or constable, should be aiding and assisting at the distress, and that the two appraisers should be sworn, but this portion is now repealed. (35 & 36 Vict. c. 92, s. 13.) It is not necessary that the appraisers should be professional ones, but they must be reasonably competent. (*Roden* v. *Eyton*, 6 C. B. 427.) There must be two, whatever the amount of rent distrained for, notwithstanding 57 Geo. 3, c. 93, seems to contemplate an appraisement by one where it is under 20*l*. (*Allen* v. *Flicker*, 10 A. & E. 640.) Neither the landlord nor his bailiff or person actually making the distress can act as one of the appraisers. (*Lyon* v. *Weldon*, 2 Bing. 334; *Westwood* v. *Cowne*, 1 Stark. 172.) If the tenant to save expense request that appraisers be not called in, they may be dispensed with. (*Bishop* v. *Bryant*, 6 C. & P. 484.)

Stamp on appraisement.

The appraisement must be properly stamped. (See 33 & 34 Vict. c. 97, s. 38, and schedule.)

Sale.

When the distress is impounded on the premises it may be sold there. (11 Geo. 2, c. 19, s. 10.) The landlord cannot sell before the expiration of the five days, but he is not bound to sell

immediately the five days have expired. (*Philpott* v. *Lehain*, 35 L. T. 855.) He is allowed a reasonable time afterwards for appraisement and sale. (*Pitt* v. *Shew*, 4 B. & Ald. 208.) Corn loose or in sheaves, and hay, however, must be sold immediately upon the expiration of the five days, and growing crops must be sold when cut and placed in barns. (*Piggott* v. *Birtles*, 1 M. & W. 448.) In other cases the landlord must not keep the distress upon the premises after a reasonable time for appraisement and sale has elapsed, but must remove it unless the tenant consent to its remaining. (*Griffin* v. *Scott*, 2 Ld. Raym. 1424; *Winterbourne* v. *Morgan*, 11 East, 395.)

The five days must be five clear days computed exclusive of the day of distress and the day of sale. (*Robinson* v. *Waddington*, 13 Q. B. 753; 18 L. J., Q. B. 250.) But, in an action for selling the goods before the five days have elapsed, the tenant can only recover if he have sustained actual damage. (*Lucas* v. *Tarleton*, 3 H. & N. 116; 27 L. J., Ex. 246.)

Sale for the best price.

Before selling, the office of the county court of the district should be searched to see if the goods have been replevied. The goods must be sold for the best price that can be obtained for them. It was held, that if sold at the appraised value, they were presumed to have been sold at the best price (*Walter* v. *Rumbal*, 1 Ld. Raym. 53); but the ground of decision was the reliance the law placed upon the appraisers being sworn, and the rule no longer holds, now that appraisers are not sworn, so that appraisement is only *primâ facie* evidence of the value. (*Cook* v. *Corbett*, 24 W. R. 181.) Very often the goods are bought by the appraisers or one of them at their own valuation; this course, however, should only be adopted when the value of the goods is small.

The landlord cannot take the goods at their appraised value. (*King* v. *England*, 4 B. & S. 782; 33 L. J., Q. B. 145.) The fact of goods being allowed to stand in the rain, or being improperly lotted, may be evidence of not selling at the best price. (*Poynter* v. *Buckley*, 5 C. & P. 512.) If a tenant is under covenant not to carry hay and straw off the premises, the landlord cannot sell hay and straw, taken as a distress, subject to a condition that it shall be consumed on the premises, without being liable to an action for not selling at the best price (*Ridgway* v. *Lord Stafford*, 6 Ex. 404; 20 L. J., Ex. 226; *Hawkins* v. *Walrond*, 45 L. J., C. P. 772; L. R., 1 C. P. D. 280), unless there is an express condition in the lease enabling him to do so.

Costs of the distress under 20*l.*

Where a distress is made for arrears of rent *not exceeding* 20*l.*, the person making the distress, or person employed by him, shall not have, take or receive any other or more costs or charges for or in respect of the same than those set down in the schedule to the act 57 Geo. 3, c. 93 (s. 1), and which are as follows:—

	s.	*d.*
Levying distress	3	0
Man in possession, per day . .	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 advertisement, if any such	10	0
Catalogues, sale and commission, and delivery of the goods, 1*s.* in the pound on the net produce of the sale.		

If any person shall in any manner levy, take or receive, or retain or take from the produce of the

goods sold, any greater costs and charges than are mentioned above, or make any charge whatsoever mentioned in the said schedule, and not really done, it shall be lawful for the party aggrieved to apply to a justice of the peace for the county, who may, after examining into the complaint, order treble the amount of the moneys so unlawfully taken to be paid by the person so having acted to the party complaining, together with full costs. (Sect. 2.)

Above 20*l.* Where the rent distrained for exceeds 20*l.*, the costs and charges to be taken are not regulated by statute. They must, however, be reasonable. (*Lyon* v. *Tomkies*, 1 M. & W. 603; *Hills* v. *Street*, 5 Bing. 37.) In practice they are generally one or two guineas for the levy, 5*s.* a day for the man in possession, and the other charges above mentioned. The nature of possession to be taken must depend on the nature of the distress, and the statutory charge of 2*s.* 6*d.* per day would not be allowed for a man in possession of growing grass crops during the period of its maturing. (*Ex parte Arnison*, L. R., 3 Ex. 56; 37 L. J., Ex. 57.)

Broker to give copy of charges. 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. (57 Geo. 3, c. 93, s. 6.) The landlord is not liable, unless he personally interferes in the distress, for the broker's neglect to deliver a copy of charges. (*Hart* v. *Leach*, 1 M. & W. 560.)

Overplus. The landlord should leave the overplus of the proceeds of any sale, after satisfying the rent and

costs, with the sheriff or undersheriff, and any unsold goods distrained he may return to the premises on which he distrained them. (*Evans* v. *Wright*, 27 L. J., Ex. 50; 2 H. & N. 527.) In practice the overplus is often paid to the tenant or his agent, and when this is done the tenant cannot complain that it has not been paid over to the sheriff or undersheriff for his use, since the statute is thereby substantially satisfied. (Per Lord Abinger, *Lyon* v. *Tomkies*, 1 M. & W. 606.) If the proceeds of sale are insufficient to satisfy the rent, the landlord may bring an action for the balance. (*Philpott* v. *Lehain*, 35 L. T. 855.)

Second distress.

Where the rent in arrear consists of several amounts falling due on different days, there may be a separate distress for each. (*Anon.*, Moore, 7; *Gambrell* v. *Falmouth*, 4 A. & E. 73.) Nor does it matter whether the first distress be taken for the rent which last became due. (*Palmer* v. *Strange*, 1 Leo. 43; *S. C.*, *Pamer* v. *Stabick*, 1 Sid. 44.) As a general rule, however, a man may not split one entire demand and distrain twice for the same rent when he might have taken enough on the first occasion. (*Owens* v. *Wynne*, 4 E. & B. 579; *Bagge* v. *Mawby*, 22 L. J., Ex. 236; 8 Ex. 641.) But if the value of cattle distrained shall not be of the full value of the arrears distrained for (17 Car. 2, c. 7, s. 4); or if there are not sufficient goods on the premises on the first occasion; or if goods are of an uncertain or imaginary value, as pictures, jewels, racehorses, &c., and the landlord mistake their value (*Hutchins* v. *Chambers*, 1 Burr. 589); or if the landlord is prevented from realizing the distress by the conduct of the tenant (*Lee* v. *Cooke*, 27 L. J., Ex. 337; 3 H. & N. 203); or where cattle die in the pound, by the act of God, a second distress may be taken.

Abandonment.

The same rule against a second distress applies

where the landlord, having distrained enough, voluntarily abandons it (*Bagge* v. *Mawby*, 22 L. J., Ex. 236; 8 Ex. 641; *Dawson* v. *Cropp*, 1 C. B. 961), unless the landlord withdraw the distress at the request and for the accommodation of the tenant (*Bagge* v. *Mawby*, *supra*), or is induced to do so by a false representation of the tenant. (*Wollaston* v. *Stafford*, 15 C. B. 278.) Merely quitting possession of goods after distress is not necessarily an abandonment (*Bannister* v. *Hyde*, 29 L. J., Q. B. 141); nor is failure to resume immediate possession upon being forcibly expelled (*Eldridge* v. *Stacey*, 15 C. B., N. S. 458); or allowing the goods of a stranger which have been distrained to be removed for a temporary purpose. (*Kerby* v. *Harding*, 6 Ex. 234.) The question of whether or not there has been an abandonment is one for the jury. (*Eldridge* v. *Stacey*, *supra*.)

Effect of tender of rent.

A tender of the rent, without any costs, before seizure (although the warrant to distrain may have been delivered to the bailiff) extinguishes the right to distrain, and makes a subsequent distress illegal. (*Bennett* v. *Bayes*, 29 L. J., Ex. 224; 5 H. & N. 391.) A tender after distress and before impounding, of the rent and costs of the distress, makes the subsequent detainer illegal (*Vertue* v. *Beasley*, 1 M. & Rob. 21; *Six Carpenters' case*, 1 Sm. L. C. 133, 7th ed.); and even after the impounding the tenant may within five days tender the rent and the proper costs, and, if the landlord afterwards sell, may maintain an action against him. (*Johnson* v. *Upham*, 2 E. & E. 250; 28 L. J., Q. B. 252.) But the tenant must at his peril in each case tender the proper amount of rent and costs, and tender it unconditionally. (*Finch* v. *Miller*, 5 C. B. 428.)

To whom tender made.

The tender may be made to the landlord himself, notwithstanding he has authorized a broker

to distrain and left the matter in his hands (*Smith* v. *Goodwin*, 4 B. & Ad. 413), or to his agent authorized to receive rents. (*Bennett* v. *Bayes*, 29 L. J., Ex. 224; 5 H. & N. 391.) A bailiff authorized to distrain is authorized to receive the rent, and tender may be made to him (*Hatch* v. *Hale*, 15 Q. B. 10); but tender to a man left in possession (being other than the person holding the warrant to distrain) is invalid. (*Boulton* v. *Reynolds*, 2 E. & E. 369.)

CHAPTER VII.

REMEDIES FOR IRREGULAR, EXCESSIVE OR ILLEGAL DISTRESS.

In pursuing his summary remedy by distress, the landlord must be careful that the distress is neither irregular, excessive nor illegal.

Irregular distress.

A distress is irregular when the taking of the distress is perfectly legal and in order, but some of the subsequent proceedings are unlawful. The most frequent instances of irregular distress are, selling without having given notice, or within five days from the notice; selling growing crops before they are gathered, contrary to 11 Geo. 2, c. 19, s. 8; selling without appraisement, or for less than the best price; and not leaving the overplus in the hands of the sheriff or under-sheriff. (See upon these various points, Chap. VI.) And so, although a distress is lawfully made, it is unlawful to detain or sell it after tender of the rent with proper costs, or to sell after the goods have been replevied.

At common law an irregularity in the conduct of a distress made the entire proceedings void, and the person distraining a trespasser *ab initio*. (*Six Carpenters' case*, 1 Sm. L. C. 133, 7th ed.) This was found to occasion hardship, and therefore, by 11 Geo. 2, c. 19, s. 19, it was provided that when 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 distraining, or his agent, the distress itself shall not be deemed

to be unlawful, nor the party making it be therefore deemed a trespasser *ab initio;* but the party aggrieved by such unlawful act or irregularity shall or may recover full satisfaction for the special damage sustained thereby and no more. But the tenant cannot recover if there has been a tender of amends before action. (Sect. 20.) The protection of this act does not extend to a distress illegal in the very commencement. (*Attack* v. *Bramwell*, 3 B. & S. 520.)

An action for irregularity in dealing with a distress cannot be maintained without proof of special damage, on failure of which the plaintiff is not entitled to a verdict for even nominal damages, but the defendant is entitled to the verdict. (*Lucas* v. *Tarleton*, 3 H. & N. 116; *Rodgers* v. *Parker*, 18 C. B. 112; 25 L. J., C. P. 220; *Proudlove* v. *Twemlow*, 1 Cr. & M. 326.)

Excessive distress.

By the statute of Marlebridge (52 Hen. 3, c. 4) it is enacted that "distresses shall be reasonable and not too great." To be excessive a distress must be obviously disproportioned to the rent. (*Field* v. *Mitchell*, 6 Esp. 71.) When a landlord is about to make a distress, he is not bound to calculate very nicely the value of the property seized, but he must take care that some proportion is kept between that and the sum for which he is entitled to take it (*per* Bayley, J., *Willoughby* v. *Backhouse*, 2 B. & C. 823), and in doing so is only bound to exercise a reasonable and honest discretion. (*Roden* v. *Eyton*, 6 C. B. 430.) Taking a single chattel, though of considerably greater value than the rent, is not excessive if there was no opportunity to take one of less value. (*Avenell* v. *Croker*, M. & M. 172.) The question of excess is one for the jury (*Smith* v. *Ashforth*, 29 L. J., Ex. 259), and an action will lie for an excessive distress although the sale, less the ex-

penses, did not equal the rent due. (*Ib.*) The landlord is not bound by the amount of rent actually claimed at the time of distraining, and though he then claim for more rent than is due, he will not be liable to an action unless the distress is excessive for the rent really due. (*Tancred* v. *Leyland*, 16 Q. B. 669; 20 L. J., Q. B. 316; *French* v. *Phillips*, 26 L. J., Ex. 82; *Glyn* v. *Thomas*, 25 L. J., Ex. 125; 11 Ex. 870; *Phillips* v. *Whitsed*, 29 L. J., Q. B. 164.)

For an excessive distress the plaintiff is entitled to nominal, though he prove no actual, damage, since the law will presume damages from a man being prevented from dealing with his property. (*Chandler* v. *Doulton*, 34 L. J., Ex. 89; 3 H. & C. 553.) Whether impounded on the premises or off the premises, the tenant is entitled to recover such actual damage as he has sustained through loss of the use and enjoyment of the excess taken, or of the power of disposing freely thereof, or through the inconvenience and expense in procuring sureties to a larger amount than he otherwise would have been on replevying. (*Piggott* v. *Birtles*, 1 M. & W. 441.) He is also entitled to the excess of the value of the goods above the rent and the expenses of distress.

Illegal distress.

An illegal distress is one which is wrongful in the very commencement, such as a distress by a stranger, or by the landlord after he has parted with his reversion, a distress when no rent is due, or after it has been tendered, or after a former distress for the same rent, distraining off the premises, or between sunset and sunrise, or in an unlawful manner, as by breaking open the outer door, or distraining things privileged from distress.

In the case of an illegal distress the distrainor is a trespasser *ab initio*, and the full value of the

goods taken, without any deduction for rent, is recoverable as damages (*Attack* v. *Bramwell*, 32 L. J., Q. B. 146; 3 B. & S. 520; *Keen* v. *Priest*, 28 L. J., Ex. 157); and where the landlord has placed a man in possession, the plaintiff is entitled to damages, although he had the use of the goods all the time. (*Bayliss* v. *Fisher*, 7 Bing. 153.)

When a distress and sale is made for rent pretended to be in arrear and due, when in truth no rent is due, the owner of the goods distrained is entitled to recover by action double the value of the goods with full costs of suit. (2 W. & M. sess. 1, c. 5, s. 5.) This only applies where the goods have been actually sold. (*Masters* v. *Farris*, 1 C. B. 715.)

Against whom action may be brought.

When a distress is *illegal*, the person who committed the act complained of is responsible and not the landlord, unless he authorized or subsequently sanctioned the act done. (*Lewis* v. *Read*, 13 M. & W. 834; *Freeman* v. *Rosher*, 13 Q. B. 780; 18 L. J., Q. B. 340; *Green* v. *Wroe*, W. N. 1877, p. 130.) If, when he knows the circumstances, he repudiates the act, he is not bound by it. (*Hurry* v. *Rickman*, 1 M. & Rob. 126.) But he is responsible for any mere *irregularity*, although done without his knowledge or sanction. (*Haseler* v. *Lemoyne*, 5 C. B., N. S. 530; 28 L. J., C. P. 103.)

When in the county court.

An action for irregular, excessive or illegal distress, when the amount claimed is under 50*l.*, may be brought in the county court.

An injunction to restrain a distress will not be granted (even if the right to distrain be doubtful) without provision being made to secure the landlord in the event of his being found to be entitled. (*Shaw* v. *Earl of Jersey*, 48 L. J., C. P. 308.)

Replevin.

Whenever there has been an unlawful distress the tenant has his remedy by replevin. Replevin consists of the re-delivery to the owner of the goods taken, upon his undertaking to try the validity of the distress. It may be resorted to, to obtain the

recovery of all kinds of goods which can lawfully be distrained, but not of fixtures, animals *ferœ naturæ*, and other things which from their nature cannot be the subject of distress. (*Niblet* v. *Smith*, 4 T. R. 504.) Proceedings in replevin consist—(1) of the tenant giving security that he will prosecute an action of replevin, whereupon the goods are restored; and (2) of the action so undertaken to be brought. So long as the goods remain unsold the tenant may replevy. (*Jacob* v. *King*, 5 Taunt. 451.)

Formerly the replevy was made by the sheriff, who took the goods from the distrainor and redelivered them to the owner, upon the execution of a replevin bond by the owner and two sureties conditioned to prosecute his suit with effect and without delay against the distrainor, and to return the goods if a return should be awarded. By the 19 & 20 Vict. c. 108, this power was taken away, and it was provided that the registrar of the county court of the district in which any distress subject to replevin shall be taken, shall be empowered to approve of replevin bonds, to grant replevins, and to issue all necessary process in relation thereto, and such process shall be executed by the high bailiff. (Sect. 63.) The registrar will cause the goods to be replevied to the owner upon his giving security to prosecute an action against the distrainor, either in the superior court or in the county court. (Sect. 64.) If the replevisor (or owner) intends to proceed in the superior court, he must give security to cover the alleged rent in respect of which the distress was made, and the probable costs of the cause, and must commence his action within one week from the date of giving security, and be prepared to prove (unless judgment be obtained by default) that he had good ground for believing either that the title to some corporeal or incorporeal hereditaments, or to some toll, market, fair, or franchise, was in question, exceeded 20*l*. (Sect. 65.)

If he elect to sue in the county court, the replevisor must give security for the alleged rent and the probable costs of the cause, and must commence his action within one month from the date of giving security. (Sect. 66.) In both cases, also, "to make return of the goods, if a return thereof shall be adjudged," is one of the conditions. The security shall be in the form of a bond, with sureties to the distrainor (sect. 70); or a deposit of a sum, equal to the amount of the security which would be required, with the registrar. (Sect. 71; Co. Cot. Orders, 1875, Ord. XXX.) Replevin bonds are exempt from stamp duty. (See general exemption at end of schedule to 33 & 34 Vict. c. 98.) This schedule seems to have been overlooked in the note at the end of the County Court Rules, 1876.

The action of replevin is in the same form as any other action. No other cause of action can be joined with it, either in the superior court (C. L. P. Act, 1852, s. 41) or in the county court. (Co. Cot. Orders, 1875, Ord. XXII. r. 1.) If brought in the county court it may be removed by *certiorari* to a superior court, when the defendant is prepared to prove that he had good ground for believing that the title to some corporeal or incorporeal hereditaments, or to some toll, market, fair, or franchise was in question, or that the rent, in respect of which the distress was taken, exceeded 20*l*. (19 & 20 Vict. c. 108, s. 67.) Unless so removed the county court has full jurisdiction, whatever the amount of the rent and though title come in question. (*Fordham* v. *Akers*, 4 B. & S. 578; 33 L. J., Q. B. 67.) If the rent exceed 20*l*. there is an appeal from the county court. (Sect. 68.)

Remedies within the

For any form of wrong committed in a distress within the metropolitan police district where the

metropolitan police district.

rent is under 15*l.*, a summary remedy is provided by 2 & 3 Vict. c. 71, s. 39, which enacts, that "on complaint to any of the police magistrates by any person who shall within the metropolitan police district have occupied any house or lodging by the week or month, or, where the rent does not exceed the rate of 15*l.*, by the year, that his goods have been taken from him by an unlawful distress, or that the landlord, or his broker, has been guilty of any 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 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, 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 at such time as the magistrate shall appoint; or if the distress shall have been sold, to order payment to the tenant of the value thereof, deducting thereout the rent which shall 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, not being greater than 15*l.*, such value to be determined by the magistrate."

CHAPTER VIII.

HOW TENANCIES DETERMINE.

By effluxion of time.

WHERE a lease is granted for a term of years, or for one year only (*Cobb* v. *Stokes*, 8 East, 358), or is determinable on the happening of a certain event, then upon the expiration of the term or the happening of the event, the tenancy is put an end to, without notice to quit. So are all underleases granted by the lessee. (See *Weller* v. *Spiers*, 20 W. R. 772.)

Leases for optional periods.

If a lease is for a certain term, but determinable by one or either party at an earlier date (*ante*, p. 67), the party determining it must give the notice provided for in the lease, or if no provision is made he must give a reasonable notice. (*Goodright* v. *Richardson*, 3 T. R. 462.)

Merger.

A tenancy is determined whenever the term and the reversion both vest, without any intervening estate, in the same person in the same right, for then the less interest merges in the greater. (2 Preston, Abst. 12; Smith, Law of Prop. 1150, 3rd ed.) If any underlease or derivative title have been created out of the term, it will not be affected by the merger.

Surrender,

Determination of a tenancy may be effected by surrender, that is, by the tenant rendering up his estate to his immediate landlord, and the landlord accepting the surrender. A surrender may be either express or by operation of law. The

express,

29 Car. 2, c. 3, s. 3, requires that "an express surrender shall be by deed or note in writing, signed

by the party surrendering, or his agent, authorized by writing;" and 8 & 9 Vict. c. 106, s. 3, further requires that "a surrender in writing, unless of a copyhold interest or any interest which might by law have been created without writing, shall be by deed." Cancelling a lease or tearing off the names of the parties, unless there is also "a deed or note in writing," will not operate as a surrender. (*Doe* v. *Thomas*, 9 B. & C. 288; *Ward* v. *Lumley*, 29 L. J., Ex. 322.) But no technical words are requisite in the writing.

by operation of law.

A surrender by operation of law or implied surrender occurs where the one party does, and the other assents to, an act which is inconsistent with the continuance of the lease or tenancy. Thus, there cannot be two concurrent leases or tenancies of the same premises, and therefore, if, during the continuance of a lease, the landlord, with the assent of the tenant, grant a new lease, the previous lease is surrendered by operation of law; or, in other words, the tenant having assented is estopped from afterwards denying the landlord's power to grant the new lease, which he could only do, assuming the old lease to be surrendered. (*Lyon* v. *Reed*, 13 M. & W. 285.) And this is so, whether the new lease is to the tenant himself (*ib.*; *McDonnell* v. *Pope*, 9 Hare, 705), to himself jointly with a third person (*Hamerton* v. *Stead*, 3 B. & C. 478), or to a third person alone. (*Davison* v. *Gent*, 1 H. & N. 744; 26 L. J., Ex. 122; *Thomas* v. *Cook*, 2 B. & Ald. 119.) His assent in the latter case would be sufficiently evidenced by his giving up possession to the new lessee. (*Davison* v. *Gent*, *supra*.) It is immaterial that the new lease is for a less term than the unexpired residue of the old one, or that the old lease was by deed and the new one by parol. (*Ib.*; *Dodd* v. *Acklom*, 13 L. J., C. P. 11; 6 M. &

Gr. 679, *per* Tindal, C. J.) But a lease which is void or voidable (*Doe* v. *Poole*, 17 L. J., Q. B. 143), or which does not pass an interest according to the contract of the parties (*Doe* v. *Courtney*, *ib.* 151), will not operate as a surrender. Neither will a mere agreement for a new lease with the tenant (*Foquet* v. *Moor*, 7 Ex. 870; 22 L. J., Ex. 35), or with a stranger, unless the tenant quits and the stranger enters and each does so upon the express faith of that agreement; for a mere change of possession does not itself raise a presumption of a surrender, but only that the person in possession is an assignee or underlessee. (*Copeland* v. *Gubbins*, 1 Stark. 96; *Doe* v. *Wood*, 14 M. & W. 682.) A giving up of a small portion of the premises and a proportionate reduction of the rent does not in itself amount to a surrender by operation of law. (*Holme* v. *Brunskill*, 47 L. J., C. P. 610; L. R., 3 Q. B. D. 495.) The creation of a new relation in regard to the property inconsistent with that of the continuance of landlord and tenant, operates as a surrender, as where the lessee of a ferry became servant to the lessor, and accounted to him for the profits. (*Peter* v. *Kendal*, 6 B. & C. 703.)

Anything amounting to an abandonment of possession by the tenant under circumstances from which it can be inferred that such abandonment was assented to by the landlord, or followed by the landlord actually taking possession, will amount to a surrender by operation of law. (*Furnivall* v. *Grove*, 30 L. J., C. P. 3; *Dodd* v. *Acklom*, 13 L. J., C. P. 11; *Saint* v. *Pilley*, 44 L. J., Ex. 33; L. R., 10 Ex. 137; *Jones* v. *Bridgman*, 39 L. T. 500.) Thus, where the tenant left the premises, and wrote to the landlord requesting him to relet, and the latter, without further communication, did relet, it was held to constitute a surrender. (*Nicholls* v. *Ather-*

stone, 16 L. J., Q. B. 371; 10 Q. B. 944.) So where the tenant having left, the landlord without any such request relet. (*Walls* v. *Atcheson*, 3 Bing. 462.) Again, delivery and acceptance of the key upon a parol agreement that the tenancy is to cease (*Whitehead* v. *Clifford*, 5 Taunt. 518), or delivery of the key under circumstances from which the intention of the landlord to resume possession may be inferred (*Furnivall* v. *Grove*, *supra*; *Moss* v. *James*, 47 L. J., Q. B. 160), will operate as a surrender. But there must be something to show that the landlord assents to the tenant's quitting, either by accepting the key for the purpose of resuming, or actually resuming, possession of the premises; merely leaving the key at the office of the landlord, who does not return it, is not sufficient (*Cannan* v. *Hartley*, 19 L. J., C. P. 323); neither is an abandonment of the premises followed by an entry of the landlord thereon for the purpose of repairing, airing, or drying, but not with a view to take possession. (*Bessell* v. *Landsberg*, 7 Q. B. 638.) And where the tenant sent the key with the intention of giving up possession, the fact that the landlord received the key and attempted unsuccessfully to relet the premises was held not to estop him from alleging that the tenancy was still subsisting; and it was further held that upon a reletting, the surrender only takes effect from the date of such reletting, and not from the time of the original receipt of the key. (*Oastler* v. *Henderson*, 46 L. J., Q. B. 607; L. R., 2 Q. B. D. 575; but see *Phene* v. *Popplewell*, 31 L. J., C. P. 235; 12 C. B., N. S. 334.) Moreover a parol licence to quit, upon which the tenant quits accordingly, will not determine a yearly tenancy, unless the landlord accept possession. (*Mollett* v. *Brayne*, 2 Camp. 103.)

Effect of surrender,

When a lease is surrendered it does not destroy

the tenant's liability under his covenants for breaches of covenant and rent *accrued* due (*Att.-Gen.* v. *Cox*, 3 H. L. Cas. 240); but rent *accruing*, and which does not become payable until a day subsequent to the surrender, is lost. (*Grimman* v. *Legge*, 8 B. & C. 324.)

on under-leases.

A surrender will not avoid or prejudice an underlease (*Doe* v. *Pyke*, 5 M. & S. 146; *Mellor* v. *Watkins*, L. R., 9 Q. B. 400; as to a disclaimer under the Bankruptcy Act, see *Taylor* v. *Gillott*, 44 L. J., Ch. 740; L. R., 20 Eq. 682, and *post*, Chap. X.), or derivative rights depending upon the continuance of the lease. (Co. Litt. 338 b; *Saint* v. *Pilley*, 44 L. J., Ex. 33; L. R., 10 Ex. 137.) On the other hand, neither surrender nor merger destroys the undertenant's liability under his lease or tenancy; for 8 & 9 Vict. c. 106, s. 9, provides "that if a reversion expectant on a lease is surrendered or merges, the estate which confers as against the tenant the next vested right to the tenement shall be deemed the reversion for the purpose of preserving the incidents to, and obligations on, the reversion." (As to surrenders for renewal, see 4 Geo. 2, c. 28, s. 6; *Cousins* v. *Phillips*, 35 L. J., Ex. 84; 3 H. & C. 892.)

Disclaimer.

A tenant, whether from year to year or for a term of years, incurs a forfeiture of his interest, if he disclaim, or deny his landlord's title, and set up an adverse title to the property, either in himself or in a third person. (*Doe* v. *Cooper*, 1 M. & Gr. 139, *per* Tindal, C. J.; *Doe* v. *Rollings*, 4 C. B. 188.) A disclaimer in the case of a tenant from year to year may be either verbal or written (*Doe* v. *Stanion*, 1 M. & W. 695, 702; *Doe* v. *Grubb*, 10 B. & C. 816); but a verbal disclaimer will not work a forfeiture in the case of a tenant for a term of years. (*Doe* v. *Wells*, 10 A. & E. 427.) On the death of the lessor, refusal to pay to his

devisee under a will which is disputed is not a disclaimer. (*Doe* v. *Pasquali*, Peake, 259; *Jones* v. *Mills*, 31 L. J., C. P. 66.) A subsequent distress by the landlord waives a disclaimer. (*Doe* v. *Williams*, 7 C. & P. 322.)

Forfeiture,

The right of a landlord to enter for forfeiture of the term by the tenant, is either given by law without any stipulation, or is made the subject of express stipulation in the instrument of demise.

for condition broken.

If a lease be granted on condition, and the condition be broken, the lessor may enter or maintain ejectment without any express proviso for re-entry. For mere breach of a covenant, the lessor can only do so if there is an express proviso for re-entry. (*Doe* v. *Phillips*, 2 Bing. 13.) To create a condition, apt and proper words must be used. (*Doe* v. *Watt*, 8 B. & C. 308, 315.) In an agreement of demise it was "stipulated and conditioned" that the tenant should not assign, and this was held to create a condition (*ib.*); but where a tenant merely "agreed" that he would not underlet, it was held not to create a condition. (*Shaw* v. *Coffin*, 14 C. B., N. S. 372; *Crawley* v. *Price*, L. R., 10 Q. B. 302; 23 W. R. 874.) Strict proof of breach of a condition working a forfeiture is always required.

Under a proviso for re-entry.

To provide against difficulties in the proof of a broken condition, leases usually contain a proviso for re-entry on breach of any of the covenants contained in the lease. Provisoes of this description, it is said, are to be construed like other contracts, according to the apparent intention of the parties (*Goodtitle* v. *Saville*, 16 East, 95; *Wooler* v. *Knott*, 45 L. J., Ex. 313, 884; L. R., 1 Ex. D. 124, 265), and not with the strictness of conditions at common law. (*Doe* v. *Elsam*, Mo. & M. 189.) On this point, however, there is considerable conflict in the views of the judges. (See judgments in *Doe* v. *Ingleby*, 15 M. & W. 459; *Doe* v. *Stevens*,

3 B. & Ad. 303; *Wooler* v. *Knott*, *supra*.) The somewhat conflicting decisions (apart from the dicta) upon the point would seem reconcileable by the following propositions. (1) The proviso must be construed strictly and according to the letter to ascertain whether or not it was meant to include, and did incorporate, the covenant on breach whereof the right to re-enter is claimed. If it did, then (2) the question whether or not the covenant itself has been broken, is to be ascertained by reference to the rules which prevail in construing ordinary contracts between parties, and for that purpose the object and intent, as well as the actual words of the covenant, must be looked at.

For breach of negative covenants.

A proviso which seems to contemplate failure in the performance of affirmative covenants only, will not apply to breaches of negative covenants. (*West* v. *Dobb*, L. R., 5 Q. B. 460; 39 L. J., Q. B. 190.) So that a power to re-enter in the event of the lessee "failing or neglecting to perform any of the covenants on his part to be performed," will not sanction a re-entry for breach of a covenant not to assign without consent. (*Hyde* v. *Warden*, L. R., 3 Ex. D. 72; 47 L. J., Ex. 121.) And an omission to do something is not within the words "do or cause to be done." (*Doe* v. *Stevens*, 3 B. & Ad. 303.) And it has been held, that breaches of a negative covenant are not covered by the words "make default in performance" (*Doe* v. *Marchetti*, 1 B. & Ad. 715; see *Evans* v. *Davis*, 48 L. J., Ch. 223), for a negative cannot be performed (Co. Litt. 303 b); though in a more recent case, in reply to a question put by the House of Lords, nine judges were unanimous on the view that a proviso for re-entry, "if the lessee shall make default of or in performance of all or any of the covenants, &c., which on his part are or ought to be observed,

performed, or kept," would apply to embrace covenants not to do something, as well as covenants to do something. (*Croft* v. *Lumley*, 6 H. L. Ca. 672; 27 L. J., Q. B. 321.)

Construction of provisoes,

We have already considered the usual covenants in leases, and what are breaches thereof. (*Ante*, Chap. V.; and see *post*, Chap. X., as to breaches of covenants in respect of assignments.) If the proviso for re-entry is insensible, the courts will not put a construction upon it to make it operative (*Doe* v. *Carew*, 2 Q. B. 217; 11 L. J., Q. B. 5); neither will the courts reject clear and positive words, unless upon clear evidence that they are contrary to the intention of the parties (*Doe* v. *Godwin*, 4 M. & S. 270); so that upon the construction of a proviso for re-entry on breach of the covenants "hereinafter" contained, it was held to be restricted to subsequent covenants, although there were none to which it could apply, since such covenants might have been omitted through mistake, or struck out of the draft. (*Ib.*) The proviso is usually extended beyond breaches of covenant, so as to include other acts and omissions of the tenant, such as bankruptcy, liquidation, composition, &c. A proviso for re-entry if the lessee be "duly found and declared a bankrupt," does not apply to an invalid adjudication of bankruptcy (*Doe* v. *Ingleby*, 15 M. & W. 465); but the bankruptcy of a surviving executor of a tenant is within a proviso "if the lessee, his executors, administrators or assigns shall become bankrupt," &c. (*Doe* v. *David*, 1 Cr., M. & R. 405.) Seizure by the sheriff under an extent at the suit of the crown is within a proviso for re-entry in case the term thereby granted should be "extended or taken in execution." (*Rex* v. *Topping*, M'Clel. & Y. 544.) If the re-entry is to accrue, "in case no sufficient distress can be found on the

premises," every part of the premises must be searched (*Rees* v. *King*, Forrest, 19; 2 B. & B. 855); and unripe growing crops may amount to a sufficient distress. (*Ex parte Arnison*, L. R., 3 Ex. 56; 37 L. J., Ex. 57.) A proviso in the lease of a publichouse for re-entry on breach, amongst other covenants, of one not to do any act that "could or might affect, lessen, or make void either or any of the licences," was held not to give a right of re-entry after two unindorsed convictions under the Licensing Acts against the lessee. (*Wooler* v. *Knott*, L. R., 1 Ex. D. 124, 265; 45 L. J., Ex. 313, 388.) No precedent formality on the part of the landlord is necessary to take advantage of a proviso for re-entry, except in the case of non-payment of rent. In such a case, to create a forfeiture *at common law*, there must be a demand, by the landlord or his agent, of the precise rent due and no more, upon the precise day when it is due and payable, at a convenient time before sunset, and upon the land at the most notorious place of it, or at the place, if any, appointed for payment. (*Duppa* v. *Mayo*, 1 Wms. Saund. 287.) To relieve from these troublesome formalities the proviso is usually framed for re-entry, if the rent be unpaid for a certain number of days after it is due, although no formal demand be made. After the lapse of the time a forfeiture accrues without any demand. (*Doe* v. *Masters*, 2 B. & C. 490; *Doe* d. *Dixon* v. *Roe*, 7 C. B. 134; *Phillips* v. *Bridge*, L. R., 9 C. P. 48; 43 L. J., C. P. 13.) Moreover, by 15 & 16 Vict. c. 76, s. 210, the landlord may, without any formal demand of rent or re-entry, commence an ejectment when one half-year's rent is in arrear, and the landlord has by law the right to re-enter for the non-payment thereof, and when no sufficient distress is to

for non-payment of rent.

be found on the premises countervailing the arrears then due. (*Post*, Chap. XI.)

Forfeiture makes lease voidable not void.

An act or default giving a right of re-entry does not absolutely determine the lease, but makes it voidable at the election of the landlord alone, and not of the tenant, who may not take advantage of his own wrong. (*Rede* v. *Farr*, 6 M. & S. 121.) And this is so though the proviso run that the "lease shall be void to all intents and purposes" (*Doe* v. *Bancks*, 4 B. & Ald. 401); or shall be "null and void" (*Doe* v. *Birch*, 1 M. & W. 402; *Dakin* v. *Cope*, 2 Russ. 170); or "shall cease and determine." (*Davenport* v. *Regina*, 47 L. J., P. C. 9; L. R., 3 App. Cas. 115.) And the landlord must by some unequivocal act evince his intention to avoid it (*Roberts* v. *Davey*, 4 B. & Ad. 664); such as commencing proceedings in ejectment (*Jones* v. *Carter*, 15 M. & W. 718); creating a new tenancy with a third person in possession (*Baylis* v. *Le Gros*, 4 C. B., N. S. 537), or the like. But once having elected, the landlord cannot draw back.

Forfeiture of the lease does not extinguish the liability of the tenant in respect of breaches of covenant that had accrued at the time of forfeiture. (*Hartshorne* v. *Watson*, 4 Bing. N. C. 178.)

Waiver of forfeiture.

If after the forfeiture the landlord, with notice thereof, do any act which admits the continuance of the tenancy, he waives his right to take advantage of the forfeiture. (*Ward* v. *Day*, 33 L. J., Q. B. 3, 254; and see *Dumpor's case*, 1 Smith, L. C. 41, 7th ed.) Thus, if he accept (*Walrond* v. *Hawkins*, 44 L. J., C. P. 116; L. R., 10 C. P. 342; *Croft* v. *Lumley*, 5 E. & B. 648; *Davenport* v. *Regina*, *supra*), or sue for (*Dendy* v. *Nicholl*, 4 C. B., N. S. 376), or distrain for (*Cotesworth* v. *Spokes*, 10 C. B., N. S. 103), rent becoming due after the forfeiture, it is a waiver. And an unqualified

demand for such rent would seem to have the same effect. (*Doe* v. *Birch*, 1 M. & W. 408.) But not an acceptance of rent due at the time of the forfeiture (*Price* v. *Worwood*, 4 H. & N. 512), or due subsequently, if at the time of receiving it the landlord was ignorant of the forfeiture. (*Roe* v. *Harrison*, 2 T. R. 425.) It is not clear whether the statute 8 Anne, c. 14, s. 7, giving the right to distrain within six months after the termination of a tenancy, applies in the case of forfeiture, and therefore, whether or not a distress after forfeiture for rent due before forfeiture is a waiver (*Ward* v. *Day*, 33 L. J., Q. B. 3, 254); but if the landlord bring an ejectment for the forfeiture, he unequivocally declares his election to determine the lease, and a subsequent distress, whether it is justifiable under that statute or is a mere trespass, is no waiver. (*Grimwood* v. *Moss*, L. R., 7 C. P. 360.)

Waiver is only of past breaches.

Acceptance of rent or other act is only a waiver of breaches actually incurred, and not of a breach continuing after the act relied on as a waiver (*Doe* v. *Jones*, 5 Ex. 498; 19 L. J., Ex. 405; *Doe* v. *Woodbridge*, 9 B. & C. 376); and a waiver of one forfeiture does not prevent the landlord availing himself of subsequent breaches. (23 & 24 Vict. c. 38, s. 6.)

Relief against forfeiture.

We have previously seen that the courts will relieve, under certain circumstances, against forfeiture for breaches of covenant to insure. (*Ante*, p. 130.) They will also relieve against forfeiture for non-payment of rent, upon payment of all arrears of rent with costs. (23 & 24 Vict. c. 126, s. 1.) But generally relief will not be granted in case of forfeiture for the breach of any covenants, other than those for the payment of rent or other sums certain, or for insurance, except in case of mistake, accident or fraud. (*Gregory* v. *Wilson*, 9 Hare, 689; *Bracebridge* v. *Buckley*, 2 Price, 200;

Reynolds v. *Pitt*, *ib.* 212, n.; *Peachy* v. *Duke of Somerset*, 2 Wh. & Tu. L. C. in Eq. 1100 *et seq.*, 5th ed.) Recently, however, relief was granted against a forfeiture for non-repair, where the landlord, after giving notice to repair, led the tenant to suppose that the notice would not be insisted upon. (*Hughes* v. *Metropolitan Rail. Co.*, L. R., 2 App. Cas. 439; 46 L. J., C. P. 583.) So relief was granted where repairs were not finished within a given time on account of the weather (*Bargent* v. *Thompson*, 4 Giff. 473); but was refused where the tenant had employed a person to do repairs, but who had done them badly. (*Nokes* v. *Gibbon*, 3 Drew. 681.)

By forfeiture of the original lease all underleases will be defeated, the same as by effluxion of time. (Coote, L. & T. 375.)

Notice to quit,

A tenancy from year to year may be determined by a notice to quit, given by either landlord or tenant. A stipulation by which either party professes to deprive himself of the right to give notice to quit is void, because it is repugnant to the nature of a tenancy from year to year (*Doe* v. *Browne*, 8 East, 165; *Wood* v. *Beard*, L. R., 2 Ex. D. 30; 46 L. J., Q. B. 100; *Roberts* v. *Tregaskis*, 38 L. T. 176; but see *Re King's Leaseholds*, L. R., 16 Eq. 521; *Kusel* v. *Watson*, 26 W. R. 653; 38 L. T. 604); but the parties may stipulate that upon the happening of a certain event the tenant may quit without notice. (*Bethell* v. *Blencowe*, 3 M. & G. 119.) A notice to quit may be verbal unless a written one is stipulated for. (*Timmins* v. *Rowlinson*, 3 Burr. 1603.) When in writing it should not be witnessed, for then, in order to prove it, the witness must be called, or his absence accounted for. (*Doe* v. *Durnford*, 2 M. & S. 62.)

length of;

The parties may stipulate for any length of

notice, and that it shall expire at any period of the year, and in such case the stipulated notice must be given. (*Doe* v. *Baker*, 8 Taunt. 241; *Bridges* v. *Potts*, 33 L. J., C. P. 343.) In the absence of stipulation local custom may regulate the length of notice required, but there must be strong evidence of the custom. (*Roe* v. *Charnock*, Peake, 5.) Unless by statute, agreement, or local custom, some other period of notice is fixed, it must be given a half a year at least before the expiration of some year of the tenancy. (*Right* v. *Darby*, 1 T. R. 159; *Doe* v. *Snowden*, 2 W. Bl. 1225.) The half-year must be not merely six calendar months, but, unless the tenancy commenced on one of the usual feast days, a full period of 182 days. (*Anon.*, Dyer, 345.) If the tenancy commenced on one of the ordinary feast or quarter days, the notice must be from feast day to feast day, given on or before the quarter day next but one before that on which it is to determine. Such a notice is sufficient though less than a full half-year (*Roe* d. *Durant* v. *Doe*, 6 Bing. 574; *Howard* v. *Wansley*, 6 Esp. 53), and is required though more than a full half-year. (*Morgan* v. *Davies*, L. R., 3 C. P. D. 260; 26 W. R. 816.) If the parties stipulate for a "six months'" notice, six lunar months would be sufficient. (*Rogers* v. *Kingston-upon-Hull Dock Co.*, 34 L. J., Ch. 165.) In the case of a weekly tenancy a week's notice to quit would seem sufficient (*Jones* v. *Mills*, 31 L. J., C. P. 66); and so where premises are taken by the month, a month's notice only is required. (*Doe* d. *Parry* v. *Hazel*, 1 Esp. 94.) As to tenancies within the provisions of the Agricultural Holdings Act, 1875, where a half-year's notice, expiring with the year of tenancy, is by law necessary and sufficient for determination of a tenancy from year to year, a year's notice so

expiring shall, by virtue of the act, be necessary and sufficient for the same; but nothing in the section shall extend to the case where the tenant is adjudged bankrupt, or has filed a petition for composition or arrangement with his creditors. (38 & 39 Vict. c. 92, s. 51.) Following the above cases, it has been held that the words "half year" do not mean the same as six months, and do not apply to a tenancy created by deed before the act, with a stipulation for a *six months'* notice to quit. (*Wilkinson* v. *Calvert*, L. R., 3 C. P. D. 360; 26 W. R. 829; and see *Hewitt* v. *Harris* there cited, also 22 Sol. Jour. 386; and *quære* would the act apply to a tenancy commencing on the 29th of September, in which case more than a "half-year's" notice would "by law be necessary," see *Morgan* v. *Davies*, *supra*.)

when to expire.

The notice to quit, whatever its length, must, in the absence of stipulation to the contrary, expire at that period of the year when the tenancy commenced (*Doe* v. *Donovan*, 1 Taunt. 555), and on the last day of the year, unless the lease provide otherwise. (*Bridges* v. *Potts*, 33 L. J., C. P. 338.) If a tenant for life execute a lease which determines upon his death, and the remainderman receives rent from the lessee (thus affirming the tenancy), the notice must expire on the last day of some year of tenancy computed from the original entry. (*Roe* v. *Ward*, 1 H. Bl. 97; *Doe* v. *Weller*, 7 T. R. 478.) The same rule applies where the tenant holds over after the expiration of the lease (*Doe* v. *Samuel*, 5 Esp. 173), even when the original term is for a broken period not ending on the day when the tenancy commenced. (*Berrey* v. *Lindley*, 3 M. & Gr. 498; 11 L. J., C. P. 27; *Doe* v. *Dobell*, 1 Q. B. 806.) But when the original tenant sublets, and the underlessee enters at a different time of year to the

commencement of the original tenancy, and holds over, the notice to quit must be given with reference to the entry of the underlessee, and not with reference to the commencement of the original tenancy. (*Kelly* v. *Patterson*, L. R., 9 C. P. 681; 43 L. J., C. P. 320; *Doe* v. *Lines*, 11 Q. B. 402.)

Where the entry is between the quarter days.

Although a tenancy, in the absence of payment of rent or other definition of the commencement, is to be considered as commencing on the day of entry (*Doe* v. *Matthews*, 11 C. B. 675), yet if a tenant enter in a broken quarter, and pay rent for such broken quarter, and afterwards pay rent from quarter to quarter, the tenancy, so far as concerns the notice to quit, will be held to commence from the quarter day after he first entered (*Doe* v. *Stapleton*, 3 C. & P. 275; *Doe* v. *Grafton*, 18 Q. B. 496; 21 L. J., Q. B. 276); so if no rent is to be paid for the broken quarter. (*Sandill* v. *Franklin*, L. R., 10 C. P. 377; 44 L. J., C. P. 216; 23 W. R. 473.)

Where entry at different times.

When the tenant (as is usual with farms) has entered on different parts of the premises at different times, the notice must be given with reference to the entry on the principal subject of the demise (*Doe* v. *Snowdon*, 2 W. Bl. 1224; *Doe* v. *Watkins*, 7 East, 551), and the jury must decide which is the principal part. (*Doe* v. *Howard*, 11 East, 498; *Doe* v. *Hughes*, 7 M. & W. 139.)

If a tenant inform his landlord that his tenancy began on a certain day, notice to quit accordingly is good; nor may the tenant afterwards show that it commenced on a different day. (*Doe* v. *Lambly*, 2 Esp. 635.) And where a question arises as to when the tenancy commenced it is a question for the jury. (*Walker* v. *Goode*, 30 L. J., Ex. 172.)

Notice must be for the whole.

A landlord cannot give a notice to quit as to part of premises demised together at an entire rent (*Doe* v. *Archer*, 14 East, 245; *Doe* v. *Church*,

3 Camp. 71), except when he desires to resume possession of part for purposes sanctioned by the Agricultural Holdings Act, 1875. (38 & 39 Vict. c. 92, s. 52.)

Form of notice.

The notice should be reasonably clear and certain in its terms. A notice to quit "all the property you hold of me," or similar general description, is sufficient; and any trifling inaccuracy, which could not mislead the party to whom it is given, will not invalidate a notice. Thus, a mistake as to the parish, when the tenant held only one farm (*Doe* v. *Wilkinson*, 12 A. & E. 743), calling the premises by the wrong name (*Doe* v. ——, 4 Esp. 185), putting a wrong year as that in which the notice was to end (*Doe* v. *Kightley*, 7 T. R. 63), addressing the notice to the tenant by a wrong christian name, and he did not return it (*Doe* v. *Spiller*, 6 Esp. 70), have been held not to invalidate a notice, for the courts listen with reluctance to objections to the form of notice. (*Doe* v. *Archer*, 14 East, 245.)

The notice need not specify the particular day on which the tenant is to quit. A notice to quit "at the expiration of the current year of the tenancy, which shall expire next after the end of one half-year from the date thereof," is sufficient. (*Doe* v. *Butler*, 2 Esp. 589; 2 Camp. 258, n.; *Doe* v. *Smith*, 5 A. & E. 350.) When a specific day is mentioned, care should be taken that it is the correct one, otherwise it will be invalid, though served in time for the right day. (*Doe* v. *Lea*, 11 East, 312.) Where a tenant held from Martinmas to Martinmas, a notice given to the tenant on the 21st of October to quit on the 13th May then next, or on such other day or time as the current year for which he held should expire, it was held insufficient, for it would not be good for May, and the *current* year would expire on the 11th of November, a few days after the

notice. (*Doe* v. *Morphett*, 7 Q. B. 577; 14 L. J., Q. B. 345; *Mills* v. *Goff*, 14 M. & W. 72.) But a notice for two alternative days is good, if either of them is the correct one; thus, where it was uncertain whether a tenancy commenced on new or old Lady-Day, a notice to quit on the 25th of March or the 8th of April was held sufficient. (*Doe* v. *Wrightman*, 4 Esp. 6; and see *Doe* v. *Vince*, 2 Camp. 256.)

The notice need not state to whom possession is to be given up (*Doe* v. *Foster*, 3 C. B. 215), but it must be imperative to quit without an alternative: and therefore if it is to quit *or* pay double value, it is bad; but "I desire you to quit or I shall *insist on* double rent" was held good, since it was not regarded as offering an alternative. (*Doe* v. *Jackson*, Doug. 175; *Doe* v. *Goldwin*, 2 Q. B. 143.) So the notice of the tenant must denote an absolute intention to give up the premises at the lawful time. (*Goode* v. *Howells*, 4 M. & W. 202.)

By whom given.

Notice on behalf of the landlord should be given by himself or his agent. A mere receiver of rents, as such, has no implied authority to give a notice to quit (*per* Parke, J., *Doe* v. *Walters*, 10 B. & C. 633), but an agent to receive rent and to let has. (*Doe* v. *Mizem*, 2 M. & Rob. 56; *Doe* v. *Robinson*, 3 Bing. N. C. 677; *Erne* v. *Armstrong*, 20 W. R. 370.) And he may give the notice in his own name without purporting to give it as agent. (*Jones* v. *Phipps*, L. R., 3 Q. B. 567; 37 L. J., Q. B. 198.) The steward of a corporation may give notice without any authority under seal. (*Roe* v. *Pierce*, 2 Camp. 96.) If the agent at the time of giving notice have no authority, a recognition and adoption of the notice by the landlord in time for it to begin to operate will make it good, but not a subsequent adoption

of it. (*Doe* v. *Walters*, 10 B. & C. 626; *Doe* v. *Goldwin*, 2 Q. B. 143.) A notice given by one of several joint tenants (*Doe* v. *Summersett*, 1 B. & Ad. 135), or partners (*Doe* v. *Hulme*, 2 Man. & Ry. 433), or the authorized agent of one of them (*Doe* v. *Hughes*, 7 M. & W. 139), is sufficient for the whole. Notice should be addressed to the immediate tenant, and not to a mere under-tenant. (*Pleasant* v. *Benson*, 14 East, 234.)

Service of.

When in writing, the notice may be served upon the tenant personally, or, in the case of joint tenants upon one of them (*Doe* v. *Watkins*, 7 East, 551), or it may be left at his dwelling-house, whether upon the demised premises or not, with his wife or servant, but in that case the nature and contents should be explained at the time (*Jones* v. *Marsh*, 4 T. R. 464; *Doe* v. *Lucas* 5 Esp. 153; *Tanham* v. *Nicholson*, L. R., 5 H. L. 561; *Liddy* v. *Kennedy*, 20 W. R. 150), and it will be sufficient though the tenant is not informed of it until within half a year of its expiration. (*Doe* v. *Dunbar*, Mo. & M. 10.) Merely leaving the notice on the premises without delivering it to anyone is not sufficient (*Doe* v. *Lucas*, *supra*), unless it be proved to have come to the tenant's hands in due time. (*Alford* v. *Vickery*, C. & M. 280.) Service upon the person in possession will be good, as he is *primâ facie* the assignee or agent of the tenant (*Doe* v. *Williams*, 6 B. & C. 41; *Doe* v. *Murless*, 6 M. & S. 110; *Roe* v. *Street*, 2 A. & E. 329); and where a tenant is dead, service upon his widow in possession is good in the absence of evidence of probate or administration. (*Rees* v. *Perrott*, 4 C. & P. 230; *Sweeny* v. *Sweeny*, Ir. R., 10 C. L. 375.) Notice may be served through the post; and where a notice was sent through the post to the place of business of the landlord's agent, and reached there after the agent left, but

during business hours, on the last day for giving notice, it was held sufficient. (*Papillon* v. *Brunton*, 5 H. & N. 518; 29 L. J., Ex. 265.) Service in the case of a corporation may be upon one of its officers, but the notice must be addressed to the corporation. (*Doe* v. *Woodman*, 8 East, 228.)

Waiver of notice.

A notice to quit may be withdrawn by mutual consent (*Tayleur* v. *Wildin*, L. R., 3 Ex. 303; 37 L. J., Ex. 173), or it may be waived in various other ways. If the landlord distrain for (*Zouch* v. *Willingale*, 1 H. Bl. 311), or receive (*Goodright* v. *Cordwent*, 6 T. R. 219; *Doe* v. *Batten*, Cowp. 243), rent due after the expiration of the notice, it is a waiver. But not so if the rent was due before the expiration of the notice. Merely demanding subsequent rent without its being paid is not necessarily a waiver (*Blyth* v. *Dennett*, 22 L. J., C. P. 79); and in a case where the rent was usually paid at a banker's, and the banker without authority received rent after the expiration of a notice to quit, this was held no waiver. (*Doe* v. *Calvert*, 2 Camp. 387.) A second notice to quit is generally, though not necessarily, a waiver of a former one. (*Doe* v. *Palmer*, 16 East, 53; *Doe* v. *Humphreys*, 2 East, 237.) The tenant's holding over after the expiration of the notice, is not a waiver, without evidence of a renewal of the tenancy (*Jenner* v. *Clegg*, 1 M. & Rob. 213; *Gray* v. *Bompas*, 11 C. B., N. S. 520); nor will a mere indulgence granted to the tenant operate as a waiver. Thus, where the landlord being about to sell the premises gave the tenant notice, but promised not to turn him out unless they were sold, it was held that the tenant's having held over under this promise was no waiver. (*Whiteacre* v. *Symonds*, 10 East, 13; *Doe* v. *Crick*, 5 Esp. 196.)

When once an effectual notice to quit is given,

it determines the tenancy; and waiver of the notice creates a new tenancy commencing from the expiration of the old one. Therefore a surety for rent is discharged by a proper notice to quit, although the notice is afterwards withdrawn. (*Tayleur* v. *Wildin*, L. R., 3 Ex. 303; 37 L. J., Ex. 173; L. R., 3 Ex. 303; *Holme* v. *Brunskill*, 47 L. J., C. P. 610; L. R., 3 Q. B. D. 495.)

A valid notice determines underleases.

A valid notice to quit determines not only the lease but all underleases the tenant may have created.

CHAPTER IX.

RIGHTS AND LIABILITIES OF THE PARTIES ON THE DETERMINATION OF THE TENANCY.

SECT. 1.—*Fixtures.*

Fixtures defined.

THE term "fixtures" is often used to express different meanings. (Broom's Max. 372.) The sense in which it is most generally used is that of chattels affixed to or planted in the soil, so as to become part of the freehold. (*Climie* v. *Wood*, 37 L. J., Ex. 158, *per* Kelly, C. B.) In this sense we use it. The old rule of law is, that every chattel annexed to realty becomes upon annexation part of the realty, according to the maxim *quicquid plantatur solo, solo cedit;* and, though this old rule applies in its integrity as between a mortgagor and mortgagee of the freehold in respect of chattels attached by the former (*Holland* v. *Hodgson*, 41 L. J., C. P. 146; L. R., 7 C. P. 328; *Hawtrey* v. *Butlin*, 42 L. J., Q. B. 163; *Cross* v. *Barnes*, 46 L. J., Q. B. 479), yet, as between other persons, the rule has been very much relaxed (*per* Kelly, C. B., *Climie* v. *Wood*, *supra*), and there now exists a mass of authorities prescribing that chattels may (especially as between landlord and tenant) be annexed to the freehold, and yet remain as much chattels after they become annexed as they were before. (*Per* Willes, J., *Climie* v. *Wood*, 38 L. J., Ex. 223.) It therefore becomes important to consider by what means articles placed upon the

demised premises by a tenant during the tenancy lose their character of chattels, and become fixtures. In connection with this point it should be noticed, that articles which are not fixtures are removable at all times before and after the determination of the tenancy, and on the other hand they are distrainable for rent.

Articles not attached.

Articles not further attached than by their own weight, are generally to be considered as mere chattels, *e. g.* wooden barns or other structures resting on, but not attached to, a brick or stone foundation (*Wansborough* v. *Maton*, 4 A. & E. 884; *Wiltshear* v. *Cottrell*, 1 E. & B. 674; *Rex* v. *Otley*, 1 B. & Ad. 161), or resting on the ground alone, though by their weight they may have become imbedded in the ground (*Huntley* v. *Russell*, 13 Q. B. 572); and weighing machines resting in holes lined with brickwork, but not attached to the brickwork, so as to be lifted out at pleasure. (*In re Richards*, L. R., 4 Ch. 630.) But even in such a case, if the intention is apparent to make the articles part of the land, they become so. (*D'Eyncourt* v. *Gregory*, L. R., 3 Eq. 382.) Thus, blocks of stone placed on the top of one another, without any mortar or cement, for the purpose of forming a drystone wall, would become part of the land, though the same stones if deposited in a builder's yard, and for convenience stacked in the form of a wall, would remain chattels. (*Per* Blackburn, J., *Holland* v. *Hodgson*, L. R., 7 C. P. 328.)

Articles fastened only for using them as chattels.

When an article is actually fastened to the building or land, the rule to determine whether it is a chattel or a fixture, is to consider in the first place whether it can be easily removed *integrè*, *salvè et commodè* without injury to itself or to the fabric, and, in the next place, whether the annexation was for the permanent and substantial im-

provement of the freehold, or merely for a temporary purpose, *or for the more complete use and enjoyment of it as a chattel.* (*Per* Parke, B., *Hellawell* v. *Eastwood*, 20 L. J., Ex. 154; *Turner* v. *Cameron*, 39 L. J., Q. B. 125.) In accordance with this rule it has been held, that machinery fastened for the purpose of steadying it, by screws let into the floor with molten lead (*Hellawell* v. *Eastwood, supra; Waterfall* v. *Penistone*, 6 E. & B. 876); distillery tanks, which formed the roofs of rooms and houses, boiling backs and mash tuns (lying on brick piers against the walls), which formed the floors of some of the rooms, and were screwed down for the purpose of being steadied, and connected to pipes which were attached to fixtures (*Chidley* v. *Churchwardens of West Ham*, 32 L. T., N. S. 486); pumps fastened with screws (*ib.;* and see *Grymes* v. *Boweren*, 6 Bing. 437); a hydraulic press fixed by means of brickwork to the floor of a factory (*Parsons* v. *Hind*, 14 W. R. 860); hangings, chimney-glasses, pier-glasses or pictures slightly attached to the walls, for the purpose of holding them up in their places (*Beck* v. *Rebow*, 1 P. Wms. 94); chandeliers and seats merely screwed to the premises to steady them (*Dumergue* v. *Ramsey*, 10 W. R. 844); and carpets attached by nails to floors, for the purpose of keeping them stretched (*per* Parke, B., *Hellawell* v. *Eastwood, supra*), are not fixtures. On the other hand, railways formed in the ordinary manner, by nailing the rails to wooden sleepers laid on the land, under and about which ballast was packed, were held to be fixtures, and not distrainable. (*Turner* v. *Cameron*, 39 L. J., Q. B. 125; but see *Beaufort* v. *Bates*, 31 L. J., Ch. 481.)

Articles fixed so as to become part of the fabric.

Of chattels, which have become fixtures, some become so completely a part of the fabric, as essential to its use, that a tenant who has annexed

them cannot remove them; as, for instance, doors and windows. There are others, however, annexed to the land for the purpose of use in trade or business, or for domestic convenience or ornament, in so permanent a manner as to become part of the land; but which, in order to encourage trade, or to enable a tenant to have full enjoyment of the land for the purpose of domestic convenience, a tenant who has erected them is entitled to remove them during his term. (*Per* Willes, J., *Climie* v. *Wood*, L. R., 4 Ex. 328; 38 L. J., Ex. 223.)

Trade fixtures.

The test as to the removability of trade fixtures is, whether the removal is in accordance with any prevailing practice, is possible without injury to the estate, and whether the articles were in themselves of a perfect chattel nature before they were put up, or at least have in substance that character independently of their union with the soil, or, in other words, whether they may be removed without being entirely demolished, or losing their essential character or value. (Amos, Fixtures, 48.) If they answer this description, it is immaterial that for the purposes of removal they have to be taken to pieces. (*Whitehead* v. *Bennett*, 27 L. J., Ch. 474.) Of articles which as trade fixtures have been considered removable are, a soap boiler's vats (*Poole's case*, 1 Salk. 368); salt pans fixed with mortar to a brick floor (*Lawton* v. *Salmon*, 1 H. Bl. 259, n.; *Mansfield* v. *Blackburne*, 6 Bing. N. C. 438); baker's ovens, furnaces, coppers in brewhouses, brewing vessels, and pipes (*Poole's case*, *supra*); an engine screwed down to planks, and a boiler fixed in brickwork (*Climie* v. *Wood*, 38 L. J., Ex. 223); fire engines, steam engines and other machinery in the working of a colliery (*Lawton* v. *Lawton*, 3 Atk. 13; *Dudley* v. *Ward*, Amb. 113); a dutch barn set up for trading purposes, having a foundation of

brickwork and uprights fixed in and rising from the brickwork, and supporting a roof composed of tiles, and the sides open (*Dean* v. *Allalley*, 3 Esp. 11); and a varnish house, built on plates laid on brickwork let into the ground, with a brick chimney. (*Penton* v. *Robart*, 2 East, 88; and see *Fitzherbert* v. *Shaw*, 1 H. Bl. 258.) Buildings which are the mere accessories of removable machinery may usually be removed, but not if they are of a permanent character. (*Whitehead* v. *Bennett*, 27 L. J., Ch. 474.) Greenhouses and hothouses, erected by a market gardener or nurseryman for the purposes of his trade, are removable (*Penton* v. *Robart*, *supra*); but a conservatory, not for trading purposes, erected on a brick foundation attached to a dwelling-house, and communicating with it by windows opening into the conservatory, was held not to be removable (*Buckland* v. *Butterfield*, 2 B. & B. 54); and so were a greenhouse in a garden, and a boiler built into the brickwork in the greenhouse; but the pipes of the heating apparatus attached to the boiler were held removable. (*Jenkins* v. *Gething*, 2 J. & H. 520; and see *Martin* v. *Roe*, 26 L. J., Q. B. 129.) So a nurseryman may at the end of his term remove trees planted for the purposes of his trade (*Lee* v. *Risdon*, 7 Taunt. 191); but a private person could not (*Wyndham* v. *Way*, 4 Taunt. 316), nor even a border of box, or a flower. (*Empson* v. *Soden*, 4 B. & Ad. 655.)

Agricultural fixtures.

The exception in favour of trade does not extend to agriculture; and a tenant in agriculture who erected a beast house and other farm buildings which were let into the ground, was held not entitled to remove them, though he left the premises in the same state as when he entered. (*Elwes* v. *Maw*, 3 East, 38; 2 Smith's L. C. 162, 7th ed.) However, by the 14 & 15 Vict. c. 25,

14 & 15 Vict. c. 25, s. 3.

s. 3, it is provided that "if any tenant of a farm or lands shall after the passing of this act (24 July, 1851), *with the consent in writing of the landlord* for the time being, erect any farm building, either detached or otherwise, or put up any other building, engine or machinery, either for agricultural purposes or for the purposes of trade and agriculture (which shall not have been erected or put up in pursuance of some obligation in that behalf), then all such buildings, engines and machinery shall be the property of the tenant, and shall be removable by him notwithstanding the same may consist of separate buildings, or that the same or any part thereof may be built in or permanently fixed to the soil, so as the tenant making any such removal do not in anywise injure the land or buildings belonging to the landlord, or otherwise do put the same in like plight and condition, or as good plight and condition as the same were in before the erection of anything removed." But the tenant may not remove any such matter or thing without first giving one month's notice in writing to the landlord or his agent, when it shall be lawful for the latter to elect to purchase; the value to be ascertained by two referees or their umpire. As to the right to remove an unfinished erection, see *Smith* v. *Render* (5 W. R. 875).

38 & 39 Vict. c. 92, s. 53.

This salutary enactment has to a certain extent been superseded by 38 & 39 Vict. c. 92, s. 53, so far as concerns tenancies to which that act is applicable. (*Infra*, Sect. 4.) The provision is as follows:—"Where after the commencement of this act a tenant affixes to his holding any engine, machinery, or other fixture for which he is not under this act or otherwise entitled to compensation, and which is not so affixed in pursuance of some obligation in that behalf, or instead of some fixture belonging to the landlord, then such fix-

ture shall be the property of and be removable by the tenant." But before removal, the tenant must pay all rent and satisfy all other obligations in respect of the holding; he shall not in removal do any unavoidable damage, and shall after removal make good all damage occasioned by the removal. He shall not remove any fixture without a month's previous notice in writing to the landlord, who may elect to purchase; the value in case of difference to be settled by reference. But the section does not apply to a steam engine erected by the tenant, if before erection he has not given the landlord notice of his intention to do so, or if the landlord has in writing objected to the erection. (See Appendix B.)

Fixtures for ornament or domestic convenience.

The privilege of removal in respect of fixtures put up for ornament or domestic convenience (usually termed tenant's fixtures, as distinguished from landlord's fixtures, which are not removable) is more limited than that in favour of trade. The test of removability seems to be whether they are slightly fixed, *can be removed entire*, and with little or no damage to the fabric. (*Grymes* v. *Boweren*, 6 Bing. 437; *Avery* v. *Cheslyn*, 3 A. & E. 75.) The following have been held, or by the courts regarded, as removable:—Bells (*Lyde* v. *Russell*, 1 B. & Ad. 394), cornices (*Avery* v. *Cheslyn*, *supra*), wainscots fixed only by screws (*Lawton* v. *Lawton*, 3 Atk. 15), bookcases and other furniture fixed by holdfasts, screws, or nails to the wall (*Birch* v. *Dawson*, 2 A. & E. 37; *Ex parte Quincy*, 1 Atk. 477), ornamental chimney-pieces (*Leach* v. *Thomas*, 7 C. & P. 327; *Bishop* v. *Elliott*, 24 L. J., Ex. 229), iron backs to chimneys (*Harvey* v. *Harvey*, 2 Str. 1141), stoves and grates fixed with brickwork in the chimney-places, but removable without injury to the chimney-place (*Rex* v. *St. Dunstan*, 4 B. & C. 686), pumps slightly attached (*Grymes*

v. *Bowcren*, *supra*), cooling coppers, mash tubs, water tubs, and blinds. (*Per* Abbott, C. J., *Colegrave* v. *Dias Santos*, 2 B. & C. 77.) But ordinary fixtures put up to complete the house, as hearths and chimney-pieces, not ornamental (*Poole's case*, 1 Salk. 368; *Bishop* v. *Elliott*, *supra*), fire grates (*Richardson* v. *Ardley*, 38 L. J., Ch. 508), a ladder fixed to the ground and to a beam above, being the only means of access to the room above, a crank nailed at top and bottom to keep it in its place, and a bench nailed to the wall (*Wilde* v. *Waters*, 16 C. B. 637), are not removable.

Right of removal regulated by custom or contract.

Custom will often extend or regulate the right of removal in the case of fixtures. (*Davis* v. *Jones*, 2 B. & Ald. 165.) Frequently, also, the right is controlled by the contract of the parties. The tenant may renounce his right to remove fixtures. (*Dumergue* v. *Rumsey*, 2 H. & C. 777.) He may deprive himself of the right by undertaking to repair and *yield up* in a good state of repair improvements and fixtures. (*Naylor* v. *Collinge*, 1 Taunt. 19; *West* v. *Blakeway*, 2 M. & G. 729; *Burt* v. *Haslett*, 25 L. J., C. P. 201; *Penry* v. *Brown*, 2 Stark. 403.) But a covenant to surrender at the end of the term the premises, together with all locks, keys, bars, bolts, marble and other chimney-pieces, footpans, slabs, "and other fixtures and articles in the nature of fixtures, which shall at any time during the said term be fixed or fastened to the said demised premises, or be thereto belonging," was held not to prevent the tenant removing trade and tenant's fixtures, but only landlord's fixtures. (*Bishop* v. *Elliott*, 24 L. J., Ex. 229; *Sumner* v. *Bromilow*, 34 L. J., Q. B. 130.)

Time of removal.

When a tenant has the right to remove fixtures, he must exercise that right either during his original term (*Lyde* v. *Russell*, 1 B. & Ad. 394), or

during such further period of possession by him as he holds the premises under a right still to consider himself as tenant. (*Weeton* v. *Woodcock*, 7 M. & W. 14; *Re Lavies, Ex parte Stephens*, L. R., 7 Ch. D. 127; 47 L. J., Bkcy. 22.) So soon after the end of his term as the tenant is treated as a trespasser by the landlord, the right of removal is gone. (*Ib.*; *Heap* v. *Barton*, 21 L. J., C. P. 153.) But it does not seem settled whether or not a tenant who remains in possession as a mere tenant at sufferance has this right. (*Leader* v. *Homewood*, 5 C. B., N. S. 546; 27 L. J., C. P. 316). In whatever way a lease may be determined, whether by forfeiture or by effluxion of time, the tenant has no right to remove fixtures after the landlord has entered (*Pugh* v. *Arton*, L. R., 8 Eq. 626; 38 L. J., Ch. 619), unless in accordance with a provision in the lease (*Stansfield* v. *Mayor of Portsmouth*, 27 L. J., C. P. 124), or by virtue of a licence, which must be under seal. (*Roffey* v. *Henderson*, 21 L. J., Q. B. 49; 17 Q. B. 574.)

If a tenant mortgage the tenant's fixtures and afterwards surrender the lease, the mortgagee has still the right during a reasonable period after the surrender to enter and sever them (*London Loan and Discount Co.* v. *Drake*, 6 C. B., N. S. 798; 28 L. J., C. P. 297; *Moss* v. *James*, 47 L. J. Q. B. 160; on appeal, 38 L. T., N. S. 595); and so where a trustee in liquidation sold the fixtures, and afterwards, without a formal disclaimer, surrendered the lease, the purchaser was held to be entitled to a reasonable time for their removal. (*Saint* v. *Pilley*, 44 L. J., Ex. 33; L. R., 10 Ex. 137.) But if a trustee in bankruptcy disclaims the lease, he becomes a trespasser as from the date of the adjudication, and has no right to sever and remove the fixtures. (*Re Lavies, Ex parte Stephens*,

L. R., 7 Ch. D. 127; 47 L. J., Bkcy. 22.) Notwithstanding this last decision, and the strong terms of the judgment of James, L. J., to the contrary, Bacon, V.-C., recently held that a trustee after notice to disclaim and before actual disclaimer might remove the fixtures (*Ex parte Foster, Re Roberts*, 26 W. R. 834; 38 L. T., N. S. 888); but this decision has since been reversed. (*Ex parte Brooks, Re Roberts*, 48 L. J., Bkcy. 22; 27 W. R. 255.)

If the fixtures have been disannexed during the term, so as to become chattels, they may be removed after the term has expired. (*Darby* v. *Harris*, 1 Q. B. 895.)

If after the tenancy has determined the tenant continues in possession under a new agreement or lease, and nothing is said as to the fixtures, the right of removal is lost, and he is in the same position as if the landlord, being seised of both land and fixtures, had demised both to him. (*Fitzherbert* v. *Shaw*, 1 H. Bl. 258; *Thorpe* v. *Milligan*, 5 W. R. 336; *Thresher* v. *East London Waterworks Co.*, 2 B. & C. 608.)

Sect. 2.—*Emblements.*

Emblements on determination of uncertain tenancies.

By the general rule of common law, if a tenant of land has an uncertain or contingent interest, so that at the time he sows his crop he cannot be sure whether his tenancy will determine before, or last beyond, the time of harvest, and it is determined before the harvest by the act of God, by operation of law, or by the act of another person, the tenant or his representative is entitled to emblements, *i. e.* the profits of the sown land. (Shep. Touch. 244; *Bulwer* v. *Bulwer*, 2 B. & Ald. 470.)

The right attaches to the estate of a tenant at will, a tenant for life, the lessee for years of a tenant for life, and to all other estates determin-

able by the act of the landlord, or by death, or by operation of law.

Unless by the tenant's act.

If an uncertain estate be determined by the tenant's own act, as if the tenant surrender, or in the case of a woman being tenant during widowhood, she think proper to marry, or if the estate of the tenant is determined by entry for forfeiture on condition broken, or the like, in each of these cases the tenant is not entitled to emblements. (Co. Litt. 55 b; *Bulwer* v. *Bulwer*, 2 B. & Ald. 470; *Davies* v. *Eyton*, 7 Bing. 154.) But where the lessee who has so determined his estate has let in an underlessee, the latter will be entitled.

What crops may be claimed.

Emblements extend to every species of crop which is not produced spontaneously, but by industry and manurance, and which ordinarily repays the labour by which it is produced within the year in which the labour is bestowed, though the crop may in extraordinary seasons be delayed beyond that period. (*Graves* v. *Weld*, 5 B. & Ad. 105.) They include therefore corn, turnips, carrots, potatoes, hemp, flax, saffron and the like, and hops also, for though they spring from old roots, yet they are annually manured. (Co. Litt. 55 b (n. 1.) On the other hand, no things requiring more than a year to come to maturity are capable of being emblements (*Graves* v. *Weld*, *supra*); and growing crops of grass, even if sown from seed, and though ready to be cut for hay, cannot be taken as emblements; for this is a natural product, though it may be improved by cultivation. (Co. Litt. 56 a.) It would seem that crops of artificial grasses, such as clover, might. (Smith, L. & T. 349, 2nd ed.)

Right to enter to take.

The right to emblements includes the right for the tenant, or any person to whom he may assign

them, to enter, cut and carry them away. (Co. Litt. 56 a.)

Right to, how affected by 14 & 15 Vict. c. 25.

With respect to tenancies at rack rent, which determine by the death or cesser of the estate of the landlord, the common law right to emblements is superseded by 14 & 15 Vict. c. 25, s. 1, which provides, that "where the lease or tenancy of any farm or lands, held by a tenant at rack rent, shall determine by the death or cesser of the estate of any landlord entitled for his life, or for any other uncertain interest, instead of claims to emblements, the tenant shall continue to hold and occupy such farm or lands until the expiration of the then current year of his tenancy, and shall then quit upon the terms of his lease or holding, in the same manner as if such lease or tenancy were then determined by effluxion of time or other lawful means during the continuance of his landlord's estate; and the succeeding landlord or owner shall be entitled to recover and receive of the tenant, in the same manner as his predecessor or such tenant's lessor could have done, if he had been living or had continued the landlord or lessor, a fair proportion of the rent for the period which may have elapsed from the day of the death or cesser of the estate of such predecessor or lessor to the time of the tenant so quitting, and the succeeding landlord or owner and the tenant respectively shall, as between themselves and as against each other, be entitled to all the benefits and advantages and be subject to the terms, conditions and restrictions to which the preceding landlord or lessor and such tenant respectively would have been entitled and subject in case the lease or tenancy had determined in manner aforesaid at the expiration of such current year: provided always, that no notice to quit

shall be necessary or required, by or from either party, to determine any such holding and occupation as aforesaid."

The statute applies wherever, at the determination of the tenancy, there are on the land crops or roots in respect of which the tenant might have claimed a right to emblements, as in the case of a cottage with an acre of ground, partly cultivated as a garden, and partly sown with corn and planted with potatoes. (*Haines* v. *Welch*, L. R., 4 C. P. 91.)

Sect. 3.—*Away-going Crops and other Tenant Rights.*

Emblements can be taken only when the end of a tenancy depends upon an uncertainty; for when the tenant knows at what time his interest will cease, all crops not severed when it does cease become by the common law the property of the landlord. This hardship of the common law is in most instances controlled, either by express agreement, or by the custom of the country, allowing the outgoing tenant his away-going crops, *i. e.* crops sown in the last year of the tenancy, but not harvested until after it has expired. Custom also attaches other important incidents to the end of the tenancy, such as the tenant's right to compensation for tillage. On the other hand, while at common law all the straw, hay, manure, and severed corn and other chattels belong to and are removable by the outgoing tenant, custom often provides for their being consumed or left upon the land, an allowance being made for them to the tenant. The rules of law as to customs being the same in respect of all matters to which they apply, we shall treat of the

Custom as to away-going crops, tillage, straw, manure, &c.

rights and obligations under customs generally, allowing the practitioner to apply those general rules to the specific matter, whether crops, tillages, straw, or whatever it may be, affected by custom. This becomes the more necessary since customs vary so widely, both in their nature and extent, in different parts of the country.

Custom means usage.

A custom of the country need not, as we have before observed (Chap. V., Sect. 3), be immemorial; it is sufficient if it be shown to be the prevalent usage of the district in which the land is situated.

The principle being that as a tenant enters so he leaves.

The readiest solution of the inquiry as to what allowances an outgoing tenant is entitled to, is to ascertain upon what terms he entered; for the custom of the country is founded upon this principle, that justice requires that a tenant should quit upon the same terms as he entered; if then when he entered upon the farm he paid for away-going crops, or for foldage, manure, fallowing or tillage, then he is entitled to be paid for such matters upon quitting. (*Webb* v. *Plummer*, 2 B. & Ald. 751, *per* Bayley, J.)

Custom and lease construed together,

Custom attaches its incidents to all tenancies whether by parol or by deed (*Wigglesworth* v. *Dallison*, 1 Smith, L. C. 598, 7th ed.), and to tenancies from year to year, as well as for a term (*Onslow* v. ——, 16 Ves. 173), even in respect of tillages. (*Brocklington* v. *Saunders*, 13 W. R. 46.)

unless inconsistent.

If there are express words excluding the custom, or if the lease contains stipulations which are repugnant to or inconsistent with it, to that extent the custom is superseded.

It is sometimes difficult to say, whether or not the terms of a lease do exclude a particular custom as to the tenant's away-going rights. If the lease contain no stipulations as to *quitting*, the tenant is entitled to away-going crops according to the custom, though the terms of the *holding* may be

inconsistent with the custom (*Holding* v. *Pigott*, 7 Bing. 465); and where the lease provided that the tenant should "during the term consume with stock on the farm all the hay, straw and clover grown thereon, which manure shall be used on the said farm," but made no provision as to the unconsumed straw at quitting, it was held that the matter was governed by custom, in accordance with which it was to be left on the farm on being paid for. (*Muncey* v. *Dennis*, 26 L. J., Ex. 66; 1 H. & N. 216.) Even if the lease contain a stipulation as to some rights of the parties on the determination of the tenancy, that will not exclude the custom as to other rights to which no reference is made: thus, where a lease provided that the tenant should consume three-fourths of the hay and straw on the farm, and spread the manure arising therefrom, and leave such of it as should not be spread on the land, for the use of the landlord, on receiving a reasonable price for it, but making no provision as to seeds and labour, it was held not to exclude the tenant's right to an allowance for seeds and labour under a custom of the country by which tenants at quitting were entitled to payment for seeds and labour. (*Hutton* v. *Warren*, 1 M. & W. 466.) But if it appear distinctly by the lease that the stipulated payments are the only ones to be made, the custom will be excluded. (*Webb* v. *Plummer*, 2 B. & Ald. 746.) Thus, if there was a covenant by the tenant to plough and sow a certain portion of the demised land in the last year, being such as the custom of the country required, he being paid on quitting for the *ploughing*, or to plough, sow and manure, he being paid for the *manuring*, the principle of *expressum facit cessare tacitum* would apply. (*Per* Parke, B., *Hutton* v. *Warren*, 1 M. & W. 478.) So, a stipulation in a lease, binding

the tenant to leave manure, the manure to be expended on the land, without making any mention of payment for it, was held to exclude the custom for an outgoing tenant to leave and be paid for such manure. (*Roberts* v. *Barker*, 1 Cr. & M. 808.) And since the principle of custom is to secure to the tenant on going out the like payments as he made when he went in, an agreement that the tenant shall pay on *leaving* will exclude a claim by the landlord for payment under the custom for manures, &c., upon his coming in. (*Clarke* v. *Roystone*, 13 M. & W. 752.)

Rate of payment regulated by custom.

Where under an agreement an outgoing tenant is to be paid for certain matters, the payment must be in accordance with the custom. Thus, a stipulation that the outgoing tenant should be paid for straw, was held in accordance with the custom to mean straw at a fodder price, viz., one-half the market price. (*Clarke* v. *Westrope*, 25 L. J., C. P. 287.)

Rights when tenancy determines otherwise than by regular expiration.

The custom by which a tenant was entitled to away-going crops upon the regular expiration of a Lady-day tenancy, was held to be excluded where the tenancy was determined on the 1st of June by an award. (*Thorpe* v. *Eyre*, 1 A. & E. 926; and see *Whittaker* v. *Barker*, 1 Cr. & M. 113.) If the tenant become bankrupt, his trustee, whether he disclaim the lease or not, will not be allowed to sell off crops, manure, hay or straw, contrary to the provisions of the lease (*Ex parte Whittington*, Buck, 87; *Ex parte Maundrell*, 2 Mad. 315); but he will be entitled to an off-going crop, if the bankrupt would have been so entitled at the expiration of the lease, and the possession of the premises is, on the application of the lessor, given up to him.

Right to away-going

By the terms of the lease, the right to away-

going crops may be made to depend upon the tenant adopting a specified course of husbandry (*Holding* v. *Pigott*, 7 Bing. 465); but unless this is so, the outgoing tenant's rights to crops, in accordance with the custom or his lease, will not depend upon whether or not he has complied with his obligations in respect of the cultivation of the land (*Boraston* v. *Green*, 16 East, 79, 80); for, in such a case, the landlord would have his remedy against the tenant for breach of covenant or agreement, and the tenant would take his crop under the custom. (*Holding* v. *Pigott*, 7 Bing. 476.) But where the custom is for a tenant in his last year of tenancy to crop land in a particular way, as, for instance, to crop one-third of the arable land with wheat, and to reap that wheat after the tenancy has expired, if the tenant crop more than one-third, the landlord will be entitled to the excess (*Caldecott* v. *Smythies*, 7 C. & P. 808), unless it were sown with the landlord's permission. (*Griffiths* v. *Tombs*, *ib.* 810.) If an off-going tenant, not having a right to away-going crops, remove them, the landlord and not the incoming tenant would have an action for them. (*Davies* v. *Connop*, 1 Price, 53.)

crops independent of obligations as to cultivation.

An outgoing tenant's interest in the sown land may be either a possession or merely an easement. Thus in the case of a custom by which the outgoing tenant was entitled to two-thirds of the crops on the land at the end of the tenancy, but he was to cut the whole and keep the fences in repair until it was cut and carried away, it was held that the effect of such a custom was to vest the possession of the field in the outgoing tenant until the crop was carried (*Griffiths* v. *Puleston*, 13 M. & W. 358; *Beaty* v. *Gibbons*, 16 East, 116); and by the custom or agreement he may have the use of the barns to thrash out his crop.

Away-going rights when coupled with right to possession of land.

(*Beavan* v. *Delahay*, 1 H. Bl. 5; *Knight* v. *Benett*, 3 Bing. 364.) But where the custom or agreement is that the landlord shall have the crop at a valuation, all the outgoing tenant can claim is the right to go upon the land to improve the crop whilst growing. (*Strickland* v. *Maxwell*, 2 Cr. & M. 539.) If a tenant bound to consume hay or bring on a rateable amount of manure for any sold, sell the hay, the incoming tenant may refuse to allow its removal until the manure is brought on. (*Smith* v. *Chance*, 2 B. & Ald. 753.)

Who liable to out-going tenant.

It usually happens in practice that the off-going and incoming tenants settle and adjust the compensation between themselves, without referring to the landlord; but whether there is an incoming tenant or not, the person primarily liable to the tenant in respect of his away-going rights is the landlord, and an alleged custom making the incoming tenant and not the landlord liable would be bad. (*Bradburn* v. *Foley*, L. R., 3 C. P. D. 129; 47 L. J., C. P. 331; *Sucksmith* v. *Wilson*, 4 F. & F. 1083; *Faviell* v. *Gaskoin*, 21 L. J., Ex. 85; 7 Ex. 273.) And this is so, even where the landlord is the assignee of the reversion, to whom possession has been yielded up under a notice to quit by the original landlord, although all the rent has been paid to the original landlord. (*Womersley* v. *Dally*, 26 L. J., Ex. 219.) However, the primary liability of the landlord may be superseded by a contract between outgoing and incoming tenant, and it is a question of fact to be decided upon the special circumstances of each case, whether or not there has been such a contract. No such contract is implied from the mere fact of the incoming tenant entering on the land. (*Codd* v. *Brown*, 15 L. T., N. S. 536.) The tenant cannot by his contract oust the rights of the landlord; and where by the custom of the

country the landlord was bound to compensate the outgoing tenant for tillages and things left on the farm, having the right to deduct from the amount any rent due, and the outgoing contracted with the incoming tenant that the latter should take to those things, it was held that the latter stood in the place of the landlord and could deduct from the sum agreed to be paid the amount of rent in arrear. (*Stafford* v. *Gardner*, L. R., 7 C. P. 242.)

An injunction will be granted to prevent a tenant from removing crops, manure, &c., contrary to the custom of the country. (*Onslow* v. ——, 16 Ves. 173.)

SECT. 4.—*Compensation for Improvements under the Agricultural Holdings Act*, 1875.

38 & 39 Vict. c. 92.

The reason that induced the courts to recognize the tenant's claim to emblements and away-going crops, viz., the encouragement of agriculture, has induced the legislature to provide, by 38 & 39 Vict. c. 92 (amended by 39 & 40 Vict. c. 74), for the compensation of outgoing tenants for certain unexhausted improvements. The act is beneficial in its intention, though somewhat loose in its provisions.

In what cases it applies.

The act, which is limited to England and Wales, commenced from the 14th of February, 1876 (s. 2), and applies only to improvements executed after the commencement of the act (s. 5), upon holdings, either agricultural or pastoral, not less than two acres in extent. (Sect. 58.) It does not apply to a tenancy *for a term* existing at the commencement of the act, but does to a tenancy from year to year so existing, unless within two months after the 14th of February, 1876, written

notice to the contrary was given by either landlord or tenant. (Sect. 57.) It would also seem to apply to a tenancy from year to year by holding over after the expiration of a term which determines after the commencement of the act.

Application to future tenancies.

As to tenancies created after the commencement of the act, ss. 54 and 56 must be read together; for s. 56 provides that the act shall apply to every contract of tenancy beginning after the commencement of the act, *unless the parties agree in writing* in the contract of tenancy or otherwise *that the act* or any part or provision thereof *shall not apply to the contract;* while s. 54 provides that nothing in the act shall prevent the parties from entering into and carrying into effect any such agreement as they shall think fit, *or shall interfere with the operation thereof.* The joint operation of these sections would seem to be that any provision in a lease or contract of tenancy inconsistent with the provisions of the act will to that extent exclude the operation of the act, though the parties may not in terms have declared that the act or any part thereof shall not apply. The parties may by reference adopt a part without the whole of the act. (Sect. 55.)

Save as expressly therein provided, the act does not affect the rights and remedies of either party under the custom of the country, contract of tenancy, or other contract, or otherwise (s. 60), but provides that the tenant shall not claim compensation under the act and under the custom of the country in respect of the same thing. (Sect. 59.)

Improvements of first class.

The act provides for compensation in the case of three classes of improvements executed after the commencement of the act, and not exhausted at the determination of the tenancy. The first class includes:—drainage of land, erection or enlargement

of buildings, laying down permanent pasture, making and planting osier-beds, making water meadows or works of irrigation, making gardens, making or improving roads or bridges, making or improving watercourses, ponds, wells, or reservoirs, or works for supply of water for agricultural or domestic purposes, making fences, planting hops, planting orchards, reclaiming waste lands, and warping land. (Sect. 5.) The tenant shall not be entitled to compensation unless these improvements are executed with the previous consent in writing of the landlord (s. 10); indeed as to most of them the tenant would be guilty of waste if done without the landlord's sanction. (*Ante*, Chap. V., Sect. 4.) The improvements are to be deemed exhausted at the end of twenty years. (Sect. 6.) The compensation shall be the amount laid out, less a deduction of one-twentieth for each year the tenancy endures after the year of outlay; or when the landlord was not at the time of consent absolute owner, the compensation "shall not exceed a capital sum fairly representing the addition which the improvement, as far as it continues unexhausted at the determination of the tenancy, then makes to the letting value of the holding." (Sect. 7.) Under this latter clause it seems doubtful whether the compensation is limited to the original outlay, supposing the letting value is increased to an amount which when capitalized is greater than the original outlay, as might happen in the case of under draining. Besides the general deductions hereinafter mentioned, the compensation shall be subject to deduction for want of repair. (Sect. 11.)

Improvements of the second class are: boning land with undissolved bones, chalking land, clay burning, claying, liming and marling land. (Sect. 5.) Notice must have been given in writing to the

Second class.

landlord not more than forty-two nor less than seven days before executing the improvement; and if executed after notice to quit, it must have been done with the previous consent in writing of the landlord. (Sect. 12.) These improvements are to be deemed exhausted at the end of seven years (s. 6); and the compensation is, "the sum *properly* laid out by the tenant on the improvement," less one-seventh part for each year after the year of the outlay. (Sect. 8.)

Third class.

Improvements of the third class are: application to the land of purchased artificial or other purchased manure, and consumption on the holding by cattle, sheep or pigs of cake or other feeding-stuff not produced on the holding. (Sect. 5.) The improvements are to be deemed exhausted at the end of two years. (Sect. 6.) The compensation is "such proportion of the sum *properly* laid out by the tenant, as fairly represents the value thereof at the determination of the tenancy to an incoming tenant." (Sect. 9.) But no compensation will be allowed, when the tenant has taken from the portion of the holding on which the improvement was executed "a crop of corn, potatoes, hay or seed, *or any other exhausting crop.*" This clause is likely to produce some difficulty until interpreted by the courts. All crops—particularly those that mature seed, and green crops in a less degree—are in reality "exhausting;" though, if consumed on the land on which they were grown, they may have the effect of greatly improving the land. But there is another point to be considered. The rule of construction of acts of parliament is, that where several words specifying particular things are followed by a general word, such general word shall be construed as applying only to things *ejusdem generis.* (*Per* Denman, C. J., *Reg.* v.

Neville, 8 Q. B. 463; 15 L. J., M. C. 36; *Sandiman* v. *Breach*, 7 B. & C. 96; *Reg.* v. *Edmundson*, 28 L. J., M. C. 213, 215; *Gunnestad* v. *Price*, 44 L. J., Ex. 44, 45.) It seems doubtful, therefore, whether the words, "or other exhausting crops" extend the section beyond those crops specifically mentioned. No compensation will be allowed for the consumption of cake or other feeding-stuff where the tenant is entitled to payment for the same under the custom of the country or an agreement (s. 14),—a provision which seems superfluous in the face of s. 59,—nor compensation for any larger outlay during the last year of the tenancy than during the three preceding or any less number of years for which the tenancy has endured. And there shall be a deduction of the value of the manure that would have been produced from any hay, straw, roots or green crops sold off the holding during the last two years or less time for which the tenancy has endured, except so far as a proper return of manure to the holding has been made in respect of such produce sold off. (Sect. 15.)

Tenant may also claim for breaches of covenant.

If the tenant claims under the act for improvements, he shall also be entitled to obtain, according to the provisions of the act, compensation for breaches of covenant or agreement committed by the landlord. (Sect. 18.)

As to deductions.

The specific deductions before mentioned from the compensation in respect of each of the several classes of improvements, are matters of which evidence must be given before the referee or umpire, who will take them into account in determining the amount of compensation, for each is preceded by the words "in the *ascertainment* of the compensation there shall be taken into account," &c. The act also provides as to all three classes of tenants' claims, that in "the ascertain-

ment of" the compensation there shall be taken into account in reduction thereof any benefit given or allowed to the tenant in consideration of his executing the improvement. (Sect. 17.)

There are other deductions, applying to all classes of improvements, which will be deducted from the amount actually awarded to the tenant, as sect. 16 provides, that *the amount of the tenant's compensation* shall be subject to deductions: (1) for taxes, rates, and tithe rent-charge due or becoming due to which the tenant is liable; (2) for rent due or *becoming due* [these words seem to be unnecessary, as no rent *can* become due after the expiration of the tenancy]; (3) for landlord's compensation under this act.

Landlord's compensation.

A landlord's right to compensation is given by section 19, which is as follows:—"Where a tenant commits or permits waste, or commits a breach of covenant *or other agreement* connected with the contract of tenancy, and the tenant claims compensation under this act in respect of an improvement, then the landlord shall be entitled, by counter-claim, but not otherwise, to obtain, on the determination of the tenancy, compensation in respect of the waste or breach, subject and according to the provisions of this act. But nothing in this section shall enable a landlord to obtain, under this act, compensation in respect of waste or a breach committed or permitted in relation to *a matter of husbandry* more than four years before the determination of the tenancy." Passing over the minor doubts which suggest themselves upon the wording of this section, it seems to amount to a new statute of limitations in cases to which it applies (whatever they may be determined to be). Thus, supposing a tenant for years to commit waste, voluntary or permissive, more than four years before the end of his tenancy, and then

claim compensation under the act, the landlord has no remedy, either by action or by cross-claim, for the injury. Except as to waste, however, the section seems only to relate to tenancies under a deed, for it speaks of "a breach of covenant or other agreement." A covenant must be under seal, and, according to the rule as to matters *ejusdem generis* (*ante*, p. 236), "other agreement" would be similarly restrained. Moreover, where it does apply, the limit as to four years does not exclude claims for breaches of covenant to repair buildings, &c., not amounting to waste,—it being borne in mind that a tenant from year to year is not liable for permissive waste. (*Ante*, p. 119.)

Procedure.

The provisions as to procedure under the act seem reasonably clear, and as they will be found in full in the Appendix B., it is only necessary to refer to them briefly here. The tenant must give written notice of his intention to make a claim a month at least before the termination of the tenancy; the landlord may, within fourteen days from the end of the tenancy, give written notice of a counter-claim, both stating, as far as reasonably may be, the particulars of the intended claim. (Sect. 20.) If there be any difference on the question of the claims, it must be settled by reference (s. 21) to a single referee jointly appointed, or to two, one appointed by each. If to two, and one dies or fails to act, the party who appointed him may appoint another; notice of every appointment to be given by the one party to the other. Fourteen days after notice by one party to, and failure by the other party to, appoint a referee, the party giving notice may apply to the county court to make the appointment. Where two referees are appointed they must, before entering on the reference, appoint an umpire, and, in case of his death or incapacity before the

award, must appoint another; on failure to do so, the county court may appoint one. (Sect. 22.) Either party on appointing a referee may require the umpire to be appointed by the Inclosure Commissioners or by the county court, and in the latter case he shall be so appointed unless the other party dissent, in which case he shall be appointed by the Inclosure Commissioners. (Sect. 23.) The power of the county court as to appointment of referees or umpire shall be exercised by the judge, or by the registrar with the consent of the parties. (Sect. 24.) The delivery to a referee of his appointment shall be deemed a submission, and neither party shall revoke a submission without the consent of the other. (Sect. 25.) Referees and umpire have power to require production of samples, vouchers and documents, to administer oaths (s. 26), and to proceed *ex parte*. (Sect. 27.) The award shall, in the case of a single referee, be ready for delivery within twenty-eight days after his appointment; in the case of two referees, the time may by themselves be extended to forty-nine days. (Sect. 29.) If they fail to award, the umpire has twenty-eight days after notice to him that the matter stands referred to him; this time may be extended by the registrar of the county court. (Sect. 30.) Certain particulars are to be stated in the award (ss. 31, 32), including the day for payment of the sum awarded. (Sect. 34.) Costs are in the discretion of the referees or umpire subject to taxation by the registrar of the county court. (Sect. 33.) The submission may *not* be made a rule of any court (s. 35); but where the sum claimed for compensation [*Qy.* aggregate sum, or sum claimed by either party] exceeds 50*l.*, the award is within seven days, subject to appeal to the judge of the county court, on the ground (1) that it is invalid;

(2) for awarding compensation for matters upon which the party claiming was not entitled to compensation, and (3) for neglecting to award compensation for matters in respect of which the party claiming was entitled. (Sect. 36.) By the Consolidated County Court Orders, 1875 (Order 34), it is provided, that a copy of the award, with a statement of grounds of appeal, shall be filed within four days after delivery of the award. (Rules 1, 2.) A copy of the statement shall be sent by the registrar to the respondent (r. 3), who must within eight days deliver to the registrar his reply (r. 4); copies of both shall then be sent to the judge, who will appoint the time for hearing. (Rule 6.) The judge may either hear and determine the appeal, or remit the case in whole or in part to the referee or umpire. The decision of the judge shall be final, save that the judge *shall* [not *may*], at the request of either party, state a special case on a question of law for the High Court of Justice. (Sect. 36.) Money awarded, including costs, if not paid within fourteen days after the time fixed, shall be recoverable upon order made by the judge, as upon an ordinary judgment in the county court. (Sect. 37.) Costs of proceedings in the county court shall be in the discretion of the court and taxable by the registrar. (Sect. 40.)

SECT. 5.—*Tenant's Liability for holding over.*

Lessee bound to deliver up premises.

Where there is a demise of a house or premises, there is an undertaking by the tenant that he will at the expiration of the term deliver up possession to the landlord. (*Henderson* v. *Squire*, 38 L. J., Q. B. 73; L. R., 4 Q. B. 170.) If he neglect to do so, and the landlord lets the premises to

another, and has to pay damages on account of not being able to give possession, the tenant is liable for such damages and costs. (*Bramley* v. *Chesterton*, 27 L. J., C. P. 23; 2 C. B., N. S. 592.) The tenant is also responsible for the act of his subtenant in holding over, and until absolute possession is given continues liable for rent (*Harding* v. *Crethorn*, 1 Esp. 57; *Ibbs* v. *Richardson*, 9 A. & E. 849), and will have to bear the costs of an ejectment against the undertenant (*Henderson* v. *Squire*, *supra*), and other special damage resulting from possession not having been delivered. Where premises are let for a certain term to two persons, and at the end of the term one of them holds over with the assent of the other, both will be liable for the time during which the one holds over. (*Christy* v. *Tancred*, 7 M. & W. 127; 9 *ib.* 438; *Tancred* v. *Christy*, 12 *ib.* 316.) But one tenant cannot make his co-tenant liable by holding over without his assent. (*Draper* v. *Crofts*, 15 M. & W. 166.)

Obtaining possession by re-entry.

A person wrongfully holding possession of hereditaments cannot treat the rightful owner who enters as a trespasser. (*Butcher* v. *Butcher*, 7 B. & C. 402.) After a tenancy has determined, any act of the landlord showing an intention to take possession is sufficient to re-vest the possession in him, and thenceforth the tenant and those claiming under him are wrongfully in possession and liable to be treated as mere trespassers. (*Hey* v. *Moorhouse*, 6 Bing. N. C. 52.) The landlord may assert his right to possession by entry, and expel the tenant. This he may do either by peaceably taking possession (*Taunton* v. *Costar*, 7 T. R. 431), by breaking open the door of a house which the tenant has vacated (*Turner* v. *Meymott*, 1 Bing. 158), or even if the tenant and his family remain in possession the landlord may enter for-

cibly and put him out, first requesting him to go, and in case of refusal using only such force as is necessary to overcome his resistance. For a breach of the peace committed in making a forcible entry and expulsion the landlord may become liable to an indictment for breach of the peace, but he will not be liable to the other person in damages for trespass and assault. (*Davison* v. *Wilson*, 11 Q. B. 890; 17 L. J., Q. B. 196; *Harvey* v. *Brydges*, 14 M. & W. 437, 442; 1 Ex. 261; *Delany* v. *Fox*, 26 L. J., C. P. 5.) It is always dangerous, however, to trust to force to obtain possession, and where it cannot be obtained without personal violence the wiser course is to proceed by ejectment. (See *post*, Chap. XI.)

In addition to his other liabilities a tenant may, by holding over, become responsible for double value or double rent.

Double value.

By 4 Geo. 2, c. 28, s. 1, it is enacted, that "In case any tenant or tenants for *any term of life, lives or years*, or other person or persons who are or shall come into possession of any lands, tenements or hereditaments, by, from or under or by collusion with such tenant or tenants, shall *wilfully* hold over any lands, tenements or hereditaments, after the determination of such term or terms, and *after demand made and notice in writing given* for delivering the possession thereof, by his or their landlords or lessors, or the person or persons to whom the remainder or reversion of such lands, tenements or hereditaments shall belong, his or their agent or agents thereunto lawfully authorized, then and in such case such person or persons so holding over shall, for and during the time he, she or they shall so hold over, or keep the person or persons entitled out of possession of the said lands, tenements or hereditaments as aforesaid, pay to the person or persons

so kept out of possession, their executors, administrators or assigns, at the rate of double the yearly value of the lands, tenements and hereditaments so detained, for so long as the same are detained," to be recovered by action, against the recovering of which said penalty there shall be no relief in equity.

This is a penal statute, and is to be construed strictly, and the action does not lie against a weekly tenant who is not a tenant "for life, lives or years" (*Lloyd* v. *Rosbee*, 2 Camp. 453), nor against a quarterly tenant. (*Wilkinson* v. *Hall*, 3 Bing. N. C. 531.) The act applies only to a "wilful" and contumacious holding over, and not to a holding over under a *bonâ fide* mistake as to the tenant's own rights (*Wright* v. *Smith*, 5 Esp. 203); or where there is a dispute as to the landlord's title (*Swinfen* v. *Bacon*, 30 L. J., Ex. 33; 6 H. & N. 846); or where the premises are held over by a sub-tenant without the tenant's authority or assent. (*Rands* v. *Clark*, 19 W. R. 48.)

The requirement of the act of "a demand made and notice in writing given," will be satisfied, in the case of a tenant from year to year, by a valid written notice to quit without further demand. (*Hirst* v. *Horn*, 6 M. & W. 393.) In the case of a tenant for a term of years, the demand may be served either previous to the expiration of the term (*Cutting* v. *Derby*, 2 W. Bl. 1075), in which case the landlord would be entitled to double value from the end of the term (*ib.*), or the demand may be made within reasonable time after, if the landlord have done no act in the meantime to acknowledge the continuation of the tenancy, and he will thereupon be entitled to double value as from the time of such demand. (*Cobb* v. *Stokes*, 8 East, 358.)

In estimating value, only land and buildings

can be included; and where part of a mill with driving power for machinery was let, double value of the power was held not recoverable. (*Robinson* v. *Learoyd*, 7 M. & W. 48.)

Double value cannot be distrained for (*Timmins* v. *Rowlinson*, 3 Burr. 1605), but can be recovered by action in the High Court of Justice, or in the county court if the claim is not above 50*l.* (*Wickham* v. *Lee*, 18 L. J., Q. B. 21), and is recoverable after the landlord has recovered in ejectment. (*Soulsby* v. *Neving*, 9 East, 310.) The action being for a penalty must be brought within two years (3 & 4 Will. 4, c. 42, s. 3), and it can only be maintained by the landlord or reversioner, and not by a new lessee whose term is to begin on the ending of the tenancy of the tenant holding over. (*Blatchford* v. *Cole*, 5 C. B., N. S. 514.) Acceptance of single rent waives the right to double value. (*Doe* v. *Batten*, 9 East, 314, n.)

Double rent.

By 11 Geo. 2, c. 19, s. 18, it is provided, that "In case any tenant or tenants shall give notice of his, her or their intention to quit the premises by him, her or them holden, at a time mentioned in such notice, and shall not accordingly deliver up the possession thereof at the time in such notice contained, then the said tenant or tenants, his, her or their executors or administrators, shall from thenceforward pay to the landlord or landlords, lessor or lessors, double the rent or sum which he, she or they should otherwise have paid, to be levied, sued for, and recovered at the same time and in the same manner as the single rent or sum before the giving of such notice could be levied, sued for or recovered, and such double rent or sum shall continue to be paid during all the time such tenant or tenants shall continue in possession as aforesaid."

This act, it will be observed, applies only where

the tenant has given a notice binding upon him to quit at the expiration of the term specified in the notice, and upon which the landlord might at that time act and bring ejectment. (*Johnstone* v. *Huddleston*, 4 B. & C. 935, *per* Bayley, J.) The notice to quit need not be in writing. (*Timmins* v. *Rowlinson*, 3 Burr. 1603.) A tenant holding over and paying double rent may quit at any time without a fresh notice to quit. (*Booth* v. *Macfarlane*, 1 B. & Ad. 904.) Double rent may be recovered by distress or by action, which, where the amount claimed does not exceed 50*l.*, may be brought in the county court. (*Wickham* v. *Lee*, 12 Q. B. 521.)

CHAPTER X.

ASSIGNMENTS AND UNDERLEASES.

Assignments generally,

THE original parties to a demise may be changed either by the lessor assigning his estate or reversion, or by the lessee assigning his interest or term, or there may be a change of both parties.

how affected by 36 & 37 Vict. c. 66.

As the relation between landlord and tenant has ever been considered a legal and not an equitable one (*Cox* v. *Bishop*, 26 L. J., Ch. 389; 8 De G., M. & G. 815), and as the courts of equity have recognized and enforced the principles of common law affecting assignments (*Valliant* v. *Dodemede*, 2 Atk. 546; *Onslow* v. *Corrie*, 2 Madd. 330; *Staines* v. *Morris*, 1 Ves. & B. 8), no radical modification of the principles affecting assignments is introduced by the 24th section of the Supreme Court of Judicature Act, 1873 (36 & 37 Vict. c. 66); notwithstanding those principles have to a considerable extent been based upon the common law rule, that mere personal contracts or *choses in action* are not assignable,—a rule which in equity was to a great extent superseded, since an assignment of a contract was regarded as amounting to an agreement to permit the assignee to make use of the name of the assignor in an action upon the contract. One material alteration, however, results, viz., the introduction of the equitable doctrine of notice, some of the effects of which will be subsequently pointed out.

It is necessary to consider at the outset what covenants or liabilities, express or implied, entered

into by the original parties, attach to the relative positions of landlord and tenant as such, so as to pass to the persons who by substitution may from time to time fill those relative positions. 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 the land. 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 the reversion. (*Spencer's case*, 1 Smith's L. C. 67, 7th ed.) And such covenants respectively pass to those who come in as well by assignment by operation of law as by act of the parties. At common law covenants ran with the land, but not with the reversion. (*Thursby* v. *Plant*, 1 Wms. Saund. 240 d, n. (*o*).) This was remedied by 32 Hen. 8, c. 34, which placed the assignee of a reversion in the same position as to suing and being sued in respect of covenants and agreements in a lease as the original lessor. The statute only applies to leases under seal (*Brydges* v. *Lewis*, 3 Q. B. 603; *Standen* v. *Chrismas*, 10 Q. B. 135; *Bickford* v. *Parson*, 5 C. B. 921), and to covenants running with the land (*Thursby* v. *Plant*, *supra*); and as the same rule applies to the term (*Elliott* v. *Johnson*, 36 L. J., Q. B. 50), assignees of landlord and tenant are now on the same footing.

Covenants running with the reversion.

Although the statute 32 Hen. 8, c. 34, does not apply to lettings not under seal, yet if on the death of the landlord (*Cornish* v. *Stubbs*, L. R., 5 C. P. 334; 39 L. J., C. P. 202) or other assignment of the reversion (*Wyatt* v. *Cole*, 36 L. T. 613), a tenant not holding by a demise under seal continues to pay rent to the person in whom the reversion has vested, this is evidence that the latter has assented to the tenant continuing on all the terms of the original letting. Again, if the

Assignments in case of leases not under seal.

tenant die or assign his interest, and the executors or assignee continue to pay rent, this raises an implied contract that the landlord accepts the new tenant on the terms of the original letting. (*Buckworth* v. *Simpson*, 1 Cr. & M. 834; 4 L. J., Ex. 104.) But there must be payment and acceptance of rent or other unequivocal act to show a recognition by the landlord of a new tenancy on the terms of the old one (*Elliott* v. *Johnson*, L. R., 2 Q. B. 120; 36 L. J., Q. B. 44); and the question whether or not the landlord has recognized and adopted such a tenancy is one of fact for the jury. (*Smith* v. *Eggington*, L. R., 9 C. P. 145; 43 L. J., C. P. 140.)

Covenants running with the land.

The following rules are established as to covenants running with the land; (1) all implied covenants run with the land; (2) so do all express covenants, though assigns are not named, which touch or concern something in being at the date of the covenant and parcel of the demise. Accordingly it has been held that covenants for quiet enjoyment, for further assurance, for renewal, to pay rent, to repair, to put in repair, to leave in repair, to discharge the lessor from charges ordinary and extraordinary, to cultivate lands in a particular manner, to reside on the premises, not to carry on a particular trade, to insure the premises, to supply water to houses at a certain rate, and to produce title deeds, run with the land, though the assigns are not named. (See cases cited, Coote, L. & T. 310; *Spencer's case and notes*, 1 Smith's L. C. 60, 7th ed.) And so a covenant to pay compensation for injury done to the surface by working the mines thereunder. (*Aspden* v. *Seddon*, L. R., 1 Ex. D. 496; 46 L. J., Ex. 353.) (3) If the covenant be concerning a thing not in being at the time of demise, but which is to be built or done on the demised premises, it

When "assigns" named.

will bind the assigns if the covenantor covenant for himself and his assigns. (*Spencer's case, supra; Easterby* v. *Sampson*, 6 Bing. 644, 652; *Doughty* v. *Bowman*, 11 Q. B. 444.) Such is a covenant to build a wall, a dwelling-house, or a mill. So a covenant to convey coals along a railway, to be constructed on the demised land (*Hemingway* v. *Fernandes*, 13 Sim. 228); and a covenant not to assign without licence will bind the assigns if named. (*Williams* v. *Earle*, L. R., 3 Q. B. 739; 37 L. J., Q. B. 231; *West* v. *Dobb*, L. R., 4 Q. B. 634; 38 L. J., Q. B. 289.) (4) But if the thing to be done be merely collateral to the land, and doth not touch or concern the thing demised in any sort, then the covenant will not extend to the assigns though named; as if the lessee covenant for himself and his assigns to build upon land *which is no parcel of the demise*, or to pay any collateral sum to the lessor or to a stranger. (*Spencer's case, supra;* and see *Thomas* v. *Hayward*, L. R., 4 Ex. 311; 38 L. J., Ex. 175.)

Assigns though named not bound by collateral covenants.

Covenants as to incorporeal hereditaments and fixtures.

Covenants respecting incorporeal hereditaments, as in the case of a right of shooting, or a right to get minerals, stand upon the same footing with covenants respecting land. (*Hooper* v. *Clark*, L. R., 2 Q. B. 200; 36 L. J., Q. B. 79; *Martyn* v. *Williams*, 1 H. & N. 817; but see *Stevens* v. *Copp*, 38 L. J., Ex. 31; L. R., 4 Ex. 20.) So do covenants as to fixtures, but not covenants as to chattels, which are not fixtures. (*Williams* v. *Earle*, *supra*.)

Covenants are divisible, and upon a severance of the land or the reversion, the covenants run with the severed parts. (*Twynam* v. *Pickard*, 2 B. & Ald. 105; *Wollaston* v. *Hakewill*, 3 M. & Gr. 322.)

Restrictive covenants binding by

The benefit and burden of covenants which do not run with the land or the reversion may never-

theless pass by reason of notice to the party to be affected. Thus, if a lessor enter into a covenant with the lessee that adjoining property shall not be built upon, or used in a particular manner, any purchaser from the lessor of such adjoining property with notice of the covenant will be bound by it (*Tulk* v. *Moxhay*, 2 Phil. 774; *Western* v. *McDermott*, 36 L. J., Ch. 76; *Morland* v. *Cook*, 37 L. J., Ch. 825; L. R., 6 Eq. 252; *Catt* v. *Tourle*, 38 L. J., Ch. 664; L. R., 4 Ch. 654); and the tenant will be bound by any restrictive covenants the landlord has entered into in respect of the demised property with the adjoining owners. (*Wilson* v. *Hart*, 35 L. J., Ch. 569; L. R., 1 Ch. 463; but see *Carter* v. *Williams*, L. R., 9 Eq. 678; 39 L. J., Ch. 560.) The assignee of a lease who at the time he acquired his interest in the premises had notice of any covenant affecting those premises, is bound by such covenant. (*Richards* v. *Revett*, 47 L. J., Ch. 472; L. R., 7 Ch. D. 224; *Luker* v. *Dennis*, 47 L. J., Ch. 174; L. R., 7 Ch. D. 227.) An underlessee will be compelled to observe restrictive covenants contained in the original lease. (*Parker* v. *Whyte*, 1 H. & M. 167; 11 W. R. 683.) It has even been held that an underlessee and his assigns are bound by covenants, of which he has no actual notice, contained in any assignment of the original lease, although the covenantee has no reversion in the land. (*Clements* v. *Welles*, 35 L. J., Ch. 265; L. R., 1 Eq. 200.) But as between the assignor and assignee of an underlease, the latter is held to have constructive notice of the terms of the original lease only when he has had a fair opportunity of ascertaining the terms. (*Hyde* v. *Warden*, 47 L. J., Ex. 121; L. R., 3 Ex. D. 72.)

reason of notice.

A lessor may grant or assign his reversion *by deed*, either absolutely or by way of mortgage.

Assignment of the reversion.

Formerly, upon an assignment of a reversion, it was necessary the tenant should attorn or assent to his new landlord. This formality is dispensed with by 4 Anne, c. 16, s. 9. The operation of this statute was to complete the title of the assignee of the reversion, so that without attornment by or notice to the tenant, the assignee may re-enter for condition broken. (*Scaltock* v. *Harston*, L. R., 1 C. P. D. 106; 45 L. J., C. P. 125.) Section 10 of the same statute, however, provides that the tenant shall not be prejudiced by payment of rent as before, until the grantee give him notice of the grant or assignment. If the grantee, whether absolute or by way of mortgage, give notice before the day for payment of rent, this section does not relieve the tenant from liability for any rent he may have paid in advance to his former landlord. (*De Nicholls* v. *Saunders*, L. R., 5 C. P. 589; *Cook* v. *Guerra*, L. R., 7 C. P. 132; and see *Moss* v. *Gallimore*, 1 Smith, L. C. 629, 7th ed.)

Assignee bound by tenant's equities.

Upon the purchase of the reversion, notice of a tenancy is notice of all the terms upon which the tenant holds, and the purchaser takes subject to all the tenant's equities. (*Allen* v. *Anthony*, 1 Mer. 282; *Daniels* v. *Davison*, 16 Ves. 254; *Carroll* v. *Keays*, 22 W. R. 243; *Cavander* v. *Bulteel*, L. R., 9 Ch. 79; 43 L. J., Ch. 370; but see *Caballero* v. *Henty*, 43 L. J., Ch. 635; *Phillips* v. *Miller*, 44 L. J., C. P. 265; L. R., 9 C. P. 196; *Smith* v. *Widlake*, 47 L. J., C. P. 282; 26 W. R. 52.)

The assignee of the reversion may have an action for rent and for breaches of covenant running with the land, but not for causes of action occurring before the assignment. (*Martyn* v. *Williams*, 1 H. & N. 817.)

Conditions apportioned on severance

At common law a *condition* could not be apportioned; and if the reversion were severed, neither

of the reversioners could take advantage of the condition. However, by 22 & 23 Vict. c. 35, s. 3, in such a case, if the rent is legally apportioned, the assignee of each part of the reversion has in respect of his apportioned rent, &c. the benefit of all conditions or powers of re-entry for nonpayment incident to the original entire rent.

of the reversion.

All tenants other than tenants on sufferance have, unless restrained by some provision in their leases, the right to dispose of their whole estate by way of assignment, or to carve out of it some less estate by way of underlease. If a man dispose of the whole of his term by deed, it is an assignment, though in form an underlease (*Beardmore* v. *Wilson*, 38 L. J., C. P. 91; Platt, Leases, 10; but see *Hyde* v. *Warden*, 47 L. J., Ex. 121; L. R., 3 Ex. D. 72), even where he reserves rent to himself, and the deed contains covenants not in the original lease. (*Palmer* v. *Edwards*, 1 Doug. 187, n.) If the deed passes a less estate than he has, it is an underlease, though in form an assignment. (See *Derby* v. *Taylor*, 1 East, 502.) The difference is important. If a lessee dispose of his whole term, reserving rent, he may sue for but not distrain for it. (*Preece* v. *Corrie*, 5 Bing. 24; *Parmenter* v. *Webber*, 8 Taunt. 593.) If he dispose of less than his whole interest he may do either. (See *ante*, p. 21.)

Assignments and underleases by tenant.

The *primâ facie* right to assign or underlet may be restrained by a proviso, condition or covenant. If a lease to a man, his executors, administrators *and assigns*, contain an absolute proviso against alienation, it is repugnant, and is rejected (Shep. Touch. 123, n.); as it will be also if the proviso be unintelligible. (*Doe* v. *Carew*, 2 Q. B. 317.) A condition against assignment without consent is good; but where there is a stipulation for a forfeiture, the case must be clearly brought within

Covenants and conditions against alienation.

the terms of the condition. (*Doe* v. *Ingleby*, 15 M. & W. 465.) A covenant not to *assign* without consent, is not, it seems, broken by a *specific* bequest of the term. (*Fox* v. *Swann*, Sty. 483; but see 2 Williams, Exors. 940, n.) It is not broken by an assignment involuntary or by act of law, as where it vests without specific bequest in the executors or administrators of the tenant, though, if named in the covenant, they could not assign without consent. (*Roe* v. *Harrison*, 2 T. R. 425; *Lloyd* v. *Crispe*, 5 Taunt. 249.) Neither is it broken by the bankruptcy (*Doe* v. *Bevan*, 3 M. & S. 353) or liquidation by arrangement of the tenant, by which it vests in his trustee, or by a subsequent assignment by the trustee (*Doe* v. *Bevan*, *supra*); nor by an execution, unless suffered for the purpose of evading the covenant (*Doe* v. *Carter*, 8 T. R. 57, 300); a compulsory sale to a railway or other company (*Baily* v. *De Crespigny*, L. R., 4 Q. B. 180); an underlease (*Crusoe* v. *Bugby*, 3 Wils. 235); an invalid assignment (*Doe* v. *Powell*, 5 B. & C. 308); an equitable mortgage by deposit (*Ex parte Drake*, 1 M., D. & De G. 539), or by an agreement for an assignment followed by possession, but without a formal assignment. (*West* v. *Dobb*, 38 L. J., Q. B. 289; 39 L. J., Q. B. 191.) But though a covenant against "assignment" will not comprehend the cases above mentioned, those forms of alienation may be restrained by more extended and apt words (*Doe* v. *Bevan*, 3 M. & S. 353), and generally where a tenant undertakes not to do or permit any act of alienation, he will be held to have broken his undertaking when he does any act, the legal effect of which is, that alienation is the result. (*Davis* v. *Eyton*, 7 Bing. 154; *Re Throckmorton*, *Ex parte Eyston*, L. R., 7 Ch. D. 145; 47 L. J., Bkcy. 62.) A covenant not to assign or otherwise part with the premises

for the whole *or any part of the term*, is broken by an underlease (*Doe* v. *Worsley*, 1 Camp. 20; *Roe* v. *Harrison*, 2 T. R. 425); and a covenant not to let, set or demise for all or any part of the term, includes an assignment. (*Greenaway* v. *Adams*, 12 Ves. 395.) Where a lease is made to depend upon the personal occupation of the lessee, it determines if he cease to live there, from whatever cause. (*Doe* v. *Clarke*, 8 East, 185.) Letting lodgings is not a breach of a covenant not to underlet (*Doe* v. *Laming*, 4 Camp. 77); but a covenant not to demise, lease or let the premises or any part, was held to be broken by a partnership arrangement by which the incoming partner had *exclusive* possession of one room. (*Roe* v. *Sales*, 1 M. & S. 297.) And where a person restrained from assignment without licence, obtained the licence to assign to himself jointly with another, and afterwards without consent assigned his remaining interest to that same person, the latter assignment was held a breach of the covenant. (*Varley* v. *Coppard*, 20 W. R. 972.) There is no relief against a forfeiture caused by assigning without licence. (*Hill* v. *Barclay*, 18 Ves. 63.)

Licence to assign.

Where a consent to assign is required to be in writing, an oral one is not sufficient. (*Roe* v. *Harrison*, 2 T. R. 425.) If there is a covenant that the consent shall not be withheld except on reasonable objection, and a heavy rent is reserved, a strong ground for refusal must be shown. (*Sheppard* v. *Hong Kong Banking Corporation*, 20 W. R. 459; but see *Treloar* v. *Bigge*, 43 L. J., Ex. 95; L. R., 9 Ex. 151.) Where a lease to A. contains a covenant not to assign or underlet without consent, and A. with consent agrees to underlet part of the property to B., upon "the like provisions and conditions" as are contained in A.'s lease, the

underlease ought to be framed so as to require the consent of A. only, and not of the original landlord to any assignment, &c. by B. (*Williamson* v. *Williamson*, L. R., 9 Ch. 729; 43 L. J., Ch. 738.) It is the duty of the lessee and not of the purchaser or underlessee to procure the consent (*Lloyd* v. *Crispe*, 5 Taunt. 249); and if the intended assignee enters into possession and no consent is obtained, he may leave without giving a notice to quit or becoming liable for rent after he has left. (*Crouch* v. *Tregoning*, 41 L. J., Ex. 97; L. R., 7 Ex. 88.)

Extent of licence.

Any licence to assign, underlet or do any act which without such licence would create a forfeiture or give a right to re-enter under a condition or power in the lease, shall, unless otherwise expressed, extend only to the matter specifically authorized to be done, leaving intact all rights under covenants and powers of forfeiture and re-entry in respect of any subsequent breach of covenant or condition, assignment, underlease or other matter not specifically authorized. (22 & 23 Vict. c. 35, s. 1.) And a licence given to one of several lessees to assign or underlet his share, or do any other act prohibited to be done without licence, or given to any lessee or any one of several lessees to assign or let part only, or do such prohibited act as aforesaid in respect of part only of the property, shall not destroy the right of re-entry on breach of covenant or condition by the co-lessees or by the lessee in respect (as the case may be) of remaining shares or property. (Sect. 2; and see *Dumpor's case*, 1 Smith, L. C. 41, 7th ed.)

Assignments must be by deed,

All assignments of terms must be by deed, though the leases themselves may be by parol. (29 Car. 2, c. 3, s. 3; 8 & 9 Vict. c. 106, s. 3.)

and pass the legal estate.

An assignment must not only be of the whole interest of the assignor, but it must put the assignee in possession of the legal estate, and not

give him a mere equitable title. (*Cox* v. *Bishop*, 26 L. J., Ch. 389.) Thus, the depositee of a lease by way of equitable mortgage is not liable under the covenants in a lease (*Moores* v. *Choat*, 8 Sim. 508; 1 Fisher on Mortgages, 22); neither is a person in possession under an arrangement with the lessee who consents to hold the term as trustee. (*Walters* v. *Northern Coal Mining Co.*, 25 L. J., Ch. 633; but see *Wright* v. *Pitt*, 40 L. J., Ch. 558.)

What will pass a term.

An assignment of "personal estate" will pass leaseholds. (*White* v. *Hunt*, L. R., 6 Ex. 32; *Debenham* v. *Digby*, 21 W. R. 359; but see *Harrison* v. *Blackburn*, 34 L. J., C. P. 109.) But where a lessee grants an underlease securing a rent, which is incident to the reversion on the underlease, that rent and that reversion and the benefit of all covenants are estates and property which cannot pass by a subsequent mere assignment of the original term, nor unless expressly assigned. (*Franklin* v. *Howes*, 19 W. R. 581, *per* Stuart, V.-C.)

Covenants by the assignee.

The assignee of a lease must enter into covenants to pay the rent and perform the covenants contained in the lease and to indemnify the assignor against the same (*Pember* v. *Mathers*, 1 Bro. C. C. 52; *Staines* v. *Morris*, 1 Ves. & B. 8); and the like covenants must be entered into by a railway company taking property under its compulsory powers. (*Harding* v. *Metropolitan Rail. Co.*, 41 L. J., Ch. 371; L. R., 7 Ch. 154.) Moreover, there is an implied promise, on the part of each successive assignee of a lease, to indemnify the original lessee against breaches of the covenants in the lease by such assignee during the continuance of his own estate and before he assigns over; and such promise will be implied although such assignee has covenanted to indemnify his imme-

diate assignor against all subsequent breaches. (*Moule* v. *Garrett*, L. R., 5 Ex. 132; 41 L. J., Ex. 62.)

Liability after assignment of the lessee.

An assignment does not discharge the lessee from liability. If by acceptance of rent or in other ways the landlord recognize the assignee as his tenant, that will discharge the lessee from all merely *implied* covenants, but not from his express covenants. (*Auriol* v. *Mills*, 4 T. R. 98; *Thursby* v. *Plant*, 1 Wms. Saund. 240.) And a lessee who has assigned his term, and whose assignee has been accepted by the landlord, may yet be sued on his express covenants, either by the lessor or the assignee of the lessor (*Barnard* v. *Godscall*, Cro. Jac. 309; *Brett* v. *Cumberland*, *ib.* 521); and so may his personal representatives having assets. (*Hellier* v. *Casbard*, 1 Sid. 266; *Coghil* v. *Freelove*, 3 Mod. 325.)

Of the assignee.

The assignee is liable for breach of any covenant running with the land. His liability commences from the assignment and continues until he re-assigns to some one else, and no longer. (*Onslow* v. *Corrie*, 2 Madd. 340.) Thus, no action will lie against him for a breach of covenant happening before the assignment (*Churchwardens of St. Saviour* v. *Smith*, 1 W. Bl. 351); but it will lie for breaches after the assignment, but before the assignee has taken possession; *e.g.*, a mortgagee by assignment of the term though not in possession is liable to perform the covenants in the lease, not on the score of possession but as assignee. (*Williams* v. *Bosanquet*, 1 B. & B. 238.) On the other hand, an assignee is discharged from all future liability by a re-assignment, even though the assignment be merely for the purpose of getting rid of the liability and be to an insolvent person, and though the person to whom the assignment is made never enters into

possession or accepts the lease (*Taylor* v. *Shum*, 1 B. & P. 21; *Paul* v. *Nurse*, 8 B. & C. 486; *Valliant* v. *Dodemede*, 2 Atk. 546; *Onslow* v. *Corrie*, 2 Madd. 330), unless the assignment be merely colourable and fictitious. (*Philpot* v. *Hoare*, Amb. 480; *Onslow* v. *Corrie*, 2 Madd. 341.) If part only of the estate be re-assigned, the assignee will still remain liable in respect of the part retained by him. (*Congham* v. *King*, Cro. Car. 221.) The assignee of the lease will have a right of action against the lessor or his assigns for breach of any covenant running with the land.

Assignments of leaseholds not affected by 27 Eliz. c. 4.

Inasmuch as an assignee of leaseholds becomes liable to pay rent and perform the covenants in the lease, an assignment of leaseholds can never be treated as voluntary and set aside under 27 Eliz. c. 4. (*Price* v. *Jenkins*, L. R., 5 Ch. D. 619; 46 L. J., Ch. 805; *Ex parte Doble*, *Re Doble*, 26 W. R. 407; *Horroeks* v. *Rigby*, 26 W. R. 714.)

Assignments by operation of law.

An assignment involuntary or by operation of law takes place upon the death, bankruptcy or liquidation by arrangement of the lessee, upon the lease being taken and sold under an execution, and, in the case of a female lessee not entitled to the term for her separate use, by her marriage.

By death.

Upon the death of a person, all his terms of years and chattels real vest in his executor or administrator. And they so vest notwithstanding they may be specifically bequeathed; nor is the legatee entitled to enter until the bequest is assented to by the executor or administrator. (1 Wms. Exors. 679, 7th ed.) There is an important distinction as to the time when a term of years vests in an executor, and in an administrator. An executor derives his title from the will itself, not from the probate, which is merely evidence of the will, and the property vests in him from

the moment of the testator's death. (*Woolley* v. *Clark*, 5 B. & Ald. 744; 1 Wms. Exors. 293, 7th ed.) He may do almost all the acts incident to his office before probate. Thus, he may assent to a bequest of the term, or assign or surrender the term, and such acts are effectual though he die without proving the will, if the will be in fact subsequently proved by somebody. (*Johnson* v. *Warwick*, 25 L. J., C. P. 102; 1 Wms. Exors. 303, 7th ed.) If, however, acts done before probate are relied on for title or are sought to be enforced, the will must be authenticated by subsequent probate. (*Ib.* 304, 7th ed.) With an administrator it is different. He derives his title from the appointment of the court. He has no title until letters of administration are granted to him, and the property only vests in him from that time. (*Woolley* v. *Clark*, *supra;* 1 Wms. Exors. 404, 7th ed.) So that an assignment or surrender of a lease, or an assent to any disposition thereof, by the administrator before letters is of no validity, notwithstanding he may have acted as executor *de son tort*. (*Doe* v. *Glenn*, 1 A. & E. 49; *Morgan* v. *Thomas*, 22 L. J., Ex. 152; 3 Preston, Abst. 146.) One of several executors or administrators can make an effectual disposition of chattels of the testator or intestate. If they or one of them assent to a specific bequest of a lease, the legatee becomes liable as an ordinary assignee. In the case of a testator or intestate dying before 1st January, 1878, if leaseholds are charged with any sum by way of mortgage, equitable lien, or lien for unpaid purchase-money, and the testator have signified no contrary intention, the legatee is entitled to have the mortgage discharged out of the other personal estate. (*Solomon* v. *Solomon*, 33 L. J., Ch. 473; *Gall* v. *Fenwick*, 43 L. J., Ch. 178; *Hill* v. *Wormsley*, L. R., 4 Ch. D. 665; 46 L. J., Ch. 102, which

decide that the statutes 17 & 18 Vict. c. 113, and 30 & 31 Vict. c. 69, do not apply to leaseholds.) But as to persons dying on or after that date, the before-mentioned acts are to apply, and the devisee or legatee or heir at law (*qu.* or next of kin) shall not be entitled to have such sum or sums discharged or satisfied out of the estate of the testator or intestate, unless (in the case of a testator) he shall have signified a contrary intention. (40 & 41 Vict. c. 34.) Where a testator's leaseholds are comprised with real estate in a mortgage, both shall, in the hands of the devisees and legatees thereof, contribute rateably to the payment of the mortgage debt. (*Trestrail* v. *Mason*, L. R., 7 Ch. D. 655; 47 L. J., Ch. 249.)

An executor, generally speaking, cannot waive a term of years, though it is worthless, for he must renounce the executorship *in toto* or not at all; yet, if the value of the land is of less amount than the rent, and there is a deficiency of assets, he may waive the lease. If there are assets, he must pay the rent as long as the assets hold out, and then waive. (Wms. Exors. 680, 1757.) For rent due and breaches of covenant committed in the lifetime of the tenant, the executor or administrator is liable in his representative capacity, but only so far as he has assets (2 Wms. Exors. 1753; Bullen & L. Pl. 212); for rent accruing due and breaches committed after the death of the tenant, the executor or administrator may be sued either in his representative capacity or personally as assignee of the term (*ib.*); and it seems that with respect to breaches of covenant after the death of the testator, the executor is liable *de bonis propriis* as assignee of the term (*Tilney* v. *Norris*, 1 Ld. Raym. 553; *Sleap* v. *Newman*, 12 C. B., N. S. 116), except that as to covenants to pay rent, his liability does not exceed what the

property is worth. (*Rubery* v. *Stevens*, 4 B. & Ad. 241.) An executor *de son tort* is personally liable on the covenants in a lease. (*Williams* v. *Heales*, 43 L. J., C. P. 80; *Paull* v. *Simpson*, 9 Q. B. 365.) But an executor or administrator may discharge himself from all *personal* liability by an assignment of the term (*Rowley* v. *Adams*, 4 My. & Cr. 534); and an ample means of protecting himself is now given by 22 & 23 Vict. c. 35, s. 27, which provides that where an executor or administrator, after satisfying all liabilities accrued due and claimed under a lease to the testator, and setting apart a sufficient sum to answer any future claim in respect of any fixed and ascertained sum under the lease, has assigned the lease to a purchaser, and distributed the residuary estate, he shall no longer be personally liable in respect of any subsequent claim under the lease; but the lessor may follow the assets distributed. (See *Dodson* v. *Sammell*, 30 L. J., Ch. 799; *Crook* v. *Hendry*, 26 W. R. 325.)

By bankruptcy or liquidation by arrangement.

Under the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), upon a composition under sect. 126, the property of the debtor never ceases to be his property. (*Ex parte Jones*, 23 W. R. 886; L. R., 10 Ch. 663; 44 L. J., Bkcy. 124; *Re Kearley and Clayton's Contract*, 47 L. J., Ch. 474; L. R., 7 Ch. D. 615.) Upon the bankruptcy or liquidation by arrangement under sect. 125, the whole of the bankrupt's or liquidating debtor's property (s. 15), including of course his terms of years and chattels real, vest, upon his appointment, in the trustee (s. 17; *Ex parte Rabbidge*, *Re Pooley*, 26 W. R. 646; L. R., 8 Ch. D. 367), whose title to the property shall be conclusively evidenced by the certificate of his appointment signed by the registrar (s. 18; s. 125 (6), which shall be given to him upon his appointment being reported to

the court (G. R. 105), or the resolution for liquidation filed (G. R. 295), as the case may be. The trustee may sell and assign the property (s. 25 (6), and generally exercise all the rights of the bankrupt or debtor. (Sects. 22, 25.) When any property consists of land of any tenure, burdened with onerous covenants, or is unsaleable or not readily saleable by reason of its binding the possessor thereof to the performance of any onerous act, or the payment of any sum of money, the trustee, notwithstanding he has endeavoured to sell or has taken possession, or has exercised any acts of ownership in relation thereto, may, by writing under his hand, disclaim such property, and such disclaimer shall operate as a surrender of a lease from the date of the order of adjudication. (Sect. 23.) The trustee may not execute a disclaimer of leaseholds without leave of the court, and, upon application for leave, notice shall be given to such persons as the court shall direct. (Bankruptcy Rules, 1871, r. 28; *Re Wilson*, L. R., 13 Eq. 186; 20 W. R. 363.) The exercise of the right to disclaim is limited to twenty-eight days after a written application has been made to the trustee by a person interested, to decide whether he will disclaim or not, or such further time as the court may allow. (Sect. 24.) An application for extended time should be made within the twenty-eight days. (*Ex parte Lovering, Re Jones*, 43 L. J., Bkcy. 94; L. R., 9 Ch. 590.) The court, however, has power to grant an extension of time after the twenty-eight days if sufficient cause be shown. (*Ex parte Moore, Re Stokoe*, L. R., 2 Ch. D. 802; 35 L. T., N. S. 386.) No appeal lies against an order to disclaim, after the trustee has, in pursuance thereof, executed a disclaimer. (*Re Woods, Ex parte Ditton*, 24 W. R. 1008; 45 L. J., Bkcy. 141.) If the trustee elect to disclaim, the lease is deemed to have been surrendered as from the date

of the order of adjudication, and the trustee has none of the rights and incurs none of the liabilities of a tenant after that date. (*Ex parte Stephens, Re Lavies*, 47 L. J., Bkcy. 22; L. R., 7 Ch. D. 127.) But if he neglect to disclaim, he becomes personally liable for payment of the rent and performance of the covenants in the lease (*Ex parte Dressler, Re Solomon*, 48 L. J., Bkcy. 20; *Ex parte Hook*, 59 L. T. Jour. 230, 248; and see *Ex parte Carter, Re Ware*, 39 L. T. 185; *Ex parte Davies, Re Sneezum*, 45 L. J., Bkcy. 137; L. R., 3 Ch. D. 463); but after the discharge of the trustee the Court of Bankruptcy has no power to make an order upon him for payment of rent. (*Ex parte Carter, Re Ware*, 27 W. R. 106.)

Where the bankrupt is only an assignee of a lease, the disclaimer does not, it seems, operate as an actual surrender of the term, but merely wipes out the rights of property and liability of the bankrupt in respect thereof, and does not annul the covenants between the original parties to the lease. (*Smyth* v. *North*, 20 W. R. 683; L. R., 7 Ex. 242, *per* Martin and Pigott, BB.) As we have before noticed (*ante*, p. 199), a surrender of a lease does not ordinarily destroy the rights of an underlessee. (*Doe* v. *Pyke*, 5 M. & S. 146.) How far a disclaimer by a trustee under sect. 23 may do so is not clear. In a recent case, where a lessee had agreed to grant an underlease to one who entered upon the property, and the lessee afterwards became bankrupt and his trustee disclaimed the lease, it was held that the underlessee had no equity to enforce the agreement against the original lessor. (*Taylor* v. *Gillott*, 44 L. J., Ch. 740; 32 L. T., N. S. 795, *per* Hall, V.-C.) It is to be observed that it was merely an agreement for an underlease on terms materially different from those of the original lease, especially in not containing a proviso for re-entry on breach of covenants; but the Vice-Chancellor

thought that where an underlease comprised the same property as the original lease, and contained the same provisions and covenants, much might be said in favour of the view that, notwithstanding the disclaimer, the underlease was kept on foot as against the lessor.

Any person injured by the operation of sect. 23 shall be deemed a creditor, and may prove to the extent of his injury. (Sect. 23.) Where a bankrupt was lessee of premises for a term of ten years at a rent of 500*l.*, and his trustee disclaimed, and his landlord was unable to relet at so high a rent, it was held that he was entitled to prove for the difference between the present value of the 500*l.* per annum during the residue of the term and the present value for the same period of the letting value of the premises. (*Ex parte Llynvi Coal and Iron Co., Re Hide*, L. R., 7 Ch. 28; 41 L. J., Bkcy. 5.)

Under-leases.

Though a professed underlease for an equal or greater term than the underlessor possesses amounts to an assignment, yet an underlease from year to year (*Pike* v. *Eyre*, 9 B. & C. 909; *Curtis* v. *Wheeler*, Mo. & M. 493), or for a term of years (*Oxley* v. *James*, 13 M. & W. 209), by a tenant from year to year, has not that effect; since his estate is for an indefinite period, and may or may not exceed the term he carves out of it.

The relation between an underlessor and his tenant is the ordinary relation of landlord and tenant. Mortgages of leaseholds are frequently by way of underlease. (2 Dav. Conv. 668.)

An underlessee in possession is liable for breach of covenants contained in the original lease (*Cosser* v. *Collinge*, 3 My. & K. 283; *Wilson* v. *Hart*, 35 L. J., Ch. 569; L. R., 1 Ch. 463), or any subsequent assignment thereof. (*Clements* v.

Welles, 35 L. J., Ch. 265; L. R., 1 Eq. 200.) A different rule prevailed at law, since there was neither privity of estate nor privity of contract between the original lessor and the underlessee (Coote, L. & T. 330); but even at law the underlessee was always liable to have his goods distrained for rent by the superior landlord, or himself ejected for breaches of covenants contained in the original lease.

CHAPTER XI.

EJECTMENT.

SECT. 1.—*On the Action for the Recovery of Land.*

To treat of ejectment generally is obviously and especially beyond the scope of this book; but as it may, happily, be found useful by the reader if we deal briefly with the subject in some of its more usual aspects as between landlord and tenant and their representatives, this chapter is intended to attempt to point out the mode of procedure by which, when a tenancy has expired by effluxion of time, or been determined either by determination of will, demand of possession, notice to quit, disclaimer, forfeiture, or any of the different methods considered in a previous chapter (Chap. VIII. *ante*, p. 195), a landlord may enforce the law, and obtain possession of the lands or tenements wrongfully withheld from him.

Person having legal right to actual possession may enter without any legal formality, but must do so peaceably.

Any person who has a legal right to the actual possession of lands or tenements, may enter and take possession without any legal formality; but he must do so peaceably, for to assert his right by force (except in manner before indicated, *ante*, pp. 242, 243) is to break the law (*Taylor* v. *Cole*, 3 T. R. 295; *Taunton* v. *Costar*, 7 T. R. 431; *Turner* v. *Meymott*, 1 Bing. 158; *Butcher* v. *Butcher*, 7 B. & C. 399), and render himself liable to indictment. (Burn's Justice, "Forcible Entry.") Where, therefore, the right of entry is fairly con-

tested, it is always advisable to commence an action for the recovery of the lands or tenements. This action must formerly have been commenced within twenty years after the right of entry accrued. (3 & 4 Will. 4, c. 27, s. 2.) On and after the 1st January, 1879, by the Real Property Limitation Act, 1874, which then came into force, the period of limitation was reduced to twelve years after the right of action shall have accrued to the claimant or some person through whom he claims. (37 & 38 Vict. c. 57, s. 1.) In the case of a lease by an ecclesiastical or eleemosynary corporation (*ante*, pp. 27—32) voidable by the successors in title of the original lessor, as not being in conformity with the disabling statutes of Elizabeth, the Statute of Limitations runs against the successors from the granting of the lease, not from their election to avoid it. (*Governors of Magdalen Hosp.* v. *Knott*, L. R., 8 Ch. D. 709; 47 L. J., Ch. 726.)

Period of limitation.

R. P. Lim. Act, 1874.

Special advantages of landlords.

In an action by a landlord against tenant, to recover the possession of lands, houses, and other tenements, the plaintiff enjoys many special advantages both at common law and by statute. He need not generally prove his own title, for, as we have seen (*ante*, p. 11), a tenant who has come in under or paid rent cannot, except under very exceptional circumstances, dispute the lessor's title, whether the original lessor or his assignee be plaintiff (*Gouldsworth* v. *Knights*, 11 M. & W. 337; *Cuthbertson* v. *Irving*, 29 L. J., Ex. 485); and a person claiming under the tenant is equally estopped (*Doe* v. *Mills*, 2 Ad. & E. 17; *L. & N. W. Ry. Co.* v. *West*, L. R., 2 C. P. 553), whether he be an assignee of the term or a mere licensee. (*Doe* v. *Baytup*, 3 Ad. & E. 188.) Thus the action as between landlord and tenant is shorn of many of the difficulties usually found in proceed-

At common law.

ings to recover the possession of land where the plaintiff must generally recover upon the strength of his own, and not upon any weakness or defect in the defendant's title. (*Martin* v. *Strachan*, 5 T. R. 107, *n.*; *Doe* v. *Thompson*, 13 Q. B. 674; *Doe* v. *Powell*, 1 Ad. & E. 531; *Doe* v. *Barber*, 2 T. R. 749; and see *Richards* v. *Richards*, 15 East, 294, note (*a*).)

Proof by landlord in the action for the recovery of lands, houses, &c.

In general therefore the landlord need only prove—

(1) The contract of tenancy, which, if by deed or in writing, must be done by production of the lease or counterpart (*Roe* v. *Davis*, 7 East, 363), or, if by parol, by evidence of a person present at the making, or by the oral admissions of the defendant (2 Phil. Ev. 7th ed. 270), which may be admitted to prove the terms of the lease. (*Howard* v. *Smith*, 3 M. & G. 254; and see *Slatterie* v. *Pooley*, 6 M. & W. 664.)

(2) That he has a legal right to the actual possession of the property by reason of the expiration or determination of the tenancy by (*a*) effluxion of time, or by (*b*) due notice to quit where the tenancy was from year to year, or for other indefinite periods, as where subsequently to the expiration of the lease the landlord has accepted payment of rent due at a later period, and thereby created a new tenancy from year to year (*Doe* v. *Stennett*, 2 Esp. 717; *Bishop* v. *Howard*, 2 B. & C. 100; *Doe* v. *Amey*, 12 A. & E. 476; *Doe* v. *Crago*, 6 C. B. 90); or (*c*) by a lawful demand of possession made, as where there exists either by construction of law or otherwise a tenancy at will not yet legally determined by entry or otherwise (*ante*, p. 4); or (*d*) by breach of covenant, proving that the lease contained a proviso or condition of re-entry to take effect on some act or event which has happened, or on the breach of

some covenant or stipulation which has not been performed (*Hayne* v. *Cummings*, 16 C. B., N. S. 421), and that the proviso for re-entry is applicable to such covenant or stipulation. (*Doe* v. *Phillips*, 2 Bing. 13; *Doe* v. *Golding*, 6 Moore, 231; *Doe* v. *Kneller*, 4 C. & P. 3; *Doe* v. *Bowditch*, 8 Q. B. 973.)

Proceedings by landlord on forfeiture.

In the last-mentioned event, immediately upon the forfeiture happening the landlord may either enter and take actual possession (*Davis* v. *Burrell*, 10 C. B. 821; *Davis* v. *Eyton*, 7 Bing. 154), or maintain ejectment without such entry (*Goodright* v. *Cator*, 2 Doug. 477; *Doe* v. *Abel*, 2 M. & S. 541), which is generally, it is submitted, the most advisable course; but he cannot do anything of the kind if he waive the forfeiture (not being a continuing forfeiture) (*Arnsby* v. *Woodward*, 6 B. & C. 519; and see *ante*, p. 204), nor after he has parted with his reversion absolutely or by way of mortgage (*Fenn* v. *Smart*, 12 East, 444; *Doe* v. *Edwards*, 5 B. & Ad. 1065; *Doe* v. *Ongley*, 10 C. B. 25), nor after his reversion has been merged and extinguished. (*Webb* v. *Russell*, 3 T. R. 393.) But the assignee of the reversion of a lease, containing usual power of re-entry to the lessor and his assigns, may maintain ejectment on breach of general covenant to repair, without giving notice to the lessee of his being entitled to the reversion. (*Scaltock* v. *Harston*, 45 L. J., C. P. 125; L. R., 1 C. P. D. 106; 24 W. R. 431.)

In all cases of ejectment for a forfeiture by a breach of covenant, it rests upon the lessor to show that the lease which he has granted has been forfeited by the lessee. If the covenant be to insure, the plaintiff must prove the omission to do so (*Doe* v. *Whitehead*, 8 Ad. & E. 571); if it be not to permit a sale by auction on the premises without the written permission of the lessor, the plain-

tiff must give evidence that the sale took place by the permission of the lessee, as well as without the consent of the plaintiff. (*Toleman* v. *Portbury*, L. R., 5 Q. B. 288.)

Non-payment of rent.

Nor, as we have already seen (*ante*, p. 203), can a landlord take advantage of a forfeiture or maintain ejectment for non-payment of rent without a formal demand thereof, unless there be some express condition or proviso in the lease or agreement giving the landlord a right to re-enter and determine the lease or tenancy for such non-payment (Litt. s. 325; *Doe* v. *Golding*, 6 Moore, 231; *Doe* v. *Kneller*, 4 C. & P. 3; *Brewer* v. *Eaton*, 3 Doug. 230; *Doe* d. *Dixon* v. *Roe*, 7 C. B. 134; *Hill* v. *Kempshall*, 7 C. B. 975; *Phillips* v. *Bridge*, L. R., 9 C. P. 48; 43 L. J., C. P. 13), or a right to enter and hold the premises until the arrears be satisfied. (Litt. s. 327; *Jemott* v. *Cowley*, 1 Saund. 112 *e*; *Doe* v. *Horsley*, 1 A. & E. 766; *Doe* v. *Boulter*, 6 A. & E. 675.) If the proviso allow a specified number of days for payment of rent after it becomes due, no forfeiture can accrue by non-payment until such time has elapsed. (Plow. 172 d; *Doe* d. *Dixon* v. *Roe*, 7 C. B. 134.)

We have already considered (*ante*, p. 203) the nature of the demand which, in the case of non-payment of rent, is necessary to create a forfeiture at *common law*.

Statutory enactment where six months' rent in arrear and no sufficient distress.

15 & 16 Vict. c. 76, s. 210.

By the C. L. P. Act, 1852, s. 210, in all cases between landlord and tenant, when one half-year's rent is in arrear, and the landlord or lessor has by law a right of re-entry for the non-payment thereof, such landlord or lessor may without any formal demand or re-entry serve a writ of ejectment, and in case of judgment against the defendant for non-appearance, if it appear to the court by affidavit, or be proved upon the trial, in case the defendant appears, that half a year's rent

was due before the writ was served, and no sufficient distress to be found on the premises countervailing the arrears then due, and that the lessor had power to re-enter, then the lessor shall recover judgment and execution in the same manner as if the rent in arrear had been legally demanded and a re-entry made; and in case the tenant shall permit or suffer judgment to be had and recovered and execution to be executed thereon without paying rents and arrears and full costs, and without proceeding for relief in equity (see provisions for relief of tenants against forfeiture, C. L. P. Act, 1860, 23 & 24 Vict. c. 126, ss. 1—11; *ante*, p. 205) within six calendar months after such execution executed, then the lessee shall be barred from all relief or remedy in law or equity, other than by bringing error for reversal of such judgment, and the landlord shall thenceforth hold the premises discharged from the lease.

The above section is a re-enactment of 4 Geo. 2, c. 28, s. 2, the true end of which was to limit and confine the tenant to six calendar months after execution executed for making application for relief against the forfeiture, and thus to relieve the landlord from the inconvenience of uncertainty of possession. (*Doe* v. *Lewis*, 1 Burr. 619.) The assignee of a lessee, whether by way of mortgage or otherwise (*Doe* d. *Whitfield* v. *Roe*, 3 Taunt. 402; *Williams* v. *Bosanquet*, 1 Brod. & B. 238), and a mere underlessee (*Doe* v. *Byron*, 1 C. B. 623), are "tenants" within this section.

Right of re-entry must be absolute.

The right of re-entry must be absolute and unqualified (*Doe* v. *Bowditch*, 8 Q. B. 973), and must be by virtue of some condition or proviso for re-entry contained in the lease or agreement. (2 Chit. Arch. 997 (*t*), 9th ed.)

One half-year's rent at the least

One half-year's rent at the least must be in arrear (*Hill* v. *Kempshall*, 7 C. B. 975) at the

time of the service of the writ (*Cotesworth* v. *Spokes*, 30 L. J., C. P. 220), and even due before the writ is sued out. (*Doe* d. *Gretton* v. *Roe*, 4 C. B. 576.) If more than one half-year's rent is in arrear the case is within the section (*Doe* v. *Alexander*, 2 M. & S. 525), unless there is sufficient *available* distress to be found on the demised premises "countervailing the arrears due" (*Doe* v. *Wandlass*, 7 T. R. 117), *i. e. all* the arrears, and not merely half a year's rent, where more is due. (*Cross* v. *Jordan*, 8 Ex. 149, overruling *Doe* d. *Powell*, v. *Roe*, 9 Dowl. 548; Cole, Ejec. 416). The insufficiency of the distress must be clearly established. (*Doe* v. *Wandlass*, *supra*.) Every part of the premises must be searched (*Rees* v. *King*, Forrest, 19, cited in *Smith* v. *Jersey*, 2 Brod. & B. 514; and see *Price* v. *Worwood*, 4 H. & N. 512) after the last day for saving the forfeiture, and before the writ is issued, or at all events served. (*Doe* d. *Dixon* v. *Roe*, 7 C. B. 134.) If a broker going to distrain and using reasonable diligence would not find sufficient (*Doe* v. *Franks*, 2 C. & K. 678), or if the tenant by locking up the premises prevents the goods from being found (*Doe* v. *Dyson*, M. & M. 77; *Doe* d. *Cox* v. *Roe*, 5 D. & L. 272; *Romilly* v. *Fycroft*, 4 W. R. 26), there is an insufficiency.

must be in arrear when writ issued.

Insufficiency of distress must be clearly established.

But the landlord has other and special advantages by statute. The Common Law Procedure Act, 1852, which provided a more simple mode of trying the title to lands and tenements than that which had hitherto prevailed, materially benefited landlords (ss. 213—217) in actions of ejectment, without disturbing their right to proceed in the ordinary manner, which was, indeed, expressly reserved. (Sect. 218.) By that statute proceedings in ejectment were made somewhat intelligible, even to non-professional persons. The

Statutory advantages of landlord. 15 & 16 Vict. c. 76, ss. 168, 222.

action was commenced by writ of summons, instead of as theretofore by declaration, and the use of fictitious names was abolished. But the procedure remained materially different from that pursued in other actions, and the concessions to common sense made by the Act of 1852 only paved the way for the virtual assimilation of this with all other actions under the Supreme Court of Judicature Acts, 1873 and 1875. An action for the recovery of land now, with some slight exceptions, proceeds in the same way as any other action. All actions must be commenced by the same form of writ, indorsed in every case with a plain statement of the nature of the claim; and there is now for the first time a uniform system of pleading.

Judicature Acts, 36 & 37 Vict. c. 66; 38 & 39 Vict. c. 77.

But it is necessary to steadily bear in mind that the procedure and practice under the C. L. P. Acts remain in force where not inconsistent with the Judicature Acts and Rules (38 & 39 Vict. c. 77, s. 21), and that the decisions as to the evidence necessary to support the action under the former mode of procedure are applicable to the present. It is therefore necessary to consider briefly the several more important enactments for the benefit of landlords contained in sections 213—217 of the C. L. P. Act, 1852, which are similiar enactments to those contained in 1 Geo. 4, c. 87. The sections not being set out in full in this chapter should in every case be consulted.

Procedure under C. L. P. Acts yet in force where not inconsistent.

By section 213: Where any tenant holding under a lease or agreement in writing for any term certain, or from year to year, holds over after the term has expired by effluxion of time, or has been determined by a regular notice to quit, and after a lawful demand of possession in writing, refuses to deliver up possession, and the landlord thereupon commences an action of ejectment, he may compel the tenant to find sureties for pay-

15 & 16 Vict. c. 76, s. 213. Tenant holding over after term has expired may be compelled to find sureties for payment of costs and damages,

ment of the costs and damages which shall be recovered in the action before he will be permitted to defend it.

before he may defend.

This section, to compel a tenant to enter into the recognizance to pay costs, &c., does not apply to a verbal letting. *Doe* v. *Thrustout*, M'Clel. & Y. 492, cited Day, C. L. Pro. Acts, 207. There must be a lease or agreement in writing (*Doe* d. *Bradford* v. *Roe*, 5 B. & Ald. 770); and the tenancy must have been for a term or number of years certain, or from year to year. A tenancy of apartments for "three months certain" in writing is sufficient (*Doe* d. *Phillips* v. *Roe*, 5 B. & Ald. 766); but a quarterly tenancy, determinable by three months' notice to quit, is not (*Doe* d. *Carter* v. *Roe*, 10 M. & W. 670), nor a tenancy for a term of years "should A., B. and C. so long live" (*Doe* d. *Pemberton* v. *Roe*, 7 B. & C. 2), nor a fourteen years' lease determinable at option of either party by six months' notice at end of seven years. (*Doe* d. *Cardigan* v. *Roe*, 1 D. & R. 540.) But it would appear that a tenancy from year to year in writing, supplemented by an agreement that the tenant shall continue tenant so long as the landlord shall continue vicar of A., is not thereby made a tenancy uncertain so as to withdraw it from this section. (*Doe* d. *Newstead* v. *Roe*, 10 Jur. 925.)

Sect. 213 does not apply to tenancies without writing, or not for a term certain or from year to year.

The section only applies to terms that have expired or been determined by regular notice to quit. A tenant who has surrendered his term but refuses to quit the premises cannot be proceeded against within this section (*Doe* d. *Tindal* v. *Roe*, 2 B. & Ad. 922), nor a tenant who has been permitted to hold over for more than a year after his term has expired, a tenancy from year to year having been thereby created. (*Doe* v. *Field*, 2 Dowl. 542.) Nor does the section apply where

Term must have expired or been determined.

a landlord claims under a proviso for re-entry for non-performance of covenants (*Doe* v. *Sharpley*, 15 M. & W. 558), nor where the title is in dispute (*Doe* d. *Sanders* v. *Roe*, 1 Dowl. 4.)

This section is available by tenant against sub-tenant and also to tenant in common.

Under this section a tenant may proceed against his sub-tenant (*Doe* d. *Watts* v. *Roe*, 5 Dowl. 213), and one of several tenants in common may compel the defendant to give security. (*Doe* v. *Rotherham*, 3 Dowl. 690.)

Must be a lawful demand in writing.

There must have been a lawful demand in writing of possession made and signed by the landlord or his agent. A simple demand of possession is advisable (*Doe* d. *Anglesey* v. *Roe*, 2 D. & R. 565) to avoid any difficulty of construction, although a notice desiring the tenant to quit the premises "which you hold under me, your term therein having long since expired," was held not to recognize a tenancy from year to year subsequent to the term (as was contended), but to be a mere demand of possession. (*Doe* v. *Inglis*, 3 Taunt. 54.)

Service of the demand.

The demand may be served before, and yet take effect only at the expiration of the term, so that it would seem the usual notice to quit is sufficient. *Wilkinson* v. *Colley*, 5 Burr. 2694; *Hirst* v. *Horn*, 6 M. & W. 393.) But it is advisable to make a separate and distinct demand of possession, which must be served personally or left at the dwelling-house or usual abode of the tenant. The court or judge must be satisfied that there has been a sufficient refusal, and it is therefore advisable to try and get an express refusal, and, where the tenant or person in possession happens to be absent, to make a further application. (See *Doe* d. *Selgood* v. *Roe*, 1 W. W. & H. 206.) Service on a clerk of the tenant at his place of business is not sufficient. (See *Maybury* v. *Mudie*, 5 C. B. 283; *Russell* v. *Knowles*, 7

M. & G. 1001; *Allen* v. *Greensill*, 4 C. B. 100; *Reg.* v. *Hammond*, 21 L. J., Q. B. 153.)

Proceedings under this section where tenant refuses to yield up possession.

Having obtained a sufficient refusal to deliver up possession, the landlord may at once sue out a writ of summons for the recovery of land, and address a notice, signed by himself or his agent (*Doe* d. *Beard* v. *Roe*, 1 M. & W. 360) at the foot thereof, to the tenant, requiring him, "if ordered by the court or a judge, to give bail by himself and two sufficient sureties conditioned to pay the costs and damages recovered in the action." (C. L. P. Act, 1852, s. 213.) If the notice be signed by an agent no affidavit of agency is necessary. (*Doe* d. *Geldart* v. *Roe*, 1 W. W. & H. 346.) The writ and notice appended may then be served in manner hereinafter described. (*Post*, p. 288.)

Judgment in default of appearance.

When the tenant does *not* appear the claimant may sign final judgment, and issue execution in the usual way. (*Post*, pp. 301, 304.)

Where tenant does appear plaintiff should apply to court or judge to compel defendant to find bail.

Requisites of affidavits in support: (1) proof of service of writ and notice; (2) occupation of premises by defendant; (3) lawful demand and refusal; (4) the annual value.

When the tenant *does* appear to the writ, the plaintiff should make an application to the court or judge at chambers, founded upon affidavits, to compel the defendant to find bail pursuant to the section. The affidavits should set forth (1) service of the writ and notice, without which no judgment in ejectment for want of appearance or defence can be signed (Reg. Prac. H. T. 1853, No. 112); (2) enjoyment of premises by the defendant under a lease or agreement for a term certain, which has expired or been determined by regular notice to quit. (*Doe* v. *Boast*, 7 Dowl. 487.) The words "a certain notice to quit" are insufficient. (*Doe* v. *Bell*, 8 Jur. 1100.) The lease or agreement, or counterpart or duplicate, duly stamped *before* the application (*Doe* d. *Caulfield* v. *Roe*, 3 Bing. N. C. 329; *Doe* v. *Rushworth*, 4 M. & W. 74), must be produced, and the execution proved by affidavit (*Doe* d. *Foucan* v. *Roe*, 2 L. M. & P. 322),

not necessarily by attesting witness (*Doe* d. *Gowland* v. *Roe*, 6 Dowl. 35; and see C. L. P. Act, 1854, s. 26), but it should not, as is incorrectly said in the marginal note to that case, be annexed to the affidavit; (3) lawful demand of possession and refusal, and (4) the annual value of the property.

It is not essential that the landlord should join in these affidavits if his solicitor or agent can prove the holding and determination of the tenancy. But the affidavits should be complete, and in all respects sufficient to establish a *primâ facie* case within the section; for if he fail in his application from a defect in his affidavits, he cannot renew his motion on amended affidavits (*Joynes* v. *Collinson*, 13 M. & W. 558), or upon new affidavits, unless leave for that purpose be given when the application is discharged. (See Cole, Eject. 383.)

Upon *primâ facie* case the court or judge will issue a rule nisi or summons.

Upon a sufficient *primâ facie* case in support being shown, the court or judge will fix a time for the tenant to show cause, &c., and the plaintiff may take a rule nisi or summons, which must be served upon the tenant or person in possession, and may require that the claimant may sign judgment if the defendant neglect to give security within the time limited (*Doe* v. *Roe*, 2 Dowl. 180); and if no cause be shown the court or judge will fix the sum and time. The security ordered is ordinarily equal to one year's value of the premises, with a reasonable sum for costs (*Doe* d. *Sampson* v. *Roe*, 6 Moore, 54; *Doe* d. *Levi* v. *Roe*, 6 C. B. 276), to be computed by the master; but the court will not give anything for mesne profits under *this* section (*Doe* d. *Sampson* v. *Roe*, *supra*), or for damages alleged to have been caused to the business by shutting up the premises, by dilapidations or the like. (*Doe* d. *Marks* v. *Roe*, 6 D. & L. 87.)

When rule made absolute.

Upon the rule being made absolute, or the order granted, it must be drawn up and a copy served on the tenant or his solicitor. If the tenant do not obey within the time allowed, the lessor or landlord upon filing an affidavit that such rule or order has been made, served and not complied with, may sign judgment for recovery of possession and costs of suit.

If the tenant finds bail, &c. in due time, the plaintiff may proceed to trial in the usual way. (*Post*, Sect. 2, "Proceedings in the High Court.")

Damages for mesne profits recoverable by landlord. 15 & 16 Vict c. 76, s. 214.

To render a subsequent action of trespass for mesne profits sometimes unnecessary, it was enacted by the 214th section of the C. L. P. Act, 1852, that wherever on the trial of any ejectment by landlord against a tenant, such tenant or his attorney has been served with due notice of trial, the judge shall permit the claimant, after proof of his right to recover possession, to go into evidence of the mesne profits which have accrued from the determination of the tenant's interest to verdict, or some preceding day specially mentioned therein; and the jury, finding for the plaintiff, shall give their verdict both as to the recovery of the premises and as to amount of damages for mesne profits, and thereupon the landlord shall have judgment accordingly, and shall not be barred from bringing any action for mesne profits accruing between verdict and delivery of possession.

Sect. 214 is not confined to cases where security has been given under s. 213.

This section was in substance a re-enactment of 1 Geo. 4, c. 87, s. 2, and is not confined to cases where security has been given under s. 213. Mesne profits may be recovered under s. 214, although the writ and issue do not contain any claim in respect of them (*Smith* v. *Tett*, 9 Exch. 307); but strict proof of title being required where the defendant does not appear, it is sometimes advisable for a landlord to exercise the option

reserved to him (s. 218, C. L. P. Act, 1852) and proceed in the usual manner, and afterwards to bring an action for mesne profits, or for double value or double rent (*ante*, Chap. IX., Sect. 5, pp. 241—246), because his title will then be protected by estoppel through the judgment in ejectment. (Day's C. L. P. Acts, 210.) It should also be observed that the security given pursuant to s. 213 is conditioned "to pay the costs and *damages* which shall be recovered by the claimants in the action," which includes all damages in respect of mesne profits which may be recovered pursuant to this section, but *not* mesne profits, double value or double rent recovered in any subsequent proceedings.

At the trial plaintiff must prove himself to be the landlord and defendant tenant of the premises claimed, his right to recover possession thereof, service of notice of trial (unless tenant appears, *Doe* v. *Hodgson*, 12 A. & E. 135), and amount of mesne profits due.

No stay of execution without tenant finds security not to commit waste. 15 & 16 Vict. c. 76, s. 215.

By s. 215, it was further enacted that where security has been obtained pursuant to s. 213, and the claimant obtains a verdict, the judge shall not, unless it appear to him that the finding was contrary to the evidence, or the damages given were excessive, except by consent, stay execution, except on condition of the tenant's finding security not to commit waste or damage, or sell or carry off any standing crops, hay, straw or manure after verdict and before execution.

No order to stay execution will be made in cases within this section, except on condition that the defendant actually finds security within four days from the day of trial, unless (1) it appears to the judge who tried the case that the finding of the jury was contrary to the evidence; (2) or that the damages were excessive; or (3) by consent.

On taking proceedings in error, the defendant

must find two additional sureties, although he has before given two under s. 213. (*Roe* v. *Moore*, 1 Dowl. 203.)

Injunction under 36 & 37 Vict. c. 66, s. 25, sub-sect. 8.

The Judicature Act, 1873, has greatly increased the power of the courts to restrain or prevent commission of an alleged or expected wrong, pending the decision of the court as to conflicting claims to the possession of land. Under the C. L. P. Act, 1854, a plaintiff could claim (though not as a matter of right) a writ of injunction against the repetition, continuance or committal of any breach of contract or injury (s. 79), but only *after* he had commenced an action for such an actually inflicted injury as entitled him to maintain it. The recent enactment effects a manifest improvement. Every branch of the court may *now* grant an injunction to prevent any threatened or apprehended waste or trespass, "whether the person against whom such injunction is sought is or is not in possession under any claim of title or otherwise, or (if out of possession) does or does not claim a right to do the act sought to be restrained under any colour of title; and whether the estates claimed by both or by either of the parties are legal or equitable." (Judicature Act, 1873, s. 25, sub-s. 8; Wils. 30, 2nd ed.)

15 & 16 Vict. c. 76, s. 216.

By s. 216, all recognizances and securities entered into pursuant to s. 215 are to be taken in the same manner as other recognizances of bail, and actions on them limited to six months from the delivery of possession.

Ib. s. 217.

By s. 217, a landlord whose right of entry accrued in or after Hilary or Trinity terms was enabled within ten days to serve writ and to proceed to trial at the ensuing assizes, which otherwise he might be unable to do in many cases; but the section is inapplicable where the lands lie in London or Middlesex. (*Doe* d. *Norris* v. *Roe*, 1

Dowl. 547.) The Judicature Act, 1873, abolished terms so far as relates to the administration of justice, but retains them for determining the time within which any act is to be done. (Sect. 26.) Proceedings under the 217th section are similar to those provided by 11 Geo. 4 & 1 Will. 4, c. 70, s. 36, and apply only to cases where the right of entry accrued during or immediately after an issuable term (*Doe* d. *Milner* v. *Roe*, 2 L. M. & P. 578), and not where the title accrued in Michaelmas or Easter terms (*Doe* v. *Roe*, 2 Cr. & Jer. 123), or to the case of a tenancy under an agreement expiring the day before the first day of term. (*Doe* d. *Summerville* v. *Roe*, 4 M. & Scott, 747.) The lessor of the plaintiff cannot release the action. (*Doe* v. *Brewer*, 4 M. & S. 300.)

Where applicable to his case it is advisable for landlord to avail himself of these special advantages.

Where applicable to his case it is obviously advisable for a landlord to avail himself of the special advantages afforded by the above sections; but he is always at liberty (s. 218, C. L. P. Act, 1852), and in some cases has no option but to proceed in the ordinary manner, as where the tenancy was not in writing, or had not expired or been determined by regular notice to quit, or where some forfeiture is relied on, in which cases, though he loses certain advantages, he is generally relieved from the necessity of proving any demand of possession or refusal to give up possession before action. (2 Chit. Arch. N. P. 392.)

In certain cases landlord has other remedies.

There are also cases in which a landlord need not go to a superior court at all, but may seek his remedy by action in the county court, or by summary proceedings before justices of the peace in manner hereafter noticed.

SECT. 2.—*Upon the Practice in an Action for the Recovery of Land.*

The writ.

In this action the writ must now be in the form prescribed under the Judicature Acts and Rules. (Ord. II. r. 3.) In cases under s. 213, C. L. P. Act, 1852 (*ante*, p. 274), a landlord proceeding by action of ejectment may, at the foot of the writ, address a notice, signed by himself or his agent (*Doe* d. *Beard* v. *Roe*, 1 M. & W. 360), to the tenant, requiring him to find bail by himself and two sureties conditioned to pay costs and damages recovered in the action. In all cases the writ must be indorsed with a plain statement of the plaintiff's claim: *e.g.*, "The plaintiff's claim is to recover possession of a house No. 20, Fleet Street," or "of a farm called Blackacre, situate in the parish of Churt, in the county of Surrey;" but the indorsement need not be perfectly definite and precise, for if defective it may be amended by leave of the court or a judge at chambers, (Ord. III. r. 2), which leave it may be necessary to obtain even to amend the indorsement of a writ not yet served. (Bitt. 1.)

Indorsement on writ.

Joinder of claims.

It must be remembered in indorsing the writ that whilst under the former procedure no claim could be joined with a claim for possession in ejectment, except a claim by a landlord for mesne profits against a tenant (C. L. P. Act, 1852, s. 41), *now* "claims in respect of mesne profits or arrears of rent in respect of the premises claimed or any part thereof, and damages for breach of any contract under which the same or any part thereof are held," may be joined with an action for the recovery of land, which does not include an action for foreclosure. (*Tawell* v. *Slate Co.*, L. R., 3 Ch. D. 629; Ord. XVII. r. 2.) Where considered advisable there should then be added to the indorsement on the writ a concise form of

claim, as, "and for mesne profits," or "for an account of rent or arrears of rent," or "for breach of covenant for repairs." Other causes of action may also be joined by leave of the court or a judge (Ord. XVII. r. 2; see *Whetstone* v. *Dewis*, 45 L. J., Ch. 49; L. R., 1 Ch. D. 99; 24 W. R. 93), to be obtained before issue of writ (*Pilcher* v. *Hinds*, 40 L. T. 422; 27 W. R. 619); and in a recent case the Master of the Rolls allowed an action for the delivery up of the lease itself to be joined with an action for recovery of possession of the house, stating that he should "always allow claims on a single instrument, for recovery of real and personal estate included in it, to be joined in one action." (*Cook* v. *Enchmarch*, L. R., 2 Ch. D. 111; 45 L. J., Ch. 504; 24 W. R. 293.) A claim for a receiver (*Allen* v. *Kennet*, 24 W. R. 845), and for administration (*Kitching* v. *Kitching*, 24 W. R. 901), have also been joined in appropriate cases; but the judge has power, if he thinks the different causes of action cannot be conveniently tried or disposed of together, either to order separate trials of them (Ord. XVII. r. 1; and see *Child* v. *Stenning*, L. R., 5 Ch. D. 695; 25 W. R. 519; 46 L. J., Ch. 523), or on the application (which should be by summons) of any defendant to make an order confining the action to such of them as may be conveniently disposed of in one proceeding. (*Ib.* rr. 8, 9.)

Indorsement of address on writ issued out of London office where plaintiff sues by solicitor.

Where the writ is issued out of the London office it must be indorsed with the address of the plaintiff, and the name and place of business of his solicitor. If such place be more than three miles from Temple Bar an address for service within that limit must be given, and where such solicitor is only agent of another solicitor, he must add to his own name or firm and place of business the name or firm and place of business of the principal solicitor. (Ord. IV. r. 1.) A plain-

tiff suing in person must indorse upon the writ his place of residence and occupation, and if such place be more than three miles from Temple Bar, an address for service within that limit. (*Ib.* r. 2.) Where the writ is issued out of a district registry, and the defendant must appear there (*post*, p. 294), the solicitor must give on the writ the address of the plaintiff, and his own name or firm and his place of business within the district, as an address for service; and if such place be not within the district, he must add an address for service within the district; and where the defendant does not reside within the district, he must add an address for service within three miles from Temple Bar; and where the solicitor is only agent of another solicitor, he must add to his own name or firm and place of business the name or firm and place of business of the principal solicitor. If the plaintiff sue in person, he must give his place of residence and occupation, and if such place be not within the district, an address for service within the district; and where the defendant does not reside within the district, he must add an address for service within three miles of Temple Bar. (Ord. IV. r. 3a.)

Where plaintiff sues in person.

Where the writ is issued out of a district registry.

The writ remains in force twelve, instead of as formerly three, (C. L. P. Act, 1852, s. 169) calendar (Ord. LVII. r. 1) months from date inclusive, and if any defendant has not been served with it the plaintiff, by leave of a judge or district registrar, on proof that reasonable efforts have been made to serve the writ, or for other good reason, may renew it for another six months. (Ord. VIII. r. 1.) The twelve months must be computed from date of writ (*Re Jones, Eyre* v. *Cox*, 46 L. J., Ch. 316; 25 W. R. 303), and notwithstanding the power to enlarge the time under Ord. LVII. r. 6, where the claim would otherwise be barred by the Statute of Limitations the court

Duration of writ.

Renewal of writ.

cannot renew the writ. (*Doyle* v. *Kaufman*, L. R., 3 Q. B. D. 7; 47 L. J., Q. B. 26.) Concurrent writs may be issued at any time within the twelve months for which the original writ is issued, and continue in force as long only as the original. (Ord. VI. r. 1.) The writ must be directed to the persons in possession (that is, actual possession of the premises) by name, and to all persons entitled to defend the possession of the property claimed, which property shall be described in the writ with reasonable certainty. (15 & 16 Vict. c. 76, s. 168.) The writ must also state the names of all the persons in whom the title is alleged to be. (*Ib.* s. 169.) Tenants in common may issue a joint writ to recover the property to which they are entitled. (*Elliss* v. *Elliss*, 27 L. J., Q. B. 316.) The christian name and surname of each person in possession of all or any part of the property claimed in the writ, whether as tenant or undertenant, should be correctly stated (*Doe* d. *Smith* v. *Roe*, 5 Dowl. 254; *Doe* d. *Williamson* v. *Roe*, 10 Moore, 493; *Doe* v. *Cock*, 4 B. & C. 259; *Doe* v. *Gee*, 9 Dowl. 612); but provided the writ is served on the persons in actual possession, an absolutely correct statement of the names will be unimportant (*Doe* d. *Frost* v. *Roe*, 3 Dowl. 563), as where the tenant is called *Jacob* instead of *Sarah* (*Doe* d. *Foulkes* v. *Roe*, 2 Dowl. 567), or the christian name is omitted (*Doe* d. *Warne* v. *Roe*, 2 Dowl. 517), for the court will not set aside the writ or the copy and service for a mere misnomer. (*Doe* d. *Stainton* v. *Roe*, 6 M. & S. 203; *Wells* v. *Suffield*, 4 C. B. 750.) Titled persons should be designated by their titles. (*Lapiere* v. *Germain*, 2 Lord Raym. 859; *Wells* v. *Suffield*, *supra.*)

Concurrent writs.

Parties.

Trustees of bankrupts, executors and administrators need not be so described in the writ (Cole, Eject. 94); but it is otherwise with churchwardens

Trustees of bankrupts, executors and administrators.

and overseers, who must be so named and described. (*Doe* d. *Llandesilio* v. *Roe*, 4 Dowl. 222; *Ward* v. *Clarke*, 12 M. & W. 747.) Churchwardens and overseers.

Corporations aggregate should be described by their corporate name (*Doe* v. *Miller*, 1 B. & Ald. 699; *Woolf* v. *City Steamboat Co.*, 7 C. B. 103), and corporations sole by their christian and corporate name. (Ad. Eject. 169.) Corporations.

Want of "reasonable certainty" in the description of the property will not nullify the writ; but will afford ground for an application for better particulars. (15 & 16 Vict. c. 76, s. 175.) But it is always necessary to claim enough, so as to include everything which the claimant seeks to recover, for although he may recover *less* he cannot recover *more* than he claims (*Denn* v. *Purvis*, 1 Burr. 327; *Guy* v. *Rand*, Cro. Eliz. 12); whilst remembering that a defendant may defend for part only, and that the verdict may be entered distributively according to the evidence, it is of course desirable to describe the premises with accuracy though in general terms. Any undivided part, share or proportion of houses or lands may be claimed in and by the writ. (*Rawson* v. *Maynard*, Cro. Eliz. 286; *Doe* v. *Birkhead*, 4 Ex. 110; *Ablett* v. *Skinner*, 1 Sid. 229; *Culley* v. *Taylerson*, 11 Ad. & E. 1008.) In describing property in the writ it is generally advisable to avoid the word "tenements," which comprises incorporeal hereditaments, for which ejectment will not lie. (Cole, Eject. 88.) A house may be described as "a house" or "dwelling-house" (*Royston* v. *Eccleston*, Cro. Jac. 654); but the word "messuage" (which "with the appurtenances" may include the curtilage and gardens, *Bettisworth's case*, 2 Co. R. 31 b) is more correct, and may be used for a stable, barn, church, or chapel. (1 Wms. Saund. 7; *Hillingsworth* v. *Brewster*, 1 Salk. 256; but see Description of property.

Martin v. *Davis*, 2 Stra. 914.) A "cottage" may be described as such. (*Hill* v. *Giles*, Cro. Eliz. 818; *Doe* v. *Sotheron*, 2 B. & Ad. 628.) In describing land the name and acreage of the close or field should be given. (*Savil's case*, 11 Co. R. 55 a; *Hammond* v. *Savill*, 1 Roll. R. 55; *Ablett* v. *Skinner*, *supra*; *Palmer's case*, Owen, 18; *Martyn* v. *Nichols*, Cro. Car. 573; *Pemble* v. *Sterne*, 1 Lev. 213; *Wykes* v. *Sparrow*, Cro. Jac. 435; *Dacre's case*, 1 Lev. 58; but see *Hutchinson* v. *Puller*, 3 Lev. 97.) Land unless arable should be described as "meadow," "pasture," &c. (Ad. Eject. 25), and when various sorts of land are claimed the acreage of *each* should be stated. (*Knight* v. *Symms*, 4 Mod. 97.)

Inaccuracies in the description are now, however, comparatively unimportant, for an application for better particulars may be made before appearance. (See *Doe* d. *Vernon* v. *Roe*, 7 Ad. & E. 14; *Doe* d. *Roberts* v. *Roe*, 2 D. & L. 673; *Doe* v. *Turner*, 11 C. B. 896; 2 Chit. Arch. 984, 9th ed.; Cole, Eject. 119; Day's C. L. P. Acts, 185.)

Service of writ.

No service of the writ is required where the defendant by his solicitor agrees to accept service and enter an appearance (Ord. IX. r. 1); in other cases the service of the writ (which in proceedings under sect. 213, C. L. P. Act, 1852, should have notice to find bail appended (*ante*, p. 277) must, wherever practicable, be personal (Ord. IX. r. 2); but a judge may order substituted or other service, or the substitution of notice for service, if from any cause the plaintiff is unable to effect prompt personal service. (*Ib.*) For various forms in which substituted service has been allowed, see *Cook* v. *Dey*, L. R., 2 Ch. D. 218; 45 L. J., Ch. 611; *Crane* v. *Jullion*, L. R., 2 Ch. D. 220; 24 W. R. 691; *Capes* v. *Brewer*, 24 W. R. 40; *Rafael* v. *Ongley*, 34 L. T. 124; *Dymond* v. *Croft*, 45 L. J.,

Ch. 604; 24 W. R. 842; *Whiteley* v. *Honeywell*, 24 W. R. 851. The service may be effected at any hour before midnight on last day (*Doe* d. *Kenrick* v. *Roe*, 5 D. & L. 578), but not on Sunday (29 Car. 2, c. 7, s. 6); and must be on the person or persons in *actual* possession to whom the writ is directed, as on the sub-tenant where the premises have been sub-let. (*Doe* v. *Cock*, 4 B. & C. 259. As to what constitutes "actual" as distinguished from "vacant" possession, see *post*, p. 293.)

When it may be effected; on whom.

Personal service on the tenant in possession may be effected *on* the premises or elsewhere (Lofft, 301; *Savage* v. *Dent*, 2 Str. 1064), in prison (*Doe* d. *Mann* v. *Roe*, 11 M. & W. 77), in a lunatic asylum (*Doe* d. *Gibbard* v. *Roe*, 3 M. & G. 87), or abroad. (*Doe* v. *Woodroffe*, 7 Dowl. 494.) Personal service on one of several tenants in possession (*Doe* d. *Bailey* v. *Roe*, 1 B. & P. 369), on one of two joint tenants (*Doe* d. *Williamson* v. *Roe*, 10 Moore, 493; *Doe* d. *Clothier* v. *Roe*, 6 Dowl. 291; if the notice be not addressed to him only, *Doe* d. *Braby* v. *Roe*, 10 C. B. 663), on one of several partners (*Doe* v. *Overton* v. *Roe*, 9 Dowl. 1039; *Doe* d. *Bennet* v. *Roe*, 7 C. B. 127), or on an under joint tenant (*Doe* d. *Hutchinson* v. *Roe*, 2 Dowl. 418), is good service. Even *showing* the writ to the tenant *on* the premises is good service, if he refuse to listen to the nature of it or to take it (*Doe* d. *Roberts* v. *Roe*, 6 Sc. N. R. 833); as also *off* the premises, where attempts are made to serve him with a copy and to explain the matter, and a copy is afterwards left for him *on* the premises with a servant. (*Doe* d. *Hope* v. *Roe*, 3 C. B. 771.) If the process server, after stating his business, be obstructed in his duty, *e.g.*, turned out of the house (*Doe* d. *Frith* v. *Roe*, 3 Dowl. 569), or forced by third persons from the presence of

How and where effected.

the tenant in possession (*Doe* d. *Mann* v. *Roe*, 11 M. & W. 77), thrusting a copy under the door is good service.

Service on tenant's wife, formerly good.

Formerly service on the tenant's wife on the premises (*Thrustout* v. *Coppin*, 2 W. Bl. 800; and see *Doe* d. *Royle* v. *Roe*, 16 L. J., C. P. 249), notwithstanding the tenant had left the country and settled abroad (*Doe* v. *Roe*, 1 D. & R. 514; but see *Doe* d. *Harrison* v. *Roe*, 10 Price, 30); or at her husband's dwelling-house, where she resided with him (*Doe* v. *Bayliss*, 6 T. R. 765; *Doe* d. *Wingfield* v. *Roe*, 1 Dowl. 693; *Doe* d. *Graef* v. *Roe*, 6 Dowl. 456); or in a shed, where the husband carried on his business closely adjoining the premises (*Doe* v. *Roe*, 1 Dowl. 67), was held good; and even "near the premises" was held sufficient for a rule *nisi*. (*Doe* d. *Bath* v. *Roe*, 7 Dowl. 692.) Service *on* the premises upon a woman representing herself to be the tenant's wife (*Doe* d. *Walker* v. *Roe*, 4 M. & P. 11; *Doe* d. *Grange* v. *Roe*, 1 Dowl., N. S. 274), and on the widow in possession as administratrix of a deceased tenant, was held sufficient. (*Doe* d. *Pamphilon* v. *Roe*, 1 Dowl., N. S. 186.)

Now otherwise.

Now, however, the service of the writ in all actions must be effected in the same manner; and, although the point is not free from doubt, it is submitted that service upon the tenant's wife would no longer be held good without an order of the court or a judge. Where, therefore, "prompt personal service" upon the tenant himself cannot be effected, the plaintiff will be well advised to apply to a judge in chambers for an order for substituted or other service, for otherwise he will, it is contended, be unable to sign judgment in default of appearance. The application must be supported by affidavit, setting forth the grounds upon which the application is made. (Ord. X.)

Service upon particular defendants.

Where the action is against husband and wife, service on the husband will be sufficient; but the court or a judge may order service on the wife when necessary (Ord. IX. r. 3), as *e.g.*, where the husband happens to be abroad.

Husband and wife.

Infants.

When an infant is defendant, service on his or her father or guardian, or, if none, then upon the person with whom he or she resides, will be good, unless otherwise ordered. (Ord. IX. r. 4.)

Lunatics or persons of unsound mind.

When the defendant is a lunatic or person of unsound mind, service on the committee of the lunatic or on the person with whom the person of unsound mind resides, or under whose care he or she is, will, unless the court or a judge otherwise orders, be deemed good service. (Ord. IX. r. 5.)

Partners.

Service may be effected upon a firm by serving any one of the partners, or, at the firm's principal place of business, upon any person having the control or management of the partnership business (Ord. IX. r. 6), and in a similar manner upon a person trading in the name of a firm. (Ord. IX. r. 6a.)

Upon corporations, &c.

Whenever by any statute provision is made for service of any writ of summons or other process upon any corporation or other body or number of persons, the writ must be served in manner so provided. (Ord. IX. r. 7.)

The mode of service of writs, legal notices and proceedings upon public companies, commissioners, &c. is generally defined by the public or private statutes regulating them. Thus the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 135, provides that service on the secretary shall be sufficient. (See *Wilson* v. *Caledonian Rail. Co.*, 5 Ex. 822, and *Thompson* v. *N. B. Rail. Co.*, 42 L. T. 95.) So the 7 Will. 4 & 1 Vict. c. 73, s. 26, provides, as to chartered

companies incorporated thereunder, for service on the clerk, *i. e. chief* clerk, &c. (*Walton* v. *Universal Salvage Co.*, 16 M. & W. 438.) The 7 & 8 Vict. c. 110; The Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 138; Commissioners Clauses Act, 1847 (10 Vict. c. 16), s. 99; Companies Act, 1862 (25 & 26 Vict. c. 89), s. 62, and the various acts incorporating the different companies, &c., must be consulted on this subject as occasion arises, together with the cases of *Pilbrow* v. *Pilbrow's Atmospheric, &c. Co.*, 3 C. B. 730; *Towne* v. *London and Limerick Steamship Co.*, 5 C. B., N. S. 730; and as to foreign companies, *Ingate* v. *Lloyd*, 4 C. B., N. S. 704; *Newby* v. *Van Oppen*, L. R., 7 Q. B. 293.

Service on corporations.

Writs issued against a corporation aggregate may be served on the mayor, head officer, town clerk, clerk, treasurer or secretary of such corporation. (C. L. P. Act, 1852, s. 16, which see.)

Charitable institutions.

Service on the matron *on* the premises and on the secretary, coupled with an acknowledgment by the solicitor of a charitable institution, was held good. (*Doe* d. *Fishmongers' Co.* v. *Roe*, 2 Dowl., N. S. 689.)

Chapels.

Service on the minister and a trustee (*Doe* d. *Smith, Bart.* v. *Roe*, 8 Dowl. 509), on the surviving lessees, and a sextoness (*Doe* d. *Kirschner* v. *Roe*, 7 Dowl. 97), has been held good in ejectment for a chapel. (See also *Doe* d. *Somers* v. *Roe*, 8 Dowl. 292; *Doe* d. *Dickens* v. *Roe*, 7 Dowl. 121.)

Where land or messuage is vacant.

In cases of vacant possession, when it cannot otherwise be effected, service of the writ must be made (as under C. L. P. Act, 1852, s. 170) by posting the writ on the door of the dwelling-house, or other conspicuous part of the property (Ord. IX. r. 8); but service in this manner will not

entitle the plaintiff to sign judgment without an order (Prac. Reg. 112, H. T. 1853, *post*, p. 301; see *per* Lush, J., Bitt. 8), and should only be effected as a last resort.

What constitutes "vacant possession" may occasionally be a question of practical difficulty; for there may be a legal or constructive possession without actual occupation, as during the tenant's absence (*Doe* d. *Johnson* v. *Roe*, 12 L. J., Q. B. 97), or where tenant has left beer in the cellar, or hay in a barn. (*Savage* v. *Dent*, 2 Str. 1064.) But if the tenant has locked up and quitted the house (*Doe* v. *Cock*, 4 B. & C. 259), or the house has been pulled down (*Doe* d. *Norman* v. *Roe*, 2 Dowl. 399, 428), or is untenantable with no property in it, as unfinished (*Doe* d. *Schovell* v. *Roe*, 3 Dowl. 691), the claimant may proceed as on a vacant possession; but it must clearly appear that there is no tenant in possession (*Doe* d. *Burrows* v. *Roe*, 7 Dowl. 326), for if *some* only of the houses included in the lease are vacant, the claimant cannot so proceed. (*Doe* d. *Timothy* v. *Roe*, 8 Scott, 126.) In all such cases, as far as possible, copies of the writ should be served on the parties interested and posted up on the premises (*Doe* d. *Chippindale* v. *Roe*, 7 C. B. 125), and service of a writ addressed "to the assignees and personal representatives of A. B., deceased," by posting copies on the door, was held good. (*Harrington* v. *Bytham*, 2 C. L. R. 1033.)

What constitutes vacant possession.

Service out of the jurisdiction may be allowed by a judge at his discretion, whenever the whole or any part of the property is within the jurisdiction (Ord. XI. r. 1), upon application for the order, supported by evidence showing where the defendant may probably be found, and the ground upon which the application is made. (*Ib.* r. 3.) The order which must limit a time for appearance

Service out of the jurisdiction.

(*ib.* r. 4), should also provide for service of interrogatories, if required. (*Young* v. *Brassey*, L. R., 1 Ch. D. 277.)

Date of service must be indorsed.

The person serving the writ must (except in the case of a writ issued pursuant to an order for substituted service under Ord. X., *Dymond* v. *Croft*, L. R., 3 Ch. D. 512), as under the C. L. P. Act, 1852, s. 153, within three days at most after such service, indorse on the writ the day of the month and week of the service, otherwise the plaintiff cannot proceed by default for non-appearance (Ord. IX. r. 13), and every affidavit of service of the writ must mention the day on which the indorsement was made. (*Ib.*)

Where writ may be issued.

The writ may be issued, in the discretion of the plaintiff, either in London or in any district registry. (Ord. V. r. 1.)

Where appearance must be entered.

If issued in London a defendant must enter his appearance in London. (Ord. XII. r. 1.) If issued in a district registry, any defendant residing or carrying on business within the district must appear there (*ib.* r. 2); but any defendant neither residing nor carrying on business in the district may appear either in the district registry or in London. (Ord. XII. r. 3.) If, however, he appear elsewhere than where the writ was issued, he must on the same day give notice of his appearance to the plaintiff or his solicitor (Ord. XII. r. 6a), so that the plaintiff may now enter judgment in case of default, without searching for appearance, both in London and in the district registry. But he must of course allow time for the notice to reach him in due course of post before entering judgment. (Ord. XIII. r. 5a.)

Time limited for appearance to writ.

The defendant must enter an appearance to the writ within eight (instead of sixteen, 15 & 16 Vict. c. 76, s. 169) days after service of the writ, inclusive of the day of service. If the defendant be

out of the jurisdiction, he must appear within the time limited by the order giving leave to effect service. (Ord. XI. r. 4.)

How to enter an appearance.

In entering an appearance the defendant must deliver to the proper officer a memorandum, dated on the day of delivering it, containing the name of his solicitor, or stating that he defends in person. (Ord. XII. r. 6a.) If he defends by a solicitor, the solicitor, or where he defends in person he himself, must state on the memorandum his place of business, and if the appearance be entered in London an address for service within three miles from Temple Bar, or if the appearance is entered in a district registry an address for service within the district. (Ord. XII. rr. 7, 8.) The districts of the district registrars are defined by an Order in Council issued under s. 60 of the Judicature Act, 1873, 12th August, 1875. An appearance may be entered by a third person, though he be not a solicitor. (*Oake* v. *Moorecroft*, L. R., 5 Q. B. 76, 78.)

If the memorandum does not contain such address, it will not be received; and if any such address be illusory or fictitious, the appearance may be set aside by the court or a judge on the application, by summons, of the plaintiff. (Ord. XII. r. 9.)

Partners must appear individually in their own names.

Partners sued in the name of their firm must appear individually in their own names, and the names of all defendants appearing in the same action by the same solicitor must be in the memorandum. (Ord. XII. rr. 12, 13.)

Any person trading and sued in the name of a firm, must appear in his own name. (Ord. XII. r. 12a.)

Upon receipt of the memorandum the officer will enter the appearance in the cause book. (*Ib.* r. 11.)

When defendant is to appear.

A defendant may appear at any time before judgment; but if he appear *after* the time (eight days) limited for appearance, he must on the same day give notice thereof to the plaintiff's solicitor, or to the plaintiff himself if he sues in person. (Ord. XII. r. 15.) By giving this notice he will be in the same position as if he had appeared in time; but judgment signed *after* appearance, though plaintiff have no notice, is irregular. (*Rhodes* v. *Bryant*, 2 F. & F. 265; *Oake* v. *Moorecroft*, L. R., 5 Q. B. 76, 78.)

It is essential that appearances should comply with these requirements, otherwise they may be set aside (*Smith* v. *Wedderburne*, 4 D. & L. 297); but if an appearance be entered which is wrong or irregular, it ought to be amended, and not a new appearance entered. (*Bate* v. *Bolton*, 4 Dowl. 160, 677.) If the defendant be described in the writ by initials, or by a wrong name, the appearance should be entered in his true name, as "William Wells Kilpin, sued as W. W. Kilpin." (*Lomax* v. *Kilpin*, 4 D. & L. 295.) An infant must appear by his guardian (Co. Litt. 135 b; *Carr* v. *Cooper*, 1 B. & S. 230; *Jarman* v. *Lucas*, 33 L. J., C. P. 108), in the guardian's own name. (*Fitzgerald* v. *Villiers*, 3 Mod. 236.)

Tenant, on being served with writ, must give notice to his landlord.

In order to afford the landlord a reasonable opportunity of himself appearing and defending the possession of property in the occupation of his tenants, in cases where the claim is inconsistent with his own title, and in order to avoid successful collusion between the claimant and the tenant in possession, it was also enacted, by the C. L. P. Act, 1852, s. 209 (re-enacting 11 Geo. 2, c. 19, s. 12), that every tenant to whom any writ in ejectment shall be delivered, or to whose knowledge it shall come, shall *forthwith* (*i. e.* with all reasonable celerity, *per* Tindal, C. J., in *Burgess*

v. *Boetefeur*, 7 M. & G. 494) give notice thereof to his landlord, or to his bailiff or receiver, under penalty of forfeiting the value of three years' improved or rack rent of the premises demised or holden in the possession of such tenant to the person of whom he holds, to be recovered by action in any court of common law having jurisdiction for the amount.

Sect. 209 is remedial to the landlord rather than penal to the tenant.

Under this section, which, it must be remembered, is remedial to the landlord rather than penal to the tenant, the court will set aside a regular judgment and admit the landlord to defend, if the tenant has not given him notice (*Doe* d. *Troughton* v. *Roe*, 4 Burr. 1996; *Doe* d. *Meyrick* v. *Roe*, 2 Cr. & J. 682; and see *Dobbs* v. *Passer*, 2 Str. 975); but not after execution executed, unless in the case of inadvertence (*Doe* d. *Mullarky* v. *Roe*, 11 A. & E. 333; *Doe* d. *Butler* v. *Roe*, 2 Har. & W. 130), or of collusion between the claimant and the tenant (*Doe* d. *Thomson* v. *Roe*, 4 Dowl. 115; *Goodtitle* v. *Badtitle*, 4 Taunt. 820), which if proved will always insure the interference of the court. (*Doe* d. *Grocers' Co.* v. *Roe*, 5 Taunt. 205.)

A tenant to a mortgagor who does not give him notice of an ejectment brought by the mortgagee to enforce an attornment is not liable to the penalties. (*Buckley* v. *Buckley*, 1 T. R. 647.)

Right of landlord to appear and defend.

15 & 16 Vict. c. 76, s. 172.

Judicature Acts, Ord. XII. r. 18.

Appearance by persons not named in the writ.

This section having insured the landlord's obtaining immediate information from the tenant, he was enabled by s. 172, C. L. P. Act, 1852 (re-enacting 11 Geo. 2, c. 19, s. 13), to intervene and defend. This right is preserved by Ord. XII. r. 18, which provides, that any person not named as a defendant in the writ may, by leave of the court or a judge, appear and defend, on filing an affidavit showing that he is in possession of the land either by himself or his tenant.

Under the act of George II. the word "landlord," which was there used, was construed to extend to any person claiming title consistent with the possession of the occupier, whether he had actually received any rent or not. (*Lovelock* v. *Dancaster*, 4 T. R. 122.) Thus a mortgagee out of possession (*Doe* v. *Cooper*, 8 T. R. 645), able to show that he has a *bonâ fide* interest in the result (*Doe* d. *Pearson* v. *Roe*, 6 Bing. 613), or an heir who has never been in possession (*Doe* d. *Hebblethwaite* v. *Roe*, 3 T. R. 783 (*n*), or a remainderman claiming under the same title (*Lovelock* v. *Dancaster*, 3 T. R. 783; but see *Whitworth* v. *Humphries*, 5 H. & N. 185), or a devisee in trust (*Lovelock* v. *Dancaster*, 4 T. R. 122), or the sub-lessee of three private boxes in a theatre, to the extent of his interest (*Croft* v. *Lumley*, 4 E. & B. 608), may be admitted to defend as landlord.

But a person who has recovered judgment in ejectment upon a forfeiture of a lease, but has not actually obtained possession (*Thompson* v. *Tomkinson*, 11 Exch. 442), or a third person claiming adversely (*Doe* d. *Horton* v. *Rhys*, 2 Y. & J. 88), will not be permitted to defend as landlord. "Where a person claims in opposition to the title of the tenant in possession, he can in no light be considered as landlord, and it would be unjust to the tenant to make him a co-defendant,—their defences might clash." (*Per* Lord Mansfield, *Fairclaim* v. *Shamtitle*, 3 Burr. 1295; and see *Driver* v. *Lawrence*, 2 W. Bl. 1259.) Nor will two persons, claiming separately as landlords of the same tenant for the same land (*Doe* d. *Lloyd* v. *Roe*, 15 M. & W. 431), be permitted to defend as landlords, though one person as landlord for the whole, and another, as assignee of an underlease, as landlord for part, of the premises may be (*Chester* v. *Wortley*, 17 C. B. 410); and the courts

will not set aside a judgment and execution in order to let in a person to defend, though he make an affidavit setting forth a clear title and offer to pay costs. (*Doe* d. *Ledger* v. *Roe*, 3 Taunt. 506.)

When application for permission to defend should be made.

The application to be permitted to defend as landlord should be made as soon as the person has notice of the writ, so that an appearance may be entered within the eight days allowed for doing so, and the affidavit in support must at least show a *primâ facie* case of possession by the applicant or his tenant. (*Croft* v. *Lumley*, 24 L. J., Q. B. 78.)

Upon complying with the requirements of this rule, the landlord is entitled as a matter of right to be let in to defend, and the court or judge has no power, in the case of a landlord residing out of the jurisdiction, to impose upon him the condition of finding security for costs. (*Butler* v. *Meredith*, 24 L. J., Ex. 239.)

Persons appearing as landlords.

Any person appearing to defend an action for the recovery of land as landlord, in respect of property whereof he is in possession only by his tenant, must state in his appearance that he appears as landlord. (Ord. XII. r. 19; see also s. 173, C. L. P. Act, 1852, which is almost identical in terms.)

Stay of proceedings against tenants.

Under the Judicature Act, 1873 (36 & 37 Vict. c. 66, s. 24, sub-s. 5), the courts are not disabled from directing a stay of proceedings in any cause pending before them, and will in cases of emergency restrain actions against tenants subsidiary to an action of ejectment, as where the landlord appears and defends for the whole of the land. The application to stay must be by motion in a summary way, but it does not very clearly appear whether it may be made *ex parte*, or whether, as is the case in proceedings under s. 25, sub-s. 8

(*ante*, p. 281), the applicant must proceed by summons. (See *Blewitt* v. *Dowling*, Bitt. 17.)

Where person not named in writ has obtained leave to appear.

Where a person not named as defendant in the writ has obtained leave of the court or judge to appear and defend, he must enter an appearance according to the foregoing rules intituled in the action against the party or parties named in the writ as defendant or defendants, and shall forthwith give notice of such appearance to the plaintiff's solicitor, or to the plaintiff if he sues in person, and shall in all subsequent proceedings be named as a party defendant to the action. (Ord. XII. r. 20.) This rule is substantially the same as rule 113, R. G. H. T. 1853.

A defendant may limit his defence to part only.

Any person appearing to the writ shall be at liberty to limit his defence to a part only of the property mentioned in the writ, describing that part with reasonable certainty (*ante*, p. 287) in his memorandum of appearance, or in a notice intituled in the cause (for form of notice, see No. 7 in Part I. of Appendix (A.) to the Judicature Acts), and signed by him or his solicitor, such notice to be served within four days after appearance; and an appearance where the defence is not so limited shall be deemed an appearance to defend for the whole. (Ord. XII. r. 21; and see s. 174, C. L. P. Act, 1852.)

A defendant for part only should not describe it as "freehold" or "copyhold," unless it be so described in the writ. (*Doe* v. *Jones*, 1 Camp. 367.) "A right to enter and perform divine service" is not sufficient to entitle a parson to defend for a chapel, &c. (*Martin* v. *Davis*, 2 Str. 914.)

Defendant's liability for costs.

Each of several defendants who appear will be (in the event of a general verdict for the plaintiff) liable to pay the whole of the plaintiff's costs,

unless he confess the plaintiff's title. (C. L. P. Act, 1852, ss. 204, 205; *Johnson* v. *Mills*, L. R., 3 C. P. 22; Day's C. L. P. Acts, 185.)

When defendants need not appear.

If a servant, bailiff or person not claiming any right or title be served with a writ, he should not appear, but suffer judgment by default; otherwise he will be personally liable, and the fact of his being only a servant will not be any defence. (*Doe* v. *Stradling*, 2 Stark. 187; *Doe* v. *Stanton*, 2 B. & Ald. 371.) He should, however, hand the copy writ to his employer, leaving him to obtain leave to appear and defend either as tenant in possession or as landlord, or to act as he may be advised. If judgment be signed against the servant in default of appearance, he will not be liable for costs, which would only be payable as damages in a subsequent action for mesne profits, and the judgment by default is then no evidence of his ever having been in possession. (*Doe* v. *Stanton*, 2 B. & Ald. 373, *per* Bayley, J.)

Before proceeding (on non-appearance of defendant) upon default, plaintiff must file affidavit of service.

If any defendant fail to appear to the writ, the plaintiff must, before proceeding upon default of appearance, file an affidavit of service or of notice in lieu of service (*ante*, p. 288), as the case may be. (Ord. XIII. r. 2.) By r. 112, H. T. 1853, no judgment in ejectment for want of appearance or defence, whether limited or otherwise (Ord. XIII. r. 7, *post*, p. 304), shall be signed without first filing an affidavit of the service of the writ according to the C. L. P. Act, 1852, and a copy thereof, or, where personal service has not been effected, without first obtaining a judge's order or a rule of court authorizing the signing such judgment; which said rule or order, or a duplicate thereof, shall be filed, together with a copy of the writ. (See *ante*, p. 293.)

Affidavit of service must be sufficient.

In *all* cases, where personal service has or has not been effected, an affidavit of service is neces-

sary. And it *must* be sufficient, for otherwise the judgment and execution may be set aside and restitution ordered. In cases where personal service has *not* been effected, an *ex parte* application may be made to the court or a judge for a rule or order nisi or a rule or order absolute (granting either being at the discretion of the court or judge) for leave to sign judgment if the defendant do not appear.

Requisites of affidavit.

The affidavit of service must be intituled in the proper division of the High Court of Justice, with the names of *all* claimants and defendants at full length. (*Doe* d. *Barles* v. *Roe*, 5 Dowl. 447; *Doe* d. *Cousins* v. *Roe*, 4 M. & W. 68; *Doe* v. *Lloyd*, 2 Dowl., N. S. 330; Chit. Forms, 534 (7th ed.). But if any defendant be in any way *misnamed* in the writ, the affidavit should *in its title* follow the writ (*Sims* v. *Prosser*, 15 M. & W. 151; *Reg.* v. *Surrey*, 8 Dowl. 510); but if he have appeared by his right name, a *subsequent* affidavit should name him correctly. (*Lomax* v. *Kilpin*, 16 M. & W. 94; and see *Baldwin* v. *Bauerman*, 12 C. B. 152; *Shrimpton* v. *Carter*, 3 Dowl. 648; *Tagg* v. *Simmonds*, 4 D. & L. 582.) Preferably the process server himself should make the affidavit, but any person who saw service effected may do so. (*Goodtitle* v. *Badtitle*, 2 Bos. & P. 120.) It must state *positively*, and not merely deponent's belief, that the person served was tenant in possession (*Doe* v. *Hitchcock*, 2 Dowl., N. S. 1), not "a person in possession." (*Doe* d. *Robinson* v. *Roe*, 1 Chit. R. 118 (*a*); *Doe* d. *Fraser* v. *Roe*, 5 Dowl. 720.)

Affidavit of service on tenant's wife,

An affidavit of service on tenant's wife (where such service is allowed) must state *where* service was effected. (*Oates* v. *Coates*, 6 T. R. 765; *Right* v. *Wrong*, 2 D. & R. 84; *Doe* d. *Williams* v. *Roe*, 2 Dowl. 89; *Doe* d. *Mingay* v. *Roe*,

6 Dowl. 182; *Doe* d. *Royle* v. *Roe*, 4 C. B. 256.) If effected at tenant's residence, away from the premises claimed, the affidavit must state that she was living with him at the time. (*Doe* d. *Briggs* v. *Roe*, 2 Cr. & J. 202; *Jenny* v. *Cutts*, 1 B. & P. N. R. 308.) An affidavit of service on the tenant's servant or a member of his family, must state a subsequent acknowledgment by the tenant that the copy reached his hands (*Doe* d. *Halsey* v. *Roe*, 1 Chit. R. 100; *Doe* d. *Ginger* v. *Roe*, 9 Dowl. 336; *Doe* d. *Dinorben* v. *Roe*, 2 M. & W. 374; *Doe* d. *Harris* v. *Roe*, 1 Dowl., N. S. 704); or by the servant or relative that he or she had actually given it to him. (*Doe* d. *Chaffey* v. *Roe*, 9 Dowl. 100; but see *Doe* d. *Tucker* v. *Roe*, 4 Moo. & Sc. 165.) But *special* facts (*Doe* d. *Tarluy* v. *Roe*, 1 Chit. R. 506), from which the court or judge may infer that the copy did actually reach his hands, or that tenant has absconded, will be sufficient. (*Sprightly* v. *Dunch*, 2 Burr. 1116.)

servant, member of his family,

Service on an agent must be supported by a statement of his express authority to accept service on tenant's behalf, or facts from which his authority may be implied. (*Doe* d. *Collins* v. *Roe*, 1 Dowl. 613; *Doe* d. *Nottige* v. *Roe*, 4 M. & G. 28.)

or agent.

The affidavit must show sufficient service on *each* of several tenants named in the writ. (*Doe* d. *Levi* v. *Roe*, 7 Dowl. 102; *Doe* d. *Slee* v. *Roe*, 8 Dowl. 66; *Doe* d. *Cock* v. *Roe*, 6 M. & G. 273.)

Affidavit must show service on *each* of several tenants.

The affidavit of service upon public companies, commissioners, corporations aggregate, &c. must show that the service was effected in manner prescribed by the statute (*ante*, p. 291), defining the mode thereof.

On companies, &c.

Where the writ has been served under Ord. IX. r. 8 (*ante*, p. 292), the affidavit must specially state that the premises have been abandoned and deserted by defendant, and show a case of "vacant

In cases of vacant possession.

possession" within the meaning of 15 & 16 Vict. c. 76, s. 170. (*Ante*, p. 293.)

In cases of constructive service.

Where a constructive service is relied on, the affidavit must show especially why such service should be deemed good service on the tenant. (*Doe* d. *Pigott* v. *Roe*, 4 D. & L. 88.)

Where no appearance entered, plaintiff may enter judgment.

In case no appearance be entered in an action for the recovery of land within the time limited for appearance, or if an appearance be entered but the defence be limited to part only, the plaintiff is at liberty to enter a judgment that the person whose title is asserted in the writ shall recover possession of the land, or of the part thereof to which the defence does not apply. (Ord. XIII. r. 7. This rule is in substance the same as s. 177, C. L. P. Act, 1852.)

Where plaintiff has indorsed a claim for mesne profits, &c.

Where the defendant fails to appear to the writ of summons and the plaintiff has indorsed a claim for mesne profits, arrears of rent or damages for breach of contract upon the writ, though he may enter judgment for the *land*, as above stated (Ord. XIII. r. 8), he must proceed somewhat differently as to such other claims. He need not deliver a statement of claim, but (1) where the claim is for a debt or liquidated demand only, he may file an affidavit of service, or notice in lieu of service, as the case may be, and a statement of the particulars of his claim in respect of the causes of action stated in the indorsement upon the writ, and may, after the expiration of eight days, enter final judgment for the amount shown thereby and costs to be taxed, provided that the amount shall not be more than the sum indorsed upon the writ besides costs. (Ord. XIII. r. 5.) (2) Where the plaintiff's claim is not for a debt or liquidated demand only, but for pecuniary damages, interlocutory judgment may be entered and a writ of inquiry issued to assess the damages, the

amount of which may, however, be otherwise ascertained by order of the court or a judge (Ord. XIII. r. 6), as *e. g.*, by a judge, or a judge and jury, or a judge with assessors, or a referee, official or special. (Ord. XXXVI. r. 2.)

When judgment by default may be set aside.

A judgment signed for want of appearance, if *irregular*, may, upon application to the court or a judge within a reasonable time, be set aside (r. 135, H. T. 1853; *Doe* d. *Parr* v. *Roe*, 1 Q. B. 700; *Doe* v. *Williams*, 2 A. & E. 381); and even if *regular*, upon terms, if such a course be proper and requisite to meet the justice of the case. (*Doe* d. *Shaw* v. *Roe*, 13 Price, 260; *Doe* d. *Mullarky* v. *Roe*, 11 A. & E. 333.) But if a tenant, having a good defence, *neglects* to appear, he will generally be left to bring a subsequent ejectment. (*Doe* d. *Ledger* v. *Roe*, 3 Taunt. 506.)

Pleadings.

Unless the defendant on appearance (see Ord. XII. r. 10) has dispensed with its delivery (Ord. XIX. r. 2), the plaintiff *may*, at any time after issuing the writ (Ord. XXI. r. 1 *b.*), and *must* (unless otherwise ordered by the court or judge), within six weeks from the defendant's appearance (*ib.* r. 1 *a.*), deliver to the defendant a statement of his complaint and of the relief or remedy he claims. (Ord. XIX. r. 2.) If he do not so deliver it, the defendant may, at the expiration of the six weeks, apply to the court or a judge to dismiss the action with costs for want of prosecution (Ord. XXIX. r. 1); but if without being required to deliver any, the claimant unnecessarily or improperly deliver a statement of claim, it will be at his own costs. (Ord. XXI. r. 1 *c.*)

Statement of claim.

Contents of statement of claim and pleadings generally.

The statement of claim (Ord. XIX. r. 8), and, indeed, all other pleadings, should state as concisely and distinctly as possible (see *Marsh* v. *Mayor, &c. of Pontefract*, 20 Sol. Journ. 161) the

material facts upon which the pleader relies. (Ord. XIX. r. 4.) But it must neither allege conclusions of law (*Watson* v. *Rodwell*, 45 L. J., Ch. 744; L. R., 3 Ch. D. 380; *Hanmer* v. *Flight*, 24 W. R. 346) from, or contain the evidence (*Weir* v. *Barnett*, Bitt. 69; *Smith* v. *West*, Bitt. 123) in support of, those facts. If the contract of tenancy or the relation of landlord and tenant between the claimant and defendant is to be implied from a series of letters, conversations or circumstances, general reference may be made thereto, and they need not be set out in detail. (Ord. XIX. r. 27.) The pleader may also state the effect of any document without setting it out in full, unless the *precise* words are material. (Ord. XIX. r. 24.) Where notice to quit, demand of possession, &c. must have been given or made to enable him to succeed in ejectment, he may allege such notice, &c. as a fact. (*Ib.* r. 26.) In all cases either the statement of claim or the indorsement of the writ should give full particulars. (Bitt. 14, 44.)

Venue in ejectment formerly local, *now* transitory.

Formerly the venue in ejectment being local had to be laid in the county where the lands were situate, and if at the trial the premises were found to be in a different county the claimant was liable to be non-suited. Now, however, local venues are abolished. The claimant in his statement of claim must name the county or place in which he proposes the action shall be tried, and unless otherwise ordered (it is left almost entirely to the discretion of the judge) it shall be tried there. If he omit to name a place the action will be tried in Middlesex. A judge's order may be discharged or varied by a divisional court. (Ord. XXXVI. r. 1.)

Discovery and inspection.

The claimant at the time of delivering his claim, and the defendant at the time of delivering his defence, and each at any subsequent time before the close of the pleadings, may as of right

(and either party by leave obtained upon application supported by affidavit, at any time may) deliver interrogatories in writing for the examination of the opposite party or parties (Ord. XXXI. r. 1), notifying at foot which of such interrogatories each defendant is required to answer. Interrogatories may, by leave, be delivered to any member or officer of a corporation which is a party to the action. (*Ib.* r. 4.) Interrogatories.

Wherever an order for interrogatories is necessary, they will be gone into on the application, and will not be granted as of course (*Hewetson* v. *Whittington Soc.*, Bitt. 27); and it seems the usual interrogatory as to documents will not be allowed without first getting an order (under Ord. XXXI. r. 12; *Pitten* v. *Chatterburg*, Bitt. 62), but it is certainly difficult to say why it should not be.

Under the provisions of the C. L. P. Act, 1854, ss. 50, 52, interrogatories could only be put by leave of a judge, but the power though extended is still limited. Interrogatories which seek exclusively for the case of the other side, or are "fishing," irrelevant or unnecessary, are as objectionable under the new as under the old system; and if either party on being interrogated object to answer any or all of the interrogatories administered, on the ground that it or they is or are scandalous, irrelevant, not put *bonâ fide* for the purpose of the action, immaterial, or objectionable on any other ground, he may either take the objection in the affidavit in answer or apply within four days after service, to a judge at chambers to set aside or strike out any one or more of the interrogatories so objectionable (Ord. XXXI. r. 5; R. S. C. November, 1878); whether he succeed in his application or not being entirely dependent upon the particular views of the particular judge in chambers. The answer must be filed within Must be answered by

affidavit filed within ten days.

ten days unless the time is enlarged by a judge. (Ord. XXXI. r. 6.) Objections to answer must be specific. (*Church* v. *Perry*, 36 L. T. 513.)

Form of affidavit in answer.

Like all others, the affidavit in answer must be made in the first person, divided into paragraphs numbered consecutively, each dealing as nearly as possible with a distinct portion of the subject (R. G., M. V. 1854, r. 2), and, following the order of the interrogatories, answering or assigning reasons for not answering each specifically. (*Chester* v. *Wortley*, 18 C. B. 239.) Where the matter is not within the personal knowledge of the deponent, the affidavit must be on his "information and belief," or state that he has none on the subject (*The Minnehaha*, L. R., 3 Ad. 148, 151); but he is not bound to procure information for the purpose of answering (*per* Brett, J., *Phillips* v. *Routh*, L. R., 7 C. P. 287), and the sufficiency of the answer, if objected to, will be determined by the court or a judge on motion or summons. (Ord. XXXI. r. 9.) If the affidavit exceed ten folios it must be printed. (*Ib.* r. 7, R. S. C., June, 1876.)

Omission to answer, or insufficient answer.

Where any person interrogated omits to answer or answers insufficiently, the party interrogating may apply to the court or judge for an order requiring him to answer or to answer further, either by affidavit or by *viva voce* examination, as the judge may direct. (Ord. XXXI. r. 10.) Application for such an order should be made promptly (*Chester* v. *Wortley*, *supra*), and should be, in special cases, supported by affidavit. (*Swift* v. *Nun*, 26 L. J., Ex. 365.)

What interrogatories admissible.

As a general rule, it would appear to be impossible to define what interrogatories will or will not be struck out at chambers in any given case. The courts having a general discretion (*Tupling* v. *Ward*, 6 H. & N. 749), guided by the principles upon which

courts of equity formerly allowed discovery, necessarily modified according to the different circumstances of different cases (see Day's C. L. P. Acts, 307, and cases there cited), some judges will indignantly strike out interrogatories which other judges will unhesitatingly allow, and whilst apparently there is at present more trouble about interrogatories under the new system than under the old procedure, now, as then, an appeal will probably prove fruitless. (*Post*, p. 320.) It seems, however, settled that a claimant may interrogate the defendant as to whether he is or is not the real defendant (*Sketchley* v. *Conolly*, 11 W. R. 573), and the defendant may by interrogating the plaintiff seek to discover the character in which he claims, and the pedigree upon which he relies (*Flitcroft* v. *Fletcher*, 25 L. J., Ex. 94), provided he can show that he is wholly unacquainted with the plaintiff's title. (*Stoate* v. *Rew*, 32 L. J., C. P. 160; *Pearson* v. *Turner*, 33 L. J., C. P. 224; *Blyth* v. *L'Estrange*, 3 F. & F. 154; see also *Ingilby* v. *Shafto*, 33 Beav. 31.) But a defendant who holds over after the expiration of his lease, will not be allowed to interrogate the plaintiff with a view of showing that his title has expired (*Wallen* v. *Forrestt*, L. R., 7 Q. B. 239); nor will a claimant be allowed to interrogate a defendant as to the title under which he claims to retain possession, or tending to show a sub-lease to the defendant by the lessee, amounting to a forfeiture by the lessee. (*Bishop of Cork* v. *Potter*, I. R., 11 C. L. 94.) Generally a party is entitled to discovery of the facts necessary to support his opponent's case, but not of the evidence by which it is to be proved. (*Eade* v. *Jacobs*, 47 L. J., Ex. 74; 26 W. R. 159.) Interrogatories should be so put that the party interrogated can answer "yes" or "no" to them. (*Armitage* v. *Fitzwilliam*,

20 Sol. Journ. 281.) Any party may put in evidence such one or more of the answers of the opposite party as he chooses, subject to power in the judge to direct the others also to be put in. (Ord. XXXI. r. 23.)

Time when interrogatories *should* be administered.

In no case may parties take advantage of the provisions of the Judicature Acts for the purpose of increasing costs, and the practice of delivering interrogatories before the statement of defence has been delivered (unless justified by special circumstances), though admissible under Ord. XXXI. r. 1, will not be allowed in the Common Law Divisions, unless good cause be shown for their allowance at so early a stage (*Mercier* v. *Cotton*, L. R., 1 Q. B. D. 442; *Disney* v. *Longbourne*, L. R., 2 Ch. D. 704; 45 L. J., Ch. 32; *Harbord* v. *Monk*, 27 W. R. 164; *Beal* v. *Pieling*, 38 L. T. 486); whilst the costs occasioned by all interrogatories exhibited unreasonably, vexatiously or at improper length, will have to be borne by the party in fault. (Ord. XXXI. r. 2. See also Add. Rules (Costs), r. 18.)

Discovery of documents.

Any party may, without filing any affidavit, apply (having first taken out a summons, 20 Sol. Journ. 32) to a judge for an order directing any other party to the action to make discovery on oath of the documents which are or *have been* in his possession or power, relating to any matter in question in the action (Ord. XXXI. r. 12, and see *New Brit. Mut. Inv. Co.* v. *Peed*, L. R., 3 C. P. D. 196; 26 W. R. 354); and the court or a judge may at any time during the pendency of any action or proceeding, order the production by any party thereto on oath of such of the documents in his possession or power relating to any matter in question in such action or proceeding, as the court or judge shall think right; and the court may deal with such documents when produced in such

manner as shall appear just. (Ord. XXXI. r. 11.) It has been said that a plaintiff is not entitled to discovery until he has delivered his claim (*Cashin* v. *Cradock*, L. R., 2 Ch. D. 140; 20 Sol. Journ. 282); nor a defendant until he has delivered his statement of defence (*Ib.*); but it is submitted this is not the case in practice when cause is shown for an early application.

A defendant in possession may be compelled to make an affidavit of his documents of title, although he may have a right to object to produce them. (*New Brit. Mut. Inv. Co.* v. *Peed*, L. R., 3 C. P. D. 196; 26 W. R. 354.)

Although the affidavit formerly required by s. 50, C. L. P. Act, 1854, tracing some one document into the possession or power of the opposite party, is now dispensed with, the nature of the document of which discovery is sought must at least be known; for the act is not intended to encourage speculative summonses (*per* Lush, J., 20 Sol. Journ. 58), and parties seem only entitled to discovery of documents which they have a *primâ facie* right to inspect. (*Mattock* v. *Heath*, 20 Sol. Journ. 54; but see *per* Quain, J., *ib.* 101.)

The party against whom the order for discovery is made must specify in his affidavit (which is in general conclusive, *Welsh Steam Collieries* v. *Gaskell*, 36 L. T. 352; *Johnson* v. *Smith*, 25 W. R. 539) which, if any, of the documents mentioned in the order he objects to produce. (Ord. XXXI. r. 13.)

Inspection of documents.

Every party to an action or other proceeding may, at or before the hearing, give notice in writing to any other party, in whose pleadings or affidavits reference is made to any document, to produce such document for the inspection of the party giving such notice or of his solicitor, and to permit him or them to take copies thereof; and any party not complying with such notice shall not afterwards put such document in evidence

on his behalf in such action, unless he satisfy the court that it relates only to his own title, he being a defendant, or that he had some sufficient cause for not complying with such notice (Ord. XXXI. r. 14); and no costs of such notice or inspection will be allowed, unless in the opinion of the taxing master there was good and sufficient reason for it. (Add. Rules (Costs), 15.)

The party to whom such notice is given must, within two days from the receipt thereof, if *all* the documents therein referred to *have been* set forth by him in his affidavit of documents, or within four days if *any* of the documents referred to in such notice *have not been* set forth by him in such affidavit, give notice to the party desiring inspection, stating a time within three days from delivery thereof at which the documents, or such of them as he does not object to produce, may be inspected at the office of his solicitor, and stating which (if any) of the documents he objects to produce and on what ground (Ord. XXXI. r. 16); or if he omits to give notice of time for inspection or objects to give inspection, the party desiring it may (*ib.* r. 17) apply to a judge for an order (which he may sufficiently serve on the solicitor of the objecting party) (*ib.* rr. 21, 22) to inspect documents; and, except in the case of documents referred to in the pleadings or affidavits of the party against whom the application is made or disclosed in his affidavit of documents, such application must be founded upon an affidavit showing of what documents inspection is sought, that the party applying is entitled to inspect them, and that they are in the possession or power of the other party. (*Ib.* r. 18.) In an application against a company, an officer of the company may be named to make discovery without being made a party to the suit. (*Cooke* v. *Ocean Steam Co.*, 20 Sol. Journ. 80.) Where satisfied that

the right to discovery or inspection sought depends on the determination of any issue or question in dispute in the action or that it is desirable, the court or judge may order such issue or question to be determined before deciding upon the right to the discovery or inspection. (Ord. XXXI. r. 19; *Wood* v. *The Anglo-Italian Bank, Limited*, 34 L. T. 255; and see Ord. XXXVI. r. 6, *post*, 322.)

Party failing to answer or discover documents may be attached, &c.

Any party failing to answer interrogatories or to discover or allow inspection of documents as ordered, is liable to attachment; and, if a plaintiff, to have his action dismissed for want of prosecution; and, if a defendant, to have his defence, if any, struck out, and to be placed in the same position as if he had not defended. (Ord. XXXI. r. 20.) This highly penal provision, which it is in the discretion of the court to enforce or not (*Hartley* v. *Owen*, 34 L. T. 752), will only be exercised in the last resort, and, it seems, will not be enforced when the parties really intend to answer. (*Twycross* v. *Grant*, W. N. 1875, pp. 201, 225.)

Appeals from decisions at chambers.

Appeals from any decision of the judge at chambers to the Common Law Divisions of the High Court, must be made by motion within eight days after the decision appealed against. (Ord. LIV. r. 6.) The motion, as far as the parties are concerned, must be *made* within the eight days, and it is not enough that *notice* of motion be given within that time (*Fox* v. *Wallis*, L. R., 2 C. P. D. 45; 25 W. R. 287); and it was held that the limit applied even if no divisional court should sit within the eight days (*Crom* v. *Samuels*, L. R., 2 C. P. D. 21; 46 L. J., C. P. 1); but the meaning of the order has been since explained to be, that in such a case the right of appeal will not be lost, but the appellant must move the next prac-

ticable court. (*Forrest* v. *Davis*, 26 W. R. 534.) The notice must name a day within eight days of the decision, and, if possible, one upon which the court will sit (*Deykin* v. *Coleman*, 25 W. R. 294); and if the last of the eight days be Sunday, the appellant may make his appeal on the following Monday. (*Taylor* v. *Jones*, 45 L. J., C. P. 110.) The notice must be served at least two clear days before the day named for hearing (Ord. LIII. rr. 3, 4); and the time may be enlarged by the court or a judge. (Ord. LVII. r. 6.)

Statement of defence.

When the plaintiff has delivered his statement of claim, the defendant is bound (unless the time is enlarged by the court or a judge) to deliver his defence within eight days from the delivery of the claim or from the time limited for appearance, whichever is last. (Ord. XIX. r. 2; Ord. XXII. r. 1.) Failing his doing so, the plaintiff may enter a judgment, that the person whose title is asserted in the writ, shall recover possession of the land with his costs (Ord. XXIX. rr. 2, 7); or, if the plaintiff have endorsed a claim for mesne profits, arrears of rent or damages for breach of contract upon the writ, if the defendant or any of several defendants makes default in delivering a defence, the plaintiff may enter judgment against the defaulting defendant or defendants (*ib.* r. 8), and proceed with his action against the others (*ib.* rr. 4, 5). A writ of inquiry will then issue to assess the damages (if any), unless the court or a judge order them to be ascertained in another way (see Ord. XXXVI.); or, in the case of several defendants, the damages against him or those in default must be assessed at the trial, unless the court or judge shall otherwise direct. (Ord. XXIX. rr. 4, 5.)

Contents of statement of defence.

The general observations made (*ante*, p. 305) as to the rules governing the contents of a statement

of claim may be taken to apply equally to all other pleadings, the principal rules to be remembered being those against prolixity, embarrassing (*Davy, Brothers* v. *Garrett*, L. R., 7 Ch. D. 473; 47 L. J., Ch. 218), irrelevant (*Cashin* v. *Craddock*, L. R., 3 Ch. D. 376; 25 W. R. 4), and inconsistent pleadings and against the pleading of evidence. (*Blake* v. *The Albion Life Assurance Co.*, 45 L. J., C. P. 663; 24 W. R. 677.) But it is not sufficient for the defendant in defence to deny generally the facts alleged in the claim, but he must deal specifically with each allegation of fact which he does not admit to be true. (Ord. XIX. r. 20.) If he deny any allegation of fact in the claim he must not do so evasively, but must give a fair and substantial answer (*ib.* r. 22); and he will strictly be taken to admit those allegations of fact which he does not, either specifically or by necessary implication, deny. (*Ib.* r. 17; *Byrd* v. *Nunn*, L. R., 7 Ch. D. 284; 47 L. J., Ch. 1; *Thorp* v. *Holdsworth*, 45 L. J., Ch. 406.) A defendant who is in possession by himself or his tenant need not plead his title unless his defence depends on an equitable estate or right, or he claims relief upon any equitable ground against any right or title asserted by the plaintiff. But except in such case it is sufficient for him to state that he is in possession, and he may nevertheless rely upon any ground of defence he can prove except as before mentioned. (*Ib.* r. 15.) If he plead that he is in possession by his tenants, it is better to name them. If the defence set up applies only to a part of the plaintiff's claim, or if any part of his claim is admitted to be due, the plaintiff may sign judgment for such part of his claim as the statement of defence is silent upon or admits to be due upon such terms as the judge may think fit; and the defendant may go on with his defence as to

Signing judgment for part of claim admitted to be due.

the residue. (Ord. XIV. r. 4.) But the statement of claim must disclose facts which support the claim, otherwise the plaintiff will not be entitled so to sign judgment. Thus, in an action against the defendant as assignee of a lease to recover possession of premises, damages for breach of covenant and rent, the defence denied that defendant was such assignee or liable under the covenants, but admitted that the lease had been avoided and that plaintiff was entitled to re-enter; 25*l.* was paid into court in respect of mesne profits. The plaintiff was not allowed to sign judgment under the above rule for rent, although the statement of defence was silent as to this part of the claim, and the allegation of defendant's possession of the premises was thus admitted under Order XIX. rule 17; *ante*, p. 315 (*Hanmer* v. *Flight*, 36 L. T. 279; 25 W. R. Dig. 197), on the ground that the statement of claim did not support the claim.

Counter-claim.

By an obvious improvement upon the old system, a defendant may now plead a set-off or set up a counter-claim, not merely as a defence but as a claim to any remedy or relief against the plaintiff, thus obviating any necessity for a cross action and enabling the court to pronounce final judgment both on the original and cross claim. (Ord. XIX. r. 3.) And it is not essential that the counter-claim should show a claim to an amount equalling the plaintiff's claim. (*Mostyn* v. *West Mostyn Coal and Iron Co. Limited*, L. R., 1 C. P. D. 145; 45 L. J., C. P. 401.) And the court or judge may transfer the action from one division to another where advisable, as when the counter-claim was for specific performance of the agreement for a lease, the action was transferred to the Chancery Division. (Ord. LI. r. 2; Ord. LIV. r. 2; *Hillman* v. *Mayhew*, L. R., 1 Ex. D.

132; 45 L. J., Ex. 334; 24 W. R. 435.) If the claim be partly pecuniary the defendant may *now* set off unliquidated damages, and obtain judgment for any balance proved to be in his favour or any remedy to which he may establish his claim. (Ord. XXII. r. 10.) But the court or judge may, on application by the plaintiff before reply, exclude such counter-claim (*ib.* r. 9), and on application before trial refuse permission to defendant to avail himself thereof in cases where the set-off or counter-claim cannot be conveniently disposed of in the pending action. (Ord. XIX. r. 3.) Where a set-off or counter-claim is founded upon separate and distinct facts, the defendant must so state those facts (*ib.* r. 9), stating specifically that he relies upon them by way of set-off or counter-claim. (Ord. XIX. r. 10, and see *Hillman* v. *Mayhew*, L. R., 1 Ex. D. 132; 45 L. J., Ex. 334; 24 W. R. 485.)

Matters arising pending the action.

If any ground of defence arise after action brought, but *before* defendant has delivered his defence, he may plead the same alone or with his other grounds of defence, and the plaintiff may similarly plead in reply any fresh defence to defendant's set-off or counter-claim arising after defendant has delivered his defence. (Ord. XX. r. 1.) Where fresh ground of defence arises *after* defendant has delivered his defence, he may by leave deliver a further defence within eight days after such defence has arisen, and similar power is given to the plaintiff in the case of a fresh defence to any set-off or counter-claim arising after reply. (*Ib.* r. 2.) Whenever, either in his original or further defence, the defendant alleges a defence arising after action brought, the *plaintiff* may deliver a confession of such defence, and sign judgment for his costs up to pleading of such defence, unless the court or judge otherwise order.

(*Ib.* r. 3.) Where the defence discloses a good answer in law, such confession is the plaintiff's proper course in preference to discontinuing (*infra*), but it will bar any second action for the same cause. (*Newington* v. *Levy*, L. R., 5 C. P. 607; 6 C. P. 180.)

Discontinuance.

At any time before or after defendant has delivered his defence, before taking any other proceeding (save an interlocutory application) in the action, the plaintiff may by written notice discontinue his action or withdraw any part of his alleged claim, upon paying defendant's costs of the action or occasioned by such withdrawal; but his doing so will be no defence to any subsequent action. If any further proceeding have been taken, the plaintiff can neither withdraw the record nor discontinue without leave; but the court or judge before, at or after trial may order discontinuance or the striking out of any part of the alleged claim upon such terms as may seem fit. So also upon terms the defendant may, with, but not without, leave, withdraw or have struck out the whole or part of his defence or counter-claim. (Ord. XXIII. r. 1.) The record may be withdrawn by either party by consent (*ib.* r. 2, R. S. C. December, 1875), and the defendant may sign judgment for costs on discontinuance. (*Ib.* r. 2*a*.)

Reply and subsequent pleadings (if any allowed).

The plaintiff must deliver his reply, if any, within three weeks after defence delivered (Ord. XXIV. r. 1); after which no further pleading other than joinder of issue can be pleaded without leave (*ib.* r. 2), which may be obtained upon terms, and then all subsequent pleadings must be delivered within four days after delivery of previous pleading. (*Ib.* r. 3.) If the plaintiff does not deliver his reply, or either party fails to deliver any subsequent pleading within the period allowed, the pleadings shall at its expiration be deemed

closed, and the statements of fact in the pleading last delivered admitted. (Ord. XXIX. r. 12.) If the plaintiff should neglect to reply, it seems that defendant may apply to the court or a judge for an order dismissing the action for want of prosecution under Ord. XXXVI. r. 4 *a*; or may, if the plaintiff does not within six weeks give notice of trial, himself do so. (*Litton* v. *Litton*, L. R., 3 Ch. D. 793.)

Amendment of pleadings.

The plaintiff may *without* leave amend his claim once within the time limited for reply and before reply, or if no defence has been delivered, then within four weeks from the appearance of the defendant who has last appeared; and so, also, a defendant who has pleaded a set-off or counter-claim may amend the same within the time limited for and before pleading to the reply, or if there be no reply then within twenty-eight days from the filing of his defence. (Ord. XXVII. rr. 2, 3.) Either party may *with* leave amend his claim, defence or reply at any stage of the proceedings. (*Ib.* r. 1.) In such case the order to amend, if not acted upon within time limited therein, or fourteen days from date thereof, becomes void *ipso facto*. (Ord. XXVII. r. 7.) Generally, all matters tending to prejudice, embarrass or delay, or scandalous, may be struck out, and all necessary amendments made. (*Ib.* r. 1.) Proper amendments may be made at any time; after joinder of issue (*Chesterfield* v. *Black*, 25 W. R. 409), after the cause has been entered for trial (*Roe* v. *Davies*, L. R., 2 Ch. D. 729), or at the trial. (*Budding* v. *Murdoch*, L. R., 1 Ch. D. 42; 45 L. J., Ch. 213; *King* v. *Cooke*, L. R., 1 Ch. D. 57; 45 L. J., Ch. 190.) Where any party has amended without leave, the other may within eight days after the receipt of the amended pleading apply to the court or judge to disallow the same

(*ib.* r. 4), or for leave to plead further or amend his former pleading. (*Ib.* r. 5.) All amended pleadings must be marked with the date of the amending order (if any), and the day on which such amendment is made (*ib.* r. 9), and delivered to the other side within the time allowed for amending. (*Ib.* r. 10.)

Where a plaintiff amends his claim after delivery of the defence three courses are open to the defendant, one of which he must follow. He may either put in a new defence or obtain leave under Ord. XXVII. r. 5, to amend the original defence or proceed with his original defence. In the latter event the amendments in the claim will be taken to be admitted under Ord. XXIX. r. 12. (*Boddy* v. *Wall*, L. R., 7 Ch. D. 164.)

All amendments should be in furtherance of justice (*Rex* v. *Mayor of Grampound*, 7 T. R. 699), and under the new as under the old system will only be allowed for the "purpose of determining the real questions in controversy between the parties" (Ord. XXVII. r. 1; see *St. Losky* v. *Green*, 30 L. J., C. P. 19); and not to prejudice the other party (see *Bradworth* v. *Foshaw*, 10 W. R. 760; *Riley* v. *Baxendale*, 30 L. J., Ex. 87; *Jacobs* v. *Seward*, L. R., 5 H. L. 464); and ordinarily only on payment of costs. (*Wall* v. *Lyon*, 9 Bing. 411; *Cargill* v. *Bower*, L. R., 4 Ch. D. 78; 46 L. J., Ch. 175.)

The practice at judges' chambers unhappily continues, notwithstanding that printed lists of the summonses to be taken at different hours are made out, to be as unsatisfactory as ever. Although appeals from interlocutory orders (which are sometimes made in two or three minutes' hurry, bustle and noise at judges' chambers, even in complicated and important cases) lie, first to a divisional court (see Ord. LIV. r. 6), and thence

to the court of appeal (see Ord. LVIII. r. 2), applications under Ord. XXVII. r. 1, to amend pleadings, which may involve the fate of a cause, are matters of practice within the discretion of the judge, with which the court will generally refuse to interfere (*Watson* v. *Rodwell*, 24 W. R. 1009; *Golding* v. *Wharton, &c. Co.*, L. R., 1 Q. B. D. 374; 24 W. R. 423), and in these, as in other cases, an appeal is practically useless.

Close of pleadings.

Directly either party has joined issue, simply without adding any further or other pleading, the pleadings will be deemed closed (Ord. XXV.); but if it appear to a judge that the issues of fact in dispute are not sufficiently defined, he may direct the parties to prepare issues; in case of difference to be settled by himself. (Ord. XXVI.)

Joinder of issue.

Joinder of issue will operate as a denial of every material allegation of fact in the pleading of the other side, except facts admitted. (Ord. XIX. r. 21.)

Notice of trial.

The parties being thus fairly at issue, the claimant should give notice of trial before a judge or judges, or a judge with assessors, or a judge and jury, or a referee official or special, with or without assessors, the mode being at his option. (Ord. XXXVI. rr. 2, 3.) If *he* neglects to give such notice within six weeks after close of pleadings, the defendant may (and will advisably if he have a counter-claim) do so, and himself choose the mode of trial (*Ib.* r. 4); or he may apply to the court or judge to dismiss the action for want of prosecution (*Ib.* r. 4a.) But either party may, within four days after receipt of notice of trial, by any mode other than a jury, require and will be entitled to have the issues of fact tried by a jury (*ib.* rr. 3, 4); and the court or judge may, upon application within four days from service of the notice of trial, order it to be by any other mode

(*ib.* r. 5), provided that neither party insists upon his right to try by a jury (*Sugg* v. *Silber*, L. R., 1 Q. B. D. 362; 45 L. J., Q. B. 460; *Clarke* v. *Cookson*, L. R., 2 Ch. D. 746): such right being absolute in cases merely involving questions of fact (*Bordier* v. *Burrell*, L. R., 5 Ch. D. 512; 46 L. J., Ch. 615; *West* v. *White*, L. R., 4 Ch. D. 631; 46 L. J., Ch. 333), but subject to the discretion of a judge in any action which would formerly have been properly brought only in the Court of Chancery. (Ord. XXXVI. r. 26; *Back* v. *Hay*, L. R., 5 Ch. D. 235; 25 W. R. 392; *Garling* v. *Royds*, 25 W. R. 123; *Pilley* v. *Baylis*, L. R., 5 Ch. D. 241.) In all cases the court or judge may order that different questions of fact arising in the action be tried by different modes of trial or at different times, at such place and in such order as seems fit. (*Ib.* r. 6.) But no order to try separate issues separately will, it seems, be granted so as to prejudice either party. (*Millissich* v. *Lloyd*, 20 Sol. Journ. 31.)

Ten days' notice of trial must be given (unless the other party has consented to take short, *i. e.*, four days', notice. (Ord. XXXVI. r. 9.) The notice must be given before entering the action for trial (*ib.* r. 10), and cannot be countermanded except by consent or leave. (*Ib.* r. 13.) It must state whether it is for the trial of the action or of issues therein; and, in actions in the Queen's Bench, Common Pleas and Exchequer Divisions, the place and day for which it is to be entered for trial. (*Ib.* r. 8.) Notice of trial for London or Middlesex will not be deemed to be for any particular sittings, but for any day after expiration of the notice on which the trial can come on in its order. (*Ib.* r. 11.) If the party giving such notice omit on the day after to enter the action for trial, the other party may do so within four

days. (Ord. XXXVI. r. 14.) But notice of trial elsewhere than London or Middlesex will be deemed to be for the first day of the next assizes at the place mentioned (*ib.* r. 12), and either party may enter the action for trial. (*Ib.* r. 15.) Unless, within six days after notice of trial is given the cause is entered for trial by one party or the other, the notice of trial will be no longer in force. (*Ib.* r. 10a.) The party entering the action must deliver two full copies of the pleadings for the use of the judge (*ib.* r. 17a), each pleading above ten folios of seventy-two words being printed. (Ord. XIX. r. 5.) The judge may postpone or adjourn the trial (Ord. XXXVI. r. 21), upon terms which will generally be onerous to the party applying for the adjournment. (*Lydall* v. *Martinson*, L. R., 5 Ch. D. 780.)

Proceedings at trial.

When the action is called on, if the defendant does not appear, the claimant may, after proving service of notice of trial (*Cockshott* v. *London General Cab Co.*, 47 L. J., Ch. 126; 26 W. R. 31), prove his claim, so far as the burden of proof lies upon him. (Ord. XXXVI. r. 18.) If the claimant does not appear, the defendant, without proving that he has been served with notice of trial (*James* v. *Crow*, L. R., 7 Ch. D. 410; 47 L. J., Ch. 200), may have judgment dismissing the action and prove his counter-claim, if he have one. (*Ib.* r. 19.) Verdict or judgment obtained in default of such appearance may be set aside upon application to the court or judge within six days after trial, upon terms. (*Ib.* r. 20.)

Evidence.

By affidavit by consent.

Except that the parties by agreement (which should be a formal consent in writing, *New West Brewery Co.* v. *Hannah*, L. R., 1 Ch. D. 278) may allow, and the court or judge may order, depositions or affidavits to be read, the mode of giving evidence in trials by jury and the rules of

evidence are unaffected by the Judicature Acts and Rules. (38 & 39 Vict. c. 77, s. 20; Ord. XXXVII. r. 1.) When affidavits are used by consent they must be printed (Ord. XXXVIII. r. 6), and the plaintiff must file his within the time agreed or fourteen days after consent, and deliver a list thereof to the defendant (*ib.* r. 1), who must then within fourteen days file his and deliver a list to the plaintiff (*ib.* r. 2), who may file affidavits strictly in reply (but see *Peacock* v. *Harper*, L. R., 7 Ch. D. 648; 47 L. J., Ch. 238) within seven days thereafter, delivering a list to the defendant (*ib.* r. 3); and either party may, by notice before the expiration of fourteen days after the time allowed for filing affidavits in reply, require the production at the trial of any deponent for cross-examination (*ib.* r. 4); and the party receiving such notice can compel his attendance. (*Ib.* r. 5.) As to printing, delivery and costs of affidavits, see Add. Rules. (Orders II., III. and V.)

By order.

The court may order evidence to be given by affidavit or taken by interrogatories or otherwise before a commissioner or examiner; but such order will not be made where the other party *bonâ fide* desires the production of the deponent for cross-examination and he can be produced. (Ord. XXXVII. r. 1.) Where necessary, a judge may order depositions to be taken, filed and given in evidence. (*Ib.* r. 4.) Evidence upon motion, petition or summons may be by affidavit, subject to power of the court or judge to order attendance and cross-examination of the deponent. (Ord. XXXVII. r. 2.) Affidavits for use on interlocutory motions may state deponent's belief and grounds thereof; those used at trial must state facts *within* his own knowledge. Hearsay, argument or extracts unnecessarily included will be at cost of party filing the affidavit. (*Ib.* r. 3.)

It does not appear probable that evidence by affidavit will ever become popular, at least in the Common Law Divisions of the High Court. Nor is it, perhaps, desirable that parties should forego the advantages derived from that study of the demeanour of witnesses which juries are accustomed to apply, and weaken the effect of cross-examination by directing it against a studied and astoundingly technical affidavit comprising an examination in chief, carefully prepared by an acute legal adviser.

Judgment.

The judge may at or after the trial direct (Ord. XXXVI. r. 22a)—

(I.) Judgment to be entered for any or either party absolutely. In such case if the officer present at the trial be not the proper officer to enter judgment, the associate's certificate will be authority to the proper officer (*ib.* r. 24), a full copy of the pleadings being delivered to him, to enter judgment in a book kept for the purpose. (Ord. XLI. r. 1.) Where the trial has been by jury or before a judge alone, either party may then, without any leave reserved, apply to the Court of Appeal to set aside such judgment and enter any other judgment, on the ground that the judgment directed to be entered is wrong, either with reference to the finding of the jury upon the questions submitted to them, or to the judge's finding. The application to the Court of Appeal must be by motion upon notice. (Ord. XL. r. 4 a; *Jones* v. *Davis*, 36 L. J. 415; 25 W. R. Dig. 198.)

(II.) The judge may adjourn the case for further consideration, the argument upon which must take place before himself.

(III.) The judge need not direct entry of any judgment, but may leave any party to move for it; in which case, if the claimant do not set down

and give notice of motion within ten days after trial, the defendant may do so himself. (Ord. XL. r. 3.) No judgment can be entered without the order of a court or judge. (Ord. XXXVI. r. 22 a.)

In all cases other than those in which judgment is to be otherwise obtained under the Judicature Acts and Rules, as in default of appearance (Ord. XIII. rr. 1, 7, 8, *ante*, p. 304), of pleading (Ord. XXIX. rr. 7, 8, *ante*, pp. 304, 314), on failure to allow discovery or inspection (Ord. XXXI. r. 20, *ante*, p. 313), or has been given or directed to be entered by the judge (Ord. XXXVI. r. 22 a, *ante*, p. 325), judgment must be obtained by motion for judgment (Ord. XL. r. 1) made upon notice without any rule to show cause (Ord. LIII. r. 2) within one year from the time when the party became entitled to do so. (Ord. XL. r. 9.)

New trial. Any party desiring a new trial of a cause heard in London or Middlesex, must move a divisional court within four days after trial, or on the first subsequent day on which a divisional court to which the application may be made shall sit to hear motions, for an order calling upon the other side (upon whom a copy must be served within eight days from date) to show cause at the expiration of eight days why a new trial should not be directed. (Ord. XXXIX. rr. 1a, 2.) If the trial have taken place elsewhere than in London or Middlesex, the motion must be made within the first four days of the next following sittings. (*Ib.*) But a new trial will not be granted on the ground of misdirection or improper admission or rejection of evidence, unless the court shall be of opinion that substantial wrong or miscarriage has been thereby occasioned (Ord. XXXIX. r. 3); and the court can grant a new trial as to so much of the matter as the miscarriage affects. An order to

show cause shall be, unless otherwise ordered, a stay of proceedings. (*Ib.* r. 5.)

Execution.

Judgment having been obtained that one person recover and another person deliver up possession of the land, upon filing an affidavit showing due service thereof and that it has not been obeyed, the person prosecuting such judgment may sue out a writ of possession and enforce it in manner heretofore used in actions of ejectment in the superior courts of common law. (Ord. XLVIII. rr. 1, 2.)

Sect. 3.—*Actions in County Courts for the Recovery of Land.*

Actions of ejectment originally excluded from jurisdiction of county courts, 9 & 10 Vict. c. 95, s. 58;

Prior to "The County Courts Act, 1867," actions of ejectment, or in which the title to any corporeal hereditament was in question, were excluded from the cognizance of the county courts (9 & 10 Vict. c. 95, s. 58), except where by agreement the parties consented to give the court jurisdiction, as they were empowered to do by 19 & 20 Vict. c. 108, s. 23. Litigants, however, rarely agree; the consents were not therefore very numerous, and, with a view to beneficially increasing the jurisdiction of these very useful courts, the act of 1867 provided, that "all actions of ejectment, where neither the value of the lands, tenements or hereditaments, nor the rent payable in respect thereof, shall exceed the sum of twenty pounds by the year, may be brought and prosecuted in the county court of the district in which the lands, tenements or hereditaments are situate." (30 & 31 Vict. c. 142, s. 11.)

may now be brought where annual value does not exceed 20*l.*, 30 & 31 Vict. c. 142, s. 11.

How value determined.

As the court is without jurisdiction where either the annual value or rent exceeds the sum of twenty pounds, proof that such is the case is of course a

complete answer to the action. It is therefore of vital importance that before entering his plaint in the county court the landlord should ascertain that his case is, at least, in that respect one to which the statute applies. This he can do by taking as his criterion of value the rent at which the property might reasonably be expected to let to a tenant from year to year, that being the test adopted for the purpose of rating under the Poor Law Assessment Acts. (*Elston* v. *Rose*, L. R., 4 Q. B. 4; 38 L. J., Q. B. 6.) If the premises are held subject to a ground rent, the amount thereof is not to be deducted in estimating the annual value. (*Ib.*)

Meaning of "rent payable."

It must, however, be remembered that "rent payable" does not mean a sum which some people are or may be willing to pay for the premises, nor even the rent actually paid by under-lessees, though proof of the amount of such payments would be obviously strong evidence of the real value, but means (where the amounts are different) the rent payable as between the parties to the action. (*Brown* v. *Cocking*, L. R., 3 Q. B. 672; 37 L. J., Q. B. 250.)

Prohibition in cases where action brought, though annual value exceeds 20*l.*

In cases where, notwithstanding that the annual value or rent exceeds twenty pounds, the action is improperly commenced in the county court, the defendant may either (1) waive the objection of want of jurisdiction altogether; or (2) he may raise the objection at the trial; or (3) he may, without waiting for the trial (*Sewell* v. *Jones*, 19 L. J., Q. B. 372; *Wadsworth* v. *Queen of Spain*, 20 L. J., Q. B. 488), by application to a judge at chambers founded upon an affidavit disclosing all the material facts, obtain a writ of prohibition. Where, however, there is a substantial ground for the objection, it is generally advisable to raise it at the trial, when, if it be overruled, which can

hardly be the case when the objection is *bonâ fide*, or if the judge proceed upon an erroneous mode of calculation, or upon a wrong principle, and assume a jurisdiction he does not really possess, the defendant may either obtain a prohibition before execution issued or appeal to the court above.

Courts may also try questions of *title*, where neither annual value nor rent exceeds 20*l*. 30 & 31 Vict. c. 142, s. 12.

The act of 1867 further enacted that "The county courts shall have jurisdiction to try any action in which the title to any corporeal or incorporeal hereditaments shall come in question where neither the value of the lands, tenements or hereditaments in dispute, nor the rent payable in respect thereof, shall exceed the sum of twenty pounds by the year, or in case of an easement or licence where neither the value nor reserved rent of the lands, tenements or hereditaments in respect of which the easement or licence is claimed, or on, through, over or under which such easement or licence is claimed shall exceed the sum of twenty pounds by the year; provided that the defendant in any such *action of ejectment*, or his landlord, may within one month from the day of service of the writ apply to a judge at chambers for a summons to the plaintiff to show cause why such action should not be tried in one of the superior courts, on the ground that the title to lands or hereditaments of greater annual value than twenty pounds would be affected by the decision in such action; and on the hearing of such summons the judge, if satisfied that the title to other lands would be so affected, may order such action to be tried in one of the superior courts, and thereupon all proceedings in the county court in such action shall be discontinued." (30 & 31 Vict. c. 142, s. 12.)

Defendant may apply to remove case into superior court.

Where title to lands, &c. of greater annual value involved.

It will be noticed that the proviso to the above

section is somewhat strangely confined to actions of ejectment.

The title must be *bonâ fide* in dispute.

In order to oust the jurisdiction of the court the title set up must not be a mere suggestion or assertion of right. There must be a *bonâ fide* claim that has a legal foundation, and not one advanced simply to take the case out of the cognizance of the county court. (*Lloyd* v. *Jones*, 6 C. B. 81; *Lilley* v. *Harvey*, 17 L. J., Q. B. 357; *Emery* v. *Barnett*, 27 L. J., C. P. 216.) But the judge cannot assume jurisdiction because the claim to title does not appear to him to be supported by *bonâ fide* or sufficient evidence. (*Marsh* v. *Dewes*, 17 Jur. 558.) And where the question of title is actually raised before the court, and the judge continues to try the case, a prohibition will be granted. (*Lilley* v. *Harvey*, *supra*; *Chew* v. *Holroyd*, 22 L. J., Ex. 95.) Where it does not so appear upon the face of the proceedings, the judge should ascertain whether title is in question, and his decision may be revised on motion for a prohibition. (*Thompson* v. *Ingham*, 14 Q. B. 710; *Sewell* v. *Jones*, 19 L. J., Q. B. 372; *Pearson* v. *Glazebrook*, L. R., 3 Ex. 27.)

Questions of title may arise in cases of terms of years or for life.

As will have been noticed, the words of the statute are "to any corporeal or incorporeal hereditament;" but questions of title may be raised in the case of terms of years or for life. (*Chew* v. *Holroyd*, *supra*; *Mountney* v. *Collier*, 1 E. & B. 630; 22 L. J., Q. B. 124.)

30 & 31 Vict. c. 142, s. 12, applies both to actions brought to try questions of title, and to cases where title arises incidentally; and the pro-

The jurisdiction conferred by the 12th section of the act of 1867 (*supra*) does not apply merely to actions expressly brought to try a question of title, but also to cases where it comes in question incidentally; and the provision, ousting the jurisdiction where title is in question, applies to proceedings for the recovery of small tenements

(*Pearson* v. *Glazebrook*, L. R., 3 Ex. 27) under 19 & 20 Vict. c. 108, s. 50. (See *post*, Sect. 4, "Actions for the Recovery of Small Tenements.")

viso applies to proceedings under 19 & 20 Vict. c. 108, s. 50.

Having clearly ascertained that the case is one within the jurisdiction of the court, the claimant in an action for the recovery of land, like other plaintiffs in county courts, must commence his action by a *plaint*, which is a concise statement by the plaintiff of the names and residences of the parties and the cause of action, made to and numbered and recorded by, the registrar of the court of the district wherein the property is situate, in a book called the "Plaint Book," specially kept for the purpose. (9 & 10 Vict. c. 95, s. 59; C. C. Orders, 1875, Ord. IV. r. 1.)

Actions are commenced by "plaint," pursuant to 9 & 10 Vict. c. 95, s. 59.

Nature of plaint.

As in the supreme court so in the county court, no cause of action, except claims in respect of mesne profits, arrears of rent, or damages for breach of any contract under which the property or part thereof is held, may be joined with an action for the recovery of land, except by leave of the judge. (C. C. Orders, 1875, Ord. VI. r. 1; and see *ante*, p. 283.)

Joinder of claims.

All persons in whom title is alleged must be joined as plaintiffs, and the person or persons alleged to be in possession or apparent possession of the premises must be defendants. (C. C. Orders, 1875, Ord. V. r. 10.) The claimant must also file with the registrar a full written description of the property, its annual value and rent (if any fixed or paid), with as many copies of such particulars as there are defendants. (C. C. Orders, 1875, Ord. VII. r. 5.) The plaint will not be vitiated merely by misnomer of one or more of the parties, or inaccurate description of the property, if the person or place be described so as to be commonly known. (9 & 10 Vict. c. 95, s. 59.)

Parties.

Description of property.

Upon entry of the plaint, a poundage fee of

Fees on

entry of plaint.

one shilling in the pound (estimated as upon a claim of 20*l.*), together with his own fee of one guinea (Treasury Ord., Oct. 1875, Sched. (A), must be paid to the registrar, who, on receipt, will give the claimant a "plaint note." (C. C. Orders, 1875, Ord. VIII. r. 1.)

Summons

The plaint having been entered in the "Plaint Book," the registrar (C. C. Orders, 1875, Ord. II. r. 4) will then issue a summons directed to and calling upon the defendants to appear to the plaint. The summons must be dated of the day on which the plaint was entered, which is the date of the commencement of the action (C. C. Orders, 1875, Ord. VIII. r. 2), and must contain the names of all the parties, with a copy of the particulars of the property claimed annexed (r. 4), sealed with the seal of the court. This is deemed part of the summons.

must bear date of entry of plaint,

contain names of all parties, and a copy of the description of the property annexed.

Amendment of names or descriptions of parties.

Insufficient or incorrect descriptions or names of parties may be amended at the instance of either party, by order of the court, on such terms as it shall think fit (C. C. Orders, 1875, Ord. XVII. rr. 6, 7); and if a greater number of persons have been made parties than by law required, the names of the persons improperly joined may likewise be struck out by order of the court, on such terms as it shall think fit (rr. 9, 10); but no action shall be defeated by reason of the misjoinder of parties. (R. 12.)

Where too many persons made parties.

Action not to be defeated by misjoinder of parties.

Want of "reasonable certainty" in description of the property.

In the County Court (Common Law) Rules issued under the act of 1867, it was provided by rule 230 (originally taken by 15 & 16 Vict. c. 76, s. 175) that "want of reasonable certainty in the description of the property or any part of it in any summons or notice" should "not nullify it; but the judge" might, "if he saw fit, order the description to be amended at the hearing, or an amended description to be delivered,

subject in either case to such terms as he might think fit." It would appear that no similar provision was thought necessary in the Cons. C. C. Orders and Rules, 1875; and care should be taken to describe the property with such sufficient accuracy as to avoid consequent difficulties. "Reasonable certainty" is, however, it is submitted, all that is or can be required; and by Ord. IX. r. 4, it will be seen that it is so, at all events in the notice given by a defendant desiring to limit his defence to part only of the property.

The summons must be delivered to the bailiff at least forty, and served thirty-five, clear days before the return day (C. C. Orders, 1875, Ord. VIII. r. 7), such time being given to enable a defendant or his landlord to apply to a judge of the High Court at chambers for a summons to the plaintiff to show cause why the action should not be tried in the High Court, on the ground that the title to lands or hereditaments of greater annual value than 20*l.* would be affected by the decision in such action. If the judge should thereupon order the action to be tried in the superior court, the proceedings in the county court must then be discontinued. The defendant must lodge the order before the return day of the summons with the registrar, who must record it in the "Plaint Book" and transmit it, with a copy of the summons and particulars, to the "Masters" of the divisional court named in the order, giving notice at the same time that he has done so to the plaintiff.

The summons must be served thirty-five clear days before return day, in order to allow application under 30 & 31 Vict. c. 142, s. 12. (*Ante*, p. 329.)

It has been doubted whether such an order puts an end to the proceedings in the case altogether, and thus compels a plaintiff to commence *de novo* in the divisional court, or whether the order being in the nature of a certiorari the plain-

If defendant successful, the plaintiff must commence *de novo* in the High Court.

tiff may not dispense with issuing a writ in the High Court. But it is submitted that the proceeding by the defendant is in fact an objection to the jurisdiction of the county court, and that the plaintiff must consequently begin *de novo* by issuing a writ in the High Court, the pleadings being the same as in other actions. (See *ante*, p. 274.)

Days upon which summons may not be served.

The summons may be served on any day except Sunday, Christmas Day, Good Friday and the Saturday before Easter, days appointed by royal proclamation for public fast, humiliation or thanksgiving, or on days when the offices of the courts are closed by order of the Lord Chancellor. (C. C. Orders, 1875, Ord. XXXVII. r. 35.)

Service of summons, how effected.

The summons must, except in the cases hereafter mentioned, be served upon the defendant personally, or upon some person apparently not less than sixteen years old, at the defendant's house or dwelling or at his place of business (if he be the master or one of the masters thereof (C. C. Orders, 1875, Ord. VIII. r. 9), unless the bailiff ascertain that he has removed to another place within the district, in which case the bailiff must

On an infant.

serve the summons there. (*Ib.*) When the defendant is an infant, service on his father or guardian, or if none, upon the person with whom he resides or under whose care he is, will, unless the judge or registrar otherwise orders, be good service; but the judge or registrar may order that service on the infant shall be deemed good service.

On a lunatic.

(C. C. Orders, 1875, Ord. VIII. r. 10.) Where the defendant is a lunatic, service on his committee, if he has one, or if not, then on the person with whom he resides or under whose care he is, will, unless the court otherwise orders, be good.

On partners.

(C. C. Orders, 1875, Ord. VIII. r. 11.) Any one or more partners sued in the firm's name may be

served, as may any person at the firm's principal place of business apparently at the time of service having the control or management of the partnership business there. (*Ib.* r. 12.) If defendant be living or serving on board ship, service may be made on the person apparently in charge of the vessel at the time of service. (*Ib.* r. 13.) If the defendant be residing or quartered in barracks, serving as a soldier or marine, the summons may be served at the barracks upon the adjutant of the corps, or on any officer or serjeant of the company or troop to which such soldier or marine belongs. (*Ib.* r. 14.) If defendant be a prisoner in gaol, service may be effected there on the governor or other person in charge. (*Ib.* r. 15.) If the defendant be working in a mine or other works underground, service may be effected at the mine or works on the engine-man, banks-man or other person in charge of the mine or works. (*Ib.* r. 16.) If the defendant be employed or dwelling in a lunatic or other public asylum or in any common gaol or house of correction, service may be effected on the gate-keeper or lodge-keeper thereof. (*Ib.* r. 17.) Service may be effected on railway companies or other corporations by delivering the summons to the secretary, station master or clerk at any station or office of defendants within the district of the court (*ib.* r. 18); and where provision is made by any statute for service of summons upon any corporation, &c., service may be effected in manner so provided. (*Ib.* r. 23.)

On sailors.

On soldiers.

Prisoners.

Miners, &c.

Where defendant employed in a public asylum or prison.

Corporations.

In cases of vacant possession (*ante*, p. 293), or if the defendant cannot be found, and his place of abode be unknown or admission thereto cannot be obtained, posting a copy of the summons upon the door of the dwelling-house or other conspicuous part of the property, is good service upon the de-

In cases of vacant possession.

fendant. (C. C. Orders, 1875, Ord. VIII. r. 20.)

Where violence is threatened.

Where the bailiff is prevented by violence from personally serving such summons, it will be sufficient to leave it as near to the defendant as practicable. (*Ib.* r. 21.)

Notice of doubtful service to be given.

Where the answers given by the person to whom the summons is delivered, at the place mentioned therein as the residence or place of business of a defendant, render it doubtful whether the court will be satisfied that service has come to the knowledge of the defendant before the return day, the high bailiff must forthwith send notice to the plaintiff. (C. C. Orders, 1875, Ord. II. r. 23.)

When defendant is out of England.

Where a defendant is out of England the judge, or in his absence the registrar, may upon an affidavit of the fact, direct the service of the plaint and summons to be effected within such time and in such manner as he may think fit. (C. C. Orders, 1875, Ord. XXXVII. r. 42.)

Endorsement of service.

If service has been personal, the bailiff who served the summons must endorse on the copy delivered to him by the registrar (*ante*, p. 333) the fact of such service. If service has not been personal, he must endorse on the copy the statement made by the person to whom the summons was delivered, or other circumstances from which it may be inferred that the service has come to the knowledge of the defendant. If the summons has not been served, the bailiff must give notice thereof to plaintiff (C. C. Orders, 1875, Ord. II. r. 22), and endorse the fact and reason of non-service, and deliver it to the registrar, pursuant to rule 26 (*post*, p. 337); and all such copies must be produced by the registrar or high bailiff as the judge may require. All these endorsements must be signed by the bailiff. (C. C. Orders, 1875, Ord. II. r. 21.)

Seven clear days before the court day, the high

bailiff must deliver to the registrar a list of all ordinary summonses on plaints, before judgment issued to him, returnable at such court, and must state therein the mode of service or the cause of non-service of each summons; and the high bailiff must, at the same time, unless the judge otherwise order, deliver to the registrar the copies of summonses served and the summonses themselves not served. (C. C. Orders, 1875, Ord. II. r. 26.)

Proof of service.

If the defendant does not appear at the hearing, the judge may, as is hereafter mentioned (*post*, p. 351), try the cause on the part of the plaintiff only, upon *proof of the service of the summons*. This, whether of home or foreign service, is done by the bailiff, if present, or by the endorsement on the copy signed by the bailiff, showing the fact and mode of such service. Wilfully and corruptly endorsing any false statement is a misdemeanor in such bailiff. (9 & 10 Vict. c. 95, s. 62; 38 & 39 Vict. c. 50, s. 3.)

All questions as to sufficiency of the service and the proof thereof are entirely matters for the determination of the county court judge, and the High Court will not interfere with his decision. (9 & 10 Vict. c. 95, s. 80; *Zohrab* v. *Smith*, 5 D. & L. 635; 17 L. J., Q. B. 174; *Waters* v. *Handley*, 6 D. & L. 88; *Robinson* v. *Lenaghan*, 17 L. J., Ex. 174.)

Tenant defendant must give notice to his immediate landlord, pursuant to 15 & 16 Vict. c. 76.

Where the action is inconsistent with his immediate landlord's title, every tenant served with a summons in an action for the recovery of land, or to whose knowledge it shall come, must forthwith give notice to his immediate landlord or be liable under the C. L. P. Act, 1852, s. 209 (*ante*, p. 296), to forfeit to his landlord three years' rack rent (see *Crocker* v. *Fothergill*, 2 B. & Ald. 652) of the premises.

Any person not named

Any person not summoned as a defendant may,

as a defendant may, by leave, appear and defend.

by leave of the registrar, appear and defend on filing an affidavit (with a copy for each plaintiff and defendant), twelve clear days before the return day, that he is in possession, by himself or tenant, of the property or part thereof therein described; whereupon the registrar must enter the name, &c. of such person in the "Plaint Book" as an additional defendant, and send a notice, with a copy of the affidavit annexed, of such entry to the plaintiffs and original defendants ten clear days before the return day. (C. C. Orders, 1875, Ord. IX. r. 3.)

Further particulars.

If the particulars of claim are deemed insufficient, the defendant may, within three days of being served with the summons, notify to the plaintiff that he requires further particulars, and the plaintiff must then, within two clear days, file full particulars of his claim, and send a copy to the defendant. (C. C. Orders, 1875, Ord. VII. r. 8.)

Limitation of defence.

Where a defendant desires to limit his defence to a part only of the property sought to be recovered, he may give notice in writing, signed by himself or his solicitor, to the registrar, twelve clear days before the return day, describing the part with reasonable certainty, whereupon the registrar shall, ten clear days before the return day, send the same by post to the plaintiff or plaintiffs. (C. C. Orders, 1875, Ord. IX. r. 4; see *ante*, p. 332.)

Discontinuance of action.

Where a plaintiff desires to discontinue the action against all or any of the defendants, he must give notice in writing to the registrar, and to the party or parties as to whom the plaintiff desires to discontinue the action; and after the receipt of such notice, the party may apply for an order against the plaintiff for the costs incurred before the receipt of the notice, and of attending

the court to obtain the order. (C. C. Orders, 1875, Ord. XII. r. 1 a.)

Confession by defendant.

Any defendant may, at any time before the return day, confess the action as to the whole or any part of the lands by signing, in the presence of the registrar or one of his clerks, or a solicitor of the Supreme Court, and attested by the person in whose presence it is signed, an admission of the title of the plaintiff to the lands or to the said part thereof, and of his right to the possession thereof; and the registrar shall upon the receipt of such admission forthwith give notice thereof by post to the plaintiff, and the judge may on the return day, upon proof of the signature of the defendant or defendants to such admission by affidavit or otherwise, in case the same is not attested by the registrar or clerk, and without any further proof of the plaintiff's title (if no defendant other than the defendant signing such admission defends for the said lands or the said part thereof), give judgment for the plaintiff for the recovery of possession and for costs; provided that if the plaintiff receive notice of such admission before the return day, he shall not be entitled as against the defendant or defendants signing to any costs incurred subsequently to the receipt of such notice, except the costs of attending the court on the return day, unless the judge shall otherwise order; provided also, that where the admission is not signed by all the defendants defending for the said lands or the said part thereof, the trial shall proceed against these (*sic*) non-admitting defendants, as if no admission had been signed. (C. C. Orders, 1875, Ord. XXXVII. r. 24.)

Abatement.

Where a sole plaintiff or defendant or one or more of several plaintiffs or defendants die before judgment, the action will not abate if the cause of

action survive or continue. (C. C. Orders, 1875, Ord. XV. r. 4.)

Where one or more of several plaintiffs or defendants die *after* judgment, proceedings on it may be taken by or against the survivor or survivors without leave of the court. (C. C. Orders, 1875, Ord. XV. r. 6.)

Provisions to continuance under Act of 1867.

The County Court (Common Law) Rules, issued under the act of 1867, provided for the continuance of an action of ejectment on death of any of the parties by rules 241—249 inclusive, which have now been superseded by the Consolidated County Court Orders and Rules, 1875. These special provisions are not again prescribed in the later rules, the single rule said to be substituted for the nine superseded rules being rule 11 of Ord. XVI. ("List of Rules and Orders in force prior to the 2nd November, 1875, with a reference to the new rules respectively substituted for each."—Orders, 1875), which has reference to the general jurisdiction of the court on the trial of the action! In the Schedule, however, the forms of orders for the substitution of parties and continuation of the action, in use under the old are retained under the new rules, and it is therefore here thought advisable to state the provisions under the act of 1867.

Where party dies before return day, surviving parties to appear.

Where any party to an action of ejectment dies before the return day, the surviving party or parties thereto shall appear in court on the return day. (Rule 241.)

Where plaintiff dies before return day, heir or other representative may continue.

Where a sole plaintiff or one of several plaintiffs in ejectment, claiming otherwise than as joint tenants, dies before the return day, the heir or other legal representative of such deceased plaintiff, on the return day, may apply to the judge upon filing an affidavit of the death of the de-

ceased plaintiff and of his own heirship or other representative character, for leave to continue the action in his own name as plaintiff; and the judge may make an order granting such leave upon such terms, as to adjournment and payment of costs, as he shall see fit; and thereupon the entry of the plaint in the plaint book must be amended by substituting for the name of the deceased plaintiff the name of the applicant as heir or other legal representative, as the case may be, of the deceased plaintiff. The substituted plaintiff cannot recover, unless he shall prove the title of the deceased plaintiff as stated in the summons, and also that he is heir or other legal representative of the deceased plaintiff; but upon proof of such title and of his representative character as alleged, he is entitled to judgment for the recovery of possession and costs. If, however, the defendant does not appear on the return day, the cause will be adjourned and a copy of the order will be sent by the registrar, by post or otherwise, to the defendant. (Rule 242.)

Death of one of several plaintiffs before return day.

Where one of several plaintiffs dies before the return day, and no application is made on the return day by the legal representatives of the deceased plaintiff, the name of the deceased plaintiff will be struck out, and the action will proceed and be tried as between the surviving plaintiff and the defendant; and the surviving plaintiff will have judgment for the recovery of the whole of the property mentioned in the summons, if he proves himself entitled thereto; or if not, then for the recovery of such part or share thereof as he proves himself entitled to, and for costs. (Rule 243.)

Death of one or more plaintiffs after judgment and

Where judgment in ejectment is given for two or more plaintiffs, and one or more of such plaintiffs dies after judgment and before execution is

before execution.

executed, the surviving plaintiff or plaintiffs may apply to the registrar upon an affidavit stating the death of the deceased plaintiff or plaintiffs, to make an entry in the minute book of the death of such plaintiff, and strike out therefrom the name of the deceased plaintiff or plaintiffs, and to issue execution for the recovery of the possession of the entirety of the property and the costs; but this does not affect the right of the legal representatives of the deceased plaintiff or plaintiffs, or the liability of the surviving plaintiff or plaintiffs to such legal representatives; and the entry of possession of such surviving plaintiff or plaintiffs under such execution is considered as an entry of possession on behalf of such legal representatives in respect of the property to which they are entitled as such representatives. (Rule 244.)

Death of sole plaintiff after judgment and before execution.

Where a sole plaintiff or all the plaintiffs in ejectment shall die after judgment but before execution executed, any person or persons entitled upon the death of the plaintiff or plaintiffs to the property recovered, may issue execution, by leave of the registrar, upon proof of title to the benefit of the judgment upon substitution of their name or names as plaintiffs, together with a statement of his or their derivative title, for that of the original plaintiff or plaintiffs. The registrar must give notice of the substitution to the defendant or defendants by post, and execution shall not issue upon the judgment until after six clear days from the posting of the notice. (Rules 245, 201.)

Death of sole defendant before return day.

Where a sole defendant or all the defendants in an action of ejectment die before the return day, any person or persons claiming to be entitled to the property on the death of the defendant or defendants, may apply at the hearing to the judge, upon filing an affidavit stating such death and the grounds upon which he claims the property, for

leave to defend in the place of the deceased defendant or defendants, and the judge may make an order granting such leave upon such terms as to adjournment and payment of costs as he may see fit; and thereupon the entry of the plaint in the plaint book will be amended by substituting the name of the applicant for that of the deceased defendant, and the action will proceed as if the applicant had originally been defendant. (Rule 247.)

If no such application is made, the action may proceed and be tried as in the case of the non-appearance of a defendant; and the plaintiff, upon proof of the service of the summons and of his title to the property, is entitled to judgment.

If no such application is made, any person claiming to be entitled to the property upon the death of the defendant or defendants, may apply for a new trial upon filing an affidavit stating the death of the defendant, the grounds upon which he claims the property, and that he had no notice or knowledge of the summons before the return day thereof; and if the judge orders a new trial, the name of the applicant must be substituted for that of the deceased defendant in the minute book and summons, and the action will proceed as if the applicant had originally been defendant; and if the judge refuses a new trial he may order the applicant to pay the costs of the application.

Death of one of several defendants before return day.

The above provisions in rule 247 are to apply in the case of the death before the return day in ejectment of one of several defendants who defends separately, whether any other defendant defends for the same property or not. (Rule 249.)

Death of defendant after judgment.

Where a sole defendant or all the defendants in ejectment die after judgment, the plaintiff nevertheless is entitled to proceed by execution

for the recovery of possession, and to proceed by summons in the nature of a *scire facias* for the recovery of the costs against the legal personal representatives of the deceased defendant or defendants. (Rule 248; and see Rule 202.)

Death of one or more of several defendants before or after the return day.

Where, before or after the return day, one or more of several defendants in ejectment who defend jointly, die, the name of the deceased defendant will, upon application of either party, and upon proof of the death, be struck out, and the action will proceed against the surviving defendant or defendants. (Rule 246.)

Before the trial both parties should of course take steps to ascertain and adduce the necessary evidence in support of their respective cases. To do this it often becomes of the greatest importance for the one party to discover and inspect documents in the custody of the other, with a view either to their production at the trial, or to the administering of interrogatories upon matters relating to the action, and also to subpœna those persons as witnesses who can either give evidence or produce documents in support of his case. These results may be attained.

By an Order in Council of the 18th Nov. 1867, in pursuance of a power contained in the C. L. P. Act, 1854 (17 & 18 Vict. c. 125), those sections of that act relating to inspection and discovery of documents and to interrogatories (ss. 50—54) were, amongst others, extended and applied to the county courts.

Production of documents.

Where in any action any party desires the production of any document relating to the matter in question in such action, he may make an affidavit that he has reason to believe that it is in the possession or power of one of the parties, and the registrar shall, upon delivery to him of the affidavit and a copy thereof, file the affidavit and make an

order that the party against whom the document is made shall answer on affidavit, stating what documents he has in his possession or power relating to the matters in dispute, or what he knows as to their custody; and whether he objects, and, if so, on what grounds, to the production of those in his possession or power. The order must state the time for answering, and be served by the bailiff or a solicitor or by post. (C. C. Orders, 1875, Ord. XIII. r. 1.)

Answer to order to produce.

The party against whom the order is made must answer on affidavit in accordance with the terms of the order, and send the affidavit and a copy within the time named to the registrar, who is to file it and transmit a copy to the other side. (C. C. Orders, 1875, Ord. XIII. r. 2.)

Further order after answer received.

If, after the answer on affidavit is filed, the party desiring production requires a further order thereon, he is to apply to the registrar, who, if there be no matter of fact or law in dispute, will make an order in writing in accordance with the facts; but if there be matter of fact or law in dispute, the registrar must transmit both affidavits to the judge, who will appoint a time and place for hearing the application, and make such order thereon as shall be just. (C. C. Orders, 1875, Ord. XIII. r. 3.)

Order must state when and to whom the document shall be produced.

An order for production of documents must state when and to whom they are to be produced, and it may order the same to be deposited with the registrar for production at the hearing, or that he may make a copy thereof for any party. (C. C. Orders, 1875, Ord. XIII. r. 4.) As discovery is really only preliminary to obtaining inspection of the documents discovered, before an order is made, it should be shown that there is a reasonable ground to suppose that inspection will follow. It seems that discovery and inspection will

be allowed at any time before trial. (See 20 Sol. Journ. 219.)

Inspection of documents.

Where either party is desirous of inspecting any document which he is entitled to inspect relating to the matter in question in such action, and which is in the possession or control of the other party, he may, five clear days before the hearing, give notice to the other party that he or his solicitor desires to inspect the same, describing it, at any place to be appointed by the other party: if the holder neglect or refuse to appoint such place or to allow such inspection within three days after receiving such notice, the judge may, in his discretion on the day of trial, adjourn the action and make such order as to costs as he shall think fit. (C. C. Orders, 1875, Ord. XIII. r. 5.)

The words "relating to the action" do not mean simply the issue raised. (*Pape* v. *Lister*, 40 L. J., Q. B. 87. As to the nature of documents of which inspection will be permitted, see *Mattock* v. *Heath*, 20 Sol. Journ. 54; also *Woolley* v. *North London Rail. Co.*, 38 L. J., C. P. 317; *Mahony* v. *National, &c. Fund*, L. R., 6 C. P. 252; *Cossey* v. *London, Brighton, &c. Rail. Co.*, L. R., 5 C. P. 146.)

Interrogatories.

Either party may further apply to the registrar for leave to interrogate the opposite party. On making application he must file an affidavit made by himself only, or by himself and his solicitor or agent, if any, or by leave of the registrar by his solicitor or agent only, stating that deponent believes that the party proposing to interrogate will derive material benefit in the action from the discovery, and that there is good cause of action or defence upon the merits. The registrar will thereupon order that the applicant may, within a time named, deliver to the opposite party interrogatories in writing, and in the order require the party interrogated to answer by affidavit within

such time to be appointed by the registrar, as shall enable the answers to be used at the trial. (C. C. Orders, 1875, Ord. XIII. r. 6.)

Objection to interrogatories.

If the party served with the order object to answer he must file an affidavit stating his grounds for objecting, and that he will be prepared to show cause to the court at the return day. If he objects to answer some only of the interrogatories, he may reply to the others in the same affidavit. (C. C. Orders, 1875, Ord. XIII. r. 7.)

Successful objection.

If at the return day he successfully shows cause, the judge may hear or adjourn the case as he thinks fit, and upon terms as to costs.

Unsuccessful objection.

If he does not successfully show cause, the judge may order the interrogatories to be then and there answered *vivâ voce* in court, or may adjourn the action and make an order for them to be answered by such time and for the payment of such costs incurred through the delay as he may think fit. (*Ib.* r. 8.)

When an oral examination of the party interrogated and who has answered insufficiently (17 & 18 Vict. c. 125, s. 53) is directed by the judge to be taken before the registrar, the answers given must be transcribed by the registrar or his clerk, read over to and signed by the witness, and filed by the registrar as the deposition of the witness. (C. C. Orders, 1875, Ord. XIV. r. 7.) Disobedience to the order to attend and be examined is a contempt of court and punishable accordingly. (17 & 18 Vict. c. 125, ss. 51, 54.)

As to when interrogatories may be administered in an action for the recovery of land, and what questions have been held admissible, see *ante*, pp. 307—310.

It must also be remembered that only under exceptional circumstances will the defendant be allowed to interrogate the claimant in this action

as to the character in which he claims or the pedigree upon which he relies. The case of *Flitcroft* v. *Fletcher* (11 Ex. 543; 25 L. J., Ex. 94, *ante*, p. 309) turned upon the fact that the action was brought against a person who had been long in possession by a stranger of whose title the defendant was wholly ignorant; and in *Wallen* v. *Forrest* (41 L. J., Q. B. 96) the court refused to allow a tenant, withholding possession of demised premises at the expiration of the lease, to interrogate the plaintiff to show that his title had expired, and expressed some doubt as to the decision in *Flitcroft* v. *Fletcher*, *supra*. See also *Stoate* v. *Rew*, 32 L. J., C. P. 160; *Pearson* v. *Turner*, 33 L. J., C. P. 224; *Blyth* v. *L'Estrange*, 3 F. & F. 154; *Ingilby* v. *Shafto*, 33 Beav. 31; *Finney* v. *Forwood*, L. R., 1 Ex. 6; *Derby Bank* v. *Lumsden*, L. R., 5 C. P. 107.

Admission of documents.

Where any party desires to adduce any document in evidence he may, not less than five clear days before the trial, give notice to any other party to the action who is competent to make admissions requiring him to inspect and admit the document. The expense of proof of it afterwards, whatever may be the result of the action, will have to be paid, unless he admits the document within three days, by the party who ought to have admitted it, unless the judge otherwise orders. No costs of proof of any document will be allowed unless notice to admit has been given, except in cases where, in the opinion of the registrar, the failure to give notice has saved expense. (C. C. Orders, 1875, Ord. XIII. r. 9.)

Notice to produce documents.

Either party may give oral or written notice to the other to produce at the trial any documents in his custody or control. Though not absolutely necessary, it is safer to specify the documents separately, and in all cases the notice should point

out with reasonable certainty what documents may be really called for. "All letters written by the plaintiff to the defendant relating to the matters in dispute" will be sufficient to include a particular letter not specified. Upon failure or refusal to produce, the notice to do so must be proved, and then secondary evidence of the contents of the documents called for may be given by copy, orally or otherwise.

Witnesses.

Summonses to compel the attendance of witnesses, with or without a clause requiring the production of documents, may be obtained of the registrar (38 & 39 Vict. c. 50, s. 2), for service either at home or abroad, and, by leave of the judge or registrar, may be issued in blank and served by the party applying (within a reasonable time before the return day; C. C. Orders, 1875, Ord. XIV. r. 2) for the same or his solicitor, or by some person in the permanent and exclusive employment of the party or his solicitor, but only one name shall be inserted in such summons. (Ord. XIV. r. 1.) It must here be observed that by 9 & 10 Vict. c. 95, s. 85, any number of names might be inserted in one summons, but that section being now repealed by the act of 1875, it is now uncertain whether more than one name may be inserted in summonses where service is to be by bailiff.

Non-attendance of witnesses.

Upon service of the summons a reasonable sum, according to the scale of allowance in force, should be tendered for expenses. Persons summoned as witnesses who fail to attend without sufficient cause, or to produce documents which they have been summoned to produce, and persons who, being in court, are required to give evidence but refuse to do so, may be fined any sum, not exceeding 10*l.*, by the judge.

Scale of allowance to witnesses.

The following is the scale of expenses allowed to witnesses:—

	s.	*d.*	£	*s.*	*d.*
Gentlemen, merchants, bankers and professional men, *per diem*, from	15	0 to	1	1	0
Tradesmen, auctioneers, accountants, clerks and yeomen, *per diem*, from . . .	7	6 to	0	15	0
Artisans and journeymen, *per diem*, from	4	0 to	0	7	6
Labourers and the like, *per diem*, from	3	0 to	0	4	0

Travelling expenses, sum reasonably paid, but not more than sixpence per mile one way.

If the witnesses attend in more than one cause, they will be entitled to a proportionate part in each cause only.

Action may be tried by a jury.

The action may at the instance of either party be tried by a jury (C. C. Orders, 1875, Ord. XVI. r. 3) of five (9 & 10 Vict. c. 95, s. 73), upon a demand for one being made in writing to the registrar three clear days before trial. (Ord. XVI. r. 1.) In cases where no demand for a jury has been so made, but at the trial both parties desire one, the judge may adjourn the trial upon terms in order that the necessary steps may be taken for such trial to take place. (C. C. Orders, 1875, Ord. XVI. r. 2.)

Proceedings at trial.

The action for the recovery of land is tried in the same manner as other actions in the county courts, the question being, generally speaking, whether the statement in the summons of the plaintiff's title to the property therein mentioned, is true or false, and the evidence adduced in support of the plaintiff's case must be the same as would

be adduced in the High Court in a similar action.

Where plaintiff does not appear.

Upon the cause being called on, if the plaintiff does not appear, and the defendant does appear but does not admit the claim, the court may allow the defendant the same costs as if the action had been tried, but no hearing fee shall be charged. (C. C. Orders, 1875, Ord. XVI. r. 5.)

Where defendant does not appear.

If the plaintiff appears and the defendant does not appear, the plaintiff, on proof of service of the summons (*ante*, p. 337), will be entitled to judgment for the recovery of possession. (9 & 10 Vict. c. 95, s. 80.)

Where both parties appear.

If both parties appear, upon payment by the plaintiff to the registrar of the hearing fee of two shillings in the pound (19 & 20 Vict. c. 108, s. 78), the trial proceeds much in the same manner as in the Supreme Court. The judge, in the absence of a jury, decides all questions of fact as well as of law. (9 & 10 Vict. c. 95, s. 69.) The claimant or his advocate, if he employ one, states his case and adduces evidence in its support. The defendant or his advocate then, in his turn, addresses the court and calls his witnesses; but although in some courts he is allowed to sum up his evidence, the judges generally do not permit him to make a second speech, the plaintiff being entitled to a general reply.

Where plaintiff's title has expired before trial.

If it appear at the hearing that the plaintiff's title existed as alleged in the summons and at the time of entry of the plaint, but that it expired before the return day, the plaintiff will be entitled to judgment according to the fact that he was so entitled, and for his costs, unless the court otherwise orders. (C. C. Orders, 1875, Ord. XVIII. r. 8.)

Special case.

Under the former practice, where all parties to

an action of ejectment agreed upon the facts, they might, by leave of the registrar, state a case for the opinion of the judge, who then heard and determined the action upon the facts stated in such case. (C. C. Com. Law Rules, r. 235.) But no such provision is made under the new rules, although a form for the heading and conclusion of a special case is retained in the Appendix to the rules. (See Form 163.)

Judgment.

When the hearing of the case is ended, the judge pronounces judgment in a summary way, or, if there be a jury, sums up to them and they return a verdict. Upon judgment for the plaintiff, execution may issue upon the day, if any, named therein; if no day be named, it may issue after the expiration of fourteen clear days from the day on which judgment was given. (Ord. XVIII. r. 9.) If the judgment be for recovery of possession and costs, there may be either one or separate warrants of execution for the recovery of possession and for costs at the election of the plaintiff. (Order XVIII. r. 10.) If judgment be for the defendants or any of them with costs, execution may issue for the costs against the plaintiff upon the day, if any, named in the judgment; if no day be named, it may issue after the expiration of fourteen clear days from the day on which judgment was given, unless the judge otherwise order. (C. C. Orders, 1875, Ord. XVIII. r. 11.)

Execution where judgment for plaintiff.

Where judgment is for possession and costs.

Where judgment is for defendant, with costs.

Appeal.

In actions for the recovery of land, as in other actions, an appeal lies from the county court (30 & 31 Vict. c. 142, s. 13) to divisional courts of the High Court, consisting of such of the judges as may be from time to time assigned by arrangements made for that purpose by the judges of the High Court. (36 & 37 Vict. c. 66, s. 45.) The decision of such court is final, unless

special leave to appeal be given by the same tribunal. (36 & 37 Vict. c. 66, s. 45.) The appeal must be either by special case or by motion.

By special case.

(1.) Any party dissatisfied with the judgment, order or direction of the court in point of law, or upon the admission or rejection of evidence, may, before the rising of the court on the day upon which judgment is pronounced, deliver to the registrar a statement in writing signed by him or his advocate containing the grounds of his dissatisfaction, and in the event of no such statement being delivered, the successful party may proceed upon the judgment, unless the judge otherwise order; but the judge may direct proceedings to be taken on the judgment notwithstanding such statement has been delivered. The party dissatisfied may appeal on grounds other than those contained in such statement, and although he shall not have delivered such statement (C. C. Orders, 1875, Ord. XXIX. r. 1); but he must give notice of appeal in writing signed by the appellant or his solicitor, within ten days of the judgment or direction complained of, exclusive of the day of trial, and forward such notice to the registrar and the successful party. (13 & 14 Vict. c. 61, s. 14; C. C. Orders, 1875, Ord. XXIX. rr. 2, 3.) Where the judge reserves a point and afterwards decides against the party moving, such party still has a right of appeal dating from such decision. (*Foster* v. *Green*, 30 L. J., Ex. 263.) Where judgment is reserved, and notice thereof is subsequently sent to the parties for the purposes of appeal, the date of the judgment is the date of the notice, and not of the day for which the judgment is ordered to be entered up. (*Waterton* v. *Baker*, L. R., 3 Q. B. 176; *Francis* v. *Dowdeswell*, L. R., 9 C. P 430.) The notice should state the grounds of appeal, the sufficiency or otherwise of such state-

Time and form of notice of appeal.

ment being matter, if questioned, for decision by the judge, with which the High Court will not interfere. (*Cannon* v. *Johnson*, 21 L. J., Q. B. 164; *Evans* v. *Matthews*, 26 L. J., Q. B. 166.) The respondent may waive his right to notice (*Park Gate Co.* v. *Coates*, L. R., 5 C. P. 634; *Ward* v. *Raw*, L. R., 15 Eq. 83); but unless he do so the appellant *must* give notice, or his appeal will be struck out. (*Stone* v. *Dean*, E. B. & E. 504; *Norris* v. *Carrington*, 16 C. B., N. S. 10.) The notice will not operate as a stay of execution or proceedings, unless the judge so orders; but the registrar will detain the proceeds of any execution which may then be in, or may come into his hands pending such appeal, to abide the event, unless the judge otherwise orders. (Ord. XXIX. r. 4.) The appellant must, within the time specified for notice, give security for the costs of the appeal, and, if he be defendant, also security for the amount of the judgment, unless he has been ordered to pay the amount into court. (13 & 14 Vict. c. 61, s. 14.)

Notice not a stay of execution.

Case to be presented to judge.

The appellant must prepare the case for appeal, and present it to the judge for signature at the court held next after the parties have agreed upon the facts. (C. C. Orders, 1875, Ord. XXIX. r. 5.) Whilst the right of appeal must be promptly exercised, the appellant's right to have the case signed by the judge at a later court than that named in this rule, is not barred thereby, although the respondent may proceed upon his judgment, unless the judge otherwise order. (*Hacking* v. *Lee*, 2 E. & E. 906; 29 L. J., Q. B. 204; *Furber* v. *Sturmey*, 3 H. & N. 521; *Williams* v. *Williams*, 16 L. T., N. S. 581.) If the judge does not approve of the case, both parties must be summoned to attend him and be heard as to the form of the case, which will be finally settled and signed

by the judge and then sealed by the registrar. (Ord. XXIX. r. 5.) If the parties do not agree upon the form of the case, the appellant must lodge his draft case with the registrar, who will give notice to the parties who may appear before the judge on a day named. In that case also the judge will finally settle and sign the case. (Ord. XXIX. r. 6.) If the judge refuse to settle and sign a case either party may move the divisional court under 19 & 20 Vict. c. 108, s. 43, for a rule to compel him to do so, but the granting or refusing such a rule is discretionary, and it will be refused where the question is one of fact only. (*Sharrock* v. *London & N. W. Rail. Co.*, L. R., 1 C. P. D. 70; 24 W. R. 346.)

Form of case.

The case should separate fact and law, be reasonably concise (*Cawley* v. *Furnell*, 20 L. J., C. P. 197; *Evans* v. *Mathias*, 7 E. & B. 590), clear as to whether or not a question of law is desired to be decided (*London & N. W. Rail. Co.* v. *Grace*, 2 C. B., N. S. 555), and binds the parties, who cannot travel out of it. (*Watson* v. *Ambergate Rail. Co.*, 15 Jur. 448; *Yorke* v. *Smith*, 21 L. J., Q. B. 53.) As to what becomes of the appeal if the judge die before signing the case, see *M'Allum* v. *Cookson*, 28 L. J., C. P. 1.

One copy of the case must then be deposited with the registrar, and another sent by the appellant to the respondent within three clear days after it is signed and sealed, otherwise the respondent may proceed upon the order, unless the judge otherwise direct. (C. C. Orders, 1875, Ord. XXIX. r. 7.) The appellant must also within the same time transmit the case and a copy under seal of the court to the proper officer of the High Court, giving notice to the successful party that he has done so, otherwise the latter may proceed on the judgment, and will be, on

application to the court, entitled to costs incurred in consequence of the appellant's proceedings; or, if he think fit, may, within twenty-eight clear days from the signing and sealing, himself transmit it in like manner, and give the like notice to the appellant. (*Ib.* r. 8.) The judgment of the court of appeal, or an office copy thereof, may be deposited by either party with the registrar, and thereupon filed and enforced as if made in the county court. (*Ib.* r. 9.)

By motion.

Where any person aggrieved has (by leave of the judge or of right, see *Turner* v. *G. W. R. Co.*, L. R., 2 Q. B. D. 125; 46 L. J., Q. B. 226) a right of appeal, he may, within *eight* days after the ruling, order, direction or decision complained of, appeal (in the first place *ex parte*) by motion to the divisional court instead of by case. The provisions of the Judicature Act (Ord. LIII. rr. 2, 3), as to notice of motion, do not apply to these cases (*Dillon* v. *Lloyd*, Ex. Div., Mich. Sittings, 1875), and no notice of appeal seems necessary. When the divisional court of appeal is not sitting (but then only, *Brown* v. *Shaw*, L. R., 1 Ex. D. 425), the motion may be made before a judge at chambers. At the trial below, the judge, on request, must take a note of any question of law, or of the facts in evidence in relation thereto, and of his decision thereon and of his decision of the cause, and, at the expense of any party to the cause requiring the same for purposes of appeal, must furnish a copy of such note signed by himself (his signature being verified by affidavit, *Welsh* v. *Mercer*, L. R., 8 Ex. 71), which must be used and received on such motion and at the hearing of such appeal. (38 & 39 Vict. c. 50, s. 6.) Notes compiled by the judge after the trial from evidence wholly on affidavits may be received by the Court of Appeal

from divisional courts, though no request to take notes were made at the trial. (*Hill* v. *Perssé*, 24 W. R. 275.) The court may grant a rule to show cause on such terms as it may think fit, returnable in the same way as on the argument of rules generally. Unless cause be shown within a specified time the order made will be one reversing the judgment below. (*Eccles* v. *Eccles*, 24 W. R. 39.) No appeal from a county court is given on a question of fact. (*Cousens* v. *London Deposit Bank*, 45 L. J., C. P. 573; L. R., 1 Ex. D. 404.)

The pendency of an action of ejectment in the superior courts was formerly no answer to a plaint in a county court to recover possession of the same premises (*Bissill* v. *Williamson*, 7 H. & N. 391); but now by the Consolidated County Court Orders, 1875 (Ord. XVI. r. 10), if on the return day it appear that an action is pending in any other court of record for the same cause, the court may order the plaint to be struck out, unless the plaintiff undertake to discontinue the action in such other court before a day to be named, to which the trial shall be adjourned, and unless before such adjourned trial such action shall have been discontinued the plaint shall then be struck out. This rule is certainly most reasonable, but its validity as being *ultra vires* may as certainly be questioned.

Sect. 4.—*Actions in County Courts for the Recovery of Small Tenements.*

In the last section we considered the proceedings in "The action for the recovery of land" in county courts under the provisions of the Act of 1867. (30 & 31 Vict. c. 142, s. 11, *ante*, p. 327.)

Landlord must elect to proceed either under 30 & 31 Vict. c. 142, s. 11, or under 19 & 20 Vict. c. 108, ss. 50, 52.

In now passing on to a consideration of the action for the "recovery of small tenements" in county courts, under the provisions of the Act of 1856 (19 & 20 Vict. c. 108, ss. 50, 52), it must be remembered that the plaintiff must *elect* between these two modes of proceeding. He cannot pursue both. (C. C. Orders, 1875, Ord. XXXVII. r. 25; *Williamson* v. *Bissill*, 7 H. & N. 391; 31 L. J., Ex. 131.) The landlord who proposes, being guided by the annual value of his property, to commence his action in the county court should therefore carefully consider, where both forms of proceeding are equally open to him, which remedy he will elect to pursue as being the more speedy or generally advantageous under all the circumstances of his particular case.

Proceedings against tenant (A) holding over; or (B) for non-payment of rent.

Where a tenant holds over after the legal determination of his tenancy, and also where the landlord has a legal right of re-entry and possession on the ground that his rent is unpaid, proceedings may in the case of small tenements be sometimes most advantageously commenced in the county court under the provisions of the Act of 1856. (19 & 20 Vict. c. 108, ss. 50, 52.)

(A) Against tenant holding over.

19 & 20 Vict. c. 108, s. 50.

Landlord may recover possession,

When the term and interest of the tenant of any corporeal hereditament, where *neither* the value of the premises *nor* the rent payable in respect of them exceeds 50*l.* by the year, and on which no fine or premium has been paid, has expired or been determined by a legal notice to quit, and the tenant or any person holding or claiming by, through, or under him neglects or refuses to deliver up possession of the premises, the landlord may at his option enter a plaint in the county court of the district where the premises lie for their recovery, either against the tenant or the person so neglecting or refusing, whereupon a summons will issue in the ordinary

way. (19 & 20 Vict. c. 108, s. 50.) The plaintiff may also, as against the *tenant*, add a claim for rent or mesne profits or for both down to the day appointed for the hearing, or to any preceding day to be named in the plaint, so that the aggregate amount does not exceed 50*l.* (19 & 20 Vict. c. 108, s. 51), but not if the plaint be against the sub-tenant. (*Campbell* v. *Loader*, 3 H. & C. 520; 34 L. J., Ex. 50.)

and claim for rent and mesne profits. 19 & 20 Vict. c. 108, s. 51.

Where the title comes into question, and the yearly rent or value exceeds 20*l.*, the court has no jurisdiction. (30 & 31 Vict. c. 142, s. 12.) Thus, although the judge may decide as to whether the tenancy was determined either by effluxion of time or by a legal notice to quit, and his decision thereon is conclusive (*Fearon* v. *Norvall*, 5 D. & L. 439), he cannot decide as to whether the claimant has or has not title as landlord (*Kerkin* v. *Kerkin*, 3 E. & B. 399; *Pearson* v. *Glazebrook*, 37 L. J., Ex. 15), if the limit of value or rent be exceeded. (*Ante*, p. 330.) It is therefore very necessary before entering the plaint to consider (1) is title in question, and (2) does the yearly rent or value exceed 20*l.*? If these two questions can be answered in the affirmative, the court has no jurisdiction, and the case must be taken into the High Court, unless by the written consent of both parties, signed by them or their solicitors (19 & 20 Vict. c. 108, s. 25), jurisdiction is given to the county court to hear and determine the cause. But, without such consent, it is the duty of the judge to ascertain whether any real dispute or question between the parties, as to the right or title of the plaintiff or of the defendant to the tenements in question, legally may and actually does exist between the parties. (*Lilley* v. *Harvey*, 5 D. & L. 648; *Fearon* v. *Norvall*, *ib.* 439; *Mar-*

Court has no jurisdiction where title of premises above the yearly value or rent of 20*l.* comes into question.

wood v. *Waters*, 13 C. B. 820; *Latham* v. *Spedding*, 17 Q. B. 440; *Lloyd* v. *Jones*, 6 C. B. 81.)

Cases where title comes into question.

Thus, where a defendant set up as defence that he had given up possession to a third party, who made a *bonâ fide* claim, it was held that the judge ought not to have refused to hear the case on the ground that title came into question until he had ascertained and decided that the defendant gave up possession by compulsion; because if he gave it up voluntarily, he would be estopped from setting up the third person's title as against his landlord's, and the court would have jurisdiction. (*Emery* v. *Barnett*, 27 L. J., C. P. 216.) Title is in question where the tenant makes a *bonâ fide* claim of ownership or alleges title in a third person. (*Marwood* v. *Waters*, 13 C. B. 821; and see *ante*, p. 330.)

Ordinary relation of landlord and tenant must exist.

In order to maintain this action, the ordinary relation of landlord and tenant must exist between the parties, the term "landlord" being understood to mean the person entitled to the immediate reversion of the property, or, in the case of joint tenancy, coparcenary, or tenancy in common (see *ante*, pp. 22—24), any one of the persons entitled to such reversion. (9 & 10 Vict. c. 95, s. 142.) Thus a plaintiff mortgagee cannot recover possession from a defendant, tenant of the mortgagor, unless he has consented to hold under the plaintiff (*Jones* v. *Owen*, 5 D. & L. 669); and it was held that the court had no jurisdiction where the action was against an occupier in possession under an agreement to purchase, one of the terms of which was that the rent should be deducted from the purchase-money, and it appeared that he had paid a sum which, together with a set-off, equalled the amount of the purchase-money (*Banks* v. *Rebbeck*, 20 L. J., Q. B. 476), for in neither

instance does the *ordinary* relation of landlord and tenant exist. (See also *Jones* v. *Thomas*, 4 L. T., N. S. 210.) The plaintiff must therefore show generally that such a relationship did exist. He must prove:—

Evidence for plaintiff.

(1.) The tenancy or holding. If by lease, the lease or a counterpart must be produced, or proof must be given that defendant has admitted its terms. (*Howard* v. *Smith*, 3 Sc. N. R. 574.) A demise or tenancy from year to year may be proved by payment and receipt of yearly rent (*Doe* v. *Horn*, 3 M. & W. 333; *Bishop* v. *Howard*, 2 B. & C. 100), even, as we have seen (*ante*, p. 6), where defendant has been let into possession under a lease void by the Statute of Frauds, or a mere agreement for a future lease. (*Doe* v. *Bell*, 5 T. R. 471; *Doe* v. *Amey*, 12 A. & E. 476.)

(1.) Proof of tenancy.

(2.) That "neither the value of the premises nor the rent payable in respect thereof" has exceeded 50*l.* by the year. This must be proved at the trial, whether the defendant does or does not appear; as must—

(2.) Yearly value nor rent has exceeded 50*l.*

(3.) The expiration or other determination of the tenancy, with the time or manner thereof. (*Ante*, Chap. VIII. p. 195.)

(3.) Expiration or determination of tenancy.

(4.) That "no fine or premium" was paid for the lease.

(4.) No fine or premium paid.

(5.) That the defendant has neglected or refused and still neglects or refuses to deliver up possession. For the purpose of proving this, it is advisable to make a demand of possession, and, if possible, obtain a refusal in like manner as under the C. L. P. Act, 1852, s. 213. (*Ante*, p. 276.) But proof that the defendant retains possession after demand made is *primâ facie* evidence that he refuses or at all events neglects to deliver up possession. (Cole, Eject. 656.)

(5.) Neglect or refusal to give up possession.

(6.) Where the defendant does not appear,

(6.) Service of the summons.

service of the summons must be proved. (As to mode of service, see *ante*, p. 334.) The judge's decision as to sufficiency of the service is conclusive. (*Robinson* v. *Lenaghan*, 2 Ex. 333.)

(7.) Plaintiff's title.

(7.) Should the title of the landlord have accrued since the letting of the premises, the plaintiff must prove in addition to the above facts the right by which he claims possession, not that his title can come in issue, but in order that his character as landlord may appear. (*Ante*, p. 360.) His right may be evidenced by length of possession (*Doe* v. *Cooke*, 7 Bing. 346), or title as heir or administrator, or by will or conveyance.

Judgment.

After such proof has been given, unless the defendant show good cause to the contrary, as, for example, by proving that the plaintiff's evidence is insufficient upon some of the above material points, or by producing contrary evidence, so far as he is not estopped from so doing by the relationship of landlord and tenant, the judge

Order for possession.

may order that possession be given by the defendant to the plaintiff either forthwith or on or before such day as the judge shall think fit to name, but such order need not be drawn up or served. (19 & 20 Vict. c. 108, s. 56.) If the order be not obeyed, the registrar, whether service of the order can be proved or not, must, at the

Warrant for possession.

instance of the plaintiff, issue a warrant authorizing and requiring the high bailiff to give possession of the premises to the plaintiff, such warrant to bear date the day next after the last day named by the judge in his order for possession to be given and to remain in force for three months from such date. (*Ib.*) Armed with this warrant the bailiff is justified in entering on the premises between 9 a.m. and 4 p.m. with such assistants as he may deem necessary, and giving possession to the plaintiff accordingly. (*Ib.* s. 55.)

An order for the giving up of possession of premises under this section is not analogous to a judgment in ejectment or conclusive evidence of title in a subsequent action for mesne profits. Where, therefore, a landlord, having given his tenant and sub-tenant a week's notice to quit, entered a plaint against them in the county court, and the judge ordered that possession should be delivered up on a day named, which was done, and the landlord afterwards sued the sub-tenant in a superior court for mesne profits, it was held that the order of the county court judge was not conclusive as to the plaintiff's right to possession, but that it was competent for the sub-tenant to prove that the term of the tenant was a quarterly holding and had not been determined by a proper notice to quit; it was also held that the order did not entitle the landlord to maintain an action of trespass for mesne profits against the sub-tenant (*Campbell* v. *Loader*, 3 H. & C. 520; 34 L. J., Ex. 50; 13 W. R. 348), section 51 only giving a right to mesne profits as against the tenant and not against any other person in possession.

The warrant of possession can neither be issued nor executed when the lands are situated without the jurisdiction of the court, although both parties reside within it. (*Ellis* v. *Peachey*, 5 D. & L. 675.) The order of possession does not affect the rights of third persons; hence a person whose rights are injuriously affected may maintain trespass against the person obtaining the warrant and on whose behalf it is executed. (*Hodson* v. *Walker*, L. R., 7 Ex. 55; 41 L. J., Ex. 51.)

(B) Proceedings against tenant for non-payment of rent.

Thus far we have been considering cases within section 50 (19 & 20 Vict. c. 108), where the tenancy has expired or been determined by legal notice to quit; but, as before mentioned (*ante*, p. 358), the landlord may also under section 52

19 & 20 Vict. c. 108, s. 52.

of the same act commence proceedings in the county court where he is unable to obtain payment of his rent, in cases where he has by law a right to re-enter and take possession on non-payment thereof; provided, of course, that neither the value of the premises nor the rent exceeds 50*l.* per annum. In such a case no formal demand of re-entry is necessary, as the statute expressly provides that the service of the summons shall stand in lieu of a demand and re-entry. If, however, the tenant, five clear days before the return day of the summons, pays into court all the rent in arrear and costs, the action ceases. If he neither makes such payment nor at the time named in the summons show good cause why the premises should not be recovered, then, on proof—

No formal demand of re-entry necessary.

(1) Of the yearly value and rent of the premises;

(2) That one half-year's rent was in arrear before the plaint was entered, and that no sufficient distress (see *ante*, pp. 272, 273) was then to be found on the premises to countervail such arrears;

(3) Of the landlord's right to re-enter—this can only be by virtue of some condition or proviso contained in the lease or agreement, whether by deed, in writing, or by oral agreement, express or implied;

(4) That the rent is still in arrear;

(5) Of the title of the plaintiff if such title has accrued *since* the letting of the premises; and

(6) Service of the summons in cases where defendant does not appear;

the judge may order that possession of the premises mentioned in the plaint be given by the defendant to the plaintiff on or before such day, not being less than four weeks from the trial, as

the judge may name, unless within that period all the rent in arrear and the costs be paid into court. If the order be not obeyed and the rent and costs be not so paid, the order may be enforced in manner already mentioned (*ante*, p. 362), the proceedings under both sections being similar in that respect. In proceedings for non-payment of rent, however, the plaintiff having obtained possession will hold the premises discharged from the tenancy; and the defendant and all persons claiming by, through, or under him, will, so long as the order remains unreversed, be barrred from all relief. Any fine or premium paid for the lease does not deprive the court of jurisdiction under s. 52, as it does under s. 50.

Sub-tenant served with summons must give notice to his immediate landlord.

In these cases, as in actions of ejectment, whether under the Judicature Acts in the High Court, or under the Act of 1867 (30 & 31 Vict. c. 142, s. 11, *ante*, p. 327), in the county court, when the summons is served on or comes to the knowledge of any sub-tenant of the plaintiff's immediate tenant, such sub-tenant being an occupier of the whole or a part of the premises sought to be recovered, must forthwith (*i. e.*, with all reasonable celerity, *ante*, p. 296) give notice of it to his immediate landlord; and such landlord on receipt of the notice, if not originally a defendant, may be added or substituted as a defendant to defend the possession of the premises in question. If the sub-tenant omit to give such notice to his immediate landlord he is liable to the penalty of forfeiting three years' rack rent of the premises held by him to his landlord. The action for this penalty must be brought in the county court whence the summons issued (19 & 20 Vict. c. 108, s. 53), although it may exceed in amount the general statutory limit within which the county courts have jurisdiction.

Protection of officers.

No action or prosecution may be brought against any officer of the court for issuing or executing any warrant or affixing any summons, on the ground that the person suing out the same had not lawful right to the possession of the premises. (9 & 10 Vict. c. 95, s. 124.) The person, however, who sues out the warrant is not so protected. (*Ib.* s. 125.)

Landlord with lawful title not a trespasser.

Where the landlord at the time of applying for the warrant had lawful right to possession of the premises, neither he nor his agent may be deemed a trespasser by reason merely of any irregularity or informality in the mode of proceeding; but the party aggrieved may bring an action on the case, in which he must allege special damage, and may recover full compensation with costs of suit. If the special damage be not proved, the defendant will be entitled to a verdict; if proved, but the jury assess it under five shillings, the plaintiff can recover no more costs than damages, unless the judge before whom the trial takes place, certifies that in his opinion full costs ought to be allowed. (9 & 10 Vict. c. 95, s. 125.)

Appeal.

In all actions where the yearly rent or value of the premises exceeds 20*l.* an appeal lies as of right; where the rent or value is below that amount, then an appeal lies by leave of the judge in manner already described. (19 & 20 Vict. c. 108, s. 68; 30 & 31 Vict. c. 142, s. 13, *ante*, p. 352.)

The "Treasury Order regulating Court Fees, 1875," authorizes the following fees to be taken in cases of ejectment under the Act of 1867, and in actions for the recovery of small tenements, &c.:—

For every plaint, one shilling in the pound.

Where the claim or demand exceeds forty shillings, and an ordinary summons is to be

served by bailiff, an additional fee of one shilling.

Where in any case the number of defendants shall exceed three, an additional fee of one shilling for each defendant above three.

For every hearing, two shillings in the pound. An additional hearing fee shall be taken for every new trial. No fee shall be payable for hearing any application for a new trial, or to set aside proceedings, &c.

In all cases where the defendant shall either personally, or by his solicitor or agent, admit the claim, one half of the fee paid by the plaintiff for the hearing of the plaint shall be returned to the plaintiff by the registrar of the court, although the court may have been required to decide upon the terms and conditions upon which the claim is to be paid.

For every jury, five shillings shall be paid to the registrar by the party demanding the jury, on such demand, for the use of the jurors.

For issuing every warrant against the goods, eighteen pence in the pound on the amount for which such warrant shall issue.

For issuing every warrant to deliver possession of tenements, eighteen pence in the pound.

In plaints under sects. 11 & 12 of "The County Courts Act, 1867," poundage shall be estimated as upon a claim for a sum of twenty pounds.

In plaints for the recovery of tenements, when the term has expired or been determined by notice, all poundage, except as aforesaid, shall be estimated on the amount of the weekly, monthly or yearly rent of the tenement, as such tenement shall have

been let by the week or by the month or for any longer period; and if no rent shall have been reserved, then on the amount of the half-yearly value of the tenement to be fixed by the registrar.

Where a claim for rent or mesne profits, or both, is added to a plaint for the recovery of a tenement, an additional poundage shall be taken on the amount or amounts so claimed; but where thereby the total amount on which poundage would be taken shall exceed twenty pounds, the poundage shall be estimated on twenty pounds only.

In plaints for the recovery of tenements for non-payment of rent, all poundage, except as aforesaid, shall be estimated on the amount of the half-yearly rent of the tenement.

In the above cases where the poundage would, but for this direction, be estimated on an amount exceeding twenty pounds, it shall be estimated at twenty pounds only.

In every case where the poundage cannot be estimated by any rule in this schedule, it shall be estimated on twenty pounds.

All fractions of a pound, for the purpose of calculating poundage, shall be treated as an entire pound.

Where a counter or other claim is made under Order X. of the County Court Rules, 1875, the same fees shall be taken as upon the entry and hearing of a plaint.

	£	s.	d.
For a warrant to replevy . . .	0	2	6
For a replevin bond, where the alleged rent or damage does not exceed 20*l.*	0	10	6
For a replevin bond, where the alleged rent or damage exceeds 20*l.* .	1	1	0
For notice to distrainor . . .	0	2	6

	£	*s.*	*d.*
For every subpœna to be served in a home district, if served within two miles of court house . . .	0	1	0
For every mile beyond two . .	0	0	6
But the total fee to be taken is in no case to exceed . .	0	3	0
For every subpœna to be served in a foreign district	0	3	0
For every sitting under the Agricultural Holdings (England) Act, 1875 (*ante*, pp. 240, 241) . .	1	0	0

Registrars' Fees.

On entry of plaint under sections 11 and 12 of the County Courts Act, 1867, to the registrar (*ante*, p. 332).	1	1	0
Where the plaint has not been entered under section 12, and the judge shall certify that the court has exercised jurisdiction under that section, the above fee of £1 : 1*s.* shall be paid.			
On every order for a new trial in actions commenced under sections 11 and 12 of County Courts Act, 1867 .	0	10	6
Taxing costs under either of the said sections 11 and 12, or under section 23 of the Agricultural Holdings (England) Act, 1875 . .	0	10	6
For drawing up, sealing and issuing every order under Ord. XXXIV. r. 7. (Proceedings in applications for referee or umpire under sections 22, 23 of the Agricultural Holdings (England) Act, 1875) . .	0	4	0
For every sitting under Ord. XIV. rr. 7 and 8	0	10	0

	£	s.	d.
Where the sitting is longer than one hour, for every additional hour or part of an hour	0	10	0
For every notice or summons under— Ord. XIII. r. 3 (*ante*, p. 345) . . Ord. XVI. r. 12 (addition of absent parties at hearing) . . . Ord. XXXIV. (Agricultural Holdings (England) Act, 1875) .	0	2	6
For copies of every proceeding or document under Ord. XXXVII. r. 3, per folio	0	0	4
Filing affidavit on issue of duplicate plaint note	0	0	6
For every bond with sureties . .	0	5	0

High Bailiffs' Fees.

For delivering the goods on completion of a replevin bond . . . Together with 6*d.* a mile from the court house to the place where the goods are.	1	1	0

SECT. 5.—*Proceedings for the Recovery of Small Tenements before Justices of the Peace.*

1 & 2 Vict. c. 74.

The "Act to facilitate the recovery of possession of tenements after due determination of the tenancy."

In order "to facilitate the recovery of possession of tenements after due determination of the tenancy, the statute 1 & 2 Vict. c. 74, provided in certain cases a summary mode of obtaining the possession of premises, by proceedings before justices of the peace, which may, where applicable, very frequently be found less expensive and more advantageous to landlords than the proceedings in county courts under 19 & 20 Vict. c. 108, ss. 50—52. (*Ante*, p. 357.)

Proceedings by landlord after tenancy determined.
1 & 2 Vict. c. 74, s. 1.

When the term of the tenant of any property held by him at will, or for any term not exceeding seven years at a rent (if any) not exceeding 20*l.* a year, and upon which no fine has been reserved or made payable, shall have ended or been determined by legal notice to quit or otherwise, and such tenant or the actual occupier neglect or refuse to quit and deliver up possession, the landlord or his agent may cause such tenant or occupier so refusing to be served with a written notice, signed by the landlord or his agent, of his intention to proceed to recover possession under this act; and if the tenant or occupier do not appear at the time and place, and show to the satisfaction of the justices reasonable cause why possession should not be given, and still neglect or refuse to deliver up possession, the landlord or his agent may give proof of the holding and of the end or other determination of the tenancy with the time and manner thereof, and where the landlord's title has accrued since the letting of the premises the right by which he claims possession; and upon proof of service of the notice, and of the neglect or refusal of the tenant or occupier, the justices acting for the place within which the premises, or any part thereof, be situate, in petty sessions assembled, or any two of them, may issue a warrant to the constables and peace officers of such place commanding them, within not less than twenty-one nor more than thirty clear days from date of warrant, to enter, by force if needful, and give possession to the landlord or his agent. Such entry not to be made on Sunday, Good Friday, Christmas Day, or at any time except between 9 a.m. and 4 p.m. Nothing in this act is to protect any person obtaining the warrant from an action if he has no lawful right to the possession, or to affect the rights of an outgoing tenant by

the custom of the country or otherwise. (1 & 2 Vict. c. 74, s. 1.)

Notice of intention to proceed before justices, pursuant to this act.

The notice to be given pursuant to the above section must be in the form prescribed, which is as follows:—

"I , owner (*or* agent to the owner, *as the case may be*) do hereby give you notice that unless peaceable possession of the tenement (*shortly describing it*) situate , which was held of me (*or* of the said *as the case may be*) under a tenancy from year to year (*or as the case may be*) which expired (*or* was determined) by notice to quit from the said (*or otherwise as the case may be*) on the day of , and which tenement is now held over and detained from the said , be given to (the owner *or* agent) on or before the expiration of seven clear days from the service of this notice, I , shall on next, the day of , at of the clock on the same day at [*a notice omiting to state the place at which the application will be made is bad*, Delaney *v.* Fox, 1 *C. B., N. S.* 166] apply to her Majesty's justices of the peace acting for the district of (*being the district, division, or place in which the said tenement or any part thereof is situate*) in petty sessions assembled to issue their warrant directing the constables of the said district to enter and take possession of the said tenement, and to eject any person therefrom. Dated this, &c.

"Signed,

"(*Owner* or *agent.*)"

Service of notice.

Service of this notice may be personal or on some person at the premises. It must be read over and explained to the person served, or with whom the same is left. If the person holding

over cannot be found it may be posted up on some conspicuous part of the premises. (1 & 2 Vict. c. 74, s. 2.)

Any person obtaining warrant, without lawful right to possession, liable to action for trespass.

When the person obtaining the warrant has not lawful right to possession, the tenant may enter into a bond with two sureties, to be approved by the justices, to sue the person obtaining the warrant for trespass, and the warrant will then be delayed. (1 & 2 Vict. c. 74, ss. 3 and 4.)

No action against justices, &c.

Actions shall not be brought against the justices or constables for issuing or executing such warrants, by reason that the person on whose application the same shall be granted had not lawful right to the possession of the premises. (1 & 2 Vict. c. 74, s. 5.) But it seems doubtful whether third persons who assist the constable in executing the warrant are similarly protected. (*Darlington* v. *Pritchard*, 4 M. & G. 783, 794; 12 L. J., C. P. 34; and see *Jones* v. *Chapman*, 14 M. & W. 124.) An action of trespass will lie against the landlord for obtaining a warrant and turning the tenant out of possession, if it turn out that such landlord at the time had no right to the possession (*Darlington* v. *Pritchard*, *supra*); but the same protection is afforded to a landlord who has a lawful title at the time of applying for the warrant, against his being deemed a trespasser, as under 9 & 10 Vict. c. 95, s. 125 (*ante*, p. 366; 1 & 2 Vict. c. 74, s. 6).

Construction of act.

In the construction of this act "premises" signifies lands, houses or other corporeal hereditaments; "person" comprehends a body politic, corporate, or collegiate, as well as an individual; words importing the singular number, where necessary, extend and apply to several persons or things, as well as to one; words importing the masculine, where necessary, extend and apply to the feminine gender; the term "landlord" has the

same signification as under 9 & 10 Vict. c. 95, s. 142 (*ante*, p. 360); and "agent" means any person usually employed by the landlord to let the premises or collect the rents thereof, or specially authorized to act in the particular matter by writing under the hand of the landlord. (1 & 2 Vict. c. 74, s. 7.)

Requisites to successful prosecution of proceedings.

In order, therefore, to enable a landlord to successfully maintain these proceedings before justices, there must be a concurrence of the following circumstances:—

The demise must be at will or for a period not exceeding seven years.

(1.) The premises must have been demised under a lease or agreement, express or implied, at will, or for any term not exceeding seven years. There is no such limit in the County Court Acts. The fact, but not the duration of the tenancy, may be proved by parol evidence, even where there is a written agreement. (*Ingram* v. *Knowles*, 20 L. J. 208.)

The rent must not exceed 20*l*.

(2.) The rent reserved must not have exceeded 20*l*. a year. In an action in the county court for the recovery of small tenements, as we have seen (*ante*, p. 358), neither the rent nor value thereof must exceed 50*l*. a year. (19 & 20 Vict. c. 108, s. 50.)

No fine must have been reserved.

(3.) No fine must have been reserved or made payable. There is a similar condition imposed in 19 & 20 Vict. c. 108, s. 50, though not in s. 52. (*Ante*, pp. 358, 363.)

Term must have ended or been determined.

(4.) The term or tenancy must have ended or been duly determined by a legal notice to quit *or otherwise*. Where the landlord proceeds in the county court under 19 & 20 Vict. c. 108, the term must in every case either have expired, been determined by legal notice to quit, or forfeited for non-payment of rent (ss. 50—52); the words "or otherwise" not being found in that act. But in proceedings before justices, by virtue

of those words, the tenancy may have been determined by entry for a forfeiture other than non-payment of rent. As we have seen (*ante*, p. 4) a tenancy at will is determined by a mere demand of possession or by entry. The term not exceeding seven years here mentioned, means either a tenancy for a time certain, or a tenancy from year to year. As a tenancy for a time certain naturally expires by effluxion of time, there is in such a case no necessity for notice to quit. But tenancies from year to year, whether express or implied, whether the rent be reserved yearly or otherwise, cannot be determined except by notice to quit given at least half a year previously. (*Ante*, p. 4.) If the tenancy be from half year to half year, a half-year's notice to quit must be given; if from quarter to quarter, a quarter's notice; if from month to month, a month's notice; and if from week to week, a week's notice, unless otherwise expressly stipulated between the parties.

The notice *must* be correct as to the time of the expiration of the tenancy, and in order to avoid mistake, which is fatal, may be in the following form:—

"Sir,—I hereby (*or* as agent for Mr. A. B., your landlord, and on his behalf) give you notice to quit and deliver up possession of the (*house*, *land*, *&c.*), situate at , in the county of , which you hold of me (*or* him) as tenant thereof, on the 25th day of December next, *or* at the expiration of the current year (*or as the case may be*) of your tenancy which shall expire next after the end of one half year (*or as the case may be*) from the date of this notice. Dated, &c."

Tenant or occupier must have neglected or refused to

(5.) The tenant or occupier must have neglected or refused to deliver up possession of the premises. Where the person wrongfully with-

give up possession.

holding the premises is an undertenant or assignee, the landlord should take proceedings against him and not against the original lessee.

Landlord or his agent are alone competent to proceed under this act.

(6.) The landlord *or his agent* may proceed alone under this act, which in some instances is an advantage, as rendering the employment of a solicitor unnecessary, the "agent" being competent to represent the landlord.

Jurisdiction of justices not ousted by questions of title.

The jurisdiction of the justices is neither ousted by the tenant setting up title in a third person, if the tenancy and its legal determination are proved to their satisfaction (*Rees* v. *Davies*, 5 C. B., N. S. 56), nor by a claim of title in proceedings to recover possession of a house alleged to belong to a parish, under 59 Geo. 3, c. 12, s. 24, as in that case the question of title is necessarily involved in the matter which the justices have to determine. (*Ex parte Vaughan*, L. R., 2 Q. B. 114; 36 L. J., M. C. 17.) But the tenant may show that he has acquired title by the Statute of Limitations, so that no warrant should be issued. (*Webb* v. *Fordred*, 32 J. P. 114.)

Extension of act.

1 & 2 Vict. c. 74 has been extended to masters of grammar, charity and other schools (3 & 4 Vict. c. 77, s. 19; 4 & 5 Vict c. 38, s. 18, and 23 & 24 Vict. c. 136, s. 13); to occupiers of poor allotments (8 & 9 Vict. c. 118, s. 111); to persons encroaching on lands enclosed (15 & 16 Vict. c. 79, s. 13; *Chilcote* v. *Youldon*, 29 L. J., M. C. 197), and to occupiers of lands vested in the Secretary of State for War. (22 & 23 Vict. c. 12, s. 5.)

Sect. 6.—*Recovery of deserted Premises by Proceedings before Justices.*

11 Geo. 2, c. 19, s. 16.

If any tenant holding any lands, tenements or hereditaments at a rack rent, or, where the rent

reserved shall be full three-fourths of the yearly value of the demised premises, who shall be in arrear for one year's rent [since amended to one half-year's rent, although no express right of re-entry reserved, 57 Geo. 3, c. 52], shall desert the demised premises, and shall leave the same uncultivated or unoccupied so as no sufficient distress can be had to countervail the arrears of rent, it shall and may be lawful for two or more justices of the peace for the county or place (having no interest in the demised premises), at the request of the lessor or landlord, lessors or landlords, or his, her or their bailiff and receiver, to go upon and view the same, and to affix, or cause to be affixed, on the most notorious part of the premises, notice in writing what day—at the distance of fourteen days at least—[clear days, *Creak* v. *Justices of Brighton*, 1 F. & F. 110] they will return to take a second view thereof; and if upon such second view the tenant or some person on his or her behalf shall not appear or pay the rent in arrear, or there shall not be sufficient distress on the premises, then the said justices may put the landlord or landlords, lessor or lessors into the possession of the said demised premises, and the lease thereof to such tenant as to such demise shall from thenceforth become void. (11 Geo. 2, c. 19, s. 16.)

Appeal. Sect. 17.

An appeal lies from the justices to the judges on circuit in the respective counties in which the premises lie (see *Reg.* v. *Sewell*, 8 Q. B. 161), and if they lie in the city of London or county of Middlesex, then to the judges of the Queen's Bench and Common Pleas. (11 Geo. 2, c. 19, s. 17.)

In the metropolis. 3 & 4 Vict. c. 84, s. 13.

In the metropolis it is not necessary that the magistrate should go personally to view the premises, but he may issue a warrant to a constable

of the metropolitan police to affix the notice, and upon a return to such warrant and proof that neither the tenant nor any person on his behalf appeared and paid the rent, and that there is not sufficient distress upon the premises, any such magistrate may issue a warrant to such constable to put the landlord, lessor or *agent* into possession. (3 & 4 Vict. c. 84, s. 13.) Every constable to whom such warrant shall be directed must execute and return the same pursuant to the provisions in 2 & 3 Vict. c. 47.

In the city of London.

11 & 12 Vict. c. 43, s. 34.

The Lord Mayor and aldermen of London have the same jurisdiction and power as two justices under 11 Geo. 2, c. 19, s. 17 (see *Edwards* v. *Hodges*, 15 C. B. 477), but not the same as a metropolitan police magistrate under 3 & 4 Vict. c. 84, s. 13 (*supra*), so that they must proceed in like manner as the justices, and cannot send a constable to view premises and affix notices, &c.

By 21 & 22 Vict. c. 73, s. 1, every stipendiary magistrate may do *alone* all acts authorized to be done by two justices.

In proceedings to recover possession of deserted premises under the act of Geo. 2, no information or complaint on oath is necessary in order to justify the interference of magistrates under that act. (*Basten* v. *Carew*, 3 B. & C. 649; 5 D. & R. 558.)

What are deserted premises.

Where a tenant ceases to reside on the premises for several months and leaves them without a sufficient distress, they are "deserted" within the meaning of this act, although a servant be found upon them (*Ex parte Pilton*, 1 B. & Ald. 369; and see *Taylerson* v. *Peters*, 7 A. & E. 110); but, on the other hand, where the wife and tenant's children remained on the premises, without any furniture except three or four chairs stated to belong to a neighbour, it was held that the pre-

mises were not so deserted. (*Ashcroft* v. *Bourne*, 3 B. & Ad. 684.)

The magistrates should always have a record of their proceedings, under this act, drawn up. Its production being a conclusive answer to an action of trespass against them (see *per* Abbott, C. J., *Basten* v. *Carew*, 3 B. & C. 649), and a protection to the landlord and constable who assisted in getting possession, even though an appeal has been successful. (*Asheroft* v. *Bourne*, 3 B. & Ad. 684; *Reg.* v. *Sewell*, 8 Q. B. 161.)

APPENDIX (A).

STAMPS.

THE following provisions as to stamp duties are contained in the Schedule to 33 & 34 Vict. c. 97:—

LEASE OR TACK—

(1.) For any definite term less than a year:

	£	s.	d.
(*a.*) Of any dwelling-house or tenement, or part of a dwelling-house or tenement, at a rent not exceeding the rate of 10*l.* per annum	0	0	1
(*b.*) Of any furnished dwelling-house or apartments where the rent for such term exceeds 25*l.*	0	2	6
(*c.*) Of any lands, tenements, or heritable subjects except or otherwise than as aforesaid	The same duty as a lease for a year at the rent reserved for the definite term.		

(2.) For any other definite term or for any indefinite term:

Of any lands, tenements, or heritable subjects—

Where the consideration, or any part of the consideration, moving either to the lessor or to any other person, consists of any money, stock, or security;

In respect of such consideration.....	The same duty as a conveyance on a sale for the same consideration.

Where the consideration or any part of the consideration is any rent;
In respect of such consideration:
If the rent, whether reserved as a yearly rent or otherwise, is at a rate or average rate:—

	If the term is definite, and does not exceed 35 years, or is indefinite.			If the term being definite exceeds 35 years but does not exceed 100 years.			If the term being definite exceeds 100 years.		
	£	s.	d.	£	s.	d.	£	s.	d.
Not exceeding 5*l.* per annum..	0	0	6	0	3	0	0	6	0
Exceeding—									
5*l.* and not exceeding 10*l.*	0	1	0	0	6	0	0	12	0
10*l.* ,, ,, 15*l.*	0	1	6	0	9	0	0	18	0
15*l.* ,, ,, 20*l.*	0	2	0	0	12	0	1	4	0
20*l.* ,, ,, 25*l.*	0	2	6	0	15	0	1	10	0
25*l.* ,, ,, 50*l.*	0	5	0	1	10	0	3	0	0
50*l.* ,, ,, 75*l.*	0	7	6	2	5	0	4	10	0
75*l.* ,, ,, 100*l.*	0	10	0	3	0	0	6	0	0
100*l.*									
For every full sum of 50*l.*, and also for any fractional part of 50*l.* thereof	0	5	0	1	10	0	3	0	0

(3.) Of any other kind whatsoever not hereinbefore described 0 10 0

The following important provisions are also contained in the Act itself (33 & 34 Vict. c. 97):—

Agreements for not more than thirty-five years to be charged as leases.

Sect. 96 (1). An agreement for a lease or tack, or with respect to the letting of any lands, tenements, or heritable subjects for any term not exceeding thirty-five years, is to be charged with the same duty as if it were an actual lease or tack made for the term and consideration mentioned in the agreement.

(2) A lease or tack made subsequently to, and in conformity with, such an agreement duly stamped, is to be charged with the duty of sixpence only.

Leases, how to be charged in respect of produce, &c.

Sect. 97 (1). Where the consideration, or any part of the consideration, for which any lease or tack is granted or agreed to be granted, does not consist of money, but consists of any produce or other goods, the value of such produce or goods is to be deemed a consideration in respect of which the lease or tack or agreement is chargeable with *ad valorem* duty; and where it is stipulated that the value of such produce or goods is to amount at least to, or is not to exceed, a given sum, or where

the lessee is specially charged with, or has the option of paying after, any permanent rate of conversion, the value of such produce or goods is, for the purpose of assessing the *ad valorem* duty, to be estimated at such given sum, or according to such permanent rate. 33 & 34 Vict. c. 97.

(2) A lease or tack or agreement made either entirely or partially for any such consideration, if it contains a statement of the value of such consideration, and is stamped in accordance with such statement, is, so far as regards the subject-matter of such statement, to be deemed duly stamped, unless or until it is otherwise shown that such statement is incorrect, and that it is in fact not duly stamped. Effect of statement of value.

Sect. 98 (1). A lease or tack, or agreement for a lease or tack, or with respect to any letting, is not to be charged with any duty in respect of any penal rent, or increased rent in the nature of penal rent, thereby reserved or agreed to be reserved or made payable, or by reason of being made in consideration of the surrender or abandonment of any existing lease, tack or agreement of or relating to the same subject-matter. Directions as to duty in certain cases.

(2) No lease made for any consideration or considerations in respect whereof it is chargeable with *ad valorem* duty, and in further consideration either of a covenant by the lessee to make, or of his having previously made, any substantial improvement of or addition to the property demised to him, or of any covenant relating to the matter of the lease, is to be charged with any duty in respect of such further consideration. (See also 33 & 34 Vict. c. 44.)

(3) No lease for a life or lives not exceeding three, or for any term of years determinable with a life or lives not exceeding three, and no lease for a term absolute not exceeding twenty-one years, granted by an ecclesiastical corporation aggregate or sole, is to be charged with any higher duty than thirty-five shillings.

Sect. 99. The duty upon an instrument chargeable with duty as a lease or tack for any definite term less than a year of— Duty in certain cases may be denoted by adhesive stamp.

(1) Any dwelling-house or tenement, or part of a dwelling-house or tenement, at a rent not exceeding the rate of ten pounds per annum;

(2) Any furnished dwelling-house or apartments;

or upon the duplicate or counterpart of any such instrument, may be denoted by an adhesive stamp, which is to be cancelled by the person by whom the instrument is first executed.

Sect. 100 (1). Every person who executes, or prepares or is employed in preparing, any instrument upon which the duty may, under the provisions of the last preceding section, be denoted by an adhesive stamp, and which is not, at or before the execution thereof, duly stamped, shall forfeit the sum of five pounds. Penalty in certain cases.

(2) Provided that nothing in this section contained shall render any person liable to the said penalty of five pounds in respect of any letters or correspondence. Proviso.

	£	s.	d.
ASSIGNMENT or SURRENDER for value:			
The same duty as on a conveyance. (*See* 33 & 34 Vict. c. 97, Schedule, title Conveyance or Transfer on Sale)			
Surrender, of any kind whatsoever, not chargeable with duty as a conveyance on sale or mortgage..	0	10	0
SCHEDULE, INVENTORY, or document of any kind whatsoever, referred to in or by, and intended to be used or given in evidence as part of or material to, any other instrument charged with any duty, *but which is separate and distinct from*, and not indorsed on or annexed to such other instrument:			
Where such other instrument is chargeable with any duty not exceeding 10*s*.....	The same duty as such other instrument.		
In any other case	0	10	0

39 VICT. CAP. 16, s. 11.

AN instrument whereby the rent reserved by any other instrument chargeable with stamp duty as a lease or tack and duly stamped accordingly is increased, shall not be chargeable with stamp duty otherwise than as a lease or tack in consideration of the additional rent thereby made payable.

APPENDIX (B).

38 & 39 VICT. CAP. 92.

An Act for amending the Law relating to Agricultural Holdings in England.

[13*th August*, 1875.]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Preliminary.

Short title.

1. This Act may be cited as The Agricultural Holdings (England) Act, 1875.

Commencement of act.

2. This Act shall commence from and immediately after the fourteenth day of February, one thousand eight hundred and seventy six. (See p. 233.)

Extent of act.

3. This Act shall not extend to Scotland or Ireland.

Interpretation.

4. In this Act—

"Contract of tenancy" means a letting of land for a term of years, or for lives, or for lives and years, or from year to year, or at will:

"Determination of tenancy" means the cesser of a contract of tenancy by reason of effluxion of time, or from any other cause:

"Landlord" means the person for the time being entitled to possession of land subject to a contract of tenancy, or entitled to receipt of rent reserved by a contract of tenancy, whatever be the extent of his interest, and although the land or his interest therein is encumbered or charged by himself or his settlor, or otherwise, to any extent; the party to a contract of tenancy under which land is actually occupied being alone deemed to be the landlord in relation to the actual occupier:

"Tenant" means the holder of land under a contract of tenancy:

"Landlord" or "tenant" includes the agent authorized in writing to act under this Act generally, or for any special purpose, and the executors, administrators, assigns, husband, guardian, committee of the estate, or trustees in bankruptcy, of a landlord or tenant:

"Holding" includes all land held by the same tenant of the same landlord for the same term under the same contract of tenancy:

"Absolute owner" means the owner or person capable of disposing, by appointment or otherwise, of the fee simple or whole interest of or in freehold, copyhold, or leasehold land, although the land or his interest therein is mortgaged, encumbered, or charged to any extent:

"County court" in relating to a holding, means the county court within the district whereof the holding or the larger portion thereof is situate:

"Person" includes a body of persons and a corporation aggregate or sole.

The designations of landlord and tenant shall, for the purposes of this Act, continue to apply to the parties to a contract of tenancy until the conclusion of any proceedings taken under this Act on the determination of the tenancy.

Compensation.

Tenant's title to compensation.

5. Where, after the commencement of this Act, a tenant executes on his holding an improvement comprised in either of the three classes following:

FIRST CLASS.

Drainage of land.	Making or improving of watercourses, ponds, wells, or reservoirs, or of works for supply of water for agricultural or domestic purposes.
Erection or enlargement of buildings.	
Laying down of permanent pasture.	
Making and planting of osier beds.	Making of fences.
Making of water meadows or works of irrigation.	Planting of hops.
Making of gardens.	Planting of orchards.
Making or improving of roads or bridges.	Reclaiming of waste land.
	Warping of land.

SECOND CLASS.

Boning of land with undissolved bones. Chalking of land. Clay-burning.	Claying of land. Liming of land. Marling of land.

THIRD CLASS.

Application to land of purchased artificial or other purchased manure.	Consumption on the holding by cattle, sheep, or pigs of cake or other feeding stuff not produced on the holding.

he shall be entitled, subject to the provisions of this Act, to obtain, on the determination of the tenancy, compensation in respect of the improvement. (See pp. 233, 234, 235.)

Time in which improvement exhausted.

6. An improvement shall not in any case be deemed, for the purposes of this Act, to continue unexhausted beyond the respective times following after the year of tenancy in which the outlay thereon is made (see pp. 235, 236):

Where the improvement is of the first class, the end of twenty years:

Where it is of the second class, the end of seven years:

Where it is of the third class, the end of two years.

Amount of tenant's compensation in first class.

7. The amount of the tenant's compensation in respect of an improvement of the first class shall, subject to the provisions of this Act, be the sum laid out by the tenant on the improvement, with a deduction of a proportionate part thereof for each year while the tenancy endures after the year of tenancy in which the outlay is made and while the improvement continues unexhausted; but so that where the landlord was not, at the time of the consent given to the execution of the improvement, absolute owner of the holding for his own benefit, the amount of the compensation shall not exceed a capital sum fairly representing the addition which the improvement, as far as it continues unexhausted at the determination of the tenancy, then makes to the letting value of the holding. (See p. 235.)

Amount of tenant's compensa-

8. The amount of the tenant's compensation in respect of an improvement of the second class shall, subject to the

tion in second class.

provisions of this Act, be the sum properly laid out by the tenant on the improvement, with a deduction of a proportionate part thereof for each year while the tenancy endures after the year of tenancy in which the outlay is made and while the improvement continues unexhausted. (See p. 236.)

Amount of tenant's compensation in third class.

9. The amount of the tenant's compensation in respect of an improvement of the third class shall, subject to the provisions of this Act, be such proportion of the sum properly laid out by the tenant on the improvement as fairly represents the value thereof at the determination of the tenancy to an incoming tenant. (See p. 236.)

Consent of landlord for first class.

10. The tenant shall not be entitled to compensation in respect of an improvement of the first class, unless he has executed it with the previous consent in writing of the landlord. (See p. 235.)

Deduction in first class for want of repair, &c.

11. In the ascertainment of the amount of the tenant's compensation in respect of an improvement of the first class, there shall be taken into account, in reduction thereof, any sum reasonably necessary to be expended for the purpose of putting the same into tenantable repair or good condition. (See p. 235.)

Notice to landlord for second class.

12. The tenant shall not be entitled to compensation in respect of an improvement of the second class, unless, not more than forty-two and not less than seven days before beginning to execute it, he has given to the landlord notice in writing of his intention to do so, nor where it is executed after the tenant has given or received notice to quit, unless it is executed with the previous consent in writing of the landlord. (See p. 236.)

Exclusion of compensation in third class after exhausting crop.

13. The tenant shall not be entitled to compensation in respect of an improvement of the third class, where, after the execution thereof, there has been taken from the portion of the holding on which the same was executed, a crop of corn, potatoes, hay, or seed, or any other exhausting crop.

Exclusion of compensation for consumption of, cake, &c. in certain cases.

14. The tenant shall not be entitled to compensation in respect of an improvement of the third class, consisting in the consumption of cake or other feeding stuff, where, under the custom of the country or an agreement, he is entitled to and claims payment from the landlord or incoming tenant in respect of the additional value given by that consumption to the manure left on the holding at the determination of the tenancy. (See p. 237.)

Restrictions as to third class.

15. In the ascertainment of the amount of compensation in respect of an improvement of the third class,—

(1.) There shall not be taken into account any larger

outlay during the last year of the tenancy than the average amount of the tenant's outlay for like purposes during the three next preceding years of the tenancy, or other less number of years for which the tenancy has endured; and,

(2.) There shall be deducted the value of the manure that would have been produced by the consumption on the holding of any hay, straw, roots, or green crops sold off the holding within the last two years of the tenancy or other less time for which the tenancy has endured, except as far as a proper return of manure to the holding has been made in respect of such produce sold off. (See p. 237.)

Deductions from compensation for taxes, rent, &c.

16. The amount of the tenant's compensation shall be subject to the following deductions:

(1.) For taxes, rates, and tithe-rentcharge due or becoming due in respect of the holding to which the tenant is liable as between him and the landlord:

(2.) For rent due or becoming due in respect of the holding:

(3.) For the landlord's compensation under this Act. (See p. 238.)

Set-off of benefit to tenant.

17. In the ascertainment of the amount of the tenant's compensation there shall be taken into account in reduction thereof any benefit which the landlord has given or allowed to the tenant in consideration of the tenant executing the improvement. (See p. 238.)

Tenant's compensation for breach of covenant.

18. Where a landlord commits a breach of covenant or other agreement connected with the contract of tenancy, and the tenant claims under this Act compensation in respect of an improvement, then the tenant shall be entitled to obtain, on the determination of the tenancy, compensation in respect of the breach, subject and according to the provisions of this Act. (See p. 237.)

Landlord's title to compensation.

19. Where a tenant commits or permits waste, or commits a breach of a covenant or other agreement connected with the contract of tenancy, and the tenant claims compensation under this Act in respect of an improvement, then the landlord shall be entitled, by counter-claim, but not otherwise, to obtain, on the determination of the tenancy, compensation in respect of the waste or breach, subject and according to the provisions of this Act.

But nothing in this section shall enable a landlord to obtain under this Act compensation in respect of waste or

a breach committed or permitted in relation to a matter of husbandry more than four years before the determination of the tenancy. (See pp. 238, 239.)

Procedure.

Notice of intended claim.

20. Notwithstanding anything in this Act, a tenant shall not be entitled to compensation under this Act unless one month at least before the determination of the tenancy he gives notice in writing to the landlord of his intention to make a claim for compensation under this Act.

Where a tenant gives such a notice the landlord may, before the determination of the tenancy, or within fourteen days thereafter, give a counter-notice in writing to the tenant of his intention to make a claim for compensation under this Act.

Every such notice and counter-notice shall state, as far as reasonably may be, the particulars of the intended claim. (See p. 239.)

Compensation agreed or settled by reference.

21. The landlord and the tenant may agree on the amount and mode and time of payment of compensation to be paid to the tenant or to the landlord under this Act.

If in any case they do not so agree the difference shall be settled by a reference. (See p. 239.)

Appointment of referee or referees and umpire.

22. Where there is a reference under this Act, a referee, or two referees and an umpire, shall be appointed as follows:

(1.) If the parties concur, there may be a single referee appointed by them jointly:

(2.) If before award the single referee dies or becomes incapable of acting, or for seven days after notice from the parties, or either of them, requiring him to act, fails to act, the proceedings shall begin afresh, as if no referee had been appointed:

(3.) If the parties do not concur in the appointment of a single referee, each of them shall appoint a referee:

(4.) If before award one of two referees dies or becomes incapable of acting, or for seven days after notice from either party requiring him to act fails to act, the party appointing him shall appoint another referee:

(5.) Notice of every appointment of a referee by either party shall be given to the other party:

(6.) If for fourteen days after notice by one party to the other to appoint a referee, or another referee, the other party fails to do so, then, on the application

of the party giving notice, the county court shall within fourteen days appoint a competent and impartial person to be a referee:

(7.) Where two referees are appointed, then (subject to the provisions of this Act) they shall before they enter on the reference appoint an umpire:

(8.) If before award an umpire dies or becomes incapable of acting, the referees shall appoint another umpire:

(9.) If for seven days after request from either party the referees fail to appoint an umpire, or another umpire, then, on the application of either party, the county court shall within fourteen days appoint a competent and impartial person to be the umpire:

(10.) Every appointment, notice, and request under this section shall be in writing. (See p. 240.)

Requisition for appointment of umpire by inclosure commissioners, &c.

23. Provided, that where two referees are appointed, an umpire nay be appointed as follows:

(1.) If either party, on appointing a referee, requires, by notice in writing to the other, that the umpire shall be appointed by the Inclosure Commissioners for England and Wales, then the umpire, and any successor to him, shall be appointed on the application of either party, by those Commissioners:

(2.) In every other case, if either party, on appointing a referee, requires, by notice in writing to the other, that the umpire shall be appointed by the county court, then, unless the other party dissents by notice in writing therefrom, the umpire, and any successor to him, shall, on the application of either party, be so appointed, and in case of such dissent, the umpire, and any successor to him, shall be appointed, on the application of either party, by the Inclosure Commissioners for England and Wales. (See p. 240.)

Exercise of powers of county court.

24. The powers of the county court under this Act, relative to the appointment of a referee or umpire, shall be exerciseable by the judge of the court having jurisdiction, whether he is without or within his district, and may, by consent of the parties, be exercised by the registrar of the court. (See p. 240.)

Mode of submission to reference.

25. The delivery to a referee of his appointment shall be deemed a submission to a reference by the party delivering it; and neither party shall have power to revoke

a submission, or the appointment of a referee, without the consent of the other. (See p. 240.)

Power for referee, &c. to require production of documents, administer oaths, &c.

26. The referee or referees or umpire may call for the production of any sample, or voucher or other document, or other evidence which is in the possession or power of either party, or which either party can produce, and which to the referee or referees or umpire seems necessary for determination of the matters referred, and may take the examination of the parties and witnesses on oath, and may administer oaths and take affirmations; and if any person so sworn or affirming wilfully and corruptly gives false evidence he shall be guilty of perjury. (See p. 240.)

Power to proceed in absence.

27. The referee or referees or umpire may proceed in the absence of either party where the same appears to him or them expedient, after notice given to the parties. (See p. 240.)

Form of award.

28. The award shall be in writing, signed by the referee or referees or umpire.

Time for award of referee or referees.

29. A single referee shall make his award ready for delivery within twenty-eight days after his appointment.

Two referees shall make their award ready for delivery within twenty-eighth days after the appointment of the last appointed of them, or within such extended time (if any) as they from to time to time jointly fix by writing under their hands, so that they make their award ready for delivery within a time not exceeding in the whole forty-nine days after the appointment of the last appointed of them. (See p. 240.)

Reference to and award by umpire.

30. Where two referees are appointed and act, if they fail to make their award ready for delivery within the time aforesaid, then, on the expiration of that time, their authority shall cease, and thereupon the matters referred to them shall stand referred to the umpire. (See p. 240.)

The umpire shall make his award ready for delivery within twenty-eight days after notice in writing given to him by either party or referee of the reference to him, or within such extended time (if any) as the registrar of the county court from time to time appoints, on the application of the umpire or of either party, made before the expiration of the time appointed by or extended under this section.

Duration of improvement to be found.

31. The award shall find and state the time at which each improvement, in respect whereof compensation is awarded, is taken, for the purposes of the award, to be exhausted. (See p. 240.)

Award to give particulars.

32. The award shall not award a sum generally for compensation, but shall, as far as reasonably may be, specify—

The several improvements, acts, and things in respect whereof compensation is awarded;

The time at which each thereof was executed, committed, or permitted;

In the case of an improvement of the first class where the landlord was not at the time of the consent given to the execution thereof absolute owner of the holding for his own benefit, the extent to which the improvement adds to the letting value of the holding;

The sum awarded in respect of each improvement, act, or thing; and

The sum laid out by the tenant on each improvement. (See p. 240.)

Costs of reference.

33. The costs of and attending the reference, including the remuneration of the referee or referees and umpire, where the umpire has been required to act, and including other proper expenses, shall be borne and paid by the parties in such proportion as to the referee or referees or umpire appears just, regard being had to the reasonableness or unreasonableness of the claim of either party in respect of amount, or otherwise, and to all the circumstances of the case.

The award may direct the payment of the whole or any part of the costs aforesaid by the one party to the other.

The costs aforesaid shall be subject to taxation by the registrar of the county court, on the application of either party, but that taxation shall be subject to review by the judge of the county court. (See p. 240.)

Day for payment.

34. The award shall fix a day, not sooner than one month after the delivery of the award, for the payment of money awarded for compensation, costs, or otherwise. (See p. 240.)

Submission not to be removable, &c.

35. A submission or award shall not be made a rule of any court, or be removable by any process into any court, and an award shall not be questioned otherwise than as provided by this Act. (See p. 240.)

Appeal to county court.

36. Where the sum claimed for compensation exceeds fifty pounds, either party may, within seven days after delivery of the award, appeal against it to the judge of the county court on all or any of the following grounds:—

1. That the award is invalid;
2. That compensation has been awarded for improvements, acts, or things, breaches of covenants or

agreements, or for committing or permitting waste, in respect of which the party claiming was not entitled to compensation;

3. That compensation has not been awarded for improvements, acts, or things, breaches of covenants or agreements, or for committing or permitting waste, in respect of which the party claiming was entitled to compensation;

and the judge shall hear and determine the appeal, and may, in his discretion, remit the case to be reheard as to the whole or any part thereof by the referee or referees or umpire, with such directions as he may think fit.

If no appeal is so brought, the award shall be final.

The decision of the judge of the county court on appeal shall be final, save that the judge shall, at the request of either party, state a special case on a question of law for the judgment of the High Court of Justice, and the decision of the High Court on the case, and respecting costs and any other matter connected therewith, shall be final, and the judge of the county court shall act thereon. (See p. 241.)

Recovery of compensation.

37. Where any money agreed or awarded or ordered on appeal to be paid for compensation, costs, or otherwise, is not paid within fourteen days after the time when it is agreed or awarded or ordered to be paid, it shall be recoverable, upon order made by the judge of the county court, as money ordered by a county court under its ordinary jurisdiction to be paid is recoverable. (See p. 241.)

Appointment of guardian.

38. Where a landlord or tenant is an infant without a guardian, or is of unsound mind, not so found by inquisition, the county court, on the application of any person interested, may appoint a guardian of the infant or person of unsound mind for the purposes of this Act, and may change the guardian if and as occasion requires.

Provisions respecting married women.

39. The county court may appoint a person to act as the next friend of a married woman for the purposes of this Act, and may remove or change that next friend if and as occasion requires.

A married woman entitled for her separate use, and not restrained from anticipation, shall, for the purposes of this Act, be in respect of land as if she was unmarried.

Where any other married woman is desirous of doing any act under this Act, her husband's concurrence shall be requisite, and she shall be examined apart from him by the county court, or by the judge of the county court for the place where she for the time being is, touching her knowledge of the nature and effect of the intended act, and it

shall be ascertained that she is acting freely and voluntarily.

Costs in county court.

40. The costs of proceedings in the county court under this Act shall be in the discretion of the court.

The Lord Chancellor may from time to time prescribe a scale of costs for those proceedings, and of costs to be taxed by the registrar of the court. (See p. 241.)

Service of notice, &c.

41. Any notice, request, demand, or other instrument under this Act may be served on the person to whom it is to be given, either personally or by leaving it for him at his last known place of abode in England, or by sending it through the post in a registered letter addressed to him there: and if so sent by post it shall be deemed to have been served at the time when the letter containing it would be delivered in ordinary course; and in order to prove service by letter it shall be sufficient to prove that the letter was properly addressed and posted, and that it contained the notice, request, demand, or other instrument to be served.

Charge of Tenant's Compensation.

Power for landlord, on paying compensation, to obtain charge.

42. A landlord, on paying to the tenant the amount of compensation due to him under this Act, may obtain from the county court a charge on the holding in respect thereof.

The court shall have power, on proof of the payment, and on being satisfied of the observance in good faith by the parties of the conditions imposed by this Act, to make an order charging the holding with repayment of the amount paid, or any part thereof, with such interest, and by such instalments, and with such directions for giving effect to the charge, as the court thinks fit.

But, where the landlord obtaining the charge is not absolute owner of the holding for his own benefit, no instalment or interest shall be made payable after the time when the improvement in respect whereof compensation is paid will, for the purposes of this Act, be taken to be exhausted.

The instalments and interest shall be charged in favour of the landlord, his executors, administrators and assigns.

Advance made by a company for the improvement of land.

43. Any company now or hereafter incorporated by parliament, and having power to advance money for the improvement of land, may take an assignment of any charge made by a county court under the provisions of this Act, upon such terms and conditions as may be agreed upon between such company and the person entitled to such charge; and such company may assign any charge

so acquired by them to any person or persons whomsoever.

Duration of charge.

44. The sum charged by the order of a county court under this Act shall be a charge on the holding for the landlord's interest therein, and for all interests therein subsequent to that of the landlord; but so that the charge shall not extend beyond the landlord's interest where the landlord is himself a tenant of the holding.

Crown and Duchy Lands.

Application of Act to crown lands.

45. This Act shall extend and apply to land belonging to her Majesty the Queen, her heirs and successors, in right of the Crown.

With respect to such land, for the purposes of this Act, the Commissioners of her Majesty's Woods, Forests, and Land Revenues, or one of them, or other the proper officer or body having charge of such land for the time being, or in case there is no such officer or body, then such person as her Majesty, her heirs or successors, may appoint in writing under the Royal Sign Manual, shall represent her Majesty, her heirs and successors, and shall be deemed to be the landlord.

Any compensation payable under this Act by the Commissioners of her Majesty's Woods, Forests, and Land Revenues, or either of them, in respect of an improvement of the first class, shall be deemed to be payable in respect of an improvement of land within section one of the Crown Lands Act, 1866, and the amount thereof shall be charged and repaid as in that section provided with respect to the costs, charges, and expenses therein mentioned.

Any compensation payable under this Act by those Commissioners, or either of them, in respect of an improvement of the second class, or of the third class, shall be deemed to be part of the expenses of the management of the Land Revenues of the Crown, and shall be payable by those Commissioners out of such money and in such manner as the last-mentioned expenses are by law payable.

Application of Act to land of Duchy of Lancaster.

46. This Act shall extend and apply to land belonging to her Majesty, her heirs and successors, in right of the Duchy of Lancaster.

With respect to such land, for the purposes of this Act, the Chancellor for the time being of the Duchy shall represent her Majesty, her heirs and successors, and shall be deemed to be the landlord.

The amount of any compensation payable under this Act by the Chancellor of the Duchy in respect of an im-

provement of the first class shall be deemed to be an expense incurred in improvement of land belonging to her Majesty, her heirs or successors, in right of the Duchy, within section twenty-five of the Act of the fifty-seventh year of King George the Third, chapter ninety-seven, and shall be raised and paid as in that section provided with respect to the expenses therein mentioned.

The amount of any compensation payable under this Act by the chancellor of the Duchy in respect of an improvement of the second class or of the third class shall be paid out of the annual revenues of the Duchy.

The amount of any compensation payable under this Act to the Chancellor of the Duchy shall be paid into the hands of the Receiver General of the revenues of the Duchy, or of his sufficient deputy or deputies; and receipts shall be given by him or them for the same; and the same shall be applied as purchase-money for land sold under The Duchy of Lancaster Lands Act, 1855, is applicable under section two of that Act.

Application of Act to land of Duchy of Cornwall.

47. This Act shall extend and apply to land belonging to the Duchy of Cornwall.

With respect to such land, for the purposes of this Act, such person as the Duke of Cornwall for the time being, or other the personage for the time being entitled to the revenues and possessions of the Duchy of Cornwall, from time to time, by sign manual, warrant, or otherwise, appoints, shall represent the Duke of Cornwall, or other the personage aforesaid, and be deemed to be the landlord, and may do any act or thing under this Act which a landlord is authorized or required to do thereunder.

Any compensation payable under this Act by the Duke of Cornwall, or other the personage aforesaid, in respect of an improvement of the first class, shall be deemed to be payable in respect of an improvement of land within section eight of The Duchy of Cornwall Management Act, 1863, and the amount thereof may be advanced and paid from the money mentioned in that section, subject to the provision therein made for repayment of sums advanced for improvements.

Ecclesiastical and Charity Lands.

Landlord, archbishop, or bishop.

48. Where lands are assigned or secured as the endowment of a see, the powers by this Act conferred on a landlord shall not be exercised by the archbishop or bishop, in respect of those lands, except with the previous approval in writing of the Estates Committee of the Ecclesiastical Commissioners for England.

Landlord, incumbent of benefice.

49. Where a landlord is incumbent of an ecclesiastical benefice, the powers by this Act conferred on a landlord shall not be exercised by him in respect of the glebe land or other land belonging to the benefice, except with the previous approval in writing (*a*) of the patron of the benefice [that is, the person, officer, or authority who, in case the benefice were vacant, would be entitled to present thereto] or of the Governors of Queen Anne's Bounty (that is, the Governors of the Bounty of Queen Anne for the Augmentation of the Maintenance of the Poor Clergy).

Amended by 39 & 40 Vict. c. 74.

In every such case the Governors of Queen Anne's Bounty may, if they think fit, on behalf of the incumbent, out of any money in their hands, pay to the tenant the amount of compensation due to him under this Act; and thereupon they may, instead of the incumbent, obtain from the county court a charge on the holding, in respect thereof, in favour of themselves.

Every such charge shall be effectual, notwithstanding any change of the incumbent.

(*b*) *The Governors of Queen Anne's Bounty, before granting their approval in any case under this section, shall give notice of the application for their approval to the patron of the benefice (that is, the person, officer, or authority who, in case the benefice were then vacant, would be entitled to present thereto).*

Landlord, charity trustees, &c.

50. The powers by this Act conferred on a landlord shall not be exercised by trustees for Ecclesiastical or charitable purposes, except with the previous approval in writing of the Charity Commissioners for England and Wales.

Notice to quit.

Time of notice to quit.

51. 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, a year's notice so expiring shall by virtue of this Act be necessary and sufficient for the same; 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.

(*a*) The words in brackets are introduced by 39 & 40 Vict. c. 74, s. 3.

(*b*) The clause in *italics* is repealed by 39 & 40 Vict. c. 74, s. 2.

Resumption for Improvements.

Resumption of possession for cottages, &c.

52. Where on a tenancy from year to year a notice to quit is given by the landlord with a view to the use of land for any of the following purpose,—

The erection of farm labourers' cottages or other houses, with or without gardens;

The providing of gardens for existing farm labourers' cottages or other houses;

The allotment for labourers of land for gardens or other purposes;

The planting of trees;

The opening or working of any coal, ironstone, limestone, or other mineral, or of a stone quarry, clay, sand, or gravel pit, or the construction of any works or buildings to be used in connexion therewith;

The obtaining of brick earth, gravel, or sand;

The making of a watercourse or reservoir;

The making of any road, tramroad, siding, canal or basin, or any wharf, pier, or other work connected therewith;

and the notice to quit so states, then it shall, by virtue of this Act, be no objection to the notice that it relates to part only of the holding.

In every such case the provisions of this Act respecting compensation shall apply as on determination of a tenancy in respect of an entire holding.

The tenant shall also be entitled to a proportionate reduction of rent in respect of the land comprised in the notice to quit, and in respect of any depreciation of the value to him of the residue of the holding, caused by the withdrawal of that land from the holding or by the use to be made thereof; and the amount of that reduction shall be ascertained by agreement or settled by a reference under this Act, as in case of compensation (but without appeal).

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 tenancy; and the notice to quit shall have effect accordingly.

Fixtures.

Tenant's property in fixtures,

53. Where after the commencement of this Act a tenant affixes to his holding any engine, machinery, or other

machinery, &c.

fixture for which he is not under this Act or otherwise entitled to compensation, and which is not so affixed in pursuance of some obligation in that behalf or instead of some fixture belonging to the landlord, then such fixture shall be the property of and be removable by the tenant:

Provided as follows:—

1. Before the removal of any fixture the tenant shall pay all rent owing by him, and shall perform or satisfy all other his obligations to the landlord in respect of the holding:
2. In the removal of any fixture the tenant shall not do any avoidable damage to any building or other part of the holding:
3. Immediately after the removal of any fixture the tenant shall make good all damage occasioned to any building or other part of the holding by the removal:
4. The tenant shall not remove any fixture without giving one month's previous notice in writing to the landlord of the intention of the tenant to remove it:
5. At any time before the expiration of the notice of removal, the landlord, by notice in writing given by him to the tenant, may elect to purchase any fixture comprised in the notice of removal, and any fixture thus elected to be purchased shall be left by the tenant, and shall become the property of the landlord, who shall pay the tenant the fair value thereof to an incoming tenant of the holding; and any difference as to the value shall be settled by a reference under this Act, as in case of compensation (but without appeal):

But nothing in this section shall apply to a steam engine erected by the tenant if, before erecting it, the tenant has not given to the landlord notice in writing of his intention to do so, or if the landlord, by notice in writing given to the tenant, has objected to the erection thereof.

General Application of Act.

No restriction on contract.

54. Nothing in this Act shall prevent a landlord and tenant, or intending landlord and tenant, from entering into and carrying into effect any such agreement as they think fit, or shall interfere with the operation thereof. (See p. 234.)

Adoption of parts of Act

55. A landlord and tenant, whether the landlord is absolute owner of the holding for his own benefit or not,

may, in any agreement in writing relating to the holding, adopt by reference any of the provisions of this Act respecting procedure or any other matter, without adopting all the provisions of this Act; and any provision so adopted shall have effect in connexion with the agreement accordingly. (See p. 234.) by agreement.

But where, at the time of the making of the agreement, the landlord is not absolute owner of the holding for his own benefit, no charge shall be made on the holding, under this Act, by virtue of the agreement, greater than or different in nature or duration from the charge which might have been made thereon, under this Act, in the absence of the agreement.

56. This Act shall apply to every contract of tenancy beginning after the commencement of this Act, unless, in any case, the landlord and tenant agree in writing, in the contract of tenancy, or otherwise, that this Act, or any part or provision of this Act, shall not apply to the contract; and, in that case, this Act, or the part or provision thereof to which that agreement refers (as the case may be), shall not apply to the contract. (See p. 234.) Application of Act to future tenancies.

57. In any case of a contract of tenancy from year to year or at will, current at the commencement of this Act, this Act shall not apply to the contract, if within two months after the commencement of this Act the landlord or the tenant gives notice in writing to the other to the effect that he (the person giving the notice) desires that the existing contract of tenancy between them shall remain unaffected by this Act; but such a notice shall be revocable by writing, and in the absence of any such notice, or on revocation of every such notice, this Act shall apply to the contract. Application of Act to existing tenancies.

In every other case of a contract of tenancy current at the commencement of this Act, this Act shall not apply to the contract. (See p. 234.)

58. Nothing in this Act shall apply to a holding that is not either wholly agricultural or wholly pastoral, or in part agricultural and as to the residue pastoral, or that is of less extent than two acres. (See p. 233.) Exception of non-agricultural and small holdings.

59. A tenant shall not be entitled to claim compensation under this Act and under any custom of the country or contract in respect of the same work or thing. (See p. 234.) Exception where other compensation.

60. Except as in this Act expressed, nothing in this Act shall take away, abridge, or prejudicially affect any power, right, or remedy of a landlord, tenant, or other person, General saving of rights.

vested in or exerciseable by him by virtue of any other Act or law, or under any custom of the country, or otherwise, in respect of a contract of tenancy or other contract, or of any improvement, waste, emblements, tillages, away-going crops, fixtures, tax, rate, tithe-rentcharge, rent, or other thing. (See p. 234.)

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THE END.

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