THE LAW

OF

LANDLORD AND TENANT;

BEING

A COURSE OF LECTURES DELIVERED AT THE LAW INSTITUTION.

BY

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WITH

NOTES AND ADDITIONS

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WITH NOTES AND REFERENCES TO THE AMERICAN CASES

BY

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PREFACE.

The following Lectures on the law of Landlord and Tenant were delivered by the late Mr. John William Smith, at the Law Institution, in the years 1841 and 1842.

They are printed as they were left by the Author; all the authorities referred to by him being inserted in the text.

The Editor is responsible for the foot-notes, for those portions of the text which are included within brackets, and for the headings to the Lectures, and the marginal notes.

The new matter inserted in the foot-notes has been added chiefly with the view of showing the alterations in the law since the Lectures were delivered, and the practical application, in the later decisions, of the principles mentioned in the text. The Editor has also endeavoured, by the addition of many of the earlier cases, to make the work more useful, not only for Students, but as a Circuit Companion.

It was thought that the insertion of these additions in the text would break up, inconveniently, the broad general statements of the law of which it mainly consists; and it was also felt to be desirable that this new matter should be distinctly separated from the original work.

The references to Coke upon Littleton are made to the edition of 1823, by Hargrave and Butler, and those to Blackstone's Commentaries relate to the edition of 1825, by Mr. Justice Coleridge.

F. P. M.

Inner Temple, *April*, 1855.

PREFACE TO THE AMERICAN EDITION.

These lectures are marked by the best characteristics of Mr. Smith's style, combining comprehensiveness, perspicuity and brevity in an admirable manner.

In presenting the American Edition to the public, it has been the aim of the Editor to illustrate the text by reference to the American authorities, keeping always in view the Author's plan of confining the work within reasonable limits. There will be found therefore but little dissertation in the notes, but it is hoped an ample reference to authorities as illustrating principles.

P. P. M.

Philadelphia, *February*, 1856.

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ERRATA.

Page 37, note, fifth line, for "demesne" read "domain."

" 38, " second line, for "powers" read "rules of property."

" 90, " thirteenth line, for "not exceeding two years," read "not exceeding twenty-one years."

" 102, " ninth and tenth lines, for "8 and 9 Vict., c. 106, s. 5," read "8 and 9 Vict., c. 106, s. 4."

" 245, " eleventh line, after the words "Judge Woodward who delivers the opinion of the Court," read "in Irving *vs.* Covode."

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THE

LAW OF LANDLORD AND TENANT.

LECTURE I.

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The object of this and of the succeeding Lectures will be to state, as shortly and intelligibly as may be, the principal doctrines of the law of Landlord and Tenant. There are few words so constantly in lawyers' mouths as the words Landlord and Tenant; and yet, when we come to inquire what precise relation are they intended to express—there are few questions which one feels greater practical difficulty in answering; for, on* the one hand, there is no doubt whatever that, [*2] in point of strict law, wherever we find a subject in possession of land, *there* the relation of tenancy is in existence between him and somebody or other, since,

according to the immutable rule of English law, no subject can have what is called *allodial* property, that is, land held of nobody. Some one or other *must* be his superior lord, and, if no other person, then the sovereign, of whom all the landed property in the realm in the possession of subjects is thus ultimately held.[1] I say *ultimately*, because, put the case that there are fifty intermediate landlords, the last of them must himself hold of some person, and that person must be the sovereign, inasmuch as there is no one else capable of holding independently of any superior. There is great doubt among our legal antiquarians as to the precise period at which this system of tenures was adopted in England; some contending that it owes its origin to the Norman Conquest, others, that it existed in the Saxon times, and received certain modifications after the Conquest.[2] But, be this as it may, it has now been for upwards of eight hundred years, at least, a settled and unchangeable principle of English law, that no person except the sovereign can hold landed property without a *superior lord, and consequently, in the contemplation of strict law, the relation of Landlord and Tenant is as extensive as the ownership of landed property by subjects.[3]

[*3]

I need not, however, tell you who must be all familiar with the use of those terms, that when we speak of Landlord and Tenant, even among lawyers, we use those words in a much narrower sense than that which I have just described. For instance, when we use the words Landlord and Tenant, we do not mean to express

[1] Co. Litt. 1 a, b, 65 a.

[2] See Co. Litt. (by Hargrave and Butler,) 64 a, note 1; 2 Black. Com. 48; and Reeve's Hist. of Eng. Law, vol. i. p. 8, where the authorities on both sides of this question are mentioned.

[3] Co. Litt. 65 a; 2 Black. Com. 51.

the species of relation which subsists between the sovereign and a subject; for instance, the Duke of Wellington, who holds his estates of her Majesty by the service of presenting yearly a *banner* in lieu of all other rents and services;[4] nor do we, I think, ever intend to express the sort of relation that exists between the reversioner and the particular tenants under a settlement, where no rent is reserved, or any service rendered, although a tenancy doubtless exists between them; for instance, if I convey lands to A. in tail, keeping the reversion myself, there is no doubt *that A. becomes my tenant, though I reserve not a sixpence of rent, nor ask for any covenant [*4] on his part to perform any of the ordinary duties of a tenant, and though he might destroy my interest the next day if so minded. But though, as I have said, he is my tenant in strict law, this is not the sort of tenancy we mean when we use the words Landlord and Tenant. It is very difficult to express in terms the precise idea which we attribute to those words; but I think that I am not far wrong in saying that, when we speak of Landlord and Tenant, we have the notion in our minds of a tenancy limited in point of duration within some bounds not so extensive as to render the landlord's interest *practically* worthless, and accompanied by some remunerating incidents to

[4] This is one of the few remaining instances of a holding by *petit serjeanty* (per pervum servitium,) which was one of the old tenures *in capite*. In this tenure a subject held land immediately from the crown, rendering a bow, a sword or the like. Litt. ss. 159, 160, 161. *Grand serjeanty* was of a similar character, but the services rendered were personal to the king; as, for instance, the bearing of his sword or his lance. Litt. ss. 153 to 158. By the 12 Car. 2, c. 24, these tenures were converted, in effect, into ordinary *socage* tenures.

the reversion, such as a rent, or at all events a fine in lieu of one, and also by certain obligations, such as covenants, or, where the tenancy is evidenced by some instrument not under seal, agreements, for the performance of the duties usually required from persons taking the description of property demised; and as these are the sort of tenancies which give rise to the great mass of practical questions involved in the law of Landlord and Tenant, it is to these that I intend almost exclusively to direct my remarks. Still (as it is always useful and satisfactory to take a view of the entire subject, although you may intend to investigate certain parts only,) it will be right, I think, before entering upon details, *to enume-
[*5] rate the different sorts of *tenancy*, strictly so called, known to the law of England, and to point out very briefly their peculiarities.

The first and highest tenancy known to the law is, as you are all aware, *tenancy in fee-simple*.[5] Such a tenant has the entire uncontrolled disposition of the property. He must, however, as I have already stated, hold of *some* person, otherwise he would not be a tenant at all, and that person, if the estate was created at any time subsequently to the year 1290, must be the sovereign, for, in that year, an Act of Parliament was passed, which from the Latin words used at its commencement, we call the Statute of *Quia Emptores* [18 Ed. 1, c. 1.], which prohibits any subject from conveying lands to be held of himself in fee-simple, and directs that, for the future, when lands are conveyed in fee-simple, the grantee of them shall not become the tenant of the grantor, but shall be the tenant of the person of whom the

[5] Litt. s. 1; Watkins on Convey. bk. 1, c. ix.

grantor held. And, this is not a matter altogether unimportant, because, if the tenant of lands in fee-simple were to die without heirs and without a will, the lands would escheat to the person of whom they were immediately held.[6] And in this way *property does, even at the present day, occasionally escheat to the sovereign, of whom by far the greater part of the lands in the kingdom are now holden, although there are still some estates in fee-simple created previously to the year 1290, which were then held and still continue to be held of subjects.[7](*a*) [*6]

[6] See Co. Litt. 13 a; Com. Dig. *Escheat.* Property held upon trust or mortgage does not escheat by the attainder or conviction of the trustee or mortgagee. 13 & 14 Vic c. 60, s. 46. This act provides also for the case of the death of the trustees or mortgagees intestate and without heirs. See ss. 15 and 19; and Sugden's Essay on the Real Property Statutes, c. viii.

[7] Any examination of the incidents of tenancies in fee-simple would be out of place here. The subject is shortly and clearly dealt with in Watkins on Convey. bk. 1, c. ix.

(*a*) In America the existence of tenure is expressly negatived in several States, viz.: New York, South Carolina and Michigan, and in most, if not all the others, the ownership of land is as absolute and direct, as is compatible with the existence of society where the right of eminent demesne is recognized; yet it would not be safe to assert that any property is allodial. By the Charter of Pennsylvania, the Proprietary held his estate of the crown, in free and common socage. (3 § of Charter.) By the 17th and 18th Sections, William Penn was authorized to alien any portion of the said lands to be held of the said William Penn, his heirs or assigns, and not immediately of the king, notwithstanding the Statute *quia emptores*, and the divesting Act 27 November, 1779, 1 Smith's Laws, 479, &c., did but substitute the Commonwealth of Pennsylvania for the Proprietaries. It is believed that all the States in which the common law forms the basis of their constitutions, have some remnant of the doctrine of

The next species of tenancy is that *in tail*. The nature of which I take it for granted that you are

tenure, without which it would be impossible to account for many of their well established powers.

"It is true," says Judge Jones, in his syllabus of the Law of Land Office Titles in Pennsylvania, "the fee passes free and clear of all restrictions and reservations as to mines, royalties, quit-rents, or otherwise, excepting the fifth part of all gold and silver ore for the use of the Commonwealth, yet, fealty remains as an inseparable incident to the estate granted, and that is a service, and escheat remains, which is a perquisite and fruit of tenure; and finally, the rules of the common law regulating the descent of real estate remain, except so far as altered by Acts of Assembly, and these are of feudal origin, and proceed upon the fiction or principle of tenure."

Since the above was written, Judge Sharswood's Lecture before the Law Academy of Philadelphia, at the opening of the Session of 1855–6, has been published. The reader will there find this subject thoroughly discussed, and the same conclusion arrived at.

Judge Sharswood adds to the evidence of tenure enumerated above, "The forms and language of our conveyances," and says, "By the Act of 28 May, 1715, all deeds and conveyances proved or acknowledged, and recorded, are to have the same force and effect here for the giving possession and seisin, and making good the title and assurance, as deeds of feoffment with livery and seisin, &c. It is obvious that prior to the Act of Frauds and Perjuries of 21 March, 1772, a parol feoffment with livery was a valid conveyance of lands; and in the first case which arose upon the construction of the Act of 1715, C. J. M'Kean said: 'The legislature has at various periods, and on a variety of subjects, departed from feudal ceremonies and principles in relation to the transfer and descent of property, but in the present instance, the Act of Assembly meant only to give to a grant of lands, a greater effect upon the estate on recording the deed, than could previously have been enjoyed without livery of seisin.' M'Kee's Lessee *v.* Pfout, 3 Dall. 486. 'The object,' says C. J. Gibson, 'was to give without the aid of feudal ceremonies, the legal seisin for lawful purposes.' Desilver's Estate, 5 Rawle, 113. In both these cases it was held, that the act did not mean to give a common deed without livery, the tortious effect of a feoffment with

well acquainted with,[8] and also with the modes in which they may be barred and turned into a fee-simple.[9](a) While it continues an estate tail, however, it is held of the person by whom it was originally created or his representative.

Next come the various species of *estates for life*, whether for the life of the tenant, or *pur auter vie*,[10] whether for one life or for several, whether created by act of the party, as the estates for life limited in a settlement, or by act of the law, as in the case of *dower*,[11] and *tenancy by the curtesy*.[12] All these

[8] See Litt. ss. 13 to 31; Watkins on Convey. bk. 1, c. viii. At common law, before the statute of Westminster the 2nd (13 Edw. 1, st. 1, c. 1,) the tenant in tail was owner of a conditional fee. Lit. s. 13.

[9] See the 3 & 4 Wm. 4, c. 74 (passed August 28th, 1833); and Sugden's Essay on the Real Property Statutes, c. ii.

[10] Litt. ss. 56, 57; Watkins on Convey. bk. 1, c. iv. and v.

[11] Litt. ss. 36 to 55; 3 & 4 Wm. 4, c. 105; Watkins on Convey. bk. 1, c. vi.; Sugden's Essay on the Real Property Statutes, c. iii. And as to the assignment of dower, see Doe *d.* Riddell *v.* Gwinnell, 1 Q B. 682. 41 E. C. L. R. 728.

[12] Litt. s. 35; Watkins on Convey. bk. 1, c. vii.

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livery. In speaking on that subject in Lyle *v.* Richards, 9 S. & R. 334, C. J. Tilghman says: 'What would be the effect of a feoffment with livery is another question, and I give no opinion on it. It is a kind of conveyance out of use; indeed I have never heard of one in Pennsylvania.' I have, however, seen an early deed for a lot in Philadelphia, with an endorsement of livery of seisin, and in another chain of title, met with a Letter of Attorney to make livery. It is worthy of remark, as observed by C. J. Tilghman, that in the case of M'Kee *v.* Pfout, mentioned before, where the counsel for the plaintiff argued against the forfeiture, it was taken for granted by them, that a feoffment with livery would have occasioned a forfeiture, nor did any intimation to the contrary fall from the Court. And Lyle *v.*

(a) See Kent's Com., Vol. 4, p. 14, and in notes. In Penna. Act, 27 April, 1855. Pam. Laws, p. 368.

[*7] hold of the immediate reversioner, as *does that other description of tenant for life, denominated *tenant in tail after possibility of issue extinct*,[13] who differs from the rest in this particular, that having once had an estate of inheritance he is permitted to cut timber and do other acts which would amount to *waste* in an ordinary tenant for life, and might, as such, be prevented or punished by the reversion.

Now these are the descriptions of *freehold tenancy* known to the law, of which, after the present lecture, it is not my intention to say anything—since, having only a limited portion of time to dispose of, I think it best to devote it entirely to the consideration of those tenancies which are of the most frequent practical occurrence, and, these being, out of all question, tenancies not of a freehold character, our attention will, in the succeeding lectures, be devoted to such and to such only. There are indeed some parts of England in which tenancies for lives are extremely common,[14] more common indeed than those of a chattel nature, and are accompanied by the ordinary incidents of a tenancy for years, I mean a remunerating rent to the landlord, or a fine in lieu of one, and covenants for the performance of certain duties usually imposed on tenants for a limited period. But, though these freehold tenancies do, in these [*8] matters, very much resemble those *of which it is my intention to speak, yet, I think it unne-

[13] See Litt. ss. 32 to 34; Co. Litt. 27 b.

[14] These tenancies are also very common in Ireland. Furlong's Landl. and Ten. bk. 2, c. iv.

Richards, in which it was held that a common recovery suffered by tenant for life, was an effectual bar of contingent remainders dependent thereon, could only rest on the extension of the feudal principles of alienation and tenure to this State."

cessary to devote any separate consideration to them, because the payment of the rent and the construction of the covenants incident to them are regulated by almost precisely the same rules as those which regulate the same points in the case of a tenancy for years, and it will much simplify our course and prevent useless repetition, if we consider these once, and once only.

I shall, therefore proceed at once to the consideration of those tenancies which are of a quality inferior to freehold, and these are,

1st. Tenancies *for years.*

2ndly. Tenancies *at will.*

3rdly. Tenancies *by sufferance.*

The history of tenancies for years is curious. In the very early ages, while the feudal system retained its original vigor, estates of a less quality than freehold were unknown. There was then no such thing as an estate for years; the owner of the soil did indeed sometimes covenant with a particular person that he should enjoy the right of dwelling on and cultivating a portion of land for a certain definite period, but this did not constitute the person who occupied it a tenant at all. It was considered as a mere *agreement* between him and the freeholder, conferring no estate, and creating no tenure. If the freeholder turned him out on the following day, he had no remedy by which he could recover the possession. He might, indeed, maintain an action for the breach of the agreement *to allow him to occupy, but he was unable to recover the land, since the law did not recognize him as possessing any estate in it.[15] [*9]

The first step towards establishing him on his

[15] See Bac. Ab. *Leases.*

present footing was the invention of a particular form of the *writ of covenant*,[16] in which he was made to demand his *term*, as well as damages for the injury done him in ousting him; but as this was only a form of the action of covenant, and as he could only maintain that action against the person who had covenanted with him, (for it was not till long afterwards that covenants were held to bind the assignee of the lessor), if it so happened that his lessor had aliened the estate, or had created a particular estate of freehold in it, he had no means of wresting the possession from the alience or grantee of such particular estate, and consequently was left altogether to his action for damages.

Thus matters stood until the reign of Henry III., at which period *Bracton*, from whom we derive our knowledge of the progress of the law relative to this matter, informs us that it was determined to provide a full remedy for the grantee in such cases; and, for this purpose, a writ was invented entitled a writ of *Quare ejecit infra terminum*.* This lay against the person *actually in possession of the land*, and called upon him to show cause why he had ousted the termor within his term, which, if he could not do, the termor had judgment to recover it, and might still bring an action of covenant against his lessor.[17]

[*10]

But this writ being levelled at the mischief done to tenants by means of alienations by their own

[16] As to the early history of the action of ejectment, see Bracton, bk. 4, fol. 220. cap. 36; Hale's Hist. of the Common Law, c. 8, p. 201 (6th Edit.); Bac. Ab. *Leases;* Reeve's Hist. of English Law, vol. i. p. 341, vol. iii. p. 29, 390, vol. iv. p. 165; Adams on Eject. c. 1; Stephen on Plead. 12, 13.

[17] See Bracton, bk. 4, fol. 220, cap. 36.

lessors, was not so framed as to embrace the case of a tenant for years ousted, not by his own lessor, or any person claiming under him, but by the tortious act of a mere stranger. In such cases, the tenant had no remedy but to apply to his lessor to bring a real action to recover back the seisin of the freehold from the trespasser, and then, the lessor having obtained the seisin, the tenant's right to have his term again attached, and in this circuitous manner it became revested in him. But, in the reign of Edward III. a remedy was created for him in these cases also, by the invention of the writ of the *Ejectione firmæ*, the very writ by which actions of ejectment are now commenced.[18] This writ, the first instance of which occurs in the 44th year of King Edward III., did not, however, originally* enable the termor to recover the term, but [*11] only damages against the trespasser. To recover the term itself he was obliged to resort to a Court of Equity which, about this time, as Chief Baron Gilbert informs us at page 2 of his Treatise, began to interfere for his protection. At last the Courts of law, however, gave him a complete remedy, not by the invention of any new writ, but by altering the judgment upon the old writ of ejectment, and

[18] When this Lecture was written, and before the Common Law Procedure Act, 1852 (15 & 16 Vic. c. 76,) the action of ejectment was supposed to be commenced by the original writ which is mentioned above, although, in fact, no writ was sued out, but the proceedings were begun by the declaration. It is now commenced by a writ in the form given by that act, which is issued like an ordinary writ of summons. See ss. 168, 169, and sched. A, No. 13.(*a*)

(*a*) In most of the United States the action of ejectment is commenced by summons; the Pennsylvania act making the change was passed in 1806.

giving judgment that he should recover his term as well as damages. This was a singular stretch of power on the part of the Courts, and one on which probably no Court would venture at the present day. And what is most singular about it is, that we do not know even the precise period at which it took place, though it is ascertained to have been some time between 1455 and 1458; since, in the former year there is a reported assertion by one of the Judges, that damages only are recoverable in ejectment;[19] and, in the latter year, a reported assertion at the Bar, that the term likewise is recoverable.[20] Thus were tenants for years at last placed on the same level as freeholders, with regard to the security of their estates, and the facility of their remedy when dispossessed. Indeed, with regard to the remedy, they had arrived at a better position than the freeholder, for we all know that [*12] *the real actions, which were formerly the remedies made use of by the freeholder, became almost entirely disused, and that of ejectment, which had been invented for the sole use of the owner of the chattel interest, substituted in their place.

Such, then, being the origin of chattel interests in land, let us consider the three classes into which they are distributed; namely,

1st. Estates *for years;*
2ndly. " *at will;* and
3rdly. " *by sufferance.*

Per Chocke, J., Mich. T., 33 Hen. 6, fol. 42.

[20] See Brooke Ab. Part 2, *Quare ejecit,* fol. 167. The first entry of a judgment of recovery of the term is of the date of 1499. See Rast. Entr. 253 a; and the authorities collected in the note to Doe *d.* Poole *v.* Errington, 1 A. & E. 756. (28 E. C. L. R., p. 197.)

An estate for years is thus described by Littleton, at sec. 58 of his Tenures. "*Tenant for term of years is where a man letteth lands or tenements to another for term of certain years, after the number of years that is accorded between the lessor and the lessee, and the lessee entereth by force of the lease, then is he tenant for years.*" This definition of Littleton's, like every other given by that most accurate of legal writers, contains everything material to ascertain the nature of the estate. It is said to be, "*where a man letteth to another,*" for there must be a *lessor* and *lessee.* It must be "*for term of certain years,*" for if the term is left uncertain, the estate would be at will, not an estate for years. And, "*when the lessee entereth by force of the lease, then is he tenant for years,*" for (except in the case of a lease made under the Statute of Uses, in which case the possession is transferred to the lessee by that statute), until he has entered *by virtue of the lease, [*13] he has not an estate, but only what lawyers call an *interesse termini,*[21](*a*) which would not be suffi-

[21] Where a lease is to commence at once, but the lessee has not entered, or where it is not to commence until a future period, the lessee has only a right of entry, or interest in the term. This interest is merely executory, and the tenant is not *possessed of the term* until entry. Com. Dig. *Estates by grant* (G. 14); 1 Wms. Saund. 250 f (1). A lessee who has only an *interesse termini* may grant away his interest to another; but as he has no *estate,* a release to him by the lessor (which does not operate under the Statute of

(*a*) In legal contemplation the right to the possession, is in the lessor as against a third person, until the contract is consummated by the entry of the lessee. When entry is made, such a right of possession is transmuted from the lessor to the lessee, as will enable the latter to maintain ejectment. Sennett *v.* Bucher, 3 Penna. 394. See 4th Kent's Com. 97.

cient to enable him to maintain trespass[22] against a stranger trespassing *upon the land; but, when he has once entered, he becomes *pos-*

[*14]

Uses) will not enlarge his interest; see Co. Litt. 46 b, 270 a; and the judgment in Doe *d.* Rawlings *v.* Walker, 5 B. & C. 118; (11 E. C. L. R. 171); although it will extinguish the rent as completely as an express release of it would. Co. Litt. 270 b. An assignment by the lessee to the lessor will extinguish the *interesse termini*, Salmon *v.* Swann, Cro. Jac. 619; and the same consequence follows, it seems, from a release by the lessee to the lessor. Watkins on Convey. 36, note, 9th edit. A mere *interesse termini* will not merge in the subsequently acquired freehold, because merger is the union of two *estates*. Doe *d.* Rawlings *v.* Walker, *ubi sup.* The lessee may enter notwithstanding the death of the lessor; and if the lessee dies before entry, his personal representative may enter. Co. Litt. 46 b. Use and occupation will not lie unless there has been an actual entry by the lessee, or by one of several lessees on behalf of the others. Edge *v.* Strafford, 1 Cr. & J. 391; Lowe *v.* Ross, 5 Exch. 553;* Glen *v.* Dungey, 4 Exch. 61.* In Keyse *v.* Powell, 2 E & B. 132, (75 E. C. L. R. 132), a curious question arose. A copyhold close, containing an unopened coal-mine, had been let to a tenant from year to year; the surface was occupied by him, and it did not appear that there had been, in the demise, any exception or reservation of the mine. Whilst this tenancy continued, the copyholder in fee granted the mine to the tenant and to another person. It was held that the tenant was, before the grant of the mine, in possession of it by virtue of his tenancy from year to year, although without the right to work it; and consequently, that by the grant he and the other grantee, for whose benefit his possession enured, became possessed of the mine for the term granted, without any actual entry, and had not a bare *interesse termini* in it

[22] Even where a lease operates under the Statute of Uses (27 Hen. 8, c. 10,) the lessee cannot maintain trespass before entry, although the statute executes the use. Viner Ab. *Trespass* (S.) pl. 13, 14; Geary *v.* Bearcroft, Carter, 66; Com. Dig. *Trespass* (B. 3.) Nor can a lessee under a lease operating at common law maintain trespass before entry, for actual possession is necessary in order to support this action in respect of real property.

sessed for his *term*, which although designated by lawyers in every case a *term of years*, may be for less than a year, as for a half-year, quarter, or a month, or merely a few days; for to use the words of Sir William Blackstone, "*If the lease be but for half a year, or a quarter, or any less time, this lessee is respected as a tenant for years, and is styled so in some legal proceedings, a year being the shortest term which the law in this case takes notice of.*"[23](*a*) But, be it for a short, or be it for a long term, it is a requisite of this sort of estate that it be for a *time *certain;* for if A. grant to B. for as many years as he shall live, this, being uncertain, is no term of years; (Co. Litt. 45 b;) and, if it want the formalities requisite to pass a freehold interest, it passes no estate at all; but if A. lease to B. for ninety-nine years, or for nine hundred and ninety-nine years, [*15]

See Com. Dig *Trespass* (B. 2,) (B. 3,); Bac. Ab. *Leases* (M.); Revett *v.* Brown, 5 Bing. 7, (15 E. C. L. R, 444); and the judgment in Wheeler *v.* Montefiore, 2 Q. B. 142, (42 E. C. L. R. 605). It is otherwise with respect to goods the owner of which may bring trespass or trover, although his possession of them was only constructive at the time of the injury complained of: for the property in goods draws after it the possession. 2 Wms. Saund. 47 a; Turner *v.* Ford, 15 M. & W. 212.* The *personal occupation* of land is not, however, necessary in order to maintain trespass in respect of it; it is sufficient if the plaintiff is in actual possession by his servant, or agent. Bertie *v.* Beaumont, 16 East, 33: Reg. *v.* Wall, Lynn, 8 A. & E. 379, (35 E. C. L. R. 409). Where the interest of a tenant of land is determined by the death of a tenant for life under whom he holds, the possession ceases with the interest, and he cannot maintain trespass unless there is afterwards some actual occupation by him, or he does some act indicating an intention to retain the possession. Brown *v.* Notley, 3 Exch. 219.*

[23] See 2 Black. Comm. 140; Litt. s. 67, and Bac. Ab. *Leases* (L. 3.)

(*a*) Shaffer *v.* Sutton, 5 Binn. 228.

if he shall so long live, this is an estate for term of years; for it is certain that it cannot last beyond the number of years mentioned; and though it may determine sooner if A. die, as he probably will, before they have expired, still that does not render the estate uncertain, but only renders it defeasible by a condition subsequent.[24]

A tenancy *at will* takes place where the demise is for *no certain term*, but to continue during the *joint will* [*16] of both parties, and no longer.[25] It is the *distinguishing incident of this sort of tenancy, that the landlord may put an end to it when he thinks proper; and that, not merely by expressly signifying to

[24] See Co. Litt. 45 b. It is essential to the very existence of a term of years that there should be a time prefixed beyond which it cannot continue. The time must be *prefixed;* it is not sufficient that a period must come beyond which the lease cannot last. In the instance put in the text, of a grant to B. for so many years as he shall live, the lease must determine on B's death, and his death must happen sooner or later. Yet this is not a term of years, for, as is said by Lord Coke, "*licet nihil certius sit morte, nihil tamen incertius est horâ mortis.*" Co. Litt. 45 b. As to the distinction between conditions subsequent and conditions precedent, see Bac. Ab. *Condition* (I); Brook *v.* Spong, 15 M. & W. 153;* Egerton *v.* The Earl of Brownlow, 4 H. of Lords C. 1; and *post* Lecture IV.

[25] The definition of a tenancy at will, given by Littleton, is as follows:—"Tenant at will is where lands or tenements are let by one man to another to have and to hold to him at the will of the lessor, by force of which lease the lessee is in possession. In this case the lessee is called tenant at will because he hath no certain or sure estate, for the lessor may put him out at what time it pleaseth him." s. 68. To this definition Lord Coke adds: "It is regularly true that every lease at will must in law be at the will of both parties, and, therefore, when the lease is made to have and to hold at the will of the lessor, the law implieth it to be at the will of the lessee also." Co. Litt. 55 a.(*a*)

(*a*) And vice versa. See Mhoon *v.* Drizzle, 3 Dev. 414.

the tenant his intention so to do, but by performing any act inconsistent with the duration of the tenant's interest; thus, for instance, in Doe *d.* Bennett *v.* Turner, 7 M. & W. 226,[26] the landlord had entered on the premises and cut some stone without the permission of his tenant at will. This act was held to operate as a determination of the tenancy. See also Doe *d.* Price *v.* Price, 9 Bing. 356.[27] So, on the other hand, the tenant *may, on his part, put an end to the holding when he [*17]

[26] This case went down to a new trial, at which the jury was directed in accordance with the judgment of the Court of Exchequer in the earlier stage of the case. To this direction a bill of exceptions was tendered. The Court of Exchequer Chamber held, however, that the ruling was correct. See Turner *v.* Doe *d.* Bennett, 9 M. & W. 643.*

[27] The making of a lease by the lessor at will to commence on a future day determines the will as soon as the lease commences in point of interest. Dinsdale *v.* Iles, Raym. 224; Hinchman *v.* Iles, 1 Ventr. 247. It is not determined by a lawful act done upon the land by the lessor, as if he cuts down trees which are excepted out of the lease. Co. Litt. 55 b; see also Com. Dig. *Estates by grant*, (H. 6, H. 7, H. 8.) A covenant by the lessor to make a feoffment does not amount to a determination of the will until the feoffment is actually made, 1 Roll. Ab. 860, l. 36; but a feoffment by the lessor with livery of seisin made upon the land determines the tenancy, although the tenant at will be off the land at the time, and have no notice of the determination of the will. Ball *v.* Cullimore, 2 Cr. M. & R. 120.* The lessor may, as is obvious, determine the tenancy by a demand of possession, or by a notice of its determination communicated to the tenant; and the notice need not be given, or the demand made, upon the land. Co. Litt. 55 b; Goodtitle *v.* Herbert, 4 T. R. 680; Doe *d.* Jones *v.* Jones, 10 B. & C. 718. (21 E. C. L. R. 303.) Even where the owner of the freehold only stated to the tenant at will that unless he paid what he owed measures would be taken without delay to recover the possession of the property, the tenancy was held to be sufficiently determined; the implied offer to retain the possession not appearing to have been accepted. Doe *d.*

thinks proper, and this he may do, as we are informed by Lord Coke, (1 Inst. 55 b, 57 a), by committing any act inconsistent with the nature of his estate; for instance, by assigning the land to another, for a tenancy at will is not assignable.[28] And if an attempt be made to assign it, the assignee, if he enters on the land, becomes a trespasser. So he may put an end to his tenancy by an express declaration that he will hold no longer; but in order to render this declaration operative he must go out of possession.[29](*a*)

[*18] *There is another remarkable difference between a tenancy at will and one for years; a

Price *v.* Price, 9 Bing. 356. Where the lessor becomes insolvent, and his reversion is consequently transferred to his assignees by the operation of the Insolvent Act, the vesting order, with knowledge thereof by the tenant, is a determination of the tenancy at will. Doe *d.* Davies *v.* Thomas, 6 Exch. 854;* see also Pinhorn *v.* Souster, 8 Exch 763;* and the notes to Clayton *v.* Blake, 2 Smith's L. C. 74.(*b*)

[28] But an assignment by the tenant at will does not put an end to the tenancy unless the lessor at will have notice of it. Carpenter *v.* Colins, Yelv. 73; Pinhorn *v.* Souster, 8 Exch. 763.*

[29] Co. Litt. 55 b, note (15). A tenant at will may create a tenancy at will available as against himself. See the observation of Mr. Justice Patteson, in Doe *d.* Goody *v* Carter, 9 Q. B. 865, (58 E. C. L. R. 862). It appears from the same case, that if a tenant at will lets the premises to a third person at will, and afterwards takes a conveyance of the property, the tenancy at will created by him will not be affected. A tenant at will cannot, strictly speaking, commit waste; but if he does any act which, if committed by a tenant for years, would amount to voluntary waste, the tenancy is determined. Litt s. 71; Co. Litt. 57, a; *post*, Lect. VII.

(*a*) The tenant at will becomes a trespasser by unreasonable delay in moving after the estate is determined. Ellis v. Paige, 1 Pick. 47; Rising v. Stannard, 17 Mass. 282.

(*b*) Mhoon v. Drizzle, 3 Dev. 414.

tenancy for term of years is always created by express contract between the parties, for it must be, as I have said, for *a term certain*, and that term cannot be fixed save by express contract. But an estate at will may, and frequently does, arise by implication; for instance, in the ordinary case where A. agrees to convey land to B., and B. enters upon it before any conveyance is executed, in this case B. is not a trespasser, for he has the permission of the owner; he has no freehold, for, though in equity the land is vested in him, yet, at law, there has been no conveyance capable of transferring the seisin to him; he is not tenant for years, for he does not hold for a term certain;[30] he is therefore tenant *at will*. See Doe *v.* Chamberlain, 5 M. & W. 14;* Howard *v.* Shaw, 8 M. & W. 119.[31]* In fact, whenever you find a person in possession of land, in which he has no freehold estate nor tenancy for any certain term, and which he nevertheless holds *by *the consent of the true owner*, that person is [*19] tenant at will; for instance, in Doe *v.* Jones, 10 B. & C. 718, where the trustees of a dissenting congregation had put a minister into possession of a dwelling-house

[30] *Ante*, p. 15.

[31] The mere occupation, however, of the land by the purchaser under circumstances such as those mentioned in the text, is not sufficient to enable the vendor to sue him for use and occupation. There must be a contract, express or implied, to pay for the occupation. See Tew *v.* Jones, 13 M. & W. 12,* in which case the vendor was in possession at the time of and after the conveyance, and the action was brought by the vendee. In Winterbottom *v.* Ingham, 7 Q. B. 611, (53 E. C. L. R. 611,) the vendee of an estate was let into the possession of the premises whilst the title was under investigation, and the contract of sale was afterwards determined. It was held that the vendor could not, upon these grounds alone, recover for use and occupation, although the jury found that the occupation had been beneficial. See also *post*, Lect. V.

and chapel, it was held by the Queen's Bench that at law he was their tenant at will, and that they could put an end to his interest by simply demanding possession.[32](a)

Such being the general nature of a *tenancy at will*, namely, that it exists during the joint will of both parties, any act by either of whom inconsistent with its

[32] And see Doe *d.* Nicholl *v.* M'Kaeg, 10 B. & C. 721, (21 E. C. L. R. 304,); Burton app. *v.* Brooks resp., 11 C. B. 41, (73 E. C. L. R. 40,).

(*a*) Tenancies at will are not favored by the courts. In Timmins *v.* Rowlison, 3 Burr. 1609, Mr. J. Wilmot said, "In the country, leases at will, being found extremely inconvenient, exist only notionally."

And it is now the general language of the books, that a tenancy at will cannot arise without some express grant or contract, and that all general tenancies are constructively tenancies from year to year. Preston on Abst. of Title, p. 25, 4 Kent. 112; Comyn on Land; and Ten. 8; Lesley *v.* Randolph, 4 Rawle, 123; Thomas *v.* Wright, 9 S. & R. 87; Squires *v.* Huff, 3 A. J. Marshall, 17; Sullivan *v.* Endors, 3 Dana. 66; Du Bree *v.* Lees, 2 Bl. Rep. 1173; Richardson *v.* Langridge, 4 Taunt. 131.

One who is rightfully in possession of land, but with no intention of becoming a tenant in the ordinary acceptation of the term, is a tenant at will, one for instance who comes into possession under a contract with the owner for the purchase. Proprietors of No. 6 *v.* McFarland, 12 Mass. 325; Love *v.* Edmonstone, 1 Iredell, 152. And a grantor continuing in possession of the granted premises after a conveyance, Carrier *v.* Earle, 1 Shep 216. So a judgment debtor whose lands have been sold on execution holding over after the sale, by the consent of the purchaser, to whom he pays rent, has in New York been held a tenant at will. Nichols *v.* Williams, 8 Cow. 13. So after a lease has expired by its own limitation, and the tenant holds over, he is said in Overdeer *v.* Lewis, 1 Watts & Ser. 90, to be tenant at will. He would be more properly described as a tenant by sufferance.

nature will determine it, it follows that it is not assignable, since the very attempt to assign would operate as a determination of the will of the party assigning to remain any longer tenant, and that it may be created either by express terms or by implication.[33] One very important incident belonging to it remains to be noticed, I mean its capability of being extended by certain circumstances into a tenancy of a much more permanent description, namely, a *tenancy from year to year*.[34]

*The history of tenancies from year to year, now an exceedingly important class of chattel interests, is as follows. At a very early period of our law, a tenancy strictly at will was found to be an exceedingly inconvenient one; it left each party too much [*20]

[33] *Ante*, p. 17.

[34] By the 3 & 4 Wm. 4, c. 27, s. 7, it is enacted, "That when any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent as tenant at will, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress, or bring an action to recover such land or rent, shall be deemed to have first accrued either at the determination of such tenancy, or at the expiration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have determined; provided always that no mortgagor or *cestui que trust* shall be deemed to be a tenant at will within the meaning of this clause to his mortgagee or trustee." See as to the construction of this section, Doe *d.* Bennett *v.* Turner, 7 M. & W. 226,* 9 M. & W. 643;* Doe *d.* Stanway *v.* Rock, 4 M. & Gr. 30, (43 E. C. L. R. 25,); Doe *d.* Evans *v.* Page, 5 Q. B. 767, (48 E. C. L. R. 765,); Doe *d.* Angell *v.* Angell, 9 Q. B. 328, (58 E. C. L. R. 328,); Doe *d.* Dayman *v.* Moore, ib. 555, (58 E. C. L. R. 554,); Doe *d.* Goody *v.* Carter, ib. 863, (58 E. C. L. R. 862,); Doe *d.* Birmingham Canal Co. *v.* Bold, 11 Q. B. 127, (63 E. C. L. R. 127,); Randall *v.* Stevens, 2 E. & B. 641, (75 E. C. L. R. 641,); the notes to Nepean *v.* Doe, 2 Smith's L. C. 406; and *post*, Lect. VIII., where these cases are referred to more fully.

at the mercy of the other. It is true that there was a doctrine in the law called that of *Emblements*,[35] under which the tenant at will was entitled to ingress and regress, for the purpose of reaping and carrying his crop, if the landlord determined the tenancy after seed-time and before harvest. But this, though it prevented one extreme case of injustice, by no means obviated the [*21] *entirety of the inconveniences resulting from this sort of tenancy. The judges of the Courts of law, perceiving this, seized upon every opportunity within their power to prevent a strict tenancy at will from arising; and in order to do so, they laid hold upon any circumstances in the case which could be construed as indicative of an intention of the parties that the tenancy should not be one purely at will, but should continue till a reasonable notice from either the landlord or the tenant that it was his election to determine it. Not that the tenancy became, even so, one for a term of years; for, as it was entirely optional, entirely at the will of each party, whether and when he would give notice, the tenancy continued for some time to be and to be called a tenancy at will; differing from other tenancies at will in this respect, that reasonable notice of the determination of the will was requisite to put an

[35] The right to *emblements*, or the right to take, after the end of the tenancy, crops sown before its determination is not confined to tenancies at will, but exists also in the case of other tenures of an uncertain character. Emblements are allowed in order to encourage the cultivation of the land, and because, where the tenancy is not determined by any act of the tenant, it would be obviously unjust to deprive him of the benefit of a crop which he sowed at a time when he might reasonably expect to reap it. Co. Litt. 55 b; 2 Black. Comm. 146. The old law with respect to emblements has been altered by statute where the tenancy is determined by the death of a landlord who is entitled for his life, or for any other uncertain interest. See the 14 & 15 Vic. c. 25; and *post*, Lect. IX.

end to it.(*a*) What was a reasonable time for this purpose was at first not quite ascertained; it is, however, now well settled that in all cases of yearly tenancies, it is *half a year's notice expiring at that period of the year at which the tenancy commenced.* Doe *d.* Martin *v.* Watts, 7 T. R. 85; Doe *d.* Shore *v.* Porter, 3 T. R. 13.[36] The circumstance from which the presumption usually was derived that the parties intended to create a yearly tenancy, rather than one strictly at will, was the payment of *a yearly rent;* and accordingly it is now settled, that if a party enter into or remain in possession *under circumstances which would constitute him a tenant at will, the payment of a [*22] yearly rent or settlement of it in account with his landlord, renders him tenant from year to year, and entitles him to half a year's notice to quit. Thus, in Doe *d.* Martin *v.* Watts, 7 T. R. 85, where the tenant entered under a lease which purported to be made in pursuance of a power, but which was not warranted by the power and therefore did not bind, it was held that the reversioner, having received rent, had constituted him his tenant from year to year.[37] And even the admis-

[36] See as to notices to quit, *post*, Lect. VIII.

[37] See Doe *d.* Tucker *v.* Morse, 1 B. & Ad. 365, (20 E. C. L. R. 519. In this case the defendant had entered into possession of the premises in question under a lease from a tenant for life of the property, and the plaintiff was the remainder-man who had succeeded the tenant for life. The lease had been made under a power, but its validity was doubtful. The rent was to be paid partly in money, partly in culm, which was to be carried by the tenant to the landlord's house. After the death of the tenant for life, and after the plaintiff had come into possession, he sent one of his servants to get

(*a*) This is the tenancy held to be established in Massachusetts by all parol leases, whether for a certain or uncertain time, and whether an annual rent be reserved, or not; Ellis *v.* Paige, 1 Pick. 43.

[*23] sion that an account charging the tenant with half a year's rent was correct, has been held to warrant the implication of a tenancy from year to year. Cox *v.* Bent, 5 Bing. 185; (15 E. C. L. R. 533.)[38]

carts to bring home the culm. The servant went to the defendant, and also to other tenants. On this occasion, and also at a considerably later time, culm was carried by the defendant to the plaintiff's house, and there received. The jury found that the culm was carried by and received from the defendant in the way of rent under the reservation. The Court held that this finding was warranted by the evidence, and that, assuming that the lease was void, the receipt of the culm under these circumstances was a recognition of the defendant as tenant from year to year. See also Berrey *v.* Lindley, 3 M. & Gr. 498, (42 E. C. L. R. 263,). In that case a person had entered upon premises under an agreement for a term of five years and a half. The agreement was invalid under the Statute of Frauds; but rent having been paid it was held that a yearly tenancy had arisen. In Lee v. Smith, 9 Exch. 662,* a tenant entered into the possession of premises under an agreement in writing, which stipulated for a longer term than three years, but which, not being under seal, was void as a lease under the 8 & 9 Vic. c. 106. The rent was to be paid quarterly, and in advance. The tenant paid rent on several occasions; and the receipts stated that the payments were made in advance. The Court held that, although the agreement was void, there was sufficient evidence of the rent being payable quarterly in advance. "Although the agreement was void," said Baron Parke, "as not being under seal as required by the 8 & 9 Vic. c. 106, there was ample evidence that the party in question consented to be tenant from year to year upon the terms that the rent should be payable at the beginning instead of the end of each quarter." The presumption which arises in these cases from the payment and acceptance of rent is the same against a corporation as against an ordinary person. Doe *d.* Peunington *v.* Taniere, 12 Q. B. 998, (64 E. C. L. R. 998.) The cases in which a yearly tenancy has been held to arise upon a holding over, are referred to more fully, *post*, Lect. VIII.

[38] See also Bishop *v.* Howard, 2 B. & C. 100, (9 E. C. L. R. 52,); Doe *d.* Rogers *v.* Pullen, 2 Bing. N. C. 749, (29 E. C. L. R. 745,);

Before quitting the subject of yearly tenancy, it is right to remark that it differs from a tenancy at will in

Chapman *v.* Towner, 6 M. & W. 100;* Riseley *v.* Ryle, 11 M. & W. 16;* Doe *d.* Thompson *v.* Amey, 12 A. & E. 476, (40 E. C. L. R. 239,); Mayor of Thetford *v.* Tyler, 8 Q. B. 95, (55 E. C. L. R. 93,); In re Stroud, 8 C. B. 502, (65 E. C. L. R. 500,); and Doe *d.* Prior *v.* Ongley, 10 C. B. 25, (70 E. C. L. R. 25,). But the payment of rent must, in order to have the effect of enlarging the tenancy at will into a tenancy from year to year, be made *with reference to a yearly holding*. Therefore, where a person paid rent under an agreement for the occupation of a piece of land, which did not specify any time during which the occupation was to last, and the rent was not paid with reference to a year, or to any aliquot part of a year, it was held that the tenancy was a tenancy at will only. See Richardson *v.* Langridge, 4 Taunt. 128; the judgment of Baron Parke, in Braythwayte *v.* Hitchcock, 10 M. & W. 497;* and Doe *d.* Hull *v.* Wood, 14 M. & W. 682.* Indeed, there is no doubt that a tenancy at will may exist, if this appears to be the intention of the parties, notwithstanding the reservation of a yearly rent. Doe *d.* Bastow *v.* Cox, 11 Q. B. 122, (63 E. C. L. R. 121,); Doe *d.* Dixie *v.* Davies, 7 Exch. 89.* (*a*) And although a tenancy from year to year is ordinarily implied from the mere receipt of rent, it is clear that it is open to the party who receives the rent to rebut this presumption by explaining the circumstances under which it was received; as, for instance, by showing that it was received in ignorance of the death of the person upon whose life the premises were held. Doe *d.* Lord *v.* Crago, 6 C. B. 90, (60 E. C. L. R. 89,). In this case, the rule was laid down by the Lord Chief Justice Wilde, in delivering the judgment of the Court, in the following terms:— "It is clear, that upon proof of the payment of rent in respect of the occupation of premises ordinarily let from year to year, the law will imply that the party making such payments holds under a tenancy from year to year. . . . But it is equally clear that it is competent to either the receiver or payer of such rent to prove the circumstances under which the payments as for rent were so made, and by such circumstances to repel the legal implication which would result

(*a*) Sullivan *v.* Enders, 3 Dana, 66.

the material particular of being assignable and capable of supporting an under lease by the yearly tenant; whereas a tenancy at will, strictly so called, is put an [*24] end to by an attempt on the *part of the tenant either to assign or underlet.[39] It sometimes happens that a house is taken under circumstances from which a yearly tenancy cannot be inferred, though a monthly or a weekly one may be so; and in those cases, a month's or a week's notice to quit is sufficient, for the notice has reference in all cases to the letting. Doe *d.* Parry *v.* Hazell, 1 Esp. 94; Doe *d.* Peacock *v.* Raffan, 6 Esp. 4.[40]

from the receipt of rent, unexplained." And a jury may take into consideration the surrounding circumstances in considering whether payments which have been made by persons in the occupation of premises were or were not made under an actual or supposed contract of tenancy. Woodbridge Union *v.* Colneis, 13 Q. B. 269, (66 E. C. L. R. 267,).

[39] That is to say, if notice of the assignment is given to the lessor. *Ante*, p. 17, note [28]. We have also seen that he may underlet at will. *Ante*, p. 17, note [29].

[40] Although the notice has usually reference to the letting, and where there is no express agreement in this respect, the law implies that certain notices are to be given upon certain lettings; the length of the notice does not *necessarily* depend upon whether the tenancy is a yearly, monthly, or weekly one. It is regulated by the express or implied agreement between the parties in this respect. In ordinary yearly tenancies, the law implies, in the absence of any express stipulation upon the subject, that the notice is to be a six months' notice; but, a tenancy may be yearly or monthly, that is to say, it may be determinable only at the expiration of a year, or of a month, or of successive years or months after its commencement, and yet it may be determinable at those periods by a shorter or longer notice than a half year's notice, or by a notice having no precise relation, in point of time, to a month. Thus, in Doe *d.* Peacock *v.* Raffan, cited in the text, the letting was for a year, the rent was reserved weekly, and the notice required by the contract, was a four week's notice.

*It remains to state the nature of *a tenancy by sufferance*. *A tenant by sufferance* is defined by Lord Coke, (1 Inst. 57 b), to be *one who comes in by right and holds over without right.*[41] Thus, if a tenant *pur auter vie* continue in possession after the death of the person for whose life he held, he becomes *tenant by sufferance;* so an under-tenant who remains in possession after the expiration of the original *lease, out of which the under-lease to him was derived. Simpkin *v.* Ashurst, 4 Tyrwh. 781, [S. C. 1 Cr. M. & R. 261.] This tenancy is the very lowest known to the law.(*a*) It cannot be conveyed, it cannot be enlarged by a release, in fact, it is a mere invention of the law to prevent the continuance of the pos- [*25] [*26]

And in Doe *d.* Pitcher *v.* Donovan, 1 Taunt. 555, the letting was from year to year, and the contract provided that a quarter's notice should be given. See also Doe *d.* Chadborn *v.* Green, 9 A. & E. 658, (36 E. C. L. R. 233,); Reg. *v.* Chawton, 1 Q. B. 247, (41 E. C. L. R. 523,); the observations of Baron Parke in Huffell *v.* Armistead, 7 C. & P. 57, (32 E. C. L. R. 497,); and Towne *v.* Campbell, 3 C. B. 921, (54 E. C. L. R. 920,). In the same manner the periods at which the rent is reserved have no *necessary* relation to the duration of the holding, or to the length of the notice to quit. See the cases cited above, Doe *d.* Bastow *v.* Cox, 11 Q. B. 122, (63 E. C. L. R. 121,); and Doe *d.* Dixie *v.* Davies, 7 Exch. 89.*

[41] See Com. Dig. *Estates by grant* (1); Watkins on Convey, pp. 23–28, 9th edit. There can be no tenancy at sufferance against the crown; for if the king's tenant holds over, he is an intruder. See Co. Litt. 57 b; and the judgment in Doe *d.* Watt *v.* Morris, 2 Bing. N. C. 196, (29 E. C. L. R. 495,).

(*a*) Any one who continues in possession without agreement, after the termination of a particular estate, is a tenant at sufferance. Livingston *v.* Tanner, 12 Barb. 481; and by the revised statutes of New York one month's notice in writing is necessary before ejectment can be brought for his removal.

session from operating as a trespass.[42] You will observe also that, unlike a *tenancy for years*, which always arises from contract, and a *tenancy at will*, which may arise either from express contract or by implication, this sort of tenancy never can arise by contract, either express or implied, for, if the owner of the land were to assent to it, it would become a tenancy at will, by means of that very assent. The truth is, that it was probably invented for the purpose of preventing adverse possession from taking place, when a particular estate determined without the knowledge of the reversioner. For instance, if A. had conveyed land to B. to hold during the life of C., C. might have died without A.'s knowledge, and then had B.'s continuance in possession been held tortious, the Statute of James the 1st would have begun to run, and at the end of twenty years A. would have been barred. This was prevented by considering B. tenant on sufferance. [*27] Now, however, the Statute of 3 & 4 W. 4, c. *27, having, to use the words of the Court in Nepean *v.* Doe, 2 M. & W. 910,*[43] done away with the doctrine of *non-adverse possession*, the principal object attained by raising a tenancy at sufferance, is now at an end, and we shall probably hear but little for the future of that sort of tenancy.

I have thus, as an introduction to the subject on which we are engaged, enumerated the various sorts of tenancy known to the law, and endeavored, briefly, to

[42] This appears to be the true description of a relation which is called a *tenancy*, but which is directly opposed to the ordinary definition of a tenancy, since it is necessary, in order that it should exist, that there should be no contract, either express or implied, between the so called landlord and tenant.

[43] See the notes to Nepean *v.* Doe, and Taylor *v.* Horde, 2 Smith's L. C 396; and *post*, Lect. VIII.

point out the general nature of each of them. In the remaining Lectures, however, it is my intention, as I stated at the commencement of this Lecture, to consider them more in detail, and, in doing so, to confine my observations chiefly, if not altogether, to those which fall within the denomination of *chattel interests*.

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*LECTURE II. [*28]

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In the last Lecture, I enumerated the various sorts of tenancies known to the law. I now proceed to the consideration of their incidents, confining myslf, as I premised I would do, to such as are of an inferior degree to freehold. I mean to *terms of years*, and *tenancies from year to year;* for with regard to *tenancies strictly at will*, and *tenancies at sufferance*, they are interests of so little practical importance, that I shall probably have

[*29] nothing further to say concerning *either of them. A tenancy on sufferance, being the mere continuance of *possession* after the *right* has determined, and liable to be destroyed either by the *assent* of the landlord, which would convert it into a tenancy at will, or by his *dissent*, which would render it a tortious holding, and being, therefore, from its very nature, incapable of being accompanied by a reservation of rent, or by agreements of any description whatever,—such a tenancy, cannot, it is obvious, involve many points or subjects of discussion.[1] And with regard to tenancies strictly at will, although we sometimes find them in existence pending some other contract between the parties, as, for instance, where a vendee is let into possession before the execution of the conveyance, or a lessee under an agreement for a lease, but before it is executed; yet in these cases the tenancy at will exists merely for a short time, and merely as the consequence of a delay in completing some other contract, such, for instance, as that of sale or of demise. A tenancy at will created by express words is a thing almost unknown in practice; and it is no wonder that it should be so, since we have seen that the commonest of all stipulations, that for rent, has the effect of turning it into a tenancy of another description.[2] I shall therefore probably have very little or nothing more to say of tenancies [*30] *on sufferance and at will strictly so called. And our attention in the remainder of these

[1] *Ante*, Lect. I.

[2] The mere reservation of a rent will not, as we have seen (*ante*, Lect. I. p. 23, note [38]), prevent a tenancy from being at will, if it appears clearly from the agreement that it is the intention of the parties that it should be of this description. A tenancy at will, with a rent reserved, occurs, however, very seldom in practice.

Lectures will be directed to the incidents of tenancies for terms of years, and those from year to year.

Now, in considering these, the best and simplest method will, I think, be to divide the entire subject into four heads.

To consider:—

First, those points which occur at the *creation* of the tenancy;

Secondly, those which occur *during* the tenancy;

Thirdly, those which occur at the *determination* of the tenancy;

And *Fourthly*, as the parties to the relation are sometimes changed by the introduction which frequently takes place either of a new landlord, or a new tenant, whether by assignment of the term, or assignment of the reversion, or in other modes to which it will be necessary to advert, I must consider in the fourth place those points which occur upon a change either of the landlord or the tenant.

In pursuance of this plan, I now proceed to the consideration of the first of the above heads, namely, to the consideration of those points which occur at, and relate to, the *creation of the tenancy*.

*Now this again subdivides itself into four distinct heads; for all points which occur at the creation of the tenancy relate either— [*31]

First, *to the party demising;*

Or secondly, *to the party to whom the demise is made;*

Or thirdly, *to the thing demised;*

Or fourthly, *to the mode of demise.*

We will therefore consider these four heads in order.

First, then, with regard to the person demising.

It is obvious that the ability of the party demising to make the lease must, in the great majority of cases, depend on the extent of *his own interest*, and it is

equally obvious that, as far as his own interest extends, he has a right to demise. Thus tenant in fee simple may demise for any term whatever,[3] tenant in tail may make a lease which will be unimpeachable, at all events during his own life,[4] and in like manner the owners of inferior interests may make demises which will be unimpeachable as long as those interests
[*32] *continue. So far the matter is quite plain and obvious; but there are likewise certain cases in which persons are empowered to make leases exceeding in duration the extent of their own interests, and even some cases in which persons possessing no estate at all, are nevertheless able to demise.[5] And to the principal

[3] Com. Dig. *Estates by grant*, (G. 2).

[4] The passage in the text relates to the right of tenants in tail to grant leases at common law independently of any statute. These leases were valid during the life of the lessor, and voidable only as against the issue in tail; but they were void as against the remainder-men or reversioners. Com. Dig. *Estates by grant*, (G. 2); Bac. Ab. *Leases*, (D); Cruise's Dig. tit. XXXII. c. v. s. 71; Doe *d.* Phillips *v.* Rollings, 4 C. B. 188, (56 E. C. L. R. 188,). As to the affirmance of leases by the acceptance of rent by the issue in tail, see Pennant's Case, 3 Rep. 64 (4th Resolution).

[5] As, for instance, where leases are made under powers. There is also an apparent exception to the rule, that the power of leasing is limited by the lessor's interest in the land in the case of leases which are valid by *estoppel*. If a lease by deed is made by a person who has at the time no estate whatever in the land, and this fact does not appear by the deed, the lease takes effect immediately by estoppel; that is to say, the lessor is not allowed, during the continuance of the lease, to aver that he had no interest in the land, nor can the lessee, if he has executed the indenture, dispute the lessor's title. And if the lessor afterwards, and during the term, acquires the land by purchase or otherwise, the lease takes effect in interest. Co. Litt. 47 b; Bac. Ab. *Leases*, (O); 2 Wms. Saund. 418, note (1); Trevivian *v.* Lawrance, 1 Salk. 276; Bayley *v.* Bradley, 5 C. B. 396, (57 E. C. L. R. 396,); Sturgeon *v.* Wingfield, 15 M. & W. 224*.

of these cases it will be right, while we are upon this part of the subject, shortly to advert.

And first—a tenant in tail could not originally have made any lease which would have bound his issue after his decease, for they claimed, equally with himself, from the original grantor, and paramount to any estate or incumbrance created by *their ancestor. He could, indeed, have barred, and put an end to the estate tail, and then, being tenant in fee simple, might of course exercise the rights of one. But while he remained tenant in tail he could not have bound his issue by a demise, although such a demise was not absolutely void, but only voidable, so that if the issue had received rent after his death, it would have been set up and have become indefeasible.[6] Such was the situation of tenant in tail and his lessee, but by stat. 32 Hen. VIII. c. 28 [A. D. 1540,] called *the Enabling Statute*, his powers were enlarged, and he was enabled to make leases binding on the issue in tail, but not binding on the remainder-man or reversioner; but this power was given to him, subject to certain conditions, namely; 1st, that the lease should be by *indenture*, not by deed poll,[7] which was required in order that the [*33]

The operation of a feoffment to pass a freehold from a person who had no freehold in the land, was also an exception to the general rule. In these and the like cases "a man might," as has been quaintly said, "have a lawful freehold from a person who had nothing in the land, as a man may have fire from a flint which has no fire in it." See the observation of Babyngton J. (9 Hen. 6, 24 b), cited in Taylor *d.* Atkins *v.* Horde, 1 Burr. 60. Now, however, feoffments have no tortious operation. 8 & 9 Vic. c. 106, s. 4.

[6] Bac. Ab. *Leases*, (D); see also the authorities cited, *ante*, p. 31, note [4]; Machell *v.* Clarke, 2 Ld. Raym. 778; and Doe *d.* Southouse *v.* Jenkins, 5 Bing. 469, (15 E. C. L. R. 676,).

[7] 32 Hen. 8, c. 28, s. 1; Bac. Ab. *Leases*, (E); Com. Dig. *Estates by grant*, (B. 32), (G. 5). The statute applies only to leases made

tenant might be liable to actions of covenant in case of his committing breaches of its stipulations: 2ndly, that it should begin from the day on which it is made,[8] which is intended to prevent its termination from being postponed to a very distant period; since, otherwise, a [*34] tenant in *tail might have granted a lease to begin twenty years hence, and then, if he had himself died about that period, it would have taken effect almost entirely out of the estate of the issue: 3rdly, that any other lease in being of the same land should be surrendered or expired within a year of making the new one:[9] since, otherwise, the reversion immediately expectant on the interest of the person in possession would have been out of the issue in tail so long as the two leases continued concurrent: 4thly, the lease must not exceed three lives, or twenty-one years;[10] since it was thought unjust to keep the issue longer out of possession: 5thly, the lease must be of lands which have been usually let for twenty years before the lease made:[11] 6thly, the rent accustomably paid during that period [or a greater rent] must be reserved upon it; and—[12]

by persons of the full age of twenty-one years. See s. 1. It does not apply to copyholds. Rowden *v.* Malster, Cro. Car. 42.

[8] 32 Hen. 8, c. 28, s. 2; Bac. Ab. *Leases*, (E).

[9] 32 Hen. 8, c. 28, s. 1. [10] *Ib.*

[11] *Ib.* A lease which does not except the trees is not good under this statute, if this exception has been made in the former leases. Smith *v.* Bole, Cro. Jac. 458; and the judgment in Doe *d.* Douglass *v.* Lock, 2 A. & E. 748, (29 E C. L. R. 344,). It was doubtful whether, under this act, premises which had been usually let together could be let in separate parts. 4 Cruise Dig. 71. But see now the 39 & 40 Geo. 3, c. 41; and Doe *d.* Egremont *v.* Williams, 11 Q. B. 688, (63 E. C. L. R. 688,).

[12] See as to what is to be considered to be the ancient rent where various rents have been reserved. Bac. Ab. *Leases*, (E.).

Lastly, it must not be without impeachment of waste.[13]

Such are the provisions by which the Legislature in the time of Henry VIII. endeavored, while *they increased the power of tenant in tail, to protect the interests of the issue; and on this statute the right of tenant in tail to lease would at this day depend, were it not for stat. 3 & 4 Wm. IV. c. 74, for the abolition of *Fines and Recoveries*, the 15th section of which enacts "*that every actual tenant in tail, whether in possession, remainder, contingency, or otherwise, shall have full power to dispose of for an estate in fee-simple absolute.* OR FOR ANY LESS ESTATE, *the lands entailed*," as against the issue in tail, *and also as against the remainder-men or reversioners.*[14] These words seem large enough to give tenant in tail an unlimited power of leasing, and possibly, therefore, it may at first sight have occurred to you that they reduce the statute of Henry VIII. to a dead letter. But this is not so; for the 41st section of the *Abolition of Fines Act* provides, that every assurance by which a tenant in tail shall [under that act] effect a disposition of his lands shall be enrolled in Chancery within six calendar months, except it be a lease for not more than twenty-one years to begin from the date or [from any time] not more than twelve months from the date, and reserving a rack-rent or not less than five-sixths of one; so that, even now, if [*35]

[13] 32 Hen. 8, c. 28, s. 2; Bac. Ab. *Leases*, (E.).

[14] This act did not come into operation, for the purposes mentioned in the text, until after the 31st December, 1833. Its general provisions do not apply to Ireland. See s. 92. The 4 & 5 Wm. 4, c. 92, which is the corresponding act for Ireland, is substantially the same as the English act, with the exception of the sections which relate to lands in ancient demesne and to copyholds.

[*36] *a tenant in tail make a lease without intending to *enrol* it, he must proceed either under that exception, or under the statute 9 Henry VIII., which is in some respects more beneficial, since it enables him to make a lease for three lives, whereas the other gives him no alternative besides twenty-one years. The statute of Henry VIII., too, only requires the accustomed rent to be reserved, which is, in many cases, less than five-sixths of the rack-rent.

There is another reason which renders it important to bear in mind the provisions of the statute of Henry VIII., namely, that they apply, as you will see presently, to various cases besides that of tenant in tail.

Tenants for life have, generally speaking, no peculiar powers, except such as are granted to them under the express provisions of some deed or will, to the nature of which I will in a few moments advert.[15] But there is one class of tenants for life, I mean *Ecclesiastical Persons*, with regard to whose power of demising peculiar rules exist, which it is necessary briefly to take notice of.

[*37] *Ecclesiastical Persons might, with the consent required by law, have made leases for any period, which would have bound their successors (Shep.

[15] Mere tenants for life can make leases for their own lives only. These leases determine absolutely upon their death, and cannot be confirmed by the remainder-men. Bac. Ab. *Leases*, (I.) 2; Doe *d.* Potter *v.* Archer, 1 B. & P. 531; Doe *d.* Simpson *v.* Butcher, 1 Dougl. 50. But, if the remainder-men accept rent, this may be evidence of a new tenancy from year to year. Doe *d.* Martin *v.* Watts, 7 T. R. 83. Before the Statutes of Apportionment (11 Geo. 2, c. 19, and 4 & 5 Wm. 4, c. 22), if a tenant for life died on or before the rent-day, so that the lease determined before the expiration of the day on which the rent was reserved, no rent could be recovered either by his representative or by the remainder-man. In these cases the rent is now recoverable. See *post*, Lect. V.

Touchst. 281): thus a Bishop might have leased for any period, with the consent of the Dean and Chapter, a Parson or Vicar with that of the Patron and Ordinary. But, without such consent, they could have made no leases which would have been binding upon their successors.[16]

Such being the state of things at common law, the first statute which affected it was the *Enabling Statute* of 32 Henry VIII., c. 28, already mentioned,[17] and which enabled all ecclesiastical persons, EXCEPT PARSONS AND VICARS, to make, even without the consent of any other person, leases for the same term, and subject to the same regulations as I have already enumerated in speaking of leases by tenants in tail.[18] Next came a number of Acts called the *Disabling Statutes*, viz., the 1st Eliz. c. 19; 13 Eliz. c. 10; 14 Eliz. c. 11 & 14; 18 Eliz. c. 11; 43 Eliz. c. 9, and 1 Jac. I. c. 3; the general effect of which is to restrain ecclesiastical persons from making leases, **even with the consent* [*38] of those persons whose concurrence was required at common law, for more than twenty-one years, or three lives, reserving the ancient rent, except in the case of certain houses in corporate and market towns.[19]

[16] Bac. Ab. *Leases*, (H.); Com. Dig. *Estates by grant*, (G. 5,); Doe *d.* Brammall *v.* Collinge, 7 C. B. 939, (62 E. C. L. R. 939,).

[17] *Ante*, p. 33.

[18] Although the words of the statute seem to limit the power of leasing to ecclesiastical persons seised of an estate in fee-simple in right of their churches, it has been held to apply to prebendaries, chancellors of cathedral churches, and precentors, as they are not specially excepted. Watkinson *v.* Man, Cro. Eliz. 350; Acton's case, 4 Leon. 51; Bisco *v.* Holte, 1 Lev. 112. It has been doubted whether a perpetual curate is within the act. Reeves *v.* M'Gregor, 9 A. & E. 576, (36 E. C. L. R. 201,).

[19] See, as to these statutes, Chitty's Statutes (by Welsby and Beavan), tit. *Leases*. Leases which are not made in conformity with

Besides these Acts the statute 39 & 40 Geo. III. c. 41, has since passed, which provides for the amount of rent to be reserved, where property is demised in several portions, which had once been demised altogether. And lastly, the statutes of 6 & 7 Wm. IV. c. 20 & 64, confine the renewal of leases and the granting of concurrent leases within certain limits.[20]

the disabling acts of the 1 & 13 Eliz. are not absolutely void, notwithstanding the strong expressions used in these statutes. They are good as against the lessor during his life, if he is a corporation sole; or if made by a corporation aggregate, they are valid so long as the dean or other head of the corporation remains. Co. Litt. 45 a; and see Burn's Eccl. Law, 9th edit. tit. *Leases*. Where a dean and chapter made a lease under a local act, but not in compliance with its provisions, and afterwards rent was received under it from time to time by the deans and chapter for the time being and distributed among themselves, it was held that the lease, if voidable only, had been made good as against the parties who had received the rent, and that, if it was void, a demise from year to year might, under these circumstances, be presumed without proof of any instrument under seal. Doe *d.* Pennington *v.* Taniere, 12 Q. B. 998, (64 E. C. L. R. 998,).

[20] See also, as to the renewal of leases by ecclesiastical persons, the 6 & 7 Wm. 4, c. 20, (explained by the 6 & 7 Wm. 4, c. 64,); the 5 & 6 Vic. c. 27; and the 5 & 6 Vic. c. 108. The 5 & 6 Vic. c. 27, was passed the better to enable the incumbents of ecclesiastical benefices to lease the lands of their benefices on farming leases. It empowers the incumbent of any benefice (with the consent of the patron and of the bishop of the diocese in which the lands are locally situated, and with the consent also of the lord of the manor, if the lands are copyhold and the lease cannot, by the custom of the manor, be made without his license,) to lease by deed any part of the glebe or other lands belonging to the benefice (with or without the farm-houses, cottages, &c.,) for any term not exceeding fourteen years, to take effect in possession, reserving the best and most improved yearly rent, without any fine or other consideration for the granting of the lease. The rent must be payable quarterly to the incumbent for the time being, and the lessee must not be made dispunishable for waste.

*I have adverted to these statutes, because it is quite necessary that you should be aware that [*39]

He must covenant with the incumbent and his successors to pay the rent, and all taxes on the premises; not to assign or underlet without the consent of the bishop, patron and incumbent; to cultivate the lands according to the most approved system; and to repair and to insure any buildings upon the land demised. Mines, minerals, timber, and underwood must be reserved out of the demise; and a power of re-entry, specified in the statute, and of a stringent kind, must be inserted in the lease. The term may be twenty years if the lessee covenants to adopt any system of cultivation more expensive than the usual course, or to drain or subdivide, or to embank and warp any part of the premises, or to erect buildings, or to repair in a more extensive manner, and at a greater expense than is usually required of lessees of farms, or to improve the premises in any other way (see s. 1). The word benefice is defined by the act to include every rectory, vicarage, perpetual curacy, donative, endowed public chapel, parochial chapelry, and district chapelry, the incumbent of which in right thereof is a corporation sole (s. 15). No lease is valid under this act unless the parsonage-house, and all offices, gardens, &c., (together with so much land belonging to the benefice situated most conveniently for actual occupation by the incumbent as amounts, with the site of the house, offices, gardens, &c., to at least ten acres,) is not included in the lease, or in any other subsisting lease. This provision does not, however, apply where the land to be leased is situated five miles or more from the parsonage, or where there is no parsonage, from the church (s. 2). A proper survey and plan of the lands must be made before any lease is granted (s. 3). The 5 & 6 Vic. c. 108, enables ecclesiastical corporations, whether aggregate or sole (except any college or corporation of vicars choral, priest vicars, senior vicars, custos and vicars, or minor canons, and ecclesiastical hospitals and their masters), to grant under certain restrictions leases for the purpose of building and improvements, for any term not exceeding ninety-nine years, to take effect in possession (see s. 1). They may also lease, for not more than sixty years, running water, way-leaves and water-leaves, canals, water courses, tram-roads, railways and other ways; and they may grant mining leases of any mines, &c belonging to the corporation (ss. 4 & 6). This statute

[*40] *these leases by Bishops and other ecclesiastical corporations stand on a very different footing from leases by private individuals; and I have adverted to them very briefly, because their provisions are so minute and complex, that, had I dwelt upon them, not only would a great deal of time have been taken up, but you would have found it impossible to carry their provisions away in your recollection. If you are desirous of becoming thoroughly acquainted with them, the best mode will be to peruse some of the late cases decided as to their construction; for instance, Doe *d.* Tennyson *v.* Lord Yarborough, 1 Bing. 24; (8 E. C. L. R., 384;) Doe *d.* Cates *v.* Somerville, 9 Dowl. & Ryland, 100. [S. C., 6 B. & C., 126; 13 E. C. L. R., 68.] Vivian *v.* Blomberg, 3 Bing. N. C., 311; (32 E. C. L. R., 150;) Doe *d.* Richardson *v.* Thomas, 1 P. & D., 578. [S. C., 9 A. & E., 556; 36 E. C. L. R., 201.][21]

[*41] The husband of a woman seised of a freehold *estate in real property, could, at common law, have made a binding lease of it for the joint lives of himself and wife; and no longer, unless indeed he had, after her death, become tenant by the curtesy, and even then it would at all events have ended with his own life.[22] The enabling statute of 32 Henry

regulates, in detail, the mode in which these leases are to be granted, and renders necessary to their validity, *in all cases*, the consent of the ecclesiastical commissioners (ss. 1—20). When the lease is made by the incumbent of a benefice the patron must also consent; and where the property demised is copyhold, and the lease could not be made without a license from the lord, his consent must be obtained (s. 20). The 14 & 15 Vic. c. 74, regulates the granting of leases of lands disappropriated from bishoprics in Ireland.

[21] See also Doe *d.* Brammall *v.* Collinge, 7 C. B. 939, (62 E. C. L. R. 939,).

[22] Shep. Touchst. 280; Roper's Husb. and Wife, c. 1, s. 5, c. 3, s. 1; 2 Wms. Saund. 180, note (9).

VIII., sec. 3, however, applies to his case, and enables him to make leases for the same term, and subject to the same conditions that have been already enumerated.[23](a)

[23] *Ante*, p. 33. The rent should be reserved to the husband and wife, and the heirs of the wife. Hill *v.* Saunders, 2 Bing. 112, (9 E. C. L. R. 505,) 4 B. & C. 529, (10 E. C. L. R. 689,).

(a) The third section of the Act 32 Henry 8th, c. 28, was in these words: "*Provided always*, That the wife be made party to every such lease which hereafter shall be made by her husband of any manors, lands, tenements or hereditaments, being the inheritance of the wife; and that every such lease be made by indenture, in the name of the husband and his wife, and she to seal the same. And that the term and rent be reserved to the husband and to the wife, and to the heirs of the wife according to her estate of inheritance in the same. And that the husband shall not in anywise alien, discharge, grant, or give away the same rent reserved, nor any part thereof, longer than during the coverture, without it be by fine levied by the said husband and wife. But that the same rent shall remain, descend, revert, or come after the death of such husband, unto such person or persons, and their heirs, in such manner and sort as the lands so leased should have done, if no such lease had been thereof made."

It seems to have been held, on the construction of this statute, that these provisions only extend to leases of lands which the husband holds *in right of his wife*, but that where he holds *jointly with his wife*, his single demise will be good and binding on the wife. Smith *v* Trinder, Cro. Car. 22. But see Bacon's Abridgt. Leases, c. 2, where it is said this case was never decided.

This statute created the single exception in England to the rule, that the interest of a *feme covert* in real estate could be devested by fine or recovery only.

The Statute 32 Henry 8th, c. 28, is said in the Report of the Judges, 3 Binn. 619, to be in force in Pennsylvania, except the 4th, 5th and 8th sections But to give effect to such a lease in Pennsylvania, it is presumed that the usual separate acknowledgment of the wife would be necessary.

In New York, the Statute Henry 8th has not been adopted. But

With regard to any chattel interests his wife might possess, as he could have assigned those away absolutely, so he might always have made valid leases of them for any term, and to any extent; for *cui licet quod est majus, ei etiam quod est minus licet.*[24]

The persons I have mentioned hitherto, are persons who possess an estate, though not one which will necessarily extend to the termination of the leases [*42] which they are by the special *provisions of the legislature empowered to grant. There are, however, other persons, who, having themselves no interest at all, are nevertheless able to create one. It

[24] Co. Litt. 46 b, 300 a, 351 a; Druce *v.* Denison, 6 Ves. 385; Wildman *v.* Wildman, 9 Ves. 177. If the husband does not deal with the wife's chattels real, they belong to her on his death in preference to his personal representative. Anon. Poph. 4; Sym's Case, Cro. Eliz. 33; 1 Platt on Leases, 139. And although the wife makes by marriage an absolute gift to the husband of all chattels personal in possession in her own right, whether he survive her or not, mere *choses in action* must be reduced into possession by the husband during his lifetime, or they will survive to the wife. Co. Litt. 351 b; Fitzgerald *v.* Fitzgerald, 8 C. B. 592, (65 E. C. L. R. 592,).

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it is not necessary in New York to have recourse to fine and recovery, in order to pass the estate of a *feme covert.* She may, during coverture, part with the whole or any portion of her interest in real estate, if the deed be acknowledged in the mode prescribed by the statute concerning the proof of deeds. Jackson ex. dem.; Campbell & Reade *v.* Holloway, 7 Johns. R. 81. In this case, A. being seized of land in right of his wife, executed a lease to B. for life, in 1796, which was assigned to C. In 1806, A. and his wife executed a lease to D. for the same land, for the same lives, and with the same covenants. A. died in 1808, and the wife after the death of the husband in 1809, received rent of C. Held, that the lease of 1796 was void as to her; and she having made a valid lease in 1806 to D., she could not affirm the lease of 1796 to the prejudice of D.

will be right to mention the chief cases of this description.

First, those persons acting by virtue of POWERS.

It would be altogether foreign to the subject of these lectures, were I to go into any description of the history and nature of *Powers*, a subject on which volumes have been written, and on which volumes probably will be written.[25] A POWER is the creature of the Statute of Uses, it had no existence at common law. At common law no man could give an estate who was not himself seised or possessed of an estate.[26] But the Statute of Uses having enabled a person seised of real property to convey it by one assurance to *uses*, that is to say, in plain English, *purposes*, to be declared and made manifest by some subsequent document, it has been always held on the construction of that statute, that the person who conveys the estate need not be the same person who is to declare the uses to which it is conveyed; thus, if A. has an estate in fee simple, he may convey it to B., to such uses as C. shall appoint; C. may appoint that it shall be to the use of D. in fee-simple, and if he do, D. becomes *seised of an estate in fee-simple in the land; but C. might equally appoint to the use of D. for seven years. And if he did so, D. would have a lease for seven years, although C., from whom he received it, would have himself no estate at all.[27] This is to put the very sim- [*43]

[25] See Sugden on Powers.

[26] At common law it was essential to the validity of transfers of land that corporal possession of the land should be delivered to the purchaser in the presence of his neighbours. This mode of transfer was called a feoffment, with livery of seisin. Sugden on Powers, c. 1; 2 Black. Comm. 310.

[27] Uses existed at common law before the Statute of Uses, (27 Hen. 8, c. 10) was passed; but they were considered to create merely

plest case. But it frequently happens that it is thought convenient in settling estates, that persons sometimes having a life interest, sometimes even no beneficial interest at all, should be enabled to *grant leases [*44] of a certain duration, and on certain conditions. In such cases, in order to enable them to do so, the land is conveyed to the use, amongst other uses, that the leases so made by them shall be valid. And then, as their appointment would have given a fee had the estate been conveyed to such uses in fee as they should appoint, so will the minor interest take effect by virtue

a *trust* or *confidence* in the person to whom the estate was conveyed, to dispose of it as the person by whom it was conveyed should direct. This trust or confidence was cognizable only in a court of equity, and the person to whom the estate was conveyed was, to all intents and purposes, the owner of the estate at law. Thus, under a feoffment by A. to B., to the use of C., B. became the legal owner, and C. (the *cestui que use*) had merely an equitable interest in the land. Great inconvenience was found to result from this separation between the beneficial and the legal ownerships. The Statute of Uses was passed to *annex* the legal ownership to the equitable estate; and the change effected by it is simply this: the statute *executes* the use, that is to say, it converts, by an arbitrary enactment, the interest of the *cestui que use* into a legal estate; annexing to it the "lawful seisin estate and possession" which was before in the person to whom the estate was conveyed. After the passing of the Statute of Uses the Courts of Law held that *an use could not be limited upon an use*, that is to say, that where there were several declarations of trust, the statute would operate on the first of them only. Therefore if an estate was limited to A., to the use of B., to the use of C., the legal estate was held to be in B., with a mere *trust* in equity for the benefit of C. Upon this foundation rests the English system of trusts, which are in fact unexecuted uses. See Sugden on Powers, chap. 1, sects. 1 & 2. A clear understanding of this elementary matter is important; for it is the foundation of a great part of our system of conveying real property. See Sanders on Uses and Trusts; Hayes on Conveyancing, c. 2.

of the *power*, as it is called, which they possess, of appointing it. And when a lease is thus created by the exercise of a power, it is considered as if it had been created by the person who gave the power, and as if it had been inserted in the very instrument or settlement by which the power was created; for if I convey land to the use of such person as A. B. shall name, when A. B. has made a nomination, his nominee is my grantee, and not A. B.'s, since the property emanated from me, and A. B. was only my instrument to point out the channel into which it was to pass.[28] All which, so far as it applies to the case of a lease, you will find clearly explained in the great case of Isherwood *v.* Oldknow, 3 M. & S., 382, and in Rogers v. Humphreys, 4 A. & E., 299; (31 E. C. L. R. 144.)(*a*) I will say no more on the subject of powers, or of the division of them into powers *appendant*, *collateral*, and *in gross*,[29] the subject more properly

[28] Sugden on Powers, c. 8, s. 4.

[29] A power is said to be *appendant* when it is given to a person who has an estate in the land, and the estate to be created by the power is to take effect in possession during the continuance of the estate to which the power is annexed; as, for instance, a power to make leases. A power is *in gross* where the person to whom it is given has an estate in the land; but the estate to be created by the power is not to take effect until after the determination of the estate to which it relates; as a power to jointure an after-taken wife. Powers are *collateral* when they are given to strangers; that is to say, to persons who have neither a present nor a future estate, or interest in the lands. Watkins on Convey. bk. 1, c. 21. It often happens that the instrument by which a power of leasing is conferred, limits its exercise by providing that the ancient and accustomed rent shall be reserved, or that the leases shall contain covenants of a particular description. In these cases, the leases are void if they are not made in accordance with the directions given; and much litigation has

(*a*) 4 Kent, 337.

[*45] belonging *to a conveyancing than common law Lecture. It was, however, absolutely necessary that I should point out to you in what way leases made by persons executing powers take effect, and how and why they are, in contemplation of law, made by the person who created the power, although they frequently [*46] have the effect of overriding part *of an estate vested in the person who exercises the power; as for instance, where tenant for life, having a power of leasing, makes a lease to take effect immediately, that lease, as is obvious, overrides part of his own estate so long as his own life continues; since, had he not exercised the power, he would have continued tenant for life in possession; whereas, by exercising it, he has converted his estate in possession into a reversion on the term vested in the lessee.[30]

arisen from limitations of this sort upon leasing powers. See Doe d. Douglass v. Lock, 2 A. & E. 705, (29 E. C. L. R. 325,); Fryer *v.* Coombs, 11 A. & E. 403, (39 E. C. L. R. 126,); Dayrell *v.* Hoare, 12 A. & E. 356, (40 E. C. L. R. 182,); Rutland *v.* Wythe, 10 Cl. & F. 419; Doe *d.* Lord Egremont *v.* Stephens, 6 Q. B. 208, (51 E. C. L. R. 208,); Doe *d.* Lord Egremont *v.* Williams, 11 Q. B. 688, (63 E. C. L. R. 688,); and Doe *d.* Biddulph *v.* Hole, 15 Q. B. 848, (69 E. C. L. R. 848,). See also the 12 & 13 Vic. c. 26 (an act for granting relief against defects in leases made under powers of leasing in certain cases); the 12 and 13 Vic. c. 110, and the 13 Vic. c. 17. By these acts leases made *bonâ fide* under leasing powers, and under which the lessees have entered, but which are invalid through the non-observance or omission of some condition or restriction, or by reason of any other deviation from the terms of the power, are to be deemed, in equity, contracts for such leases as might have been granted. And if the persons against whom such leases are invalid accept rent, and, before or upon its acceptance, sign any receipt, memorandum, or note in writing, confirming the leases, they are to be deemed to be confirmed as against them. See Sugden's Essay on the Real Property Statutes, c. vi.

[30] See the cases cited in the last note.

I will just mention the case of a guardian. A guardian in *socage*[31] may, I apprehend, on the authority of Bacon's Abridgment, Tit. Lease, s. 1, par. 9, and Roe *v.* Hodgson, 2 Wils. 129, make a lease which will be good so long as his own interest as guardian lasts, and, when that is at an end, will be voidable only, not absolutely void, and capable of being confirmed by the infant at his full age; and the better opinion seems to be, that the lease of a testamentary guardian stands on the same footing, inasmuch as statute 12 Car. II., c. 24, from which testamentary guardians derive their authority, seems to assimilate their office to that of a guardian *in socage*.[32](*a*)

[31] Guardianship *in socage*, or *by the common law*, existed when a minor under fourteen was seized of lands or other hereditaments lying in tenure and holden by socage. In this case the guardianship devolved upon the next of kin, to whom the inheritance could not possibly descend; for instance, where the estate descended from the minor's father, his uncle by the mother's side was guardian. For before the 3 & 4 Wm. 4, c. 106, he could not possibly inherit. Litt. s. 123; Co. Litt. 87 b; 1 Black Com. 461.

[32] 12 Car. 2, c. 24, ss. 8–9. The testamentary guardian has the custody, not only of the lands descended from or left by the father, but of all lands acquired by the infant during his non-age, which the guardian *in socage* had not. Watkins on Conv. 483.

(*a*) Generally, in the United States, there are statutory provisions for the appointment of guardians, and an appointment under the statutes, except in the case of testamentary guardians, is necessary to give validity to the acts of the guardian. In Massachusetts, South Carolina and Maryland, it has been expressly held, that the father, as natural guardian of an infant, has no authority to make a lease of the infant's land. May *v.* Calder, 2 Mass. 55; Anderson *v.* Darby, 1 Nott & Mc. 369; M'Gruder *v.* Peter, 4 Gill & Johns. 323. A lease for a longer period than the infancy of the ward, is void. Ross *v.* Gill, 4 Call. 250.

In New York, in the case of Byrne *v.* Van Hœsen, 5 Johns. 66, it

[*47] *With regard to an executor or administrator, I need hardly say that, as all terms of years belonging to the deceased are absolutely vested in him, so that he may, if he think proper, sell them, it is likewise in his power to make underleases, if he see fit, for the benefit of the estate to do so.[33]

It remains, before concluding this part of the subject, to mention one or two cases in which parties who, as far their estates are concerned would have been competent to lease, are prevented from doing so by dis-

[33] Bac. Ab. *Leases*, (I.) 7. Several executors being in law but one person, a grant by one of them is as effectual as if all had joined, and it does not matter whether it be made in the name of the one, or whether it purport to be the grant of all, and one only executes it; *ib.* See also Keating *v.* Keating, 1 Lloyd & Goold, 133, where a lease by one executor appears to have been treated as valid; and the judgment in Doe *d.* Hayes *v.* Sturges, 7 Taunt. 222, (2 E. C. L. R. 335,). Executors disposing of terms of years vested in them in right of their testators, may make a good title, even against a specific legatee, unless the disposition be fraudulent. Williams on Executors, part III. book I. c. 1.

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was held, that where a widow with children under age, entered and took possession of the husband's property after his death, the presumption of law is, that she enters as guardian in socage to her children—that this guardianship ceases when the infant arrives at the age of fourteen years, so far as to enable the infant to enter and take the land to himself. Yet if no other guardian succeeds, the mother's guardianship will continue. That the guardian in socage is entitled to the custody of the land and the profit, for the benefit of the heirs, and may lease it; and in Pond *v.* Curtis, 7 Wendall, 46, it is said, that the guardian may bring the action for the non-payment of the rent in his own name, though the suit be commenced after the ward has attained his age. The general rule, however, is, that a suit should be brought in the name of the ward, thus, A. B. by C. D., his guardian. See Carskadden *v.* M'Ghee, 7 W. & S. 140.

abilities imposed upon them by some general principle of law.

And first a person *non compos mentis*, as he can make no binding contract, so he can execute no valid lease; his committee, however, may do so under the direction of the Court of Chancery by virtue of statute 43 Geo. III. c. 75, and 11 Geo. IV., & 1 Wm. IV. c. 65.[34]

*A lease made by a married woman is absolutely void,[35] unless indeed it were made of her sole and separate property, in which case, though it would confer no right at law, equity would enforce it, and compel the trustee to execute one which would stand good, even at law.[36] [*48]

With regard to leases executed by infants, there prevails a great deal of doubt and difficulty. The question is, not whether the lease made by the infant is binding,

[34] Co. Litt. 247 a; Beverley's Case, 4 Rep. 123. Idiots, whom Lord Coke calls "fools natural," are comprehended within this term. Before the statutes mentioned above, it had been held that the committee of a lunatic had no power to make a lease. Knipe *v.* Palmer, 2 Wils. 130. The general statement in the text requires some qualification; for, according to the later decisions, a contract is not vacated by the unsoundness of mind of one of the contracting parties, if this fact is unknown to the other, and no advantage is taken of the lunatic. And this rule applies especially to cases in which the contract is not merely executory, but has been executed in whole or in part, so that the parties cannot be restored altogether to their original position. Molton *v.* Camroux, 2 Exch. 487; S. C. *in error*, 4 Exch. 17; Beavan *v.* McDonnell, 9 Exch. 309.

[35] See the judgment in Goodright *v.* Straphan, Cowp. 201. A married woman may, however, make a valid lease under a power. Sugden on Powers, c. 4, s. 1.

[36] A married woman, who has property settled to her separate use, without any restraint on alienation, is deemed, in equity, to be a feme sole, and she may dispose of the property accordingly. Sugden on Powers, c. 4, s. 1.

for it certainly is not so, but whether it is absolutely *void*, or only *voidable*. In the former case, it would be incapable of confirmation by the infant at his full age. In the latter, it might be confirmed by any act done after his attaining his majority, and amounting to a recognition of it, such, for instance, as the receipt of the rent reserved on it. The better opinion seems to be, that the latter is the true state of the law, and that [*49] *it is only *voidable*. See the question thoroughly discussed in Zouch *d.* Abbott *v.* Parsons, 3 Burr. 1806.[37](*a*)

Having now touched upon the different estates and capacities of persons capable of making leases, I will proceed to the next question, namely, *who may be lessee*, having first merely observed that though, for the sake of simplicity, I have, in the observations I have been making, confined myself to the case of a single lessor, yet that where two or more persons are seised or pos-

[37] See also 1 Platt on Leases, 28; and the arguments and judgments in Williams v. Moor, 11 M. & W. 256;* The Newry and Enniskillen Railway Co. *v.* Coombe, 3 Exch. 565; The North-Western Railway Co. *v.* McMichael, 5 Exch. 114, and The Dublin and Wicklow Railway Co. *v.* Black, 8 Exch. 181. The Court of Chancery may authorise the granting of leases of lands belonging to infants, when it is for the good of the estate. 11 Geo. 4, & 1 Wm. 4, c. 65.

(*a*) In the United States generally, conveyances of land by minors for valuable consideration, are held to be voidable, not void. Kendall *v.* Lawrence, 22 Pick. 540; Gillet *v.* Stanley, 1 Hill, 121; Bool *v.* Mix, 17 Wend. 119; Wheaton *v.* East, 5 Yerg. 41; Phillips *v.* Green, 5 Monroe, 344; Worcester *v.* Eaton, 13 Mass. 375; Bank *v.* Chamberlin, 15 Mass. 220; Jackson *v.* Carpenter, 11 John. 539; Farr *v.* Sumner, 12 Verm 28; Ridgeley *v.* Crandall, 4 Md. 435; Cummings *v.* Powell, 8 Texas, 80; Ferguson *v.* Bell, 17 Mis. 347; M'Ginn *v.* Shaeffer, 7 W. 414.

sessed as joint tenants, or tenants in common, each of them may make leases of his or her respective share; or they may all join in one lease, which, in the case of joint tenants, will operate as a joint lease of the whole, but, in the case of tenants in common, as a lease by each of his respective share, and a confirmation by each as to the shares of the others. See Heatherley *d.* Worthington *v.* Weston, 2 Wils., 232; Mantle *v.* Wollington, Cro. Jac. 166.[38]

[38] See Com. Dig. *Estates by Grant*, (G. 6) (K. 8). Doe *d.* Poole *v.* Errington, 1 A. & E. 750, (28 E. C. L. R. 349,) and the judgment of Mr. Justice Williams, in Beer *v.* Beer, 12 C. B. 80, (74 E. C. L. R. 80,). Questions frequently arise in practice as to whether tenants in common should sue jointly or separately on covenants contained in demises of the joint property, and numerous decisions occur in the books upon this subject. The result of the cases appears to be shortly this. Where tenants in common demise jointly, and the covenant to pay rent, or perform any other act, is made with them jointly, they should join in the action. If they demise separately, reserving a separate rent, they must sue separately. The question depends mainly upon the mode in which the contract is framed. If the contract is unambiguous and clearly joint, the remedy will be joint, although it may appear that the interests of the covenantees are several. For the rule that a covenant with several persons is to be construed *according to the interest of the parties*, is a rule of construction merely which is only applicable where the language of the covenant is ambiguous, and which will not control the clearly expressed intention of the parties. Thus in Powis *v.* Smith, 5 B. & A. 850, (7 E. C. L. R. 279,) premises had been demised by two tenants in common, and the rent had, for a time, been paid to the agent of both. Afterwards they gave notice to the occupier to pay one moiety of the rent to each of them; he did so, and separate receipts were given to him. An action was brought by both the tenants in common to recover rent which had become due since the notice. At the trial the plaintiffs were non-suited upon the ground that they ought to have brought separate actions. The Court granted a new trial, holding that it should have been left to the jury, as a question of fact, to consider whether the original joint contract

[*50] *[The real property belonging to parishes is vested in the Churchwardens and Overseers of

had been altered, and whether the parties had entered into a new contract of demise, with a separate reservation of rent to each, or whether they had merely intended to make an alteration in the mode of receiving the rent. In Wilkinson *v.* Hall, 1 Bing. N. C. 713, (27 E. C. L. R. 831,) two tenants in common sued jointly for double the value of the premises which had been holden over by the defendant after the expiration of a demise. It appeared upon the declaration that there had been no joint demise. The Court held that the plaintiffs could not sue jointly. "If," said the Lord Chief Justice Tindal, in delivering judgment, "there be no joint demise there must be several actions of debt for rent, for a joint action is not maintainable, except upon a joint demise." In this case, indeed, the action was brought for double value, and was not founded upon a contract, but the Court thought that as the damages given by the statute when a tenant holds over are a compensation for the rent, they ought to stand upon the same footing as the rent itself. The later cases appear to show that, strictly speaking, the test is not so much whether the demise is joint or several, as whether the *reservation* of the rent is joint or several. Practically this does not make much difference, for the reservation of the rent usually follows the demise; but it is apprehended that if two tenants in common were to join in a lease which was so framed that the demise was distinctly separate, each demising in terms his share only, but a single rent were reserved payable to the two jointly, the remedy for its recovery would (at all events if the lease were by deed, Co. Litt. 214 a,) be joint. Indeed as we have seen in the text, whenever tenants in common join in a lease, it operates as a demise by each of his share only, and a confirmation by each of the shares of the others. In Sorsbie *v.* Park, 12 M. & W. 158*, Baron Parke laid down the rule as to the effect of the interest of the covenantees upon the mode of bringing the action in the following terms;—"I think the correct rule is, that a covenant will be construed to be joint or several, according to the interest of the parties appearing upon the face of the deed, *if the words are capable of that construction;* not that it will be construed to be several by reason of several interests, if it be expressly joint." Similar expressions are used in the judgment in Bradburne *v.* Bot-

the poor *for the time being, as a *quasi* corpo- [*51]

field, 14 M. & W. 572*. In Keightley v. Watson, 3 Exch. 722, Baron Parke said, "The rule that covenants are to be construed according to the interest of the parties, is a rule of construction merely, and it cannot be supposed that such a rule was ever laid down as could prevent parties, whatever words they might use, from covenanting in a different manner. It is impossible to say that parties may not, if they please, use joint words, so as to express a joint covenant, and thereby to exclude a several covenant, and that because a covenant may relate to several interests, it is therefore necessarily not to be construed as a joint covenant. If there be words *capable of two constructions*, we must look to the interest of the parties which they intended to protect, and construe the words according to that interest." And in Beer *v.* Beer, 12 C. B. 80, (74 E. C. L. R. 80,) Mr. Justice Maule distinctly recognised the correctness of this rule. "Several cases," said the learned judge, "were cited for the purpose of showing, that, whatever the nature of the subject of contract, if the instrument does in terms necessarily import that the promise or the covenant is made jointly with two, then the two covenantees, or the survivor, must bring the action. That is, I think, very sound law; and it is beside the class of cases where the covenant, which from its language might be either joint or several, has been held to be joint or several according to the interest of the covenantees. You are not to impose upon the instrument a meaning contrary to the true sense of the words, but choose between two senses, of both of which the words are susceptible, and adopt that which is most conducive to the interests of the covenantees. *But where the covenant is not capable of being so construed, however severable the interests of the covenantees may be, if the language they have used evince an intention that the covenant shall be joint, all must join in an action upon it.*" See also the notes to Eccleston *v.* Clipsham, 1 Wms. Saund. 153; Foley *v.* Addenbrooke, 4 Q. B. 197, (45 E. C. L. R. 197,); Hopkinson *v.* Lee, 6 Q. B. 964, (51 E. C. L. R. 964,) (a case the authority of which may perhaps be doubted); Wakefield *v.* Brown, 9 Q. B. 209, (58 E. C. L. R. 209,); Harrold *v.* Whitaker, 11 Q. B. 147, (63 E. C. L. R. 147,); and Doe *d.* Campbell *v.* Hamilton, 13 Q. B. 977, (66 E. C. L. R. 977,). Tenants in common must, it seems, sever in an avowry for rent. Pullen *v.*

[*52] ration, by the *59 Geo. 3, c. 12, s. 17, and they are entitled to make leases of these lands.[39]]

Palmer, 3 Salk. 207; Harrison *v.* Barnby, 5 T. R. 246. Joint tenants have an unity of title and interest, and differ in this respect from tenants in common. The general rule is that they must sue jointly in respect of contracts relating to their estate. Co. Litt. 180 b, Bac. Ab. *Joint Tenants and Tenants in common* (K.). It is apprehended, however, that this general rule, like the opposite one in the case of tenants in common, is subject to, and may be controlled by the express and unambiguous contract of the parties. One joint tenant may distrain alone, but he must avow in his own right, and also as bailiff to the other. Pullen *v.* Palmer, 3 Salk. 207. If several joint tenants demise at an entire rent, and one of them aliens his portion of the reversion, the severance of the reversion destroys the right to distrain for the rent. Stavely *v.* Allcock, 16 Q. B. 636, (71 E. C. L. R. 636,).

[39] Before this statute, a lease by parish officers of land belonging to the parish, created only a tenancy from year to year. Doe *d.* Higgs *v.* Terry, 5 Nev. & M. 556. It does not extend to copyholds. Doe *d.* Bailey *v.* Foster, 3 C. B. 215, (54 E. C. L. R. 215,). Under this act the church-wardens and overseers are a corporation of a peculiar kind; they may take by demise without acceptance under seal, and any one of them may authorise a distress for the rent. Smith *v.* Adkins, 8 M. & W. 362*; Gouldsworth *v.* Elliott, 11 M. & W. 337*. See as to the effect of this statute upon property which has been conveyed to trustees, Rumball *v.* Munt, 8 Q. B. 382, (55 E. C. L. R. 382,); The Churchwardens of Deptford v. Sketchley, ib. 394, (55 E. C. L. R. 394,); and Doe *d.* Edney *v.* Benham, 7 Q. B. 976, (53 E. C. L. R. 976,). The 5 & 6 Wm. 4, c. 69, (an act to facilitate the conveyance of workhouses and other property of parishes, and of incorporations or unions of parishes in England and Wales,) does not transfer the legal estate in parish workhouses, &c., from the church-wardens and overseers to the guardians of unions. Doe *d.* Norton *v.* Webster, 12 A. & E. 442, (40 E. C. L. R. 223,). Since the 59 Geo. 3, c. 12, leases not exceeding the term of three years may be granted by the parish officers without writing, if all of them concur; but where a document was signed by one overseer only, and did not appear to be a grant by all the parish officers, as he did not profess

*Next with regard to the *Lessee*. Any person [*53]
is capable of being a lessee, so far as the mere vesting of the estate is concerned; with regard, however, to any liability for rent, or upon the other stipulations usually contained in a lease, on the part of the lessee, a person under disability is in the same situation as in the case of any other contract. Thus an infant lessee, if he elect at his full age to disagree to the lease, will not be liable for rent. See Ketsey's Case, Cro. Jac. 320; and Lowe v. Griffith, 1 Scott, 58. He must, however, make his election within a *rea- [*54]
sonable time after attaining his full age, whether he will avoid the lease or no; and if he do not, he will become liable for rent. See Holmes *v* Blogg, 8 Taunt. 35; (4 E. C. L. R., 29;) Ketsey's Case, Cro. Jac. 320.[40]

to sign on behalf of all, nor was it shown by the document itself, or by extrinsic evidence, that they all concurred, it was held that there was no valid lease under this statute. Doe *d.* Lansdell *v.* Gower, 17 Q. B. 589, (79 E. C. L. R. 589,). Under s. 12 of this act, the church-wardens and overseers are empowered, with the consent of the vestry, to take lands within or near the parish on lease, for the employment of the poor. In a case in which they took the land jointly with the surveyors of the highways, it was held that the statute did not apply, and that they were personally liable for use and occupation. Uthwatt *v.* Elkins, 13 M. & W. 772*. Where a tenant was let into possession by the church-wardens of a parish, and thereupon became either a tenant from year to year, or at will, it was held that this tenancy was sufficiently determined by a notice to quit, which purported to be given on behalf of the churchwardens and overseers who were in office when the notice was served (but who were not the persons who had let the tenant into possession), and which did not state to whom the possession was to be given up. Doe *d.* Bailey *v.* Foster, 3 C. B. 215, (54 E. C. L. R. 215,).

[40] See also Kirton *v.* Elliott, 2 Bulst. 69, which appears to be the same case. Com. Dig. *Enfant* (C. 6). 1 Platt on Leases, 528. The Newry & Enniskillen Railway Co. *v.* Coombe, 3 Exch. 565; The North-Western Railway Co. *v.* M'Michael, 5 Exch. 114.

And, as an infant has a right to bind himself to pay for necessaries, and lodging is an indispensable necessary of life, it seems consistent with principle, that he should be able to bind himself to pay for that even during his minority; and therefore I conceive that if a young man under age were studying law in the Temple, or in an attorney's office, and his family were resident at a distance from town, *he would be liable to pay the rent of the lodgings in which he resided*, provided they were not of an extravagant description, so as to be unsuitable to his rank and condition in life; and I think that the same rule would apply to other analogous cases. Indeed, in Lowe *v.* Griffith, 1 Scott, 458, where an infant practised the trade of a barber, and rented a house, it was left to the jury, and held by the Court afterwards to have been properly left to them, to say whether the house was a necessary of life, or a mere incident to his trade; for, in the latter case, inasmuch as an infant is incapable by law of trading, he would not be liable. The distinction, you see, is be-
[*55] tween the necessary of life for which *an infant may bind himself to pay, if it be proper for one of his estate and degree, and the thing necessary not for the support of life in his due sphere, but for some collateral purpose. For instance, in the case I have just put of an infant residing in London for the purpose of studying law under a special pleader, I think he might contract to pay for suitable lodgings; but suppose the infant were to take out his certificate as a special pleader, and were to hire expensive chambers with an extra room for the accommodation of a clerk, and another for pupils, I am disposed to think that if an action were commenced against him for the rent, the Judge would intimate that that was not a species

of demand which could be properly ranked under the term *necessaries*.[41]

So, with regard to a married woman, there is no rule of law which prevents a lease from being granted to her. Only at the determination of her coverture she may, if she think proper, waive and disagree to it, and she will then be wholly free from any sort of liability arising from it.[42] And these points, with regard to infants *and to married women are not peculiarly applicable to leases—for the general rule of law is, that a grant of any estate to an infant or married woman is *prima facie* good, because the law presumes it to be for their benefit, but at the determination of the infancy or coverture they may, if they think proper, disagree to it. [*56]

As to an alien,—at common law, he might, if he thought proper, purchase land, either for an estate of freehold, or a term, but he was incapable of holding it; and, upon office found, the Crown became entitled to it, 1 Inst. 2 b. Subsequently by stat. 32 Hen. 8, c. 16, an Act which seems to have been dictated by the jealousy once felt of foreign manufactures, all leases of dwelling-houses and shops to alien artificers and handicraftsmen, were declared absolutely void; see on the construction of this Act, Lapierre *v.* McIntosh, 9 A. &

[41] As to the construction put upon the term *necessaries*, in the later cases, see Harrison *v.* Fane, 1 M. & Gr. 550, (39 E. C. L. R. 556,); Peters *v.* Fleming, 6 M. & W. 42;* Brooker *v.* Scott, 11 M. & W. 67;* Wharton *v.* Mackenzie, 5 Q. B. 606, (48 E. C. L. R. 606,).

[42] See Co. Litt. 3 a. During the coverture she will not of course be liable to be sued upon the lease. By the 11 Geo. 4, & 1 Wm. 4, c. 65, s. 12, leases to which married women are entitled may be surrendered and renewed under the directions of the Court of Chancery.

E. 857; (36 E. C. L. R. 305.[43]) But any alien not falling within this statute, may take a lease of a *house* for his residence, for, as Lord Coke observes (1 Inst. 2 b.), without a dwelling he cannot trade or commerce. And an alien, who has been naturalised, or has become a denizen, may hold a lease or any other real property, as a natural-born subject may.[44](*a*)

[43] See also Jevens *v.* Harridge, 1 Wms. Saund. 5. This statute did not make void *an assignment* of a lease to an alien. Wootton *v.* Steffenoni, 12 M. & W. 129;* and see now the 7 & 8 Vic. c. 66, mentioned in the next note.

[44] Since this lecture was written, the law has been altered, and the 32 Hen. 8, c. 16, has been in substance repealed, so far as relates to the matter mentioned in the text. By the 7 & 8 Vic. c. 66, s. 5, aliens being the subjects of a friendly state, and residing in any part of the United Kingdom, may, by grant, lease, demise, assignment, bequest, representation, or otherwise, take and hold any lands, houses, or other tenements, for the purpose of residence or occupation, or for the purpose of any business, trade, or manufacture, for any term not exceeding two years, as fully and effectually as a natural born subject, except so far as relates to the right of voting for members of parliament. Under this act, which does not extend to the colonies (see the 10 & 11 Vic. c. 83, s. 3), any person born out of the Queen's dominions, of a mother being a natural born subject of the United Kingdom, is capable of holding real and personal property of any description; and aliens who are the subjects of a friendly State may also hold every species of personal property, except chattels real, as effectually as natural born subjects (see ss. 3 and 4). This act also simplifies the mode of obtaining naturalization (see ss. 6 to 12). Denizens are aliens born who have obtained, *ex donatione Regis*, letters patent to make them English subjects. See Com. Dig. *Alien* (D); 1 Black. Comm. 374. *Aliens enemy* cannot sue in our courts, and contracts made with them are invalid. Bac. Ab. *Aliens* (D). Brandon *v.* Nesbitt, 6 T. R. 23; Potts *v.* Bell, 8 T. R. 548; Willison *v.* Patteson, 7 Taunt. 439, (2 E. C. L. R. 436,); and Alcenius *v.* Nygren, 24 L. J. Q. B. 19.

(*a*) For the power of aliens (not naturalized) to take, hold, trans-

*Having considered *who may be the lessor or* [*57]
lessee, the next question in order is *what may be leased*. This is a part of the subject upon which, however, I do not intend to dwell; because, though it is clear that leases for a term of years might be demised of almost every sort of tenements, such, for instance, as tithes or offices, that do not concern the public revenue or the administration of justice,[45] yet leases of this sort of property do not create the relation of landlord and tenant according to the ordinary acceptation of those terms which *we are in the habit of applying to [*58]
the lessor and lessee, not of things which lie *in*

[45] The sale of offices which touch the administration or execution of justice, or the receipt of the revenue, is prohibited by the 5 & 6 Edw. 6, c. 16, and the 49 Geo. 3, c. 126. See as to the construction of these acts, Hopkins *v.* Prescott, 4 C. B. 578, (56 E. C. L. R. 578,).

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mit and assign real estate in the United States, the student is referred to the Statute books of the several States. In most, if not all of them, it will be found that there is no difficulty in the way of an alien becoming a lessee; in some of them, New York for instance, he must make and file, in the office of the Secretary of State, an affidavit that he is a resident of the State of New York, and intends to reside in and become a citizen of the United States as soon as he can be naturalized, and that he has taken the necessary steps for that purpose; having done this, he has, for six years, full power to hold and convey real estate, except that he cannot dispose of it by will, or make leases of it. In Pennsylvania, down to 1855, the power of aliens, friends at the time of the purchase, to take, hold, transmit and assign real estate, not exceeding five thousand acres in amount, was the same as that of natural born citizens. A proviso to the seventh section of the Act of 26 April, 1855, Pamph. Laws, 330, declares "that no alien shall hereafter acquire and hold, either as trustee or in his own right, real estate of a greater annual value than is hereby limited to be held by a corporation." The corporation would seem to be limited to an income of two thousand dollars.

grant, to use the technical phrase of the law, that is to say, are only demisable by deed, but of those which lie, to use the legal phrase, *in livery*,[46] that is, of lands and houses which are in contemplation of law part of the land. To demises therefore of this sort of property, the observations which I have to make in these Lectures will be confined. And this brings me to the last of the four heads connected with the creation of the tenancy, that is to say, the mode in which it is created. This part of the subject, however, involving as it does the nature of leases for years, their different species, and the formalities required by law in order to their due creation, is too important a branch of the subject to be entered upon at this period of the evening. I shall therefore reserve it for the next Lecture.(*a*)

[46] Now, all corporeal tenements and hereditaments are deemed to lie *in grant* as well as *in livery*, so far as regards the conveyance of the immediate freehold. 8 & 9 Vic. c. 106, s. 2.

(*a*) By the 14 §, 1 art. Constitution of New York, it is declared: "no lease or grant of agricultural land for a longer period than twelve years, hereafter made, in which shall be reserved any rent or service of any kind, shall be valid."

*LECTURE III. [*59]

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You will remember that, in the last Lecture, I divided the entire subject into four principal heads—the first comprehending *those points which relate to the creation of the tenancy*—the second, *those which occur during its continuance*—the third, *those which relate to its termination*—the fourth, *those which arise upon the change of either of the parties*, whether upon the assignment of the term, or of the reversion, or for some other reason. I then proceeded to consider the first of these heads, that comprehending the points which occur at the commencement of the tenancy; and this I again *subdivided into four distinct parts—the first, [*60] *regarding the lessor*—the second, *the lessee*—the third, *the thing demised*—and the fourth, *the mode in which the demise is effected.*

Of these we disposed of three during the last lecture. The fourth remains to be considered.

Now, with regard to the demise, it may be effected in three ways; it may be either *by deed*, or *by writing without deed*, or *without writing*, that is, either by mere word of mouth, or by circumstances from which a demise may be inferred, though the express terms in which it was made do not appear.

Now, with regard to the adoption of these different modes, there is no case in which it is necessary that the lease should be by deed, except only where the thing demised is of a nature incapable of being conveyed otherwise than by deed.[1] And then, as a lease is a conveyance of a partial interest, a deed is requisite; for instance, where *tithes* are demised, they, being incorporeal hereditaments, will not pass without deed, and, consequently, a lease made of them must be by *deed;* if it be not so, it is void. Nay, if a lease is made of tithes and lands at the same time without deed, the lessor cannot distrain for his rent, inasmuch as the lease is void so far as *the tithes are concerned, and it is impossible to say, that any specific portion of the rent is chargeable upon the land only, Gardiner *v.* Williamson, 2 B. & Ad. 338;[2] (22 E. C. L. R. 146.) And although, in common parlance, you frequently talk of tithes being *let* to the farmer, and although such arrangements are common throughout England, and are constantly carried into effect without deed, yet, in point of fact, these species of

[*61]

[1] Since this lecture was written, a statutory exception to this general rule has been created. All leases *required by law to be in writing* must now be made by deed. See the 8 & 9 Vic. c. 106, s. 3, and *post*, p. 62.

[2] See also Neale *v.* Mackenzie, 2 Cr. M. & R. 84;* S. C. in error, 1 M. & W. 747*; Bird *v.* Higginson, 2 A. & E. 696, (29 E. C. L. R. 321,); Thomas *v.* Fredericks, 10 Q. B. 775, (59 E. C. L. R. 775); and Meggison *v.* Lady Glamis, 7 Exch. 685.

arrangements made without deed, by which the tenant retains the tithes and pays the clergyman, or other tithe-owner, a yearly sum, are not *leases* in the eye of the law, but mere *sales* by the tithe-owner to the terre-tenant; and the proof of this is, that if the tithe-owner find it necessary to bring an action for the stipulated sum he declares, not for rent, but for tithes sold and delivered, just in the same form in which the vendor of any other sort of goods declares. In common parlance, however, it is, as I have said, very usual to denominate such an arrangement *a letting of the tithes*, and, indeed, it does so far resemble a yearly tenancy, that, in the absence of express stipulation to the contrary, it requires half a year's notice to put an end to it; see Goode *v.* Howells, 4 M. & W. 198.* I have just touched on these points relative to tithes, as they are of very frequent practical occurrence.[3]

*But, with regard to leases of lands and houses, tenancies of which are the principal subject of these lectures, they may be by writing without seal as well as by deed.[4] It is, indeed, frequently convenient to make them by deed, because, by that means, the parties reciprocally acquire the remedy by action of covenant for the breach of any stipulations contained in the lease. Writing without deed is, however, frequently adopted as the means of demise. And, at common law, a lease, like any other contract, might have been made by mere words; and, so it might still, were it not for the provisions of the Statute of Frauds [*62]

[3] Since the passing of the acts for the commutation of tithes (see the 6 & 7 Wm. 4, c. 71, and the later acts), these arrangements cannot occur.

[4] Leases can now be made by writing without seal *only when they are not required by law to be in writing at all.* See the 8 & 9 Vic. c. 106, s. 3, and the next note.

[the 29 Car. 2, c. 3, and of the 8 & 9 Vic. c. 106.[5]

[*63] The first section of the Statute of Frauds *enacts, "That all leases, estates, interests, of freehold,

[5] The 8 & 9 Vic. c. 106, s. 3, enacts, "that a feoffment made after the first day of October, 1845, other than a feoffment made under a custom by an infant, shall be void at law, unless evidenced by deed; and that a partition, and an exchange of any tenements or hereditaments, not being copyhold, *and a lease required by law to be in writing*, of any tenements or hereditaments, and an assignment of a chattel interest, not being copyhold, in any tenements or hereditaments, and a surrender in writing of an interest in any tenements or hereditaments, not being a copyhold interest, and not being an interest which might by law have been created without writing, made after the first day of October, 1845, *shall also be void at law unless made by deed.*" It will be observed that this section relates only to *leases;* mere agreements for a lease are not affected by it; and the leases upon which it operates are made void *at law* only. It is not clear whether, since this statute, a lease in writing which purports to create a term exceeding three years, and which is not under seal, is to be deemed wholly void at law *as a contract*, so as to render all the stipulations contained in the instrument, and relating to the demise, incapable of being enforced, or whether the operation of the writing as an actual demise only is destroyed by the act. If the former of these constructions is correct (and it is difficult to suppose that it was intended to invalidate that portion of the instrument which purports to create an actual demise, and yet to leave in force the other terms of it, which have reference to the demise, and which are framed on the supposition of its being valid), a person with whom a mere agreement for a lease has been made, may be, since the statute, in a better position than one who has obtained a contract not under seal, which is intended to operate as an actual lease, exceeding three years. It appears, however, to be clear that leases, invalid under this act, have sufficient force to regulate the terms of a yearly tenancy resulting from payment of rent by the intended tenant, and that he becomes in this case, as in the analogous case of an occupation under an agreement which is void by the Statute of Frauds, tenant from year to year upon such of the terms of the writing as are applicable to a yearly tenancy. See the cases cited *ante*, p. 22, note [37], and Tress *v.*

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, [*64] and signed by the parties so making or creating the same, or their agents thereunto lawfully authorized *by writing*, shall have the force and effect of leases or estates at will only." The second section excepts "all leases, not exceeding the term of three years from the making thereof, whereupon the rent reserved to the landlord, during such term, shall amount unto two-thirds parts, at the least, of the full improved value of the thing demised."(*a*)

Savage, 23 L. J. Q. B. 339. In Lee *v.* Smith, 9 Exch. 662, a person became the tenant of premises under a written agreement made since this act came into operation, but not under seal. The term mentioned in it exceeded three years, and the rent was made payable quarterly in advance. The tenant paid several quarters' rent, not however in advance, but the receipts which were given, described the payments as being made in advance. It was held that a tenancy from year to year had been created, and that although the agreement was void under the statute, the receipts were evidence that the rent was payable in advance. A provision requiring all leases in writing to be by deed was contained in an earlier act. See the 7 & 8 Vic. c. 76, s. 4. But this statute, which was obscurely framed, was repealed, after being in force for less than a year, by the 8 & 9 Vic. c. 106. See as to its construction, Burton *v.* Reevel, 16 M. & W. 307,* and Doe *d.* Davenish *v.* Moffat, 15 Q. B. 257, (69 E. C. L. R. 257,).

(*a*) The statute of Frauds, with some modifications, has been generally adopted in this country. In New York, the exception in favor of parol leases, is confined to terms not exceeding one year; and every contract for leasing for a longer period than one year, is declared void, unless the contract, or some note or memorandum thereof, expressing the consideration, be in writing, and be subscribed by the party by whom the lease or sale is to be made. Rev. Stat. N. Y. Ch. VII., Title 1, § 6, 7 & 8. And a parol lease

These two sections, you will observe, render a writing necessary whenever the term demised is to extend for more than three years from the time of making; and

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for one year, to commence *in futuro*, is void. Crosswell *v.* Crane, 7 Barb. Sub. Ct. 191. The revised statutes of Massachusetts also reduce the time to one year. Three years is the rule in Pennsylvania, and the statute of that State does not avoid parol leases for a longer period, but declares them leases at will only. Act 21 March, 1772, § 1 & 2; 1 Smith, 389. So in New Jersey, Lester *v.* Bartlett, 2 Carter, 628.

In Pennsylvania, any note in writing, whether sealed or not, is sufficient if it shows a contract, and it is enough if it be signed by the party to be charged. Colt *v.* Selden, 5 Watts, 528; M'Farson's Appeal, 1 Jones, 503, 510; Lowry *v.* Mehaffy, 10 Watts, 387; but see Wilson *v.* Clark, 1 W. & S. 554. In this case there was a parol agreement for the sale of land. The vendor tendered a deed, the vendee refused compliance, the vendor brought an action for the purchase-money—held that he could not recover, that in Pennsylvania this was not a case for specific performance, though it might be for damages for the breach of the contract. See the opinion which was given by the late C. J. Gibson. See contra Clason *v.* Bailey, 14 John. 484, opinion by Kent; and Parrill *v.* M'Kinley, 9 Gratt. 1. And it has been held, where a tenant went into possession and paid rent for three years under a parol lease for five years, and was then evicted, that he could maintain an action for damages, on the implied covenant for quiet enjoyment. Maule *v.* Ashmead, 8 Harris, 482. See Pugh *v.* Good, 3 W. & S. 57, for observations of C. J. Gibson on the Act of 1772. It was held in that case, that delivery of possession of land, in pursuance of a parol contract, amounted to part performance, and that nothing could afford a more definite measure of part performance, or one so little susceptible of perjury, as the notorious and unequivocal act of parting with the possession—and that under such circumstances the vendee as well as the vendor, might insist on specific execution of the contract. The fourth section of the English Statute of Frauds is omitted in Pennsylvania. Where there is no part performance, and though an estate may not be created for want of a writing, an action will nevertheless lie for the breach of the parol contract, but in such case the jury will not be allowed to enforce the contract

accordingly it was held in Ryley *v.* Hicks, 1 Str. 651, that a parol lease for a year and a half, to commence at the distance of a year from the time of the making of it, is valid, since it would terminate within three years from that time: although a lease for three years to commence at a future day would be bad, since its termination would not fall within the three years.[6](*a*)

Now with regard to the effect of this section *upon a *parol lease* not authorized by its provisions, you will observe that it is not enacted that such a lease shall be void, but that it shall have the force and effect of a lease *at will* only. Now I have already pointed out to you, in the first lecture,[7] in [*65]

[6] In the same way it has been held, under s. 4 of the Statute of Frauds, which requires agreements "not to be performed within the space of one year from the making thereof," to be in writing, that a contract for a year's service to begin at a day subsequent to the making of the contract, must be in writing. Bracegirdle *v.* Heald, 1 B. & A. 722; Snelling *v.* Lord Huntingfield, 1 Cr. M. & R. 20.* See also Lord Bolton *v.* Tomlin, 5 A. & E. 856, (31 E. C. L. R. 855,).

[7] *Ante*, p. 20.

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by damages given as a penalty. Irvine *v.* Bull, 4 Watts, 287; George *v.* Bartoner, 7 Watts, 530; Fox *v.* Heffner, 1 W. & S. 375. It is not always necessary that the rescission of a lease should be in writing. Greiders' Appeal, 5 Barr, 422. When possession has been given under a parol lease, and there has been part performance by the lessee, it will take the case out of the statute in Ohio. Wilber *v.* Paine, 1 Hamm. 251. See contra, Kelly *v.* Walster, 10 Eng. Law & Eq. Rep., 517; Cocking *v.* Ward, 1 Com. Bench, 858, (50 E. C. L. R. 858,). And generally the writing need not be under seal. Clark *v.* Gilson, 2 App. 18; Blood *v.* Hardy, 3 Shep. 61; Mayberry *v.* Johnson, 3 Green, 116; Colt *v.* Selden, 5 Watts, 528; Pinckney *v.* Hagadorn, 1 Duer, 89. Whether note by an auctioneer is sufficient. See Pinckney *v.* Hagadorn, 1 Duer, 89; Miller *v.* Pelletier, 4 Edw. Ch. 102; Vielie *v.* Osgood, 8 Barb. Sup. Ct. R. 130.

(*a*) Croswell *v.* Crane, 7 Barb. Sup. Ct. 191.

what manner tenancies at will gave birth to tenancies from year to year; and how the Courts, anxious to favor the creation of the more convenient sort of tenancy, imply from the payment of a yearly rent by a tenant at will, an agreement between him and his lessor to create a yearly tenancy. The same doctrine applies to parol leases void by the Statute of Frauds; that Statute converts them into leases at will, and then, like other leases at will, they are capable of being turned into tenancies from year to year by a payment of rent, or any other circumstance denoting the intention of the parties that they shall be so considered. See Clayton *v.* Blakey, 8 T. R. 3; Doe *d.* Rigge *v.* Bell, 5 T. R. 471; Richardson *v.* Gifford, 1 A. & E. 52, (28 E. C. L. R. 49,); Beale *v.* Sanders, 3 Bing. N. C. 850, (32 E. C. L. R. 390,).[8](*a*)

In cases to which the first section of the Statute of Frauds applies, it is not, you will observe, sufficient that the demise be in writing. It must be in writing signed in the manner directed by the Act, and that is, either by the lessor himself, or by some person authorized by him *in writing*.[9] And this *is one [*66] of the few cases in which writing is necessary

[8] See Berry v. Lindley, 3 M. & Gr. 498, (42 E. C. L. R. 263,); and *ante*, p. 22, note [37].

[9] This provision of the Statute of Frauds appears to have been rendered nugatory by the 8 & 9 Vict. c. 106. For, as has been already mentioned, that act makes it necessary that those leases which are required by the Statute of Frauds to be in writing only, should also be made by deed; and it is a rule of law that no one can execute a deed as agent for another, unless the authority to do so is given him by deed. Harrison *v.* Jackson, 7 T. R. 207; Berkeley v. Hardy, 5 B. & C. 355, (11 E. C. L. R. 495,).

(*a*) Drake *v.* Newton, 3 Zabr. 111.

to create an agency. The provisions of the fourth and of the seventeenth sections of the same Statute vary from those of the first in this respect, for, in neither of them, is the agent's appointment required to be a written one.

Now with regard to leases merely by parol; as they might have been made at common law to any extent, so now they may be made in any case in which they are not expressly prohibited. And even in those cases in which they are invalidated by the Statute of Frauds, although they do not operate so as to create a term; yet, if they contain any special provisions compatible with the nature of a tenancy from year to year, those provisions are considered as engrafted upon the yearly tenancy which arises on payment of rent, for to use the words of the Court in Lord Bolton *v.* Tomlin, 5 A. & E. 856, 31 E. C. L. R. 855, "it is absurd to say that a parol lease shall be good, and yet that it cannot contain any special stipulations or agreements." (See also Richardson *v.* Gifford, 1 A. & E. 52, 28 E. C. L. R. 49; Beale *v.* Sanders, 3 Bing. N. C. 850, 32 E. C. L. R. 390,).[10]

Now, these being the three modes in which a lease may be created, namely by *deed;* [in those *cases in which it is not prohibited by the 8 & 9 Vict. c. 106;] by *writing without deed;* and in those cases in which the Statute of Frauds permits it, *without writing;* it remains to be seen, what are the component parts of such a contract. Now these will of course vary extremely, according to the nature of the subject-matter of demise, the customs of the part of the country in which it is situated, and a variety of other circumstances which render special terms and stipulations [*67]

[10] See Berry *v.* Lindley, 3 M. & Gr. 498, (42 E. C. L. R. 263,); and the cases cited *post*, p. 73, note [17].

necessary. Upon those terms which are most usually introduced into leases, I shall have something presently to say; but first I will observe, that there are *four circumstances* which every lease, be it by deed, by writing, or by parol, *must* possess. These are, first, a *lessor;* secondly, a *lessee;* thirdly, a *subject-matter capable of being demised;* and fourthly, *sufficient words of demise.* Now with regard to the capacity of the lessor, the capacity of the lessee, and the subject-matter of the demise, I have already made such observations as I thought necessary in the last Lecture; it remains, however, to observe upon the last essential to a lease, I mean the rule that there must be proper and sufficient words of demise.

The ordinary and most formal words of demise are [*68] *demise*, *grant*, *lease*, and *to farm let*;[11] *but as is stated in Bacon's Abridgment, tit. *Leases* (K), it may be laid down as a rule, that "whatever words

[11] By the 8 & 9 Vict. c. 124, (an act to facilitate the granting of certain leases), a short statutory form of lease is given, which is applicable to demises of lands and tenements. The covenants and other portions of the lease are very shortly expressed, and the statute enacts in substance, that in all leases made according to this form, or expressed to be made in pursuance of the act, the short statutory forms shall have the same meaning and effect as the longer forms generally inserted in instruments of this description. Very little use has, however, been made in practice of this statute. The 8 & 9 Vict. c. 106, s. 5, provides that in all deeds executed after the 1st of October, 1845, the words "'give' or 'grant' shall not imply any covenant in law in respect of any tenements or hereditaments, except so far as the word 'give' or the word 'grant' may by force of any act of parliament imply a covenant." This exception relates to railway acts, and other acts of a like description, which often provide that in the conveyances authorised by these statutes, covenants for title, quiet enjoyment, and further assurance shall be implied from the use of the word "grant."

are sufficient to explain the intent of the parties, that the one shall divest himself of the possession and the other come into it for a determinate time; such words, whether they run in the form of a license, 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 authentic words had been made use of for that purpose." And while stating this rule in the words of Bacon's Abridgment, I may as well embrace this opportunity of mentioning that the title *Leases* in that work, which was written by Lord Chief Baron Gilbert, is one of the greatest authorities upon the law of landlord and tenant, and is always treated by our Courts with the very highest respect.[12](*a*)

To illustrate this rule by an example or two, there is an old case reported in Sir Francis Moore, **placitum* 31, in which the owner of land said, [*69]

[12] See the judgments in Neale *v.* Mackenzie, 1 M. & W. 759;* and Wilkinson *v.* Hall, 3 Bing. N. C. 532, (32 E. C. L. R. 248,).

(*a*) No particular form of words is necessary to constitute the relation of landlord and tenant; it is sufficient if it appear to have been the intention of one to dispossess himself of the premises, and the other to enter under him for a determinate period pursuant to an agreement. Watson *v.* O'Hern, 6 Watts, 362; Moshier *v.* Reding, 3 Fairf. 478.

The following writing, signed by A., was delivered by him to B., "Received of B., three dollars and fifty cents, for the rent of my brick house in, &c., for one month, with the privilege of keeping it six months at the same rate. No. 91 or 95. December 1st, 1853." Held, that this was a lease of the premises given upon an executed consideration by A. to B., for one month from the date, and from month to month for five months longer, if B. should pay A. at the commencement of each month, three dollars and fifty cents for rent. Munson *v.* Wray, 7 Blackf. 403.

"you shall have a lease for twenty-one years of my land, paying *ten shillings yearly rent;* make a lease in writing and I will *seal it.*" This was held to be a sufficient lease for twenty-one years, for the Judges considered the intention to be that the lessee should have possession of the land immediately, and that the promise to seal a written lease was only for further assurance. This case, you will remember, was before the Statute of Frauds, otherwise the lease for twenty-one years would not have been good by *parol.*

So in Baxter *v.* Browne, 2 W. Bl. 973, Abrahall and Lloyd signed an agreement with Browne, worded that they agreed "with all convenient speed to grant him a lease of, and they did thereby let and set to him," the premises for twenty-one years, at £290 per annum, payable half-yearly to the lessors. The lease to contain the usual covenants.[13] The Court said, "this is a good lease *in præsenti*, with an agreement to execute a more perfect and formal lease in future."

Upon the other hand, it is laid down in the same section of Bacon's Abridgment, to which I have already referred, that, even if the most proper words are made use of whereby to describe and pass a present lease for years, yet if, upon the whole instrument, there [*70] 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.

Thus in Roe *v.* Ashburner, 5 T. R. 163, where the words were "articles of agreement between T. S. and D. J., entered into in regard to his fulling mills, dry-salting mills, &c., that the said mills, &c., he shall enjoy; and I engage to give him a lease in, for the

[13] Moreover, in the agreement in this case, the words "this demise" occurred. See the case.

term of thirty-one years from Whitsuntide, 1784, at a clear yearly rent of £100," the instrument was held to be an agreement only, and Lord Kenyon remarked that the words "he shall enjoy," would have been sufficient words of demise, but that the following words showed that it was the intent of the parties that there should be another instrument to pass the legal interest.[14]

There is, perhaps, no question which occurs more frequently in practice than that which arises when it becomes necessary to decide within which of these two rules a particular case falls. I mean whether looking as we must in every such case do, to the intent of the parties, a particular instrument is to be construed as a lease or as an agreement for one. It is a question which it so frequently becomes practically necessary to solve, that a few hours cannot be better employed than in perusing the chief cases that have lately been decided on the subject. They are Dunk *v.* Hunter, 5 B. & A. 322, (7 E. C. L. R. 115,); Pinero *v.* *Judson, 6 Bing. 206, (19 E. C. L. R. 100,); Staniforth *v.* Fox, 7 Bing. 590, (20 E. C. L. R. 264,); Doe *d.* Pearson *v.* Ries, 8 Bing. 178, (21 E. C. L. R. 496,); Warman *v.* Faithful, 5 B. & Ad. 1047, (27 E. C. L. R. 439,); Hayward *v.* Haswell, 6 A. & E. 265, (33 E. C. L. R. 79,); Chapman *v.* Towner, 6 M. & W. 100;* Rawson *v.* Eicke, 7 A. & E. 451, (34 E. C. L. R. 142,).[15] The reason I have cited so *many of these cases is that, without perusing a good [*71] [*72]

[14] See the next note.

[15] See also Chapman *v.* Bluck, 4 Bing. N. C. 187, (33 E. C. L. R. 317,); and Jones *v.* Reynolds, 1 Q. B. 506, (41 E. C. L. R. 646,). In the latter of these cases several letters had passed between the plaintiff and the defendant as to the letting of some iron ores and lands belonging to the plaintiff. Some expressions were used in the plaintiff's

many of them, it is quite impossible to become at all familiar with the spirit in which the Courts are in the

letters which seemed to refer to his having actually leased the iron ores; but it appeared, upon the correspondence, that the term was not to commence until a future period, and that the proportions in which the iron ores were to be worked were to be ascertained by a third person. It was held that no tenancy had been created. Mr. Justice Wightman said: "I agree that if an instrument be in other respects a present demise, a stipulation in it for a future lease will not reduce it to a mere agreement. Lawrence J., so puts it in Morgan *d.* Dowding *v.* Bissell, 3 Taunt. 65, 68; and he said, in that case, at Nisi Prius (3 Taunt. 67), 'where there is an instrument by which it appears that one party is to give possession and the other take it, that is a lease, unless it can be collected from the instrument itself that it is an agreement only for a lease to be afterwards made.' Here no present demise appears; the term is to begin from the ensuing 24th of June; and before an actual demise, there were matters to be ascertained, without which the terms of holding would not be perfectly complete." See also Eagleton *v.* Gutteridge, 11 M. & W. 465;* Gore *v.* Lloyd, 12 M. & W. 463;* and Doe *d.* Wood *v.* Clarke, 7 Q. B. 211, (53 E. C. L. R. 211,). In the last of these cases a proposal in writing for the letting of some farms mentioned the rent, the length of the term, and some other particulars of the proposed tenancy, but not the period at which the tenancy was to begin. At the foot of the proposal the following words were written, and were signed by the party intending to take the premises and by the agent of the intended landlord. "June 3rd, 1835. Agreed to the above rent, provided the house, cottage, and buildings are put into good tenantable repair, on a plan to be mutually determined upon, and finally settled within one month from the above date." It was held upon these facts, that there was no present demise, since the terms were to take effect only on the performance of a condition, and it was not ascertained when the tenancy was to commence. Strong circumstances of inconvenience which appear on the instrument, if it be construed as a lease, are held to indicate the intention of the parties that it should operate as an agreement only. See the judgment in Doe *d.* Morgan *v.* Powell, 7 M. & Gr. 990, (49 E. C. L. R. 990,). Since the 8 & 9 Vict. c. 106, the question whether an instrument oper-

habit of looking at instruments of this sort, and with the somewhat minute differences on which these questions occasionally turn. There are several considerations which often render it important to determine whether an instrument operates as a lease or an agreement for one.(*a*) In the first place, the stamp imposed on the two instruments is different.[16] In the second

ates as an actual demise, or merely as an agreement to demise, will probably occur less often in practice. For, as has been observed, that act prevents any writing *not under seal* from operating as a lease where by law a writing is necessary to constitute a lease. It will, however, be necessary to refer to the principle of the cases cited in the text in order to ascertain whether any given instrument is rendered void by this act or not; since mere agreements for a lease are not affected by it, and the question may still arise in cases in which, although the common law power of demising by parol still exists, the parties have unnecessarily entered into an agreement in writing. The rules laid down in the text may also be occasionally applicable to the construction of badly framed deeds, the operation of which as demises or as agreements to demise is doubtful; for, although the statute, where it applies, prevents any instrument which is not a deed from operating as a demise, it obviously will not make any deed take effect as an instrument of present demise when it is not properly framed for that purpose.

[16] The stamp upon ordinary agreements is now 2*s.* 6*d.* See the 13 & 14 Vic. c. 97. A document may require a stamp, both as an agreement and a lease. Lovelock *v.* Franklyn, 8 Q. B. 371, (55 E. C. L. R 371,). Glen v. Dungey, 4 Exch. 61, is a late case in which a question arose as to whether an instrument required a lease stamp. The stamps upon leases at a yearly rent, and upon leases for any

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(*a*) An agreement for a lease will be construed to be a present demise, if no future formal lease be contemplated, especially if possession be taken under it. Jenkins *v.* Eldridge, 3 Story, 325. A written authority from one to another to give a lease to a third person, on terms previously offered in writing by such third person, is not in itself a lease. Davis v. Thompson, 1 Shep. 209.

[*73] place, *the instrument, if it be construed as a lease, passes an estate in the land to the lessee, and enables the lessor to distrain for the rent reserved; whereas, construed as an agreement, it passes no estate *at law*, nor can the intended lessor distrain, unless indeed the intended lessee, after his entry upon the land, pay rent according to the terms of the agreement. If he do, he becomes at law a yearly tenant on those terms, so far as they are consistent with that sort of tenancy; and then he is *at law* entitled to a notice to quit. In equity, indeed, he always has a right to a specific performance of his agreement by the execution of a lease for the term agreed on. You will find these points illustrated by Regnart *v.* Porter, 7 Bing. 451; (20 E. C. L. R. 204,); and Mann *v.* Lovejoy, R. & M. [*74] 355; (21 E. C. L. R. 765,).[17] There is another *singular distinction between a lease and an

period less than a year, are regulated by the 13 & 14 Vict. c. 97, and the 17 & 18 Vict. c. 83, s. 23. See also the schedule to the last-mentioned act for the stamps upon leases at a yearly rent for terms exceeding thirty-five years.

[17] See also Riseley *v.* Ryle, 11 M. & W. 16,* and Thomson *v.* Amey, 12 A. & E. 476, (40 E. C. L. R. 239,). In the latter of these cases an agreement made between the plaintiff and the defendant stipulated that the plaintiff would grant a lease of a farm to the defendant for a term of years, and the lease was to contain a covenant, among others, not to take successive crops of corn, and a condition of re-entry upon the non-performance of any of the covenants. The defendant entered into possession at the time fixed by the agreement for the commencement of the term, and continued to hold and pay rent until the action was brought; but no further lease was ever executed. It was held that the defendant had become tenant from year to year, subject to the condition above mentioned. Mr. Justice Patteson, in delivering judgment, said, "It is said that a covenant respecting the rotation of crops cannot be engrafted on a yearly tenancy, but I see no reason why it should not. The tenant in

agreement for one, which arises upon the construction of the Statute of Frauds. A lease, as we have seen, may be by mere words, if the term do not exceed three years; but if it do exceed three years, then it must be in writing, signed by the lessor or his agent, and that agent must himself be authorized by writing to do so.[18] Now an agreement for a lease is governed by a different section of the Statute, the fourth section, which enacts "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."(*a*) Now you will observe upon the one hand that this enactment is, in one respect, less stringent than *that of the first section, since the memorandum it requires may be signed either by the principal or by an agent, who need NOT, like an agent who signs a lease for more than three [*75]

possession, under such circumstances, is bound to cultivate the land as if he were going to continue in possession as long as the lease itself would have lasted. It is argued that the tenancy arises by operation of law upon the payment of rent, and that the law implies no particular mode of cropping, nor any condition of re-entry. But the terms upon which the tenant holds are, in truth, a conclusion of law from the facts of the case and the terms of the articles of agreement, and I see no reason why a condition of re-entry should not be as applicable to this tenancy as the other terms expressed in the articles." See also Daniel *v.* Gracie, 6 Q. B. 145, (51 E. C. L. R. 145,) and Watson *v.* Waud, 8 Exch. 335.

[18] We have already seen that these leases must now be *by deed*. *Ante*, p. 62, note [5].

(*a*) See ante note to page 98, and the cases of Irvine *v.* Bull, 4 Watts, 287. George *v.* Bartoner, 7 Watts, 530.

years, be authorized *by writing*. On the other hand, the enactment of the fourth section is *more* stringent than that of the first, for there are certain leases which, as we have seen, are excepted out of the provisions of that section, and may, therefore, be made by mere parol. But there is no corresponding exception in the case of agreements, and therefore, though a lease for a year may be made by mere words, yet an agreement for such a lease cannot. On this distinction turned the case of Edge *v.* Strafford, 1 Tyrwh. 295, [S. C. 1 Cr. & J. 391*]. In that case the defendant had agreed by parol to take the plaintiff's lodgings for two years, and the action was brought against him for refusing to perform his contract. The Court held that the action would not lie, as the fourth section of the Statute of Frauds was imperative that such an agreement should be reduced to writing. Indeed, the Court in their judgment, which was delivered by the late Sir John Bayley, and is an excessively elaborate and instructive one, went still further, and held that, even if the words used had been sufficient to create a demise, still the action could not have been successfully maintained, inasmuch as, by the lease, an *interesse termini* only would have been created, which, as I explained in the first Lecture, would not have been perfected into a term [*76] before *entry,[19] and that the agreement to enter would have been invalid for want of a writing—which certainly is going extremely far. And I will freely confess that, had the case of Strafford *v.* Edge never existed, I should have thought it at least questionable upon the principles laid down in the judgment of the Court of Queen's Bench in Lord Bolton *v.* Tomlin, 5 A & E. 856, (31 E. C. L. R. 855), whether,

[19] *Ante*, p. 13.

if there were a valid parol demise, all terms contained in that demise must not be binding; at all events, if they were such as had a fair reference to the demise, and were calculated to render it operative. However, the concluding words of the judgment of the Court of Exchequer in Strafford *v.* Edge are, "The effect of the Statute of Frauds, so far as it applies to parol leases not exceeding three years from the making, is this, that the *leases* are valid, and that, whatever remedy can be had upon them in their *character of leases*, may be resorted to, but that they do not confer the right to sue the lessee for damages for not taking possession." The entire judgment in Strafford *v.* Edge is very well worth your perusal, and in addition to it you may refer to Mechelen *v.* Wallace, 7 A. & E. 49, (34 E. C. L. R. 32,).[20]

Having said thus much on the four incidents which are inseparable from the very being of a lease, and which exist in every lease, namely, that there should be a lessor capable of demising, a *lessee capable of holding the estate demised, a subject-matter capable of being demised, and apt and sufficient words of demise, we next arrive at those stipulations which, although not inherent to the very nature of a lease in such a manner that their absence would prevent the creation of any lease at all, are, nevertheless, the usual and proper incidents and concomitants of one. [*77]

Now, the best way of treating these is, to consider how they appear, and in what manner they operate, in a *lease by deed*, that being, generally speaking, the most formal and carefully drawn sort of lease—observing, as we go on, any difference which would arise out of the circumstance of the lease being by writing not under seal or by bare *parol*.

[20] See also Vaughan *v.* Hancock, 3 C. B. 766, (54 E. C. L. R. 766,).

Now the formal parts of which a lease by deed almost invariably is made up, are—

1st. The *Premises.*

2ndly. The *Habendum.*

3rdly. The *Reddendum.*

4thly. The *Covenants.*

5thly. Any *Exception*, *Proviso*, or *Condition*, by which the contract is qualified.

Now, with regard to the *premises*, under which word is comprised all that part of the lease which precedes the *habendum*, their office is to contain the *recitals*, if there be any, to name the lessor and the lessee, to set forth the consideration, and to specify the subject-matter of demise.[21] That *a lessor, a [*78]

[21] The premises usually contain the date of the lease, and the names and descriptions of the parties. The naming of the parties at the commencement of the deed is not only useful in order to make the contract clear, but it is important since the rights of action on it may be affected, if any person intended to be a party is not mentioned as such. For it was an inflexible rule of law that when a deed was *inter partes*, that is to say was expressed to be between certain named parties (as, for instance, between A. of the first part, B. of the second part, and C. of the third part), no one who was not a party could sue on it, even although it contained an express covenant with him, or the contract appeared otherwise to have been made for his advantage. 2 Inst. 673; 2 Roll. Ab. *Faits* (F. 1); Berkeley *v.* Hardy, 5 B. & C. 355, (11 E. C. L. R. 495,) and the judgment in Bushell *v.* Beavan, 1 Bing. N. C. 120, (27 E. C. L. R. 570,). And this rule is still in force, subject to an exception created by the 5th section of the 8 & 9 Vict. c. 106, which enacts that "under an indenture executed after the 1st of October, 1845, an immediate estate or interest in any tenements or hereditaments, and the benefit of a condition or covenant respecting any tenements or hereditaments may be taken, although the taker thereof be not named a party to the same indenture." The date of the lease is also frequently important, and care should be taken in practice to see that it is correct with reference to any portions of the lease which may refer to it, as, for instance, the *habendum*. See *post*, p. 83.

and a subject-matter of demise, are essential to lessee, the existence of every lease, we have already seen. With regard to recitals the reason for inserting them is usually to prevent the parties to the lease from afterwards denying the matters recited, for a lease by deed operates like any other deed as an estoppel, and prevents the parties to it from afterwards disputing facts recited in it.[22](*a*) With regard to the consideration, that

[22] See as to the estoppel by recitals, Salter *v.* Kidley, 1 Show. 58; Com. Dig. *Estoppel* (A. 2); the notes to the Duchess of Kingston's

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(*a*) The recital of any fact material to the conveyance, the existence on or non-existence of which, would determine its validity, is no doubt binding on the parties to a deed, and will estop them from disputing it thereafter in any proceeding arising on the deed.

But this in the words of Greenleaf, Vol. I., p 267, "is only true of particular, not of general recitals; thus, if one be bound in a bond conditioned to perform the covenants in a certain indenture, or to pay the money mentioned in a certain recognizance, he shall not be permitted to say, that there was no such indenture or recognizance. But if the bond be conditioned, that the obligor shall perform all the agreements set down by A., or carry away all the marle in a certain close, he is not estopped by this general condition from saying, that no agreement was set down by A., or that there was no marle in the close. Neither does this doctrine apply to that, which is mere description in the deed, and not an essential averment; such as, the quantity of land; its nature, whether arable or meadow; the number of tons, in a vessel chartered by the ton; or the like; for these are but incidental and collateral to the principal thing, and may be supposed not to have received the deliberate attention of the parties."

Whether the recital of the payment of the consideration money in a deed of conveyance, is an estoppel as to the amount recited to be paid, is differently ruled in England and in this country. In England, the recital is held to be conclusive evidence by estoppel, not only of the fact that there was a consideration, but also of its amount and of its payment. Shelley *v.* Wright, Willes, 9; Rowntree *v.* Jacob, 2 Taunt. 141; Lampon *v.* Corke, 5 B. & Ald. 606, (7 E. C.

[*79] *is usually in a lease expressed to be the rent thereafter reserved, the covenants by the lessee,

case, 2 Smith's L. C. 456; Lainson *v.* Tremere, 1 A. & E. 792, (28 E. C. L. R. 367,); Bowman *v.* Taylor, 2 A. & E. 278, (29 E. C. L. R. 142,); Carpenter *v.* Buller, 8 M. & W. 209;* Beckett *v.* Bradley, 7 M. & G. 994, (49 E. C. L. R. 994,); Pargeter *v.* Harris, 7 Q B. 708, (53 E. C. L. R. 708,); Pilbrow *v.* Pilbrow's Atmospheric Railway Co. 5 C. B. 440, (57 E. C. L. R. 440,); Young *v.* Raincock, 7 C. B. 310, (62 E. C. L. R. 310,); Wiles *v.* Woodward, 5 Exch. 557; and Hills *v.* Laming, 9 Exch. 256. The estoppel by recitals or other statements in a deed, does not extend beyond actions

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L. R. 205;) Baker *v.* Dewey, 1 B. & C. 704, (8 E. C. L. R. 297;) Hill *v.* Manchester Waterworks, 2 B. & Ad. 544, (22 E. C. L. R. 229,).

The generally received American doctrine is, that the notoriety of the practice of putting another than the true consideration in deeds, makes this an exception to the general rule, by limiting the force of the recital to being conclusive as to the fact, that the deed is the deed of the party, and that there was a consideration; but the *amount* of the consideration, and whether it has been *paid*, are not considered as conclusively established by the recital; as to these matters the deed may be contradicted. A man is estopped by his deed to deny that he granted, or that he had a good title to the estate conveyed; but he is not bound by the consideration expressed. Wilkinson *v.* Scott, 17 Mass. 257; Clapp *v.* Tirrell, 20 Pick. 250; Schilenger *v.* M'Cann, 6 Greenl. 364; M'Crea *v.* Purmort, 16 Wend. 468; Bowen *v.* Bell, 20 Johns. 338; Hamilton *v.* M'Guire, 3 S. & R. 355; Bolles *v.* Beach, 2 Zab. 680; Burbank *v.* Gould, 15 Mass. 118; Pritchard *v.* Brown, 4 New Ham. 400; O'Neal *v.* Lodge, 3 Harr. & M'Hen. 433; Wilt *v.* Franklin, 1 Binney, 519; Bolton *v.* Johns, 5 Barr, 151; Union Canal Co. *v.* Young, 1 Wh. 431; Wolf *v* Hauver, 1 Gill. 84; Morgan *v.* Bitzenbuger, 3 Gill. 355.

The grantor is not estopped to prove that there were other considerations than those expressed in the deed. Emmons *v.* Littlefield, 1 Shep. 233; Burbank *v.* Gould, 3 Shep. 118; Morse *v.* Shattack, 4 New H. 229; Belden *v.* Seymour, 8 Conn., 304; M'Crea *v.* Purmort, 16 Wend. 460; Whitbeck *v.* Whitbeck, 9 Cowen, 266; Shepperd *v.* Little, 14 Johns. 211; Bowen *v.* Bell, 20 Johns. 338.

and the *fine, if there be one. Where a fine is paid at the time of making the lease the lessor [*80]

or proceedings on the deed itself; that is to say, it is only in proceedings founded on the deed containing the recitals that they are *conclusive* evidence of the facts stated in them; in other collateral proceedings the recitals are evidence against the party who executed the deed, like any other admission, but they may be explained or contradicted. The limitations upon the general rule, that parties are estopped by statements in deeds executed by them, were stated by Baron Parke, in Carpenter *v* Buller, in the following terms:—"If a distinct statement of a particular fact is made in the recital of a bond, or other instrument under seal, and a contract is made with reference to that recital, it is unquestionably true, that, as between the parties to that instrument, and in an action upon it, it is not competent for the party bound to deny the recital, notwithstanding what Lord Coke says on the matter of recital in Co. Litt. 352, b; and a recital in instruments not under seal may be such as to be conclusive to the same extent. A strong instance as to a recital in a deed is found in the case of Lainson *v.* Tremere, where, in a bond to secure the payment of rent under a lease stated, it was recited that the lease was at a rent of £170, and the defendant was estopped from pleading that it was £140 only, and that such amount had been paid. So, where other *particular* facts are mentioned in a condition to a bond, as that the obligor and his wife should appear, the obligor cannot plead that he appeared himself, and deny that he is married, in an action on the bond. 1 Roll. Abr. 873, c. 25. All the instances given in Com. Dig. *Estoppel* (A. 2), under the head of 'Estoppel by matter of writing, (except one which relates to a release), are cases of estoppel in actions on the instrument in which the admissions are contained. By his contract in the instrument itself, a party is assuredly bound, and must fulfil it. But there is no authority to show that a party to the instrument would be estopped, in an action by the other party not founded on the deed, and wholly collateral to it, to dispute the facts so admitted, though the recitals would certainly be evidence; for instance, in another suit, though between the same parties, where a question should arise, whether the plaintiff held at a rent of 170*l.* in the one case, or was married in the other case, it could not be held that the recitals in the bond were conclusive

[*81] usually *acknowledges the receipt of it in this part of the instrument, and this sort of receipt

evidence of these facts. Still less would matter alleged in the instrument, wholly immaterial to the contract therein contained; as, for instance, suppose an indenture or bond to contain an unnecessary description of one of the parties as assignee of a bankrupt, overseer of the poor, or as filling any other character, it could not be contended that such statement would be conclusive on the other party, in any other proceeding between them." These observations appear to imply that such a description would estop the parties in an action on the deed itself, even although immaterial to the contract. In Pilbrow *v.* Pilbrow's Atmospheric Rail. Co., 5 C. B. 440, (57 E. C. L. R. 440,) a company was described, in a deed made between it and the plaintiff, as being registered and incorporated in pursuance of the Joint Stock Companies Registration Act; a description not, however, immaterial to the contract. It was held in an action on the deed, that the company was estopped from denying its registration and incorporation. All the parties to a deed are not, however, necessarily estopped by every recital in it. It is only where a recital is intended to be a statement, which they *all* have mutually agreed to admit as true, that it has the force of an estoppel with respect to all of them. Where it is intended to be the statement of one party only, the estoppel is confined to that party; and the intention of the parties in this respect is to be gathered from the instrument itself. See the judgment in Stroughill *v.* Buck, 14 Q. B. 787, (68 E. C. L. R. 787,). This rule is clearly illustrated by the facts of that case, which were as follows:—An indenture had been made between the defendant and the plaintiff, which recited that the defendant had advanced money to a third person on the security of some deeds, that this money was still owing, and that the defendant was interested in the deeds to the extent of the advance. It also recited that it had been agreed that the plaintiff should make further advances to this third person, and that the defendant should assign the deeds and his interest therein to the plaintiff as a security; and it contained a covenant by the defendant that the money advanced by him was still due. In an action on this indenture the plaintiff assigned as a breach that the money advanced by the defendant was not due at the time of the making of the covenant. It was objected on the part of the defendant that the

being by deed, operates as an estoppel, and is so conclusive that it is incapable of being afterwards denied or contradicted by evidence.[23]

plaintiff was estopped by the recitals in the deed from alleging this fact. But the Court held, that the recital as to the advance of the money must be taken to be the language of the defendant only, and consequently that the plaintiff was not bound by it. In Browning *v.* Beston, 1 Plowd. 134, it is said in the argument that a distinction exists between deeds poll and indentures, for "the words in an indenture are the words of both parties, and although they are spoken as the words of one party only, yet they are not his words alone, for there is the assent of the other party to each other's words; and therefore when they are written they shall be taken in such manner as the intent of the parties may be supposed to be. And they shall not be taken most strongly against one and beneficially for another, as the words of a deed poll shall, for there the words shall be taken most strongly against the grantor, and most available to the grantee. But it is not so in a deed indented, because the law makes each party privy to the speech of the other: and therefore we ought not to make such construction of words in an indenture as in a deed poll. *But if an indenture contains matter of substance, the law will make such reference thereof as is most fit and reasonable, and will say that the words are spoken by him who could most properly speak them.*" See also the arguments in Russel *v.* Gulwell, Cro. Eliz. 657; Scovell and Cavel's Case, 1 Leon. 317, and the authorities there cited. It may be convenient to mention here that the estoppel between landlord and tenant which prevents the latter from disputing the landlord's title, ceases on the expiration of the lease; subject, however, to the qualification that if the tenant came into possession under the landlord, he must restore the possession before he can dispute the title; see Co. Litt. 47 b; Bayley *v.* Bradley, 5 C. B. 396, (57 E. C. L. R. 396,); and the observations of the Lord Chief Justice Wilde, ib. 400, (57 E. C. L. R. 400,).

[23] See Baker *v.* Dewey, 1 B. & C. 704, (8 E. C. L. R. 297,); Rowntree *v.* Jacob, 2 Taunt. 141; and Baker *v.* Heard, 5 Exch. 959. The receipt which is usually indorsed on the back of a deed not being under seal, does not create an estoppel; but, like any other receipt not under seal, admits of being explained or contradicted.

[*82] *The *habendum* is that part of the lease which begins with the words "*to have and to hold;*" its office is, to specify the quantity and quality of the lessee's estate;[24] for instance thus:—"*To have and to hold the said messuages and premises with the appurtenances hereinbefore mentioned and intended to be hereby demised, unto the said A. B., his executors, administrators, and assigns, from the 1st day of January now last past, for, and during, and unto the full end and term of, twenty-one years thence next ensuing, and fully to be complete and ended.*" It is often said by our text-writers that the *habendum* in a deed may limit and ascertain the extent of general words used in the premises, but cannot *contradict* or *destroy* them; thus, for instance, if in the premises A. were to demise to B. for ninety-nine years *habendum* to him for twenty-one years, the *habendum* would be void, and the lessee would take for ninety-nine years; (see Plowden, 153), but, if, in the premises, A. demised generally to B. without naming the number of years, and then came an *habendum* for ninety-nine years, this *habendum* would be operative since it would only *explain*, not *contradict*, the words used in the premises (see 1 Inst. 183 a).[25]

Straton *v.* Rastall. 2 T. R. 366; Lampon *v.* Corke, 5 B. & A. 606, (7 E. C. L. R. 205,); Graves *v.* Key, 3 B. & Ad. 313, (23 E. C. L. R. 143,). In Lampon *v.* Corke it was held that a release contained in a deed did not amount to an estoppel, this portion of the deed being ambiguous when compared with the statements on the same subject in the recitals.

[24] See the judgment in Doe *d.* Timmis *v.* Steele. 4 Q. B. 667, (45 E. C. L. R. 667,); where it is said that the proper office of the *habendum* is to limit, explain, or qualify the words in the premises, provided it be not contradictory or repugnant to them.

[25] See also Co. Litt. 299 a. The *habendum* marks the duration of the tenant's interest, and its operation as a grant is only prospective; see the judgment in Wyburd *v.* Tuck, 1 B. & P. 464. Therefore

*In construing the *habendum* of a lease difficulties sometimes arise as to the precise period at which the term is to begin or end, and the precise duration of the estate limited.[26] With regard to the [*83]

where a tenant had entered before the execution of the lease, and had pulled down buildings, it was held that he was not liable for these acts on the covenant to repair contained in the subsequently executed lease, although the *habendum* referred to a period anterior to the acts complained of. Shaw *v.* Kay, 1 Exch. 412; see also Doe *d.* Darlington *v.* Ulph, 13 Q. B. 204, (66 E. C. L R 204,).

[26] It is important, in practice, to take care that any reference in the *habendum* to the date of the lease is correct. Where, as is frequently the case, the day upon which the lease is executed is different from that on which it is dated, a mistake in this respect may lead to considerable difficulty. For although deeds take effect from the time at which they are delivered, not from the day on which they are dated, if a reference is made in the lease to the *day of the date*—for instance, if the term is expressed to commence *from the day of the date*—its duration will be measured from that day, and not from the time at which the deed was actually executed. See Shep. Touchst. 108; Hatter *v.* Ash, cited in the text; Doe *d.* Cox *v.* Day, 10 East. 427; Styles *v.* Wardle, 4 B. & C. 908, (10 E. C. L. R. 854,); Steele *v.* Mart, ib. 272, (10 E. C. L. R. 576,); Cooper *v.* Robinson, 10 M. & W. 694;* and Doe *d.* Darlington *v.* Ulph, 13 Q. B. 204, (66 E. C. L. R. 204,). If, however, the deed has no date, or an impossible date, as, for instance, the 30th February, and reference is made in it to the *date*, this word will be construed to refer to the delivery. Styles *v.* Wardle, *ubi sup.* And where a lease was dated on the 25th of March, 1783, and the premises were demised for thirty-five years from the 25th March "*now last past*," but it appeared that the deed had not in fact been executed until after the 25th of March, 1783, it was held that the term did not begin from the 25th of March preceding the date of the deed, but from the 25th March, 1783. Steele *v.* Mart, *ubi sup.* This decision is consistent with the rule laid down in Clayton's Case, 5 Rep. 1, namely, that if the expression used in the lease is that the term is to commence "from henceforth," it shall be computed from the time of the delivery, not from the actual date. See also Bac. Ab. *Leases* (E.).

[*84] former it used to be held that *different constructions were to be put on demises, *from the date of the lease*, and *from the day of the date*—that a lease *from the date* included the day of the date, but that a lease *from the day of the date*, excluded it. Hatter *v.* Ash, 1 Lord Raym. 84. However, in Pugh *v.* Duke of Leeds, Cowp. 714, which is the chief case on this subject, it was decided, after full consideration, that the word *from* may be either inclusive or exclusive, according to the subject-matter, and that the Court will in each case put that sense upon it which will best effectuate what appears to have been the intention of the parties. And, therefore, in that case, a lease to commence *from the day of the date* having been made by the donee of a *power*, which power was to *grant leases in possession but not in reversion*, it was held to include the day of the date and to begin immediately, for the Court thought that the lessor must have intended such a lease as he had power to grant, and he had no power to grant a lease to commence *in futuro*.(*a*)

(*a*) The doctrine of Pugh *v.* the Duke of Leeds, may be taken as the generally received doctrine of the American cases, at the present day. When time is to be computed from or after a certain day, that day is to be excluded in the computation, unless it appear that a different computation was intended; so if time is to be computed from any act done, the day on which the act is done is to be excluded in the computation, whenever such exclusion will prevent an estoppel, or save a forfeiture. Wiggins *v.* Peters, 1 Met., 127; Ewing *v.* Bailey, 4 Scam., 420; Windsor *v.* China, 4 Greenl. 298; Weeks *v.* Hull, 19 Conn., 376; Cornell *v.* Moulton, 3 Denio, 12; Farnell *v.* Rogers, 4 Cush., 160; Lyle *v.* Williams, 15 S. & R., 135; Bigelow *v.* Wilson, 1 Pick., 485; Pyle *v.* Moulding, 7 J. J. Marsh, 202; Jacobs *v*, Graham, 1 Black, Jr., 392; Rand *v.* Rand, 4 N. Ham., 267; Goswiler's Estate, 3 Penna., 200: Blanchard *v.* Hil-

The judgment of Lord Mansfield in that case is exceedingly well worth your perusal, and you may read

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liard, 11 Mass., 85; Woodbridge *v.* Brigham, 12 Mass., 403; Henry *v.* Jones, 8 Mass, 453; Lorent *v.* South Carolina Insurance Company, 1 N. & M., 505; O'Connor *v.* Towns, 1 Texas, 107; Burr *v.* Lelais, 6 Texas, 76.

In Maigs *v.* Anderson, a late case in Pennsylvania, not yet in the reports, but to be found 12th Legal Intelligencer, p. 238, in the number for September 7th, 1855, it is decided that "a lease for one year, from the first day of April then next, for the rent of three hundred dollars, payable at the expiration of the term," expired at midnight, on the 31st of March. Judge Knox thus recites the facts, and propounds the law of the case: "David Maigs died in the year 1847, seized in fee of certain real estate, which passed by his death to his children, eleven in number. On the 24th of February, 1848, seven of the eleven heirs executed a lease of the farm in question to the defendant, Anderson, for one year from the first day of April then next, for the rent of three hundred dollars, payable at the expiration of the term; the plaintiff, George Maigs, was one of the seven who joined in the lease. By order of the Orphans' Court of Chester county, made upon the application of the administrator of David Maigs, this farm was sold on the 28th of October, 1848, and purchased by George Maigs, the plaintiff. One of the conditions of the sale was, that the deed should be made on the first day of April, 1849. The sale was confirmed and the deed made, but as the first of April came on Sunday, the deed was delivered the preceding Saturday, the 31st day of March, 1849. The defendant, as tenant, occupied the premises from the first day of April, 1848, until the first day of April, 1849."

"It is impossible to examine this case without clearly discovering the intention to prevent the rent in controversy from passing to the purchaser. The title to the premises by the conditions of sale was to be retained until the lease had expired and the act of the administrator, in delivering the deed the day before it could have been legally demanded, can make no difference in the case. It is argued for the plaintiff in error that at all events he was entitled to his conveyance, on the first day of April, and that inasmuch as the rent was not due until the day after he is the legal owner of it, this argument is based

it in connection with the more recent one of Askland *v.* Lutley, 9 A. & E. 879 (36 E. C. L. R. 312), in

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upon the supposition that the lease did not expire until the first of April, A. D., 1849, including the whole of that day, but this position cannot be sustained, the lease was from the first of April, A. D., 1848, for one year, *the tenant took possession on the first day of April, A. D.* 1848, and at the close of the 31st day of March, he had occupied the premises for an entire year. The first day of April, 1849, was the commencement of another year, and on the morning of that day at any moment after 12 o'clock of the preceding night, the rent was due, and payable, for the term had then expired.

"It is undeniably true, that there has not been entire uniformity in the rules laid down by Courts, in reference to the computation of time. In Goswiler's Estate, 3 Penna. R., 200, it was held 'that whenever by a rule of Court or an act of the Legislature a given number of days are allowed to do an act, or it is said an act may be done within a given number of days, the day in which the rule is taken, or the decision made is excluded,' but in Thomas *v.* Afflick, 4 Harris, 14, it was said that the rule of the common law is to include the first day and exclude the last, and that this was the true rule; admitting that 'Goswiler's Estate' was not well considered—in Lyle *v.* Williams, 15 S. & R., 136, it is said 'that where the expressions are *from the date,* the rule seems to be that if a present interest is to commence from the date, the day of the date is excluded, but if they are used merely to fix 'a terminus from which to compute time the day is included,'' and it was accordingly held in that case that where a bond was dated on the 22nd day of July, 1818, payable in five years from the date a scire-facias quare executio non might issue on the 22nd of July, 1823. The diversity in the rule appears to have been caused by a desire to apply it so as not to work injustice. The parties to this transaction doubtless had in view the universal understanding of the country, that where one rents lands or tenements for a year from the first day of April, the tenant has the right to enter on the day named, and that his term ceases on the last day of March ensuing, any other construction would not only do violence to the customs and habits of the people, but would in the case before us, work manifest injustice, by giving to the plaintiff the income, and profits of an estate, for an entire year, anterior to the commencement of his title."

which the Court of Queen's Bench declared the general rule with regard to the duration of leases for years, to be, that, *generally speaking, they last during the whole anniversary of the day from which they are granted;* since, otherwise, the day on which the last quarter's rent is usually made payable *would be subsequent to the expiration of the lease.[27] [*85]

It must also be observed, while we are upon this part of the subject, that a lease may be so worded as to run from one date in point of *computation*, and from another in point of *interest*. For instance, I may make a lease to hold for ten years from the 1st of January last, and it will begin *in interest* from the day of making, but *in computation* from last January; or I may even make a lease for ten years from the date, but not to commence till the expiration of a lease for five years now existing in the premises, and it will begin *in computation* from the date, but *in interest* from the expiration of the outstanding lease. See Enys *v* Donnithorne, 2 Burr. 1190.[28]

With regard to the *duration* of the term, it may be either for a number of years absolutely, or for a number of years determinable upon some contingency, such, for instance, as the expiration of a life or lives. In these cases care must be taken to avoid any mistake in using the particles *and* and *or*, for a lease for ninety-nine years, if A. AND B. so long live, is determinable by the death either of A. or B.; but a lease if A. OR B. so long live, lasts till the death of the survivor of them.

[27] The word "from" may be either exclusive or inclusive, according to the intention of the parties. It is now usually, but not necessarily, construed to be exclusive. See the judgment in Wilkinson *v.* Gaston, 9 Q. B. 137, (58 E. C. L. R. 137,).

[28] See the cases cited *ante*, p. 83, note [26].

[*86] Lord Vaux's *Case, Cro. Eliz. 269.[29] Sometimes the lease is for a certain number of years, but determinable sooner, at the election of the parties or one of them; and, of course, if it be specified which is to have the option, no difficulty on the subject can arise. Where that is not specified, but a lease is granted, say for seven, fourteen, or twenty-one years, without stating which party is to have the option of determining it, it was once thought that either party would have a right to put an end to it at the periods specified. (See Goodright *v.* Richardson, 3 T. R. 462.) But it has since been held, both at law and in equity, that the *lessee* only has the option, Dann *v.* Spurrier, 3 B. & P. 399; Price *v.* Dyer, 17 Ves. 356; Doe *v.* Dixon, 9 East, 15, in which Lord Ellenborough states that these decisions proceed upon the general principle that where the words of a grant are doubtful, they must be construed most strongly in favor of the grantee.[30]

I will resume this subject in the next lecture.

[29] For the word "or" in its ordinary and proper sense is a disjunctive particle, and ought to be so construed unless there be something in the context to give it a different meaning. See the judgments in Elliott *v.* Turner, 2 C. B. 461, (52 E. C. L. R. 461,); and Mortimer *v.* Hartley, 6 Exch. 60.

[30] Where, as is usually the case, the lease specifies that the option may be exercised by either the lessor or the lessee, either of them may of course determine the lease. See Goodright *d.* Nicholls *v.* Mark, 4 M. & S. 30.

*LECTURE IV. [*87]

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We were considering, on the last evening, the usual formal component parts of a lease under seal, namely:—

1st. *The Premises.*

2ndly. *The Habendum.*

3rdly. *The Reddendum.*

*4thly. *The Covenants.* [*88]

5thly. *Any Exceptions, Provisoes, or Conditions by which the Contract may chance to be qualified.*

We have already spoken of the first two of these

five subjects, namely, the *premises*, and the *habendum*. We have now to dispose of the remaining three in order.

With regard to the *reddendum*, it is the reservation of a *rent* to be paid to the lessor, as a compensation for his relinquishing the thing demised to the lessee. This rent, which is derived from the Latin word *redditus*, signifying a *return*, is defined by Chief Baron Gilbert, in his Treatise *on Rents*, page 9, to be "*an annual return made by the tenant either in labour, money, or provisions, in retribution for the land that passes ;*" from which you will observe that though a rent is usually reserved in money, it need not be so; or even in those other things mentioned by Gilbert, but which are only given by him as examples. It may, as is said by Lord Coke (1 Inst. 142 a), consist of spurs, horses, or other things of that nature; or of services or manual labor, as, to plough a certain number of acres for the landlord yearly.[1]

[*89] *I may as well here mention, though you are probably all fully aware of it, that there are three descriptions of rent known to the law, entitled, *rent-service*, *rent-charge*, and *rent-seck*. The first being a rent reserved upon a grant or lease of lands, as incidental to their tenure; the second, a rent granted out of lands by the owner to some other person, with a

[1] The services of cleaning a parish church, and of ringing a church bell at certain hours, without any pecuniary render, are rents for which a distress may be made. Doe *d.* Edney *v.* Benham, 7 Q. B. 976, (53 E. C. L. R. 976,) and see Doe *d.* Robinson *v.* Hinde, 2 M. & Rob. 441. So a royalty payable to a landlord upon the bricks which are made out of a brickfield, is a rent, although it is not paid for the renewing produce of the land, but for portions of the land itself, which is gradually exhausted by the working. Reg. *v.* Westbrook, 10 Q. B. 178, (59 E. C. L. R. 178,).

clause of distress; and the third, a rent without power of distress.[2]

A rent service, originally, might have been reserved upon a conveyance of lands from one man *to another in fee-simple, or for any less estate, and [*90] all *quit-rents*, as they are called at the present day, were originally rents of this description; but the statute of *Quia Emptores* [18 Edw. 1, c. 1] having, as I stated in the first Lecture,[3] prohibited tenancies in fee-simple from being any longer created between subjects, and

[2] See Bac. Ab. *Rent* (A.). A *rent-service* is so called, because it has some corporeal service incident to it, as, at the least fealty, Co. Litt. 87 b; and a *rent-charge*, because the land is charged with a distress for its payment, Co. Litt. 143 b. A *rent-seck* is *redditus siccus*, or a barren rent reserved without any clause of distress. A *fee-farm rent* is a rent reserved on a grant in fee. This term appears to relate to the perpetuity of the rent, not to its amount; and it is probably only properly applicable to *rents-service*. See Co. Litt. 143, b, note (5), and The Governors of Christ's Hosp. *v.* Harrild, 2 M. & Gr. 713, note, (40 E. C. L. R. 820,). Another meaning is attributed to the expression in Co. Litt. 143 b, and in the judgment and notes in Bradbury *v.* Wright, 2 Dougl. 624. The right to distrain for *rents-seck* was given by the 4 Geo. 2, c. 28, s. 5, by which it was enacted that "from and after the 24th day of June, 1731, all and every person or persons, bodies politic and corporate, shall and may have the like remedy by distress, and by impounding and selling the same, in cases of rents-seck, rents of assize, and chief rents, which have been duly answered or paid for the space of three years within the space of twenty years before the first day of this present session of Parliament, or shall be hereafter created, as in case of rent reserved upon lease, any law or usage to the contrary notwithstanding." The three years mentioned in the act during which rents-seck existing at the time of its passing must have been paid, need not be consecutive. Musgrave *v.* Emmerson, 10 Q. B. 326, (59 E. C. L. R. 326,). A fee-farm rent may be distrained for, if brought within this section, *ib.* and Bradbury *v.* Wright, *ubi sup.*

[3] See *ante*, p. 5.

directed that, upon a grant of land in fee-simple, the grantee should hold not of the grantor, but of the person of whom the grantor himself held, it has resulted from this statute, that a rent-service cannot now be reserved upon a grant of lands from one subject to another in fee-simple;(*a*) since a rent-service is incidental to a tenure, and cannot exist where there is no tenure, and there is now no tenure between the grantee under such a conveyance and the grantor.[4] However, though a rent-service cannot now be reserved upon a grant in fee-simple, it may upon the grant of any less estate; and, of course, may be so upon a lease, and accordingly every rent reserved upon a lease is a *rent-service*, and is accompanied by that which is the incident of every rent-service, namely, a right on the part of the lessor to distrain for it. Now, *with regard to the *reddendum*, or reservation of this rent, there are three things to be observed concerning it.

[*91]

First. It must always be of something issuing out of the thing demised, and differing from it in nature, and not part of the thing itself,[5] for that would not be a

[4] See Bac. Ab. *Rent* (A) 1. A grant in fee, reserving a perpetual rent, with an express power of distress, would however be good as a *rent-charge*. See Co. Litt. 143 b, note (5), and the judgment of Mr. Justice Buller in Bradbury *v.* Wright, 2 Dougl. 624. And if such a rent were created at the present day without a power of distress, it would, apparently, be a rent-seek, and as such attended with the right of distress under the 4 Geo. 2, c. 28. See 1 Selw. N. P. 661, note (3), (10th Edit.)

[5] A reservation, therefore, to the owner of the land of its vesture or herbage would not be good. Co. Litt. 142 a.

(*a*) Not so in Pennsylvania. The statute *Quia Emptores* having been held under the words of the charter not to be in force in that State. Ingersoll *v.* Sergeant, 1 Wh. 338.

reservation but an *exception*. Lord Coke shows the distinction between a reservation and an exception very clearly in the 1 Inst. 47 a. "Note" he says, "a diversity between an exception, which is ever of part of the thing granted, and a reservation which is always of a thing not in esse, but newly created or reserved out of the land or tenement demised." In the case of Doe *d.* Douglas *v.* Lock, 2 A. & E. 705, (29 E. C. L. R. 325,) the whole law on this subject is collected, and you will find it elaborately explained in the judgment of the Court, at p. 743, and the following pages.[6](*a*)

[6] See also Wickham *v.* Hawker, 7 M. & W. 63;* The Durham and Sunderland Railway Co. *v.* Walker, 2 Q. B. 940, (42 E. C. L. R. 987,); and Pannell *v.* Mill, 3 C. B. 625, (54 E. C. L. R. 625,).

(*a*) Nothing is more common in America, than to make the rent a certain portion of the annual produce of the farm,—as for instance one-half the grain, to be delivered in the bushel, and one-half the hay and straw, &c., and it has always been held that these are good reservations of rent, in kind, and that they may be distrained for. It is considered the fairest mode of letting, as well for the landlord as the tenant. The landlord has the advantage of a prosperous harvest, and the tenant escapes the heavy loss, which a year of scarcity might entail upon him. Stewart *v.* Dougherty, 9 Johns., 108; Fry *v.* Jones, 2 Rawle, 11; Rhinehart *v.* Olwine, 5 W. & S., 157, Jones *v.* Gundrim, 3 W. & S., 531. But in Bowzer *v.* Scott, 8 Blackf., 86; it is said that a rent payable in kind, cannot be distrained for.

This is commonly called letting land on the shares, a form of expression which seems to be sufficiently accurate, and quite apt for the expression of the idea intended to be conveyed. Though Judge Woodworth, in De Mott and others against Hageman, 8 Cowan, 220, seems to regard the expression as synonymous with what is called by other judges cropping. A cropper is one who is employed to raise the single crop, and who is to be paid for his labor by a certain portion of the fruits; he is held to be a servant, not a tenant. The possession is in the landlord, who alone can bring trespass, and the cropper and the landlord are tenants in common of the crop. But when the form of

Secondly. The rent must be reserved out of something to which the lessor may have recourse to distrain;

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the contract is a lease, and the lessee is put in possession of the farm, either for a year, or from year to year, or for a term of years, rendering a certain portion of the produce as rent, he is a tenant—he alone can bring trespass, and the landlord has no interest in the crops until they are severed and delivered to him. De Mott, et al., *v.* Hageman, 8 Cow., 220; Tattle *v.* Bebee, 8 Johns., 152; Fry *v.* Jones, 2 Rawle, 11; Rhinehart *v.* Olwine, 5 W. & S., 157; Haywood *v.* Miller, 3 Hill, 90; Graham *v.* Houston, 4 Dev., 332; Doremus *v.* Howard, 3 Zab., 390.

These distinctions are as old as Hare, and three others, *v.* Celey, Cro. Eliz., 143. Hare was seized in fee of sixteen acres, andeas exposuit to the other three to sow at halves. Scil.: That he should find one-half the seed, and the other three the other half, and should manure the land, and that Hare should have one moiety of the grain there growing, when it was reaped, and the others the other moiety; and after the land was sown A. entered by command of the defendant, and spoiled a great part of the corn. Upon which trespass was brought.

Quære: If this exposing the land to half be not a lease of the land, so as the action was to be brought in the name of Hare and the three? And admitting it to be a lease, if Hare be not tenant in common with them of the corn; for the moiety of that which was sown was his. The Court held it no lease of the land, but otherwise if it be for two or three crops; and therefore as to breaking of the close, Hare only was to bring the action; and as to spoiling the corn, they ought to join, being tenants in common.

In several recent cases, Putnam *v.* Wise, 1 Hill, 235; Smyth *v.* Taukersley, 20 Ala., 212; Dinehart *v.* Wilson, 15 Barb., 595; the decision in Stewart *v.* Doughty, 9 John, 108; Overseers *v.* Overseers, 14 Johns., 365; Jackson *v.* Bromnell, 1 Johns., 267, has been reconsidered. It was held in those cases that when the contract is in form a lease, reserving a portion of the crops as rent, it is a technical lease, and the title to the whole of the crops is in the lessee until he delivers to the lessor his portion in payment of his rent. "And these are the positions," say the Court, in Dinehart *v.* Wilson, "overruled in Putnam *v.* Wise. In the latter case it is laid

thus a rent cannot issue out of a right of common, or out of another rent, or in fact out of any incorporeal hereditament. It is very true that, as a contract, such a reservation may bind the lessee; thus, if I were to demise a right of common to A. B., yielding and paying £50 a year to me, this £50 a year would not be a *rent*, *because a rent cannot issue out of a right of common; but it would nevertheless be a sum due to me by A. B. by virtue of his contract, and for which, if unpaid, I might maintain an action of debt against him. See Jewel's Case, 5 Co. 3.[7] [*92]

[7] See Co. Litt. 47 a; Bac. Ab *Rent* (B); Vin. Ab. *Reservation* (B). Incorporeal hereditaments are usually capable of being demised, but *a rent*, properly speaking, cannot issue out of them; nor can a rent issue out of goods. See the 3rd Resolution in Spencer's Case, 5 Rep. 17; Newman *v.* Anderton, 2 N. R. 224; and Salmon *v.* Matthews, 8 M. & W. 827.* It is a general rule that when a rent is nominally reserved out of two things, one of which is capable of

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down as the true test, that if there is any provision in the contract for dividing the products of the premises, then the parties become tenants in common of the crops. If the occupier or cultivator is to pay a certain quantity of grain or other article, as a certain number of bushels of grain, or tons of hay, &c., &c., then he is a tenant, and the grain or hay is rent, and the landlord has no interest or title until they are delivered to him as rent." Dockham *v.* Parker, 9 Greenl., 157. See also Caswell *v.* Dietrich, 15 Wend., 379.

These views it is believed are most in accordance with the understanding of landlords and tenants, when property is let on shares.—The tenant in such cases never supposes that he has a right to sell the whole crop as his own, nor does the landlord conceive for a moment that an execution against his tenant may sell the whole crop. The sheriff who, on an execution against either landlord or tenant, when the premises are let to the shares, sells the whole crop, is liable in trespass, according to Dinehart *v.* Wilson. Where the contract is in form a lease, the tenancy in common, spoken of in Putman *v.* Wise, is a tenancy in common of the crops, not of the premises.

However, though the general rule is, as I have stated it, *that a rent cannot issue out of an incorporeal hereditament*, yet there are one or two exceptions to this rule, of which it will be proper to take notice.

In the first place, it is laid down in Bac. Ab. *Rent* (B), where the authorities upon the subject are collected, that though a reversion or remainder *is [*93] an incorporeal hereditament, so that it can only pass by grant, yet a rent reserved upon a lease of it is good, for although the lessor cannot distrain during the continuance of the particular estate in a third party, yet there is a possibility of his doing so on the determination of that particular estate. Again, though *tithes* are incorporeal hereditaments, and therefore at common law no rent could have been reserved out of them, yet stat. 5 Geo. 3, c. 17, directs that leases by ecclesiastical persons of tithes for three lives, or twenty-one years, shall be as good as if of land, and that an action of debt shall lie for the rent reserved. And it

supporting a rent, and the other not, it will be taken to issue wholly out of the former. See the cases last cited; Vin. Ab. *Reservation* (O); Doubitofte *v.* Curteene, Cro. Jac. 452; Emott *v.* Cole, Cro. Eliz. 255; and Farewell *v.* Dickenson, 6 B. & C. 251, (13 E. C. L. R. 124,). But although the rent issues in these cases out of the corporeal hereditament only in point of remedy, it is considered to issue out of both in point of render; so that where it is not apportioned between the two subjects of demise, but is reserved generally, and the contract under which it is reserved, not being under seal, cannot operate as a demise of the incorporeal hereditament, no rent at all is recoverable. See the argument in the Dean of Windsor *v.* Gover, 2 Saund 303; Gardiner *v.* Williamson, 2 B. & Ad. 336, (22 E. C. L. R. 145,); Bird *v.* Higginson, 2 A. & E. 696; (29 E. C. L. R. 321,); S. C. 6 A. & E. 824, and Meggison *v.* Lady Glamis, 7 Exch. 685. Upon the same principle, where premises are demised at an entire rent, and a portion of them cannot be legally let, the whole demise is void. See Doe *d.* Griffiths *v.* Lloyd, 3 Esp. 78.

may admit of question, whether the same effect be not produced on tithes in the hands of lay impropriators, by the construction of stat. 32 Hen. 8, c. 7, sec. 7, which put them on the same footing as lands in many respects, and in particular with regard to the remedies for their recovery.[8]

Lastly, the Queen, if she think proper, may *reserve a rent, properly so called, out of an incorporeal hereditament, the reason for which is, that she may, by virtue of her prerogative, distrain on all her tenants' lands wherever situated; whereas a subject can only distrain upon the land demised.[9] [*94]

The *third* point to be observed with regard to the *reddendum*, is that the rent must be reserved *to the lessor himself*, not to a third party. The reason of this is, that the rent is looked on as a compensation for the land, and therefore ought to be reserved to the person who would have had the land if it had not been demised; and accordingly it is laid down by Littleton,

[8] Since the Tithe Commutation Acts, leases of tithes cannot occur. See the 6 & 7 Wm. 4, c. 71, which has been amended and extended by numerous later acts. It was provided by s. 88 of this statute, that it should be lawful for any lessee being in the occupation of tithes commuted under the act, to surrender his lease so far as related to the tithes, subject to any compensation to the tenant for the loss of the tithes, and to the landlord for the non-fulfilment of any conditions contained in the lease, and to such a deduction from the rent payable in respect of any other hereditaments included in the lease, as might be fixed by the tithe commissioners. It has been held that a lessee of tithes who does not avail himself of this section, is still liable upon his covenant to pay rent, although the tithes have been commuted for a rent charge under these acts. Tasker *v.* Bullman, 3 Exch. 351.

[9] Co. Litt. 47 a; Bac. Ab. *Rent* (B); and see as to the distinctions which exist between the grants of the Crown and those of subjects, Knight's Case, 5 Rep. 54.

sec. 346, "That no *rent-service* can be reserved upon any feoffment, gift, or lease, to any person but the feoffor, donor, or lessor, or their heirs, and in no manner to a stranger." Thus in Oates *v.* Frith, Hob. 130, where a man made a lease for years of land, to begin after his own death, rendering rent to his son, the rent was held to be improperly reserved, although it turned out that his son was heir, and would have been entitled to the rent had it been reserved in proper form, namely, *to the heirs of the lessor*.[10]

[10] The lease in this case appears to have been made by the father and the son, and the term was to commence after the death of the father. See the case; see also Doe *d.* Barber *v.* Lawrence, 4 Taunt. 23. The words of Littleton, in s. 346, are "that no rent, (*which is, properly said, a rent*) may be reserved, &c., but only to the feoffor, or to the donor, or to the lessor, or to their heirs, and in no manner it may be reserved to any strange person." It would seem that, where the reservation is to a stranger, although the payment reserved is not, properly speaking, a rent, and cannot be distrained for, such a reservation is binding as a contract. See Jewel's Case, 5 Rep. 3. Another requisite to a rent, properly so called, is that the reservation should be certain. It is, however, sufficient if the amount, although not actually fixed in the reservation, is ascertainable by it. Co. Litt. 142 a. Lord Coke lays down this rule in the following terms: "It is a maxim in law, that no distress can be taken for any services that are not put into a certainty, nor can be reduced to any certainty; for *id certum est quod certum reddi potest.* . . . And yet in some cases there may be a certainty in uncertainty; as a man may hold of his lord to shear all the sheep depasturing within the lord's manor, and this is certain enough, albeit the lord hath sometimes a greater number, and sometimes a lesser number there; and yet this uncertainty, being referred to the manor which is certain, the lord may distrain for this uncertainty. *Et sic de similibus.*" Co. Litt. 96 a. See also Parker *v.* Harris, 1 Salk. 262; Orby *v.* Mohun, 2 Vern. 531; Riseley *v.* Ryle, 11 M. & W. 16;* Daniel *v.* Gracie, 6 Q. B. 145, (51 E. C. L. R. 145,); Reg. *v.* Westbrook, 10 Q. B. 178, (59 E. C. L. R. 178,); Pollitt *v.* Forrest, 11

We now come, in the fourth place, to the **covenants*, which usually are inserted after the *reddendum*. A *covenant* is the name which we give, when we find it contained in a deed, to that which, if we found it in an instrument not under seal, we should denominate a promise or agreement. No particular words are necessary to constitute one. It is sufficient that they be such as show the intention of the party to bind himself to the performance of the matter stipulated for; thus the *reddendum*, or clause reserving the rent, usually *runs in this way:—Yielding and paying therefor, yearly and every year during the said term, unto the lessee (naming him), his executors, administrators, or assigns, the clear yearly rent, or sum of so much of lawful money of Great Britain, payable quarterly (or half-yearly as the case may be), on such and such days (naming them). Now, besides this *reddendum* clause, there is, in every well-drawn lease by deed, an express covenant by the lessee to pay the rent reserved, but even if there were not, the words *yielding and paying* in the *reddendum*, would amount to a covenant, and an action of covenant could be maintained upon them by the lessee, in case of non-payment, See Hellier *v.* Casbard, 1 Sid. 266; Giles *v.* Hooper, Carth. 135; Porter *v.* Swetnam, Styl. 406.[11] (*a*) [*95] [*96]

Q. B. 949, (63 E. C. L. R. 949,). In Daniel *v.* Gracie, a marl pit and brick mine were demised, and the tenant agreed to pay so much a quarter for every yard of marl that he might get, and an additional sum of money for every thousand bricks that he might make. It was held that this reservation was sufficiently certain, and that the rent might be distrained for.

[11] As is stated in the text, no particular form of words is requisite to

(*a*) The words "yielding and paying" create an implied covenant. Rayer *v.* Ake, 3 Penna. R., 466; Webb *v.* Russel, 3 T. R., 402; Mills *v.* Awriol, 4 T. R., 98; Vyvyan *v.* Arthur, 1 Barn. Cress.,

[*97] *There are a variety of covenants usually inserted in leases of particular species of property,

constitute a covenant. This rule is illustrated by the following cases, to which it is not necessary to refer here in detail:—Courtney *v.* Taylor, 6 M. & Gr. 851, (46 E. C. L. R. 851,); Rigby *v.* The Great Western Railway Co., 14 M. & W. 811;* Wood *v.* The Copper Miner's Co., 7 C. B. 906, (62 E. C. L R. 906,); Rashleigh *v.* The South Eastern Railway Co., 10 C. B. 612, (70 E. C. L. R. 612,); and the Great Northern Railway Co. *v.* Harrison, 12 C. B. 576, (74 E. C. L. R. 576,). In Cannock *v.* Jones, 3 Exch. 233, a lease contained a covenant by the tenant to keep all the windows belonging to the demised premises, and certain other matters particularly mentioned, in repair, "the farm-house and buildings being previously put in repair and kept in repair" by the landlord. It was held that these words constituted an absolute and independent covenant on the part of the landlord to put the farm house and buildings into repair. See also Neal *v.* Ratcliff, 15 Q. B. 916, (69 E. C. L. R. 916,) where a stipulation of this kind was held to be a condition precedent, not an independent covenant; and *post*, Lect. VII. Covenants are to be construed according to the apparent intention of the parties, looking to the whole instrument and to the context (*ex antecedentibus et consequentibus*) and according to the reasonable sense and construction of the words. See Plowd. 329; and the judgment of Lord Ellenborough in Iggulden *v.* May, 7 East. 241. So that a covenant is broken if the intention is not carried out, although it may be kept to

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416; Iggalden *v.* May, 9 Ves., 330; Church *v.* Brown, 15 Ves., 264; Kunckle *v.* Wynick, 1 Dall., 307; Kimpton *v.* Walker, 9 Ves., 191: Walker *v.* Physick, 5 Barr, 202. Rawle on Covenants for Title, 472, in note, where the following language is used:—"This question has practically some importance, as, if the covenant is to be deemed an express one, the lessee is still bound to his lessor for the rent, notwithstanding an assignment of the term, and acceptance of the rent by the lessee from the assignee (Mills *v.* Awriol); while, if the covenant is merely implied, the liability for rent is but co-extensive with the occupation, and the lessee is not liable for the rent accruing after his assignment to another, and the acceptance of the rent by his lessor from the latter." Walker *v.* Physick, 6 Barr, 202.

and which will be found varied to suit the nature of the property, the length of the term, and other circumstances.[12] Thus, in the lease of a town-house, besides the lessee's covenant to pay rent, you will frequently find a covenant by him to pay *the pa- [*98]

the letter. See Com. Dig. *Covenant* (E 2), where it is said, "If a man acts contrary to the intention of his covenant, it shall be a breach, although he performs the words of his covenant; as if a man covenants to leave all the trees upon the land, and he cuts them down and leaves them there; if a brewer covenants to deliver all his grains for the cattle of the plaintiff, and he puts hops to them before delivery." In Griffith *v.* Goodhand, Sir T. Raym. 464; Platt on Cov. 55, *et seq.;* and Dormay *v.* Borradaile, 5 C. B. 380, (57 E. C. L. R. 380,) numerous instances are given of covenants which have received a larger interpretation than the words, taken literally, would warrant. See also Borradaile *v.* Hunter, 5 M. & Gr. 639, (44 E. C. L. R. 335,); and Clift *v.* Schwabe, 3 C. B. 437, (54 E. C. L. R. 437,). Under the 8 & 9 Vic. c. 124, which has been already mentioned, and the 8 & 9 Vic. c. 119, covenants framed according to the forms given by those statutes have, in leases and conveyances made in pursuance of them, a peculiar force and meaning.

[12] It may be convenient to mention here, that the non-execution of a lease by the lessor affords an answer to any action on those covenants on the part of the lessee, which depend on the interest intended to be granted by the lease, and which are made because the covenantor has that interest: such, for instance, as covenants to repair, or to pay rent. See the judgment in Pitman *v.* Woodbury, 3 Exch. 12; and Swatman *v.* Ambler, 8 Exch. 72; see also Aveline *v.* Whisson, 4 M. & Gr. 801, (43 E. C. L. R. 414,); and Cooch *v.* Goodman, 2 Q. B. 580, (42 E. C. L. R. 817,). But a covenantee in an ordinary indenture, who is a party to it, (and since the 8 & 9 Vic. c. 106, s. 5, it would seem even if he is not a party, provided the covenant respects any tenements or hereditaments), may sue the covenantor although the former have not executed the deed. And this is so even where the deed contains cross covenants on the part of the covenantee, which are stated to be the consideration for the covenants on the part of the covenantor. See Morgan *v.* Pike, 14 C. B. 473; and the judgment in Pitman *v.* Woodbury, 3 Exch. 12.

[*99] rish rates and parliamentary taxes,[13](a) to *keep

[13] No mention is made in the later portion of these lectures of covenants to pay taxes, so that it may be convenient to call attention here to some of the decisions upon this subject. A covenant to pay a rent charge without deducting any taxes, extends to subsequently imposed taxes of the same nature as those in existence at the time of the making of the covenant, but not to taxes of a different nature. Brewster *v.* Kitchell, 1 Salk. 198; S. C. 1 Lord Raym. 317. Where a tenant covenanted to pay the rent "without any deduction, defalcation, or abatement for or in any respect whatsoever," it was held that he was liable to pay the land tax. Bradbury *v.* Wright, 2 Dougl. 624; see also Amfield *v.* White, Ry. & Moo. 246, (21 E. C. L. R. 743,). In Payne *v.* Burridge, 12 M. & W. 727,* a local act of parliament authorised the commissioners appointed under it to pave certain footways, and directed that the costs of the works should be paid by the tenants or occupiers of the next adjoining houses. It also provided, that in default of payment the amount might be levied upon the tenants or occupiers by distress, and that they might deduct the costs so paid out of their rent. A tenant of one of the adjoining houses had covenanted with his landlord to pay his rent "free and clear from all manner of parliamentary, parochial, and other rates, taxes and assessments, deductions or abatements whatsoever." It was held that under this contract, the tenant was bound to bear the paving expenses. In another case where a tenant covenanted to pay "all parliamentary, parochial, and other taxes, tithes and assessments, now or hereafter to be, issuing out of all or any of the premises hereby demised, or payable by the landlords or tenants thereof for the time being;" it was held that he was liable to pay a rent-charge imposed on the premises in lieu of the land tax, which had been purchased by a previous tenant, under the 42 Geo. 3, c. 116. Governors of Christ's Hospital *v.* Harrild, 2 M. & Gr. 707, (40 E. C. L. R. 817,). In Baker *v.* Greenhill, 3 Q. B. 148, (43 E. C. L. R. 672,) a landlord was, with other landowners, liable to repair a bridge, *ratione tenuræ*. The tenant of the land had covenanted to pay the

(a) When no mention of taxes is made in the lease they are payable by the tenant, and do not constitute a set off to the payment of rent. Hughes *v.* Young, 5 Gill. & Johns. 67.

the premises in repair, and to yield them up

rent "free and clear of and from any land tax, and all other taxes and deductions whatsoever, either parliamentary or parochial, now already taxed or imposed, or hereafter to be taxed, charged or imposed upon the demised premises, or upon the tenant, his heirs, executors, administrators, or assigns in respect thereof, the landlord's property tax or duty only excepted." Some local acts of parliament reciting the liability of the landlord *ratione tenuræ*, had enacted that he and the other land-owners who were liable should keep the bridge in repair, and had enabled them to raise the requisite money by rates among themselves, according to the value of the lands chargeable, and had given them a power to levy the amount, if necessary, by distress. It was held that the liability to contribute to these repairs did not, by the operation of the local acts, become a parliamentary tax or deduction within the meaning of the covenant of the tenant. "We are of opinion," said the Court, "that the acts of Parliament for enabling the persons interested to raise the necessary funds for the repairs of the bridges by contribution amongst themselves, do not impose any tax within the meaning of the covenant. The charge was already created, and the acts merely supply a more convenient mode for raising the necessary funds to meet it." It has been held that a covenant to pay taxes on the land does not extend to church and poor rates, for these are *personal* charges. Theed *v.* Starkey, 8 Mod. 314. A sewers rate is not a *parliamentary tax* within covenants of this description. Palmer *v.* Earith, 14 M. & W. 428.* "It is quite clear," said Baron Parke in this case, "on the authority of Lord Holt, in Brewster *v.* Kitchell that sewers rates are not to be considered as *parliamentary* taxes. A parliamentary tax is one that is imposed directly by act of parliament." It would seem, that a county rate is a *parochial* tax. Reg. *v.* Inhabs. of Aylesbury, 9 Q. B. 261, (58 E. C. L. R. 261,). Where a tenant covenants to pay rates and taxes, and omits to do so, it is not necessary that the landlord should demand them from him before he can avail himself of a proviso for re-entry in respect of this covenant. Davis *v.* Burrell, 10 C. B. 821, (70 E. C. L. R. 821,). The Property and Income Tax Act (the 5 & 6 Vic. c. 35 extended by the 17 Vic. c. 10), imposes a tax upon landlords in respect of their property under lease. This tax is payable, in the first instance, by the tenants, who

[*100] *so at the end of the term;[14] frequently, too,

are empowered to deduct it from their rent. By s. 73 of this act no contract, covenant or agreement between the landlord and tenant, or any other persons, touching the payment of taxes and assessments, to be charged on their respective premises, is to be deemed to extend to the duties charged thereon under the act, or to be binding contrary to the intent and meaning of the act, but all such duties are to be charged upon and paid by the respective occupiers, subject to such deductions and repayments as are allowed by the act, which deductions, &c., are to be made and allowed notwithstanding such contracts, covenants or agreements. It has been held under this act that where a tenant pays the property tax assessed upon the premises, and omits to deduct it from his next payment of rent, he cannot afterwards recover the amount as money paid to the use of the landlord. Cumming *v.* Bedborough, 15 M. & W. 438.* Under the Tithe Commutation Acts, the rent-charge which is substituted in lieu of the tithes is charged upon the land, and may be recovered by distress. Neither the landlord or the tenant is, under these statutes, *personally* liable to pay it; but if the latter pays it, he may deduct it from his rent, unless he has agreed with his landlord to take the charge upon himself. See the 6 & 7 Wm. IV. c. 71, ss. 67, 80, 81, and Griffenhoofe *v.* Daubuz, 24 L. J. Q. B. 20. By the 14 & 15 Vic. c. 25, however, a convenient remedy is given to the landlord or succeeding tenant, who is obliged to pay the rent-charge, which ought to have been paid by the previous tenant. It is provided by s. 4 of this act 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 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."

[14] See *post*, Lecture VIII.

he covenants to keep the premises insured,[15] not to

[15] As questions upon covenants to insure are of frequent occurrence in practice, and this subject does not occur again in these lectures, it may be useful to insert here some of the cases upon it. The ordinary covenant to insure and keep insured is broken if the premises are left uninsured for any time, however short. Doe *d.* Pitt *v* Shewin, 3 Camp. 134. and see also Doe *d.* Darlington *v.* Ulph, 13 Q. B. 204, (66 E. C. L. R. 204,). The breach of covenant by non-insurance is a continuing breach, and the receipt of rent by the landlord, after the commencement of the non-insurance, waives only that portion of the breach which has then actually occurred. Doe *d.* Muston *v.* Gladwin, 6 Q. B. 953, (51 E. C. L. R. 953,). In this case, which is a very strong illustration of this rule, the tenant had covenanted to insure the demised premises, and to keep them insured in the joint names of the landlord and of himself, and the lease contained a proviso for re-entry upon the breach of any of the covenants. The tenant insured in his own name only, but he showed the policy to the landlord, who approved of it, and accepted rent during the next three years up to Christmas, 1842. The premium paid by the tenant at that period covered the year 1843. In January, 1843, the landlord assigned his reversion, and in that year the assignee brought ejectment for the forfeiture caused by the non-insurance in the joint names of the landlord and tenant. It was held that the lease was forfeited, although no notice had been given to the tenant to alter the policy. Penniall *v.* Harborne, 11 Q. B. 368, (63 E. C. L. R. 368,) was also a case of considerable hardship upon the tenant. In this case the lessee covenanted to insure the demised premises "from time to time, and at all times during the continuance" of the term, in the joint names of the lessors, and the lease contained a proviso for re-entry, if any of the covenants were broken. The lessee left a part of the premises uninsured for two months after the execution of the lease. This was held to be a breach of covenant, by which the lease was forfeited, although it appeared that the greater part of the premises had been insured by the lessee, for the amount required by the lease as to that portion, under a policy expiring at the end of the two months, and on the expiration of this policy, he had insured the whole of the premises for the full amount. It was also held, in this case, that the lease was forfeited by reason of the lessee having insured in his own

[*101] *assign or underlet without license,[16] not to carry on an offensive trade,[17] and not unfrequently for other matters. On the other hand, the lessor [*102] *usually covenants that the lessee shall quietly enjoy free from interruption by himself, or any person lawfully claiming under him.[18] With regard, however, to the duties, the performance of which is secured by these covenants, I think it better to postpone any consideration of them for the present, and to speak of them more fully when I come to consider those points which relate to things which are to be done *during the lease*, since the performance of some of them will, to a certain extent, be provided for by the law, even if there were no express stipulations entered into between the parties. And, by postponing the subject, I shall be able to treat it altogether, *first* pointing out the law, as it would stand if there were no express contracts,[19] and then showing how it has, in ordinary cases, become usual to modify it.[20]

With regard to covenants in general, there is one broad distinction which prevails amongst them when inserted in leases. I allude to the distinction between

name jointly with those of the lessors, although the 14 Geo. 3, c. 78, s. 83, (which section is still in force, see the 7 & 8 Vic. c. 84, Sched. (A)), enables any person interested in the buildings insured to require the insurance company to cause the insurance money to be laid out in rebuilding.

[16] See as to conditions not to assign, *post*, p. 115.

[17] See as to contracts not to carry on offensive trades, Doe *d.* Gaskell *v.* Spry, 1 B. & A. 617; Jones *v.* Thorne, 1 B. & C. 715, (8 E. C. L. R. 302,); Doe *d.* Wetherell *v.* Bird, 2 A. & E. 161, (29 E. C. L. R. 92,); and Simons *v.* Farren, 1 Bing. N. C. 126, (27 E. C. L. R. 572,).

[18] *Post*, Lecture VII.

[19] *Post*, Lecture VII.

[20] *Post*, Lecture VII.

those which do, and those which do not, run with the land upon the one hand, and with the reversion upon the other. This is a very important distinction in practice, since, in case of an assignment of the lease, upon the one hand, or of the reversion, on the other, the tenant's rights against the assignee of the reversion, and *vice versa* those of the assignee of the reversion against the tenant, altogether depend upon it. This is, however, *likewise a subject, the considera- [*103] tion of which I think it best to postpone, since it appears to me, that it will fall more naturally under the *fourth* head into which at starting I divided the entire subject, namely, *The consequences of an alteration of the parties to the demise by the assignment of the lessor or that of the lessee, or otherwise.*[21] I, therefore, now pass on to the last of the five component parts of the lease, and this comprises any *exceptions* out of the demise, and any *provisoes* or *conditions* which the parties to it may think fit to make. The most common exception is that of timber and other trees growing upon the land demised. With regard to this it has been laid down in Whilster *v.* Paslow, Cro Jac. 487, that, by an exception of *all woods*, the soil intervening between the trees in a wooded spot would be excepted out of the demise, and remain vested in the lessor, but that, by an exception *of all trees*, nothing would be comprehended, except the exact portion of earth which the trees occupied.[22] However, in a late case

[21] *Post,* Lecture X.

[22] See Co. Litt. 4 b, and Liford's Case, 11 Rep. 46. The words of a reservation will be construed with reference to the context of the deed, and may be qualified by it. In Pincomb *v.* Thomas, Cro. Jac. 524, one of the closes demised consisted of a wood, and the lease excepted all saleable woods then growing, or which should thereafter grow, which had been sold by the lord of the premises with free

[*104] *of Legh *v.* Heald, 1 B. & Ad. 622, (20 E. C. L. R. 624,) although the Court admitted this

entry, egress and regress for felling, marking and carrying off the same, at all times convenient. It was held that the soil of the wood was not excepted, but passed to the lessee; because the right of entry would not have been needed if the whole soil had been reserved to the lessor. This is explained by Mr. Justice Taunton in Legh *v.* Heald, 1 B. & Ad. 628, (20 E. C. L. R. 626,) where it may be observed that there is a mistake in the report of the judgment of the learned judge, who is made to state that the decision in Pincomb *v.* Thomas, was that the soil did *not* pass to the tenant. It is evident from the context, that the mistake is in the report. In Doe *d.* Rogers *v.* Price, 8 C. B. 894, (65 E. C. L. R. 894,) a lease had been granted of a farm, and of the quarries of paving and tile stone in and upon the premises, subject to a fixed rent for the farm, and to a royalty for the stone obtained. It contained an exception of "all timber trees, trees likely to become timber, saplings, and all other wood and underwood which now are, or which shall at any time hereafter be, standing, growing, and being on the premises, and all mines, minerals, and fossils whatsoever, which shall hereafter be opened and found." There was also in the lease a covenant by the tenant not to commit any waste, spoil or destruction, by cutting down, lopping, or topping any timber trees, or trees likely to become timber, saplings, or any other wood or underwood. The assignee of the term cut down some saplings, wood, and underwood, for the necessary purpose of working a quarry on the demised premises. It was held that these acts did not amount to a breach of the contract of the tenant, for that the effect of the lease was that he was only bound not to cut any of the excepted trees, *so that the cutting should amount to an excess of the rights which it was intended he should exercise;* and consequently that he was not prohibited from cutting trees in a manner necessary to a reasonable exercise of the power to get the stone. Where a lease reserves to the lessor the privilege of hawking, hunting, fishing, and fowling over the demised premises, this is not in point of law either a reservation or an exception, but it is a privilege or right *granted* to the lessor, although words of reservation may be used. See the judgment in Doe *d.* Douglas *v.* Lock, 2 A. & E. 743, (29 E. C. L. R. 342,); Wickham *v.* Hawker,

distinction, yet they held, that, where the exception was of *all timber, and other trees, wood, underwoods, &c.*, nothing would pass except the soil occupied by the trees, for that though the words *wood and underwoods* standing alone might have been sufficient to convey the intermediate soil, yet that coming after the words **timber, and other trees*, they must be held to have been meant to include things *ejusdem generis*, and not to have a more extensive effect than those which preceded them. *Mines* are, in mining counties, frequently also a subject of exception.[23] [*105]

With regard to *provisoes* and *conditions*, which are words signifying, almost exactly, the same thing, a condition being denominated a proviso merely on account of the word with which it usually begins, each of these expressions alike signifies, *some quality annexed to a real estate, by which it may be defeated, enlarged, or created upon an uncertain event.*[24] The only difference between them is, that a *proviso* is always in express words, whereas there are certain *conditions* which the law implies, even though they be not mentioned.

These implied conditions are created either by the common or the statute law.[25] By the common law, it

7 M. & W. 63;* The Durham and Sunderland Railway Co. *v.* Walker, 2 Q. B. 940, (42 E. C. L. R. 988,); and Pannell *v.* Mill, 3 C. B. 625, (54 E. C. L. R. 625,).

[23] Beds of stone which may be dug by winning or quarrying are minerals. See The Earl of Rosse *v.* Wainman, 14 M. & W. 859;* S. C. in error, 2 Exch. 800; and Micklethwait *v.* Winter, 6 Exch. 644.

[24] See Litt. ss. 328, 329; Co. Litt. 203 a; Bac. Ab. *Conditions* (A); and Lord Cromwell's Case, 2 Rep. 69 b.

[25] See as to whether any conditions can be implied on the part o the landlord as to the state of the premises, *post* Lecture VII.; and as to what is implied by law from the mere relation of landlord and tenant, see Granger *v.* Collins, 6 M. & W. 458;* Jackson *v.* Cobbin,

is a condition annexed to every estate, that the grantee shall not during its continuance commit felony or treason.[26] And Lord Coke says, in his 1st Inst. 233 b, [*106] that it *is a condition annexed to every particular estate, that, if the tenant attempt to make an alienation in fee-simple, or claim in a court of record a greater estate than he possesses, he shall thereby forfeit the land, and the reversioner or person in remainder may enter.

As to conditions in law founded on statute—the principal is that created by the Mortmain Act, which renders it a forfeiture, even on the part of tenant in fee-simple, to attempt to alien in mortmain.[27]

The conditions, however, of which I am now chiefly speaking are those express ones also called *provisoes*, which parties are in the habit of introducing into leases by express words.

There are two sorts of *conditions*,—*conditions precedent* and *conditions subsequent*. A condition *precedent* is one which is to be performed *before the estate can commence*. For instance, if A. were to make a lease for years to B., to commence from the 1st of next month, on condition of B.'s paying him on or before that day £100, this would be a condition precedent, the payment being directed to take place before the commencement of B.'s estate, so that, if he omitted to pay, the estate would never vest in him at all.[28]

8 M. & W. 790;* and Messent *v.* Reynolds, 3 C. B. 194, (54 E. C. L. R. 194,).

[26] Co. Litt. 392 b; 2 Inst. 36; and 2 Black. Comm. 266.

[27] See the 9 Hen. 3, c. 36, the later Mortmain Acts, and Com. Dig. *Condition* (R).

[28] See Com. Dig. *Condition* (B). Numerous cases occur in the reports as to conditions precedent, for it is frequently necessary, in practice, to ascertain whether particular stipulations inserted in con-

*A condition *subsequent* is one which either *enlarges or defeats an estate already created*— thus, if A. were to make a lease to B. for seven years, upon condition that, if he paid £100 to A. before the 1st of next month, he should have a lease for fourteen years; here the condition would be one subsequent to the commencement of the estate, which its performance would have the effect of enlarging. So again, if A. were to make a lease for fourteen years to B., on condition that he should not assign; here would be a condition subsequent, for B. could not assign the term till it was vested in him, and therefore his doing so would be an act *subsequent* to the commencement of his estate, and which would have the effect of defeating it.[29] [*107]

tracts are, or are not, of this character. It is not, however, necessary to refer here at length to these decisions, since it very seldom happens that leases are framed so that their operation depends upon a condition precedent, and the covenants in ordinary leases rarely contain provisions of this nature. The question whether, in ordinary contracts, any particular provision should be held to operate as a condition precedent, depends upon the intention of the parties as apparent on the contract, and not upon any formal arrangement of the words. Generally speaking, any stipulation which goes only to a portion of the consideration of the contract, that is to say any stipulation, the breach of which would deprive the party for whose sake it is inserted of only a *portion of the benefit of his contract*, will be construed not to be a condition precedent. This is, however, only a rule of construction to be applied where the contract is ambiguous. See Boone *v.* Eyre, 1 H. Bl. 273, note (a), and the notes to Pordage *v.* Cole, 1 Wms. Saund. 320 a, and to Cutter *v.* Powell, 2 Smith's L. C. 1.

[29] See Com. Dig. *Condition* (C); Ughtred's case, 7 Rep. 9 b. Where a rent-charge was devised to A., so long as her conduct and behavior should be discreet, and meet with the approbation of B., it was held that the discreetness of A.'s conduct and the approbation of B. were conditions subsequent. Wynne *v.* Wynne, 2 M. & Gr. 8,

[*108] *Now the conditions which usually are inserted in leases for years are of this latter sort. They usually are conditions *subsequent*, the effect of which is to defeat the estate in case of a breach of any one of them being committed. And those with which we most commonly meet, are framed for the purpose of enforcing *the due payment of the rent reserved, and the performance of the covenants inserted in the lease*, or for the purpose of restraining the lessee from *assigning* or *underletting* the demised premises.[30]

Conditions of this sort are usually framed in one of two modes. They either provide that, upon breach of the condition, *it shall be lawful for the lessor to re-enter*, [*109] or that, on breach of it, *the *lease shall cease, determine, and become utterly void and of no effect.*

(40 E. C. L. R 464,). So where an annuity was given to a woman for life, if she should so long continue a widow, this was held to be a condition subsequent. Brooke *v.* Spong, 15 M. & W. 153.* See also as to the distinction between conditions precedent and subsequent, the opinions of the judges, and the judgments in Egerton *v.* Earl Brownlow, 4 H. of Lords, C. 1.

[30] The 8 & 9 Vic. c. 106, s. 6, provides that "after the 1st day of October, 1845, a contingent, an executory, and a future interest, and a possibility coupled with an interest, in any tenements or hereditaments of any tenure, whether the object of the gift or limitation of such interest or possibility be or be not ascertained, *also a right of entry, whether immediate or future, and whether vested or contingent, into or upon any tenements or hereditaments in England, of any tenure, may be disposed of by deed.*" This act does not render assignable a right to re-enter upon premises under lease, for a condition broken. It applies only to an original right where there has been a disseisin, or where a party has a right of entry, and nothing but that remains. Hunt *v.* Bishop, 8 Exch. 675. In this case the word "re-enter" had been left out by mistake in the proviso for re-entry. The Court appeared to think that the omission was immaterial.

In the former case, that, I mean, in which on breach of the condition it is provided that the lessor may re-enter, it was always held that if, after the breach had been committed, he received rent which had become due since the breach, he thereby recognized the tenancy as a continuing one, and could not be allowed afterwards to take advantage of the condition. Thus in Goodright *v.* Davids, Cowp. 803, where the lease contained a covenant not to underlet without license, and also a proviso that, in case of non-observance of the covenants, the lessor might re-enter, the covenant was broken, but the lessor received rent which had accrued due afterwards; it was held that he had thereby waived his right to take advantage of the forfeiture. Lord Mansfield said, "To construe this acceptance of rent due since the condition broken a waiver of the forfeiture is to construe it according to the intention of the parties. Upon the breach of the condition the landlord had a right to enter. He had full notice of the breach, and does not take advantage of it; but accepts rent subsequently accrued. That shows he meant that the lease should continue. Cases of forfeiture are not favored in law, and where the forfeiture is once waived, the Court will not assist it."(*a*) See

(*a*) Forfeitures are not favored in law. When the lease contemplates any action by the landlord, or his agency is in any way involved in the act which is to work a forfeiture, it has been held that he must manifest his intention to insist on the forfeiture at the time. When the condition of the lease was that the lessee, at the end of each year, should give security for the next year's rent, it was held in North Carolina, that a failure to comply with the condition by the lessee will not work a forfeiture, unless the landlord demand performance at the end of the year. Tate *v.* Crowson, 6 Iredell, 65. And when rent is payable on a day certain, it must be demanded on the premises, and on the day. Jones *v.* Reed, 15 N. Ham., 68; Stœver *v.* Lessee of

also Roe *v.* Harrison, 2 T. R. 425; Doe *d.* Gatehouse *v.* Rees, 4 Bing. N. C. 384, (33 E. C. L. R. 384,). Nor is acceptance of rent the only means by which the [*110] lessor may waive his *right to take advantage of the forfeiture. Other acts on the part of the landlord, recognizing the term as still existing, have been held to have the same effect as the receipt of rent.(*a*) See Doe *v.* Meux, 4 B. & C. 606, (10 E. C. L. R. 722,); Doe *v.* Birch, 1 M. & W. 402;* Doe *d.* Baron & Baroness de Rutzen *v.* Lewis, 5 A. & E. 277, (31 E. C. L. R. 613,). And I think that from these cases we may safely draw the inference that any act upon the part of the lessor, showing an unequivocal intention to treat the lease as subsisting, has the effect of putting an end to his right to take advantage of the forfeiture.[31]

[31] If the landlord brings ejectment to enforce the forfeiture, or, it seems, if he does any other unequivocal act indicating his intention to avail himself of the option given him to determine the lease, and this option is communicated to the lessee, the lease is determined, and the subsequent receipt of rent will not set it up

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Whitman, 6 Binn. 419; McCormick *v.* Connell, 6 S. & R., 151.— But when forfeiture for non-payment of rent at the day is occasioned by accident or mistake, the Court will interfere to protect the tenant, on his bringing the amount of the rent, interest, and costs into Court for the landlord. Atkins *v.* Chilson, 11 Met., 112. A New York Statute provides that a diversion of salt works to other purposes than the manufacture of salt shall work a forfeiture of the lease-hold estate; upon this statute it has been decided that the diversion to cause a forfeiture, must be a diversion of the whole, that building a dwelling house on portion of the premises would not cause a forfeiture. Hasbrook *v.* Paddock, 1 Barb., 635.

Where a lease provides that if the rent be not paid at the day appointed, it is to be recovered in an action of debt, the language precludes the idea of forfeiture. De Lancy *v.* Ga. Nun., 12 Barb. 125.

(*a*) See Jackson *v.* Shelden, 5 Cow. 448; Coon *v.* Brickett, 2 N. H. 163; Newman *v.* Rutter, 8 Watts. 51.

But *as I have already stated, the condition, instead of providing that *upon breach the lessor* [*111]

again. See Doe *d.* Morecraft *v.* Meux, 1 C. & P. 346, (12 E. C. L. R. 207,) and Jones *v.* Carter, 15 M. & W. 718.* In the last mentioned case the landlord served upon the tenant a declaration in ejectment for a forfeiture by reason of several breaches of the covenants in the lease. The Court held that this act operated as a final election on the part of the landlord to determine the lease, and that he could not afterwards sue for rent due, or in respect of covenants broken, after the service of the declaration, although there had not been any judgment in the ejectment. Where, however, a breach of covenant is continuing, as, for instance, where a tenant, who is bound to keep the premises insured at all times during the demise, leaves the premises uninsured for a time, the receipt of rent is only a waiver of that portion of the breach which has occurred at the time when the rent is received. See Doe *d.* Ambler *v.* Woodbridge, 9 B. & C. 376, (17 E. C. L. R. 173,); Doe *d.* Flower *v.* Peck, 1 B. & Ad. 428, (20 E. C. L. R. 546,); Doe *d.* Muston *v.* Gladwin, 6 Q. B. 953, (51 E. C. L R. 953,); and Doe *d.* Baker *v.* Jones, 5 Exch. 498. In the last of these cases the lessee was bound, under a penalty of forfeiture, to repair the demised premises, and to keep them with all necessary reparations as often as need should require during the term. He allowed the premises to be out of repair, and afterwards the landlord received rent. The tenant then proceeded to pull down a portion of the buildings, and to make excavations, with the *bonâ fide* intention of repairing. It was held that the lease was forfeited, and that the reasonable time for reparation did not commence afresh after the receipt of the rent. An absolute unqualified demand of rent, which is due after a forfeiture, appears to be a waiver of it. See the judgment of Baron Parke in Doe *d.* Nash *v.* Birch, 1 M. & W. 408.* A demand, however, of rent, accruing subsequently to the expiration of a notice to quit is not necessarily a waiver of the notice. Blyth *v.* Dennett, 13 C. B. 178, (76 E. C. L. R. 178,). The reason of this distinction appears to be that in the case of a notice to quit, the tenancy is put an end to by the agreement of the parties, and therefore the determination cannot be waived without the assent of both; but in the case of a forfeiture, the lease is voidable only at the election of the lessor. See the observations of Mr. Justice Maule in the case last cited.

may re-enter, sometimes provides that *upon breach the lease shall become void and of no effect.* And where these words were used it was long supposed that the right to take advantage of the forfeiture could not be waived, for that in the other case the lease was to become void, not on the breach being committed, *but on the landlord's entering to take advantage of it*, and this being an act to be done by the landlord, he might, if he pleased, decline to perform it; and if he did so decline, the lease would, of course, still remain *in esse.* But it was thought that, when it was provided *that it should become void upon breach of the condition*, there, as no further act was to be done by any one to put an end to it, it would determine of itself the moment the condition was broken. And it was further [*112] *thought that the lessor could not waive or prevent this consequence, since it was to take place independently of any act to be done by him. And this was laid down by Lord Coke, 1 Inst. 214 b, in the following words: "When the estate or lease is *ipso facto* void by the condition or limitation, no acceptance of the rent after can make it to have a continuance; otherwise it is of a lease or estate voidable by entry." See also Finch *v.* Throckmorton, Cro. Eliz. 220, and Doe *d.* Simpson *v.* Butcher, Dougl. 50. However, it is necessary to observe that this distinction between conditions rendering the lease voidable by entry, and the forfeiture occasioned by the breach of which was, therefore, admitted to be waivable, and conditions rendering the lease void upon the breach, and the forfeiture occasioned by which was therefore thought incapable of being waived, has been much shaken, if not altogether overruled by subsequent authorities. For, in the first place, it has been held that even where it is provided that the lease shall *be*

come void upon the tenant's committing a breach of the condition, the meaning of that is, that it shall become void *at the option of the landlord*, for that to allow the tenant to exonerate himself from payment of the rent by his own tortious breach of the condition, would be to permit him to take advantage of his own wrong; and accordingly in Doe *v.* Bancks, 4 B. & A. 401, (6 E. C. L. R. 535,) and Rede *v.* Farr, 6 M. & S. 121, it was decided that, in all such cases, it is at the option of the *lessor, not of the lessee, whether the lease shall or shall not determine upon breach of the conditions. This was advancing some way towards the abolition of the old distinction between voidable and void leases; since, to give the lessor an option whether the lease should be void or not, was to give him a right which, like other rights, was capable of being waived, of exercising that option in a particular manner; and there seems no reason why the acceptance of rent subsequent to the committal of the breach should not be permitted to operate as a waiver. And accordingly the cases of Arnsby *v.* Woodward, 6 B. & C. 519, (13 E. C. L. R. 238,); Doe *v.* Birch, 1 M. & W. 402;* and particularly Roberts *v.* Davey, 4 B. & Ad. 664, (24 E. C. L. R. 292,) have gone far, and perhaps have gone the whole way towards putting an end to the distinction taken by Lord Coke; and the opinion prevalent in the profession now is, that whether the condition be worded, that the lessor may re-enter, or, that the lease shall become void, acceptance of rent *due after breach* by the lessor, will have the effect of confirming the tenancy.[32] And, at all events, it seems quite clear, from the decisions in Arnsby *v.* Woodward, and Doe *v.* Birch, that the Court will seize upon any [*113]

[32] See Coote's Landl. and Ten. 382.

expressions in the condition which may enable them to construe the effect of it to be such as to render the lease voidable rather than void; thus, although in those two cases, it was provided that the lease should become *null and void*, and that it should be lawful for [*114] the *lessor to re-enter, the Court held that the meaning of the clause was, not that it should be absolutely void, *at all events*, but void only if the lessor thought proper to re-enter, his right to do which he might waive.[33](*a*) Before quitting this part of the subject, I must request you to bear in mind that rent, by the receipt of which the landlord waives the forfeiture, must be rent WHICH BECAME DUE AFTER the breach of condition by which the forfeiture was occasioned; for it is plain to common sense that, if it became due before the forfeiture, the landlord ought not to lose his right of putting an end to the tenancy, by receiving a debt which became due at a time when nothing had happened to render the tenancy voidable. Hartshorne *v.* Watson, 4 Bing. N. C. 178, (33 E. C. L. R. 312,).[34](*b*)

[33] See also the judgment in Jones *v.* Carter, 15 M. & W. 724* where Baron Parke said, "Though the lease is declared to be *void* for breach of covenant, it is perfectly well settled that the true construction of the proviso is, that it shall be void *at the option* of the lessor; and consequently, on the one hand, if the lessor exercises the option that it shall continue, the lease is rendered valid; if he elect that it shall end, the lease must be determined."

[34] It is obvious, as is explained in the text, that the acceptance of

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(*a*) Such has been held to be the law in New York and North Carolina. Clark *v.* Jones, 1 Denio. 517; Ludlow *v.* New York and Harlem Railroad Co., 12 Barb. 440; Philps *v.* Chesson, 12 Ired. 194. In Pennsylvania the old doctrine was asserted in Kenrick *v.* Smith, 7 W. & S. 41.

(*b*) To the same effect is Jackson *v.* Allen, 3 Cowen, 220; Hunter

*Now, with regard to the condition, *that the tenant shall not assign without his landlord's* [*115]

rent affirms the existence of the tenancy during that period only in respect of which the rent is paid. It follows, therefore, that the landlord may receive any rent which became due before the alleged forfeiture, or indeed up to the day of the alleged forfeiture, or bring an action to recover it without waiving the forfeiture. It is only by receiving or claiming rent due *since* the forfeiture, that it is waived See Co. Litt. 211 b; Pennant's Case, 3 Rep. 64 b; and Coote's Landl. and Ten. 384. The effect of a distress is different, for distraining even for rent due before, or at the time of the forfeiture, appears to amount to a waiver. Doe *d.* Flower *v.* Peck, 1 B. & Ad. 436, (20 E. C. L. R. 549,). Under the old law the effect of a distress was in this respect quite clear; for as no distress could be made after the determination of the tenancy, the act of distraining was obviously an acknowledgment of a then existing tenancy. Co. Litt. 47 b. This appears to be so even since the 8 Anne, c. 14, s. 6, which allows distresses to be made within six months after the determination of the tenancy; for this statute seems to apply only where the tenancy is determined by lapse of time, or perhaps by notice to quit, and not where it ceases by reason of a forfeiture. See Doe *d.* David *v.* Williams, 7 C. & P. 322, (32 E. C. L. R. 635,). And assuming this construction of the act to be correct, a distress is, even now, an acknowledgment that the tenancy has not, up to the time of distraining, been *determined by forfeiture.* In Bailey *v.* Mason, 2 Irish Com. Law R. 582, a question arose as to the effect of a statement by the landlord at the time of the distress, that he did not intend to waive a pending ejectment. In this case the plaintiff after the service of a writ in ejectment for non-payment of rent, distrained for rent subsequently due. The notice of the distress stated that it was made *without prejudice to the year's rent due, and for which ejectment proceedings were then pending.* The Court of Common Pleas in Ireland held that this distress did not operate as a waiver of the *ejectment.* No question appears to have arisen as to

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v. Osterhoudt, 11 Barb. Sup. Ct. 33, but no act of the lessor will waive the forfeiture unless he knows that the forfeiture has been incurred. Jackson *v.* Brownson, 7 Johns. 227; Jackson *v.* Schietz, 18 Johns. 174.

license, and, sometimes also, *that he shall not underlet*—this condition is not unfrequently inserted in leases. The object of it is to prevent the tenant from assigning his interest in the premises to an insolvent person or person of bad character, and thereby leaving them at the mercy of such an occupier. It has been held in several cases, that a condition *not to assign* is not broken by an assignment by operation of law, as, for instance, under the bankrupt laws, in case of the tenant's bankruptcy, or under the insolvent laws in case of his insolvency, or by means of an execution, [*116] *for in such cases the assignment is not the act of the tenant but of the law (see Doe *v.* Bevan, 3 M. & S. 353.)[35](*a*) But, though a condition simply

whether this notice prevented the distress from operating as a waiver of the *forfeiture;* but it is difficult to see how it could have this effect.

[35] See Doe *d.* Mitchinson *v.* Carter, 8 T. R. 57; and Doe *d.* Lord Anglesea *v.* Rugeley, 6 Q. B. 107, (51 E. C. L. R. 107,). Where a tenant covenanted that he would "not assign, transfer, or set over, or otherwise do or put away the indenture of demise, or the premises thereby demised," it was held that this covenant was not broken, so as to work a forfeiture, by his making an underlease. Crusoe *d.* Blencowe *v.* Bugby, 2 W. Bl. 766; see also the judgment in Church *v.* Brown, 15 Ves. 265; and Kinnersley *v.* Orpe, 1 Dougl. 56. In Doe *d.* Holland *v.* Worsley, 1 Camp. 20, however, Lord Ellenborough held at Nisi Prius that a proviso that a tenant should "not assign or

(*a*) See Jackson *v.* Silvernail, 15 Johns., 278; Jackson *v.* Kip, 3 Wend., 231.

It is also held that a condition not to assign is not broken by underletting. When the condition was that the lease should be void if the lessee assigned, the condition was held to be valid, but it was said under such a condition the lessee might associate others with himself in the enjoyment of the term, or might make a sub-lease.—Hargrave *v.* King, 5 Ired. Eq., 430. Nor is a condition not to underlet broken by an assignment. Spear *v.* Fuller, 8 N. Ham., 174.

restraining *assignment*, does not comprehend these cases, yet, by the insertion of special words in the condition, they may be comprehended, and the lease put an end to upon their arising, since they are the very events against which it is most incumbent on the landlord to protect himself. Roe *v.* Galliers, 2 T. R. 133; Davis *v.* Eyton, 7 Bing. 154, (20 E. C. L. R. 77,).[36]

*There is a very singular point arising upon the construction of this condition not to assign without license,—a point, the state of the law regarding which does certainly appear opposed to common sense, [*117]

otherwise part with the indenture of lease, or the premises thereby demised, or any part thereof, *for the whole or any part of the term* thereby granted to any person or persons whomsoever without the license, &c.," was broken by an underlease. Letting lodgings has been held not to be a breach of a covenant not to "grant any underlease or leases for any term or terms whatsoever, or let, assign, transfer, set over, or otherwise part" with the premises; Doe *d.* Pitt *v.* Laming, 4 Camp. 77. A condition not to "set, let, or assign over" the demised premises "or any part thereof without license, &c.," includes the making of an underlease. Roe *d.* Gregson *v.* Harrison, 2 T. R. 425. See also Roe *d.* Dingley *v.* Sales, 1 M. & S. 297; and Greenaway *v.* Adams, 12 Ves. 395. A Court of Equity will not relieve against a forfeiture caused by assigning without license. Hill *v.* Barclay, 18 Ves. 63.

[36] See as to stipulations of this description, Rouch *v.* The Great Western Railway Co., 1 Q. B. 51, (41 E. C. L. R. 432,); Doe *d.* Wyndham *v.* Carew, 2 Q. B 317, (42 E. C. L. R. 692,); and Doe *d.* Lloyd *v.* Ingleby, 15 M. & W. 465.* In the last of these cases the lease contained a proviso for re-entry in case the lessee should during the term commit any act of bankruptcy, whereupon a commission or fiat in bankruptcy should issue against him, and under which he should be *duly found and declared a bankrupt*. The lessee became bankrupt, in fact, but the petitioning creditor's debt was improperly proved. The judges of the Court of Exchequer differed in opinion as to whether the tenant had been *duly* found bankrupt within the meaning of this proviso.

but which is, nevertheless, settled by a variety of decisions. It is, that if the landlord *license one assignment* the condition is at an end for ever, and the assignee may afterwards assign without license, Dumpor's Case, 4 Co. 119, Brummel *v.* Macpherson, 14 Ves. 173.[37]

[37] See the notes to Dumpor's Case, 1 Smith's L. C. 15. In order that the license may discharge the condition, it must be given in conformity with its terms; for instance, if the condition is not to assign without license *in writing*, a mere parol license will not operate as a dispensation. Roe *d.* Gregson *v.* Harrison, 2 T. R. 425; Macher *v.* The Foundling Hospital, 1 V. & B. 191. It will be observed that in Dumpor's Case, the lessee having assigned under a license from the landlords, the assignee devised the term to his son; the son died intestate, and his administrator afterwards assigned again. The assignment, which the landlords alleged to be a breach of the condition, and in respect of which they claimed the property, was this last assignment. No question arose in this case, as to the effect of a license to assign upon a *covenant* not to assign; indeed it does not appear that the lease contained such a covenant. It is not by any means clear that the covenant not to assign, is affected by the license to assign. Of course the lessee is not liable in respect of *his* assignment which by the supposition is authorised; but if he covenants that neither he *or his assigns* shall assign, it would seem that he will be liable in respect of a subsequent unauthorised assignment by his assignee. In Paul *v.* Nurse, 8 B. & C. 486, (15 E. C. L. R. 241,) the landlord sued the assignee of the lessee for non-payment of rent. The defendant pleaded that before the rent became due, he had assigned to a third person; and to this the plaintiff replied that there was a covenant in the lease by which the lessee had covenanted for himself, his executors, administrators, and assigns, not to assign without the consent of the lessor, and that no consent had been given. It was held that this replication was bad on demurrer, since the covenant by the lessee did not render the assignment by the assignee void, and the liability of the defendant as assignee was at an end when he had parted with the estate. The Court intimated that the landlord's remedy might be on the covenant not to assign, meaning, apparently that the lessee might be sued on it in respect of the assignment by the assignee, if this assignment could be brought within the terms of the covenant, by which

With *regard to this rule I will merely repeat the observation of Sir James Mansfield in Doe *v.* Bliss, 4 Taunt. 736, namely, "that the profession have always wondered at it, but that it has been law so many centuries that it cannot now be reversed." I will, however, mention one remarkable distinction which subsists between *conditions not to assign* and *conditions not to underlet*, namely, that, in the *former case, if the lessee break the condition by assigning, and the lessor accept rent subsequently accruing, and thereby waives the forfeiture upon the principles which I have been explaining, there is an end of the *condition not to assign* for the rest of the term, but, in the latter case, if the tenant break the condition by making an underlease, and the landlord accept rent accruing subsequently to the breach, he waives, it is true, the right to take advantage of *that particular forfeiture*, but, if the tenant make another underlease, he has a right to take advantage of that [*118] [*119]

the lessee only covenanted for himself, his executors, administrators, and assigns, that *he, his executors or administrators* would not assign. It will be observed, that in this case there was no condition of re-entry in respect of the breach of covenant. See Coote's Landl. and Ten. 289. A general covenant not to assign, in which "assigns" are not mentioned, does not run with the land, for it obviously contemplates that the land shall not pass into the possession of an assignee; but if a condition of re-entry is annexed to such a covenant, it seems that the assignee of the land will take it subject to the condition, and that it is immaterial, in this respect, whether the condition is for the performance of a covenant which runs with the land, or one which is wholly collateral. See 1 Wms. Saund. 288 b; the judgments in Bally *v.* Wells, 3 Wils. 33; and in Doe *d.* Flower *v.* Peck, 1 B. & Ad. 436, (20 E. C. L. R. 549,) and Coote's Landl. and Ten. 291. A covenant not to assign *without license*, which does not assume that no assignment of the land is to be made, would probably, if properly framed, be held to run with the land.

and re-enter, Doe *v.* Bliss, 4 Taunt. 735; Lloyd *v.* Crispe, 5 Taunt. 249, (1 E. C. L. R. 136,).[38]

In the case of a condition for re-entry upon non-payment of rent, it has been held that the condition is not broken unless the rent have been demanded on the very day on which it became due, with a variety of technical formalities, which you will find described in note 16 to Duppa *v.* Mayo, 1 Wms. Saund. 287, and which were so numerous and troublesome as to render it next to an impossibility to take advantage of a breach of that condition. To obviate these difficulties, the parties, sometimes, expressly insert in the condition, terms dispensing with a formal demand of the rent, which, when inserted, are held operative, see Doe *d.* Harris *v.* Masters, 2 B. *& C. 490, (9 E. C L. R. 217,). And in order, as far as possible, to accomplish the same end in cases where the parties have not expressly dispensed with a demand, stat. 4 Geo. 2, c. 28, in cases in which half a year's rent is in arrear and no sufficient distress on the premises, substitutes the service of a declaration in ejectment in the manner pointed out by the Act for the demand which would be otherwise necessary in order to create a breach of the condition. See on the construction of this Act, Doe *v.* Lewis, 1 Burr. 614, Doe *v.* Wandlass, 7 T. R. 117.[39]

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[38] See the judgment of Mr. Justice Patteson in Doe *d.* Griffith *v.* Pritchard, 5 B. & Ad. 781, (27 E. C. L. R. 329,); and the notes to Duppa *v.* Mayo, 1 Wms. Saund. 288 b.

[39] The right of entry in cases of this kind is now regulated by s. 210 of the Common Law Procedure Act, 1852, (15 and 15 Vic. c. 76,) which re-enacts s. 2 of the 4 Geo. 2, c. 28, with slight differences, rendered necessary by the new procedure in ejectment. The decisions upon the 4 Geo. 2, c. 28, are applicable to this portion of the Common Law Procedure Act, 1852. The 4 Geo. 2, c. 28, was held not to apply unless the landlord had a right of re-entry *in respect of the*

*Having thus touched on the points relative to the *creation* of a tenancy, viz., *the capacity of* [*121]

non-payment of half a year's rent. Doe *d.* Dixon *v.* Roe, 7 C. B. 134, (62 E. C. L. R. 134,); nor did it apply where the right of re-entry was not absolute; as, for instance, where the power was only to re-enter and hold the premises until the rent was satisfied. Doe *d.* Darke *v.* Bowditch, 8 Q. B. 973, (55 E. C. L. R. 973,). It is essential to proceedings under these statutes, that no sufficient distress should be found on the premises. Doe *d.* Smelt *v.* Fuchau, 15 East. 286. Every part of the premises should be searched. Rees *d.* Powell *v.* King, mentioned in the judgment in Smith *v.* Jersey, 2 Bro. & Bing. 514, (6 E. C. L. R. 253,). The goods must, however, be so visibly on the premises, that a broker going to distrain and using reasonable diligence would find them. See Doe *d.* Haverson *v.* Franks, 2 Car. & Kir. 678, (61 E. C. L. R. 678,). The statutes speak of no sufficient distress being "found" on the premises. If, therefore, the tenant locks up his doors so that the landlord cannot enter upon the premises to distrain, proof of this fact is enough without showing that no sufficient distress was on the premises. Doe *d.* Chippendale *v.* Dyson, 1 Moo. & M. 77, (22 E. C. L. R. 478,). It was at one time thought that where more than half a year's rent was due, it was not enough to show that there was no distress sufficient to countervail the whole arrears due. Doe *d.* Powell *v.* Roe, 9 Dowl. 548; Doe *d.* Gretton *v.* Roe, 4 C. B. 576, (56 E. C. L. R. 576,). But this is not the true construction of the statute. Cross *v.* Jordan, 8 Exch. 149. In Doe *d.* Scholefield *v.* Alexander, 2 M. & S. 525, a lease contained a proviso of re-entry if the rent was in arrear for twenty-one days after the time of payment "being lawfully demanded." Lord Ellenborough thought that notwithstanding the 4 Geo. 2, c. 28, a demand was still necessary, since it was made so by the express contract between the parties. The other Judges of the Court of King's Bench held, however, that as before the statute, every clause of re-entry contained these words in effect, although not in terms, their express insertion in the proviso did not vary its legal effect; and consequently that the statute, even in this case, rendered any demand unnecessary. And this view of the act has been acted upon in a later case. See Doe *d.* Earl of Shrewsbury *v.* Wilson, 5 B. & A. 384, (7 E. C. L. R. 131,).

the lessor, that of the lessee, the subject-matter of demise, and *the general nature and ordinary terms of the demise itself*, I shall proceed in the next Lecture to the second principal head into which I divided the whole subject, comprising those points which arise *during the tenancy*.(*a*)

(*a*) Upon the general subject of the preceding chapter, the reader is referred to Judge Hare's note to Dumpor's case, in the first volume of the American edition of Smith's Leading Cases, p. 87.

[*122] *LECTURE V.

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You will probably bear in mind that I commenced these Lectures by enumerating the various sorts of tenancy known to the law, and giving a general outline of their nature and qualities. In the next Lecture, confining my attention to those of a degree inferior to

freehold, and premising that it was not my intention to enter upon the consideration of any others, I divided the entire subject into four heads: the *first*, embracing points which *relate to the *commencement* of a tenancy; the *second*, those arising during its *continuance;* and the *third*, those relating to its *termination.* And it is obvious, that as every point arising upon any subject matter whatever must arise either at its *commencement*, during its *continuance*, or at its *termination*, these three heads would have comprehended the entire subject, had it not been that both the parties to the relation of landlord and tenant are liable to be changed, namely, either by the assignment of the term, or that of the reversion, or by certain other means known to the law; and inasmuch as there are peculiar rules relating to such changes, and peculiar rights and liabilities arising out of them, it became necessary to add a *fourth* head, for the purpose of embracing the points consequent upon such a change of parties. [*123]

Having made this division, our first step was, to consider the first of the four heads into which the entire subject had thus been divided, that, namely, which embraced the points relating to the *commencement* of a tenancy; and this, again, naturally subdivided itself into four minor heads; for, as in order to the creation of every tenancy there must be—1st, *a lessor;* 2ndly, *a lessee;* 3rdly, *a subject matter of demise;* and 4thly, *a demise;* it became necessary to say something upon each of these four requisites. That which occupied most of our time was (you will remember) *the demise;* for it was necessary to touch on the three different modes of demise, namely, *by deed*, *by writing without *seal*, and *by parol*, and afterwards to say a few words upon the construction of the usual component parts of a formal lease, namely, the *premises*, the [*124]

habendum, the *reddendum*, the *covenants*, and the *conditions* or *exceptions*. With the consideration of these the last Lecture concluded. And my reason for now recapitulating what has been done is, that I think it absolutely necessary, in treating so extensive a subject as the present, to adopt as clear an arrangement as possible of the various topics which it comprehends, so as to prevent them from confusing and conflicting with one another, and also to bear that arrangement constantly in mind, so as to be always aware what relation the particular topic which we are at any particular moment considering, bears to the entire subject of which it forms a part.

Having, therefore, disposed of those points which relate to the *commencement* of the tenancy, we are about to enter upon those which arise during its continuance. And these, it is obvious, relate to the respective *rights*—1st, of the *landlord* as against the tenant; 2ndly, of the *tenant* as against the landlord.(*a*)

(*a*) Another set of rights are those of the landlord against third persons. Serious injuries to the inheritance may be committed during the tenancy by strangers, and it is often a question how they are to be redressed or prevented. It is held that the owner of real estate in the possession of a lessee, other than at will, cannot maintain trespass for an injury to his reversionary interest. Lisnow *v.* Ritchie, 8 Pick., 235; Taylor *v.* Townsend, 8 Mass., 411, 415; Cannon *v.* Hatcher, 1 Hill, 260.

Case is generally the proper action to be brought by the reversioner for injuries to the inheritance. It is the remedy for interference with water courses and ways, and the damage which may be occasioned by water falling from the eaves of another's house; when the possession is in a tenant the declaration should state the fact, and allege the injury to the inheritance. Com. Dig., Tit. Act, Case Nuisance B., Jackson *v.* Pesked, 1 M. & S., 234; Alston *v.* Scales, 9 Bing., 3, (23 E. C. L. R, 460); Baxter *v.* Taylor, 4 B. & Adol., 72, (24 E. C. L. R., 41); Bell *v.* Twentyman, 1 Adol & Ellis, N. S., 766,

Now, with regard to the rights of the landlord, as against his tenant, it is obvious that these must concern either the *remuneration* he is to receive for parting with the possession of his property, or the *condition* in which he is entitled to have that property preserved while it is out of his own power to interfere with it; in other words, *his principal rights as against his tenant relate either to the *payment of rent*, or the *performance of repairs*. [*125]

Now, in the first place, with regard to *rent*. I have already, while touching upon the *reddendum* clause inserted in a formal lease, explained the nature of rent, and the difference between *rent-services*, *rent-charges*, and *rents-seck*, of the first of three descriptions are, as I stated, the rents reserved upon all leases for years.[1] The points which remain to be touched upon in this division of the subject are—

1st. With regard to the time at which the rent is payable.

2ndly. With regard to the mode of payment.

3rdly. With regard to the amount payable; and,

4thly. With regard to the means of enforcing payment.

[1] *Ante*, p. 89.

(41 E. C. L. R., 767); Tucker *v.* Newman, 11 Adol. & Ellis, 40, (39 E. C. L. R., 21); Egrement *v.* Pulman, 1 Moo. & Malk., 404, (22 E. C. L. R., 551); Davis *v.* Jewett, 13 N. H., 88; Sumner *v.* Tileston, 7 Pick., 198; Ripka *v.* Sergeant, 7 Watts & Ser., 9; Hale *v.* Oldroyd, 14 M. & W., 789;* Bellows *v.* Sackett, 15 Barb., 96.

In one case, where the lease was of a factory moved by water power, it was held that the lessee took, by implication, all the right to use the water which the lessor had. But if more water was used than the lessor had a right to, and injury was done thereby to any one, the party injured must look for redress to the lessee and not to the lessor. Wyman *v.* Farrar, 35 Maine, 64.

We will consider these four points in order.

And with regard to the first, namely, the *time* at which the rent is payable. Properly speaking, the rent reserved upon a lease is not payable until the midnight of the day specified in the lease for payment of it.(*a*) Cutting *v.* Derby, 2 W. Bl. 1077, and the judgment in Leftley *v.* Mills, 4 T. R. 170. Although, where it is necessary to make a *demand* of it in order to create a forfeiture by breach of such a condition of re-entry for non-payment of rent, as I described in the last Lecture, all the authorities agree that such demand must be [*126] made **before sunset;* see Duppa *v.* Mayo, 1 Wms. Saund. 287, and Tinckler *v.* Prentice, 4 Taunt. 549;[2](*b*) for which anomaly they assign a singular and very primitive reason, namely, that the tenant may have light to count the money. And the same rule prevails where it is necessary that the tenant should make a *tender* of the rent to prevent the forfeiture, which he must do where the proviso is so worded as to dispense with a formal demand on the part of the landlord.[3] For all other purposes, however, the rent becomes due upon the midnight of the day on which it

[2] See also the judgment in Haldane *v.* Johnson, 8 Exch. 694. It is no answer to an action upon a covenant to pay rent (no particular place for the payment being mentioned), that the tenant was on the demised premises for half an hour before, and continued there until the setting of the sun on the day on which the rent was payable, and was then ready to pay it if the landlord had been willing to accept it, but that no one came to receive it. For it is the duty of the covenantor to seek out the person to whom the money is to be paid, and to pay it, or tender it to him, on the appointed day.

[3] See Duppa *v.* Mayo, cited above.

(*a*) In a lease for a year, if no time is fixed for the payment of the rent, it is not payable until the end of the year. Menough's Appeal, 5 W. & S. 432; Boyd *v.* McCombs, 4 Barr, 148. See *ante*, note on page 121.

(*b*) McCormick *v.* Connell, 6 S. & R. 151.

was reserved payable ; and, therefore, if the landlord die before midnight of that day, the rent goes to his heir, as an incident to the reversion, (supposing it to be a reversion which descends,) not to his executor, who would have taken it, however, had the deceased survived midnight; since, then, it would have been a *debt* which, being personal property, would pass to the personal representative. Duppa *v.* Mayo, 1 Wms. Saund. 287; Clun's Case, 10 Co. 127.[4]

*Secondly, as to the *mode of payment.* Of course, where payment is made in cash, no difficulty can arise on this part of the subject, and I need hardly mention that such a payment would be governed by the ordinary rules which prevail between debtor and creditor, namely, that if made to an authorized agent of the landlord, it would be as effectual as if made to the landlord himself;[5] that a remittance by the post if authorized either expressly or by the previous usage of the parties, would be a sufficient payment ;[6] and that [*127]

[4] Rent is due and payable, in one sense, upon the morning of the day on which it is reserved ; for, at common, law, if it was paid on the morning of that day to a lessor, who died before the day was over, the payment was good as against the heir. See Clun's case, cited above, and Dibble *v.* Bowater, 2 E. & B. 564, (75 E. C. L. R. 564,). See also Lord Rockingham *v.* Penrice, 1 P. Wms. 177 ; a case which was decided before the statute of apportionment, the 11 Geo. 2, c. 19. In this case a lessor, who had made a lease under a power, died before sunset on the rent day, and the tenant paid the rent on the same day. The Court held that this payment was good to discharge the tenant, but that the executor of the lessor was liable in equity, to account for the amount to the heir or remainder-man. See as to this case, 1 Williams on Executors, 702.

[5] See Goodland *v.* Blewith, 1 Camp. 477; Owen *v.* Barrow, 1 N. R. 101; and Wilkinson *v.* Candlish, 5 Exch. 91.

[6] See Warwick *v.* Noakes, Peake, 67 a; and as to payment by giving or sending a cheque. Pearce *v.* Davis, 1 M. & Rob. 365; and Hough *v.* May, 4 A. & E. 954, (31 E. C. L. R. 415,).

the tenant would, like other debtors, have a right to tender a receipt for signature under stat. 43 Geo. 3, c. 126, s. 5.[7] In these respects the situation of landlord and tenant is the same as that of any other debtor and creditor, but there are certain peculiarities arising out of the peculiar nature of the demand for rent of which it will be proper to take notice.

[*128] *Rent is considered by the law as a demand of a very high nature, higher even than a demand upon a bond or other specialty, although, in case of death, it ranks as against the executor or administrator, with specialty debts, and is entitled to be paid along with them, and before simple contracts.(a) See Thompson *v.* Thompson, 9 Price, 471.[8] It follows from this, that if a bond be given for rent, the original demand will not merge in the specialty,[9] as you are probably aware that any demand of an inferior degree would. The same principle applies where the landlord takes a bill of exchange or promissory note in respect of the rent due. You perhaps know that, if a bill or note, payable at a future day, be given on account of an ordinary simple contract demand,[10] for instance, for

[7] The stamps on receipts are now regulated by the 16 & 17 Vic. c. 59.

[8] A debt for rent ranks as high as a specialty debt, whether the rent be reserved by lease in writing, or by parol, because the rent issues out of the realty. Willett *v.* Earle, 1 Vern. 490; Gage *v.* Acton Carth, 511.

[9] See Buller's N. P. 182.

[10] Or, even if given on account of a judgment debt. Baker *v.* Walker, 14 M. & W. 465.*

(a) In Pennsylvania, in the distribution of a decedent's estate, rents not exceeding one year are preferred to all other claims except funeral expenses, medicine furnished, and medical attendance given during the last illness of the decedent, and servant's wages not exceeding one year. Act 24 Feb. 34, s. 21.

the price of goods sold and delivered, it will suspend the right to sue for the original demand until the time has arrived at which the bill or note was payable; but it is otherwise where such an instrument is given on account of rent, for that, being a debt of a superior degree, cannot be suspended by a security of an inferior class, and, therefore, if a landlord take a note *at three months* on account of rent, he may nevertheless distrain the next day if *he think proper. Davis *v.* Gyde, 2 A. & E. 623, (29 E. C. L. R. 291,).[11](*a*) [*129]

Thirdly, with regard to the *amount* of payment. There are several payments in the nature of cross demands, which the tenant, for reasons arising out of his situation with regard to the land, is entitled to have

[11] The right to distrain is not suspended by taking a security for the rent, even although it be under seal, such, for instance, as a bond. 1 Roll. Ab. *Debt, Extinguishment* (A), pl. 2, p. 605; nor by an agreement to take interest on rent in arrear. Skerry *v.* Preston, 2 Chit. 245. In Parrot *v.* Anderson, 7 Exch. 93, a tenant who owed rent gave a bill of exchange on account of it to the agent of his landlord. The agent indorsed the bill over to a third person, and gave the landlord credit for the amount, as if the tenant had paid the rent in money. The agent paid the amount to the landlord, and the latter afterwards distrained for the rent. The Court held upon these facts that it was a question for the jury whether the transaction amounted to a discount of the bill by the agent, in which case the rent was paid, and the distress was improper, or to a mere advance of the rent by the agent to the landlord, upon which supposition he was still entitled to distrain.

(*a*) Snyder *v.* Kunkleman, 3 Penna., 490; Chipman *v.* Martin, 13 Johns., 240; Bantleon *v.* Smith, 2 Binney, 146; Gordon *v.* Correy, 5 Binney, 552; Denham *v.* Harris, 13 Alab., 465; Peters *v.* Newkirk, 6 Cow., 103; Baily *v.* Wright, 3 McCord, 484; Cornell *v.* Lamb, 20 Johns., 407; Price *v.* Limehouse, 4 McCord, 544; Printems *v.* Helfrid, 1 Nott & McCord, 187; Bailey *v.* Wright, 3 McCord, 484.

deducted out of the amount of the rent, and considered as payment of so much of it. Thus where A. leases to B., and B. underlets to C., if B.'s rent falls into arrear, C. will be justified, in order to protect himself from A.'s distress, in paying the arrears to A., and he will be allowed to treat those payments as payment of so much of his own rent to B. Taylor *v.* Zamira, 6 Taunt. 524, (1 E. C. L. R. 736,); Sapsford *v.* Fletcher, 4 T. R. 511; Exall *v.* Partridge, 8 T. R. 308; Johnson *v.* Jones, 9 A. & E. 809. (36 E. C. L. R. 293,).[12] The justice and good sense of this

[12] See Wheeler *v.* Branscombe, 5 Q. B. 373, (48 E. C. L. R. 373,). The general rule is that the tenant can treat as a discharge of the rent only those payments to third parties, which are made in satisfaction of a charge on the land, or of a debt of the landlord. See Boodle *v.* Cambell, 7 M. & G. 386, (49 E. C. L. R. 386,); Graham *v.* Allsopp, 3 Exch. 186; and Jones *v.* Morris, ib. 742. In the judgment in Graham *v.* Allsopp, the principle of the decisions mentioned in the text is thus explained :—"The immediate landlord is bound to protect his tenant from all paramount claims; and when, therefore the tenant is compelled, in order to protect himself in the enjoyment of the land, in respect of which his rent is payable, to make payments which ought, as between himself and his landlord, to have been made by the latter, *he is considered as having been authorised by the landlord so to apply his rent due or accruing due.* All such payments, if incapable of being treated as actual payment of rent, would certainly give the tenant a right of action against his landlord as for money paid to his use, and so would, in an action of debt for the rent, form a legitimate subject of set-off. And though in replevin a general set-off cannot be pleaded, yet the Courts have given to the tenant the benefit of a set-off as to payments of this description, by holding them to be in fact payments of the rent itself or of part of it." It would seem from the judgment in Jones *v.* Morris, *ubi. sup.*, that the ground upon which the landlord is presumed to authorise these payments is that he impliedly undertakes to protect the tenant against claims in respect of them. "The principle," said the Court in this case, "of the cases which have decided that a plaintiff in replevin may, in bar to an avowry for rent

*is obvious, for the hardship would be excessive on the tenant, if he were compelled to pay his [*130]

in arrear, plead payments made to a ground landlord, or other incumbrancer, having claims paramount to that of the immediate landlord making the distress, *is that the compulsory payment by the tenant of ground rent or other like charge, is in truth a partial eviction;* and the landlord is presumed to authorise the payment by the tenant of his rent to those who have a claim on the land paramount to his own, and against which (as being a partial eviction) he is bound to protect the party holding under him. If, at the time of the demise, it had been expressly stipulated that the tenant might so apply his rent, or a competent part of it, no question could arise; and even though no such stipulation has been made in express terms, yet the law considers it as implied in every contract of demise. Such payments are, therefore, payments of rent." It appears from the same case that the proper plea, in order to take advantage of these payments in replevin, is *riens in arrere*. A mere claim by a mortgagee of the premises to the rent does not fall within the principle of these decisions, and cannot be set up by the tenant in answer to his landlard's demand of the rent. See Wilton *v.* Dunn, 17 Q. B. 294. In this case the action was brought for use and occupation. The defendant pleaded that the occupation was by leave of the plaintiff, who was mortgagor in possession, that after the occupation the mortgagee who was entitled to the land during the whole period of occupation gave notice to the defendant claiming the mesne profits, and that the latter was until this notice ready and willing to pay the plaintiff, and since it had been given had become liable to pay the mortgagee. The Court held that this plea afforded no defence at law; although it might be that an actual payment to the mortgagee under the pressure of his claim would have been a defence. It must not be inferred from these cases that the action for *money paid* will lie whenever one person discharges the debt of another. In order to maintain this action it must be shown that the money sought to be recovered was paid at the request either *express* or *implied* of the defendant. It is not indeed necessary that it should be paid in discharge of a *debt* of the defendant, but, unless this be the case, an actual request must be proved; the law will not imply one. Where, however, the payment is on account of a debt due from the defendant no actual request is

[*131] own *rent in hard cash, and yet his goods were
to remain liable to distress on account of the
[*132] neglect *of his immediate lessor to pay that
which was justly due to the head landlord.

necessary, but it is sufficient if the circumstances under which it was made show that an implied request took place. See Grissell *v.* Robinson, 3 Bing. N. C. 10, (32 E. C. L. R. 15,); Pawle *v.* Gunn, 4 Bing. N. C. 445, (33 E. C. L. R. 406,); Lubbock *v.* Tribe, 3 M. & W. 607;* Brittain *v.* Lloyd, 14 M. &. W. 762;* Cumming *v.* Bedborough, 15 M. & W. 438;* Pollock *v.* Stables, 12 Q. B. 765, (64 E. C. L. R. 765,); and Lewis *v.* Campbell, 8 C. B. 541, (65 E. C. L. R. 541,). In Spencer *v.* Parry, 3 A. & E. 331, (30 E. C. L. R 166,) a tenant agreed with his landlord to pay some taxes, which by statute, were due from the landlord, but omitted to do so. The landlord was obliged to pay them, and afterwards sued the tenant for money paid to his use. It was held that the landlord could not sue in this form of action, since the money which he had paid had not been paid in discharge of any liability of the tenant, except that which arose from his special contract with the landlord. This appears to be a strong case, for the money was, at least as between the landlord and the tenant, the debt of the latter, and the circumstances might perhaps have been considered, consistently with the other decisions on this subject, to be sufficient to show that he impliedly requested the landlord to pay it. See also Brittain *v.* Lloyd, 14 M. & W. 762;* where it was held that an auctioneer, who had been compelled to pay the auction duty on a sale of lands by auction, might recover the amount from his employer in this form of action. In Hunter *v.* Hunt, 1 C. B. 300, (50 E. C. L. R. 300,) several underlessees held separate portions of premises at distinct rents, the whole of which was held under one original lease at an entire rent, and one of them who was threatened with a distress by the assignee of the reversion on the original lease paid the whole of the rent. It was held that he could not recover from the other underlessees as money paid the proportions of the rent which were due from them. It will be observed that in this case the underlessee who had paid the rent, and the other underlessees whom he sued, were entire strangers so far as related to the sum in dispute, and it is obvious that there was, under the circumstances no implied contract between them with respect to it.

And there is no way of preventing this hardship from occurring, except by allowing him to protect himself by paying the head landlord's demand, and setting it off against that on himself. This he is therefore allowed to do, and it is not necessary to found his right to do so, that the head landlord should have actually threatened to distrain upon him; it is enough that he has demanded payment, for a demand by one who has the power to distrain is treated as equivalent to a threat of distress, and to use the expressions of the Lord Chief Justice Best, in Carter *v.* Carter, 5 Bing. 406, (15 E. C. L. R. 643.) payment to such a person is no more voluntary on the part of the tenant than a donation would be voluntary which was made to a beggar who presented a pistol while he asked charity.[13]

*Upon a similar footing stands the general land tax, where it has not been redeemed; stat. 38 Geo. 3, c. 5, s. 17, enacting that the tenants of houses and lands rated to it shall pay the tax, and deduct the amount from the rent due to their landlords. See on construction of this enactment, Stubbs *v.* Parsons, 3 B. & A. 516, (5 E. C. L. R. 299,). [*133]

[The landlord's property tax, and the tithe rent-charge are also payments in the nature of cross demands, which are practically thrown in the first instance on the tenant, and which he is entitled to have deducted from his rent. See the 5 & 6 Vic. c. 35; Schedule A, No. IV. Rule 9; and the 6 and 7 Wm. 4, c. 71, s. 80.[14]]

[13] See Valpy *v.* Manley, 1 C. B. 594, (50 E. C. L. R. 594,).

[14] See as to how far the statutory rights of the parties in these respects may be varied by express contract, *ante*, pp. 99, 100, notes. As to deducting the property tax, see Franklin *v.* Carter, 1 C. B. 750, (50 E. C. L. R. 750.) If the tenant pays the tax, and omits to deduct it in his next payment of rent, he cannot afterwards

There is another case in which the landlord or his representative sometimes lays claim to a payment less in amount than the whole sum reserved. This happens where the landlord is the owner of a particular estate which determines before the arrival of the day prefixed for payment. Suppose, for instance, that A. being seised for life, demises to B. for ten years, and dies before the expiration of that term, and in the middle of a quarter; or suppose that A., being seised for B.'s life, leases to C. for ten years, and C. dies during the middle of a quarter; in these and such cases as these, [*134] the *question instantly arises, what is to be done with regard to the rent? Is the landlord, on the one hand, to have the whole quarter's rent; or is the tenant, on the other hand, to pay nothing? Or is there to be, as justice would seem to require, a rateable apportionment?

Now, at common law, the tenant would in these cases have had the land without paying any rent at all; for it was a maxim that the claim for rent did not accrue day by day, as that for interest on a loan does, but accrued all at once on the arrival of the time prefixed for payment. And, if, therefore, the landlord's interest determined previously to that day, it determined also the lease derived out of it at a time when nothing was yet due, and, as the relation of landlord and tenant was at an end, nothing could subsequently become due.[15] In order to remedy this inconvenience, the stat 11 Geo. 2, c. 19, sec. 15, enacted that on the

recover the amount as money paid to the use of his landlord. Cumming *v.* Bedborough, 15 M. & W. 438.*

[15] See Clun's Case, 10 Rep. 128 a, and Barwick *v.* Foster, Cro. Jac. 227. At common law apportionment took place when there was a division of the land into distinct portions, but never in respect of time. See Dumpor's Case, 4 Rep. 119; Viner Ab. *Apportionment;*

death [before or on the day on which the rent was reserved] of any *tenant for life* who had made a lease which would determine on his death, the tenant should pay [the whole or] a rateable proportion of the rent reserved to the executor or administrator of the deceased, in respect of the time which had elapsed since the last rent-day. *It was doubted whether this act would have comprised the case of a landlord who had made a lease of property of which he was seised for the life of another, and which lease consequently would determine on that other person's death, or the case of an underlease made out of a lease for years determinable upon lives. However, all difficulties of this sort are now removed, for, by stat. 4 & 5 Wm. 4, c. 22, all leases determinable on the life or lives of any persons whatever are brought within the provisions of the Act of George 2.[16](*b*) [*135]

and the judgment of Mr. Justice Littledale, in Slack *v.* Sharpe, 8 A. & E. 373, (35 E. C. L. R. 408,) (*a*).

[16] The words of s. 15 of the 11 Geo. 2, c. 19, are as follows:— "And whereas where any lessor or landlord, having only an estate for life in the lands, tenements, or hereditaments demised, happens to die before or on the day on which any rent is reserved, or made payable, such rent, or any part thereof, is not by law recoverable by the executors or administrators of such lessor or landlord; nor is the person in reversion entitled thereto, any other than for the use and occupation of such lands, tenements, or hereditaments, from the death of the tenant for life; of which advantage hath been often taken by the under tenants, who thereby avoid paying anything for the same; for remedy whereof be it enacted by the authority aforesaid, that after the 24th day of June, 1738, where any tenant for life shall

(*a*) Bank of Pennsylvania *v.* Wise, 3 W. 404; Cuthbert *v.* Kuhn, 3 Wh. 357; Ingersoll *v.* Sergeant, 1 Wh. 337.

(*b*) Similar enactments have been made in the United States; see in Pennsylvania, Act 24th Feb. 1834, § 2, Pamph. Laws, p. 73.

[*136] *Fourthly, with regard to *the mode in which payment of rent is enforced.*

happen to die before or on the day on which any rent was reserved or made payable upon any demise or lease of any lands, tenements, or hereditaments, which determined on the death of such tenant for life, that the executors or administrators of such tenant for life shall and may in an action on the case, recover of and from such under-tenant or under-tenants of such lands, tenements, or hereditaments, if such tenant for life die on the day on which the same was made payable, the whole, or if before such day then a proportion of such rent according to the time such tenant for life lived, of the last year, or quarter of a year, or other time in which the said rent was growing due as aforesaid, making all just allowances, or a proportionable part thereof, respectively." The 4 & 5 Wm. 4, c. 22, came into operation on the 16th of June, 1834. By s. 1 of this act (after reciting that portion of the 11 Geo. 2, c. 19, which relates to this subject) it is enacted that "rents reserved and made payable on any demise or lease of lands, tenements, or hereditaments which have been and shall be made, and which leases or demises determined or shall determine on the death of the person making the same (although such person was not strictly tenant for life thereof), or on the death of the life or lives for which such person was entitled to such hereditaments, shall, as far as respects the rents reserved by such leases, and the recovery of a proportion thereof by the person granting the same, his or her executors or administrators (as the case may be), be considered as within the provisions of the said recited act. By s. 2, it is provided that after the passing of the act "all rents-service reserved on any lease by a tenant in fee or for any life interest, or by any lease granted under any power (and which lease shall have been granted after the passing of this act), and all rents-charge, and other rents, annuities, pensions, dividends, moduses, compositions, and all other payments of every description, in the United Kingdom of Great Britain and Ireland, made payable or coming due at fixed periods under any instrument that shall be executed after the passing of this act, or (being a will or testamentary instrument) that shall come into operation after the passing of this act, shall be apportioned so and in such manner that on the death of any person interested in any such rents, &c., or other payments, or in the estate,

*I have already mentioned, that, in leases made by deed, a condition enabling the lessor [*137]

fund, office, or benefice from or in respect of which the same shall be issuing or derived, or on the determination by any other means whatsoever of the interest of any such person, he or she, and his or her executors, administrators, or assigns, shall be entitled to a proportion of such rents, &c., and other payments, according to the time which shall have elapsed from the commencement or last period of payment thereof respectively (as the case may be), including the day of the death of such person, or of the determination of his or her interest, all just allowances and deductions in respect of charges on such rents &c., and other payments being made; and that every such person, his or her executors, administrators, and assigns shall have such and the same remedies at law and in equity for recovering such apportioned parts of the said rents &c., and other payments, when the entire portion of which such apportioned parts shall form part shall become due and payable, and not before, as he, she, or they would have had for recovering and obtaining such entire rents &c., and other payments, if entitled thereto, but so that persons liable to pay rents reserved by any lease or demise, and the lands, tenements, and hereditaments comprised therein, shall not be resorted to for such apportioned parts specifically as aforesaid; but the entire rents of which such portions shall form a part shall be received and recovered by the person or persons who, if this act had not passed, would have been entitled to such entire rents; and such portions shall be recoverable from such person or persons by the parties entitled to the same under this act in any action or suit at law or in equity." By s. 3, it is enacted that the act is not to apply "to any case in which it shall be expressly stipulated that no apportionment shall take place, or to annual sums made payable in policies of assurance of any description." It will be observed, that under these statutes, where a lease determines on the death of the lessor (whether strictly tenant for life or not), or on the death of the person for whose life it was held, the remedy for recovering the fraction of rent which is made payable by the statutes in respect of the time elapsed since the last period of payment is given to the personal representative of the lessor, or to the lessor himself, as the case may be. There is, in these cases, no division of the rent between the lessor or his representative and the

[*138] to *re-enter and put an end to the demise in case of the non-payment of rent or the non-

reversioner or remainder-man. Where, however, the lease continues after the death of the lessor, and the rent is apportioned between his representative and the heir or remainder-man, the entire rent must, if reserved on lands, &c., be recovered by the latter, who is bound to account with the personal representative for his share of it. Several cases have been decided upon the latter of these acts. It has been held to extend to Scotland. Fordyce *v.* Bridges, 1 H. of Lords' C. 1. It does not apply, it would seem, where the landlord has put an end to the relation of landlord and tenant by his own act. Oldershaw *v.* Holt, 12 A. & E. 590, (40 E. C. L. R. 295.) It will be observed, that it applies only in terms, to rents &c., made payable under instruments which are executed, or wills which come into operation, after the passing of the act; and it has been held, in consequence of these expressions, that it does not extend to rents which have not been reserved by an instrument in writing. *In re.* Markby, 4 Myl. & Cr. 484. Nor does it apply as between the personal representative and the heir of a tenant in fee. Browne *v.* Amyot, 3 Hare, 173; Beer *v.* Beer, 12 C. B. 60, (74 E. C. L. R. 60,). Its provisions have been extended to the rent-charge substituted for tithes by the Tithe Commutation Acts. See the 6 & 7 Wm. 4, c. 71, s. 86. See further as to the construction of these acts, Lowndes *v.* Earl of Stamford, 21 L. J., Q. B., 371; and Chitty's Statutes (by Welsby and Beavan), tit. *Landlord and Tenant.* A recent act, which has taken away in certain cases the right to emblements and has allowed to tenants an extended occupation as a compensation for the loss of this right, contains a provision for apportioning the rent in the cases to which it relates. See the 14 & 15 Vic. c. 25, s. 1, by which it is provided, that where the lease or tenancy of any farm or lands held by a tenant at rack-rent determines by the death or cesser of the estate of any landlord entitled for his life or for any other uncertain interest, the tenant, instead of claiming emblements, is to continue to occupy until the end of the current year of the tenancy, and is then to give up the possession without any notice to quit. And the succeeding landlord or owner is entitled, under this statute, to recover from the tenant, in the same manner as the original landlord could have done if his interest

performance of the covenants is usually inserted, and I endeavored to explain what is the practical effect of such a condition.[17] Besides this, the landlord may bring an action to recover the rent in arrear. This action, if the lease be by deed, may be either in the form of debt or covenant. If it be not by deed, the action of covenant will not lie, as that is always grounded on an instrument under seal: but *the landlord may bring an action of debt on simple [*139] contract, or of assumpsit for the use and occupation of the premises.[18] The remedies by debt and covenant existed at common law, but the action of assumpsit is given by stat. 11, Geo. 2, c. 19, s. 14, the effect of which you will find discussed in Selwyn's Nisi Prius, title *Use and Occupation*.[19](a) *But the [*140]

had continued, a fair proportion of the rent for the period between the death of the original landlord, or the cesser of his interest, and the giving up of the possession by the tenant. The Lands Clauses Consolidation Act, 1845, (8 & 9 Vic. c. 18,) also authorises the apportionment of the rent where part only of lands comprised in leases for term of years is taken for the purposes of the public undertakings to which this act relates; see s. 119. So, where property is required for the purposes of the Church Building Acts, which is included with other property in a lease or underlease, the rent, and any fine certain to be paid on renewal, may be apportioned, or wholly charged on the part of the property which is not required for these purposes. See the 17 & 18 Vic. c. 32.

[17] See *ante*, p. 108.

[18] Since the Common Law Procedure Act, 1852, (15 & 16 Vic. c. 76,) forms of action, although not abolished so far as they have any substantial existence, need not be mentioned in the writs by which actions are begun, and causes of action of different kinds (except ejectment and replevin) may be joined in the same suit. See ss. 3 & 41.

[19] This statute enabled the landlord to bring an action *on the case*

(a) See Mason *v.* Beldham, 3 Mod., 73.

The 14th sect., 11 Geo., 2 ch. 19 is reported by the judges as in

great and peculiar remedy of landlords is that by *Distress.*(*a*)

for use and occupation, without being liable to be defeated by proof of a parol demise or agreement. It has been held by the Court of Queen's Bench that the action of *debt* for use and occupation lies at common law, and cannot be defeated by proof of a demise (not under seal) reserving a certain rent. Gibson *v.* Kirk, 1 Q. B. 850, (41 E. C. L. R. 807,). In the forms of pleading, introduced by the Common Law Procedure Act, 1852, (15 & 16 Vic. c. 76,) the expressions which made a formal distinction between the actions of debt and assumpsit no longer occur. In order to support an action for use

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force in Pennsylvania. The action for use and occupation is a transitory action, and can only be used when there is no lease or agreement under seal; it is founded on contract, and does not apply to a case of tortious holding. Blume *v.* McClusken, 10 Watts, 380; West *v.* Cartledge, 5 Hill, 488; Codman *v.* Jenkins, 14 Mass. 93; Henwood *v.* Cheeseman, 3 Serg. & Rawle, 500; Pott *v.* Lesher, 1 Yeates, 576; and the holding must be under a contract of demise, Kirtland *v.* Pounsett, 2 Taunt., 145; Wharton *v.* Fitzgerald, 3 Dall., 503; Grant *v.* Gill, 2 Wh. 42; McFarland *v.* Watson, 3 Comst. 286; Gilhooley *v.* Washington, 4 Comst., 217; Bancroft *v.* Wardell, 13 Johns. 489. Actual occupation is not necessary to support the action; it is enough that the defendant might have occupied had he not voluntarily abstained from it. McGunnagle *v.* Thornton, 10 S. & R. 251; Marseilles *v.* Kerr, 6 Wh. 504. But when the premises are occupied by an under-tenant of the lessee, the lessee is liable, as if he were the actual occupant. Moffat *v.* Smith, 4 Comst., 126.

In the late case of Smith *v.* Eldridge, 15 Com. B., 236, (80 Eng. Com. Law, 236,) where A. entered into an agreement (in writing) with B., to take certain premises at a certain yearly rent, the premises to be put in repair by B., and the rent not to be payable until the repairs were completed; A. by his tenant went into possession, and occupied the premises for six months, and then quitted, the stipulated repairs not having been done:—Held that B. was entitled to maintain an action for use and occupation, as upon an implied agreement to pay so much as the occupation might be reasonably worth.

(*a*) See note to pages, 154, 161.

*Distress is a right to take personal chattels found on the demised premises for the purpose [*141]

and occupation, it is not sufficient that the land or premises of one person should have been occupied by another; there must be an actual contract express or implied to pay for that occupation. See the judgments of Mr. Justice Buller in Birch *v.* Wright, 1 T. R. 387; and of Mr. Justice Bayley, in Hall *v.* Burgess, 5 B. & C. 333, (11 E. C. L. R. 485,). Any lengthy examination of the cases on this subject would be out of place here, because in dealing in the text with the remedies of the landlord, it is assumed that the relation of landlord and tenant exists. It may be useful, however, to call attention to some of the later cases on this head. In Winterbottom *v.* Ingham, 7 Q. B. 611, (53 E. C. L. R. 611,) the vendee of an estate was suffered to enter upon the premises and occupy them whilst the title was under investigation. The contract of sale was subsequently determined for want of title, and soon afterwards the purchaser gave up the possession. It was held that the vendor could not recover for the occupation during the time when the title was being investigated, although the jury found that the occupation had been beneficial. In Howard *v.* Shaw, 8 M. & W. 118,* an intending purchaser was let into possession under the contract of sale. The purchase afterwards went off, but the vendee kept possession of the premises for some time. The Court implied under these circumstances a contract on the part of the vendee to pay for the occupation which took place subsequently to the time at which the contract of sale had gone off. It may perhaps be doubted whether the decision is altogether consistent with the other authorities on this subject; for the evidence showed that the vendee kept possession after the contract of sale was put an end to, not with any intention of paying for the occupation, but in order to indemnify himself against the loss of a portion of the deposit money which had not been returned to him. See also Kirtland *v.* Pounsett, 2 Taunt. 145, and Hull *v.* Vaughan, 6 Price, 157. In Tew *v.* Jones, 13 M. & W. 12,* which was an action for use and occupation, it appeared that the defendant and another person had conveyed to the plaintiff an undivided moiety of several houses of which they were seised as devisees in trust under a will. The defendant had occupied one of these houses for a number of years before the sale, and he remained in possession after the

of obtaining payment of the rent arrear. It is a mode of proceeding immemorially known to the common law, and exists in several other cases not arising between landlord and tenant.[20] It is, however, with relation to

conveyance; but as there was no evidence of any express contract between him and the plaintiff in respect of the occupation subsequently to the sale, it was held that the action could not be maintained. In order to support this action under the statute, it is sufficient, if there is an actual holding on the part of the tenant, and he has the power to occupy the premises so far as depends on the landlord. He is therefore liable, although the demised premises have been destroyed by fire. See Pindar *v.* Ainsley, cited in the judgment in Belfour *v.* Weston, 1 T. R. 312; Baker *v.* Holtpzaffell, 4 Taunt. 45; Leeds *v.* Cheetham, 1 Sim. 146; Izon *v.* Gorton, 5 Bing. N. C. 501, (35 E. C. L. R. 198,); Packer *v.* Gibbins, 1 Q. B. 421, (41 E. C. L. R. 607,); Surpliee *v.* Farnsworth, 7 M. & Gr. 576, (49 E. C. L. R. 576,); and *post*, Lecture VII. But an actual entry by the tenant is necessary. Edge *v.* Strafford, 1 Cr. & J. 391;* and Lowe *v.* Ross, 5 Exch. 553. In Smith *v.* Twoart, 2 M. & Gr. 841, (40 E. C. L. R. 883,) a person who had agreed to take a house sent in a servant to clean it, obtaining the key from the previous tenant, and also caused one of the rooms to be repaired. It was held in an action for use and occupation, that this was sufficient evidence of occupation to go to the jury. See also Towne *v.* D'Heinrich, 13 C. B. 892, (76 E. C. L. R. 892,). It is not necessary, however, that the tenant should occupy *personally;* it is sufficient if he allows another person to occupy. Bull *v.* Sibbs, 8 T. R. 327; Bertie *v.* Beaumont, 16 East. 33; Christy *v.* Tancred, 7 M. & W. 127;* 9 M. & W. 438;* 12 M. & W. 316;* and Waring *v.* King, 8 M. & W. 571.* If a lease however is made to two persons, and one holds over at its expiration without the assent of the other, they are not both liable for use and occupation. Draper *v.* Crofts, 15 M. & W. 166.* It would seem that in an action for use and occupation the defendant is entitled to show that the plaintiff's title expired after the demise, and before the period in respect of which the action is brought, although there has not been any eviction, and the possession has not been given up to the plaintiff. See Mountnoy *v.* Collier, 1 E. & B. 630, (72 E. C. L. R. 630,).

[20] See 1 Roll Ab. *Distress* (E.) (F.); 8 Rep. 41 a; 3 Black Com. 7.

those persons alone that I am to consider it, and in doing so it is necessary to enquire,

1st. *What* the landlord may distrain.

2ndly. *Where* he may distrain.

3rdly. *When* he may distrain.

4thly. *How* he may distrain.

5thly. *What he must do* with the distress.

6thly. *What are the tenant's remedies* if the distress be wrongful.

Now, with regard to the first point, namely, *what* may the landlord distrain—the general rule is, that all personal chattels found on the premises may be distrained for rent, whether they be the chattels of the tenant or of a third person. Gilb. Distr. 33; 3 Black. Comm. 7. But, to this rule *there are some exceptions, militating both ways, for there are several cases in which personal chattels found upon the demised premises are protected from the landlord's distress, and there are others again in which things which are not personal chattels and therefore are not, according to the rule I have just stated (which is that of the common law and applies to personal chattels only), liable to distress, have been, by the enactments of particular statutes, rendered distrainable.(a) [*142]

(a) The distress is taken merely by way of pledge for the rent, originally there was no provision for its sale if not redeemed,—now, however, the distrainor is allowed after the lapse of a certain number of days, fixed by statute, usually five, within which the tenant may replevy, to sell the distress and apply the proceeds towards the payment of the rent. The original character of the distress occasioned an exception of all perishable articles. They could not be distrained because they could not be returned in the condition in which they were taken. Given *v.* Bland, 3 Blackford, 64; Morley *v.* Pencombe, 2 Exchequer, 101.

In Pennsylvania by the Act of 1849, property to the value of

There are, I have just said, certain cases in which personal chattels found on the demised premises are exempted from the landlord's distress. You will find those enumerated and classified in the celebrated case of Simpson *v.* Hartopp, Willes, 512,[21] where the Lord Chief Justice Willes, who is himself the reporter of the case, states in his judgment, that there are some things *absolutely*, some *conditionally*, privileged from being subjects of distress. Thus, in the first place, *fixtures* or things annexed to the freehold are absolutely privileged against it,[22] a class upon which I need hardly

[21] See the notes to this case, 1 Smith's L. C. 191.

[22] See Co. Litt. 47 b. In Gorton *v.* Falkner, 4 T. R. 567, Lord Kenyon lays down this rule in the following terms—"We may lay it down as a general proposition, that at this time all movable chattels are distrainable, whatever may have been said in ancient times to restrain the distress on those things which partook of the profits of the soil. Now, not only living animals, but also inanimate things, may be distrained. But to this general proposition there are several exceptions; some things are exempt from being distrained on account of the place, and others on account of the things themselves. The anvil in the smith's shop, and the millstone, are privileged, *because they are affixed to the freehold;* and a temporary removal of the one or the other for the purpose stated in the argument (the purpose of cleaning them) is not sufficient to destroy that privilege." Another reason why fixtures are not distrainable is, that as they cannot be severed without injury, it is not possible to restore them in the same condition as when they were seized; and, at common law, a distress being a mere pledge, nothing could be distrained which could not be returned in the same plight; Termes de la Ley, *Distress*, 69 a; Co. Litt. 47 a; a rule which is still in force, subject to some statutory exceptions as to growing crops and matters of this nature. Morley *v.* Pincombe, 2 Exch. 101. It is also explained in the judgment of

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three hundred dollars, exclusive of all wearing apparel of the defendant and his family, and all bibles and school books in use in the family is exempted from levy and sale on execution, or by distress for rent.—Act 9th April, 1849. § 1, Pam. Law, p. 533.

have observed, since I had confined the description of things liable to be distrained to chattels personal. It

the Court of Exchequer, in Hellawell *v.* Eastwood, 6 Exch. 311, that what is affixed to the freehold becomes part of the thing demised, and the nature of a distress is not to resume part of the thing itself for the rent, but only the *inducta et illata* upon the soil or house. The following cases will show the application of the rule that fixtures are not distrainable. In Niblet *v.* Smith, 4 T. R. 504, it was held that a lime-kiln affixed to the freehold could not be distrained. Fixtures, such as kitchen ranges, stoves, coppers, and grates are not distrainable, although they may be removed by the tenant during the term. Darby *v.* Harris, 1 Q. B. 895, (41 E. C. L. R. 828,). In Wiltshear *v.* Cottrell, 1 E. & B. 674, (72 E. C. L. R. 674,) it was held that a granary, resting by its mere weight upon staddles built into the land, was not a fixture within the meaning of a deed by which all the fixtures appertaining to a farm were conveyed. In many of the cases on this subject, questions have arisen as to the degree of annexation which is necessary in order to bring particular articles within the rule which exempts fixtures from distress. In Duck *v.* Braddyll, M'Cl. 217, it was doubted whether machinery bolted to the floor of a factory was distrainable. In Trappes *v.* Harter, 2 Cr. & M. 177,* Lord Lyndhurst said : "The screwing of a stocking-frame to the floor to keep it steady would not make it a fixture." The judgment of the Court of Exchequer, in Hellawell *v.* Eastwood, 6 Exch. 295, throws great light on this subject. In this case a portion of some machinery used for the purpose of spinning cotton was fixed by screws to the wooden floor of a mill, and another part of it was fastened by screws sunk into holes in the stone flooring, secured by molten lead poured into them. It was held that this machinery was distrainable for rent. In delivering the judgment of the Court, Baron Parke said, in reference to the question whether the machines, when fixed, were parcel of the freehold: "This is a question of fact depending on the circumstances of each case, and principally on two considerations: first, the mode of annexation to the soil or fabric of the house, and the extent to which it is united to them ; whether it can easily be removed, *integrè, salvè, et commodè* or not, without injury to itself or the fabric of the building; secondly, on the object and purpose of the annexation ; whether it was for the

[*143] may, however, be worth *while to remark a difference which exists in this respect between

permanent and substantial improvement of the dwelling, in the language of the Civil Law, *perpetui usus causâ*, or in that of the Year Book, *pour un profit de l'inheritance* (20 Hen. 7, 13), or merely for a temporary purpose, or the more complete enjoyment and use of it *as a chattel*. Now, in considering this case we cannot doubt that the machines never became part of the freehold. They were attached slightly, so as to be capable of removal without the least injury to the fabric of the building, or to themselves; and the object and purpose of the annexation was, not to improve the inheritance, but merely to render the machines steadier, and more capable of convenient use as chattels. They were never a part of the freehold any more than a carpet would be which is attached to the floor by nails, for the purpose of keeping it stretched out, or curtains, looking-glasses, pictures, and other matters of an ornamental nature, which have been slightly attached to the walls of the dwelling as furniture and which is probably the reason why they and similar articles have been held, in different cases, to be removable. The machines would have passed to the executor (per Lord Lyndhurst, C. B.; Trappes *v.* Harter, 2 C. & M. 177,). They would not have passed by a conveyance or demise of the mill. They never ceased to have the character of movable chattels, and were therefore liable to the defendant's distress. See also Lane *v.* Dixon, 3 C. B. 776, (54 E. C. L. R. 776,); and Wood *v.* Hewitt, 8 Q. B. 913, (55 E. C. L. R. 913,). Where a landlord distrains, amongst other things, goods which are not distrainable (as, for instance, looms which are in work, there being on the premises other goods sufficient to satisfy the rent), and the tenant in order to obtain a withdrawal of the distress, pays the amount of the rent and the costs, he is entitled, in an action of trespass to recover only the actual damage caused by the taking of the privileged goods, and not the whole amount of the money which he has paid. Harvey *v.* Pocock, 11 M. & W. 740.* No one can acquire a right by his own wrongful act, and therefore, if a landlord severs fixtures under a distress, the tenant may bring trover for them, and describe them as goods and chattels, although trover will not lie for fixtures unsevered from the freehold. Dalton *v.* Whittem, 3 Q. B. 961, (43 E. C. L. R. 1056,); Roffey *v.* Henderson, 17 Q. B. 574. (79 E. C. L. R. 574.)

distresses and *executions*, for *under executions by *fieri facias*, fixtures, which the party against whom the execution issues could *have removed, as against his own immediate landlord, may be seized (see Poole's Case, 1 Salk. 368), whereas Chief Justice Willes lays it down clearly, in the case I have cited, that such articles are not seizable under a distress.(*a*) [*144] [*145]

Again, a chattel is privileged against distress which is upon the premises, in consequence of its having been delivered to the owner, *to be wrought, worked up, or managed in the way of his trade or employment.* Thus, if I have sent cloth to a tailor to be made into a coat, or if I send my horse to a smith's shop to be shod, or goods to a factor to be sold, or to a carrier to be carried, this cloth, this horse, these goods, are not distrainable by the respective landlords of the persons to whom I have so intrusted them, while they remain upon the premises of the persons for the above purposes. 1 Inst. 47 a; Gisbourn *v.* Hurst, 1 Salk. 249; Gilman *v.* Elton, 3 B. & B. 75,(7. E. C. L. R. 355,); Thompson *v.* Mashiter, 1 Bing.283, (8 E. C. L. R. 510,); Matthias *v.* Mesnard, 2 C. & P. 353, (12 E. C. L. R. 613,). The principle on which these cases have proceeded is that, in a commercial country like England, the interest of the public, as well as that of individuals, requires that confidence should, as much as possible, be encouraged and kept alive between the trader *and his customers, and, therefore, the law privileges my goods from distress while in the custody of my trader in the way of trade, lest, if they were not so privileged, I might be deterred from trusting them to a poor and industrious man by the apprehension that if his rent should fall in arrear my goods might be appropriated [*146]

(*a*) Reynolds *v.* Shuler, 5 Cowen, 323

to the payment of it. Upon this general principle of public policy proceeds the case of Adams *v.* Grane, 1 Cr. & M. 380;* 3 Tyrwh. 326; where it was held that goods sent to an auctioneer for sale were privileged from being distrained for his rent. "It is the interest of the public," said Sir John Bayley, "to bring buyers and sellers together at fixed places. This privilege is therefore of great importance to the owners of goods, who should not be exposed to the risk of losing them from the default of the parties on whose premises they are deposited for that purpose." On the same principle, proceeded Brown *v.* Shevill, 2 A. & E. 138, (29 E. C. L. R. 82,) in which the carcass of a beast sent to a butcher to be slaughtered was held to be privileged from distress in respect of the butcher's rent. Still, though this sort of privilege is, no doubt, very beneficial, and has, to use the words of Sir John Bayley, in the case I have just cited, "been from time to time increased in extent, according to the new modes of dealing established between parties by the change of times and circumstances," the Courts have latterly shown a strong disposition to restrain it from exceeding the [*147] limits strictly *warranted by that principle; instances of which disposition on the part of the Courts you will find in the late cases of Muspratt *v.* Gregory, 1 M. & W. 633,* [S. C. in error, 3 M. & W. 677,*] and Joule *v.* Jackson, 7 M. & W. 450.*[23](*a*)

[23] See the notes to Simpson *v.* Hartopp, 1 Smith's L. C. 187. Lord Coke says (Co. Litt. 47 a) that sacks of corn or meal in a mill are exempt; meaning, doubtless, the corn of customers left there in

(*a*) The American cases go the whole length of the doctrine as laid down in the text, and even further, for it has been held that when the business of the tenant is such as naturally to draw to his premises the goods of other people, the landlord shall not be allowed to distrain them for rent. Thus it has been held that the goods of a

Again, *things which are actually in some person's use* are, while they so continue, privileged from being taken by way of distress for rent. Thus it is laid down in the judgment in Simpson *v.* Hartopp, which I have already cited, that the horse on which a man is actually riding, the tools with which a man is actually working, are exempt from distress. And this again is founded on reasons of public policy, for, were it otherwise, there might be great danger of a breach of the peace being occasioned by the attempt to take the chattel in actual use out of the possession of the person using it.[24](*a*)

the way of trade. So, silk sent to a silk weaver to manufacture into velvet cannot be distrained. Gibson *v.* Ireson, 3 Q. B. 39, (43 E. C. L. R. 621,). Goods standing on the premises of a commission agent for sale in the way of his business, as, for instance, a cab in the hands of an agent for the sale of carriages, are also privileged from distress for rent. Findon *v.* M'Laren, 6 Q. B. 891, (51 E. C. L. R. 891,). But it is otherwise with respect to horses and carriages standing at livery. Parsons *v.* Gingell, 4 C. B. 545, (56 E. C. L. R. 545,). And brewer's casks sent to a public house with beer, and left there until the beer is consumed, are not protected. Joule *v.* Jackson, cited above. Goods at an auctioneer's for sale are privileged, even although the auctioneer may have acquired the occupation of the place of sale by a trespass. Brown *v.* Arundell, 10 C. B. 54, (70 E. C. L. R. 54,). So are goods which are deposited by an auctioneer for the purpose of sale in an open yard belonging to his premises. Williams *v.* Holmes, 8 Exch. 861. (20 E. L. & Eq. R. 360.)

[24] Co. Litt. 47 a. Other things privileged from distress for rent

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lodger in a boarding house, and cattle *received* by a tenant, to be pastured for hire, are exempt from distress for the rent. Brown *v.* Sims, 17 S. & R., 138; Riddle *v.* Welden, 5 Wharton, 9; Cadwalader *v.* Tindall, 8 Harris, 422: Youngblood *v.* Lowry, 2 McCord, 39; Stone *v.* Matthews, 7 Hill, 428. In New York, the goods of a lodger in a boarding house were exempted from distress by the revised statutes. The act of 1846 has abolished distress for rent altogether.

(*a*) Goods which are in the custody of the law cannot be distrained.

[*148] *Things falling within the three classes which I have just described, namely, those which are

are animals in a wild state, wherein no one has a valuable property; such as bucks and does. Dogs are also mentioned by Lord Coke as protected. Co. Litt. 47 a. It appears to be doubtful, from the judgment of the Lord Chief Justice Willes, in Davies *v.* Powell, Willes, 48, whether this exemption is still applicable. But it may be observed, that although, as is stated in the judgment, the law now undoubtedly takes notice of dogs as valuable things (Wright *v.* Ramscot, 1 Saund. 83; Binstead *v.* Buck, 2 W. Bl. 1117), this was so also at the time when the rule in question was laid down by Lord Coke (see Ireland *v.* Higgins, Cro. Eliz. 125); and the property which the law recognises in them, and in other animals of the like nature, which do not serve for food, is only a base property. They are not considered to have any intrinsic value. See 4 Black. Comm. 235. The acts of parliament which make the stealing of dogs punishable do not appear to affect this question. Deer kept in a private enclosure may be distrained. Davies *v.* Powell, *ubi sup.* Cattle which escape out of the land of a stranger upon the land out of which the rent issues, through a defect of the fences which the tenant is bound to repair, cannot be distrained for rent, unless the owner, after notice, neglects or refuses to take them away. See 2 Leon. 7; Dyer, 317 b; and the notes to Poole *v.* Longuevill, 2 Wms. Saund. 290. Goods in the custody of the law are not distrainable as, for instance, goods which have been distrained damage feasant, or taken in execution. See Co. Litt. 47 a, and Peacock *v.* Purvis, 2 Bro. & Bing. 362, (6 E. C. L. R. 183,). But this exemption does not extend to goods in the custody of a messenger under a fiat in bankruptcy. Briggs *v.* Sowry, 8 M. & W. 729.* By a recent statute, growing crops seized and sold by the sheriff and left on the premises are liable to be distrained in default of any other distress. See the 14 & 15 Vic. c. 25, and *post*, p. 150 note. Lastly, the cattle and goods of the guests at an inn are also protected from distress so long as they are upon the premises. Bac. Ab. *Inns and Innkeepers* (B); Crosier *v.* Tompkinson, 2 Ld. Ken. 439.

Hamilton *v.* Reedy, 3 McCord, 38; Peirce *v.* Scott, 4 W. & S., 344; Peacock *v.* Purvis, 2 Brod. & Bing., 362, (6 E. C. L. R. 183,).

By the common law, the landlord lost his rent, if an execution was

either affixed to the freehold, or are on the premises for the purpose of being dealt with by the owner in

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levied upon the tenant's goods, before distress. The first sect., 8 Ann., c. 14, was passed to remedy this. It provides "that no goods or chattels whatsoever, lying or being in or upon any messuage, lands or tenements, which are or shall be leased for life or lives, terms of years, at will, or otherwise, shall be liable to be taken by virtue of any execution on any pretence whatsoever, unless the party at whose suit the said execution is sued out, shall, before the removal of such goods from off the said premises, by virtue of such execution or extent, pay to the landlord of the said premises, or his bailiff, all such sum or sums of money as are or shall be due for rent for the said premises at the time of the taking of such goods or chattels by virtue of such execution; provided the said arrears do not amount to more than one year's rent; and, in case the said arrears shall exceed one year's rent, then the said party, at whose suit such execution is sued out, paying the said landlord or his bailiff, one year's rent, may proceed to execute his judgment, as he might have done before the making of the act; and the sheriff or other officer is thereby empowered and required to levy and pay to the plaintiff, as well the money so paid for rent, as the execution money."

Under this statute it was held that the landlord could demand only one year's rent. Colyer *v.* Speer, 2 B. & B. 67, (6 E. C. L. R. 40,).

If there were several executions, still the landlord could claim only one year's rent, Dod *v.* Saxly Str., 1024.

And he could claim only the rent due at the time of the seizure, but he was entitled to a full year's rent, though he had been in the habit of remitting some portion of it to the tenant. Hoskins *v.* Knight, 1 M. & S., 245; Williams *v.* Lewsey, 8 Bing. 28, (21 E. C. L. R. 208,) 1 M. & Scott, 92; Rent payable in advance might be claimed. Harrison *v.* Barry, 7 Price, 690.

The statute applies to all executions at the suit of the subject.—Henchett *v.* Kimpson, 2 Wils., 140; Greaves *v.* D'Acastro, Bunb, 194; St. John's College *v.* Murcott, 7 T. R., 259; Dixon *v.* Smith, 1 Swans, 457; Thurgood *v.* Richardson, 5 M. & P., 270; Thurgood *v.* Richardson, 7 Bing., 428, (20 E. C. L. R. 190); same case, 4 Car. & P., 481, (19 E. C. L. R., 612).

The sheriff must have notice, but if he knows that the rent is due,

the way of his trade, or are in actual use, are *absolutely* [*149] privileged against distress, that is, are *privileged whether there are or are not other

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specific notice is not necessary. Arnitt *v.* Garnett, 3 B. & A., 440, (53 E. C. L. R. 257,); Smith *v.* Russell, 3 Taunt., 400; Andrews *v.* Dixon, 3 B. & A, 645, (5 E. C. L. R. 371,); Colyer *v.* Speer, 4 Moore, 473, 2 B. & B., 67, (6 E. C. L. R. 40,).

Statutes similar in spirit have been passed in many of the United States. The Pennsylvania statute of 1836, sects. 83, 84 & 85 is in these words: § 83, "The goods and chattels being in or upon any messuage, lands, or tenements, which are or shall be demised for life or years, or otherwise taken by virtue of an execution, and liable to the distress of the landlord, shall be liable for the payment of any sums of money due for rent, at the time of taking such goods in execution; provided that such rent shall not exceed one year's rent."

§ 84, "After the sale by the officer of any goods or chattels, as aforesaid, he shall first pay out of the proceeds of such sale, the rent so due, and the surplus thereof, if any, he shall apply towards satisfying the judgment mentioned in such execution; provided, that if the proceeds of the sale shall not be sufficient to pay the landlord, and the costs of the execution, the landlord shall be entitled to receive the proceeds, after deducting so much for costs, as he would be liable to pay in case of a sale under distress."

§ 85, "Whenever any goods or chattels liable to the payment of rent, as aforesaid, shall be seized in execution, the proceedings on such execution, shall not be stayed by the plaintiff therein, without the consent of the person entitled to the rent, in writing first had and obtained."

Under this and the former statute of 1772, it has been held that the rent may be apportioned in favor of the landlord, up to the time of seizure. West *v.* Sink, 2 Yeates, 274; Binns *v.* Hudson, 5 Binn, 505; Morgan *v.* Moody, 6 W. & S., 335; Parker & Keller's Appeal, 5 Barr, 390. See Case *v.* Davis, 15 Penna. State Rep., (3 Harris.) 80. If there are two levies the landlord may claim down to the date of the last. Worley *v.* Worley, 1 Trub. & H. Pr., p. 734. The landlord is entitled to his rent from the proceeds of an execution levied by a constable. Seitzinger *v.* Steinberger, 2 Jones, 379.

In New York, New Jersey and Alabama, it is held that the land-

articles upon the premises liable to be distrained. But there are some things which, although not privileged

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lord is entitled only to the rent *due* at the time of the seizure.—Hazard *v.* Raymond, 2 Johns., 478; Beekman *v.* Lansing, 3 Wend. 447; Schenck *v.* Vannut, 1 South., 329; Denham *v.* Harris, 13 Ala., 465; Bowzer *v.* Scott, 8 Blackf., 86.

The landlord is only entitled to one year's rent. The number of executions makes no difference. Van Rensselaer *v.* Quackenboss, 17 Wend., 34.

But he is not confined to the last year's rent, so that only one year's rent be received; nor is it material if the lessee holds under a lease subsequent to that under which the arrearages are due; the rent in the latter being reserved in iron, in the former in money. Parker and Keller's Appeal, 5 Barr. 390; Richie *v.* McCauley, 4 Barr. 471; Ege *v.* Ege, 5 W. 134, 140.

But it seems when the sale is of the tenant's goods, under an execution during the term of one lease, the landlord cannot claim rent agreed to be paid in advance on another lease not yet commenced. Martin's Appeal, 5 W. & S. 221.

Having taken a note for the rent will not prevent the landlord's claim though the note be not due. Fife *v.* Irving, 1 Rich. 226.

The notice to the sheriff is sufficient if given at any time before the money is paid over to the plaintiff. Beekman *v.* Lansing, 3 Wend. 447

Costs in the 84th section of the Pennsylvania Act were said in the District Court, Hennis *v.* Streeper, 1 Miles, 269, to be the costs of the execution not including those of the sheriff for executing it.

If the notice is disregarded by the sheriff, he renders himself liable. Governor *v.* Edward, 4 Bibb. 219; Colyer *v.* Speer, 4 Moore, 473; Calvert *v.* Joliffe, 2 B. & Adol. 418, (22 E. C. L. R. 178,); Lane *v.* Crockett, 7 Price, 566; Beeston *v.* Wright, 2 Doug. 655; Reed *v.* Thoyts, 6 Mee. & W. 412; Riseley *v.* Ryle, 10 Mee. & W. 101; Forster *v* Cookson, 1 Gale & D. 58; 1 Ad. & Ellis, N. S. 419, (41 E. C. L. R. 606,); Van Renssalaer *v.* Quackenboss, 17 Wend. 34.

The rent protected is that due to the immediate landlord of the defendant. Bromley *v.* Hopewell, 14 Penn. State R. (2 Harris) 400; Contra Thurgood *v.* Richardson, 5 M. & P. 270, and 7 Bing. 428, (20 E. C. L. R. 194,).

The landlord loses his right if he accepts a surrender of the lease

altogether against being distrained, are privileged *conditionally*, that is, are privileged, unless it should turn out that there is no other sufficient distress to be come by. Of this description are beasts of the plough, instruments of husbandry, and, generally speaking, the instruments of a man's trade and profession. See Fenton *v.* Logan, 9 Bing. 676, (23 E. C. L. R. 756,); Gor-

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after the levy, for he thus parts with his right to distrain. Greider's Appeal, 5 Barr. 423.

The landlord is not entitled to claim anything under the execution for which he could not distrain, therefore if part of the annual sum payable to the landlord is made up of compensation for the use of personal property, and the several proportions due for rent of the land, and for the use of the chattels, cannot be ascertained; the landlord cannot claim any thing from the sheriff. Commonwealth *v.* Contner, 6 Harris, 447. Black, C. J., says, "The rent was reserved by the lease of the furnace, and of personal property, consisting of a stove, teams, &c. Now a sum of money, payable periodically, for the use of chattels, is not *rent* in any legal sense of the word. It cannot be distrained for; and unless it can, it is not demandable out of the proceeds of a sheriff's sale; for this right comes in place of a distress by the plain words of the statute. Rent must not only issue out of *land*, but it must be fixed, definite, and certain in amount, whether payable in money, chattels, or labor. If, therefore, a lease so mixes the real and personal property together that it cannot be determined how much of what is called the rent is to be paid for the chattels, and how much is the profit of land, there can be no distress for non-payment of it. This lease stipulates for a rent of $3,500 on real and personal property both. But they may be separated. There is a provision in it that when the tenant buys and pays for the personal property, the rent shall be abated to $2,500. From this we may infer that the rent was $2,500 for the furnace, and $1,000 for the goods. It requires a very liberal construction to make this out in favor of the lessor. But after careful consideration and some doubt, we are all of opinion that we may take it from the language of the lease without violating either the natural probabilities of the case, or any received rule of interpretation."

ton *v.* Falkner, 4 T. R. 565.[25] Thus Lord Coke says, in the 1st Inst. 47 a, that the books of a scholar would be privileged in the first instance from distress, and I suppose that this exemption would include a lawyer's books also, though it is right, for the credit of the profession, to say, that there is no case to be found in which the question has been raised.

The cases I have been enumerating are cases of privilege *against* distress. Now there are, on the other hand, some cases in which articles not falling within the general description of things distrainable, are yet rendered so by a sort of exception to the general rule. These are cases included within the enactment of stat. 11 Geo. 2, c. 19, s. 8, which provides that landlords may distrain *corn*, *grass*, **or other product, growing on any part of the land demised*.[26] Such [*150]

[25] Sheep are privileged to the same extent as beasts of the plough. See the 51 Hen. 3, st. 4, and Co. Litt. 47 a, note. Chattels and animals which are in actual use cannot be distrained even damage feasant. Field *v.* Adams, 12 A. & E. 649, (40 E. C. L. R. 324,); Bunch *v.* Kennington, 1 Q. B. 679, (41 E. C. L. R. 726,).

[26] The 2 Wm. & M. sess. 1, c. 5. s. 3, gave the right to distrain "sheaves or cocks of corn, or corn loose or in the straw, or hay lying or being in any barn or granary, or upon any hovel, stack or rick, or otherwise upon any part of the land or ground charged" with the rent. Under this act, and the 4 Geo. 2, c. 28, s. 5, (which gives in respect of *rents-seek* the same powers of distress as exist in the case of rents reserved upon leases), the grantee of a rent-charge may distrain hay or straw loose or in the stack. Johnson *v.* Faulkner, 2 Q. B. 925, (42 E. C. L. R. 980,). In Miller *v.* Green, 2 Cr. & J. 142,* S. C. in error, 8 Bing. 92, (21 E. C. L. R. 459,) it was held, that the right to distrain growing crops, given by the 11 Geo. 2, c. 19, could not be exercised by the grantee of an annuity, although the deed contained a power to distrain for the arrears and to dispose of the distress in the same manner in all respects as distresses for rents reserved upon leases for years. It will be observed, that the

[*151] things not being chattels *personal, were not distrainable at common law, and, even now,

11 Geo. 2, c. 19, s. 8, mentions expressly only "lessors or landlords;" but the language of the 2 Wm. & M. sess. 1, c. 5, is more general. If a landlord seizes standing corn and growing crops as a distress for rent, and sells them before they are ripe, the sale is wholly void. Owen *v.* Legh, 3 B. & A. 470, (5 E. C. L. R. 273,). In Proudlove *v.* Twemlow, 1 Cr. & M. 326,* a landlord seized growing crops and sold them before they were cut, and they were afterwards cut and taken away by the purchaser. It appeared, however, that they were sold for the full value which they would have fetched if sold at the proper time, and that the amount produced was less than the amount of rent due. The Court held that the tenant could only recover nominal damages. Growing corn sold under an execution could not, until recently, be distrained for rent unless the purchaser allowed it to remain an unreasonable time on the ground after it was ripe. Peacock *v.* Purvis, 2 Bro. & Bing. 362, (6 E. C. L. R. 183,); Wright *v.* Dewes, 1 A. & E. 641, (28 E. C. L. R. 302,). But now, by the 14 & 15 Vic. c. 25, s. 2, growing crops seized and sold by the sheriff under an execution are liable, as long as they remain on the land, to be distrained for the rent which becomes due after the seizure and sale, provided there is no other sufficient distress. The 56 Geo. 3, c. 50, s. 1, provides that "no sheriff or other officer in England or Wales shall, by virtue of any process of any court of law, carry off, or sell, or dispose of, for the purpose of being carried off from any lands let to farm, any straw thrashed or unthrashed, or any straw of crops growing, or any chaff, clover, or any turnips, or any manure, compost, ashes, or sea-weed, in any case whatsoever; nor any hay, grass or grasses, whether natural or artificial, nor any tares or vetches, nor any roots or vegetables, being produce of such lands, in any case where, according to any covenant or written agreement, entered into and made for the benefit of the owner or landlord of any farm, such hay, grass or grasses, tares and vetches, roots or vegetables ought not to be taken off or withholden from such lands, or which, by the tenor or effect of such covenants or agreements, ought to be used or expended thereon, and of which covenants or agreements such sheriff or other officer shall have received a written notice before he shall have proceeded to sale." By

the statute does not include young *trees growing in a nursery ground, the words *other pro-* [*152]

s. 3 of this act it is enacted that any crops or produce of this description may be sold by the sheriff, subject to an undertaking to expend them on the land according to the custom of the country, or according to the terms of any covenant or written agreement which has been entered into by the tenant. By s. 6, it is provided that "in all cases where any purchaser or purchasers of any crops or produce hereinbefore mentioned, shall have entered into any agreement with such sheriff or other officer, touching the use and expenditure thereof on lands let to farm, it shall not be lawful for the owner or landlord of such lands to distrain for any rent on any corn, hay, straw, or other produce thereof which, at the time of such sale, and the execution of such agreement entered into under the provisions of this act, shall have been severed from the soil, and sold, subject to such agreement, by such sheriff or other officer; nor on any turnips, whether drawn or growing, if sold according to the provisions of this act; nor on any horses, sheep, or other cattle, nor on any beast whatsoever; nor on any wagons, carts, or other implements of husbandry, which any person or persons shall employ, keep, or use on such lands for the purpose of thrashing out, carrying, or consuming any such corn, hay, straw, turnips, or other produce under the provisions of the act, and the agreement or agreements directed to be entered into between the sheriff or other officer, and the purchaser or purchasers of such crops and produce as hereinbefore are mentioned." By s. 11 of this act the assignees in bankruptcy and insolvency, and the purchasers of the goods, stock, or crops of persons engaged in husbandry, are obliged to use the hay, manure, &c., and other produce and dressings of the lands in the same manner as the tenant ought to have used them. It has been held that this section is of general application, and is not limited to sales under an execution. Wilmot *v.* Rose, 3 E. & B. 563. It appears to be settled, after some conflict of authority on the subject, that where hay and straw is seized under a distress, and the tenant is under covenant to expend it upon the premises, the landlord has no right to sell it, subject to a condition that the purchaser shall consume it on the premises. See Ridgway *v.* Lord Stafford, 6 Exch. 404; Abbey *v.* Petch, 8 M. & W. 419;* and Frusher *v.* Lee, 10 M. & W. 709.*

duct being construed to apply to things of the same sort as those particularly specified, namely, grass and corn; things to which the process of being cut, gathered, made up, and laid up, when ripe, is incidental. See Clark *v.* Gaskarth, 8 Taunt. 431, (4 E. C. L. R. 216,).(*a*) Before leaving this part of the subject, it is right to mention that, though there are some things *conditionally* privileged, such as beasts of the plough and instruments of husbandry, so that, before they are distrained, the landlord must resort to other distrainable articles, if there be any; yet he is not obliged to resort to grass or growing corn before taking the articles conditionally privileged; since, as the privilege existed at common law, it could not have exempted *them* from being distrained before articles which were then *absolutely* exempt, and which would still continue to be so, were it not for the provisions of a particular statute. Piggott *v.* Birtles, 1 M. & W. 441.*

Having thus mentioned what the landlord may and what he may not take as a distress for rent, the next point is, *where is he to distrain?* And the general rule [*153] is, that he must distrain goods found *upon the premises demised, and there only; except, indeed, in the case of her Majesty, who by the special prerogative of the Crown may distrain on all her tenants' lands, wherever situated, and of whomsoever held.[27] But, in the case of a subject, the distress must be taken on the demised premises,[28] a rule which is

[27] Com. Dig. *Distress* (A. 3).

[28] See Co. Litt. 161 a, and Com. Dig. *Distress* (A, 3) (B, 1). The statute of Marlebridge, c. 15, (52 Hen. 3), enacted that no one save the King should distrain "out of his fee, nor in the King's highway, nor in the common street. See as to this statute, which was in

(*a*) See in Pennsylvania, 7 sect. Act 21st March, 1772; 1 Smith's Laws, 371, for a similar enactment.

exemplified in a very curious case of Capel *v.* Buszard, 6 Bing. 150, (19 E. C. L. R. 75.). In that case, certain premises lying opposite to the river Thames were demised, but no part of the soil of the river itself was demised. The landlord distrained a barge, attached to the demised premises by ropes, and which lay perpendicularly over the soil of the river, between high and low water-mark. The Court of Exchequer Chamber held, after a long and elaborate argument, that the barge, not being upon the demised premises, was not, in point of law, distrainable.

But to this rule, as to most other general rules, there are certain exceptions. In the first place, it is laid down in the 1st Inst. 161 a, that, if the landlord come to make a distress, and see the tenant's cattle feeding on the land demised, but before he can take them, the tenant [or any other] drive them off the land to prevent the distress, the landlord may follow and distrain them.[29]

affirmance of the common law, the 2d Inst. 131; and Gilbert on Dist. 40. A distress on the highway would seem not to be wholly void but only irregular, *ib.*

[29] In this case, by a fiction of law, the cattle were supposed to be still on the land. The words of Lord Coke are, "Yet may the lord justly follow and distrain the cattle, and the tenant cannot make rescous, albeit the place wherein the distress is taken is out of his fee, *for now in the judgment of law the distress is taken within his fee,* and so shall the writ of rescous suppose. But if the lord coming to distrain had no view of the cattle within his fee though the tenant drive them off purposely, or if the cattle of themselves after the view go out of the fee, or if the tenant after the view remove them for any other cause than to prevent the lord of his distress, then cannot the lord distrain them out of his fee." And notwithstanding the statue of Marlbridge, c. 15 (52 Hen. 3), if the lord came to distrain, and saw the beasts within his fee, and before he could distrain them, the tenant chased them into the highway, the lord might distrain them there. 2d Inst. 132.

[*154] *This rule of the common law seems to have given the hint for the stat. of 8 Anne, c. 14, s. 2, which has been followed up by stat. 11 Geo. 2, c. 19, s. 1, by which, if the tenant fraudulently [or clandestinely] remove his goods from the demised premises, in order to prevent a distress, the landlord is, within thirty days, allowed to follow and distrain them wherever they may be found, provided they have not been previously sold for valuable consideration to a *bona fide* purchaser.(*a*) On the construction of this

(*a*) The statutes of 8 Anne, ch. 14, § 2, and 11 George 2, ch. 19, § 1, have been substantially re-enacted in Pennsylvania by the Act of 21st March, 1772, § 5 and 6, 1 Sm. 370. Thirty days is the time allowed for seizing the goods. Similar enactments are found in other States. Poor *v.* Peebles, 1 B. Munroe, 1; Wilcoxen *v.* Bowles, 1 La. Ann. R. 230. The Supreme Court of Pennsylvania held in Grace *v.* Shively, 12 S. & R. 217, that the statute did not apply to cases where the goods were removed before the rent became due; whereupon the legislature on the 25th March, 1825, passed an additional section confined in its operation to the City and County of Philadelphia, by which the landlord is enabled even before his rent is due to distrain for it, when the tenant shall fraudulently convey away, or carry off or from the demised premises his goods and chattels with intent to defraud the landlord or lessor of his remedy by distress; in such case the landlord or lessor may consider his rent as apportioned up to the time of such conveying away or carrying off, and distrain within the space of thirty days next ensuing such conveying away or carrying off, wherever the goods may be found, provided that the landlord first make oath that he verily believes the goods were carried away for the purpose of defrauding; and provided that no goods shall be taken which have been *bonâ fide* for a valuable consideration sold before such seizure to a person not privy to the fraud.

If the goods are removed in the day time, the fact that it is without the landlord's knowledge does not make the removal fraudulent. Grace *v.* Shively, 12 S. & R. 217. And the right to follow goods is confined to the tenant's own goods, not the goods of a stranger,

part of the enactment, another part of which I shall have occasion to mention again, you may consult Furneaux *v.* Fotherby, 4 Campb. 136; Watson *v.* Main, 3 Esp. 15; and Parry *v.* Duncan, 7 Bing. 243, (20 E. C. L. R. 115,).[30] It applies, *you must remember, only to a removal of THE TENANT'S own [*155]

[30] The landlord is entitled to distrain if the removal is fraudulent, even though it is not clandestine. Opperman *v.* Smith, 4 D. & R. 33, (16 E. C L. R. 187,). The first section of the 11 Geo. 2, c .19, is substantially the same as the second section of the 8 Anne, c. 14, except that the earlier of these statutes allowed only five days after the removal for seizing the goods, and the later allows thirty. By s.

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though they may have been liable to a distress while on the premises. Adams *v.* La Comb, 1 Dall. 440; Frisby *v.* Thayer, 25 Wend. 396. And the landlord will be guilty of a trespass if he enter the house of a stranger to search for and distrain goods fraudulently removed, if he finds none. Hobbs *v.* Geiss, 13 S. & R. 417.

8 Anne, ch. 14, § 2, is in these words: And be it further enacted, that in case any lessee for life or lives, term of years, at will, or otherwise, of any messuages, lands, or tenements upon the demise whereof, any rents are or shall be reserved or made payable, shall from and after the first day of May, fraudulently or clandestinely convey or carry off from such demised premises his goods or chattels with intent to prevent the landlord or lessor from distraining the same for arrears of such rent so reserved as aforesaid, it shall and may be lawful to and for such lessor or landlord, or any person or persons by him for that purpose lawfully empowered, within the space of five days next ensuing such conveying away or carrying off of such goods or chattels as aforesaid, to take and seize such goods and chattels wherever the same shall be found as a distress for the said arrears of such rent; and the same to sell or otherwise dispose of in such manner as if the said goods and chattels had actually been distrained by such lessor or landlord in and upon such demised premises for such arrears of rent; any law, custom, or usage to the contrary in any wise notwithstanding.

goods, not to those of a stranger, which happened to be on the demised premises; for, though the landlord

4 of the 11 Geo. 2, c. 19, a remedy is given to the landlord by complaint to two justices where the goods do not exceed the value of 50*l.*; but he is not limited to this remedy. Bromley *v.* Holden, 1 Moo. & M. 175, (22 E. C. L. R. 500,). In Rand *v.* Vaughan, 1 Bing. N. C. 767, (27 E. C. L. R. 854,) it was held that the statute did not apply to cases in which the tenant fraudulently removed his goods before the rent became due. In this case the goods were in fact removed *before* the quarter-day, but the Court appeared to be of opinion that it was necessary that the rent should be actually *in arrear*, in which case goods removed *on* the quarter-day would not be distrainable. In a late case, however, the Court of Queen's Bench has held that goods fraudulently removed on the morning of the day upon which the rent becomes due may be followed and seized under the statute, the rent being under these circumstances *due and payable* (see *ante*, p. 126, note [4],) though not *in arrear* at the time of the removal. From this judgment Mr. Justice Crompton dissented, holding that, by the previous cases, it has been decided that the rent must be in arrear at the time of the removal. See Dibble *v.* Bowater, 2 E. & B. 564, (75 E. C. L. R. 564,). It is not necessary, in a plea justifying the seizure of goods under this statute, to allege that the goods have not been sold *bonâ fide* to persons not privy to the fraud. This fact must be replied. Nor is it necessary, in order to the exercise of the right given by the act, that the party upon whose land the goods are seized should himself be privy to the fraud. Williams *v.* Roberts, 7 Exch. 618. In trespass, a special plea is necessary where the seizure of goods is to be justified under this act. 2 Wms. Saund. 284 a. See as to the form of it the case last cited, and Fletcher *v.* Marillier, 9 A & E. 457, (36 E. C. L. R. 170,). By s. 7 of the 11 Geo. 2, c. 19, when goods are fraudulently removed and placed in any house or place locked up or otherwise secured, the landlord or his agent may, with the assistance of a peace officer (and in the case of a dwelling-house, after oath being made before a magistrate of a reasonable ground to suspect that the goods are in it), break open the house, &c., in the daytime, and distrain the goods as if they had been in any open place. See as to this section, *post*, p 170.

might have taken such, if not privileged, yet it would be hard indeed to debar the owner from rescuing them from jeopardy. *Thorton *v.* Adams, 5 M. & S. 38; Postman *v.* Harrell, 6 C. & P. 225, (25 E. C. L. R. 406,). [*156]

By the 8th section of the same stat. 11 Geo. 2, c. 19, the landlord may distrain cattle [of the tenant's] depasturing upon any common or way appertaining to the premises demised, a privilege too reasonable to require comment.[31](*a*)

Having thus proceeded as far as the time will permit in the consideration of the main points relative to a distress for rent, I must postpone till the next Lecture those with regard to the *time* and *mode* of making it, the *treatment of the distress when taken*, and the *tenant's remedies* in the case of illegal proceedings.

[31] The words of this section are, that the landlords or their agents may "take and seize, as a distress for arrears of rent, any cattle or stock *of their respective tenant or tenants,* feeding or depasturing upon any common appendant or appurtenant, or any way belonging to all or any part of the premises demised or holden."

(*a*) In Pennsylvania, by 7 sec. Act 21st March, 1772, 1 Smith, 371, the landlord is authorised to seize as a distress for rent, any cattle or stock of the tenant feeding or depasturing upon all or any part of the premises demised or holden.

[*157] *LECTURE VI.

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We were considering at the conclusion of the last Lecture the landlord's *remedies* in case of the non-payment of his rent, and had arrived at that by way of *Distress*. Of the six points into which I distributed that part of the subject, the time had allowed me to dispose of two only. I had *considered what [*158] the things are which the landlord is entitled to distrain, and had stated the general rule that all chattels found on the demised premises are distrainable, the exceptions from this rule and the additions to

it. I had stated also *where* he is permitted to distrain, generally speaking on the demised premises, and I had mentioned the cases in which that rule also is enlarged, and, on what particular occasions he is permitted to exercise his right of distress elsewhere—the questions which remain are: WHEN *the distress is to be made.* HOW *it is to be made.* WHAT *is to be done with it.* And lastly, *What are the tenant's remedies in case of illegal or irregular proceedings.*

Now, with regard to the question, *When the distress is to be made.* It must of course, not be made until the rent has become due, and, as I have stated in a former Lecture, that (except for one purpose, which I then specified, that, namely, of making a demand to *create*, or a tender to *prevent* forfeiture) rent does not become due till the last minute of the day on which it is by the lease made payable,[1] it follows, of course, that there can be no distress until the next day.[2](*a*) It sometimes indeed happens that by the special agreement of the parties to the lease, the rent is made payable *before* the time for which it is to be paid has elapsed, and, as there is no objection *in point of law to such an agreement, the rent would, in such case, be distrainable for as soon as the time so specially fixed had elapsed, but this you will at once perceive, is not a contravention of the general principle, but a carrying out of it, for the rent is not, in such cases, distrained for *before the time of payment has elapsed*, although, in consequence of special terms inserted in the lease, the time of payment is accelerated, [*159]

[1] *Ante*, p. 125.

[2] See Co. Litt. 47 b, note 6; Duppa *v.* Mayo, 1 Wms. Saund. 282; and the notes to Poole *v.* Longueville, 2 ib. 284 b.

(*a*) McKinney *v.* Reeder, 6 Watts. 41.

and made to occur earlier than in ordinary cases.[3] Sometimes too it happens, especially as I have heard in the Eastern Counties of England, that, by a local custom, the rent is payable as soon as the half year begins, which custom would, in the absence of terms incompatible with it, be incorporated into the lease, and give the landlord a right to distrain immediately. You will find this in Buckley *v.* Taylor, 2 T. R. 600.[4]

With regard to the *time* of making the distress, it is further to be observed, that it must be *between sunrise and sunset.* The law relative to distresses, except such part of it as owes its origin to statute, is all very ancient; and the reason given for this rule by the old books certainly savors of antiquity. It is, that the tenant may be able to see the landlord or his bailiff coming, so as to prevent the necessity of the distress by a tender.[5] A better *reason might (one would suppose) be found in the inconvenience and disturbance to families which would arise from allowing a proceeding of some violence to take place during the hours devoted to repose, an inconvenience from which I think the law has done wisely in exempting them. It must further be observed, with regard to the *time* of making the distress, that, at common law, it could not have been made *after* the expiration of the lease (1 Inst. 47 b), but by stat. 8 Anne, c. 14, s. 6, it has been been provided that a landlord may distrain *within six months after the termination of the lease*, provided his own title continues, and the same

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[3] See Lee *v.* Smith, 9 Exch. 662. It has been held, in Ireland, that the general form of avowry given by the 11 Geo. 2, c. 19, s. 22, may be used although the rent is payable in advance. Charters *v.* Sherrock, Alcock & Napier, 17, 506.

[4] See Bac. Ab. *Distress* (C).

[5] Gilbert on Dist. 50; Co. Litt. 142 a; 7 Rep. 7 a; and Aldenburgh *v.* Peaple, 6 C. & P. 212, (25 E. C. L. R. 399,).

tenant still continues in possession.[6] Upon the construction of this statute, it has been held that, if a landlord allow the tenant to retain part only of the property demised, after the expiration of the lease, he may distrain on that part, Nuttall *v.* Staunton, 4 B. & C. 51, (10 E. C. L. R. 477,); and it was held in Braithwaite *v.* Cooksey, 1 H. Bl. 465, that where the original tenant died, and his representative entered, the landlord might *distrain within six months upon that representative.[7](*a*) [*161]

[6] It is provided by ss. 6 & 7 of the 8 Anne, c. 14, that it shall "be lawful for any person or persons having any rent in arrear or due upon any lease for life or lives, or for years, or at will, ended or determined, to distrain for such arrears after the determination of the said respective leases, in the same manner as they might have done if such lease or leases had not been ended or determined; provided that such distress be made within the space of six calendar months after the determination of such lease, and during the continuance of such landlords' title or interest, and during the possession of the tenant from whom such arrears became due.

[7] Where the possession is continued beyond the expiration of the term under a custom of the country, as, for instance, where the tenant has a customary right to leave his way-going crop in the barns for a certain time after the lease has expired, the landlord may distrain, although six months have elapsed since the expiration of the lease. Beavan *v.* Delahay, 1 H. Bl. 5; Griffiths *v.* Puleston, 13 M. & W. 358.* Where a tenant remained on the premises a few days after the expiration of the term, and after the new tenant had entered, and then went away leaving some cattle on the premises, it was held that there was no continuance of the possession after the

(*a*) The common law upon the subject of distresses for rent has been adopted very generally in the United States, and the legislatures of the different States have, with more or less conformity, adopted the amendments which have been from time to time engrafted on the law by the Parliament of Great Britain. In Pennsylvania and New York, for instance, the provisions of 8 Anne and 11 George 2, have been re-enacted with some variations. The Pennsylvania Act

The utility of this statute of Queen Anne is obvious when it is considered that, before it was passed, if rent had been reserved payable, say at Lady-day and at

tenant had himself left. Taylorson *v.* Peters, 7 A & E. 110, (34 E. E. C. L. R. 45,). It has been held at Nisi Prius that this statute does not apply where a tenancy is put an end to by the tenant's wrongful disclaimer, but only where it is determined by lapse of time, or perhaps by notice to quit. Doe *d* David *v.* Williams, 7 C. & P. 322, (32 E. C. L R. 635,). An avowry for rent arrear, which is framed at common law and not under this statute, must allege that the tenancy was continuing at the time when the distress was made. Williams *v.* Stiven, 9 Q. B, 14, (58 E. C. L. R. 14,).

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of 21st March, 1772, § 14, follows the provisions of the statute of Anne as to the right of distress after the expiration of the lease, provided such distress be made during the lessor's title or interest; but it omits the provision that the distress be made within six months after the determination of the lease; and it omits the last words *during the possession of the tenant from whom such arrears are due.* With respect to these last words, Judge Huston says in Clifford *v.* Beems, "perhaps the omission of them may not be found to affect the meaning of the provision;" referring probably to the fact, that unless where statuary exceptions existed, the distress could only be made upon the premises. Clifford *v.* Beems, 3 Watts, 246; Bukup *v.* Valentine, 19 Wend. 554; Rogers *v.* Brown, 1 Spears, 283; Lougee *v.* Colton, 2 B. Munroe, 115. If the goods are sold in good faith to an innocent purchaser, although such purchaser be the succeeding tenant, and the goods yet remain upon the premises, they cannot be distrained. Clifford *v.* Beems, 3 Watts, 246. See Bell *v.* Potter, 6 Hill, 497; Weber *v.* Shearman, 3 Hill, 547, and 6 Hill, 20. In North Carolina and Missouri the right of distress for rent is not known. Dalgleish *v.* Grandy, C. & N. 22; Crocker *v.* Mann, 3 Mis. 472.

As a general rule to authorize a distress for rent in the United States there must be a certain rent, or a rent which can be reduced to a certainty, reserved. Wells *v.* Hornish, 3 Penn. R. 30; Steel *v.* Thomson, ib. 34; Scott *v.* Fuller, ib. 55; Jacks *v.* Smith, 1 Bay, 315; Roberts *v.* Tennell, 4 J. J. Marshall, 160; Benoist *v.* Sollee, 1 Brevard, 251; Reeves *v.* McKenzie, 1 Bailey, 497; Valentine *v.* Jackson, 9 Wend. 302, where it was held that if a rent certain be reserved, subject to a

Michaelmas, the landlord would have lost his remedy by distress for his last half-year's rent; for he could not have distrained for it before it was due, and it would not have become due till the last moment of Michaelmas-day, and then the term would have been at an end.[8]

[8] Therefore, as Lord Coke says, it was usual in his day to reserve the last quarter's rent in advance. Co. Litt. 47 b. Before leaving this subject it may be useful to call attention to some of the cases, which show *when* a landlord may distrain in the sense of—*under what circumstances* he may exercise this right. It is a general rule, that no distress can be made for rent, unless there is an actual demise at a fixed rent. See Hegan *v.* Johnson, 2 Taunt. 148; Dunk *v.*

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condition to be performed by the tenant, the landlord may distrain notwithstanding the condition, unless the tenant shows a performance.

When the rent is reserved in iron or grain, or any other commodity, it may be distrained for, provided it is capable of being reduced to a certainty. Thus where the rent of a mill was expressed to be "one-third of the toll which the mill grinds." The Supreme Court of Pennsylvania held the rent might be distrained for, Judge Rogers, in pronouncing the opinion of the Court, said, "If the tenant keeps an account of the toll, which it is his duty to do, the rent may be reduced to the utmost certainty. Nor can we perceive the danger which may arise to the tenant, for his rights are abundantly protected. By an offer to comply with his contract, with which he is best acquainted, he can defeat the landlord. And for an excessive distress the law, as in other cases, has provided him an ample remedy." Fry *v.* Jones, 2 Rawle, 12; Jones *v.* Gundrim, 3 W. & S. 531; Rinehart *v.* Olwine, 5 W. & S. 163; Smith *v.* Colson, 10 Johns. 91. Contra Clark *v.* Fraley, 3 Blackf. 264; Bowzer *v.* Scott, 8 Blackf. 86.

New York, in 1846, abolished the distress for rent, and it has been held that distress for rent is not an essential part of the contract between landlord and tenant; that it was merely a remedy which the legislature might alter or abolish without such act being liable to any constitutional objection. Guild *v.* Rogers, 8 Barb. Sup. Court, 502.

[*162] *Next, with regard to *the mode of making the distress.* The landlord may either distrain in

Hunter, 5 B. & A. 322, (7 E. C. L. R. 115,); Knight *v.* Benett, 3 Bing. 361, (11 E. C. L. R. 181,); Regnart *v.* Porter, 7 Bing. 451, (20 E. C. L. R. 204,); Risely *v.* Ryle, 11 M. & W. 16;* and Watson *v.* Waud, 8 Exch. 335. But a landlord may distrain on a tenancy at will if a yearly rent is reserved, Litt. s. 72; and a rent is sufficiently certain which may be reduced to certainty by computation. See Daniel *v.* Gracie, 6 Q. B. 145, (51 E. C. L. R. 145,); and Doe *d.* Edney *v.* Benham, 7 Q. B. 976, (53 E. C. L. R. 976,); cited *ante*, pp. 88–95, notes. The right to distrain may also exist by express agreement between the parties, although the subject-matter in respect of which this power is reserved may not be strictly *a rent;* therefore, where by a contract between a landlord and a tenant, it was stipulated that a penalty should be paid for every yard of hay which was not spent upon the land, and that it should be recoverable by distress as for rent in arrear, it was held that it might be so recovered; but that as it was not a rent, the landlord could not avow for it in the general form which is given by the 11 Geo. 2, c. 19. Pollitt *v.* Forrest, 11 Q. B. 949, (63 E. C. L. R. 949,). Another general rule is, that a landlord who has no reversion cannot distrain; therefore if a lessee for years assigns his term, reserving a rent, he cannot distrain at common law, nor under the 4 Geo. 2, c. 28, s. 5, for a rent-seck cannot, it is said, issue out of a term of years. See Newcomb *v.* Harvey, Carth. 161; —— *v.* Cooper, 2 Wils. 375; Smith *v.* Mapleback, 1 T. R. 441; Preece *v.* Corrie, 5 Bing, 24, (15 E. C. L. R. 453,); and Pollock *v.* Stacy, 9 Q. B. 1033, (58 E. C. L. R. 1033,). It does not, however, appear to be quite clear that a rent-seck cannot issue out of a term of years, for the passage in the Year Book of 45 Edw. 3, which is cited incorrectly in —— *v.* Cooper, and correctly in Bro. Ab. *Dette*, pl. 39, as the authority for this position, has a *quære* added to it; and see also Co. Litt. 147 b. A tenant from year to year, who underlets from year to year, has however a sufficient reversion to distrain. Curtis *v.* Wheeler, 1 Moo. & M. 493, (22 E. C. L. R. 572,). With respect to the limitation in point of time on the right to distrain, only six years' arrears of rent are recoverable by distress, 3 & 4 Wm. 4, c. 27, s. 42. But the power to distrain for this limited amount does not appear to be

*person, or, as is now the practice, by an authorized agent or bailiff. The authority is [*163]

lost *by reason of the mere non-payment of the rent* for any time short of the period after which the right to recover the land itself is gone. Where the right to the land is at an end, as there is no longer any tenancy or any reversion, the right of distress ceases also. Where the land continues to be held under a lease in writing, and the rent is simply withheld, the non-payment of it for any number of years will not affect the interest of the landlord or his representatives in the land itself. Doe *d.* Davy *v.* Oxenham, 7 M. & W. 131;* and Sugden's Essay on the Real Property Statutes, c. I. s. III. But where there is no lease in writing, the right to recover the land is lost so soon as twenty years have elapsed from the time at which the right of action in this respect has accrued to the landlord, or to any person through whom he claims; and this time, when the receipt of rent has been discontinued, is the last time at which the rent was received. See the 3 & 4 Wm. 4, c. 27, ss. 2, 3, & 8. By s. 2 of this act, it is provided that no person shall make an entry *or distress*, or bring an action to recover any land or rent, but within twenty years next after the right of entry, distress or action has first accrued. But this section has been held not to apply to rents reserved on a demise, but to be confined to rents existing as an inheritance distinct from the land, and for which, before this act, the party entitled to them might have had an assize. See Paget *v.* Foley, 2 Bing. N. C. 679, (29 E. C. L. R. 714,); Grant *v.* Ellis, 9 M. & W. 113;* Doe *d.* Angell *v.* Angell, 9 Q. B. 328, (58 E. C. L. R. 328,); The Dean of Ely *v.* Cash, 15 M. & W. 617;* and Owen *v.* De Beauvoir, 16 M. & W. 547;* S. C. 5 Exch. 166. The only way, therefore, in which it can affect the right of making a distress, is by its operation in destroying the right to recover the land itself after the period of limitation which it mentions. By an act passed in the same session, the 3 & 4 Wm. 4, c. 42, s. 3, a limitation of twenty years is imposed on actions of debt for rent upon an indenture of demise, but this statute does not mention distresses. See as to the construction of these acts, the cases last cited, the notes to Nepean *v.* Doe, 2 Smith's L. C. 396; and Humfrey *v.* Gery, 7 C. B. 567, (62 E. C. L. R. 567,). There is another general rule limiting the right of a landlord to distrain: namely, that after a distress for rent has once been made, no

[*164] usually given by *an instrument called a *war-*

second distress will be valid for the same rent where enough might have been taken under the first distress, or where if enough has been taken under it, the distress has been afterwards voluntarily abandoned. See Dawson *v.* Cropp, 1 C. B. 961, (50 E. C. L. R. 961,). This rule is illustrated, and the limitations on it are explained in Bagge, app., *v.* Mawby, resp., 8 Exch. 641. In this case a landlord distrained upon the goods of a tenant, who had previously committed an act of bankruptcy. Before any sale took place he withdrew the distress without obtaining payment of the rent, owing to a notice from one of the creditors of the tenant that he was taking proceedings in bankruptcy against him; but at that time no assignee had been appointed. The landlord afterwards distrained a second time for the same rent. The Court held that as he had abandoned the first distress on account of a mere threat, which he ought to have disregarded, and without any sufficient excuse, the second distress was illegal. "There is nothing more clear," said Baron Parke, in delivering judgment, "than this, that a person cannot distrain twice for the same rent, for if he has had an opportunity of levying the amount of the first distress, it is vexatious in him to levy the second, unless there be some legal ground for his adopting such a course. . . . If there has been some mistake as to the value of the goods, and the landlord fairly supposed the distress to be of the proper value at the time of levying the first distress, and he afterwards finds it to be insufficient, he may then distrain for the remainder; or, if the tenant has done anything equivalent to saying, 'Forbear to distrain now, and postpone your distress to some other time;' in such cases, the landlord may distrain a second time. *But if there is a fair opportunity, and there is no lawful or legal cause why he should not work out the payment of the rent by reason of the first distress, his duty is to work it out by the first distress, and he cannot distrain again.* . . The principle upon which, as a general rule, a landlord cannot distrain twice is, that he must not vex his tenant by the exercise, upon two occasions, of this summary remedy." Finally, it must be observed that the discharge of the tenant under the bankrupt acts does not take away the right to distrain. Briggs *v.* Sowry, 8 M. & W. 729;* Newton *v.* Scott, 9 M. & W. 434;* S. C. 10 M. & W. 471.* Nor is it any objection to a distress that after the rent became

rant of distress.[9](*a*) But whether the landlord or the bailiff distrain, *care must be taken that the outer door be open at the time of making the distress, if it be made in a dwelling-house, for this is one of the cases in which the maxims holds, that [*165]

due, the tenant petitioned the Insolvent Court, inserted the rent in his schedule, and was opposed in respect of it by the landlord, but obtained his discharge. Phillips *v.* Shervill, 6 Q. B. 944, (51 E. C. L. R. 944,).

[9] The warrant of distress does not require a stamp. Pyle *v.* Partridge, 16 M. & W. 20.* It should be signed by the landlord, but the signature of one joint tenant is sufficient if the others do not dissent. Robinson *v.* Hoffman, 4 Bing. 562, (13 E. C. L. R. 637,). A warrant which directs the bailiff to distrain one sum composed of several rates, is wholly bad, if one of the rates is illegal. Milward *v.* Caffin, 2 W. Bl. 1330; Sibbald *v.* Roderick, 11 A. & E. 38, (39 E. C. L. R. 21,). But it is otherwise, if the amount claimed in respect of both demands is mentioned, and the legal part can be distinguished from the illegal. Skingley *v.* Surridge, 11 M. & W. 503;* see also Clark *v.* Woods, 2 Exch. 394. A subsequent ratification by the landlord of the bailiff's authority is as effectual as a previous command. Bro. Ab. *Traverse per sans ceo.* pl. 3. Where a landlord gives a warrant to distrain, he impliedly authorizes the bailiff to receive the rent if tendered. Hatch *v.* Hale, 15 Q. B. 10, (69 E. C. L. R. 10,). A distress may be made for one rent, and the landlord may avow for another. See Fitz. Ab. *Avowrie*, pl. 232; the judgment of Lord Kenyon in Crowther *v.* Ramsbottom, 7 R. 657, and the judgment of Baron (then Mr. Justice) Parke in Lucas *v.* Nockells, 10 Bing. 172, (25 E. C. L. R. 87,). And if a person having authority to distrain for rent due to another, says, at the time, that he distrains for rent due to himself, he may, nevertheless, justify as the bailiff of the person to whom the rent is really due. Trent *v.* Hunt, 9 Exch. 14.

(*a*) In Pennsylvania the warrant need not be in writing. Jones *v.* Gundrim, 3 W. & S. 531; Fremeiseus *v.* Reigart, 4 Watts. 98; aliter in Georgia and formerly in New York. Bigelow *v.* Judson, 19 Wend. 229.

every man's house is his castle; but, if the OUTER door be open, the inner doors may afterwards be broken open, as in case of an execution. See Browning *v.* Dann, Bull, N. P. 81.[10](*a*) There is a curious case in 4 Taunt. 562, Gould *v.* Bradstock, in which the tenant occupied a paper mill, over which was a room in which the landlord resided. It happened that the wheel of the mill rose higher than the level of the floor of the upper apartment, and, in order to hide it from view, the landlord had placed boards over it, which were no part of the ceiling of the mill, but put entirely for his own convenience. Having occasion to distrain, his [*166] bailiff took away these *boards, and came down through the aperture left for the wheel, in order to distrain; and it was held that trespass would not lie against him for so doing.

In order to render the distress complete, there must be a *seizure* of the property distrained upon, but a very slight act amounts, in contemplation of law, to such a seizure; thus, walking round the premises, making an inventory of the articles there, and declaring that they were seized as a distress for the rent due, has been held to amount to an actual seizure of them. See

[10] See Co. Litt. 161 a. The outer door of a stable, although not within the curtilage, cannot be broken open. Brown *v.* Glenn, 16 Q. B. 254, (71 E. C. L. R. 254,). But the landlord may open the outer door by the usual means adopted by persons having access to the building; as by turning the key, lifting the latch, or by drawing back the bolt. Ryan *v.* Shilcock, 7 Exch. 72. In cases within the 11 Geo. 2, c. 19, s. 7, there is, as has been already mentioned, an exception to this rule.

(*a*) Williams *v.* Spencer, 5 Johns. 352; State *v.* Thackaw, 1 Bay, 358; State *v.* Armfield, 2 Hawks, 246; Curtis *v.* Hubbard, 1 Hill. 337.

Hutchins *v.* Scott, 2 M. & W. 809 ;* Swann *v.* Earl of Falmouth, 8 B. & C. 456, (15 E. C. L. R. 227,) ; Wood *v.* Nunn, 5 Bing. 10, (15 E. C. L. R. 445,).[11]

As soon as the distress is made, the person distraining ought to make an inventory of the property distrained, and serve it, with a notice of the distress, on the tenant, either personally or at his place of abode; or, if there be no house upon the premises, then upon the most conspicuous part of them; this is by stat. 2 W. & M. sess. 1, c. 5, s. 2, on the construction of which you may consult Walter *v.* Rumbal, 1 Ld. Raym. 53; Moss *v.* Gallimore, 1 Dougl. 278.[12] I shall

[11] See Hartley *v.* Moxham, 3 Q. B. 701, (43 E. C. L. R. 933,). In this case the goods of a stranger had been seized as a distress, but before any notice to him, the distrainer allowed him to take them off the premises for a temporary purpose, intending that they should be returned, and they were afterwards returned; it was held that there was no abandonment of the distress. Kerby *v.* Harding, 6 Exch. 234.

[12] The words of this section are as follows: Where any goods or chattels shall be distrained for any rent reserved and due upon any demise, lease, or contract whatsoever, and the tenant or owner of the goods so distrained shall not, within five days next after such distress taken, and notice thereof (with the cause of such taking) left at the chief mansion house, or other most notorious place on the premises charged with the rent distrained for, replevy the same, with sufficient security to be given to the sheriff according to law, that then in such case, after such distress and notice as aforesaid, and expiration of the said five days, the person distraining shall and may, with the sheriff or under-sheriff of the county, or with the constable of the hundred, parish or place, where such distress shall be taken (who are hereby required to be aiding and assisting therein), cause the goods and chattels so distrained to be appraised by two sworn appraisers (whom such sheriff, under-sheriff, or constable are hereby empowered to swear,) to appraise the same truly, according to the best of their understandings; and after such appraisement shall and may lawfully sell the goods and chattels so distrained for the best price that can be

[*167] have *occasion to say much more presently regarding the provisions of this statute. What

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 said sheriff, under-sheriff, or constable for the owner's use." The notice required by the statute must be in writing, for it is *to be left* at the chief mansion house. Wilson *v.* Nightingale, 8 Q. B. 1034, (55 E. C. L. R. 1034,). It should mention distinctly the goods which are taken, and give clear information in this respect to the tenant or person to whom they belong, and should also state the amount of rent in arrear. In Kerby *v.* Harding, 6 Exch. 234, the notice stated that the landlord had distrained the several goods and chattels, which were specified in a schedule. The schedule mentioned certain goods, not including those of the plaintiff, who was a stranger, and had deposited some articles belonging to him on the premises, and it concluded, "and all other goods, chattels, and effects on the said premises, that may be required in order to satisfy the above rent, together with all necessary expenses." It was held that this notice was too vague to justify the sale of the plaintiff's goods. In another case, however, the notice stated that the broker had taken the goods mentioned in the inventory underwritten. The inventory mentioned specifically certain goods, and then proceeded, "and any other goods and effects that may be found in and about the said premises, to pay the said rent and expenses of this distress." It appeared that all the goods on the premises were intended to be taken, and the Court refused, apparently with some hesitation, to hold that this notice was insufficient. Wakeman *v.* Lindsey, 14 Q. B. 625, (68 E. C. L. R. 625,). The want of a notice does not render the distress invalid. Trent *v.* Hunt, 9 Exch. 14. In Taylor *v.* Henniker, 12 A. & E. 488, (40 E. C. L. R. 245), a landlord distrained for a larger amount of rent than was due, and gave a notice of distress, mentioning this incorrect amount. It was held that an action on the case lay against him at the suit of the tenant, although the goods distrained were of less value than the rent really due, and before the sale took place, a second notice had been given claiming only the amount really due. But this case has been overruled by a later decision in the Exchequer Chamber. See

I said, applies to *distresses regularly made upon the demised premises, but there is one [*168] case to which I have not yet adverted, in which the legislature has instituted a peculiar law applicable to those cases in which the tenant has, for the purpose of preventing his landlord's distress, fraudulently removed his goods from the demised premises. This law, as I have stated in a previous Lecture,[13] is applicable only to a case in which the tenant has removed *his own goods*, for it is obvious that, though it may be right to prevent him from withdrawing from the landlord the security on which he has relied, there would be no justice in preventing a stranger who had unconsciously allowed his property to be on premises liable to rent, from saving himself from their loss, by withdrawing them at any, even the very latest moment.(*a*)

But, with regard to the tenant himself—the *legislature has thought fit to guard against a [*169] case which frequently happened; that, namely, of his taking all his property away from the premises demised, so as to leave the landlord without any distress at all. And accordingly, it is enacted by stat. 11 Geo. 2, c. 19, s. 1, that if any tenant *fraudulently or clandestinely* carry away his goods to prevent the land-

Tancred *v.* Leyland, 16 Q. B. 669, (71 E. C. L. R. 669,). And in the still later case of Stevenson *v.* Newnham, 13 C. B. 285, (76 E. C. L. R. 285), it was held by the same Court, that a count in case for distraining for more rent than was due, was bad, although it alleged that the distress was made maliciously; for an act which does not amount to a legal injury is not actionable, even if done with a bad intent.

[13] *Ante*, p. 155.

(*a*) Adams *v.* La Comb. 1 Dall. 440. Frisbey *v.* Thayer, 25 Wend. 396. See *ante*, note to page 154.

lord from distraining, the landlord may, within thirty days next after such carrying away, take and seize the goods *wherever they may be found*, and sell and dispose of them in the same way as if they had been found upon the premises.[14] It is, indeed, provided by the second section of the Act, that they shall not be sold if already disposed of to *bona fide* purchasers, an enactment the justice of which is obvious.[15] In section 7 is contained the part of the enactment to which I am now principally adverting; for, with regard to the right to seize such goods, I have already, as you may remember, mentioned it while treating of the question *what* goods may be taken. The MODE of taking them is chalked out by the 7th section, which enacts that where any goods fraudulently or clandestinely conveyed away shall be kept in any house, building, or place—(I don't cite the precise words of the Act, for they are very long, and to read them at length would take up too much of our time, and you may consult them at leisure)—but the effect is, that wherever the goods be secured, it shall be lawful *for the landlord or [*170] his agent to distrain them, first calling to his aid the constable or peace officer of the place, and, in the case of a dwelling-house, oath being first made before a justice of reasonable ground for suspecting that the goods are there, to break open doors—which, as I have already explained, cannot be done in an ordinary case,—and make distress upon the goods.[16](*a*)

[14] See *ante*, p. 154. [15] See *ante*, p. 155.

[16] See as to the attendance of a constable in these cases, Rich *v.* Woolley, 7 Bing. 651, (20 E. C. L. R. 291,); Cartwright *v.* Smith, 1 M. & Rob. 284. It is not necessary that there should be a previous request to open the doors. Williams *v.* Roberts, 7 Exch. 618.

(*a*) The first and second sections of the act 11 Geo. 2, c. 19, have

This is an enactment of considerable severity, although a very just one, and it has accordingly been strictly construed. It has been held that a removal of goods, to fall within it, must have taken place *after* the rent has become due. *Watson* v. *Main*, 3 Esp. 15; *Furneaux* v. *Fotherby*, 4 Camp. 136; *Rand* v. *Vaughan*, 1 Bing. N. C. 767, (27 E. C. L. R. 854,).[17] It is also held in *Ashmore* v. *Hardy*, 7 C. & P. 501, (32 E. C. L. R. 729,) that the landlord cannot seize after he has conveyed away the reversion, for he has then ceased to be landlord, and consequently does not fall within the letter of the Act. The statute being a very important one, I will refer you to a few of the cases decided on it—*Parry* v. *Duncan*, 7 Bing. 243, (20 E. C. L. R. 115,); *Thornton* v. *Adams*, 5 M. & S. 38; *Welch* v. *Myers*, 4 Camp. 368.[18]

The *distress* having been made, the next question is, *what is to be done with it?* And, in order *perfectly to comprehend the present state of the [*171] law upon this subject, it will be necessary to show

[17] But see Dibble *v.* Bowater, 2 E. & B. 564, (75 E. C. L. R. 564,); and *ante*, p. 155, note.

[18] *Ante*, p. 154.

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been incorporated in the Pennsylvania Act of March 21st, 1772. The seventh section was not incorporated, and has never been followed. It was early decided under this statute that the goods of a stranger could not be followed and distrained. Adams *v.* Lacomb, 1 Dall. 440. The goods of the tenant's assignee may be followed and seized, if clandestinely removed. Jones *v.* Gundrim, 3 W. & S. 531, but not those of the tenant after a *bonâ fide* sale to an innocent purchaser. Clifford *v.* Beems, 3 Watts, 246. And it has been held to be a trespass to enter the house of a stranger to search for and distrain goods fraudulently removed, if no goods of the tenant are there found. Hobbs *v.* Geiss, 13 S. & R. 417. See *ante*, note to page 154.

briefly how the matter stood at common law, and to enumerate the changes which have since taken place in their order.

At common law, the distress was but a pledge for the rent arrear, the landlord was entitled to keep it as a security until such rent was satisfied, but he could do no more; if he sold it he became a trespasser *ab initio*, and all his proceedings were void;[19] the general principle being, that, when a man abuses an authority given him by law to take another's goods, or enter on another's premises, the abuse renders him a trespasser, in contemplation of law, from the very commencement of the transaction. This principle, which you will find laid down and discussed in the *Six Carpenters' Case*, 8 Co. 146, is no longer, as I shall by and by show you, applicable to distresses for rent arrear. At common law, however, it was so, and its effect was that, if the landlord *abused* his authority to distrain, he became a trespasser from the very beginning of the transaction. And a *sale* of the distress, which he had then no right to sell, was clearly such an abuse.[20]

[*172] *The distress, as I have said, was at common law a *pledge*, but it was a pledge with

[19] See Gilbert on Dist. 67. Distresses damage feasant are not affected by the 2 Wm. & M. sess. 1, c. 5, and this rule of the common law is therefore still applicable to them, *ib.*

[20] See the notes to this case, 1 Smith's L. C. 65. Although the 11 Geo. 2, c. 19, s. 19, enacts that where a distress is made for rent which is due, any irregularity or unlawful act afterwards done shall not make the landlord a trespasser *ab initio*, he may still become such by seizing goods which are not distrainable. But if he distrains goods which are privileged as well as other goods which are liable to be distrained, he is only a trespasser as to the former. Harvey *v.* Pocock, 11 M. & W. 740.* He appears, however, to be in this case a trespasser *ab initio* as to the entry. Price *v.* Woodhouse, 1 Exch. 559. See also *post*, p. 176, note (25.)

which the landlord could not deal as he thought proper. It was his duty to *impound it in a common pound*, the state of which he was bound to take care should be suitable to the nature of the distress; thus, if the articles distrained were of a perishable nature, he was to secure them in a pound *covert*, or weather-proof; if they were cattle, in an *open* pound, whither the owner might come to feed them;[21] unless, indeed, he chose to take upon himself the responsibility of doing so. The state of the common law on this subject you will find discussed in the case of *Wilder* v. *Speer*, 8 A. & E. 547, (35 E. C. L. R. 450,) which was a case of a distress *damage feasant*, in which the common law on this subject remains unaltered.

Subject, however, to this rule the landlord might have taken the distress to any pound he pleased, a right fraught with the greatest hardship to the tenant who was obliged to feed his cattle while they remained in the pound, if it were a public *one, though if the landlord put them into a *private* one, then [*173] indeed, *he* was obliged to supply them with sustenance. But if he put them in a *public* pound, they lay there at the tenant's risk, and, if they starved, it was his loss, the landlord was not answerable.[22] Now, indeed, by a just and humane law, stat. 5 & 6 W. 4, c. 59, the person who distrains cattle, for whatever cause, is

[21] See Gilbert on Dist. 62; 2 Inst. 106; Co. Litt. 37 b; and Bac. Ab. *Distress* (D). The distrainer could not at common law, and cannot now, work or use the distress, for he has no property in it, but only a power by law to take it, *ib.* He is not entitled to bind or tie the beasts distrained in the pound, even to prevent their escape. Gilbert on Dist. 65.

[22] See Bac. Ab. *Distress* (D), and Doct. and Stud. p. 14; Dial. 1, c. 5.

bound to supply them with food;[23] but, at common law, the matter was as I have stated it to you.

[23] It is enacted by s. 4 of this act that, "every person who shall impound or confine, or cause to be impounded or confined, any horse, ass, or other cattle or animal, in any common pound, open pound, or close pound, or in any inclosed place, shall and he is hereby required to find, provide, and supply such horse, ass, and other cattle or animal so impounded or confined, daily with good and sufficient food and nourishment for so long a time as such horse, ass, or other cattle or animal shall remain and continue so impounded or confined as aforesaid; and every such person who shall so find, provide, and supply any such horse, ass, or other cattle or animal, with such daily food and nourishment as aforesaid, shall and may, and he and they are hereby authorised and empowered to recover of and from the owner or owners of such cattle or animal not exceeding double the full value of the food and nourishment so supplied to such cattle or animal as aforesaid, by proceeding before any one justice of the peace within whose jurisdiction such cattle or animal shall have been so impounded and supplied with food as aforesaid, in like manner as any penalty or forfeiture, or any damage or injury, may be recovered under and by virtue of any of the powers or authorities in this act contained, and which value of the food and nourishment so to be supplied as aforesaid, such justice is hereby fully authorised and empowered to ascertain, determine, and enforce as aforesaid, and every person who shall have so supplied such food and nourishment as aforesaid shall be at liberty, if he shall so think fit, instead of proceeding for the recovery of the value thereof as last aforesaid, after the expiration of seven clear days from the time of impounding the same, to sell any such horse, ass, or other cattle or animal, openly at any public market (after having given three days' public printed notice thereof) for the most money that can then be got for the same, and to apply the produce in discharge of the value of such food and nourishment so supplied as aforesaid, and the expenses of and attending such sale, rendering the overplus (if any) to the owner of such cattle or animal." By s. 5, it is provided that, where cattle have been impounded without sufficient food more than twenty-four hours any person may enter into the pound and supply them with food without being liable to an action of trespass or other proceeding. It will be observed that this act

*Now it is hardly necessary to observe, that this state of the law was fraught with hardship [*174] to the tenant, so long as the landlord had a right to drive the cattle to a distance; and, therefore, the first improvement in the law was made by stat. 52 Hen. 3, cap. 4, [Statute of Marlebridge] which prohibited the person distraining from driving the distress *out of the county*.(*a*) But, even this being found too great a latitude, stat. 1 & 2 Philip & Mary, c. 12, was passed, which directed that no distress of cattle should be

affords no means of recovering the value of the food supplied, except where it is furnished by the party impounding. Mason *v.* Newland, 9 C. & P. 575, (38 E. C. L. R. 337,). If several horses are distrained, the distrainer may sell one or more of them for the expenses of all. But in pleas to an action of trespass for taking and converting the horses sold it must be alleged that it was necessary to sell them for the payment of the expenses, Layton *v.* Hurry, 8 Q. B. 811, (55 E. C. L. R. 811,). After a sale, under this act, the distrainer can only keep the value of the food and the expenses of the sale; for, subject to this deduction, the statute requires that the overplus should be returned to the owner of the cattle. Mason *v.* Newland, *ubi sup.*

(*a*) There has been no re-enactment in Pennsylvania of this section of the Statute of Marlebridge, nor is there anything in the Act of March, 1772, prescribing where the goods are to be impounded. The report of the judges, however, recommends the 4th Chapter of 52 Henry III. to be incorporated. The 1st section 1 and 2 Philip and Mary, c. 12, is also reported as in force and to be incorporated. But it was said in Woglaw *v.* Cowperthwaite, 2 Dall. 68, to have been the usage in Pennsylvania, both before and since the Act of 1772, to impound the distress on the premises, and there to appraise and sell it, agreeably to the statute of 11 George II. c. 19, though the clause of that statute which gives this power is not contained in the Act of Assembly, and that the construction of the statute 2 W. & M. c. 5, that the distrainer may leave the distress on the premises for the five days mentioned in the act, but becomes a trespasser after that time, will hold under the act of 1772.

driven *out of the hundred*, [*rape*, *wapentake*, *or lathe*] where it was taken, except to an open pound [in the same shire] not above three miles from the place of taking it. [*175] *And, at last, it appeared so much better both for the landlord and the tenant that the distress should not be taken off the premises at all, but should remain there in a situation equally and easily accessible to both, that by stat. 11 Geo. 2, c. 19, s. 10, it was enacted that "in cases of distress for rent, the person distraining may impound or otherwise secure the distress on such part of the premises as shall be most convenient."[24] Upon this statute, which is the law now in force with regard to the impounding a distress for rent, it has been held that the landlord ought not to deprive the tenant of the enjoyment of his whole house, or even interfere with it; but ought to put the things distrained into one room, if that can be conveniently accomplished, unless, indeed, he obtains the tenant's consent to leave them in their ordinary situations, of which consent very slight evidence will be sufficient, as it is so obviously the tenant's own interest to grant it. In the absence of consent, it is obvious that the part of the premises to be taken for the purpose of securing the distress will, in each case, depend on the nature of the distress, and of the premises in the particular case. In some instances it may be, and indeed has been, necessary to occupy the whole premises; [*176] *for instance, when they were a small cottage. See on the

[24] The words of this section are, "that it shall be lawful for any person or persons 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."

above points, *Washborn* v. *Black*, 11 East, 405 n; *Cox* v. *Painter*, 7 C. & P. 767, (32 E. C. L. R. 862).[25]

[25] See also Woods *v.* Durant, 16 M. & W. 149.* When a tender of the rent has been made, it often becomes material to inquire into what constitutes an impounding; for, as is said by Lord Coke in the Six Carpenters' Case (8 Rep. 146), "tender upon the land before the distress, makes the distress tortious; tender after the distress, and before the impounding, makes the detainer, and not the taking, wrongful; tender after the impounding makes neither the one nor the other wrongful, for then it comes too late, because then the case is put to the trial of the law to be there determined." And these rules apply to goods seized for rent, as well as to cattle taken damage feasant. Ladd *v.* Thomas, 12 A. & E. 117, (40 E. C. L. R. 67,). See as to what is a sufficient impounding to make a tender too late, Firth *v.* Purvis, 5 T. R. 432; Browne *v.* Powell, 4 Bing. 230, (13 E. C. L. R. 480); Thomas *v.* Harries, 1 M. & Gr. 695, (39 E. C. L. R. 607); Ellis *v.* Taylor, 8 M. & W. 415;* Peppercorn *v.* Hofman, 9 M. & W. 618.* If a sufficient tender is made before the distress, the remedy is replevin or trespass; if it be made after the distress and before the impounding, detinue is the right form of action, Gulliver *v.* Cosens, 1 C. B. 788, (50 E. C. L. R. 788,). In Ladd *v.* Thomas, Lord Denman, C. J., was of opinion that trespass was the proper form of action for continuing on the premises to keep possession of the goods distrained after the distress had ceased to be lawful. See also Peppercorn *v.* Hofman, and Ash *v.* Dawnay, 8 Exch. 237. In West *v.* Nibbs, 4 C. B. 172, (56 E. C. L. R. 172), however, which was an action of trespass for seizing goods, it was held, by the Court of Common Pleas, that a landlord who had, after the impounding, accepted the rent and the expenses of distress, could not be treated as a trespasser merely because he retained the possession of the goods distrained, although his refusal to give them up might render him liable in trover. It must be observed that since the Common Law Procedure Act, 1852 (15 & 16 Vic. c. 76), the distinctions between different actions, except so far as they are matter of substance, are no longer important, and indeed have ceased to exist. The 6 & 7 Vic. c. 30, which was passed to amend the law relating to pound-breach and rescue, and which gives power to two justices in certain cases to try summarily offences of this description, does not apply where the cattle are seized under a distress for rent. See s. 1.

[*177] *With regard to a distress of growing crops, which, though not distrainable at common law, may, as I stated in a former Lecture,[26] be distrained by virtue of stat. 11 Geo. 2, c. 19, s. 8. The same section directs how they shall be impounded after they have been cut, gathered, and carried: the Act directs, *that they shall be laid up in barns, or other proper places on the premises, or as near thereto as may be if there be none on the premises.*[27](a)

Such is the state of the law with regard to the IMPOUNDING the distress, which is the first step to be taken with regard to it; and next comes the inquiry, what shall become of it after it has been impounded? Now I have stated, that at common law it was a mere pledge, the landlord could not have disposed of it; he might detain it till the rent was paid, but he could do

[26] *Ante*, p. 149.

[27] This section enables the landlord to distrain the crops, "and the same to cut, gather, make, cure, carry, and lay up, *when ripe*, in the barns, or other proper place on the premises so demised or holden; and in case there shall be no barn or proper place on the premises so demised or holden, then in any other barn or proper place which such lessor or landlord, lessors or landlords, shall hire or otherwise procure for that purpose, and as near as may be to the premises."

(a) The seventh section of the Pennsylvania Act of 1772, authorizes growing crops to be distrained, but there is no provision similar to the 8th section of 11 George II. ch. 19, which directs that they shall be laid up in barns. The Pennsylvania Act authorizes a sale, and declares that "the purchaser of any such corn, grass, hops, roots, fruits, pulse, or other product, shall have free egress and regress to and from the same where growing, to repair the fences, from time to time, and when ripe to cut, gather, make, cure, and lay up and thrash, and after to carry the same away in the same manner as the tenant might legally have done, had such distress never been made."

no more. This was a bad law both for landlord and tenant. It did not always procure satisfaction of his rent for the one, while it often had the effect of depriving the other of all means of satisfying it. It was, therefore enacted by stat. 2 Wm. & M., sess. 1, c. 5, s. 2, "That where any goods or chattels shall be distrained for rent reserved and due on any *contract, and the tenant or owner of them [*178] shall not *within five days* [*next*] *after the distress and notice thereof*, (with the cause of such taking) left at the chief mansion house, or other most notorious place upon the premises charged with the rent, replevy the same; the person distraining may, with the sheriff or under-sheriff of the county, or constable of the hundred, parish, or place where the distress was taken, cause the distress to be *appraised* by two sworn appraisers, whom the sheriff or other officers shall swear to appraise them truly, and, after such appraisement, may sell the same towards satisfaction of the rent and the charges of the distress and appraisement, leaving the overplus, if any, in the hands of the sheriff or other officer for the owner's use.[28] This being the important practical enactment relative to this part of the subject, it is necessary to pay some attention to its provisions.

And first you will observe, that the sale is not to take place unless the tenant omit to replevy *within five days after the distress.* These five days are to be reckoned *inclusive* of the day of the sale; *Wallace* v. *King*, 1 H. Bl. 13;[29] and though, *upon [*179]

[28] These are not the exact words of this section, but the substance of it is given. See *ante*, p. 166, note [12]. If the overplus is not left in the hands of the sheriff, the tenant cannot bring an action for money had and received; he must sue in case under the statute. Yates *v.* Eastwood, 6 Exch. 805.

[29] This case has been overruled. It is now held that under this

the one hand, the landlord must not incumber the premises by keeping the goods there after the five days, and a reasonable time for appraising and selling them has elapsed, *Griffin* v. *Scott*, 2 Ld. Raym. 1424; yet, on the other hand, he must not sell before five times the space of twenty-four hours has completely elapsed. *Harper* v. *Taswell*, 6 C. & P. 166. (25 E. C. L. R. 376.).[30](*a*)

statute, as in other cases of a like kind, the days must be calculated inclusively of the last day, and *exclusively* of the day of taking. Robinson *v.* Waddington, 13 Q. B. 753, (66 E. C. L. R. 753,).

[30] See the last note, the cases cited, *ante*, p. 176, note [25], the judgment of Baron Parke in Piggott *v.* Birtles, 1 M. & W. 448,* and the notes to Simpson *v.* Hartopp, 1 Smith's L. C. 193. As to the sale of hay, straw, and growing crops, see *ante*, p. 150, note [26].

(*a*) In Pennsylvania, in the construction of the Act of 1772, it is held that the day of making the distress is to be excluded in computing the time, and Sunday is not to be counted as one of the five days if it happen to be the last if counted. Thus where the distress was made on Tuesday that day was excluded; then the fifth day being Sunday was excluded also, and Monday was held to be the fifth day after the distress. "It is true," the Court say, "that a different rule has been adopted in England, in reckoning the five days allowed for a like purpose by the statute of 2 W. & M. as to the commencement or first day thereof. In Wallace *v.* King, 1 Hen. Bl. Rep. 13, the day of the distress was held to be the first of the five days. This we think, however, is rather too severe a construction against the tenant." McKinney *v.* Reader, 6 Watts, 37. It was held in the same case that the omission to give the notice did not render the distress unlawful, but that it was necessary to warrant a sale of the goods. The notice may be given either to the tenant or the owner. Caldcleugh *v.* Hollingsworth, 8 W. & S. 302. And an omission to appraise and advertise renders the landlord a trespasser *ab initio*. Kerr *v.* Sharp, 14 S. & R. 399. The Pennsylvania Act of 21st March, 1772, requires six days notice of the sale. The language of the Act is that the person distraining *shall and may*, with the sheriff, under sheriff, or any constable, &c., cause the goods to be

I have already spoken of the *notice of distress* which the Act requires. With regard to the *appraisement*, the decisions are extremely fine-drawn, and the law on that subject has been rendered more complicated by stat. 57 Geo. 3, c. 93. *Practically* I recommend you to have the distress in every case appraised by *two* sworn appraisers. The decisions, among which there is some variance, are *Fletcher* v. *Saunders*, 1 M. & Rob. 375; *Bishop* v. *Bryant*, 6 C. & P. 484; (25 E. C. L. R. 536;) *Allen* v. *Flicker*, 10 A. & E. 640, (37 E. C. L. R. 204.)[31] As to the *swearing* of the appraisers,

[31] The 57 Geo. 3, c. 93, enacted that no person making any distress for rent, where the sum demanded and due did not exceed 20*l.*, should take in respect of the distress other costs or charges than those fixed by the schedule of the act; and in the schedule a sum is allowed in respect of the appraisement, "whether by one broker or more." Allen *v.* Flicker, cited in the text, decided that, notwithstanding this provision, there must be two appraisers, even where the rent distrained for does not exceed 20*l.*

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appraised by two respectable freeholders; and after such appraisement *shall or may*, after six days public notice, lawfully sell the goods for the best price that can be gotten for the same, for and towards satisfaction of the rent and the charges incurred, leaving the overplus, if any, in the hands of the sheriff, under sheriff or constable, for the owner's use. In Quinn *v.* Wallace, 6 Wh. 461, this language was said to be imperative—that the person distraining must sell; and the proceedings under this statute were said, by Judge Kennedy, to have changed the nature of a distress, so that it is no longer a mere pledge. But that it was like to an execution with the single exception that the tenant was entitled to his replevin. The District Court for the City of Philadelphia held in Reichenback *v.* Post, (not reported) that the "sheriff, under-sheriff, or constable," was only necessarily called in at the appraisement that the subsequent sale might be made without their presence or concurrence.

It was held in New York also that five full days were to be given to the tenant after the day on which notice of the distress is given. Butts *v.* Edwards, 2 Denio, 164.

they are to be sworn before the constable of the parish where the distress is taken. *Avenell* v. *Croker*, Moo. & Malk. 172; (22 E. C. L. R. 499,) *Kenney* v *May*, 1 M. & Rob. 56.[32]

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We have now seen *what* the landlord is to distrain; *where* he is to distrain; *when* he is to distrain; *how* he is to distrain; and *in what manner the distress is to be disposed of.* It remains to consider, *what is the remedy if the distress be illegally levied or improperly pursued.*

This divides itself into two questions; *first*, what is the tenant's remedy if the distress be for a lawful demand but illegally executed, that is, if the rent be really due and *a* distress justifiable, but yet the proceedings taken in *the* particular distress be illegal; and *secondly*, what is the remedy where the distress is wholly unwarranted and unjustifiable.

Now, in the first case, I have already stated, that the rule of the common law was, that if the person distraining abused the right given him by the law to distrain, his whole proceeding became null and void, and he was considered as a trespasser from the very beginning.[33] But by stat. 11 Geo. 2, c. 19, s. 19,(*a*) "When any distress shall be made for any rent justly due, and any irregularity or unlawful act shall be afterwards done by the party distraining or his agent,

[32] A distress, which is appraised by the person who makes it, is irregular. See Westwood *v.* Cowne, 1 Stark. 172, (2 E. C. L. R. 73), and the judgment of the Lord Chief Justice Best, in Lyon *v.* Weldon, 2 Bing. 336, (9 E. C. L. R 604,). The appraisers must be reasonably competent, but they need not be professional appraisers. Roden *v.* Eyton, 6 C. B. 427, (60 E. C. L. R. 427,).

[33] *Ante*, p. 171.

(*a*) In Pennsylvania, where this section of the statute is not in force, the distrainer under such circumstances would be a trespasser *ab initio*. Kerr *v.* Sharp. 14 S. & R. 399.

the distress shall not be deemed unlawful, nor the distrainer a *trespasser *ab initio;* but the party grieved may recover satisfaction in an action of trespass or on the case."[34] See, on this statute, *Winterbourne* v. *Morgan*, 11 East. 395. A subsequent section, s. 20, allows the landlord to *tender* amends before [*181]

[34] These are not the precise words of the statute. The true construction of this section has been held to be that *case* must be brought when the injury complained of is the subject of an action on the case, and *trespass* where it amounts to a trespass. The nature of the irregularity determines the nature of the action. See the judgment of Lord Ellenborough in Winterbourne *v.* Morgan, cited above. But, as has been already observed, since the Common Law Procedure Act, 1852 (15 & 16 Vic. c. 76), many of the peculiar forms of pleading which made a distinction between different actions are nó longer in use. Trespass will not lie for an excessive distress; the proper remedy is an action on the case founded on the Statute of Marlebridge. (52 Hen. 3). Hutchins *v.* Chambers, 1 Burr. 590. Trover will not lie, since the 11 Geo. 2, c. 19, for goods irregularly sold under a distress, if the whole or any part of the rent distrained for was due. Wallace *v.* King, 1 H. Bl. 13; Whitworth *v.* Smith, 1 M. & Rob. 193. A distress, to be excessive, must be obviously unreasonable. A landlord is entitled to protect himself by seizing what any reasonable man would deem adequate; and is only bound to exercise a reasonable and honest discretion. See Roden *v.* Eyton, 6 C. B. 427, (60 E. C. L. R. 427,). A landlord is not liable in trespass for the acts of the broker whom he employs to distrain, unless he authorises them beforehand, or subsequently assents to them, with a knowledge of what has been done. Therefore, where, in an action of trespass against a landlord, it appeared that he had given a warrant to distrain to a broker, and that the latter had taken away a fixture and sold it, and had paid the proceeds to the landlord, who had received them without inquiry and without knowing that anything irregular had been done, it was held that the landlord was not liable. Freeman *v.* Rosher, 13 Q. B. 780, (66 E. C. L. R. 780,). See also as to the remedies of the tenant in respect of irregularities in the making and carrying out of the distress, *ante*, p. 176, note [25], and Woodfall's Landl. and Ten. 703—706 (6th Edit.).

action brought. Thus, you perceive, the ordinary rule of law laid down in the *Six Carpenters'* *Case [*182] is relaxed in favour of a landlord by this statute.

Secondly, where the distress is totally unwarrantable. This involves two cases:—The first, where the party distraining is a mere stranger, and has no pretence whatever to make any claim for rent. In such a case, the tenant may, of course, pursue any remedy adapted by law to a violent seizure of goods. He may, if he think proper, bring his action of replevin, in which case he will have the goods at once restored to him; but he may equally bring trespass or trover, and, though in these forms of action he cannot recover his goods *in specie*,[35] he will, at least, recover a compensation for them in the shape of damages.

Where, however, the landlord distrains, but improperly so, the tenant may, it is true, bring trover or trespass against him;[36] but the form of action usually selected is *replevin*, since that enables him to obtain his goods at once, and have the benefit of them pending the suit brought to try the landlord's right. The action of replevin is a very singular one.[37](*a*) It com-

[35] Under the Common Law Procedure Act, 1854 (17 & 18 Vic. c. 125), the Courts of Common Law have now power to compel the delivery up of specific chattels in actions brought for their detention. See s. 78.

[36] Under the 2 Wm. & M. sess. 1, c. 5, s. 5, the landlord is liable, in an action on the case, to pay double the value of the goods distrained, if at the time of the distress no rent is due. See the act, and Masters *v.* Farris, 1 C. B. 715, (50 E. C. L. R. 715,).

[37] See, generally, as to the proceedings in this action, and as to when it will lie, Bac. Ab. *Replevin and Avowry;* Selwyn's N. P. *Replevin;* George *v.* Chambers, 11 M. & W. 149;* and Allen *v.* Sharp, 2 Exch. 352.

(*a*) In the United States replevin is universally begun by writ as

mences, not like *ordinary actions, by a writ sued out of the superior court; but the party [*183] whose goods have been taken *makes plaint* in the court of the sheriff.[38] This plaint is removed into the superior court. He there sets forth his grievance, namely, the seizure of his goods; the defendant pleads, or as the technical term is, *avows* the right upon which he relies to seize them, and thus the title to distrain is ultimately tried and decided on.

This action of replevin is as old as the law itself, but the proceedings in it have been much altered by modern enactments. At common law, a party whose goods were distrained sued a writ out of Chancery

[38] The jurisdiction of the old county courts in replevin, in cases of distress for rent and damage feasant, is now transferred to the county courts constituted under the 9 & 10 Vic. c. 95. See s. 119 of that act, and Edmonds *v.* Challis, 7 C. B. 413, (62 E. C. L. R. 413,). Actions of replevin are brought in the county courts without writ, and these courts have jurisdiction, whatever may be the value of the goods; 2nd Inst. 139, 312; Pollock on the County Courts, 145; and although the title may be in question. Reg. *v.* Raines, 1 E. & B. 855, (72 E. C. L. R 855,). But where either the title is in question, or the rent or damage in respect of which the distress is taken exceeds 20*l.*, the proceedings are removable by certiorari into the superior courts. See the 9 & 10 Vic. c. 95, s. 121; Mungean *v.* Wheatley, 6 Exch. 88; and Stansfield *v.* Hellawell, 7 Exch. 373.

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in other actions. It requires the sheriff to deliver the enumerated articles to the plaintiff, and to summon the defendant, so that he has a day in Court. It is a proceeding in *personam* as well as in *rem*, and has a much wider scope than belongs to it in England, where its chief use is to try the legality of a distress. In the United States, on the contrary it is quite as often used to try the title to personal property. For further information on this subject, and on the other matters treated of in the remainder of the text and notes to this chapter, the reader is referred to Morris on Replevin.

directed to the sheriff, who was commanded to *replevy* the goods, that is, to give them back to their owner; and to take sureties from him, binding him to try the question of the distrainer's right to take them, and to return the goods if that question was decided against him. [*184] *That was the common law; but it was found extremely inconvenient to send tenants, perhaps poor ones, to the Court of Chancery for writs, and accordingly by [c. 21 of the] stat. Hen. 3, commonly called the Statute of Marlebridge, jurisdiction was given the sheriff to entertain actions of replevin in the first instance; see *Thompson* v. *Farden*, 1 M. & Gr. 535, (39 E. C. L. R. 548,). By means of this statute the tenant obtains restitution of the goods seized immediately. But as it would have been unjust to take the distress from the landlord and leave him without any security, the stat. of Westminster the 2nd, (*i. e.* 13 Edw. 1, c. 2) requires the sheriff, when he restores him the distress, to take security from him that he will prosecute an action of replevin against the distrainer, and return the distress if the court so award. And this security, by stat. 11 Geo. 2, c. 19, s. 23, is directed to be *a bond* from the plaintiff—that is, the tenant,—with two responsible persons as sureties,[39] in [*185] *double the

[39] The sheriff is responsible for taking insufficient sureties, and is bound to use a reasonable discretion in the matter. Jeffery *v.* Bastard, 4 A. & E. 823, (31 E. C. L. R. 362,); Plumer *v.* Brisco, 11 Q. B. 46, (63 E. C. L. R. 46,). But if the sureties were at the time apparently responsible, he is not liable. Hindle *v.* Blades, 5 Taunt. 225, (1 E. C. L. R. 122,); 1 Wms. Saund. 195 f. This statute requires that the bond shall be conditioned to prosecute the suit "with effect and without delay." These words also form part of the condition of the bond which must be given upon the removal of replevins from the county courts under the 9 & 10 Vic. c. 95, s. 121.

value of the goods distrained; and this bond is assignable to the distrainer, contrary to the usual rule of the law of England, that *choses in action* are not assignable.[40] Thus the party distrained, if he dispute the right of the distrainer, may obtain back his goods; but, on condition of bringing an action of replevin against the distrainer: if he succeed in this action he recovers damages, but, if not, the judgment is provided by stat. 17 Car. 2, c. 7, the particular enactments of

They mean that the suit shall be prosecuted *to a not unsuccessful termination.* Jackson *v.* Hanson, 8 M. & W. 477.* In Morris *v.* Crouch, 2 Q. B. 293, (42 E. C. L. R. 681,) a bond was conditioned to prosecute the suit "with effect," not adding "without delay." The distrainer removed the proceedings, and carried the suit regularly forward in the superior court until he died. It was held that the condition was not broken. See also Rider *v.* Edwards, 3 M. & Gr. 202, (42 E. C. L. R. 112,). The condition to prosecute the suit, "without delay," may, however, be broken by a delay which does not exceed the time allowed by the ordinary practice of the courts, if the defendant in replevin be unduly prejudiced by it. Therefore, where a plaint was removed into a superior court, and the plaintiff obtained successive orders for time to declare, and did not declare until more than five months after the removal, it was held that there was evidence for the jury of a delay in prosecuting the suit. Gent *v.* Cutts, 11 Q. B. 288, (63 E. C. L. R. 288,). Although the jurisdiction in replevin of the old county courts is now transferred to the new courts established under the 9 & 10 Vic. c. 95, the sheriff must still, it seems, take a bond pursuant to the 11 Geo. 2, c. 19. Edmonds *v.* Challis, 7 C. B. 413, (62 E. C. L. R. 413,). The bond which is required by the County Court Act before the proceedings can be removed, is to be given by the party removing the proceedings to the other party in the action, and is to be approved by the judge; see s. 127; but where a judge, by mistake, took the bond to himself, it was held not to be void. Stansfield *v.* Hellawell, 7 Exch. 373.

[40] See the notes to Mounson *v.* Redshaw, 1 Wms. Saund. 195 f.; and Austen *v.* Howard, 7 Taunt. 325, (2 E. C. L. R. 384,).

which are somewhat complicated; but the general effect of which is, that the landlord recovers his rent and costs.[41]

[*186] *The time will not permit us to go further.

[41] See the notes to Mounson *v.* Redshaw, 1 Wms. Saund. 193 to 195, h. The 11 Geo. 2, c. 19, s. 22, provided that when the distress was for rent, quit-rents, reliefs, heriots, and other services, and the plaintiff became non-suit, discontinued his action, or had judgment given against him, the defendant should recover double costs. This provision has been altered by the 5 & 6 Vic. c. 97, s. 2, under which the defendant is now entitled, in these cases, to receive only a full and reasonable indemnity as to all costs, charges, and expenses incurred in and about the action.

*LECTURE VII. [*187]

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AFTER the time which has elapsed since the delivery of the last Lecture, it is right briefly to recapitulate what has been done. I began, as you may recollect, by describing the different sorts of tenancy.[1] I then divided the considerations arising out of the relation of landlord *and tenant into four heads—the first comprising *those points which relate to the* [*188] *commencement of the tenancy;* the second, *those which occur during its continuance;* the third, *those which relate to its termination;* and the last, *those which arise out of*

[1] *Ante*, Lecture I.

a change either of the tenant or the landlord. Pursuing the subject in this order, we had disposed of the first head, comprising those points which relate to the commencement of the tenancy.[2] We had entered upon the second, and, as this naturally subdivided itself into two considerations, that of *the landlord's rights against his tenant*, and that of *the tenant's rights against the landlord;* we had begun with the former class, the principal topic included in which being the landlord's right to rent, I had spoken at some length on the nature of rent, the time and the manner in which it is payable, the demands which the tenant sometimes is entitled to set off against it, the mode in which its payment is enforced, particularly by *distress*, to the various topics connected with which the last Lecture was devoted.[3]

Having thus brought to a termination the remarks I had to offer on the subject of the rent—the remuneration which the landlord receives for giving up the possession of his property to the tenant, it remains to consider his right to require the tenant to treat that property in a particular manner while it is out of his possession. When *I speak of the treatment [*189] of the property, I mean in the way of *upholding* and *cultivating* it. Since it is obvious, that if a house, it will, without repairs, go to decay; and if consisting of land, it will, if improperly cultivated, lose heart and degenerate; the rights, therefore, of the landlord as against the tenant, with regard to those two matters, *cultivation* and *repairs*, are of great practical importance, and very frequent practical discussion.

In order clearly to comprehend this portion of the subject, it is necessary to see how the law stands with

[2] *Ante*, Lectures II., III., and IV.

[3] *Ante*, Lectures V. and VI.

regard to it in the absence of any express agreement of the parties. Now the rule of law is clear that the owner of the inheritance, whether in fee simple or in fee tail, has, in respect of the greatness and durability of his interest, a power to deal with the property in any manner he thinks proper. He may build houses or pull them down, cut timber, open mines,—in short, deal with the property as he thinks fit. No action lies against him in a Court of law, nor would a Court of equity interfere for the purpose of restraining him. All this is laid down in Plowd. 259; 11 Co. 50 a; *Jervis* v. *Bruton*, 2 Vern. 251; and see *The Attorney-General* v. *Duke of Marlborough*, 3 Madd. 498.

But though tenants of an estate of inheritance have these powers in respect of the greatness of their interest, it is otherwise with the owners of particular estates. They are, indeed, entitled to *reasonable *estovers* and *botes*, for the purposes of *fuel*, *agriculture*, and *repairs*;[4] but they are prohibited from destroying those things which are not included in the temporary profits of the land, because that would tend to the permanent and lasting loss of the persons entitled to the inheritance. Any proceeding on their part which contravenes the rules which govern their estates [*190]

[4] The word "estovers" is used by our old law writers in a very general sense. In the text it means the liberty to take necessary wood for the use or furniture of a house or farm off the estate of another. See Co. Litt. 41, b. 2 Black. Comm. 35; Tomlin's Law Diet. *Estovers*. House-bote is a sufficient allowance of wood to repair the house, or to burn in it; in the latter sense it is sometimes called fire-bote. Plough-bote and cart-bote are wood to be employed in making and repairing instruments of husbandry; and hedge-bote is wood for repairing hedges or fences. 2 Black. Comm. 35; Viner's Ab. *Waste* (M). These common law rights are now usually excluded or regulated by the express contract between the parties.

in this respect, is called *waste;* and as these rules are not precisely similar in their application to all sorts of particular tenancies, it will be necessary to consider their bearing on the three sorts of particular tenancies:

Estates for life;

Estates for years;

And Estates at will.

I must, however, first observe, that at common law there was a distinction between the tenants of estates created by *the act of the law*, and tenants of estates created by *the contract of the parties;* the former having been always punishable for committing waste, the latter not so. Thus, tenant by *the curtesy, or in [*191] dower, was at all periods of the law restrained from waste; tenant for term of years was not so. And the reason of this distinction was, that it was thought it would be a hardship if the law were to give the estate without restraining the person to whom it was given from doing injury to the inheritance; while it was thought to be no hardship on a person who had let a tenant in by express contract, and who had the power of inserting in the contract stipulations against the commission of waste—it was thought to be no hardship upon him to leave the tenant in the same situation in which he had himself placed him by the contract.[5] However, this state of the law, though it

[5] See also 2 Inst. 299; Viner's Ab. *Waste* (B); Com. Dig. *Waste* (A. 2); 2 Wms. Saund. 252. Upon the same principle, where *the law* creates a duty or a charge, and the party upon whom it is imposed is prevented from performing it without any default on his part, the law excuses him. But if the duty or charge is imposed *by contract* the person bound is responsible for a non-performance of it caused even by inevitable accident, *because he might have protected himself by his contract.* See Paradine *v.* Jane, Aleyn, 27, and Spence *v.* Chodwick, 10 Q. B. 517, (59 E. C. L. R. 517,).

may be thus plausibly advocated in theory, was found very detrimental in practice; and by the operation of two statutes, that of Marlebridge, 52 Hen. 3, c. 23, which you will find set out and commented upon in Lord Coke's 2nd Inst. 144, and that of Gloucester, 6 Edw. 1, c. 5, which you will find set out and commented upon in Lord Coke's 2nd Inst. 299, all tenants of particular estates were restrained from waste, as *tenants by the curtesy, and in dower, had been previously to those Acts. [*192]

It must also be premised, that there are two different descriptions of waste;

1st. *Voluntary waste;* and

2ndly. *Permissive waste.*

Voluntary waste consists in doing something which the tenant is prohibited by law from doing.

Permissive waste, in allowing something to happen which he is bound by law to prevent.

The one is an offence of *commission*, the other of *omission*.[6]

Now with regard to tenants for life, they are guilty of *voluntary* waste if they fell timber,(*a*) excepting for

[6] See as to the distinction between voluntary and permissive waste, Co. Litt. 53 a.; Viner's Ab. *Waste*; and the notes to Greene *v.* Cole, 2 Wms. Saund. 252 a. As to the mode of describing in pleading the commission of voluntary and permissive waste, see Martin *v.* Gilham, 7 A. & E. 540, (34 E. C. L. R. 152), and Edge *v.* Pemberton, 12 M. & W. 187.*

(*a*) The American doctrine upon the subject of waste by felling timber differs materially from the English. The circumstances of the two countries give rise to the differences. In England timber is an object of extraordinary care. In the United States, on the other hand, particularly in the early period of its settlement, it was an object to get rid of timber. It was therefore said in one case, where a dowress had cut down timber, and cleared part of the lands

the purpose of their reasonable estovers and botes,—if they pull down or damage houses,—if they open

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alloted to her, that "it would be an outrage on common sense to suppose that what would be deemed waste in England would receive that appellation here." "If the tenant in dower clears part of the lands assigned to her, and does not exceed the relative proportion of cleared land, considered as to the whole tract, she cannot be said to have committed waste thereby." Hastings et al. *v.* Cruncklеton, 3 Yeates, 261. To cut oak trees for fire wood was held in Massachusetts not to be waste in tenant in dower. But to cut and sell timber trees in exchange for fire wood was held to be so. Padelford *v.* Padelford, 7 Pick. 152. Though in Loomis *v.* Wilbur, the Court said it was not waste for a tenant for life to cut timber trees for the purpose of making necessary repairs on the estate, and to sell them, and purchase with the proceeds boards for such repairs, if that was proved to be the most economical way of making the repairs. 5 Mason, 13; Neel *v.* Neel, 7 Harris, 323.

A tenant for years when the leased property is wild land, covered with timber, may clear and open a reasonable proportion without being guilty of waste, and how much may be cut without waste, is a question for the jury. Jackson *v.* Brownson, 7 Johns. 227; Chase *v.* Hazelton, 7 N. Hamp. 171; Owen *v.* Hyde, 6 Yerg. 334; McCullough *v.* Irvine's Executors, 1 Harris, 443; and it is a criterion of waste that the trees were cut for the sake of the profit on the sale of the timber, and not for the purpose of preparing the land for cultivation. A tenant will not be permitted just before the expiration of his lease to fell timber on the pretext of clearing the land for cultivation. Kidd *v.* Dennison, 6 Barb. Sup. Ct. 9; Davis *v.* Gilliam, 5 Ired. Eq. 308; Morehouse *v.* Cothcal, 2 Zab; New Jersey, 521. It is waste for an out-going tenant to remove the manure made on the premises. Lewis *v.* Jones, 5 Harris, 262. And in general the tenant is bound to farm according to the custom of the place where the land lies, and if he divert the land from the usual course of husbandry it is waste. Jones *v.* Whitehead, 1 Parsons, 304.

But even where estates are unimpeachable of waste, and in cases of ornamental timber, Courts of Equity hold the excessive use of the legal power incident to the estate to be inequitable, and will control it by injunction. Marker *v.* Marker, 4 Eng. Law and Eq. Rep. 103.

mines,(*a*)—or if they destroy heir-looms incident to the inheritance. See 1 Inst. 53 a; *Foster* v. *Spooner*,

(*a*) In Saunder's Case, 5 Coke's Rep., 22, three points were resolved.

1st. "If a man hath land in part of which there is a coal-mine open, and he leases the land to one for life, or for years, the lessee may dig in it; for inasmuch as the mine is open at the time, &c., and he leases all the land, it shall be intended that his intent is as general as his lease is; scil. that he shall take the profit of all the land, and, by consequence, of the mine on it, vide 17 E. 3, 7, a, b. John Hull's Case, acc.; and so the doubt in F. N. B. 149 C. well explained." (See Stoughton *v.* Leigh, 1 Taunt. 402; Bourne *v.* Taylor, 10 East. 189; Whitechurch *v.* Holwerthy, 4 M. & S. 340.)

2. "If the mine were not open, but included within the bowels of the earth at the time of the lease made, in such case by leasing of the land, the lessee cannot make new mines, for that shall be waste." (Viner *v.* Vaughan, 2 Beav. 466.)

3. "If a man hath mines hid within his land, and leases his land, and all mines therein, then the lessee may dig for them, for *quando aliquis aliquid concedit, concedere videtur*, &c., *id sine, quo res ipsa esse non potest*, and therewith agrees 9 E. 4, 8, where it is said, that if a man lease his land to another, and in the same there is a mine, (which is to be intended of a hidden mine), he cannot dig for it; but if he lease his land and all mines in it, then although the mine be hidden, the lessee may dig for them; and, by consequence, the digging of the mine in the principal case was waste in the first lessee." (See Astry *v.* Ballard, 2 Lev. 185; Whitfield *v.* Bewit, 2 P. Wms. 242. But new shafts may be opened for the purpose of working the old mines. Clavering *v.* Clavering, 2 P. Wms. 388; 10 Pick. 460.)

It was further decided in this case, that if land be leased in which there is a hidden mine, and the lessee opens it, and then assigns over his estate, the assignee cannot dig in it; and that if the lessee in such case assigns his term with an exception of the profits of the mines, or the mines themselves, or of the timber, trees, &c., such exception is void. (See Doe *v.* Wood, 2 Barn. & Ald. 724.)

Following Saunder's case, it was held in Maryland, in Owings *v.* Emery, 4 Gill. 260, that the opening a new mine was waste. It was also held that a lease of a lot or piece of ground, without any

Cro. Eliz. 17; *Saunders' Case*, 5 Co. 12; *Whitfield* v. *Bewit*, 2 P. Wms. 240.[7]

[7] See Viner's Ab. *Waste* (E.) It is not waste if a lessee for years cuts down willows, leaving stools or butts from which they may shoot afresh, unless they are a shelter to the house, or a support to the bank of a stream against the water. Phillips *v.* Smith, 14 M. & W. 589.* A good deal of information on the subject of waste may be derived from the judgment of the Court in this case. It is there said, "The principle on which waste depends is well stated in the case of Lord Darcy *v.* Askwith, Hob. 234; thus, it is generally

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reference to mines or quarries, was a grant simply of the superfices of the soil.

The Statute of Gloucester is reported by the judges as in force in Pennsylvania, and the writ of estrepement is given by statute to the landlord against his tenant, after notice to quit, and to the remainder-man against tenant for life. Act 29 March, 1822, sect. 1, 7 Smith, 520, and Act 10 April, 1848, sect. 1, Pamph. Laws, 472. The last act contains the proviso "that no tenant or tenants for life shall hereby be restrained from the reasonable and necessary use and enjoyment of the land and premises in his, her or their possession." An Act of 2d April, 1803, sect. 2, 4 Smith, 89, authorised writs of estrepement pending actions of ejectment. The third section of the Act 27th March, 1833, Pamph. Laws, p. 99, declared: "Quarrying and mining, and all such other acts as will do lasting injury to the premises, shall be considered as waste, under the provisions of 2d section of the Act 2d April, 1803, "but made certain exceptions in the case of quarries or mines which were opened previous to the institution of the suit for recovering possession of the premises. In Neel *v.* Neel, 7 Harris, 324, the Court held that where coal mines had been opened by the devisor, the devisee for life was entitled to mine them to any extent, even to their exhaustion, and that it made no difference that the devisor had not mined them for sale. "The fact of his opening the pits made the coal a part of the profits of the land, and the right to them will pass as such by a devise of a life estate." And in the subsequent case of Irving *v.* Covode, (not yet reported, but to be found in the Pittsburgh Legal Journal, of May 12th, 1855, Vol. 3, p. 26,) the Court held, that where an open mine existed on the pre-

*A tenant for life is guilty of *permissive* waste, if he allow the buildings on the estate [*193]

true that the lessee hath no power to change the nature of the thing demised; he cannot turn meadow into arable, nor stub a wood to make it pasture, nor dry up an ancient pool or piscary, nor suffer ground to be surrounded, nor destroy the pale of a park; nor he may not destroy the stock or breed of anything, because it disherits and takes away the perpetuity of succession as villains, fish, deer,

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mises, the tenant for life was not limited in his use of it by the amount he could himself extract, but that he might sell all his right to a Company, who might mine to any extent that their capital would permit, and, for that purpose, make new openings, build railroads, &c. The Court add, that such improvements are not necessarily injurious to the remainder-man, for the estate is liable to fall in at any moment, and when it comes to him he takes it with all that has been added to develope and improve it. When the lease is of a "Coal Bank" the lessee may make new openings. Tiley *v.* Moyers, Supreme Court Pennsylvania, (not yet reported.)

Judge Woodward, who delivers the opinion of the Court, throws in a dictum which may, perhaps, foreshadow the course of future decisions. "It may, indeed, be doubted," he says, "whether the saving clauses (in the Act 10th April, 1848,) adverted to, do not empower him to *open mines and quarries, that he may have reasonable use and enjoyment of the premises;* but this we do not decide, as it is not in the case."

It seems questionable whether some modification will not be required in this country of the rule which forbids a tenant for life to open a new mine. There are numerous untouched hills in Pennsylvania unsusceptible of cultivation, the only value of which is in the coal or ore beneath them. To say that one has an estate for life in these hills, and yet that he cannot touch the coal or ore, is to keep the word of promise to the ear, but break it to the hope. The distinction between open and unopen mines is, to say the least, unsatisfactory. Why that use which, in the nature of the land, is the true use of it, shall not be made of it, until an owner of the fee has begun so to use it, it is not easy to say. If it is in the nature of the property to be consumed, and in that consumption consists its only

[*194] to decay; *though it is laid down, that if he find a house ruinous when his estate com-

young spring of woods, or the like. . . . On the other hand, those acts are not waste which, as Richardson, C. J., in Barrett *v.* Barrett, Hetley, 35, says, are not prejudicial to the inheritance, as, in that case, the cutting of sallows, maples, beeches, and thorns, there alleged to be of the age of thirty-three years, but which were not timber either by general law, or particular local custom. So, likewise, cutting even oaks or ashes, where they are of seasonable wood, *i. e.*, where they are cut usually as underwood, and in due course are to grow up again from the stumps, is not waste." See also Com. Dig. *Chase* (N). In Huntley *v.* Russell, 13 Q. B. 572, (66 E. C. L. R. 572,) an action upon the case for dilapidations was brought by a rector against the executors of his predecessor in the rectory. It appeared that the deceased rector had suffered a farm-building adjoining the rectory-house to go into decay, but had erected a building better fitted for the purpose at the distance of a mile from the house,

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value, the reasoning of the first resolve in Saunder's case is strictly applicable. If this is too great an innovation, perhaps a feasible and just arrangement would be, to allow the tenant for life to open and work mines—the proceeds thereof, after paying the expenses of the opening, to become capital, and be invested; the interest on such investments to belong to the tenant for life, and the principal, at his death, to the owner of the reversion. In the case of Hollingshead *v.* Allen, 5 Harris, 281, Judge Rogers, in charging the jury, at Nisi Prius, says: "Can it be the law of this country, that where valuable mines are discovered, whether of coal, iron ore, valuable sand, gold, or silver, they cannot be touched by a tenant for life, without forfeiture of his interest, and subjecting himself to heavy damages, under the Statute of Gloucester? I charge you, gentlemen, that such is not the law, although it is a nice point. But can the tenant for life pocket all the profits made by a sale of the soil itself, which is part of the inheritance, or is he obliged to account for the profits, to the owner of the fee? On this point I have no difficulty. The tenant must account to the tenant in fee for all the profits made by the sale of the same." In the Supreme Court these points were not mentioned.

mences, he may permit it to fall down,—though he might justify the taking reasonable estovers of timber from the estate for repairing it. (See 1 Inst. 53 a; 54 b.) And, I apprehend, that on the same principles, if the tenant for life were to allow the walls, banks, and defences of the estate to become ruinous, he would be guilty of permissive waste; thus it is laid down by several authorities, that if the property be on the bank of a river, which flows so gently that by reasonable industry its banks may be preserved, it would be waste

but in a situation more convenient for the farming business. No faculty or license had been obtained for the alteration. The deceased rector had also removed a cottage, or farm-building, which had been placed upon the soil, and had been intended, at the time of the erection, to be removable at will, but which had become imbedded in the ground to the depth of a foot by the mere weight of the building. It was held that neither of these acts amounted to waste or dilapidation. Mr. Justice Patteson, in delivering the judgment of the Court, said, "The incumbent of a rectory is not precisely in the situation of a particular tenant, because there is no person who has the inheritance in reversion; but the fee simple of the glebe being in abeyance, the incumbent is in truth but tenant for life; and he or his executors are no doubt liable for any waste committed. But to constitute waste there must be either, first, a diminishing of the value of the estate, or, secondly, an increasing the burthen upon it, or, thirdly, an impairing the evidence of title. Doe d. Grubb *v.* Lord Burlington, 5 B. & Ad. 507," (27 E. C. L. R. 217,). In the same case, some gravel pits on the soil of the rectory, which had been opened by the surveyors of the highways, under the Highway Acts, had been improperly left open by them. A lessee of the deceased rector had taken gravel from them, and had sold it to private persons. The Court held that the opening of the pits having arisen from a public necessity only, and their continuing open having been caused only by the omission of a public duty, the deceased rector had no right to consider that they were open for all purposes, and therefore that the removal of the gravel by his lessee amounted to an act of waste, as much as if the pits had been opened by him for the purpose of sale.

in the lessee for life to suffer them to fall into decay. See 1 Inst. 53 b.[8]

It must, however, be observed, that these doctrines regarding permissive waste do not apply to cases in which the damage happens from the *act of God*, as it is called, that is, from some inevitable and irresistible convulsion of nature; thus, if a house were thrown down by the violence of tempest, or consumed by lightning, the tenant could not be made liable for this as waste; though it is said, that if the roof only were blown off, he would *be bound to cover it again within a reasonable time. See 2 Roll. Ab. 820.[9](*a*)

[*195]

[8] Viner's Ab. *Waste* (I).

[9] See Viner's Ab. *Waste* (I.) But if the house was burnt by negligence or mischance it was waste, before the 6 Anne, c. 31, *ib.*; and Co. Litt. 53 b. It will be observed that the exception to the general rule as to permissive waste which is mentioned in the text, is limited to cases in which the injury is caused by some *inevitable and*

(*a*) This exception was extended in Pennsylvania to damage by public enemies. In a case in which there was an express covenant to keep the demised premises in good repair, and to deliver them up at the end of the term in such good repair, &c., the defendant pleaded that an alien enemy, to wit., the British army, commanded by General Sir William Howe, on the 1st of September, 1777, had invaded the City of Philadelphia, had taken possession of the premises, and held the same until the end of the term, and afterwards; and that during the period they held possession they had committed the waste and destruction, &c. Chief Justice McKean delivered an elaborate opinion—concluding that the defendant ought to pay the rent, because of his express covenant to pay it, but that he should be excused from his covenant to deliver up the premises in good repair; because a covenant to do this against an act of God or an enemy ought to be special and express, and so clear that no other meaning could be put upon it. Pollard *v.* Shaeffer, 1 Dallas, 210. See Magaw *v.* Lambert, 3 Barr, 444.

Thus much on the subject of waste by tenants for life: now with regard to tenants for years, and at will. With regard to *voluntary* waste, a tenant for years, or at will, stands in the same situation precisely as a tenant for life; indeed it is obvious to common sense, that what the owner of a freehold interest is prohibited from doing, the owner of a chattel interest must be equally prohibited from.[10]

With regard to *permissive* waste, the liabilities of the tenant of a chattel interest seem less than those of a tenant for life of the freehold. A tenant from year to year, clearly according to the latest authorities, is bound to do no more than keep the house wind and water tight. (See *Auworth* v. **Johnson*, 5 C. & P. 239, (24 E. C. L. R. 545,); *Leach* v. *Thomas*, 7 C. & P. 327, (32 E. C. L. R. 638.)[11] With [*196]

irresistible convulsion of nature. For, if the damage, although immediately caused by the violence of a tempest, might have been avoided by a reasonable amount of previous precaution on the part of the tenant, it would seem that he is liable. Therefore *if the lessee suffers a little breach in the wall to continue*, by means of which the violence of the sea afterwards breaks all the wall and surrounds the land, this appears to be waste. Anon. Moo. 62; see also Reg. *v.* Leigh, 10 A. & E. 398, (37 E. C. L. R. 122,). It must be recollected that the observations in the text relate only to the liability of the tenant for waste in the absence of any express contract in this respect; since it is clear that, if he enter into an express contract without exception or qualification, he is liable, although the damage may be caused by inevitable accident. Paradine *v.* Jane, Alleyn, 27, *ante*, p. 191, note [5].

[10] Viner's Ab. *Waste* (S).

[11] So, on the other hand, the landlord of a tenant from year to year is not, in the absence of any express contract, under any obligation to repair the premises. Gott *v.* Gandy, 2 E. & B. 847, (75 E. C. L. R. 847,); nor is there any implied duty on the owner of a house which is in a ruinous and unsafe condition to inform a proposed tenant that it is unfit for habitation. Keates v. The Earl of Cadogan, 10 C. B. 591, (70 E. C. L. R. 591,).

regard to tenants for terms of years, there is a great paucity of authorities upon the question how far their liability in respect of permissive waste extends, in the absence of any express agreement on the subject. The reason of this paucity of information is, that in practice a case rarely, if ever, occurs, in which it is necessary to inquire, what the general law is on the subject: for every lease of any importance contains stipulations upon the subject of repairs, and where those are inserted they supersede the law, as it would stand without them; and of course, therefore, the question what that law is in the absence of express stipulation, rarely if ever occurs. They certainly seem to be placed by Littleton, s. 67, and by Lord Coke in his Commentary (Co. Litt. 53,) in the same situation, in this respect, as tenant for life. And it is clear from Lord Coke's Commentary on the stat. of Gloucester, 2nd Inst. 298, [299, 302] that the old action of waste given by that statute, would have lain against a tenant for term of years. But it has been questioned by some recent authorities, whether an action on the case for *permissive* waste lies against a tenant for years at all. (See *Gibson* v. *Wells*, 1 New. Rep. 390; [*197] *Herne* v. *Bembow*, 4 Taunt. 764; *Jones* v. *Hill*, 7 Taunt. 392, (2 E. C. L. R. 414,):[12] and if this be the case, then as the old writ of waste has been abolished by Lord Lyndhurst's Act,[13] the consequence would be

[12] A tenant for years appears to be liable for *permissive* waste. Hartnett *v.* Maitland, 16 M. & W. 257.*

[13] See the 3 & 4 Wm. 4, c. 27, s. 36. Even before this act abolished the writ of waste, the old action of waste had fallen almost into disuse, in consequence of the adoption of the more expeditious and easy remedy of an action on the case *in the nature of waste*. See 2 Wms. Saunders, 252, note 7. The Courts of Common Law have now the power of granting writs of injunction to restrain waste; a

that the liability of a tenant for years would, in the absence of express agreement, be just the same as that of a tenant from year to year, and no greater. Upon the whole the law upon this subject is somewhat unsettled, and I am loth to dwell upon it, because it so seldom comes into question in practice; if you wish to pursue the inquiry, you may peruse the notes to *Greene* v. *Cole*, 2 Wms. Saund. 252.(*a*)

With regard to a tenant strictly at will, it is laid down by Littleton, s. 71, that he cannot commit waste at all, for he is not liable for permissive waste because of the weak and uncertain nature of his holding, which would render it a hardship to compel him to go to any expense for repairs.[14] *And as to voluntary waste, as I have already explained to you, that any act incompatible with his interest determines it,[15] it [*198]

remedy which was formerly confined to Courts of Equity. See s. 79 of the Common Law Procedure Act, 1854, 17 & 18 Vic. c. 125.

[14] See Harnett *v.* Maitland, 16 M. & W. 257.* In this case the declaration alleged that the defendant held premises as tenant to the plaintiffs under a demise made by the plaintiffs to the defendant, the reversion thereof belonging to the plaintiffs, and that by reason of the tenancy it was the duty of the defendant to use the premises in a tenant-like and proper manner, and not to permit, or to commit waste thereto. The breach alleged was, that the defendant suffered and permitted the premises to become waste and ruinous. The Court held that the declaration was bad in substance, since it did not show that the defendant was more than a mere tenant at will, and a tenant at will is not liable for permissive waste.

[15] *Ante*, p. 17.

(*a*) It is held in several American cases that if there be no stipulation whatever on the subject in the lease, the tenant is bound to keep the premises in repair. Long *v.* Fitz Simmons, 1 Watts & Serg. 530; Cornell *v.* Vanartsdalen, 4 Barr, 373; City Council *v.* Moorhead, 2 Rich. 430. See Cleves *v.* Willoughby, 7 Hill, 83; Mumford *v.* Brown, 6 Cowen, 475.

follows that an act done by him, which if done by a tenant for years would amount to voluntary waste, puts an end to the estate at will altogether and renders him a trespasser, so that he is liable to an action of trespass, not to one upon the case.

There is one species of injury to the premises, from liability for which the tenant, whether for life or years, is exempted by an express provision of the legislature: I mean the stat. 6 Anne, c. 31, s. 6, rendered perpetual by the stat. 10 Anne, c. 14, and which provides that no "action shall be maintained against any person in whose house or chamber any *fire* shall accidentally begin:" but this act contains an exception of all express agreements between the landlord and tenant.[16](*a*)

[16] The 6 Anne, c. 31, was repealed by the 12 Geo. 3, c. 73, s. 46, and the last-mentioned act was repealed by the old Metropolitan Buildings Act, the 14 Geo. 3, c. 78, s. 101, which provided, however, that the 6 Anne, c. 31, should not be revived. The 14 Geo. 3, c. 78, contains a provision on this subject, which is wider than that which was contained in the Statute of Anne, and which is still in force. It enacts that, "no action, suit, or process whatever shall be had, maintained, or prosecuted against any person in whose house, chamber, *stable, barn, or other building, or on whose estate* any fire shall accidentally begin." See s. 86. The Metropolitan Buildings Act now in operation (the 7 & 8 Vic. c. 84) has repealed the greater portion of the 14 Geo. 3, c. 78, but has left this section unrepealed, see Sched-

(*a*) The language of Lord Denman, in Filliter *v.* Phippard, 11 Add. & Ellis, U. S., &c., 354, (63 E. C. L. R. 353,) is this: "The ancient law or custom of England, appears to have been that a person in whose house a fire originated, which afterwards spread to his neighbour's property and destroyed it, must make good the loss. And it is well established that, when the fire was occasioned by a servant's negligence, the owner, the master of the house where it began, is answerable for the consequences to the sufferer. And the case of Turberville *v.* Stamp, 1 Comyn's Rep. 32, S. C. 1 Salk, 13—the last decided before the statute 6 Ann. c. 31—makes this plain, and

*Such is the state of the law in the absence of any express agreement between the parties; [*199]

ule A. It has been held that this clause is general in its operation, and is not confined to the districts to which the ordinary provisions of the 14 Geo. 3, c. 78, applied. See Richards *v.* Easto, 15 M. & W. 244*, and Filliter *v.* Phippard, 11 Q. B. 347, (63 E. C. L. R. 347,). There has been some difference of opinion as to the meaning of the words, "*shall accidentally begin.*" It appears from some expressions made use of by Sir William Blackstone, in his Commentaries, that he thought that the word *accidental* was used in the Statute of Anne in contradistinction to the term *wilful*, and that it included the case of a fire caused by negligence, so that the owner of a dwelling-house was protected by that act against responsibility in respect of a fire originating in his own negligence or in that of his servant. See 1 Black. Comm. 431, and the remarks of Lord Lyndhurst upon this passage in Viscount Canterbury *v.* The Attorney General, 1 Phill. 315. In Filliter *v.* Phippard, however, it was held by the Court of Queen's Bench that s. 86 of the 14 Geo. 3, c. 78, does not apply where a fire is caused by negligence. And in the same case the Court appeared to be of opinion that this statute does not extend to cases in which a fire is lighted intentionally, and mischief results from it. And in Vaughan *v.* Menlove, 4 Scott, 244, it was held that an action upon the case might be supported against a person who negligently kept on his premises a stack of hay so put together as to be likely to ignite, and which did ignite and caused injury to the adjoining buildings. It must, however, be observed, that in the last mentioned case the attention of the Court was not called to the 14 Geo. 3, c. 78.

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declares the same principle, when the fire originates in the defendant's close."

Lord D. then discusses the question whether the word "accidentally," used in the English statutes, includes fires arising from carelessness, and is of opinion that it does not, and that Blackstone's remarks upon this subject are erroneous.

There appear to be no statutes on the subject in America, 1 Reed's Penn'a Black. 213, except the New York statute, quoted below, which is conceived in an entirely different spirit.

The cases decided, however, seem to view the law as Lord Denman

but, as I have already said, in almost every case in which the term is of importance, provision is made on

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did, with the exception, perhaps, that they would qualify the statement "that a person in whose house a fire originates, which afterwards spreads to his neighbour's property and destroys it, must make good the loss," by adding, if the fire arose from his negligence or carelessness. Thus the American cases seem to have held the common law sufficient to protect the person on whose premises the fire originated, to the extent of the protection afforded in England by the statute as read by Lord Denman.

In Barnard *v.* Poor the action was case, charging the defendant with carelessly and negligently setting a fire on his own lands, by which a quantity of wood on adjoining lands was destroyed. Chief Justice Shaw said: "The Court are of opinion that, in this action, it is immaterial whether the proof establishes gross negligence, or only want of ordinary care, on the part of the defendant. In either case, the plaintiffs would be entitled to recover in damages the actual amount of loss sustained, and no more, in the form of vindictive damages, or otherwise." Barnard *v.* Poor, 21 Pick. 378.

Maull *v.* Wilson, 2 Harrington, 443. The action was case for carelessly carrying fire, whereby plaintiff's stack yard was destroyed. The Court charged the jury, that if the fire were wilfully and *directly* thrown on the hay, this action could not be maintained; that if the fire arose from mere accident, without any negligence on the part of defendants, they were not liable. If the fire was occasioned by the carelessness and negligence of defendants, they were answerable to the full value of the property destroyed.

Clark *v.* Foot, 8 Johns. 421. Clark sued Foot to recover damages sustained by Foot's setting fire to the plaintiff's woods. The evidence was, that the defendant's servant, by defendant's orders, set fire to certain fallow ground belonging to the defendant, which fire ran into the plaintiff's woodland.

The Court said: "The point to be tried was, whether there was negligence on the part of Foot or his agent; for Foot was as much accountable for the negligence of his servant, whilst employed in his business, as if the fire had spread by his own neglect.

"It is a lawful act for a person to burn his fallow; and if his neighbour is injured thereby, he will have a remedy by action on the

the subject by express stipulation, generally in the shape of a covenant to repair inserted in the lease.

Now with regard to these express covenants they of course differ much, according to the nature of the demised property. And as the construction *put upon them varies according to the varying terms employed in framing them, it would be tedious and almost useless, to enter on an enumeration of the exact [*200]

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case, if there be sufficient ground to impute the act to the negligence or misconduct of the defendant or his servants.

"Should a man's house get on fire, without his neglect or default, and burn his neighbour's, no action would lie against him, notwithstanding the fire originated in his house, because it was lawful for him to keep the fire there." 3 Bl. Com. 43; Noy's Max. c. 44.

The Revised Statutes of New York, (1 R. S. 696, §1,) provide that "any person negligently setting fire to his own woods, or negligently suffering a fire kindled upon his own wood or fallow land, to extend beyond his own land, shall forfeit *treble damages* to the party injured thereby." Lawyer *v.* Smith, 1 Denio, 207.

If the tenant covenants to deliver the premises in good repair, he must protect himself by exceptions in his lease, if he wishes to avoid liability to rebuild in case the premises are burned. In the absence of a covenant to repair, it is said he is not liable to rebuild if the premises are burned, but he must pay the rent. Magaw *v.* Lambert, 3 Barr, 444; Long *v.* Fitzsimmons, 1 W. & S. 530; Warner *v.* Hitchins, 5 Barb. 666; Cook *v.* Champlain Trans. Co. 1 Denio, 91; Huston *v.* Springer, 2 Rawle, 100; Cline *v.* Black, 4 McCord, 431; Beach *v.* Crain, 2 Comst. 86.

It was decided in Stockwell *v.* Hunter, 11 Met. 448, that a demise of the basement rooms of a building of several stories in height, without any stipulation, by lessor or lessee, for rebuilding in case of fire or other casualty, gives the lessee no interest in the land, though he pays all the rent in advance; and if the whole building is destroyed by fire, his interest in the rooms is terminated, and the lessor may re-enter for the purpose of rebuilding, without being chargeable for an eviction. Alexander *v.* Dorsey, 12 Geo. 12. Kerr *v.* Merchant's Ex. Co.; 3 Edw. c. 315; Winter *v.* Cornish, 5 Ohio, 477.

words on which constructions have, at various times, been put by the Court, and the best plan will be to cite some of the cases which seem to me best to illustrate the spirit in which the Courts are in the habit of reading them. You may see *Harris* v. *Jones*, 1 Moo. & Rob. 173; *Doe d. Dalton* v. *Jones*, 4 B. & Ad. 126, (24 E. C. L. R. 64,); *Gutteridge* v. *Munyard*, 7 C. & P. 129, (32 E. C. L. R. 534,); *Burdett* v. *Withers*, 7 A. & E. 136, (34 E. C. L. R. 57,); *Stanley* v. *Towgood*, 3 Bing. N. C. 4, (32 E. C. L. R. 13.)[17] I have already

[17] These cases establish that where there is a general covenant to repair, the age and general condition of the house at the commencement of the tenancy are to be taken into consideration in considering whether the covenant has been broken; and that a tenant who enters upon an old house is not bound to leave it in the same state as if it were a new one. They show that the meaning of the expression "good repair" has relation to the age of the building, and is different with respect to old and to new premises. See the cases and the observations of Baron Parke in Hart *v.* Windsor, 12 M. & W. 77.* See also Mantz *v.* Goring, 4 Bing. N. C. 451, (33 E. C. L. R. 409,). But, where a tenant covenants to *keep* the premises, and to deliver them up at the expiration of the tenancy in good repair, order, and condition, he is bound to *put* them into good repair, and is not justified in keeping them in bad repair, because he found them in that condition. Even in this case, however, the extent of the repairs is to be measured by the age and class of the buildings. Payne *v.* Haine, 16 M. & W. 541.* It is said in Rolle's Abridgment, that if a lessee covenants to repair, "provided always, and it is agreed that the lessor shall find great timber," this is a covenant on the part of the lessor to find the timber by reason of the word *agreed*, and not a qualification of the covenant of the lessee; but that if this word is omitted, the proviso is merely a qualification of the lessee's covenant. 1 Roll. Ab. 518, Covenant (C). In a recent case, however, where a lessee covenanted to repair the demised premises, *the farm-house and buildings being previously put in repair and kept in repair* by the landlord, it was held that these words amounted to an absolute and independent covenant on the part of the landlord to put the premises in repair. Can-

*observed that the statute of Anne exempts tenants from the consequences of accidental [*201]

nock *v.* Jones, 3 Exch. 233. See also Neale *v.* Ratcliff, 15 Q. B. 916, (69 E. C. L. R. 916,) and Hunt *v.* Bishop, 8 Exch. 675, in the first of which cases a tenant covenanted to keep the demised premises in repair, the *same being first put into repair by* the landlord, and it was held that the repairing by the landlord was a condition precedent to the obligation on the tenant to keep the premises in repair. It often happens that leases contain a general covenant to repair, and also a covenant to repair within a certain time after notice. These covenants, as usually framed, are construed to be separate and independent covenants, and the one is not held to qualify the other. See Wood *v.* Day, 7 Taunt. 645, (2 E. C. L. R. 530,). Doe d. Morecraft *v.* Meux, 4 B. & C. 606, (10 E. C. L. R. 722,) and Horsefall *v.* Testar, 7 Taunt. 385, (2 E. C. L. R. 411,). It must be observed that there is no implied contract to use the premises in a tenant-like manner, where the tenant expressly contracts to repair. Standen *v.* Chrismas, 10 Q B. 135; (59 E. C. L. R. 135.) Questions often occur in practice as to the amount of the damages recoverable by the landlord upon a covenant to repair when the term is unexpired at the time when the action is brought. In Marriott *v.* Cotton, 2 C. & Kir. 553, (61 E. C. L. R. 553,) where a landlord brought an action for non-repair during the continuance of a term of years, it was ruled at *Nisi Prius* that nominal damages only could be recovered. But it is at least doubtful whether this ruling can be supported, since there is both reason and authority in favour of the view that the true measure of the amount of damages in this case is the injury to the market value of the landlord's reversion. See Smith *v.* Peat, 9 Exch. 161; Doe d. Worcester Trustees *v.* Rowlands, 9 C. & P. 734, (38 E. C. L. R. 425,) and Turner *v.* Lamb, 14 M. & W. 412,* from the last of which cases it appears that the amount of the damages depends on the length of the term which is still unexpired. Another question, which relates to the damages recoverable under a covenant to repair, arises where there is a lease and a sub-lease, both of which contain a contract to repair, and the superior landlord has sued the lessee on his covenant to repair In Neale *v.* Wyllie, 3 B. & C. 533, (10 E. C. L. R. 244,) where a tenant holding under a lease which contained a covenant to repair, underlet to a person who entered into a similar covenant, and the original

[*202] fire; yet, as *I have also stated, that act leaves express contracts between landlord and tenant untouched,[18] and, consequently it has been held that, where the tenant is under a general covenant to *repair the premises, and to leave them in repair* at the end of the term, and accidents by fire are not excepted out of that covenant, he must rebuild them if they should be casually burnt down. *Earl of Chesterfield* v. *Duke of Bolton*, Comyn, 627; *Poole* v. *Archer*, Skin. 210; *Bullock* v. *Dommitt*, 6 T. R. 650.[19] And what seems even harder, he is obliged to pay the rent, though he

lessor brought an action against the lessee on the covenant in the lease, and recovered, it was held that the damages *and costs* recovered in that action, and *also the costs of defending it*, might be claimed as special damage in an action by the lessee against the under-lessee for the breach of his covenant to repair. But it was doubted in Penley *v.* Watts, 7 M. & W. 601,* whether this decision was correct, so far as it relates to the costs of the first action, and it has been overruled by the later case of Walker *v.* Hatton, 10 M. & W. 249,* where, under circumstances substantially similar, it was held that the costs occasioned by the defence of the first action were not recoverable against the under-lessee, as they were not necessarily caused by the breach of covenant on his part. See also Smith *v.* Howell, 6 Exch. 730; Pennell *v.* Woodburn, 7 C. & P. 117, (32 E. C. L. R. 528,) Short *v.* Kalloway, 11 A. & E. 28, (39 E. C. L. R. 17,); Blyth *v.* Smith, 5 M. & Gr. 405, (44 E. C. L. R. 217,); and Logan *v.* Hall, 4 C. B. 598, (56 E. C. L. R. 598,).

[18] This act, as has been already observed (*ante*, p. 198, note [16]), has been repealed; but the 14 Geo. 3, c. 78, s. 86, which is the provision on this subject now in force, also provides that no contract or agreement made between landlord and tenant shall be thereby defeated or made void.

[19] See also M'Kenzie *v.* M'Leod, 10 Bing. 385, (25 E. C. L. R. 184,). By the law of Scotland, the tenant is liable to compensate the landlord if the premises are burnt down by the negligence or misconduct of the tenant's servant in the ordinary scope of his employment.

has quite lost the enjoyment of the premises.(*a*) *Weigall* v. *Waters*, 6 T. R. 488; *Izon* v. *Gorton*, 5 Bing. N. C. 501, (35 E. C. L. R. 198,); **Holtzapffell* v. *Baker*, 18 Ves. 115 [S. C. 4 Taunt. 45.][20] [*203]

With regard to *cultivation*, you will generally find that the stipulations with regard to the mode of cultivation inserted in the lease resemble pretty much the general custom of the county where the lands are situated. And, even if there were no express stipulations on the subject, such stipulations would be held to be impliedly incorporated with the lease, unless, indeed, it were to appear either expressly or impliedly, that the parties did not intend to be governed by it. See *Hutton* v. *Warren*, 1 M. & W. 466*; *Wigglesworth* v. *Dallison*, 1 Dougl. 201.[21]

[20] See also Leeds *v.* Cheetham, 1 Sim. 146; Packer *v.* Gibbins, 1 Q. B. 421, (41 E. C. L. R. 607,); and *ante*, p. 140, note.

[21] As is stated in the text, the custom is excluded where the written agreement is expressly or impliedly inconsistent with it. Roberts *v.* Barker, 1 Cr. & M. 808;* Clarke *v.* Roystone, 13 M. & W. 752.* Evidence of usage or custom is receivable to annex incidents to written contracts in matters with respect to which they are silent, not only in agreements between landlords and tenants, but also in commercial contracts, and in contracts in other transactions of life in which known usages have been established. See the notes to Wigglesworth *v.* Dallison, 1 Smith's L. C. 307; and the judgment in Syers *v.* Jonas, 2 Exch. 116, where Baron Parke says, "There is no doubt that, in mercantile transactions, and others of ordinary occurrence, evidence of established usage is admissible, not merely to explain the terms used, but to annex customary incidents. In the case of Hutton *v.* Warren, the law on this subject was laid down fully, and the limitations pointed out. Such usage is admissible when it is not expressly or impliedly excluded by the tenor of the written instrument." See also *post*, Lect. IX. A stipulation as to

(*a*) See Pollard *v.* Schaffer, 1 Dall. 210, and *ante*, note to page 195; Nave *v.* Berry, 22 Ala. 382. See note (*a*) page 252.

[*204] *As the landlord and tenant thus, by express stipulation, sometimes extend that liability which would have attached to the tenant in the absence of express words, under the denomination of *waste*, so they occasionally, in some respects, diminish that liability by inserting in the lease the words *without impeachment of waste*, the effect of which is to enable him to cut down timber, open mines, and do many other acts which, in the absence of express agreement, would be waste. *Pyne* v. *Dor*, 1 T. R. 55. But even when these words are inserted, equity will restrain him from committing malicious waste, such, for instance, as cutting down trees placed for the shelter and ornament of the house. *Packington's Case*, 3 Atk. 215.

With regard to the landlord's remedies in case of the tenant's committing any breach of duty with regard to repairs or cultivation,—where there is any express covenant or agreement between the parties, the action is, of course, one of *covenant* if the lease be by deed, or of *assumpsit* if it be not by deed, for the breach of such express covenant or agreement. If there be no express agreement, but the tenant has committed that which, in the eye of the law, and looking at the nature of his tenancy, amounts to *waste*, the remedy was anciently by a mixed action, called an action of *waste;* that is, however, one of the forms of action abolished by Lord Lyndhurst's Act, 3 & 4 W.

the cultivation of the land demised in a particular mode, as, for instance, an agreement respecting the rotation of crops, may be engrafted on a yearly tenancy that arises by implication of law from the payment of rent. Doe *d.* Thomson *v.* Amey, 12 A. & E. 476, (40 E. C. L. R. 239,); see also Hyatt *v.* Griffiths, 17 Q. B. 505, (79 E. C. L. R. 505,).

4, c. 27, s. 36; and, even before that Act *had passed, it had fallen altogether into disuse, in [*205] consequence of there being a much easier and more efficacious remedy by an *action on the case in the nature of waste*, which, in the absence of express agreement, is the form now universally adopted. Of this action you will find a full and satisfactory account in the notes to *Greene* v. *Cole*, 2 Wms. Saund. 251.[22](*a*)

Besides these actions, equity will interfere by injunction for the purpose of restraining voluntary waste, if it be of a nature likely to be of permanent detriment to the inheritance. See *Coulson* v. *White*, 3 Atk. 21; *Jackson* v. *Cator*, 5 Ves. 688.[23]

Now, with regard to the tenant's rights against the landlord. The chief rights of the landlord against the

[22] See *ante*, p. 197, note [13].

[23] See The Mayor of London *v.* Hedger, 18 Ves. 355. In Pratt *v.* Brett, 2 Madd. 62, an injunction was granted against sowing land with pernicious crops, and removing the hay and manure from it; see also Fleming *v.* Snook, 5 Beav. 250. The Superior Courts of Common Law have now the power to issue writs of injunction. By the Common Law Procedure Act, 1854 (17 & 18 Vic. c. 125), s. 79, it is enacted that in "all cases of breach of contract or other injury, where the party injured is entitled to maintain and has brought an action, he may . . . . . claim a writ of injunction against the repetition or continuance of such breach of contract or other injury, or the committal of any breach of contract or injury of a like kind, arising out of the same contract, or relating to the same property or right; and he may also, in the same action, include a claim for damages or other redress."

(*a*) The action of waste is given by statute in Pennsylvania, Act 13th June, 1836, § 79, P. L. 587, though it is not much, if ever, resorted to. The remedies in general use are the action on the case in the nature of waste, or by writ of estrepement where it is applicable. See Brightly's Purdon, title *Waste*. Or by bill in equity. 1 Parsons, 304; Green *v.* Keen, 4 Md. 98.

tenant are, as we have seen, *to have the stipulated compensation paid him for his property*, and *to have it properly treated while it remains out of his possession*. The [*206] great and principal right *of the tenant against the landlord is—*to be maintained in the peaceable and quiet enjoyment of the property demised to him.* And this right the law appends to every tenancy, whether there be an express covenant for quiet enjoyment contained in the lease or not. And, indeed, as I shall in a few moments explain to you, it sometimes happens that the effect of an express covenant for quiet enjoyment is to *diminish* instead of to extend the right which the tenant would have possessed by law, had there been no covenant; a strong instance of which will be found in *Merrill* v. *Frame*, 4 Taunt. 329, a case which I will presently cite more at length. Now, in the absence of any express stipulation, the tenant's right may be expressed in these words, *he has a right to have his estate secured to him*, AND *he has a right to have the quiet enjoyment of it secured to him*.[24]

[24] There is however no implied obligation on the landlord to repair the premises, Pindar *v.* Aiusley, cited in the judgment in Belfour *v.* Weston, 1 T. R. 312; Leeds *v.* Cheetham, 1 Sim. 146; Baker *v.* Holtpzaffell, 4 Taunt. 45; Arden *v.* Pullen, 10 M. & W. 321;* Gott *v.* Gandy, 2 E. & B. 847, (75 E. C. L. R. 847,). Nor is there any implied warranty on the letting of a house, or of land, that it is, or shall be, reasonably fit for habitation, occupation, or cultivation. Neither does the law imply a contract, still less a condition, on the demise of real property, that it is fit for the purpose for which it is let.(*a*) Hart *v.* Windsor, 12 M. & W. 68;* Sutton v. Temple, ib. 52. It was held, indeed, in Smith *v.* Marrable, 11 M. & W. 5,* that where a ready furnished house was let for temporary residence at a watering-place, there was an implied condition on the letting that it was reasonably fit for habitation, and, therefore, that the tenant was entitled to quit it without notice upon its appearing to be greatly

(*a*) Cleaves *v.* Willoughby, 7 Hill, 83.

*Thus, if A. lets to B., having himself no title, and B. is evicted by the true owner, he may bring an action against A. to be indemnified, though there be no covenant for title contained in the lease, for the word *demise* creates an implied covenant. *Style* v. *Hearing*, Cro. Jac. 73; *Pincombe* v. *Rudge*, Yelv. 139; *Holder* v. *Taylor*, Hob. 12.[25](*a*). [*207]

infested with bugs. But, unless a distinction exist between a demise of this description and an ordinary letting, it may be doubted whether this case be law; and whether, if the point were to arise again, it would not be held that the tenant is bound, in all cases of this description, to protect himself from inconvenience by express stipulation. See the judgments in the last three cases cited above.

[25] See De Medina *v.* Norman, 9 M. & W. 820,* where it was said, by Baron Parke, that the "meaning of a contract to demise is not

(*a*) Dexter *v.* Manly, 4 Cush. 14. In Pennsylvania a covenant or agreement for quiet enjoyment is implied in a parol lease, and assumpsit may be maintained for the breach of it. C. J. Black, thus expresses himself: "It is not denied that the word demise in a lease implies a covenant for quiet enjoyment during the term. That word was not used here, for the lease was made by parol, and the parties did not understand Latin. But the word lease is a fair translation of demise, and ought to be and is interpreted in the same way by the Court." Maule *v.* Ashmead, 8 Harris, 484. See in New Hampshire and New York, Lovering *v.* Lovering, 13 N. H. 513; Baxter *v.* Ryerss, 13 Barbour's Sup. C. R. 284. The New York statutes, it would seem, have taken away all actions on covenants implied in the conveyance of real estate. Kenney *v.* Watts, 14 Wend. 38.

If to the implied covenant arising from the word "demise," is added an express covenant for quiet enjoyment "without eviction by the lessor, or any claiming under him," the express covenant restricts the implied. Noke's Case, 4 Coke, 81; Merrill *v.* Frame, 4 Taunt, 329, and in Line *v.* Stephenson, 5 Bing. N. C. 183, (35 E. C. L. R. 77,) Lord Denman, C. J., says, "It is true that the word *demise* does imply a covenant for title, but only where there is no express covenant inconsistent with such a construction." See also Blair *v.* Hardin, 1 Marsh, 232; Gates *v.* Caldwell, 7 Mass. 68;

[*208] *As the lessor is, in the absence of express agreement, bound to guarantee his tenant

only that a certain form of words shall be put on paper, but that the party assuming to demise shall have a title to demise." See also the judgment of the same learned judge in Sutton *v.* Temple, 12 M. & W. 64;* the judgment of the Court in Hart *v.* Windsor, ib. 85; and the notes to Promfret *v.* Ricroft, 1 Wms. Saund. 322 a. Even on a demise by parol a contract for quiet enjoyment is implied; but not a contract for good title. Bandy *v.* Cartwright, 8 Exch. 913. In Messent *v.* Reynolds, 3 C. B. 194, (54 E. C. L. R. 194,) it was doubted whether a contract for quiet enjoyment could be implied from a mere agreement to let. It has, however, been held that a person who lets premises agrees impliedly to give possession of them, and not merely to give a right of action against any person who is in possession and refuses to give it up. And, therefore, if the lessor omits to give possession to the lessee, the latter may recover damages against him, and is not driven to bring an ejectment for the land.

Sumner *v.* Williams, 8 Mass. 201; Vanderkarr *v.* Vanderkarr, 11 Johns. 122.

The implied covenant, however, does not survive the estate of the grantor as the express covenant will. Thus, if tenant for life makes a lease for years, and dies during the term, the remedy on the implied covenant dies with him; but if an express covenant is introduced into the lease it is binding on his estate, and may be enforced against his executors. Swan *v.* Searles, Dyer, 257; Adams *v.* Gibney, 6 Bing. 656, (19 E. C. L. R. 296,); Williams *v.* Burrell, 1 Com. B. R. 402, (50 E. C. L. R. 402,); Fisher *v.* Milliken, 8 Barr. 112; Van Rensselaer *v* Platner, 2 John's Cases, 17. See Quain's Appeal, 10 Harris, 510. Until this case, there never was a doubt entertained in Pennsylvania that the action lay against the executor on the covenant. The Court say: "The real security is the covenant running with the land and encumbering it. It is a covenant payable in the contemplation of the parties out of the profits of the land; and it would be entirely unreasonable that the law should hold the administrator for the rent, when it gives the land to the heir." The next step is, to say that the covenantor is not bound after he parts with the land. See 8 Sect. Penn'a Act, 1850, P. L. 571.

against eviction from the premises by some person having superior title, so he is bound to guarantee him

Coe *v.* Clay, 5 Bing. 440, (15 E. C. L. R. 660,). A covenant for quiet enjoyment, whether it be express or implied, runs with the land, and may be sued on by the assignee of the lessee. In Williams *v.* Burrell, 1 C. B. 402, (50 E. C. L. R 402,) a tenant for life, with a leasing power, demised the land by deed for a term of years, if three persons should so long live. The indenture contained a covenant by the lessor in the following terms :—" And the said Earl (the lessor), for himself, his heirs and assigns, the said demised premises, with the appurtenances, unto the said J. W. (the lessee), his executors, administrators, and assigns, under the rent, covenants, conditions, exceptions, and agreements before expressed, against all persons whatsoever lawfully claiming the same, shall and will during the said term warrant and defend." It was held, that this clause operated as an express covenant for quiet enjoyment during the whole of the term granted by the lease. And, therefore, the lease having, after the death of the lessor, been held to be void as not in due conformity with the leasing power, that the lessee or his assignee, or the executors of such assignee, might recover against the executors of the lessor the value of the term and the costs of defending an ejectment brought by the remainder-man, and also the sum recovered by him as mesne profits. The Court, after examining in detail in their judgment into the distinction between a *warranty* properly so called and the covenant in question, and also into the difference between covenants *in law* and covenants *in deed*, proceeded : " Therefore, both upon principle and authority, we think this is an *express* covenant for quiet enjoyment which extends to the term purported to be granted, and, consequently, that the defendants are liable therein as executors of the covenantor. We think that the executor of the lessee has the same right of suing on this covenant as the original lessee. In Spencer's Case, 4th Resolution, it was held that a covenant in law for title would pass with the estate; and there is neither principle nor authority to show that an express covenant, either for title or quiet enjoyment, will not equally pass and be available for the assignee of the lessee, or the executor of such assignee. And although, in Andrew *v.* Pearce (1 New. R. 158), it was held that no action was maintainable upon the covenant for quiet enjoyment by the assignee of the lessee against the executor of the lessor, yet that was expressly

[*209] *against the *disturbance* which would be occasioned by some person enforcing a charge which the lessor ought to have satisfied, but which, not being satisfied by him, entitled its owner to make distress upon the demised premises. Thus, if A. let to B., and B. to C., and B. allow his rent to A. to become in arrear, so that A. makes a distress for it upon the premises in C.'s occupation, C., as I have in a former Lecture explained, if he think fit to pay the charge, in order to liberate his goods from the distress, may claim credit for the amount, as so much rent due to his own immediate landlord B.[26] But it may happen that C. owes B. no rent, or less than the amount which he has been thus forced to pay, or he may not have been able to pay the charge, but have been obliged to suffer his property to be sold by the distrainer; still, as the landlord is under an implied obligation that he shall quietly enjoy the property demised to him, he may maintain an action against B., his landlord, and will recover damages proportionate to the injury which he has thus experienced by his defaults. *Hancock* v. *Caffyn*, 8 Bing. 358, (21 E. C. L. R. 576,); *Burnett* v. *Lynch*, 8 D. & R. 368; [S. C. 5 B. & C. 589]; (11 E. C. L. R. 597,); and see *Dawson* v. *Dyer*, 5 B. & Ad. 584, (27 E. C. L. R. 248.)[27]

on the ground that the lease had become absolutely void by the death of the lessor, before the assignment made to the plaintiff; a fact which does not occur in the present case." It must be recollected, that since the 8 & 9 Vic. c. 106, s. 4, neither the word "give," nor the word "grant," in any deed executed after the 1st October, 1845, implies any covenant in law in respect of any tenements or hereditaments, except so far as these words may by force of any Act of Parliament imply a covenant. See *ante*, p. 68, note.

[26] *Ante*, p. 129.

[27] In Dawson *v.* Dyer, which was a case of an *express* contract for

*However, this implied obligation on the part of the landlord to protect his tenant in [*210] the possession and quiet enjoyment of the premises, extends only to guarantee the tenant against evictions and disturbances caused by himself, or any person claiming under him, or paramount to him; for it is obvious to sound reason and common sense, that if one man demises property to another, he ought to take care that he have himself a right to that which he demises; and consequently that no person claiming *paramount to him*, that is by a superior title to his,

quiet enjoyment, the premises were demised for a term at a certain rent, and the lease contained a proviso for re-entry if the rent should be in arrear twenty-one days. The lessee covenanted to pay the rent, and the landlord covenanted that the lessee, *paying the yearly rent on the days appointed*, and performing all the covenants in the lease, should peaceably and quietly enjoy the premises. The lessee having been disturbed in his possession, it was held that he might sue the landlord on his covenant, although at the time when the cause of action accrued, the rent had been in arrear more than twenty-one days; the payment of the rent not being a condition precedent to the performance of the covenant for quiet enjoyment. Some observations made by the Lord Chief Justice Tindal, in his judgment in Ireland *v.* Bircham, 2 Bing. N. C. 97, (29 E. C L. R. 454,) appear to be inconsistent with this decision, but the real point decided in the last-mentioned case is not so. In Ireland *v.* Bircham, a lessee demised the premises by deed to an under-tenant for a term to commence at a future day; and the deed contained a covenant by the lessee with the under-lessee that the latter, paying the rent reserved on the under-lease and observing the covenants in it, should quietly enjoy the premises *during the term* by the underlease granted. Before the time arrived at which the term was to commence, the lessee forfeited his own term by non-payment of the rent due to the superior landlord, and the under-lessee brought an action against him on his covenant. The Court held, that as the under-lessee was not in possession of the land, and the term to which the covenant related had not in fact begun this action could not be maintained.

shall interfere with the enjoyment of his tenant. And in like manner it is plain, that he ought to take care
[*211] that he has not, by *his own act*, given a *title to some one to interfere with his tenant's possession. Indeed, to do so would be manifest dishonesty, for which by every rule of justice and of common sense, he ought to be and is answerable; but the case is quite different when somebody who has no title at all—some mere trespasser, thinks proper to interfere with the tenant's enjoyment. In such a case, the law of the land vindicates the tenant's rights, and he is bound to resort to that law; and he may sue and prosecute the wrong-doer without having recourse to his landlord, whom it would be unreasonable to expect to indemnify him against every wanton trespass committed by third persons: *Andrews' Case*, Cro. Eliz. 214; Shep. Touch. 166. Upon the whole, the law on this subject may be summed up by saying, that the landlord, *in the absence of express agreement*, is under an implied obligation to indemnify the tenant against eviction, or disturbance by his own act, or the acts of those who claim under or paramount to him; but not against the tortious acts of third persons, for which the law of the realm affords the tenant a direct remedy against those who commit them.[28](*a*)

[28] A trespass by the lessor does not operate as a suspension of the rent, see 1 Wms. Saund. 204, note [2]; nor does a trespass by a stranger. See Paradine *v.* Jane, Aleyn. 26, where, in an action for rent, a plea by the lessee that a German prince, by name Prince Rupert, an alien born, had invaded the realm with an hostile army, and had entered upon his possession and expelled him from the premises, was held to be no answer to the action. An eviction is an

(*a*) And not against the exercise of the right of eminent domain by the state. Dobbins *v.* Brown, 2 Jones, 75.

*This is, I say, the law in *the absence of express agreement*, for where there are express [*212]

answer to a demand for rent which is claimed as due after the eviction, but not in respect of rent due before it.(*a*) See 2 Roll. Ab. 428, Rent (O); Bac. Ab. Rent (L); Boodle *v.* Cambell, 7 M. & Gr. 386, (49 E. C. L. R. 386,); and Selby *v.* Browne. 7 Q. B. 620, (53 E. C. L R. 620,). An eviction of part of the premises occasions a suspension of the entire rent during its continuance, but the tenancy is not put an end to, nor is the tenant discharged from the performance of the covenants other than those which provide for the payment of the rent.(*b*) This is explained in the judgment of the Court in Morrison *v.* Chadwick, 7 C. B. 283, (62 E. C. L. R. 283,). "It may be urged," said the Court, "that the landlord may have evicted the tenant from the possession of a part of the demised premises, the possession of which part was the main inducement to him to enter into the covenants of the lease, and therefore that he ought not any longer to be bound by them. But it is to be borne in mind, that in addition to the suspension of the rent, the lessee may maintain his action against the lessor for the eviction; by which it is to be presumed that he will obtain satisfaction for any inconvenience or loss which he may suffer." See also Newton *v.* Allin, 1 Q. B. 519, (41 E. C. L. R. 652,) where a plea of eviction of part of the demised premises was held to be no answer to an action of covenant for non-repair. In order to make a plea of this kind a good answer to a claim for rent, it must show either an eviction or a dissolution of the tenancy by mutual consent, such as a surrender. See Gore *v.* Wright, 8 A. & E 118, (35 E. C. L. R. 346,); Dunn *v.* Di Nuovo, 3 M. & Gr. 105, (42 E. C. L. R. 63,); Morrison *v.* Chadwick, cited above,

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(*a*) Kesler *v.* McConachy, 1 Rawle, 335.

(*b*) Vaughn *v.* Blanchard, 1 Yeates, 175; Pendleton *v.* Dyett, 4 Cow. 58, and 8 Cow. 727; Reed *v.* Ward, 10 Harris, 144, 150. The Court say: "After severance," (that is, apportionment,) "the entry and expulsion of the tenant by one reversioner suspends only the rent which issues out of that part, and has no effect upon the rent due from other tenants, or from the same tenant for other lands, although all the lands had previously been held by one tenant under one lease."

[*213] terms and *stipulations on this subject in the demise, the rule *expressum cessare facit tacitum* applies, and those terms, and not the rules which I have just stated, govern the subject. Thus the landlord may, if he think proper, extend his liability by covenanting in express terms against disturbance by a particular person named in the covenant, and then he will be liable for all disturbances caused by that specific person, be they rightful or wrongful. See *Nash* v. *Palmer*, 5 M. & S. 374.[29] And, on the other hand, the wording of the express covenant may very much restrain the implied liability. A very remarkable instance of this is to be found in *Merrill* v. *Frame*, 4 Taunt. 329, the case to which I said I should recur. There the lessor covenanted against eviction by himself, and all persons claiming "*by, from, or under him.*"

and Smith *v.* Lovell, 10 C. B. 6, (70 E. C. L. R. 6,). In Neale *v.* Mackenzie, 2 C. M. & R. 84,* S. C. 1 M. & W. 747,* a lessee of land accepted the lease and entered. Upon his entry he found a small portion of the land in the occupation of a person entitled under a previous lease from the same lessor for a term exceeding that granted by the later lease. This person kept possession of the land demised to him, and excluded the lessee under the later lease from the enjoyment of it until half a year's rent became due from the latter. The Court of Exchequer Chamber held, reversing the judgment of the Court below, that this case was not analogous to an eviction, but that the later demise was wholly void as to the portion of land occupied under the first lease, and that the rent was not apportionable, so that the lessor was not entitled to distrain either for the whole rent reserved on this lease, or for any part of it. See also Watson *v.* Waud, 8 Exch. 335. If, however, the lessee is evicted from part of the demised premises by title paramount to that of the lessor, the rent is apportioned. See 1 Roll. Ab. 235, *Apportionment* (B); Stevenson *v.* Lambard, 2 East, 575; and the cases cited above.

[29] See also Fowle *v.* Welsh, 1 B. & C. 29, (8 E. C. L. R. 14,); and Lewis *v.* Smith, 9 C. B. 610, (67 E. C. L. R. 610,).

It was held that the lessee was not guaranteed against eviction by a title *paramount to his lessor's*, although he would have been so had the express covenant not been inserted at all.[30](*a*) Upon the whole, in these *cases you must look to the words of each covenant as the measure of the liability; and to the general law only when there is no express covenant at all. [*214]

I must now pause till the next Lecture.

[30] In Stanley *v.* Hayes, 3 Q. B. 105, (43 E. C. L. R. 652,) the lessor had covenanted with the lessee for the quiet enjoyment by him of the demised premises "without any let, suit, trouble, denial, disturbance, eviction or interruption whatsoever of or by" the landlord, his heirs or assigns, "or any other person lawfully claiming or to claim *by, from, or under*, him, them, or any of them," and afterwards a collector of the land-tax had entered upon the lessee and seized goods upon the premises for arrears of the tax due from the landlord before the demise. It was held, that these facts did not amount to a breach of the landlord's covenant, for that it was only applicable to claims by a title from him, and, under the circumstances, the claim had been made not *through* but *against* him.

(*a*) The exercise of the right of eminent domain is not a breach of the covenant of warranty. Dobbins *v.* Brown, 2 Jones, 75. It would seem that it may be of the covenant of quiet enjoyment. See Peters *v.* Grubb, 9 Harris, 465.

[*215] *LECTURE VIII.

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The points connected with the determination of a tenancy may be discussed under two questions—

1st. In what way may it be put an end to?

2ndly. What are the mutual rights of the landlord and tenant upon its determination?

With regard to the former question—a tenancy may determine—

1. By efflux of time.

[*216] 2. *By surrender.

3. By forfeiture.

4. By notice to quit, which applies, however, only to the case of tenancies from year to year, or of a like

description with tenancies for years. A tenancy *at will*, strictly speaking, may, as I before told you, be determined simply by the determination of the landlord's or tenant's will.[1]

Now, with regard to the determination of a tenancy by lapse of time—by efflux of the period stated in the lease—it is, of course, unnecessary to say much. From that moment the tenant's right to the possession determines, the landlord's reversion becomes a right to the *possession*.[2] And although formerly it would not have been so, now, by the late statute 3 & 4 Wm. 4, c. 27, the time of limitation begins to run against the landlord, so that, in twenty years, he will be barred, if he take no step to vindicate his title.

It is worth while to pause for a few moments to consider the precise position, with reference to this Act of Parliament, of a landlord and tenant upon the determination of the lease. The lease constitutes the tenant's title to the possession. With its expiration his right of possession ends. After its expiration, therefore, if he continue in *possession, he continues *without any title at all*. Still, as he originally entered by good title, he becomes, not a mere trespasser, but a *tenant by sufferance;* a *tenant by sufferance* being, as I explained in the first Lecture, one who comes in by right, and holds over without right. Now, previously to the act of 3 & 4 Wm. 4, c. 27, the possession of a tenant by sufferance never was adverse to the landlord, and, so long as the tenancy at sufferance continued, the time of limitation would not begin [*217]

[1] *Ante*, p. 16.

[2] In this case both the parties have, as is obvious, notice from the lease itself of the period at which it determines. See Cobb. *v.* Stokes, 8 East. 358, and the judgment of Lord Mansfield in Messenger *v.* Armstrong, 1 T. R. 54.

to run against him. There were, indeed, modes in which the tenancy at sufferance was liable to be determined, even without the landlord's intervention; for not merely would a demand by the landlord determine it, but, if the tenant by sufferance transferred the possession to a third party, that third party came in, not as a tenant by sufferance, but as a trespasser, since the tenant by sufferance, having no title himself, could, of course, give none to his transferee. And, for the same reason, if the tenant by sufferance died, his representative, if he held on, held as a trespasser, and the time of limitation ran from his entry.[3] But, if none of these things took place, but the old tenant who had come in under the lease simply continued to hold over as tenant on sufferance, his possession was not considered by the law *adverse* to the right of the reversioner, nor *did the time of limitation run so long as the tenancy on sufferance continued.[4](a)

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[3] See Co. Litt. 57 b.; Com. Dig. *Estates by Grant* (I.); and the note to Watkins on Convey. (9th edition,) p. 23.

[4] See the note to Watkins on Convey. (9th edition), p. 23; and the notes to Nepean *v.* Doe, 2 Smith's L. C. 399.

(*a*) The statute 3 & 4 William 4, has not, it is believed, been followed in any of the United States. It is still true here that a possession acquired from the true owner cannot be used to the destruction of his estate, unless it was the intention to transfer the entire estate at the time of the transfer of the possession. McGinnis *v.* Porter, 8 Harris, 83. Possession to give title under the Statute of Limitations must be an "actual, continued, visible, notorious, distinct and hostile possession," as was said by Judge Duncan, in Hawk *v.* Senseman and others, 6 Serg. & Rawle, 21. And again, in the same case: "The owner does not forfeit his title to the first straggler who sets himself down on his land; but the policy of the law, for the sake of quieting men's possession, confers the possessory right itself on him who has *entered under an adverse claim*, and held

The statute 3 & 4 Wm. 4, c. 27, has put an end to this state of things, and has enacted in effect by s. 2, *that the time of limitation shall run from the period at which the right to the possession first accrued*, unless the title of the rightful owner be acknowledged by the party in possession. And in the great case of *Nepean* v. *Doe*, 2 M. & W. 894,* the Court of Exchequer Chamber has declared the effect of this enactment to be, that the question now is, *not whether there has been what was formerly called an adverse possession for twenty years, but whether twenty years have elapsed since the right accrued, whatever be the nature of the possession* ;[5] so

[5] See the notes to this case, 2 Smith's L. C. 396, and *ante*, p. 19, note [34]. Where the possession is a bar under the 3 & 4 Wm. 4, c. 27, it may still properly be called *adverse possession*, although not in the old sense. Sugden's Essay on the Real Property Statutes, Chap. I. ss. III. & IV. It is provided by s. 7 of this act, that where any person is in possession of land as tenant at will, the right to recover the land is to be deemed to have first accrued either at the termination of the tenancy, or at the expiration of one year from its com-

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a notorious possession and occupation for twenty-one years." The title draws the possession, and the statute does not begin to run until there is an actual ouster. 4 Kent Com. 482, &c.; Green *v.* Liter et al., 8 Cranch, 229; Kennebec Prop'rs *v.* Springer, 4 Mass. 416; Same *v.* Laboree, 2 Greenl. 275; Jones *v.* Porter, 3 Penn. 132; Nickle *v.* McFarland, 3 Watts, 165; Hall et ux. *v.* Stevens, 9 Met. 418; Burhans *v.* Van Zandt, 7 Barb. Sup. Ct. R. 92; Jackson *v.* Stiles, 1 Cow. 575 Wadsworthville School *v.* Mectze, 4 Rich, 50; Herbert *v.* Henrick, 16 Alab. 581, 594.

But if one in possession of land under another, repudiates the contract, and gives the person under whom he went into possession notice that he shall no longer hold under him, the relation ceases, the possession becomes adverse, and the Statute of Limitations begins to run. Greene *v.* Munson, 9 Verm. 37; North *v.* Barnum 10 Vermt. 220.

that you see, now, by the operation of this act, the tenant, if he held over, would in twenty years acquire

mencement, provided that no mortgagor or *cestui que trust* is to be deemed a tenant at will, within the meaning of this section, to his mortgagee or trustee. It may be useful to refer to some of the late decisions which show the construction which has been put upon this portion of the act. It has been held that this section does not apply when the tenancy at will has ceased before the passing of the act. Doe d. Evans *v.* Page, 5 Q. B. 767, (48 E. C. L. R. 767,); and Doe d. Birmingham Canal Company *v.* Bold, 11 Q. B. 127, (63 E. C. L. R. 127,). In Doe d. Bennett *v.* Turner, 7 M. & W. 226;* 9 M. & W. 643;* the owner of land let a person into possession of it as a tenant at will, and some years afterwards determined the will. Twenty-two years after this he brought an ejectment to recover the land. The Court held, that as his right of action *first* accrued under the statute at the expiration of one year after the commencement of the tenancy at will, the action was brought too late, unless the jury found, as a fact, that after the tenancy at will had been determined, the tenant, who would then become a mere tenant at sufferance, had entered into an express or implied agreement with the owner of the land for a new tenancy. See also Doe d. Angell *v.* Angell, 9 Q. B. 328, (58 E. C. L. R. 328,). The right to recover the land has been held to be barred under this statute after an occupation for more than twenty years without payment of rent, even although during part of that time the wife of the person in possession had a life estate in the land in question, and occupied it with him, the jury having found that he was a tenant at will; Doe d. Dayman *v.* Moore, 9 Q. B. 555, (58 E. C. L. R. 555,). In Doe d. Goody *v.* Carter, *ib.* 863, a purchaser of land was let into possession before conveyance, and allowed his son to occupy as tenant at will without paying any rent. The son continued to occupy as at first, until his death, which occurred within twenty-one years of his entry Some years after the commencement of the son's occupation, the father took from the vendor a conveyance of the land, and mortgaged the property, but he made no alteration in the terms of the son's tenancy. After the son's death his widow continued to occupy without payment of rent until the expiration of twenty-one years from her husband's entry. An ejectment was afterwards brought against her by the person to whom the interest of the

a title himself by lapse of time. And the old doctrine, as to the innoxious effect of a tenancy on sufferance, is done away with.

mortgagee had passed. It was held that the action was brought too late, for that the tenancy at will was not determined by the father's taking a conveyance, and even, if it had been determined by that event, or by the mortgage, a tenancy at sufferance must be deemed to have then commenced, there being no evidence of a new tenancy at will, and the tenancy altogether had lasted more than twenty years from the end of the first year. In Doe d. Jacobs *v.* Phillips, 10 Q. B. 130, (59 E. C. L. R. 130,) the Court of Queen's Bench held that the trustee of a term who had never been in possession, and had never demanded the possession, could not recover the land after twenty years had elapsed, since, if the *cestui que trusts* were to be deemed tenants at will, a demand of possession was necessary, and if no tenancy existed, the action might have been brought twenty years before. In this case the Court appeared to be of opinion that s. 3 of the 3 & 4 Wm. 4, c. 27, is applicable to the case of a *cestui que trust* holding possession of the land under a trustee. But the Court of Common Pleas has held, after a careful examination of the sections of the statute which relate to this subject, that this is not so; but that the general object of the statute is to settle the rights of persons adversely litigating with each other, and not to deal with cases of trustee and *cestui que trust*, in which there is only a single interest; namely, that of the person beneficially entitled. Garrard Dem. *v.* Tuck Ten., 8 C. B. 231, (65 E. C. L. R. 231,). It would appear from the last-mentioned case that a *cestui que trust* who enters into the possession of the land is, at law, a tenant at will to the trustee, and that under s. 2 of this act the right of entry of the trustee accrues only upon the determination of the tenancy at will resulting from the possession, and does not arise from its first commencement. In Randall *v.* Stevens, 2 E. & B. 641, (75 E. C. L. R. 641,) a person had been let into possession of land as a tenant at will before the passing of the statute, and never paid any rent. After the passing of the act, and before twenty-one years had elapsed from the commencement of the tenancy at will, the landlord entered and turned the tenant out of the possession, which, however, was resumed by him again on the same day. No fresh tenancy at will, however, was entered into, and

[*219] *But, though at the end of the lease, if the tenant holds over he holds over as a tenant at
[*220] sufferance—*still, if when the period for payment of rent comes, he pay to his landlord the
[*221] rent reserved by the *expired lease, he becomes tenant from year to year; the payment of such rent by him, and the receipt of it by his landlord, being considered indicative of their mutual intention to create a yearly tenancy; and thereupon the Statute of Limitations ceases to run against the landlord, who acquires a new reversion expectant on the yearly tenancy, and the tenant becomes entitled to the ordinary notice to quit. And it is very remarkable that the yearly tenancy thus raised is governed, not by the simple rules which govern yearly tenancies in the absence of express stipulation, but by the provisions of the expired lease, so far as they are consistent and compatible with a yearly holding. See *Doe d. Rigge* v *Bell*, 5 T. R. 471; *Richardson* v. *Gifford*, 1 A. & E.

no rent was paid at any time. Under these circumstances the Court held that the landlord was entitled to enter upon the premises at any time before the lapse of twenty years from the time at which the tenant had resumed the possession, although more than twenty-one years might have elapsed from the time when he was first let into the possession, and had become tenant at will. In delivering judgment in this case, the Court observed, that if the matter had been *res integra*, the more reasonable construction of s. 7 might have been that "where there has been no actual determination of the tenancy by act of the parties within twenty-one years, it shall be deemed to have determined at the expiration of the first year, making an occupation of twenty-one years without payment of rent a bar: but that where there has been an actual determination of the tenancy within that period, whereby a new right of entry accrues, this clause of the statute shall have no operation, '*such tenancy*' *being supposed by the statute to continue till the right of entry is barred.*"

52, (28 E. C. L. R. 49,); *Beale* v. *Sanders*, 3 Bing. N. C. 850, (32 E. C. L. R. 390,).[6](*a*)

[6] See the cases cited, *ante*, p. 22, note [37]; and Doe d. Thomson *v* Amey, 12 A. & E. 476, (40 E. C. L. R. 239,) in which case it was held, that a person who was let into possession under an agreement for a future lease for years, which was to contain a covenant against taking successive crops of corn, and a condition of re-entry for breach of any of the covenants, and who had paid rent, had thereby become a yearly tenant subject to these terms and conditions. The following recent decisions are instances of the application of the rule which is mentioned in the text. In Finch *v.* Miller, 5 C. B. 428, (57 E. C. L. R. 428,) a tenant had occupied the premises under an agreement in writing, by which they were let for three, seven, or ten years, subject to a six months' notice at any of these periods, and by which it was stipulated that a quarter's rent should be paid on taking possession, and should be allowed to the tenant at the determination of the tenancy. A notice to determine the tenancy at the end of the third year was given by the tenant, but shortly before it expired the parties verbally agreed that the occupation should continue for another year, nothing being said as to the terms. It was held, that this agreement stipulated in substance for a forehand rent, and that, no other terms being mentioned, the tenant continued to occupy for the additional year on the terms of the original agreement, and, consequently, that the payment made on taking possession was applicable to the last quarter of the actual occupation, and was to be allowed to the tenant in respect of this quarter. In another case, the assignee of a lease for a term of years made an underlease, and on its expiration the assignee of the under-lessee, who was then in possession, held over and paid rent. The original lease commenced at Christmas and ended at

(*a*) See, to the same purport, the following American cases,— Fronty *v.* Wood, 2 Hill S. C. 367; Brewer *v.* Knapp, 1 Pick. 335; Diller *v.* Roberts, 13 S. & R. 60; Bacon *v.* Brown, 9 Conn. 334; Dorrill *v.* Stevens, 4 McCord, 59; De Young *v.* Buchanan, 10 Gill. & Johns. 149; Phillips *v.* Menges, 4 Wh. 226; Conway *v.* Starkweather, 1 Denio, 113; Jackson *v.* Patterson, 4 Harrington, 534; Hawkins *v.* Pope, 10 Ala. 493; Lockwood *v.* Lockwood, 22 Conn. 425.

[*222] *Next with regard to the determination of the lease by *surrender*. A surrender, which [*223] derives *its name from the two Latin words *sursum* and *redditio* is defined by my Lord Coke (1 Inst. 337 b) to be "*the yielding up of an estate for life or years to him that hath an immediate estate in the reversion or remainder.*"

Midsummer. The Court held, that a tenancy from year to year had arisen by reason of the holding over and payment of rent, but that it commenced at *Midsummer*, when the lease expired, not at *Christmas*, when the entry of the original lessee took place; see Doe d. Buddle *v.* Lines, 11 Q. B. 402, (63 E. C. L. R. 402,). And see Doe d. Davenish *v.* Moffatt, 15 Q. B. 257, (69 E. C. L. R. 257,) in which case a tenant entered into possession and paid rent under a contract of demise which, not being under seal, could operate only as an agreement for a lease, owing to the provisions of the 7 & 8 Vic. c. 76, which were then in force. The agreement provided for a lease for three years, and that it should be renewable for the same term upon notice by the tenant. The tenant paid rent and gave a notice that he wished to have a renewal of the tenancy. It was held, that by the payment of rent a tenancy from year to year had been created, subject to the terms of the agreement, and therefore that the tenant's interest expired without any notice to quit at the end of the three years mentioned in the agreement, but that his having exercised the option to take a renewed term gave him no interest in the land. A tenant who holds over after the expiration of a lease may be taken to hold on any of its terms which are not inconsistent with a yearly tenancy. Hyatt *v.* Griffiths, 17 Q. B. 505, (79 E. C. L. R. 505). In this case a stipulation was contained in a lease ending at Michaelmas that the tenant might retain and sow a portion of the land with wheat at the seed time next after the end of the term, and have the standing of it till the following harvest, without paying any rent, and the use of part of the farm for the purpose of threshing out the crop, with liberty of ingress and egress. It was held, that this was a stipulation which might be incident to a tenancy from year to year. It must be observed, that in all these cases it is a question of fact for the jury, whether the tenant who holds over does or does not hold upon any of the terms of the expired lease. See the case last cited.

There are two species of surrender:—

1. *A surrender in express terms.*

2 *A surrender by operation of law.*

With regard to a surrender in express terms, the proper and technical words by which it should be made are *surrender and yield up*, but the general rule that all documents shall be construed so as to effectuate if possible the intention of the parties applies to surrenders as well as to other assurances, and, consequently, words of *release*, if it be plain that they are so intended, will operate as a surrender, although a release is the very opposite thing to a surrender, for a release, as you know, operates by the reversion being given to the owner of the particular estate, whereas, in the case of surrenders, the particular estate is given up to the reversioner. See *Smith* v. *Mapleback*, 1 T. R. 441.[7](*a*)

[7] See also Williams *v.* Sawyer, 3 Bro. & Bing. 70, (7 E. C. L. R. 353,). An agreement of this description, which does not operate as a surrender, may yet amount to an excuse for the non-payment of the rent. See Gore *v.* Wright, 8 A. & E. 118, (35 E. C. L. R. 346,); Turner *v.* Hardey, 9 M. & W. 770 ;* Dunn *v.* Di Nuovo, 3 M. & Gr. 105, (42 E. C. L. R. 63,); Morrison *v.* Chadwick, 7 C. B. 266, (62 E. C. L. R. 266,); and Smith *v.* Lovell, 10 C. B. 6, (70 E. C. L. R. 6,).

(*a*) To constitute an express surrender, no set form of words is necessary, nor is it required there should be a formal re-delivery or cancellation of the deed or other instrument which created the estate to be surrendered. All that is requisite is the agreement and assent of the proper parties manifesting such an intent, followed by a yielding up of the possession to him who hath the greater estate. Greider's Appeal, 5 Barr, 424. The fact of surrender merges the term in the reversion; the relationship of landlord and tenant between the parties is completely gone. There is no apportionment of rent up to the day of the surrender. In Bain *v.* Clark, 10 Johns. 424, the tenant

[*224] *At common law, a surrender might have been made by mere words, whenever the estate surrendered could have been created by mere words, which was the case with all leases for years of corporeal hereditaments.[8] However, by the Statute of Frauds, 29 Car. 2, c. 3, s. 3, no surrender is valid unless [by deed or note] in writing, signed by the party making it or his agent thereunto lawfully authorised by writing, or "*by act and operation of law.*" You will see the operation of this statute and the state of the previous law discussed in *Farmer d. Earl* v. *Rogers*, 2 Wils. 26.[9]

[8] Co. Litt. 338 a.

[9] An insufficient notice to quit, accepted by the landlord, will not since this statute amount to a surrender; nor can there be, apparently, a surrender to operate *in futuro*. See Johnstone *v.* Hudlestone, 4 B. & C. 922, (10 E. C. L. R. 860,); Doe d. Murrell *v.* Milward, 3 M. & W. 328;* and Bessell *v.* Landsberg, 7 Q. B. 638, (53 E. C. L. R. 638,). Since this Lecture was written the 8 & 9 Vic. c. 106, s. 3, has provided that "*a surrender in writing* of an interest in any tenements or hereditaments, not being a copyhold interest, and not being an interest which might by law have been created without writing, made after the 1st October, 1845, *shall be void at law unless made by deed.*" This enactment does not extend to Ireland. *Ib.*

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surrendered his lease by writing, agreeing, however, for the payment of the rent reserved by the lease, and that the landlord might take all lawful means for its recovery, according to the lease and the laws of the State. The landlord having distrained for a year's rent, the former tenant brought replevin. The Court said: "The relationship of landlord and tenant between the parties was entirely gone, and though the lessee might continue bound for a year's rent, by reason of the express agreement in the deed of surrender, yet that was a personal responsibility founded on the agreement, and could not arise from the continuance of the contract between them as landlord and tenant. See Shephard *v.* Spalding, 4 Met. 416.

But this statute contained, as you have just heard, an exception of surrenders by *act and operation of law.* Such surrenders, therefore, are still, notwithstanding the Statute of Frauds, valid *without writing; and this renders it necessary to enquire what constitutes a surrender *by act and operation of law.*(a) [*225]

(a) It is held in Pennsylvania, on the interpretation of the Statute of Frauds, notwithstanding the general words of the Act, that surrenders required to be in writing are only of leases required to be in writing; consequently, that leases not exceeding three years, whether they be in writing or not, may be surrendered by parol, by express words; and that implied surrenders are valid notwithstanding the statute, which has to do merely with express surrenders. McKinney *v.* Reader, 7 Watts, 123. This was an action of trespass, in which plaintiff declared that he was quietly possessed of a house and lot of ground, and that the defendant broke and entered into the premises and kept the possession. The defendant was the owner of the house and lot and leased them to the plaintiff for one year; during the year the plaintiff absconded, and afterwards his family locked up the premises, and followed, without leaving property on the premises to pay the rent. The question was, whether this was not such an implied surrender of the lease as justified the landlord in resuming his possession. The Court below was of opinion that it was not; their judgment was reversed by the Supreme Court. C. J. Gibson says: "An implication of surrender is not precluded by the Statute of Frauds, which concerns a surrender by express words, and of a lease, too, which could not have been validly constituted otherwise than by writing." "I take it, a lease for less than three years, whether written or not, may be surrendered or transferred by an oral expression of assent. The case of an implied surrender, however, I have already intimated, was never imagined to be within this statute; and it is with this alone we have at present to do. The question, therefore, stands not on any supposed statutory provision, but on common law principles of recision; and I confess I have found no case which comes entirely up to the position, that the desertion of rented premises is a surrender in law; yet, for want of a specific proceeding to prevent a failure of justice, we must, as the British Court would have

At first it was contended that the cancellation of the lease would operate as a surrender of the term created therein *by act and operation of law*. However, it was soon determined that this would not suffice. *Roe d. Berkeley* v. *Archbishop of York*, 6 East, 86; *Doe d. Courtail* v. *Thomas*, 9 B. & C. 288; (17 E. C. L. R. 135,); *Magennis* v. *Mac Cullogh*, Gilb. Cases in Eq. 235.

It had, however, been held, before the passing of the Statute of Frauds, that if A., being B.'s tenant, accept of a new lease from B., to take effect during the continuance of the subsisting lease, it operates as a surrender in law of the subsisting lease; for the two leases are incompatible, and the acceptance of the second shows that the lessee contemplated the destruction of the first. See Com. Dig., *Surrender* (I.); *Hamerton* v. *Stead*, 3 B. & C. 478, (10 E. C. L. R., 220,).[10]

[10] In Hamerton *v.* Stead, cited above, a tenant from year to year

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done, had not their Parliament relieved them from the task, enlarge the class of implied surrenders beyond its limits in the books, by holding that an abandonment is such a relinquishment of the premises as justifies an immediate resumption of it."

"Here the tenant had locked up his effects, and fled from the State with an avowed intent to evade the rent; and though in his letters from Jersey, whence he carries on this suit, he expressed a desire to return, checked by fear of arrest, he spoke as would an absconding debtor, and gave particular directions for the retreat of his family with his effects. Can it be that these circumstances did not constitute a surrender which authorized the landlord to resume the possession for the preservation of his property, and the avoidance of a loss from the mis-employment of it? He might possibly have had a remedy by the Act of 3d April, 1830, but I cannot think the law so unreasonable as to say he became a trespasser." See also Magaw *v.* Lambert, 3 Barr, 444; Greider's Appeal, 5 Barr, 424.

*So far the law is quite clear and intelligible, but(a) of late years there has been a consider- [*226]

made, during a current year, an agreement with his landlord that the latter should grant a lease to him and to a third person. From that time the third person entered and occupied jointly with the tenant. It was held, that the agreement and the joint occupation determined the former tenancy, although the lease contracted for was never granted. In this case a new tenancy was, it will be seen, inferred from the joint occupation by the old and new tenant; although no new lease had been actually granted. But, a mere agreement for a new demise will not operate as a surrender of an existing lease. Foquet *v.* Moor, 7 Exch. 870. In Doe d. Earl of Egremont *v.* Forwood, 3. Q. B. 627, (43 E. C. L. R 897,) the Court of Queen's Bench was of opinion that a surrender which was made in consideration of the granting of a new lease took effect, although the new lease turned out to be invalid, not being granted in accordance with the leasing power under which it was made. But this doctrine has been departed from by the same Court in some later cases. See Doe d. Earl of Egremont *v.* Courtenay, 11 Q. B. 702, (63 E. C. L. R. 702,) in which case a tenant for life, acting under a leasing power, granted a new lease to a person who was already in possession of the land under a previous lease, and it was stated in the new lease that it was granted in consideration of the surrendering up of the former lease, *which surrender was thereby made and accepted accordingly.* The later lease was invalid, not being in conformity with the leasing power. It was held, under these

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(a) It is said in Rowan *v.* Lytle, 11 Wend. 617, that the cancelling and destroying the lease, by the agreement of parties will not divest the interest of the lessee, that the New York Statute requires a deed or note in writing, signed by the parties. The case was of a lease for eight years, which required a writing to make it valid.

The acceptance by a tenant of a new lease of the same premises, during the term of the first lease, is deemed a virtual surrender of the first lease, unless there are facts rebutting such presumption. Van Renssalaer *v.* Penniman, 6 Wend. 569; Livingston *v.* Potts, 16 Johns, 28; Hesseltine *v.* Seavey, 4 Shep. 212; Smith *v.* Niver, 2 Barb. Sup. Ct. R. 180.

[*227] able struggle *to extend the effect of a *surrender by operation of law* to cases in which the tenant has not himself taken a new lease, but has put a third person into possession of the premises, and that person has, with his own concurrence, and the concurrence of the landlord, been treated as the landlord's immediate tenant. The most remarkable case on this subject is *Thomas* v. *Cook*, 2 B. & A. 119, in

circumstances, that the first lease remained in force, and that it was immaterial whether the second lease was, at the time of the demise, void or only voidable at the will of the tenant for life. The Court explained the principle upon which these cases depend, in the following terms: "The principle laid down by Lord Mansfield in Wilson *v.* Sewell, 4 Burr. 1980, and Davison d. Bromley *v.* Stanley, *ib.* 2213, seems to us the true one; that where the new lease does not pass an interest *according to the contract*, the acceptance of it will not operate a surrender of the former lease; that in the case of a surrender implied by law from the acceptance of a new lease, a condition ought also to be understood as implied by law, making void the surrender in case the new lease should be made void; and that, in case of an express surrender so expressed as to show the intention of the parties to make the surrender only in consideration of the grant, the sound construction of such instrument, in order to effectuate the intention of the parties, would make that surrender also conditional to be void in case the grant should be made void." And in the later case of Doe d. Biddulph *v.* Poole, 11 Q. B. 713, (63 E. C. L. R. 713,) the same principle was acted upon, and the acceptance of a fresh lease, which had been avoided contrary to the intention of the parties, was held not to amount to an absolute surrender of an old lease, but to be a surrender conditioned to be void, if the new grant should not take effect. The Court observed, in this case, that as, where a new lease is accepted, a surrender is presumed only for the purpose of making a grant operative which would otherwise be without effect, it would be unreasonable, where the grant fails contrary to the intention of the parties, to hold that an absolute surrender was intended. See also as to surrenders by the taking of a new lease, Lyon *v.* Reed, 13 M. & W. 285,* and the cases cited *post* p. 228, note [12].

which it was held that three circumstances, namely, the making by the landlord of a lease incompatible with the existing one, the assent of the tenant to it, and the delivery up of possession to the lessee named by it, amounted altogether to a surrender by operation of law of a tenancy not created by deed. This case was followed by *Johnstone* v. *Huddlestone*, 4 B. C. 922, (10 E. C. L. R. 860,),[11] in which the circumstances then before the Court were held not to amount to a surrender by operation of law. That case was most elaborately argued by Baron Parke and Mr. Justice Patteson, both then at the bar, and Sir John Bayley, in delivering judgment, commented on the previous case of *Thomas* v. *Cook*, as follows:—"That case," said his lordship, "only decided that where there had been a change of possession, and an agreement between the landlord and tenant, that the former should accept the person in possession as his tenant from a given period, the law, in order to effectuate the intention of the parties, *would work a surrender of the original tenant's interest."[12] [*228]

[11] See also Doe d. Murrell *v.* Milward, 3 M. & W. 328.*

[12] The law with respect to surrenders *by operation of law* has been much considered in some later cases than Thomas *v.* Cook, and the tendency of the more modern decisions, at least in the Court of Exchequer, has been to narrow very much the application of the rule laid down in that case, if not to shake its authority altogether. As this is a subject of much practical importance, which has led to some difference of opinion between the Courts, and the questions relating to it cannot be considered to be yet altogether settled, it may be convenient to refer here at length to the more important of the later decisions. In Lyon *v.* Reed, 13 M. & W. 285,* the Court of Exchequer examined the law upon this head in a very elaborate judgment. "The term surrender by operation of law," said the Court in this case, "is properly applicable only to cases in which the owner of a particular estate has been a party to some act, the validity of which

[*229] *Since *Johnstone* v. *Huddlestone*, the point has repeatedly occurred in a variety of cases, in

he is by law afterwards estopped from disputing, and which would not be valid if his particular estate had continued to exist. Thus, if lessee for years accepts a new lease from his lessor, he is estopped from saying that his lessor had not power to make the new lease; and, as the lessor could not do this until the prior lease had been surrendered, the law says that the acceptance of such new lease is of itself a surrender of the former. . . . . So, if tenant for years accepts from his lessor a grant of a rent issuing out of the land and payable during the term, he is thereby estopped from disputing his lessor's right to grant the rent, and as this could not be done during his term, therefore he is deemed in law to have surrendered his term to the lessor. All the old cases will be found to depend on the principle to which we have adverted, namely, an act done by or to the owner of a particular estate the validity of which he is estopped from disputing, and which could not have been done if the particular estate continued to exist. The law there says, that the act itself amounts to a surrender. In such case it will be observed there can be no question of *intention*. The surrender is not the result of intention. It takes place independently, and even in spite of intention." In the same case the Court after reviewing the earlier decisions, made the following observations in reference to Thomas *v.* Cook: "It is a matter of great regret that a case involving a question of so much importance and nicety should have been decided by refusing a motion for a new trial. Had the case been put into a train for more solemn argument, we cannot but think that many considerations might have been suggested which would have led the Court to pause before coming to the decision at which they arrived. Mr. Justice Bayley, in his judgment, says, the jury were right in finding that the original tenant assented, because, he says, it was clearly for his benefit, an observation which forcibly shows the uncertainty which the doctrine is calculated to create. The acts *in pais* which bind parties *by way of estoppel* are but few, and are pointed out by Lord Coke. Co. Litt. 352 a. They are all acts which anciently really were, and in contemplation of law have always continued to be, acts of notoriety, not less formal and solemn than the execution of a deed, such as *livery*, *entry*, *accept-*

some *of which the circumstances have been held to amount to an implied surrender, in [*230]

ance of an estate, and the like. Whether a party had or had not concurred in an act of this sort, was deemed a matter which there could be no difficulty in ascertaining, and then the legal consequences followed. But in what uncertainty and peril will titles be placed, if they are liable to be affected by such accidents as those alluded to by Mr. Justice Bayley. . . . . Perhaps the case of Thomas *v.* Cook itself, and others of the same description, might be supported upon the ground of the actual occupation by the landlord's new tenants, which would have the effect of eviction by the landlord himself in superseding the rent, or compensation for use and occupation during the continuance of that occupation. But we feel fully warranted in not extending the doctrine of that case, which is open to so much doubt, especially as such a course might be attended with very mischievous consequences to the security of titles." In Creagh *v.* Blood, 8 Irish Equit. Rep. 688, Sir E. Sugden (when Lord Chancellor of Ireland) was of opinion, although it was not necessary to decide the point in that case, that the doctrine of Thomas *v.* Cook could not be applied to a surrender of a freehold interest, and he appeared to assent to the reasoning contained in the judgment in Lyon *v.* Reed. In a case in the Court of Common Pleas which was decided before Lyon *v.* Reed, and which appears to be a strong case, the facts were that two joint lessors had demised a house by a lease in writing signed by both to a tenant at a yearly rent payable quarterly. One of the lessors never interfered after signing the lease. The key was given to the wife of the tenant, and he entered into possession; but before the first quarter's rent became due, his wife delivered the key back to the other lessor, there having been some dispute as to the arrears of rent which were due to the superior landlord and as to some taxes and rates which were also in arrear. It was held that the delivering back of the key by the tenant *animo sursum reddendi*, and the acceptance of it by the lessor to whom it was given, amounted to a surrender by operation of law, and that the jury were warranted in finding that the other lessor was bound by it. See also Dodd *v.* Acklom, 6 M. & G. 672, (46 E. C. L. R. 672,). In Nickells *v.* Atherstone, 10 Q. B. 944, (59 E. C. L. R. 944,) a tenant of premises under an agreement

others not to be sufficient for that purpose. It is easy to see why the point should have so often occurred, since it is obvious that the question to whom notice to quit ought to be given, and against whom an action for the rent ought to be brought, may both depend on it. I will refer to the latest cases in which it has come under discussion. They are *Graham* v. *Whichelo*, 3 Tyrwh. 201, 1 C. & M. 188; *R.* v. *Banbury*, 1 A. & E. 136, (28 E. C. L. R. 85,); *Walls* v. *Atcheson*, 3 Bing. 462, (11 E. C. L. R. 228,). I have one more observation to make with regard to this class of implied surrenders, namely, that I think there would be considerable difficulty in applying the *doc-
[*231] trine of *Thomas* v. *Cook* to the case of a term created by deed, and I am not aware that it ever has been so applied; and I should strongly recommend you, should any case turning on this doctrine occur to you in practice, not to assume that the doctrine will be extended by the Courts a whit beyond the limits of the cases already decided; for the whole doctrine is, to say the least of it, an encroachment on the Statute

for a three years' occupation removed his property from the premises, and left them in the first year. At the same time he applied to the landlord to take them off his hands, but this request was refused. He then asked the landlord to let the rooms for him, and at a later period he wrote a letter to the landlord authorising him to let the premises to any other person. The landlord thereupon let the rooms, and put a new tenant into possession. The Court of Queen's Bench held that these facts amounted to a surrender by operation of law, and it observed that although it entirely concurred in the actual decision in Lyon *v.* Reed, it did not assent to the observations made in the judgment in that case upon Thomas *v.* Cook, and the decisions of that class. See also on this subject Doe d. Hull *v.* Wood, 14 M. & W. 682;* Morrison *v.* Chadwick, 7. C. B. 266, (62 E. C. L. R. 266,); and the cases cited, *ante*, p. 223, note [7].

of Frauds, and one which is regarded by the Courts with jealousy.[13](*a*)

There is one more observation to be made with regard to surrenders in general, namely, that a surrender is never allowed to operate injuriously upon the rights of third parties. I mean to say, that, if A. is B.'s landlord, B. may, it is true, surrender his estate to A.; but if he have, since its commencement, created some minor interest out of it, as, for instance, if he have charged it with an annuity, or have made an under-lease, he cannot, by surrendering, destroy the charge or affect the estate of the under-lessee, (Sheph. Touch. 301) for it is obvious that if he could do so, the grossest injustice and fraud might be committed upon the annuitant or under-tenant.[14](*b*)

If, however, a tenant who has made an under-lease, surrenders, although he cannot prejudice his tenant's interest, yet he himself will lose the rent *he has reserved upon the under-lease; for the rent, as I have before explained, is incident to the reversion, and the surrenderor cannot have it, as he has surrendered his reversion on the under-lease to his immediate lessor; nor can the surrenderee have it, for, though [*232]

[13] See the cases cited in the last note.

[14] See also the judgment of Lord Ellenborough in Doe d. Beadon *v.* Pyke, 5 M. & S. 154.

(*a*) The doctrine of Thomas *v.* Cook appears to have been recognized in several American cases. See Smith *v.* Niver, 2 Barb. Sup. Ct. R. 180; Bailey *v.* Delaplaine, 1 Sandf. Sup. Ct. R. 5; Logan *v.* Anderson, 2 Doug. 101. In Whitney *v.* Meyers, 1 Duer, 266, it was held that an absolute parol lease, made by the landlord to a new tenant, during the term of a written lease with the consent of the first lessee, amounts to a surrender of the first lease.

(*b*) McKenzie *v.* Lexington, 4 Dana, 129.

the reversion to which it was incident has been conveyed to him, yet as soon as it was so conveyed to him, it merged in the greater reversion of which he was already possessed, and became totally lost and swallowed up, so that the consequence is, that neither the surrenderor nor the surrenderee being entitled to the rent, the under-lessee holds without payment of any rent at all, excepting where the contrary has been expressly provided by statute.[15]

Now there were many cases in which leases, especially those granted by Ecclesiastical Persons, were surrendered merely for the purpose of being *renewed;* and, in these cases, the under-tenants of the lessees would, unless they could have been *persuaded to concur in the arrangement, have been discharged from their respective rents, to obviate which it is now enacted by stat. 4 Geo. 2, c. 28, s. 6, that in case any lease shall be surrendered in order to be renewed, the new lease shall be as valid *to all intents* as if the under-leases had been likewise surrendered before the taking of the new lease; and that the reme-

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[15] It is, however, now provided by the 8 & 9 Vic. c. 106, s. 9, that when the reversion expectant on a lease of any tenements or hereditaments of any tenure, made either before or after the passing of the act, is surrendered or merges after the 1st of October, 1845, the estate which for the time being confers as against the tenant under the lease the next vested right to the premises is to be deemed the reversion expectant on the lease, to the extent and for the purpose of preserving such incidents to, and obligations on, the reversion as, but for the surrender or merger, would have subsisted. This provision extends both to England and to Ireland, but not to Scotland. It must be observed with reference to the effect of a surrender upon the position of the surrenderor that his liability in respect of personal covenants, which have been broken before the surrender, is not in any way affected by it. See The Attorney General *v.* Cox, 3 H. of Lords' C. 240.

dies of the lessees against their under-tenants shall remain unaltered, and the chief landlord shall have the same remedy by distress and entry for the rents and duties reserved in the new lease, so far as the same exceed not the rents and duties reserved in the former lease, as he would have had in case the former lease had still continued. See for a decision on this Act, *Doe d. Palk* v. *Marchetti*, 1 B. & Ad. 715, (20 E. C. L. R. 662,).

Next, with regard to the determination of the tenancy by *forfeiture*. I have, in a previous Lecture, spoken at considerable length upon the ordinary proviso for re-entry inserted in leases, the mode in which it is taken advantage of, and that in which the right to take advantage of it may be waived.[16] But, besides this sort of forfeiture, which arises out of express provision, the tenant will commit a forfeiture if he disclaim and deny his landlord's title. See Bac. Ab. *Leases and Terms for Years*, (T. 2), and *Doe d. Graves* v. *Wells*. 10 A. & E. 427, (37 E. C. L. R. 129,), which last case shows *that the disclaimer which occasions a forfeiture must not be by mere word of mouth.[17](*a*) [*234]

[16] See *ante*, pp. 108–114.

[17] A disclaimer is a renunciation by the lessee of his character of tenant, either by setting up a title in a third person or by claiming title in himself. See the judgment of the Lord Chief Justice Tindal in Doe *d.* Williams *v.* Cooper, 1 M. & G. 139, (39 E. C. L. R. 381,). And see this case, Doe *d.* Davies *v.* Evans, 9 M. & W. 48;* Doe *d.* Phillips *v.* Rollings, 4 C. B. 188, (56 E. C. L. R. 188,); and Doe *d.* Bennett *v.* Long, 9 C. & P. 773, (38 E. C. L. R. 447,) as to what facts will amount to evidence of a disclaimer. A subsequent distress

(*a*) The refusal to pay rent, and disclaimer of the lessor's title, attornment to another, or assertion by the lessee of title in himself,

Lastly, as to the determination of a lease by *notice to quit.* This, it is obvious, applies altogether to a

by the landlord appears to be a waiver of a disclaimer. Doe *d.* David *v.* Williams, 7 C. & P. 322, (32 E. C. L. R. 635,).(*a*)

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work as forfeiture of the lease, and warrants ejectment upon the part of the landlord without notice to quit. Jackson *v.* Vincent, 4 Wend. 633 : Fortier *v.* Balance, 5 Gilman, 41 ; Jones *v.* Tatham, 8 Harris, 598; Stewart *v.* Roderick, 4 W. & S. 189; Duke *v.* Harper, 6 Yerg. 280; Clark *v.* Everley, 8 W. & S. 226; Doe d. Ellerbrock *v.* Flynn, 1 C. M. & R. 137.

It is said in De Lancey *v.* Ga Nun, 12 Barb. 120, and in Montgomery *v.* Craig, 3 Dana, 101, that a tenant who holds under a written lease, does not forfeit his lease by disclaiming by parol his landlord's title.

If the tenant attorns to a third party, or puts a third party in possession, the party so put in possession stands in the tenant's shoes, and can avail himself of no defence which the tenant cannot. Before advantage can be taken of any defect in the landlord's title by the tenant, or any body put in possession by him, the premises must be restored to the landlord, who cannot be forced by any collusion between his tenants and third parties to prove his title. The possession he has parted with to his tenant, he is entitled to have restored; and if the tenant, without giving notice to his landlord, confess a judgment in ejectment, or suffer judgment to go by default, the possession thus obtained by the plaintiff in the ejectment will not

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(*a*) A tenant from year to year, who had agreed to buy his landlord's estate, having remained in possession for several years, without paying either rent or interest on the purchase-money, the agent of the lessor applied to him to give up possession; to which he answered that he had bought the property and would keep it, and had a friend who was ready to give him the money for it; held, that this was no disclaimer, because it was not a claim to hold the estate on a ground necessarily inconsistent with the continuance of the tenancy from year to year. Doe *d.* Gray *v.* Stanion, 1 M. & W. 695.

yearly tenancy, or, at least, to those tenancies which are in the nature of yearly tenancies, such as from

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avail him against the landlord. Stewart *v.* Roderick, 4 Watts & Sergt. 188.

It is a well settled rule that neither the tenant or any one claiming under him, or put or admitted to possession by him, can dispute the landlord's title. Knight *v.* Smyth, 4 M. & S. 347, in which case, in 1815, Justice Dampier says, "It has been often ruled that neither the tenant, nor any one claiming by him, can dispute the landlord's title. This, I believe, has been the rule for the last twenty-five years, and, I remember, was so laid down by Buller, J., on the Western Circuit." Jackson *v.* Harder, 4 Johns. Rep. 202; Same *v.* Whitford, 2 Caines, 215; Brant *v.* Livermore, 10 Johns. R. 358; Jackson *v.* Hinman, 10 Johns. 292; Galloway *v.* Ogle, 2 Binn. 468; Boyer *v.* Smith, 5 Watts, 66; Newman *v.* Rutter, 8 Watts, 54; Cooper *v.* Smith, 8 Watts, 536; Rankin *v.* Tenbrook, 5 Watts, 386; Reed *v.* Shipley, 6 Vermt. 602; Philips *v.* Robertson, 2 Overt. 399, Jackson *v.* Stewart, 6 Johns. 34; Graham *v.* Moore, 4 S. & R. 467; Moshier *v.* Reding, 3 Fairf. 478; Jackson *v.* Stiles, 1 Cow. 575; Norton *v.* Sanders, 1 Dana, 14; Binney *v.* Chapman, 5 Pick. 124; Phillips *v.* Rothwell, 4 Bibb. 33; Turley *v.* Rogers, 1 A. K. Marshall, 245; Heath *v.* Williams, 12 Shep. (Maine) 209; King *v.* Murray, 6 Iredell, 62; Byrne *v.* Beeson, 1 Doug. 179; Lockwood *v.* Walker, 3 McLean, 431; Bank of Utica *v.* Mersereau, 3 Barb. Ch. R. 528; McIntyre *v.* Patton, 9 Hump. 447; Burke *v.* Hale, 4 Eng. 328; Newman *v.* Mackin, 13 S. & M. 383; Howell *v.* Ashmore, 2 Zabr. 261; Kluge *v.* Lachenour, 12 Ired. 180; Freeman *v.* Heath, 13 Ired. 498; Pope *v.* Hawkins, 16 Ala. 321; Henly *v.* Branch Bank at Mobile, 16 Ala. 552; Chambers *v.* Pleak, 6 Dana, 426.

Where a landlord dies before the expiration of the term, the tenants become tenants of the heir, and can no more dispute the title of the heir than that of the deceased landlord. Blantin *v.* Whitaker, 11 Humph. 313; Williams *v.* McAliley, Cheves, 200.

The rule has its exceptions: for instance, when there has been any fraud or misrepresentation used to induce one already in possession of land to accept a lease, the lessee is not bound by the rule. Hockenbury *v.* Snyder, 2 W. & S. 240; Newman *v.* Rutter, 8 Watts,

month to month, or week to week. The ordinary case, however, is that of a yearly tenancy. I have explained

54; Gleim *v.* Rise, 6 Watts, 44; Isaac *v.* Clark, 2 Gill, 1; Miller *v.* Bonsadon, 9 Ala. 317; Baskin *v.* Seechrist, 6 Barr, 154; Hamilton *v.* Marsden, 6 Binn. 45; Miller *v.* McBrier, 14 S. & R. 382; Thayer *v.* Society of United Brethren, 8 Harris, 60.

The tenant is permitted to show that his landlord's title has expired, or that he has been *bona fide* evicted by title paramount. Walter *v.* Waterhouse, 2 Wm. Saunds. 418, note; Doe *v.* Seaton, 2 Crompt. Mees. Riscoe, 728; De Vatch *v.* Newsam, 3 Ham. 57; Jackson *v.* Rowland, 6 Wend. 666; Lunsford *v.* Turner, 5 J. J. Marsh, 104; Gregory *v.* Crabb, 2 B. Munroe, 234; Wells *v.* Mason, 4 Scam. 84; Swan *v.* Wilson, 1 A. K. Marshall, 99; Randolph *v.* Carlton, 8 Ala. 606; Ryers *v.* Farwell, 9 Barb. Sup. Ct. 615; Howell *v.* Ashmore, 2 Zabr. 261; Tilghman *v.* Little, 13 Ill. 64.

The origin of the rule seems involved in some obscurity. It did not prevail at common law except when there was an indenture, when the doctrine of estoppel by deed applied. See Hamilton's Lessee *v.* Marsden, 6 Binney, 47. Littleton says, in treating of tenant for term of years, "And where the lessee entereth by force of the lease, then is he tenant for term of years, and if the lessor in such case reserve to him a yearly rent upon such lease, he may choose for to distrain for the rent in the tenements letten, &c. But in such case it behoveth that the lessor be seized in the same tenements at the time of his lease; for it is a good plea for the lessee to say that the lessor had nothing in the tenements at the time of the lease, except the lease be made by deed indented, in which case such plea lieth not for the lessee to plead." Co. Lit. lib. i. ch. 7, sect. 58, 43 *b*. Coke's comment is, "The reason of this is, for that in every contract there must be *quid pro quo* for *contractus est quasi actus contra actum*, and, therefore, if the lessor hath nothing in the land, the lessor hath not *quid pro quo*, nor any thing for which he should pay rent." The first trace I find of the rule among the reporters is in the observations of Mr. Justice Dampier, above quoted in Doe *v.* Smyth, unless it be a casual observation of Lord Kenyon in Cooke *v.* Loxley, 5 Term, R. 5.

The rule has of late years been referred to the doctrine of estoppel in pais, and it has been aptly remarked "The principle, was, of

in a former Lecture on what principles the necessity of a notice to quit was originally established, and *at what time* it must be given, namely, half a year before the expiration of the then current year of the tenancy,[18] excepting where the rent is payable on the usual feast-days, in which case a notice on or before one of the feast-days in the earlier half of the tenancy, to quit on the feast-day at the conclusion of the tenancy is sufficient. Thus notice on the 28th of September to quit on the 25th of March then next is good, when the tenant entered at Lady Day, and the rent is payable at that day and at Michaelmas. *Roe d. Durant* v. *Doe*, 6 Bing. 574, (19 E. C. L. R. 260,), though there are fewer than one hundred and eighty-two days *between the 28th of September and the 25th of March. See *Doe* v. *Kightley*, 7 T. R. 63; [*235] *Howard* v. *Wemsley*, 6 Esp. 53.[19](*a*) The other points

[18] *Ante*, p. 21.

[19] So, notice *on* the 29th of September to quit at Lady-day is a good half-year's notice. Doe *d.* Matthewson *v.* Wrightman, 4 Esp.

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necessity, called into being by that feature of the action of ejectment which requires an absolute possessory title in the plaintiff, and makes, in its absence, the mere fact of possession decisive in favor of the defendant." See the note by the American editor to Doe *v.* Oliver, 2 Smith's Leading Cases, 541, 3d Am. ed. This view has been taken by the late American cases. See the most recent cases cited above.

(*a*) There are some peculiarities about the law regarding notices to quit, as held in several adjudged cases, both in this country and in England, which it is difficult to assign to any principle. Thus in Doe *d.* of Robinson *v.* Dobell, 1 Q B. 806, (41 E. C. L. R. 786,) the premises on the 13th of August, 1838, were let "for one year and six months certain from the date," and it was further agreed "that three calendar months' notice shall be given on either side, previous to the determination of said tenancy." The

[*236] *relative to a notice to quit, relate to *the form in which it is to be couched*, *the manner in which*

6; Doe *d.* Harrop *v.* Green, ib. 198. The parties may, as is obvious, stipulate by their express contract for any length of notice. A notice to quit *at Michaelmas* may be construed to mean Old Michaelmas, where by the custom of the country the tenancy begins at that time. Furley *v.* Wood, 1 Esp. 198; but a notice to quit at Old Michaelmas was held to be bad, although given half a year before new Michaelmas, when the tenancy was under a deed, made since the alteration of the style, and which fixed the feast of St. Michael as the period for its commencement. See Doe *d.* Spicer *v.* Lea, 11 East, 312, and Cadby *v.* Martinez, 11 A. & E. 720, (39 E. C. L. R. 211,). Where a tenant holds over after the expiration of a lease or agreement, the resulting yearly tenancy will usually be deemed to have commenced at the period which corresponds with the original entry, and the notice to quit must therefore usually be given with reference to that period. Thus in Berrey *v.* Lindley, 3 M. & Gr. 498, (42 E. C. L. R. 263,); a tenant entered under an agreement, which was invalid under the Statute of Frauds, and which provided for a term of five years and a half from Michaelmas, 1823. Negociations were afterwards entered into for a term of seven years from the expiration of the term which was supposed to exist under the agreement; the rent to be increased, and the landlord agreeing to make some alterations on the premises. The alterations were made, but no lease was executed. At Michaelmas, 1829, a year's rent was paid at the increased rate, and subsequently other payments were made on the same footing. It was held, under these circumstances, that a notice to quit at Michaelmas was valid. And in Doe *d.* Robinson *v.* Dobell, 1 Q. B. 806, (41 E. C. L. R. 786,) where the premises had been demised for one year and six months, certain, from the 13th of August, at a rent payable quarterly, with a stipulation for a three months' notice, and at the expiration of the term the tenant had held over, it was held that a three months' notice to quit expiring on the 13th of August was proper, and not a notice expiring at the period at which the

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tenant entered, and after holding to the end of the term, held over. On May 7th, 1840, the lesssor of the plaintiff gave the defendant notice to quit "on or before the 13th day of August

*it is *to be served*, and *the mode in which it may be waived.* [*237]

original tenancy ended. But, where the assignee of an under-lessee held over, after the expiration of an under-lease, which determined at a time different from that at which the original tenancy began, it was held that the yearly tenancy, which resulted from the holding over, must be taken to have commenced not from the time of the original entry of the lessee, but from the time at which the under-lease expired. Doe *d.* Buddle *v.* Lines, 11 Q. B. 402, (63 E. C. L. R. 402,). Where a tenant who comes in in the middle of a quarter, afterwards pays rent for the half quarter, and then continues to pay from the commencement of the succeeding quarter, his tenancy will be deemed to commence, so far as relates to the period at which the notice to quit must be given, from the quarter-day succeeding his entry, not from the entry itself. Doe *d.* Holcomb *v.* Johnson, 6 Esp. 10; Doe *d.* Savage *v.* Stapleton, 3 C. & P. 275, (14 E. C. L. R. 564,). But, where the entry takes place during a broken quarter, and *no rent is paid*, the commencement of a tenancy will be reckoned from the day at which the occupation actually began. Doe *d.* Cornwall *v.* Matthews, 11 C. B. 675, (73 E. C. L. R. 675,). Where a house and land are let together, to be entered upon at different times, and it does not appear, from the terms of the demise, at what time the whole is to be considered to be let together, the notice to quit is regulated by the time of the entry upon the principal subject matter of the demise; and it is a question of fact for the jury which is the principal and which the accessorial subject. See Doe *d.* Strickland *v.* Spence, 6 East, 120; Doe *d.* Lord Bradford *v.* Watkins, 7 East, 551; Doe *d.* Heapy *v.* Howard, 11 East, 498; Doe *d.* Williams *v.* Smith, 5 A. & E. 350, (31 E. C. L. R. 643,); Doe *d.* Kindersley *v.* Hughes, 7 M. & W. 139;* and Doe *d.* Davenport *v.* Rhodes, 11 M. & W. 600.* Where the time at which the tenancy commenced is doubtful, the notice should require the tenant to give up the possession at the period at which it is supposed that the tenancy ends, and then proceed, "or at the expiration of the year of the tenancy, which will expire next

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next, or at the expiration of the current year of your tenancy, which shall expire next after the end of three months from and after your being served with this notice." The Court held that the notice was

With regard to its *form*. It is not necessary that a notice to quit should be in writing, unless the parties

after half a year"—if the notice is a six months' notice—"from the time of the service of this notice." It is better not to use the expression *current* year. See Doe *d.* Mayor of Richmond *v.* Morphett, 7 Q. B. 577, (53 E. C. L. R. 577,) cited in the next note. A tenancy from year to year, so long as both parties please, is determinable at the end of the first as well as of any subsequent year, by notice, unless upon the creation of the tenancy the parties use words which show that they contemplate a tenancy for two years at least. Doe *d.* Clarke *v.* Smaridge, 7 Q. B. 957, (53 E. C. L. R. 957,); and see Denn *d.* Jacklin *v.* Cartwright, 4 East, 31; Doe *d.* Chadborn *v.* Green, 9 A. & E. 658, (36 E. C. L. R. 233,); Reg. *v.* Inhabitants of Chawton, 1 Q. B. 247, (41 E. C. L. R. 523,); and Doe *d.* Monck *v.* Geekie, 5 Q B. 841, (48 E. C. L. R. 841,); as to what circumstances are sufficient to show that the parties intend that the tenancy shall last for two years certain. It is doubtful whether, in the absence of evidence of a contract or usage requiring a notice to quit, a notice is necessary to determine an ordinary weekly hiring of apartments. Huffell *v.* Armistead, 7 C. & P. 56, (32 E. C. L. R. 497,); Towne *v.* Campbell, 3 C. B. 921, (54 E. C. L. R. 921,).

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right; that the three months' notice must be calculated with reference to the original commencement of the tenancy, and not with reference to the expiration of the term. If a tenancy from year to year exist, it is held in England that six months' notice expiring with the end of the year, is necessary to terminate the tenancy; and that the right to this notice is mutual, *i. e.*, if the landlord wishes to terminate the tenancy, he must give his tenant the six months' notice. Kingsbury *v.* Collins, 4 Bing. 202, (13 E. C. L. R. 467,); Izon *v.* Gorton, 5 Bing. N. C. 501, (35 E. C. L R. 198,). If the tenant wishes to go, he must give his landlord the full six months' notice of his intention to quit. Johnstone *v.* Huddlestone, 4 Barnwell & Cress. 923, (10 E. C. L. R. 860,); Bessell *v.* Landsberg, 7 Adol. & Ellis, 638, (53 E. C. L. R. 637,).

The American cases agree as regards the necessity of notice by the landlord to determine the tenancy, though there is a difference in the States as to the length of notice required.

have expressly stipulated that it shall be so. *Timmins* v. *Rowlison*, 3 Burr. 1603; *Doe* v. *Crick*, 5 Esp.

Six months is the rule in Vermont, New Jersey, and Kentucky. Hanchet *v.* Whitney, 1 Verm. 315; Den *v.* Drake, 2 Green, 523; Den *v.* Blair, 3 Green, 181; Moorehead *v.* Watkyns, 5 B. Munroe, 228.

Three months is all that is required by the laws of Pennsylvania and South Carolina. Hutchinson *v.* Potter, 1 Jones, 472; Brown *v.* Vanhorn, 1 Binney, 334; McCanna *v.* Johnson, 7 Harris. 434; Godard *v.* Railroad Co. 2 Rich. 346. The notice must be given three months before the end of the year. The tenancy cannot be determined at any other time. If the notice is not so given the moment another year begins, the tenant has a right to hold to the end of it.

With regard to notice by the tenant, very few, if any, cases are to be found in the American books.

Cooke *v.* Neilson, in Pennsylvania, is the only one known to the writer. It was there held that the tenant may leave at the end of the year without notice to his landlord. This case originated in the District Court for the City and County of Philadelphia, and is to be found in Brightly's N. P. Cases, 463. The case is remarkable as containing a very able argument by the President of the Court, Judge Sharswood, against the judgment which was entered. The case was taken to the Supreme Court, and in 10 Barr, 41, is said to have been affirmed by a divided Court.

When there is a demise for a fixed period, and the tenant holds over, the rule in New York and Pennsylvania is that he is either a trespasser or a tenant on the terms of the old lease, at the option of the landlord, and he is bound for a year's rent. Conway *v.* Starkweather, 1 Denio, 113; Hemphill *v.* Flynn, 2 Barr, 144. And when a lease is for one year or other term certain, a notice to quit is not necessary. Den *v.* Adams, 7 Halst. 99; Bedford *v.* McElherron, 2 S. & R. 49; Mosheir *v.* Reding, 3 Fair. 478; Logan *v.* Herron, 8 S. & R. 459; Clapp *v.* Paine, 6 Shep. 264; Dorrell *v.* Johnson, 17 Pick. 263; Allen *v.* Jaquish, 21 Wend. 628; Preble *v.* Hay, 32 Maine, 456; Walker *v* Ellis, 12 Ill. 470; Pierson *v.* Turner, 2 Carter, 123; Lesley *v.* Randolph, 4 Rawle, 126.

196.[20] The Courts are very liberal in construing notices to quit, provided they be so worded that the tenant cannot mistake the object. Thus, a notice to quit was once held good, though dated in a wrong year; in that case, to be sure, the mistake was *verbally* corrected at the time of service. *Doe* v. *Kightley*, 7 T. R. 63. See also *Doe* v. *Culliford*, 4 D. & R. 248, (16 E. C. L. R. 202,), and *Doe d. Cox v.* ——, 4 Esp. 185, in which a notice to quit the *Waterman's Arms* was held a good notice to quit the *Bricklayers' Arms*, being
[*238] *served on the right person, and there being no house called the *Waterman's Arms* in the
[*239] parish.[21] I do not cite these cases for the *purpose of encouraging negligence in the framing

[20] A notice signed by one of several joint tenants on behalf of the others is sufficient to determine a yearly tenancy with respect to all of them; for where by a joint demise joint tenants create a tenancy from year to year, the true character of the tenancy is, not that the tenant holds of each the share of each so long as he and each shall please, but that he holds the *whole* of *all* so long as he *and all* shall please. See Doe d. Aslin *v.* Summersett, 1 B. & Ad. 135, (20 E. C. L. R. 427,). And a notice given by a person authorised by one of several lessors, who are joint tenants, determines the tenancy as to all. Doe d. Kindersley *v.* Hughes, 7 M. & W. 139;* see also Alford *v.* Vickery, Car. & Marsh, 280, (41 E. C. L. R. 156,) and Doe d. Bailey *v.* Foster, 3 C. B. 215, (54 E. C. L. R. 215,).

[21] See also Doe d. Armstrong *v.* Wilkinson, 12 A. & E. 743, (40 E. C. L. R. 368,) where a notice to quit misdescribed the parish in which the premises were situated, mentioning by mistake the adjoining parish, and it was held, after a verdict in ejectment for the landlord, that the variance was not material, the tenant not having shown that he held more than one farm under the landlord, or that he was misled by the mistake. But, although notices to quit are construed reasonably, and a literal construction will not be adopted, if it leads to an absurd result, and the words will fairly bear another meaning, the Courts will not adopt a construction at variance with the clear language of the notice merely because otherwise it would be bad. See

of notices to quit; for there is no doubt that in framing any document, however liberal the interpretation the Courts are in the habit of putting upon it may be, the best plan is to proceed as if the very strictest interpretation were to be given to it. For instance, would any

Doe d. Williams *v.* Smith, 5 A. & E. 350, (31 E. C. L. R. 643,); and Doe d. Mayor of Richmond *v.* Morphett, 7 Q. B. 577, (53 E. C. L. R. 577,). In the latter of these cases a tenant from year to year held from Martinmas to Martinmas. A notice to quit was given to him on the 21st of October to quit on the 13th of May then next, or upon such other day or time as the *current* year for which he held should expire. It was held, that this notice was bad, for it could not be good for May, and the *current* year would expire in November, a short time after the notice; and the Court observed that it did not think that Doe *v.* Culliford cited in the text was law. And in Mills *v.* Goff, 14 M. & W. 72,* a very strict construction was put upon a notice. In this case, a tenancy from year to year had begun on the 11th of October, and a notice was given to the tenant in June, 1840, requiring him to quit the premises "on the 11th October now next ensuing, *or such other day and time as your said tenancy may expire on.*" It was held, that this notice, which was obviously not good, as a three months' notice, was not even sufficient for the year ending on the 11th of October, 1841, as it did not give to the tenant sufficient information that the landlord meant it to operate as a notice for the subsequent year. A notice to quit requiring the tenant, in the alternative, to quit or else agree to pay double rent, is not sufficient. But, it is otherwise if the notice requires him to quit, and adds, that if he does not the landlord will insist upon double rent; for, in the latter case, no option is given to the tenant to enter into a new contract. Doe d. Matthews *v.* Jackson, 1 Dougl. 175; Doe d. Lyster *v.* Goldwin, 2 Q. B. 143, (42 E. C. L. R. 610,). A notice given by an unauthorized agent cannot be adopted by the landlord after the proper time for giving it has elapsed, for a notice to quit must, to be valid, be such that the tenant may safely act upon it at the time when he ought to receive it. See the case last cited. Where a written notice is defective, the jury may not be asked whether, from the landlord's conduct, they believe that he understood it to refer to the right period. Cadby *v.* Martinez, 11 A. & E. 720, (39 E. C. L. R. 211,).

body in his senses draw a promissory note thus, "*Borrowed of A. B.* £50, *to be repaid in one month*," merely because it was once held that such an irregular form of words amounted to a promissory note;[22]—but I cite them for the purpose of showing that, practically, there is less reason than in most cases of informality, for giving up a matter as hopeless where the informality consists in the wording of a notice to quit.(*a*)

With regard to the *service* of the notice. It is sufficient to deliver and explain it to the servant of the tenant at his dwelling-house, even though the dwelling-house be not situated upon the demised premises. *Jones* v. *Marsh*, 4 T. R. 464; *Doe* v. *Dunbar*, M. & M. 10, (22 E. C. L. R. 459,). If there be joint tenants, service on one of them furnishes presumptive evidence that it arrived at the hands of the other. *Doe* v. *Watkins*, 7 East, 551; **Doe* v. *Crick*, 5 Esp. 196.
[*240] Where the tenant happens to be a corporation,

[22] See the cases cited in Byles on Bills, Chapter III.

(*a*) When a notice to quit is given under a power which requires the notice to be in writing, the notice must be in writing. Legg *d.* Scott *v.* Benion, Willes, 43; Right *d.* Fisher *v.* Cuthell, 5 East. 491. A notice to quit must be absolute. A notice demanding possession, and declaring, if possession is not given by a certain day, rent, at a given rate, will be claimed, is not sufficient. Doe *d.* Matthews *v.* Jackson, 1 Doug. 175; Doe *d.* Lyster *v.* Goldwin, 2 Q. B. 143, (42 E. C. L. R. 610,); Ayres *v.* Draper, 11 Miss. 548. The notice must be given by the party entitled to enter, or his properly authorised agent. A notice by an unauthorised agent cannot be made good by an adoption of it by the principal after the proper time for giving it. Doe *d.* Lyster *v.* Goldwin, 2 Adol. & Ellis, 143, (42 E. C. L. R. 610,); Doe *d.* Mann *v.* Walters, 10 B. & C. 626, (21 E. C. L. R. 265,). There may be an implied authority, and whether there is or not is for the jury. Mann *v.* Walters. See also Goodtitle *v.* Woodward, 3 B. & A. 689, (5 E. C. L. R. 396,).

as it is obviously impossible that there can be any personal service, notice may be served upon one of its officers. *Doe* v. *Woodman*, 8 East, 228.[23](*a*)

[23] Where a notice to quit was put under the door of the house, but it was shown that it had come to the hands of the tenant before the time at which it was necessary that it should be given, it was held, that a sufficient service was proved. Alford *v.* Vickery, Car. & Marsh, 280, (41 E. C. L. R. 156,). In Stapylton *v.* Clough, 2 E. & B. 933, (75 E. C. L. R. 933,) an agent, who was usually employed by a landlord to serve notices to quit, signed an indorsement upon a duplicate of a notice stating that he had served it on the tenant, and afterwards said, in coversation, that he had delivered the notice to another person. It was held, that this oral statement was not evidence after the death of the agent, since it did not appear to have been made in the ordinary course of his business, his duty being completed when he had signed the written memorandum.

(*a*) In Neville *v.* Dunbar, M. & M. 10, (22 E. C. L. R. 459,) Mr. Neville's attorney went on the 22d of March to the defendant's house, and there served two copies of a notice to quit, one on the servant, the other on a lady there. It was attempted to show that both the lady and the servant, on whom the notices were served, were dead; and it was agreed that, in that case, as the defendant would be unable to call them to prove that they did not communicate the notice to him according to the course suggested by Buller, J., in Doe *d.* Griffiths *v.* Marsh, 4 T. R. 464, and as the sufficiency of the notice was treated, both in that case and in Doe *d.* Duross *v.* Lucas, 5 Esp. 153, and in Doe *d.* Lord Bradford *v.* Watkins, 7 East. 553, as depending on the presumption that it came to the tenant's hands, there would be no sufficient evidence that it did so to entitle the plaintiff to a verdict. The proof, however, failed as to the servant. Abbott, Lord C. J., said, "I have no doubt that the service of the notice was sufficient. The question does not arise here, for the servant might be called, but I have no doubt of the absolute sufficiency of the notice; were it to be held otherwise, a landlord would have no means of determining a tenancy if his tenant happened to be absent from his house at the time when it was necessary to serve the notice." See Widger *v.* Browning, 2 Carr. & P. 523, (12 E. C. L. R. 711,) where

Lastly, with regard to a *waiver*. We have already seen that a forfeiture may be *waived* by the receipt of rent which fell due subsequently to the time at which the forfeiture incurred.[24] So may the right to take advantage of a notice to quit. *Goodright* v. *Cordwent*, 6 T. R. 219; *Doe* v. *Batten*, Cowp. 243. So a distress for rent which accrued due after the expiration of the notice is a waiver of the right to take advantage of it, for it affirms the tenancy to be a subsisting relation. *Zouch* v. *Willingale*, 1 H. Bl. 311.[25] Nay, the right to take advantage of a notice to *quit may, it is held, be waived by a subsequent notice to quit at a period after the expiration of the former; for, though the object of both is the same, namely, to oust the tenant, yet the latter recognises the existence of a

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[24] *Ante*, p. 109.

[25] See as to this, *ante*, p. 110, note [31], and p. 114, note [34]. But the tenant does not waive the notice to quit by holding over after its expiration; and the landlord cannot, in this case, distrain without some evidence of a renewal of the tenancy. Jenner *v.* Clegg, 1 M. & Rob. 213; Alford *v.* Vickery, Car. & Marsh, 280, (41 E. C. L. R. 156,).

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it is said that personal service of notice is not generally necessary. In Doe *v.* Lucas the notice was not delivered to any one, but simply left on the premises, which did not afford sufficient probability that the defendant had ever actually received it.

The notice must be given to the tenant, not to the sub-tenant. Pleasant *d.* Hayton *v.* Benson, 14 East. 234. The notice to his own lessee will enable the landlord to recover against the sub-lessee. Roe *v.* Wiggs, 2 N. R. 330. And where the original tenant has quitted, and another has taken possession, it will be presumed, in the absence of any evidence to the contrary, that the latter has come in as assignee of the former, though he has never paid rent, and notice served on such assignee will be good. Doe *d.* Morris *v.* Williams, 6 B. & C. 41, (13 E. C. L. R. 31,). Doe *v.* Murless, 6 M. & S. 110.

tenancy at a period subsequent to that at which the former, if operative, would have determined it. *Doe* v. *Palmer*, 16 East, 53. But it was held otherwise, where the second notice to quit was not served till an ejectment had been brought against the tenant to enforce the former one, for the Court said that it was impossible for the plaintiff to suppose that his landlord intended to waive the first notice when he knew that the landlord was, on the foundation of that very notice, proceeding by an ejectment to turn him out. *Doe* v. *Humphreys*, 2 East, 237. For other cases in which the question of waiver or no waiver has arisen, you may consult *Doe* v. *Steel*, 3 Camp. 117; *Doe* v. *Inglis*, 3 Taunt. 54; *Whiteacre* v. *Symonds*, 10 East, 13.[26]

Now, supposing the tenancy to be determined, whether by *efflux of time*, by *forfeiture*, by *surrender*, or by *notice to quit*—what are the mutual rights of the landlord and tenant on its termination? In the first place, the landlord has a right to the possession of the premises; and he *may enter on them *peaceably*, if he can succeed in doing so; but if the [*242] tenant hold over, and he break in forcibly, so as to endanger a breach of the peace, he runs the risk of an indictment. See the judgment of Lord Tenterden in *R.* v. *Smyth*, 1 M. & Rob. 155. And the Court of Common Pleas has lately held (one Judge, however, dissenting) that he is liable also to an action, though it was formerly thought otherwise, and, perhaps, cannot be even now considered settled without the decision of a Court of Error. *Newton* v. *Harland*, 1 M. & Gr.

[26] A demand of rent accruing due subsequently to the expiration of a notice to quit, is not necessarily a waiver of the notice. Whether it is so, or not, is a question of intention which must be left to the jury. Blyth *v.* Dennett, 13 C. B. 178, (76 E. C. L. R. 178,).

644, (39 E. C. L. R. 581.).[27](a) In such cases, [*243] *therefore, the landlord's *safest* course is to resort to legal proceedings; and he may either

[27] The judges who decided Newton *v.* Harland were the Lord Chief Justice Tindal, Mr. Justice Bosanquet, and Mr. Justice Erskine. Mr. Justice Coltman differed from the other judges, saying that in his opinion, although in these cases the law would, for the preservation of the peace, punish for the forcible entry, yet the tenant at sufferance, being himself a wrong-doer, could not be heard to complain in a civil action for that which was the result of his own misconduct and injustice. This opinion has received considerable support in later cases, although Newton *v.* Harland cannot be said to have been actually overruled. In Harvey *v.* Brydges, 14 M. & W. 437,* the point decided in Newton *v.* Harland did not arise; but Baron Parke observed, that if it were necessary to decide it, he should have no difficulty in saying, that where a breach of the peace is committed by a freeholder, who, in order to get into possession of his land, assaults a person wrongfully holding possession of it against his will, although the freeholder may be responsible to the public in the shape of an indictment for a forcible entry, he is not liable to the other party; and that learned judge added, that he could not see how it was possible to doubt that it is a perfectly good justification to say that the plaintiff was in possession of the land against the will of the defendant, who was owner, and that he entered upon it accordingly; even though, in so doing, a breach of the peace was committed. See also the judgment of the Lord Chief Justice Wilde, in Wright *v.* Burroughes, 3 C. B. 699, (54 E. C. L. R. 699,) in which case, however, there was no forcible entry; Davison *v.* Wilson, 11 Q. B. 890, (63 E. C. L. R. 890,) and Davis *v.* Burrell, 10 C. B. 825, (70 E. C. L. R. 825,) where Mr. Justice Cresswell observed, that the doctrine of Newton *v.* Harland had been very much questioned.

(*a*) The doctrine of Mr. Justice Coltman in Newton *v.* Harland, and of Baron Park in Harvey *v.* Bridges, seems to be held in several American cases, and it certainly appears the more reasonable doctrine. Overdeer *v.* Lewis, 1 Watts & S. 90; Ives *v.* Ives, 13 Johns. 235; Hyatt *v.* Wood, 4 Johns. 150; Walton *v.* File; 1 Dev. & Bat. 567; Beecher *v.* Parmelee, 9 Verm. 352; Johnson

sue in *trespass* for the recovery of damages, or in *ejectment* for that of the premises themselves; or, if the tenancy be such as to admit of it, he may resort to the provisions of stat. 1 & 2 Vic. c. 74, by which two justices may by their warrant, issued in the manner pointed out by that statute, restore to the landlord possession of premises held [at will or] for a term not exceeding seven years, [either without rent, or] at a rent not exceeding £20 a-year, and in which the tenancy is legally determined.[28]

[28] See as to the mode of pleading in trespass a justification under this act, Jones *v.* Chapman, 14 M. & W. 124.* Where the landlord takes proceedings under this statute, but has no right to the possession, he is liable in trespass. Darlington *v.* Pritchard, 4 M. & Gr. 783, (43 E. C. L. R. 404,). The provisions of this act have been in a great degree superseded by those of the County Court Act, 9 & 10 Vic. c. 95, which has provided a wider remedy of the same kind. It is enacted by s. 122 of this act, that when the term and interest of the tenant of any house, land, or other corporeal hereditament, where the value of the premises, or the rent payable, does not exceed 50*l.* by the year, and on which no rent has been paid, has ended, or been duly determined by a legal notice to quit, and the tenant or (if he does not occupy, or only occupies a part) any person by whom the premises or any part of them, are then actually occupied, neglects or refuses to give up possession, the landlord or his agent may enter a plaint in the County Court, and obtain a summons to the person who retains the possession. These proceedings must be taken in the County Court for the district in which the premises are situated. See Rule 199 of the Rules of Practice of the County Courts.

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v. Hannahan, 1 Strobhart, 313. It is also held in Pennsylvania, under the statutes in force in that State, that the indictment for forcible entry and detainer, to authorize an award of restitution, must set out the estate of the ejected party. Van Pool *v.* The Commonwealth, 1 Harris, 391; Commonwealth *v.* Toram, 2 Parsons, 411. Burd *v.* Commonwealth, 6 S. & R. 252. Torrence *v.* The Commonwealth, 9 Barr, 184.

[*244] *There is another act [the 11 Geo. 2, c. 19, s. 16, extended by] the 57 Geo. 3, c. 52, which was passed to provide for the case of a tenant deserting the premises, and leaving them to go to ruin, and the landlord without remedy for rent;(*a*) and it provides that in such case, two justices, taking a course therein specifically pointed out, may, in a summary way, deliver the possession back to the landlord.(*b*) See

If the tenant neglects to appear, or if upon the hearing of the case the County Court judge decides that the landlord is entitled to recover the possession, a possession warrant issues under the seal of the Court to a bailiff, requiring and authorising him to give possession of the premises to the landlord or to his agent, within a time not less than seven or more than ten clear days from the date of the warrant. See Pollock on the County Courts, Part I., Chap. XIII. In the Earl of Harrington *v.* Ramsay, 8 Exch. 879, the Court of Exchequer held, that this statute gives jurisdiction to the County Court where *either the rent or* the annual value does not exceed 50*l.* The Court of Queen's Bench has also put the same construction upon the act. See In re Earl of Harrington, 2 E. & B. 669, (75 E. C. L. R. 669,). But in this case Mr. Justice Crompton dissented from the decision, being of opinion that the County Court has jurisdiction only, where *neither the rent nor the value* exceed this sum; an interpretation of the act which appears to be consistent with the view taken of it by the Court of Exchequer in an earlier case. See Crowley *v.* Vitty, 7 Exch. 319.

(*a*) See Jackson *v.* Hawkes, 2 Caines, 335, McKinney *v.* Reader, 7 Watts 123, from which it appears that in such case the landlord has a right to resume his possession without process. But see Saltonstall *v.* White, 1 Johns Cases, 221; Wood *v.* Wood, 9 Johns. 257. See also as to vacant possession, Doe d. Darlington *v.* Cock, 4 B. & C. 259 (10 E. C. L. 568); ex parte Pillow. 1 B. & A. 369; Hillary *v.* Gay, 6 Car. & Pay. 284, (25 E. C. L. R. 435,).

(*b*) Similar enactments have been made by the legislatures of most of the States.

In Pennsylvania, by second section of the Act 25th March, 1825, which is confined to the City and County of Philadelphia, (8 Sm.

on this act, *Ashcroft* v. *Bourne*, 3 B. & Ad. 684, (23 E. C. L. R. 301,); *Basten* v. *Carew*, 3 B. & C. 649, (10 E. C. L. R. 295,).[29]

[29] Under this act the proceedings of the justices are examinable in a summary way by the judges of assize. See as to this provision, Reg. *v.* Traill, 12 A. & E. 761, (40 E. C. L. R. 377,); and Reg. *v.* Sewell, 8 Q. B. 161, (55 E. C. L. R. 161,).

Laws, 411,) it is enacted, "If any lessee for a term of years, in the City and County of Philadelphia, shall remove from such demised premises without leaving sufficient property thereon to secure the payment of at least three months' rent, or shall refuse to give security for the payment thereof in five days after demand of the same, and shall refuse to deliver up possession of such premises, it shall and may be lawful for the landlord or lessor to apply to any two aldermen or justices of the peace within the City or County of Philadelphia, and make an affidavit or affirmation of the fact, and thereupon the said aldermen or justices of the peace shall forthwith issue their precepts to any constable of the proper City or County, commanding him to summon such lessee before such aldermen or justices on a day certain, not exceeding eight nor less than five days, to answer such complaint; and the said aldermen or justices shall, on the day appointed, proceed to hear the case; and if it shall appear that the lessee has removed from the premises without leaving sufficient goods and chattels, or giving security for the payment of the rent as aforesaid, and has refused to deliver up possession of the demised premises, they shall enter judgment against such lessee, that said premises shall be delivered up to the lessor or landlord forthwith, and shall, at the request of the said lessor or landlord, issue a writ of possession, directed to said constable, commanding him forthwith to deliver possession of the premises to the landlord or lessor; and also to levy the costs on the defendant in the same manner that executions issued by justices of the peace are directed by law."

Under this statute it has been ruled that the record must show that the tenant was a lessee for term of years. Geisenberger *v.* Corf, 7 Leg. Int. 7, and that there must be an actual removal to justify proceedings under this act. "A lessee or tenant *who removes*, and does not leave property sufficient to pay the rent, *or* give security

Besides these remedies, there are two statutes which, in case of a tenant holding over after the expiration of his interest, enable the landlord to subject him to considerable pecuniary loss. One of these is stat. 4 Geo. 2, c. 28, s. 1, which, in *case of his holding over after demand and notice *by the landlord*, subjects him to pay for the future double the yearly *value* of the premises to be recovered by action of debt.[30](a) The other is the stat. 11 Geo. 2, c. 19, s.

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[30] The statute requires that there should be a "demand made and notice *in writing* given for delivering the possession" of the premises. A notice to quit, when regular, will operate also as a demand of the possession under the act without any more specific demand; and notices to deliver up the possession under the statute are not construed strictly. See Doe *d.* Matthews *v.* Jackson, 1 Dougl. 175; Poole *v.* Warren, 8 A. & E. 582, (35 E. C. L. R. 463,); Doe *d.* Lyster *v.* Goldwin, 2 Q. B. 143, (42 E. C. L. R. 610,); and Page *v.* More, 15 Q. B. 684, (69 E. C. L. R. 684,). But, where a notice required the tenant to give up the possession at twelve at noon on the day on which the tenancy was determinable, at which time the landlord would attend to receive the keys and the rent, and stated that in the event of his not so surrendering, the landlord would demand a certain daily rent mentioned in the notice, which exceeded in fact double the amount of the original rent, it was held that this notice was insuffi-

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for the payment thereof, if required, is within the provisions of the act; but a lessee or tenant who continues in possession, who neither removes himself nor his goods is not within the same." Freytag *v.* Anderson, 1 Rawle, 75; Black *v.* Alberson, 1 Ash. 127. A tender of security after the expiration of the five days is too late. Ward *v.* Wandell, 10 Barr, 98.

For what constitutes a removal, and the proceedings under the New York statute, see Stratton *v.* Lord, 22 Wend. 611; Jackson *v.* Hakes, 2 Caines, 335.

(*a*) These statutes were followed in the revised statutes of New York, but have not been adopted in other States.

Pennsylvania in 1792, and Maryland in 1793, passed laws to

18, which, if the *tenant do not quit after determining his interest *by his own notice*, sub- [*246]

cient, the tenant being required to give up the possession before the expiration of the tenancy. See the case last cited. The act only speaks of tenants "for life or lives or years;" it has therefore been held not to apply to a weekly tenancy. Lloyd *v.* Rosbee, 2 Camp. 453; Sullivan *v.* Bishop, 2 C. & P. 359, (12 E. C. L. R. 616,). See also Bac. Ab. *Leases* (L. 3). It does not apply where the tenant retains the possession under a fair claim of right. Wright *v.* Smith, 5 Esp. 203. Where the owner of a woollen-mill and steam-engine let a room, with a supply of power from the engine by means of a revolving shaft in the room, it was held that in estimating the double value of the premises, the value of the power supplied could not be included; for the act speaks only of the value of the *lands, tenements and hereditaments*, which are detained. Robinson *v.* Learoyd, 7 M. & W. 48.* The action may be brought in the County Court; and the tenant cannot deprive the Court of jurisdiction by setting up a title to the premises in himself, if he has admitted the existence of the tenancy up to the time at which the holding over commenced. Wickham *v.* Lee, 12 Q. B. 521, (64 E. C. L. R. 521,). But he may, in accordance with the general rule, show that his landlord's title has expired, and so oust the jurisdiction of the County Court. Mountnoy *v.* Collier, 1 E. & B. 630, (72 E. C. L. R. 630,).

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enable landlords to obtain possession summarily against tenants holding over.

The Pennsylvania act, which is to be found in 1 Smith, 373, is in these words:

"SECTION 12. Where any person or persons in this province, having leased or demised any lands or tenements to any person or persons for a term of one or more years, or at will, paying certain rents, and he or they, or his or their heirs or assigns, shall be desirous upon the determination of the lease, to have again and repossess his or their estate so demised, and for that purpose shall demand and require his or their lessee or tenant to remove from and leave the same; if the lessee or tenant shall refuse to comply therewith in three months after such request to him made, it shall and may be lawful to and for such lessor or lessors, his or their heirs and assigns, to complain

thereof to any two justices of the city, town, or county where the demised premises are situate, and upon due proof made before the said justices, that the said lessor or lessors had been quietly and peaceably possessed of the lands or tenements so demanded to be delivered up, that he or they demised the same, under certain rents, to the then tenant in possession, or some person or persons under whom such tenant claims, or came into possession, and that the term for which the same was demised, is fully ended, then and in such case, it shall and may be lawful for the said two justices, to whom complaint shall be made as aforesaid, and they are hereby enjoined and required forthwith to issue their warrant in nature of a summons, directed to the sheriff of the county, thereby commanding the sheriff to summon twelve substantial freeholders to appear before the said justices within four days next after issuing the said summons; and also to summon the lessee or tenant, or other person claiming or coming into possession under the said lessee or tenant at the same time to appear before them, the said justices and freeholders, to show cause, if any he has, why restitution of the possession of the demised premises should not be forthwith made to such lessor or lessors, his or their heirs or assigns; and if, upon hearing the parties, or in case of the tenant's or other person's claiming or coming into possession under the said lessee or tenant, neglect to appear after being summoned as aforesaid, it shall appear to the said justices and freeholders that the lessor or lessors had been possessed of the lands or tenements in question; that he or they had demised the same for a term of years, or at will, to the person in possession, or some other under whom he or she claims, or came into possession, at a certain yearly or other rent, and that the term is fully ended, that demand had been made of the lessee or other person in possession, as aforesaid, to leave the premises three months before such application to the said justices, then, and in every such case, it shall and may be lawful for the said two justices to make a record of such finding by them, the said justices and freeholders, and the said freeholders shall assess such damages as they think right against the tenant or other person in possession as aforesaid, for the unjust detention of the demised premises, for which damages and reasonable costs, judgment shall be entered by the said justices, which judgment shall be final and conclusive to the parties; and upon which the said justices shall, and they are hereby enjoined and required to issue their warrant, under

their hands and seals, directed to the sheriff of the county, commanding him forthwith to deliver to the lessor or lessors, his or their heirs or assigns, full possession of the demised premises aforesaid, and to levy the costs taxed by the justices, and damages so by the freeholders aforesaid assessed, of the goods and chattels of the lessee or tenant, or other person in possession, as aforesaid, any law, custom, or usage to the contrary notwithstanding.

Section 13. *Provided always*, That if the tenant shall allege that the title to the lands and tenements in question, is disputed and claimed by some other person or persons, whom he shall name, in virtue of a right or title accrued or happening since the commencement of the lease so, as aforesaid, made to him, by descent, deed, or from or under the last will of the lessor, and if thereupon the person so claiming shall forthwith, or upon a summons immediately to be issued by the said justices, returnable in six days next following, before them appear, and on oath or affirmation, to be by the said justices administered, declare that he verily believes that he is entitled to the premises in dispute, and shall, with one or more sufficient sureties, become bound, by recognizance, in the sum of one hundred pounds, to the lessor or lessors, his or their heirs or assigns, to prosecute his claim at the next Court of Common Pleas to be held for the county where the said lands and tenements shall be, then, and in such case, and not otherwise, the said justices shall forbear to give the said judgment. *Provided also*, That if the said claim shall not be prosecuted according to the true intent and meaning of the said recognizance, it shall be forfeited to the use of the lessor or landlord, and the justices aforesaid shall proceed to give judgment, and cause the lands and tenements aforesaid to be delivered to him in the manner hereinbefore enjoined and directed.

Act of 22d March, 1814, §1, 6 Smith, 176. The provisions of the 12th section of the act entitled, "An act for the sale of goods distrained for rent, and to secure such goods to the persons distraining the same, for the better security of rents, and for other purposes therein mentioned," shall not be so construed or extended, as to enable any landlord or lessor, his heirs or assigns, by the summary mode of proceeding therein prescribed, to dispossess any person claiming to hold such leased or demised premises, as joint-tenant, copartner, or tenant in common, with the landlord or person claiming possession. *Provided*, That the tenant or the person in possession, or the person under

whom the tenant may claim to hold, shall, upon the return of the warrant, in the nature of a summons issued by the two justices of the peace to whom the landlord, lessor, or person claiming possession may have applied, declare, on oath or affirmation to be taken and subscribed before the said justices, that the premises in dispute are holden and claimed by or under a co-joint-tenant, copartner, or tenant in common with the landlord, lessor, or person claiming possession, and that the person making such oath or affirmation doth verily believe, that the premises in dispute do not exceed in quantity or value the just proportion of the joint-tenant, partner, or tenant in common, by or under whom the premises may be holden or attempted to be holden. *And provided also*, That the tenant or person in possession, or the person under whom the tenant may claim to hold, shall, with one or more sufficient sureties, become bound by recognizance in the sum of one thousand dollars, to the lessor or landlord, or person claiming possession, his heirs or assigns, to prosecute his claim at the next Court of Common Pleas to be held for the county where the lands shall be. But if the said claims shall not be so prosecuted, then and in that case such proceedings shall be had as would have been had if the said recognizance had not been entered into."

This act has been determined to apply to leases for less than a year. Shaffer *v.* Sutton, 5 Binney, 228. There must be a certain rent reserved Blashford *v.* Duncan, 2 S. & R. 480; Scott *v.* Fuller, 3 Penn'a, 55; Hohly *v.* German Ref'd So'y, 2 Barr, 293.

Where the notice is from year to year, the notice to quit must be given three months before the expiration of the current year. Lesley *v.* Randolph, 4 R. 123; Boggs *v.* Black, 1 Bin. 333; Logan *v.* Herron, 8 S. & R. 461. But when the lease is for a term certain, a notice before the expiration of the term is unnecessary. If the tenant does not then remove, the landlord may, after the expiration of the term, give notice and proceed under this act. Logan *v.* Herron, 8 S. & R. 459; Lesley *v.* Randolph, 4 R. 126; Bedford *v.* McElherron, 2 S. & R. 49; Evans *v.* Hastings, 9 Barr, 273. The tenant may waive the notice—but the fact of waiver must be expressly found by the inquisition. Hutchinson *v.* Potter, 1 Jones, 472.

The tenancy must be at an end before proceedings can be taken. Logan *v.* Herron, 8 S. & R. 470; Clark *v.* Everley, 8 W. & S. 231; and the record must show that the term is ended. Fahnestock *v.* Faustenauer, 5 S. & R. 174. The affidavit of the landlord is suffi-

jects him thenceforward to double the yearly *rent* to be recovered in the same way as the single rent might have been during the continuance of the tenancy.[31](*a*)

[31] A parol notice to quit is within the statute; for the act does not require that it should be in writing; and a notice to quit may be given by parol. Timmins *v.* Rowlison, 3 Burr. 1603. The act extends to a parol demise from year to year, ib.; but it does not apply

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cient to found the proceedings. Cunningham *v.* Gardner, 4 W. & S. 120. The summons may be made returnable before the fourth day. Hower *v.* Krider, 15 S. & R. 43. See Stroup *v.* M'Clure, 4 Yeates, 523; Blashford *v.* Duncan, 2 S. & R. 481. All the facts necessary to give jurisdiction must appear on the record. 2 S. & R. 480; McGee *v.* Fessler, 1 Barr, 126.

The sheriff alone can select the jurors. Ayres *v.* Nooinger, 8 Barr, 414.

If the jury cannot agree, they may be discharged, and another summoned. Cunningham *v.* Gardner, 4 W. & S. 120. The tenant is concluded by the finding. The landlord may renew his complaint before other justices. Ayres *v.* Novinger, 8 Barr, 414.

A writ of error lies to the Common Pleas, and a certiorari may issue. Boggs *v.* Black, 1 Binn. 333; Clark *v.* Yeat, 4 Binn. 185; Clark *v.* Patterson, 6 Binn. 128; Grubb *v.* Fox, *ib.* 460; Lennox *v.* McCall, 3 S. & R. 95; but is no supersedeas. Grubb *v.* Fox, 6 B. 460; Un. Canal Co. *v.* Keyser, 7 Harris, 137. And the finding may be traversed on an ejectment brought by the tenant to try the title. Galbraith *v.* Black, 4 S. & R. 207. On reversal, restitution is not of course, but may be refused. McGee *v.* Fessler, 1 Barr, 126.

Under the proviso in the 13th section of the act, it is said the tenant himself may make the claim. Steele *v.* Thompson, 3 Penn. 37; Cunningham *v.* Gardner, 4 W. & S. 126, and he may show that his landlord's title has expired, though he cannot dispute it. 1 W. & S. 498.

See as to the extent of the justice's jurisdiction, Steel *v.* Thompson, 3 Penn. 34; Newell *v.* Gibbs 1 W. & S. 499; Clark *v.* Everley, 8 W. & S. 226.

(*a*) In addition to the Act given in the preceding note, the Legislature of Pennsylvania, on the third of April, 1830, passed the

unless the tenant has given a notice binding upon him to quit at the expiration of the time specified in it, and upon which the landlord might have acted. Johnstone *v.* Hudlestone, 4 B. & C. 922, (10 E. C. L. R. 860,).

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following Act to enable landlords to recover possession when the tenants neglect or refuse to pay the rent, as often as the same becomes due, and there are not adequate goods on the premises to secure the rent.

Act of 3d April, 1830, § 1. Pam. Laws, 187.

In case any lessee for a term of years, or at will, or otherwise, of a messuage, lands, or tenements, upon the demise whereof any rents are or shall be reserved, where the lessee shall neglect or refuse to pay rent reserved as often as the same may grow due, according to the terms of the contract, and where there are no goods on the premises adequate to pay the said rent so in arrear, except such articles as are exempt from levy and sale by the laws of the commonwealth, it shall and may be lawful for the lessor to give the lessee notice to quit the premises within fifteen days from the date of the notice, if such notice is given on or after the first day of April, and before the first of September, and within thirty days from the date thereof, if given on or after the first of September, and before the first day of April; and if the lessee shall not, within the period aforesaid, remove from and deliver up the said premises to the said lessor, or pay and satisfy the rent so due and in arrear, it shall be lawful for the lessor to make complaint on oath or affirmation, to any two aldermen or justices of the peace, as the case may require, who, on its appearing to them that the lessor has demised the premises for a term of years, or otherwise, whereof any rent or rents have been reserved, that the said rent is in arrear and unpaid, that there is not sufficient goods and chattels on the premises to pay and satisfy the said rent, except such as are by law exempted from levy and sale, and that the lessee has, after being notified in manner aforesaid, refused to remove and redeliver up possession of the premises, shall then and in that case issue their precept, reciting substantially the complaint and allegation of the lessor, directed to any constable of the proper city or county, commanding him to summon the said lessee to appear before the said aldermen or justices at a day and time to be therein fixed, not less than three, nor more than eight

days thereafter, to answer the said complaint; and the said aldermen or justices shall, on the day appointed, or on some other day then to be appointed by said justices or aldermen, proceed to hear the case, and if it shall appear that the said complaint so made as aforesaid by the lessor, is in all particulars just and true, then the said aldermen or justices shall enter judgment against such lessee, that the premises shall be delivered up to the lessor, and at the request of the lessor issue a writ of possession, directed to the said constable, commanding him forthwith to deliver actual possession of the premises to the lessor, and also to levy the costs on the defendant, in the same manner that costs are now by law levied and collected on other writs of execution; but if on the hearing aforesaid it shall appear that the said complaint is vexatious and unfounded, the said aldermen or justices shall dismiss the same with costs to be paid by the lessor. *Provided always*, That at any time before the said writ of possession is actually executed, the lessee may supersede and render the said writ of none effect, by paying to the said constable, for the use of the lessor, the rent actually due and in arrear, and the costs; which rent so in arrear shall be ascertained and determined by the said aldermen or justices on due and legal proof, and indorsed by them on the said writ of possession, together with the costs of the proceeding, of all of which doings the said constable shall make return to the said aldermen or justices within ten days after receiving of the said writ, and the said constable shall be answerable in default of executing the said writ according to its lawful requisitions, or in returning the same in the same manner as to the amount of rent ascertained and determined, and costs, as constables are now by law answerable on other writs of execution. *And provided further*, That no writ of possession shall be issued by the said aldermen or justices for five days after the rendition of judgment, and if within the said five days, the tenant shall give good, sufficient and absolute security by recognizance for all costs that may have, and may accrue, in case the judgment shall be affirmed; and also for all rent that has accrued, or may accrue up to the time of final judgment; then the tenant shall be entitled to an appeal to the next Court of Common Pleas, which appeal shall be then tried in the same manner that other suits are tried. *And provided further*, That nothing herein contained shall prevent the issuing of a *certiorari* with the usual form and effect.

Under this statute it has been held that the sheriff's vendee of the

landlord's title is a lessor within its meaning. McKeon *v.* King, 9 Barr, 213; Clark *v.* Everley, 8 W. & S. 227. And that the notice to quit must be accompanied with a demand for the rent. Clark *v.* Everley, 8 W. & S. 223. And that the notice must be served on the party residing on the premises. Clark *v.* Everley, 8 W. & S. 228. It must be proved affirmatively on the hearing that there is a deficiency of goods on the premises. Clark *v.* Everley, 8 W. & S. 228. As to what is sufficient in the finding of the justices. See McKeon *v.* King, 9 Barr, 213.

The justices are not to enter judgment for the rent arrear. Hazen *v.* Culbertson, 10 W. 395.

As to the recognisance, see Hazen *v.* Culbertson, 10 Watts, 393.

*LECTURE IX. [*247]

RIGHTS OF PARTIES ON DETERMINATION OF TENANCY (continued) 247
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IN the last Lecture we considered the different modes in which a tenancy may be determined, whether by *efflux of time*, *surrender*, *express or implied*, and *forfeiture*, or—in the case of a yearly tenancy, or tenancy of a like description to a yearly one—by *notice to quit*. It remains to consider the respective rights of the two parties upon the determination of the tenancy. These are often provided for by express agreement; but even in the absence of express agreement, there are two matters for which the law provides, between landlord and tenant, under the head of *Emblements* and **Fixtures*. The term *emblements* expresses a right which the law gives to the tenant of an [*248] estate of uncertain duration, and which has unexpectedly determined, without any fault of his, to take the crops growing upon the land when his estate determines, although his estate is itself come to an end.

It is obvious that this right proceeds upon a just and fair principle, for a tenant who has been at the labor and expense of sowing and tilling the ground, ought, in justice and fairness, to be allowed to reap the crop produced by that labour, notwithstanding the unforeseen determination of his interest.[1]

[1] Since this Lecture was written the right to emblements has been taken away by statute, wherever the lease of any farm or land, held at rack-rent, determines by the death or cesser of the estate of a landlord who is entitled for life, or for any other uncertain interest. And in these cases an extended occupation has been allowed to the tenant as an equivalent. See the 14 & 15 Vic. c. 25, s. 1, (which came into operation on the 24th of July, 1851,) and which enacts that when "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."

*Now, this right to the *emblements* extends to a tenant for life wherever his estate determines by the act of God, or by the act of the law; that is, in fact, whenever it determines by any means except his own fault. Thus, for instance, if a tenant for life dies before harvest time, and so his estate comes to an end, that is an act of God, and his executors will be entitled to the crops. But if a widow holds lands, (and there are instances of such an estate,)[2] so long as she shall remain sole and unmarried, if she think proper to marry again, she will not be entitled to emblements, for to re-marry is her own fault, or perhaps her misfortune, and at all events, before she did so, she had time and opportunity to consider this point regarding emblements as well as other points of more importance to her. This state of the law is laid down in *Oland's Case*, 5 Coke, 116, and in the judgment of the Lord Chief Justice Abbott in *Bulwer* v. *Bulwer*, 2 B. & A. 470.[3](*a*) [*249]

[2] See Co. Litt. 214 b; and for instances of such an estate, Oland's Case, cited above; Doe d. Gwillim *v.* Gwillim, 5 B. & Ad. 122, (27 E. C. L. R. 60,); and Brooke *v.* Spong, 15 M. & W. 153.*

[3] See also Co. Litt. 55 b; and Com. Dig. *Biens* (G). In Oland's Case, cited in the text, an instance is given of such a determination of an estate by act of law as gives a right to emblements. It is there said, that if a lease be made to a husband and wife during the coverture, and afterwards they are divorced *causâ præcontractus*, the husband shall have the emblements, for the sentence which dissolves the marriage is the judgment of the law. See the observations on this case in Davis *v.* Eyton, 7 Bing. 159, (20 E. C. L. R. 79,). Emblements may be claimed by the executors or administrators of tenants for life, to the exclusion of the remainder-men or reversioners, because

(*a*) Debow *v.* Colfax, 5 Halst. 128; 3 N. H. 504; Davis *v.* Thompson, 1 Shep. 209; Sherburne *v.* Jones, 2 App. 70; Davis *v.* Brocklebank, 9 N. H. 73.

[*250] *Now the same principles apply to terms for years, and tenancies at will. Where the duration of a term of years is certain, where, for instance, it is a term of seven, or of fourteen, or of twenty-one years, the tenant shall not have the crops upon its termination, because he knew the extent of his interest beforehand, and it was his own fault to leave the land covered with crops at the time that interest determined;(a) but where the determination of an estate for years depends upon an uncertain event, the case is otherwise, and when the uncertain event happens, and the estate in consequence comes to an end, the tenant [*251] is entitled to the *crops growing upon the land when the estate determines. 1st Inst. 55 b.[4]

the estate is in these cases determined by the act of God, Co. Litt. 55 b; unless, indeed, the tenant for life was not the person who actually sowed the land, in which case the reason upon which the right is founded no longer applies. As, for instance, where the land has been sowed by a person who has created a life estate, but before its creation. See Grantham *v.* Hawley, Hob. 132; and 1 Roll. Ab. 727, pl. 21. So, upon the death of a tenant by the curtesy, his executors or administrators, like those of any other tenant for life, are entitled to emblements. 1 Roper's Husb. and Wife, 35 (2nd Edit.). The personal representatives of the incumbent of a benefice were, it would seem, entitled at common law to emblements of the glebe lands, but this right was, at all events, clearly established by the 28 Hen. 8, c. 11. See Williams on Executors, 603 (4th Edit.). A clergyman who resigns his living, is not, however, entitled to emblements. Bulwer *v.* Bulwer, 2 B. & A. 470.

[4] See also Co. Litt. 56 a; Knevett *v.* Poole, Cro. Eliz. 463; Viner's Ab. *Emblements;* 2 Black. Com. 122; and the judgment in Kingsbury *v.* Collins, 4 Bing. 207, (13 E. C. L. R. 469,). Upon the same principle, tenants by statute merchant, and recognisance, were entitled to emblements. Co. Litt. 55 b; Barden's Case, 2 Leon.

(a) Whitmarsh *v.* Cutting, 10 Johns. 360; Bain *v.* Clark, 10 Johns. 424; Harris *v.* Carson, 7 Leigh, 632.

And in like manner, with regard to an estate at will, if the landlord put an end to it, the tenant is entitled to the crops, for he could not foresee that the landlord would determine it; but it is otherwise where the estate is determined by the act of the tenant himself, for he must be taken to have considered the consequences before he so acted. Littleton, s. 68; 5 Coke, 116; and the judgment in *Bulwer* v. *Bulwer*, 2 B. & A. 470.[5](*a*)

These principles were a good deal discussed in *Davis* v. *Eyton*, 7 Bing. 154, (20 E. C. L. R. 79,). In that case the tenant held as lessee from year to year, subject to a condition of re-entry by the lessor, which was as follows:—" That if the lessee should commit an act of bankruptcy, whereon a commission should *issue, and he should be declared bankrupt, or if he should become insolvent, *or incur any debt* [*252] *upon which any judgment should be signed, entered up, or given against him and on which any writ of fieri facias, or*

54. And where a tenant for a term of years if he should so long live, sows the land, and dies before severance, his executor is entitled to the crop. 1 Roll. Ab. 727, pl. 12. It has been already observed, that the right to emblements has been taken away by the 14 & 15 Vic. c. 25, where the lease or tenancy of any farm or lands held by a tenant at rack-rent determines by the death or cesser of the estate of any landlord who is entitled for life, or for any other uncertain interest. See *ante* p. 248, note [1].

Thus, as is said by Lord Coke, in Oland's Case, cited above, if a lease be made to one until he does waste, and he sows the land and afterwards does waste, he will not be entitled to emblements. See also Com. Dig. *Biens* (G, 2); and the judgment of Lord Mansfield in Wigglesworth *v.* Dallison, 1 Dougl. 207.

(*a*) Davis *v.* Thompson, 1 Shep. 209; Sherburn *v.* Jones, 2 App. 70; Davis *v.* Brocklebank, 9 N. H. 73.

other writ of execution should issue, it should be lawful for the lessor to re-enter into the demised premises, and the same again to have, re-possess, and enjoy, as in his former estate."

This condition was broken by the tenant allowing an execution to issue against him; the landlord re-entered for the forfeiture, and the question arose whether the tenant was entitled to the emblements on this determination of his tenancy. This question arose, not directly between him and the landlord, but between the landlord and the assignees under a commission in bankruptcy which had subsequently been taken out, and who stood, with regard to these crops, in the same position precisely as the bankrupt himself. The Court, after a long discussion, in which all the authorities were referred to, held that the lessor was entitled to the crops, for that it was the lessee's own fault to break the condition, and that, though it was true that process of law was necessary to complete the breach, still such legal process having issued in consequence of his default, must be considered as produced by his own act rather than by that of the law. To use the words of Baron (then Mr. Justice) Alderson, "The lessee incurred a forfeiture by his own act; the lessor had stipulated that if the lessee contracted a debt which [*253] should *be followed up by judgment and execution, or committed an act of bankruptcy followed up by a commission, the lessor should re-enter and have the land as of his former estate. It seems to me that the legal consequences only *qualify* the act of the lessee, because that act pervades all the subsequent proceedings; for the commission could not issue unless there had been an act of bankruptcy, nor the execution unless there had been a previous debt; and if the lessee stipulates that in such case he shall be turned

out of possession, it is by his own act that he is turned out."

Now, with regard to the question, what articles pass under the denomination of emblements. The word emblements only extends to such vegetable productions as yield an *annual* profit, such, for instance, as wheat or oats;(*a*) and, therefore, if the tenant of an uncertain estate plant or sow trees or any other thing which takes more than a year to come to perfection, his interest in it is gone when his estate determines. See 1 Inst. 55 b.[6] *And this doctrine was affirmed in the case of *Graves* v. *Weld*, 5 B. & Ad. 105, (27 E. C. L. R. 53,), after a most elaborate discussion. In that case a tenant for ninety-nine years, determin- [*254]

[6] Lord Coke says, in this place, "But if the lessee plant young fruit-trees, or young oaks, ashes, elms, &c., or sow the ground with acorns, &c., there the lessor may put him out notwithstanding, because they will yield no present annual profit." See also Com. Dig. *Biens* (H). Emblements may be claimed in hemp, saffron, flax, and the like; in melons and potatoes; and also in hops although they spring from old roots, because they are annually manured and require cultivation. See Wentw. Off. Ex. 147, 153, (14th Edit.); Co. Litt. 55 b, note 1; Latham *v.* Atwood, Cro. Car. 515; the judgment of Mr. Justice Bayley, in Evans *v.* Roberts, 5 B. & C. 832, (11 E. C. L. R. 701,); and Williams on Executors, 597. Growing grass, however, even if grown from seed, cannot be taken as emblements; for although it may be increased by cultivation, it cannot be sufficiently distinguished from the merely natural product of the soil. See Co. Litt. 56 a; 1 Roll. Ab. 728; Com. Dig. *Biens* (G, 1); and Gilb. Evid. 215, 216. But it appears to be otherwise with respect to artificial grasses, such as clover, and the like. 4 Burn's Eccl. Law, 410 (9th Edit.)

(*a*) It is said that the right to emblements does not attach till the seed is sown; preparing the land for the reception of the seed does not confer it. Price *v.* Pickett, 21 Ala. 741.

able on three lives, had sowed his land, in the spring of 1830, with barley, and in the May of the same year he sowed broad clover seed along with the barley. In the autumn of that same year 1830, he reaped the barley, and in doing so cut off a little of the clover which had sprung up, and which, it seems, has the effect of improving the barley straw. But before the time came for taking the main crop of clover for hay, which would have been in the autumn of the following year, the last of the three lives expired, and the tenant's interest of course expired along with it; so that the question arose, whether the tenant was entitled to this crop of clover under the head of *emblements;* for it was clear that if the crop could be considered emblements, he was entitled to it, inasmuch as his estate having determined by the act of God, and without any default of his own, he clearly fell within the class of persons who have a right to emblements. The question therefore was whether the clover *was emblements*, and it was objected that it could not be so considered, since the crop was not to be taken within [*255] a year after the time of sowing it; *and the Court considered that objection to be well founded. "In the very able argument before us," said the Lord Chief Justice, delivering the judgment of the Court, "both sides agreed as to the principle upon which the law which gives emblements was originally established. That principle was, that the tenant should be encouraged to cultivate by being sure of receiving the fruits of his labour; but both sides were also agreed, that the rule did not extend to give the tenant *all* the fruits of his labour, or the right might be extended in that case to things of a more permanent nature, as trees, or to more crops than one; for the cultivator very often looks for a compensation

for his capital and labour in the produce of successive years. It was, therefore, admitted by each, that the tenant could be entitled to that species of product only which grows by the industry and manurance of man, and to one crop only of that product. But the plaintiff insisted that the tenant was entitled to the crop of any vegetable of that nature, whether produced annually or not, which was growing at the time of the cesser of the tenant's interest; the defendant contended that he was entitled to a crop of that species only *which ordinarily repays the labour by which it is produced within the year in which that labour is bestowed*, though the crop may, in extraordinary seasons, be delayed beyond that period. And the latter proposition we consider to be the law."(*a*)

*The last thing to be mentioned with regard to this subject of emblements is, that where the tenant is entitled to emblements, he is also entitled to free ingress, egress, and regress to reap and carry them. This is laid down by Lord Coke, 1 Inst. 56 a; and it is also laid down in Shepherd's Touchstone, 244, that if the tenant sell the emblements, as he may do, the vendee will have similar rights; and, indeed, all this is clear upon the ordinary principle that *quando lex aliquid concedit, id etiam concedere videtur sine quo, ea res quæ conceditur esse non potest.*[7] [*256]

[7] But the person who is entitled to enter to take away the emblements, has no right to the exclusive occupation; and it is doubted in Plowden's Queries, whether the personal representative of a tenant for life is not bound to pay rent for the land till the corn is ripe; See Williams on Executors, 605. See also as to the right of an outgoing tenant to enter and take crops, to which he is entitled under a custom of the country, Griffiths *v.* Puleston, 13 M. & W. 358.*

(*a*) Evans *v.* Englehart, 6 Gill. & Johns. 190; Singleton *v.* Sin-

Now these points with regard to emblements depend upon the common law, and regulate all cases where there is no contract on the subject between the landlord and tenant. But, as I said at the commencement of this Lecture, the matter frequently becomes the subject of contract either *express* or *implied* from the custom of the country; and you will frequently find, that by virtue either of such *express* or *implied* stipulation, the out-going tenant has a right to his *away-going crop* as it is called, at the determination of his tenancy. [*257] Now, where *there are express terms to that effect in the lease or agreement under which the tenant holds, there can be no dispute as to his right; but, even if there be no express terms, it is held that the custom of the country may be imported by implication into a lease which contains nothing inconsistent with it, and may entitle the tenant to take the crop growing upon the land at the determination of his tenancy, and to do everything that is necessary for that purpose; (see *Beavan* v. *Delahay*, 1 H. Bl. 5; *Boraston* v. *Green*, 16 East, 71; *Caldecott* v. *Smythies*, 7 C. & P. 808,) (32 E. C. L. R. 884,); and this, even when the lease into which it is sought to import the custom is under *seal*, as was decided in *Wigglesworth* v. *Dallison*, Dougl. 201, the great case on this subject, and in which Lord Mansfield said, "We have thought of this case, and we are all of opinion that the custom is good. It is just, for he who sows ought to reap, and it is for the benefit and encouragement of agriculture. It is, indeed, against the general rule of law concerning emblements, which are not allowed to tenants who know when their term is to cease; because,

gleton, 5 Dana, 92; Penhallow *v.* Dwight, 7 Mass. 34; Stewart *v.* Doughty, 9 Johns. 108.

it is held to be their fault or folly to have sown, when they knew their interest would expire before they could reap. But the custom of a particular place may rectify what otherwise would be imprudence or folly. The lease being by deed does not vary the case. The custom does not alter or contradict the agreement in the lease; it only *superadds a right which is consequential to the taking."[8](a) [*258]

[8] See the notes to this case, 2 Smith's L. C. 305, and *ante*, p. 203, note [21].

(a) The law, as laid down in the text, may be said to be an accurate general exposition of the law on the subject of emblements, as it prevails generally in the United States.

By the custom of Pennsylvania, New Jersey, and Delaware, a tenant for a term certain is entitled to what is called the way-going crop. In Demi *v.* Bossler, a case in Pennsylvania, 1 Penn'a, 224, Judge Huston says: "By the common law, a tenant, after the expiration of his lease, and removal from the tenement, had no right to return; and hence the crops growing and ungathered were lost to him. The law in this State has varied from that, as to what has been called the way-going crop, which, heretofore, has been confined to grain sown in the autumn to be reaped the next harvest; and no difference has yet been established between a tenant who pays a rent in money, and one who gives as rent to his landlord a share of the produce of the farm. The usage and general understanding of the country form a part of general agreements, unless otherwise specified. If a tenant rents a farm for one year, it is understood he is to take one crop of each kind of grain cultivated, and that he is to mow as many crops of grass as the meadows will produce." The right need not be mentioned in the lease; and, after the expiration of the lease, the tenant may enter to gather the crop, or may maintain trespass against the lessor or his vendee if they cut it. Stultz *v.* Dickey, 5 Binn. 285; Differdoffer *v.* Jones (cited), 5 Binn. 289, and 2 Binn. 487; Biggs *v.* Brown, 2 S. & R. 14; Demi *v.* Bossler, 1 Penn'a, 224; Van Doren *v.* Everitt, 2 South. 460; Templeman *v.* Biddle, 1 Harring. 522.

However, if the custom would be inconsistent with the express terms of the lease, it cannot be incor-

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Agricultural leases, in these States, generally begin in the spring, either in the end of March or beginning of April. The tenant whose lease expires in the spring, may sow grain the autumn previous, to be cut the harvest after his tenancy expires—but if he puts in the spring crop, the oats for instance, before he leaves he is not entitled to reap it, but loses it, unless by express contract. In Demi *v.* Bossler, before cited, the tenant had made such an attempt. Judge Houston says: "If a tenant, on a monied rent, can sow with oats, flax, or other grain in March, before his lease expires, which is always about the first of April, he in fact gets the benefit of the farm for two years, although he pays the rent of but one. So, if he takes the farm on the shares, and after raising the summer crop one year, sows in March all the grounds with oats, no tenant can go on it the next year, or he will have no land to cultivate for spring crops. The law has been well and justly settled, and favorably to tenants. The present attempt is unreasonable, and pregnant with injustice to one party, and would eventuate in injury to tenants as a class; for the tenant who rents a farm for the ensuing year, will not know whether he can put in a spring crop until he knows whether the month of March will be clement or inclement, or whether the previous tenant was regardful of the rights and interests of others, and the general laws and usages of the country."

The Courts in Pennsylvania have gone further, and said: "The way-going crop includes as well the straw as the grain, which the tenant may remove, and dispose of as he pleases, being subject only to the terms of his contract, and not to any supposed custom of the country on the subject." Craig *v.* Dale, 1 Watts & Ser. 509; Iddings *v.* Nagle, 2 Watts & Ser. 23; Rank *v.* Rank, 5 Barr, 213. And in North Carolina, the same law is held with regard to the manure made on the premises. Smithwick *v.* Ellison, 2 Iredell, 326 Perhaps the question of good husbandry was overlooked in these cases. (See the following note.)

In Delaware, an incoming tenant is held to be entitled, from custom and necessity, to enter before his term commences, and fill the ice-house on the premises. State *v.* M'Clay, 1 Harring. 520.

porated into it; see *Webb* v. *Plummer*, 2 B. & A. 746; *Boraston* v. *Green*, 16 East, 71.[9](*a*)

[9] As it is often difficult in practice to determine whether particular customs of the country are or are not inconsistent with the special stipulations of the lease, it may be useful to refer here to the facts of some of the cases on this subject. In Hutton *v.* Warren, 1 M. & W. 466,* which is one of the principal modern decisions upon it, the evidence showed that by the custom of the country, the tenant was bound to farm according to a certain course of husbandry for the whole of his tenancy, and that on quitting the premises he was entitled to a fair allowance for seed and labour on the arable land, and was obliged to leave the manure if the landlord was willing to purchase it. The lease under which the tenant held, contained a stipulation, that he would consume a certain proportion of the hay and straw on the farm, and spread the manure arising therefrom upon the land, and leave such part of the manure as should not be so spread on the premises at the end of the term for the use of the landlord, upon his paying a reasonable price for it. It was held that the custom mentioned above, was not inconsistent with the stipulation in the lease as to leaving the manure on the premises, since the only alteration made by it was that the tenant was obliged to spend more than the produce of the farm on the premises, being paid for it in the same way as he would have been for that which the custom required him to spend. The following observations upon some of the earlier decisions on this subject, are contained in the judgment in this case, and explain very clearly the extent and application of the rule which is mentioned in the text. "In Wigglesworth *v.* Dallison, afterwards affirmed on writ of error," said the Court, "the tenant was allowed an away-going crop, though there was a formal lease under seal. There the lease was entirely silent on the subject of such a right, and Lord Mansfield said that the custom did not alter or contradict the lease, but only superadded something to it. This question subsequently came under the consideration of the Court of King's Bench, in the case of Senior *v.* Armytage, reported in Mr. Holt's Nisi Prius Cases (p. 197,) (3 E. C. L. R. 84,). In that case, which was an action by a tenant against his landlord for a compensation for seed and

(*a*) Harris *v.* Carson, 7 Leigh, 632.

[*259] *I may as well observe before concluding this subject, that there are other matters which

labour under the denomination of tenant right, Mr. Justice Bayley, on its appearing that there was a written agreement between the parties, nonsuited the plaintiff. The Court afterwards set aside that nonsuit, and held, as appears by a manuscript note of that learned judge, that though there was a written contract between landlord and tenant, the custom of the country would be still binding, *if not inconsistent* with the terms of such written contract; and that, not only all common-law obligations, but those imposed by custom, were in full force where the contract *did not vary them.* Mr. Holt appears to have stated the case too strongly when he said, that the Court held the custom to be operative unless the agreement *in express terms* excluded it; and probably he has not been quite accurate as attributing a similar opinion to the Lord Chief Baron Thompson, who presided on the second trial. It would appear that the Court held that the custom operated, unless it could be collected from the instrument, either expressly or impliedly, that the parties did not mean to be governed by it. On the second trial, the Lord Chief Baron Thompson held that the custom prevailed, although the written instrument contained an express stipulation that all the manure made on the farm should be spent on it, or left at the end of the tenancy, *without* any compensation being paid. Such a stipulation certainly does not exclude by implication the tenant's right to receive a compensation for seed and labour. The next reported case on this subject is that of Webb *v.* Plummer, (2 B. & A. 746), in which there was a lease of down land, with a covenant to spend all the produce on the premises, and to fold a flock of sheep upon the usual part of the farm; and also, in the last year of the term, to carry out the manure on parts of the fallowed farm pointed out by the lessor, the lessor paying for the fallowing land and carrying out the dung, but nothing for the dung itself, and paying for grass on the ground, and thrashing the corn. The claim was for a customary allowance for *foldage* (a mode of manuring the ground), but the Court held, that as there was an express provision for some payment on quitting for the things covenanted to be done, and an omission of foldage, the customary obligation to pay for the latter was excluded. No doubt could exist in that case but that the language of the lease was equivalent to a stipulation

occur at *the determination of an agricultural tenancy, and for which you will find that the [*260]

that the lessor should pay for the things mentioned, *and no more.*" The rule mentioned in the text is also illustrated by the later case of Clarke *v.* Roystone, 13 M. & W. 752.* In this case, which was an action by a landlord against his tenant, the declaration alleged that the plaintiff had given possession of a farm whereon he had laid certain quantities of manure to the defendant as tenant, and that in consideration of this, and that the plaintiff would permit the defendant to have the benefit of the manure, the defendant promised to pay to the plaintiff so much money as he deserved to have, according to the custom of the country where the farm was situated. At the trial, the plaintiff gave in evidence a written agreement between him and the defendant, by which it appeared that the land had been manured with a certain quantity of manure per acre, and that the tenant agreed that the land when given up by him should be left in the same state, or that he would allow a valuation to be made. It was held, that this written agreement was inconsistent with the custom of the country as proved in the case, and therefore excluded it. "The declaration," said Baron Parke, "is upon an executory contract, to pay to the plaintiff so much money on request, and thereupon that the defendant, the tenant, was to have a tenancy according to the custom of the country. Now what is the custom of the country? It is to pay half tillage upon coming in, and of course to receive half tillage upon going out. Then if you import these words into the alleged contract, and suppose the contract to be, that the tenant shall do that which the custom of the country requires, then the defendant is to pay so much money upon request as is equal to the half tillage. That is the nature of the contract described in the declaration. Now look at the proof. The proof is, that the defendant was to occupy these closes of land, which were manured the year before; and then there was a stipulation that, at the end of the term mentioned in the contract, he should put the premises exactly in the same state as to manure which they were in at the commencement of the tenancy, or submit to a valuation; that is, that he should pay for the deterioration of the estate, according to the value put upon it by competent persons, by the want of such manure. Therefore here is a stipulation, that the premises, upon the tenant's going out, shall be left in

[*261] custom of the *country frequently provides; thus you will often find that the tenant is obliged by custom to leave hay, straw, and manure upon the premises, and entitled by custom to remuneration for what is so left; and so you will find he is often entitled to a compensation for the seeds left, and the tillage bestowed upon the land before his departure, and of which he will not have the benefit. And whenever these or similar customs exist, the rule is just the same as with regard to customs regulating the way-

the same condition they were in at the time he entered, or that he shall pay for the difference at the end of the term. That excludes the idea of the payment of any money down at the time of entry, because, at the end of the term, he is to put them into the same condition, or to pay damages according to their deterioration. That is not according to the custom of the country; and it appears to me, therefore, that the allegation in the declaration is not proved; that the custom of the country is excluded by the terms of the contract." See further as to what stipulations operate to exclude evidence of a custom of the country, Wiltshear *v.* Cottrell, 1 E. & B. 674, (72 E. C. L. R. 674,). Where the outgoing tenant is, by the custom of the country, entitled to a share of the crops sown during the last year of the tenancy, his interest is not a mere *easement*, but amounts to a possession, and it is a good answer to an action of trespass brought against him in respect of his entry to take the crops away. Beavan *v.* Delahay, 1 H. Bl. 5; Griffith *v.* Puleston, 13 M. & W. 358.* Where the custom is that the incoming tenant shall pay for the fallows, &c, and shall be repaid upon his leaving the premises, he may recover the amount *from his landlord* if there be no incoming tenant. Faviell *v.* Gaskoin, 7 Exch. 273. It must be observed, that in all these cases the question as to what is the implied contract created by the custom, appears to be one of fact for the jury. When a custom of the country is proved to exist, it will not be assumed to be confined only to tenancies which are not created by writing, but will be considered to be applicable to all tenancies in whatever way they may be created, unless it is impliedly or expressly excluded by the contract. Wilkins *v.* Wood, 17 L. J., Q. B 319.

going crops; namely, that if there be nothing in the lease inconsistent with the custom, the custom *may be incorporated into it by implication, [*262] but that if there be any inconsistency between the two, the custom gives way and the express contract of the parties prevails, and this is on the general principle of law, that *expressum cessare facit tacitum.* See *Roberts* v. *Barker*, 1 Cr. & M. 808;* *Dalby* v. *Hirst*, 1 Bro. & Bing. 224, (5 E. C. L. R. 600,); and the elaborate judgment of [the Court delivered by] Baron Parke in *Hutton* v. *Warren*, 1 M. & W. 466.*[10](a)

[10] See the last note.

(a) See Mousley *v.* Ludlum, 9. Eng. Law & Eq. R. 319.

With regard to the manure made on premises let for agricultural purposes, it has been held that good husbandry requires it to remain, and therefore the outgoing tenant may not remove it.

Chief Justice Gibbs in Brown *v.* Crump, 1 Marsh. 567, (4 E. C. L. R. 473,) says, "The doctrine which I have often heard Mr. J. Buller lay down is, that every tenant, where there is no particular agreement dispensing with that engagement, is bound to cultivate his farm in a husbandlike manner, and to consume the produce on it; this is an engagement which arises out of the letting, and which the tenant cannot dispense with, unless by special agreement." In Daniels *v.* Pond, 21 Pick. 371, Chief J. Shaw in delivering the opinion of the Court says, "Manure made on a farm, occupied by a tenant at will, or for years, in the ordinary course of husbandry, consisting of the collections from the stable and barn-yard, or of composts formed by an admixture of these with the soil, or other substances, is by usage, practice, and the general understanding, so attached to, and connected with the realty, that in the absence of any express stipulation on the subject, an outgoing tenant has no right to remove the manure thus collected, or to sell it to be removed; and that such removal is a tort for which the landlord may have redress." In Lassell *v.* Reed, 6 Greenleaf, 222, Chief Justice Mellen said, "that the claim of the tenant to remove the manure made on the premises, even if made by his own cattle, and with his own fodder, had no

Next with regard to *fixtures.* I use this word to denote certain things which are fixed to the freehold

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foundation in justice or reason, and such a claim the laws of the land cannot sanction." In Middlebrook *v.* Corwen, 15 Wend. 169, Chief Justice Nelson says, "that when a farm is let for agricultural purposes, (no custom or stipulation in the case) the manure does not belong to the tenant, but to the farm; and the tenant has no more right to dispose of it to others, or remove it himself from the premises than he has to dispose of or remove a fixture." And Judge Lewis, in the case of Lewis *v.* Jones, 5 Harris, 264, says, "It is implied from the letting of a farm for agricultural purposes, that the tenant will cultivate the land according to the rules of good husbandry. This is as much a part of the contract as that he shall deliver up possession at the end of the term, or that he shall do no waste. If the manure which is made by the feeding and bedding of his stock on the premises, according to the usual course of husbandry, is to be disposed of and carried to another farm, it only creates a necessity for the purchase of other fertilizing materials to keep the land in good order for the production of crops," &c. "When a farm is let for agricultural purposes, the tenant cannot justify the removal of any portion of the manure made on the premises, by occasionally employing his teams in business not connected with the cultivation of the soil, and supplying them in part with hay and grain purchased from others, so long as the manure thus made is commingled with that made from the produce of the farm." In Waln *v.* O'Connor, a milk farm was held to be a farm used for agricultural purposes so far as the right to remove the manure was concerned. 9 Leg. Int. 97.

The only American decision at variance with the cases cited above, is believed to be that of Smithwick *v.* Ellison, 2 Iredell, 326; and there the question does not seem to have undergone a very full discussion. The doctrine is confined to farms let for agricultural purposes. Lewis *v.* Jones, 5 Harris, 266; Needham *v.* Allison, 4 Foster, (N. H.) 355.

In Middlebrook *v.* Corwen, 15 Wend. 169, and in Stone *v.* Proctor, 2 Chip. 113, manure accumulated on a farm in the ordinary way, is treated as a fixture, and part of the freehold.

The considerations which induced the above decisions, had they

of the demised premises, but which, nevertheless, the tenant is allowed to disannex and take away, provided he exert his right of doing so within the time allowed by law.[11]

In order to explain clearly the doctrine of fixtures, which is one of very great practical importance, I must remind you that it is a maxim of the law of England, that every thing which is once annexed to the freehold becomes part and parcel thereof, and follows the same rules, and belongs to the same owners as that to which it is annexed.[12] *Thus if the tenant build a house upon the land, he cannot pull it [*263]

[11] See as to fixtures generally, Amos and Ferard on Fixtures; the notes to Elwes *v.* Mawe, 2 Smith's L. C. 114, and *ante*, p. 142, note [22]. The term "*fixture*" is properly applicable to something annexed to the freehold; but it is a modern word which is often used in a larger sense, and is generally understood to comprehend any article which a tenant has a power of removing. See the judgment in Hallen *v.* Runder, 1 Cr. M. & R. 276;* the judgment of Baron Parke in Sheen *v.* Richie, 5 M. & W. 182,* and the judgments in Wiltshear *v.* Cottrell, 1 E. & B. 690, (72 E. C. L. R. 690,) and Elliott *v.* Bishop, 24 L. J., Exch. 33.

[12] See Co. Litt. 53 a; the introduction to Amos and Ferard on Fixtures, and the judgment of Baron Parke in Mackintosh *v.* Trot-

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been fully weighed, it would seem, should have produced a different result in the cases of Craig *v.* Dale, 1 W. & S. 509, and Iddings *v.* Nagle, 2 W. & S. 23. Farmers would unanimously pronounce it bad husbandry to sell the straw for consumption off the premises. It is from the straw that the barn-yard manure in a great measure is made: and in many of the interior counties, away from the limestone regions, it is the only fertilizer to be had. Though the high price of straw in the neighborhood of large cities induces some farmers to save as much of that article as possible for market, enough of the proceeds is always invested in the manure which a city affords, to replace in the barn-yard the loss occasioned by the sale of the straw. Any other course would inevitably impoverish the premises. See the case of Sarles *v.* Sarles, 3 Sandf. Ch. R. 601.

down again without committing waste; and generally, wherever any thing is once firmly and permanently annexed to the inheritance, even though by the tenant himself, he cannot remove it again, unless by virtue of express stipulation with his landlord, or of some exception introduced into the above general rule of the law for his benefit.

Now it was found in very early times, that this rule if unrelaxed, would operate very harshly upon a variety of persons; for it applied not only to the case of a landlord and tenant, but to that of an heir, who, upon the death of his ancestor, claimed to retain the fixtures as against the personal representative, who was generally a nearer relation. It applied also to the case of a particular estate, on the determination of which the [*264] remainder-man or *reversioner laid claim to fixtures which had been erected during its continuance. But in no case did it work so much hardship as in that between landlord and tenant, because the latter had been generally paying an adequate rent

ter, 3 M. & W. 186.* This principle of law is expressed by the maxim *quidquid plantatur solo, solo cedit.* See as to the degree of annexation which is necessary in order to bring any article within the operation of the rule which exempts fixtures from distress, Hellawell *v.* Eastwood, 6 Exch. 295, cited *ante*, p. 144, note. Where the relation of landlord and tenant does not exist, and a chattel has been annexed by its owner to the freehold of another in such a manner that it may be severed without injury to the freehold, it is not necessarily to be inferred from the annexation that the chattel becomes the property of the freeholder. It is a question of fact for the jury whether this is so or not, and they are at liberty to infer from the circumstance of the user of the chattel being retained by the original owner of it, or from other circumstances of a like nature, that it was agreed that he should have the power to remove it. Wood *v.* Hewett, 8 Q. B. 913, (55 E. C. L. R. 913,); see also Lane *v.* Dixon, 3 C. B. 776, (54 E. C. L. R. 776,).

for the premises, and it was hard that the landlord should have not only that, but also expensive fixtures put up by the tenant, and paid for out of his pocket.

Now the hardship of this general rule of law soon caused it to be relaxed in all the cases I have mentioned, and the relaxation was in proportion to the hardship, and was greatest in the case in which the hardship had been greatest, that, namely of landlord and tenant.[13] And when the rule was thus relaxed it was not equally so with regard to all descriptions of fixtures put up by the tenant, for the removal of some was, as I shall explain, much more favored than that of others.

The fixtures which a tenant is allowed to disannex and remove are of two classes—

1st. *Those which are put up for the ornament of the premises, or the convenience of the tenant's occupation.*

2ndly. *Those which are put up for the purpose of carrying on some trade or business.*

With regard to the former class, there are many cases in which the tenant has been allowed to *remove fixtures put up for convenience or ornament, and which are of such a description [*265] as to be capable of being disannexed without any permanent injury to the inheritance, such, for instance, as stoves and grates fixed into the chimney with brickwork, marble chimney-pieces, and wainscot, fixed with screws.(*a*) See *Lawton* v. *Lawton*, 3 Atk. 15; *R.* v. *St. Dunstan*, 4 B. & C. 686, (10 E. C. L. R. 758,); *Colegrave* v. *Dias Santos*, 2 B. & C. 76, (9 E. C. L. R. 42,); *Winn* v. *Ingilby*, 5 B. & A. 625, (7 E. C. L. R. 214,); and *Grymes* v. *Boweren*, 6 Bing. 437, (19 E. C. L. R. 201,), in which the tenant was allowed to take

[13] See the judgment of the Lord Chief Justice Tindal in Grymes *v.* Boweren, 6 Bing. 439, (19 E. C. L. R. 201,).

away a pump which was attached to a stout perpendicular plank resting on the ground at one end, and at the other end fastened to the wall by an iron pin, which had a head at one end and a screw at the other, and went completely through the wall. The judgment of the Lord Chief Justice Tindal in that case presents a good summary of the law with regard to this class of fixtures, and shows by what considerations we are to be guided in determining whether a particular article falls within the class of removable fixtures or not. "It is difficult," says his lordship, "to draw any very general, and at the same time precise and accurate rule on this subject; for we must be guided, in a great degree, by the circumstances of each case, the nature of the article, and the mode in which it is fixed. The pump, as it is described to have been fixed in this case, appears to me to fall within the class of removable fixtures. The rule has always been more relaxed as between *landlord and tenant, than as between persons standing in other relations. It has been holden that stoves are removable during the term; grates, ornamental chimney-pieces, wainscots fastened with screws, coppers, and various other articles; and the circumstance that, upon a change of occupiers, articles of this sort are usually allowed by landlords to be paid for by the in-coming tenant to the out-going tenant, is confirmatory of this view of the question. Looking at the facts of this case; considering that the article in dispute was of domestic convenience; that it was slightly fixed; was erected by the tenant; could be moved entire; and that the question is between the tenant and his landlord; I think the rule should be made absolute."

[*266]

In this judgment the Lord Chief Justice lays peculiar stress on the five circumstances which are always

considered most material in questions of this sort, namely,

1st. That the article was one of domestic convenience.

2ndly. That it was erected by the tenant.

3rdly. That it could be moved entire.

4thly. That it was but slightly fixed; and

5thly. That the question was between landlord and tenant.

Before quitting this part of the subject, I will recommend you to peruse the judgment in *Buckland* v. *Butterfield*, 2 Bro. & Bing. 54, (6 E. C. L. R. 35,), which has always been considered the chief decision on the subject of domestic fixtures. In that case the *tenant sought to remove a conservatory, but [*267] was not permitted to do so. The judgment of the Lord Chief Justice Dallas will be found to contain a summary of almost all that can be said regarding the removal of this class of fixtures.[14]

[14] In addition to the articles mentioned in the text, the following things may be considered to fall within the definition of tenant's fixtures. Hangings, tapestry, pier glasses, chimney glasses, and iron backs to chimneys, Beck *v.* Rebow, 1 P. Wms. 94. Harvey *v.* Harvey, 2 Str. 1141; beds fastened with ropes or nails to the ceiling, Noy's Max. 167 (9th Edit.), Keilw. 88; stoves, mash-tubs, locks, bolts, and blinds, Colegrave *v.* Dias Santos, 2 B. & C. 76, (9 E. C. L. R. 42,); cupboards standing on the ground and supported by holdfasts, R. *v.* Inhab. of St. Dunstan, 4 B. & C. 686, (10 E. C. L. R. 758,); coffee mills and malt mills, R. *v.* Inhab. of Londonthorpe, 6 T. R. 377; iron ovens, clock cases, 4 Burn's Eccl. L. 411 (9th Edit.) carpets attached to the floor by nails for the purpose of keeping them stretched out, curtains, pictures and other like matters of an ornamental nature which are slightly attached to the walls of the dwelling-house, as furniture. See the judgment in Hellawell *v.* Eastwood, 6 Exch. 313. As to the distinction between what are called *landlord's fixtures and tenant's fixtures*, see the judgments in Elliott *v.*

Next, with regard to fixtures erected by the tenant for the purpose of carrying on a *trade*—these have much greater privileges than ornamental fixtures, (*a*). and cases frequently occur in which, to favor commerce, a tenant is allowed to take away fixtures erected for this purpose, which he would certainly not be allowed to remove, if they were put up merely for the [*268] purposes *of ornament or domestic convenience. Thus, in the case I have just cited, *Buckland* v. *Butterfield*, the tenant was not allowed to take away a conservatory which had been added to the premises for ornament, and for the pleasure of the family; and yet in *Penton* v. *Robart*, 2 East, 90, Lord Kenyon expressed a clear opinion that a nurseryman who is forced to erect conservatories, in order to carry on his trade, would be permitted, at the expiration of his term, to remove them. "Shall it be said," said his lordship, in that case, "that the great gardeners and

Bishop, 24 L. J., Exch. 33. Fixtures which a tenant may sever from the freehold and take away during the term, such as kitchen ranges, stoves, coppers, and grates, are not therefore liable to be distrained for rent. Darby *v.* Harris, 1 Q. B. 895, (41 E. C. L. R. 828,). The ordinary rights of the tenant as to the removal of fixtures may of course be varied by the express contract entered into between him and the landlord. See *post*, p. 275.

(*a*) The doctrine that property fixed to the premises by the tenant for manufacturing purposes, is his, is fully recognized in the United States. Raymond *v.* White, 7 Cow. 319; White *v.* Arndt, 1 Wharton, 91; Holmes *v.* Tremper, 20 Johns. 29; Vanness *v.* Packard, 2 Peters, 137; Lemar *v.* Miles, 4 Watts. 330; Taylor *v.* Townsend, 8 Mass. 411; Washburn *v.* Sproat, 16 Mass. 449; Whiting *v.* Brastow, 4 Pick. 310; Cook *v.* Champlain Transportation Co., 1 Denio, 91; Voorhis *v.* Freeman, 2 Watts & Sergt. 116; Tyler *v.* Pennock, 2 Watts & Sergt. 390; Pemberton *v.* King, 2 Dev. 376; Godard *v.* Gould, 14 Barb. 662.

nurserymen in the neighborhood of this metropolis, who expend thousands of pounds in the erection of greenhouses and hothouses, &c., are obliged to leave all these things upon the premises, when it is notorious that they are even permitted to remove trees, or such as are likely to become such, by the thousand, in the necessary course of their trade? If it were otherwise, the very object of their holding would be defeated."

Here is, you see, a case in which Lord Kenyon expressly asserts a species of building to be removable, when set up for the purposes of trade, which the Court of Common Pleas, in *Buckland* v. *Butterfield*, had decided not to be removable when set up by an ordinary tenant for purposes of ornament and enjoyment. And, indeed, the other case put by Lord Kenyon, of the trees, illustrates the same proposition; for, on the one hand, it seems clear that a nurseryman may remove *trees and shrubs planted by him in his business, and constituting, as it were, part [*269] of his stock in trade;(*a*) and, on the other hand, it has been decided that a private individual cannot remove the slightest shrubs, not even a box border. *Empson* v. *Soden*, 4 B. & Ad. 655, (24 E. C. L. R. 288). In that case Mr. Justice Littledale went so far as to say that the tenant would not be justified in carrying away even flowers.

For other examples of the relaxation of the strict rule in favor of trade fixtures, you may consult *Lawton* v. *Salmon*, 1 H. Bl. 259, note; *Dean* v. *Allalley*, 3 Esp. 11; *Trappes* v. *Harter*, 4 Tyrwh. 603 [S. C. 2 Cr.

(*a*) It was held in Miller *v.* Baker, 1 Met. 27, that shrubs and trees on lands leased for a nursery, are personal chattels, as between landlord and tenant and his assigns, and may be removed.

& M. 153;]* *Earl of Mansfield* v. *Blackburne*, 6 Bing. N. C. 426, (37 E. C. L. R. 442).[15] *And, indeed, it is quite obvious that, at a period like the present, at which the use of machinery is becoming so universal, and at which so much capital is consequently invested in property of that sort, encouragement must, upon principles of public policy, be given to the tenant to erect fixtures of that kind,

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[15] See the notes to Elwes *v.* Mawe, 2 Smith's L. C. 114; the judgment of the Court of Exchequer in Hellawell *v.* Eastwood, 6 Exch. 295; Heap *v.* Barton, 12 C. B. 274, (74 E. C. L. R. 274,) and the cases cited *ante*, p. 142, note [22], see also Fisher *v.* Dixon, 12 Cl. & F. 312 a case in which no question was in fact raised as to trade fixtures, but in which some of the earlier decisions on this subject are examined and explained. The general result of the cases relating to it, and the principle upon which they are founded, is thus stated in Amos and Ferard on Fixt. 32. "The inference to be drawn from the cases is that a tenant has an indisputable right to remove fixtures, which he has annexed to the demised premises for the purpose of carrying on his *trade;* and that the *benefit of the public* may be regarded as the principal object of the law in bestowing this indulgence. The reason which induced the Courts to release the strictness of the old rules of law, and to admit an innovation in this particular instance was, that the commercial interests of the country might be advanced by the encouragement given to tenants to employ their capital in making improvements for carrying on trade, with the certainty of having the benefit of their expenditure secured to them at the end of their terms." The principal circumstances to consider in inquiring whether any particular article is removable as a *trade* fixture, are the nature of its annexation to the freehold and the extent of injury which would be caused by its removal; the character of its construction; the intention with which it was put up; its comparative value to the respective claimants; and the existence or otherwise of any custom relating to the matter. See Amos and Ferard on Fixt., Part I., c. ii., s. 1. As to the right of tenants of farms to remove buildings and machinery erected for the purposes of *trade and agriculture*, under the 14 & 15 Vic. c. 25, s. 3, see the next note.

by allowing him to remove them at the expiration of his interest. And, accordingly, we may, I think, expect to see the exception in favor of trade fixtures every day extended.

With regard to agricultural fixtures—it has been much questioned whether they fall within the exception which has been made in favor of fixtures erected for the purposes of trade. Lord Ellenborough, in his celebrated judgment in *Elwes* v. *Mawe*, 3 East, 38, expresses himself against extending the exception to them. However, since that time it has been thought by many that his lordship's view may have been in that respect too narrow, and that as farming is now carried on so much by the aid of machinery, and at such an outlay of capital, the farmer ought not to be deprived of the encouragement which is extended to the tradesman and the manfacturer. Mr. Amos, in particular, has argued strongly to this effect, and *seems by no means clear that Lord Ellenborough's opinion on that point would now be upheld, (*a*)[16] [*271]

[16] See Amos and Ferard on Fixt., Part I., c. ii., s. 2. The result of the cases on this subject is thus stated in the notes to Elwes *v.* Mawe, 2 Smith's L. C. 117. "Upon the whole, the extent of the tenant's right with respect to agricultural fixtures, does not seem, even as yet, quite defined. It is clear that it does not go beyond, and, unless the opinion expressed by Lord Ellenborough in Elwes *v.* Mawe be modified, it falls considerably short of his rights with respect to trading fixtures." It has been held that a tenant is entitled at the expiration of his term to remove a wooden barn which he has erected on a foundation of brick and stone, the foundation being let into the ground,

(*a*) Buildings erected by the tenant for agricultural purposes, were held in the following cases to be on the same footing as those erected for purposes of trade. Dubois *v.* Kelly, 10 Barb. Sup. Ct. 496; Pemberton *v.* King, 2 Dev. 376; Miller *v.* Baker, 1 Met. 27; Holmes *v.* Tremper, 20 Johns, 29; Leland *v.* Gassitt, 17 Verm. 403.

[*272] *Now, having pointed out what fixtures are removable, it remains only to point out at

but the barn resting upon it by its weight alone, and being, therefore, removable without injury to the foundation. Wansbrough *v.* Maton, 4 A. & E. 884, (31 E. C. L. R. 386,). In Wiltshear *v.* Cottrell, 1 E. & B. 674, (72 E. C. L. R. 674,) a question arose as to whether certain machinery and other articles erected on a farm passed under a conveyance of the land and *of all fixtures to the farm belonging;* and it was held that a granary consisting of a wooden shed tiled over, and resting by its mere weight upon a wooden frame which rested upon staddles built into the land was a mere chattel, and could not be considered as either part of the land, or as affixed to the freehold. But it was held that some stone pillars mortared into a foundation of brick and mortar which was let into the earth, and having on their tops stone caps mortared to them for the purpose of supporting ricks, passed under the deed. And the same rule was applied to a threshing machine which was placed inside one of the barns, and fixed by screws and bolts to posts which were let into the earth, and could not be got out without disturbing the soil. In Huntley *v.* Russell, 13 Q. B. 572, (66 E. C. L. R. 572,) it was held that a cottage or farm building placed upon the soil of a rectory but not fixed into the ground, and intended at the time of the erection to be removable at will, might be removed by the incumbent without incurring any liability to his successor for waste or dilapidation; although the posts on which it rested had, by the weight of the building, become imbedded in the ground to the depth of a foot. Since this Lecture was written, the relative rights of landlords and tenants in these respects have been altered by statute, where tenants erect farm buildings or machinery for agricultural purposes, or for the purposes of trade *and* agriculture, *with the consent in writing of the landlords.* It is enacted by the 14 & 15 Vic. c. 25, s. 3 (passed on the 24th of July, 1851), "that if any tenant of a farm or lands shall after the passing of this act, with the consent in writing of the landlord for the time being, at his own cost and expense, 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 ma-

what time the tenant must exercise his privilege of doing so. And it is well settled that he must do so either during his term, or at all events before he has quitted the premises after the expiration of his term. If, at the end of his term, he leave the premises, and leave the fixtures on them, he is taken to have abandoned his right to remove them, *and they become his landlord's property. See *Lyde* v. *Russell*, 1 B. & Ad. 394, (20 E. C. L. R. 532,).(*a*)[17] [*273]

chinery, 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 any wise 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 so removed: provided, nevertheless, that no tenant shall, under the provision last aforesaid, be entitled to remove any such matter or thing as aforesaid, without first giving to the landlord or his agent one month's previous notice in writing of his intention so to do; and, thereupon, it shall be lawful for the landlord, or his agent on his authority, to elect to purchase the matters and things so proposed to be removed, or any of them, and the right to remove the same shall thereby cease, and the same shall belong to the landlord; and the value thereof shall be ascertained and determined by two referees, one to be chosen by each party, or by an umpire to be named by such referees, and shall be paid or allowed in account by the landlord, who shall have so elected to purchase the same." This act does not extend to Scotland, see s. 5.

[17] See also the judgment of Lord Holt in Poole's case, 1 Salk. 368; Penton *v.* Robart, 2 East, 88; Fitzherbert *v.* Shaw, 1 H. Bl. 258; the judgment in Hallen *v.* Runder, 1 Cr. M. & R. 275;* the

(*a*) The law, as stated in the text, is recognized in the following cases: White *v.* Arndt, 1 Wharton, 91; Pemberton *v.* King, 2 Dev. 376; Shepard *v.* Spaulding, 4 Met. 416; Gaffield *v.* Hapgood, 17 Pick. 192; Stockwell *v.* Marks, 5 Shep. 455; Preston *v.* Briggs, 16 Verm. 124; Beers *v.* St. John, 16 Conn. 322; State *v.* Elliott, 11

[*274] *Thus far I have considered the rules which regulate the removal of fixtures, simply as

judgment of Baron Parke in Minshall *v.* Lloyd, 2 M. & W. 459;* and the notes to Elwes *v.* Mawe, 2 Smith's L. C. 115. In Mackintosh *v.* Trotter, 3 M. & W. 184,* a question arose as to whether a lessee could, during his term, maintain trover for fixtures attached to the freehold, and which had been sold by the defendants. It was held that he could not, and Baron Parke said, in delivering judgment: "The principle of law is, that whatsoever is planted in the soil belongs to the soil . . . . the tenant has the right to remove fixtures of this nature *during his term*, or *during what may, for this purpose, be considered as an excrescence on the term;* but they are not goods and chattels at all, but parcel of the freehold, and, as such, not recoverable in trover." The latter part of the rule thus laid down is more fully explained in the later case of Weeton *v.* Woodcock, 7 M. & W. 14.* "The rule," said the Court, in this case, "to be collected from the several cases decided on this subject, seems to be this, that the tenant's right to remove fixtures continues during his original term, *and during such further period as he holds the premises under a right still to consider himself as tenant.*" And in Roffey v. Henderson, 17 Q. B. 574, (79 E. C. L. R. 574,) similar expressions were used by

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N. H. 540. See Holmes *v.* Tremper, 20 Johns. 29, where it was held that a cider mill might be removed after the term, and Lawrence *v.* Kemp, 1 Duer, 363, where the same doctrine was applied to gas fixtures. In Holmes *v.* Tremper, it was held, (and the same thing was said in Pemberton *v.* King,) that fixtures which the tenant might remove were his, and that his right of property was not lost by failing to remove them during the term, or before he quitted possession; and if he afterwards entered and took them, he only took his own, which the landlord could not retake, though he might bring an action of trespass. See contra State *v.* Elliott, 11 N. H. 540, Preston *v.* Briggs, 16 Verm., 124. Beers *v.* St. John, 16 Conn., 522, and Stockwell *v.* Marks, 5 Shep. 455. See Judge Hare's note to Elwes *v.* Mawe, in the fifth American edition of Smith's Leading Cases. In Lyde *v.* Russel, 1 B. & Ad. 394 (20 E. C. L. R. 532), it was held with regard to bells, bell-pulls, cranks, &c., which had been put in by the tenant, that if not removed during the term they became the property of the landlord.

they subsist in the absence of agreement; but as I have frequently had occasion to say, during this Lec-

Mr. Justice Patteson. "The general principle," said that learned judge, "is, that where the articles are of such a kind as to become fixed to the freehold, the tenant, if they are tenant's fixtures, may remove them during the term, *or during such time as he may hold possession after the term in the capacity of a tenant.*" In the last-mentioned case, the facts appeared to be, that an outgoing tenant of a house was possessed of shelves, stoves, and other articles of this description, which were his own property, but which had been affixed to the freehold. When he was about to leave the premises, he requested his landlord to purchase these fixtures, or to allow them to remain, so that they might be purchased by the incoming tenant, and stated, that if they were not bought he would then remove them. The landlord wrote, in reply, refusing to buy the fixtures, but stating that he had no objection to the outgoing tenant leaving them on the premises and making the best terms he could with the incoming tenant. The fixtures remained unsevered from the freehold, the landlord let the premises again, and the incoming tenant refused to purchase the articles in question. After the latter had been in possession two months, the outgoing tenant demanded liberty to enter and remove the fixtures, and on this permission being refused, he sued the incoming tenant in an action on the case for the hindrance, and in trover for the fixtures. It was held, that the action would not lie, for if the landlord's letter amounted to a license to the outgoing tenant to take away the fixtures, it could not, not being under seal, operate as a valid grant of such a right as against the new tenant, who was no party to the license, and trover would not lie for the articles claimed, so long as they were unsevered from the freehold. The law with respect to the period at which the tenant must exercise his right to remove, cannot be considered to be altogether settled. See the notes to Elwes *v.* Mawe, 2 Smith's L. C. 118, where it is doubted whether a tenant, whose interest is uncertain in point of duration, has not a *reasonable* time after the expiration of his tenancy within which he may remove his fixtures. See also Heap *v.* Barton, 12 C. B. 274, (74 E. C. L. R. 274,) where no question, in fact, arose upon this point, the right to remove *at all* having been taken away by an agreement between the parties; but the Lord Chief Justice Jervis said, speaking of the

ture, *expressum cessare facit tacitum.* And, where there is any express stipulation between the landlord and tenant regarding the fixtures, that, as a matter of course, overrules and supersedes the *rules of law which I have just stated. See *Naylor* v. *Collinge*, 1 Taunt. 18; *Penry* v. *Brown*, 2 Stark. 403, (3 E. C. L. R. 463;) *Thresher* v. *East London Waterworks Company*, 2 B. & C. 608. (9 E. C. L. R. 267.)[18] And custom, which, we have already seen, sometimes engrafts terms upon leases as to which the documents themselves are silent, might have the same effect in regulating the relative rights of the parties with regard to fixtures. See *Trappes* v. *Harter*, 4 Tyrwh. 603, [S. C. 2 Cr. & M. 153*]; *Davis* v. *Jones*, 2 B. & A. 165; *Watherell* v. *Howells*, 1 Camp. 227; *Culling* v. *Tuffnal*, Bull, N. P. 34.[19]

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law on this subject: "The Courts seem to have taken three separate views of the rule; first, that fixtures go, at the expiration of the term, to the landlord, unless the tenant has, during the term, exercised his right to remove them; secondly, as in Penton *v.* Robart, that the tenant may remove the fixtures, notwithstanding the term has expired, if he remains in possession of the premises; thirdly, that his right to remove fixtures after his term has expired, is subject to this further qualification, viz., that the tenant continues to hold the premises under a right still to consider himself as tenant." And see Amos and Ferard on Fixt., Part I., c. ii., s. 5.

[18] See also Amos and Ferard on Fixt. 108; and as to the construction of contracts affecting the right to remove fixtures, Rex *v.* Topping, M'Cl. & Y. 544;* Martyr *v.* Bradley, 9 Bing. 24; (23 E. C. L. R. 469;) The Earl of Mansfield *v.* Blackburne, 6 Bing. N. C. 426, (37 E. C. L. R. 442,); West *v.* Blakeway, 2 M. & Gr. 729, (40 E. C. L. R. 828,); Foley *v.* Addenbrooke, 13 M. & W. 174;* Wiltshear *v.* Cottrell, 1 E. & B. 674, (72 E. C. L. R. 674,); and Elliott *v.* Bishop, 24 L. J. Exc. 33.

[19] See also Wansbrough *v.* Maton, 4 A. & E. 884, (31 E. C. L. R. 386,). Any customary right in this respect will be destroyed if the parties enter into an express contract inconsistent with it. See

In practice, you will generally find that *fixtures* are, either by express agreement, or even where there is no express agreement on the subject, by arrangement, valued at the end of the term between the outgoing and incoming tenant—the former receiving, and the latter paying, the value of the removable fixtures left on the premises; but though, in practice, this is so, and a mere bystander would think that the whole transaction was between the outgoing and incoming tenant, *yet in point of fact, and in legal effect, it is between the outgoing tenant and the landlord, for the former is entitled to have nothing valued which he could not, either by virtue of the general rules of law which I have stated, or by express or implied agreement, remove, as against his landlord; so that the real question is, what are their mutual rights with regard to the fixtures.[20] [*276]

Wiltshear *v.* Cottrell, 1 E. & B. 674, (72 E. C. L. R. 674,); and the cases cited, *ante*, p. 258, note [9].

[20] See Faviell *v.* Gaskoin, 7 Exch. 273; and *ante*, p. 261, note.

[*277] *LECTURE X.

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I HAVE now arrived at the last of the four heads into which I originally divided this subject. You will probably remember, that after describing the general nature of the relation between landlord and tenant, the different sorts of tenancy, and their distinguishing peculiarities, I divided the entire subject into four heads.

[*278] *The first comprising points which occur at the *creation* of the tenancy.

The second those which occur during its *continuance.*

The third those which occur at its *termination.*

The fourth those which occur upon a *change of the*

original parties to the relation of landlord and tenant. It is to this fourth point that my observations will be this evening directed.

According to the general rule of the law of England, a contract, or *chose in action* as we technically denominate it, is not assignable so as to invest the assignee with any rights at law.[1] There are, it is true, certain excepted cases. Bills, notes, and other negotiable instruments are assignable by the law merchant, or by Acts of Parliament passed for the purpose; and there are one or two other exceptions of less importance; but the general rule is, that at law a contract cannot be assigned.[2]

The Courts of Equity indeed will enforce such *an assignment if it be made on good consideration; and though they cannot alter the course of things at law, will practically carry their decree into effect by treating the assignor of the contract as a trustee of it for the assignee, and forcing him to permit the latter to sue upon it in his name.[3] But [*279]

[1] This rule of the common law, which seems to have been confined at first to contracts relating to landed property, was adopted in order to prevent litigation, and to protect the poorer classes from being injured by the transfer of fictitious or doubtful rights of action to great persons in the state. See Co. Litt. 214 a; 2 Roll. Ab. 45, 46, *Graunts* (F) (G).

[2] A statutory exception to this general rule was created by the 51 Geo. 3, c. 64, which made India bonds assignable, so that the property in the bonds became absolutely vested, both at law or in equity, in the assignee. Another of the exceptions referred to in the text, existed in the case of bail bonds given to the sheriff, on the arrest of a defendant in an action, which were assignable by the sheriff to the plaintiff, by force of the 4 Anne, c. 16, s. 20. See also, *ante*, p. 185.

[3] See the cases collected in Chitty's Equity Index. *Chose in Action.*

though a contract is thus, in effect, assignable, yet in form and in contemplation of law it is not so.

But though a lease is necessarily a *contract*, yet it is a contract which creates an *estate;* and by the law of England an *estate* is assignable, although a contract is not so. And the landlord, therefore, may assign over his estate in his reversion—the tenant his estate in his term; and thus the parties to the relation may be altered either by a change of landlord, or a change of tenant, or a change of both landlord and tenant. And it is the consequences of such a change that I am now about to consider.

Now it is obvious that such an assignment may be brought about in either of two ways:

1st. By the act of the parties.

Or 2ndly. By the act of the law.

Let us first suppose it to be brought about by the act of the parties. And *first* let us ask *how an assignment by act of the parties is effected?*

Secondly, what are its consequences when effected?

Now an assignment made by the landlord must be made by deed, for his reversion is an incorporeal [*280] *hereditament; and every incorporeal hereditament lies, as we say, in grant, and can be conveyed by deed only: and this was so at common law[4]—with this addition, that in order to perfect the assignment of the landlord's reversion, it was necessary that the tenant in possession should have *attorned* to the assignee, that is *recognised* the assignee's title to be considered his landlord; for it was considered unreasonable to place the tenant in a situation of responsibility and obligation to a person of whose very existence he might be ignorant, since the assign-

[4] See Beely *v.* Purry, 3 Lev. 154.

ment might be executed behind his back, and altogether without his knowledge. And, therefore, the law before it would place him in that situation, rendered it necessary that he should have *attorned*, that is, in some way shown that he knew of the assignment, or recognised the assignee as his landlord.[5]

However, when an estate was in the occupation of a great many tenants it was troublesome to procure attornments from all of them; and therefore by stat. 4 Anne, c. 16, s. 9, this ceremony of attornment was altogether abolished, and an assignment by the landlord is now perfectly valid without it. But though attornment was thus done away with, the interests of the tenant were not disregarded, for by the same statute (s. 10) it was enacted, that the tenant should not be prejudiced by payment of any rent to the old landlord before *he received notice of the change of interest; so that the effect of that statute has been to substitute for the necessity of an attornment, the necessity of giving notice to the tenant before he can be sued by the assignee for rent-arrear which has accrued due since the time of the assignment. You will see the effect of this statute discussed in *Moss* v. *Gallimore*, Dougl. 279.[6] (*a*). [*281]

[5] See as to attornment at common law, Co. Litt. 309 b.

[6] See also the notes to this case, 1 Smith's L. C. 315, and the judgment in Doe d. Agar *v.* Brown, 2 E. & B. 331, (75 E. C. L. R. 331,). Since this statute, when a mortgagor conveys his estate to a mortgagee, the tenants of the former become, without attornment, the tenants of the latter; and if he gives notice to them of the mortgage,

(*a*) The statute of Anne has been generally adopted throughout the United States. Farley *v.* Thompson, 15 Mass. 18; Report of the Judges, 3 Binney, 625; Burden *v.* Thayer, 3 Met. 78; Baldwin *v.* Walker, 21 Conn. 168; Coker *v.* Pearsoll, 6 Ala. 542.

When the assignment is by the tenant of his term, it might originally have been made by mere parol; but by the Statute of Frauds, [29 Car. 2, c. 3] it is enacted that all assignments of leases or terms for years, shall be by deed or note in writing, signed by the party assigning, or his agent thereunto lawfully authorized by writing.[7] *[And by the 8 & 9 Vic. c. 106, s. 3, all assignments of chattel interests, not being copyhold, in any tenements or hereditaments, made after the 1st of October, 1845, are void at *law*, unless made by deed.[8]]

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You will recollect, that by the Statute of Frauds it is also enacted that a lease, which might at common law have been made by mere words, shall now be

they are bound to pay their rent to him. The situation of tenants of the mortgagor who became such *after* the mortgage is different, for the mortgagee is not assignee of the reversion with respect to them. Mere notice to them by the mortgagee of the mortgage, is not sufficient to create the relation of landlord and tenant between them and him. See the notes to Moss *v.* Gallimore, referred to above, and Evans *v.* Elliott, 9 A. & E. 342, (36 E. C. L. R. 159,). See also as to where a new tenancy will be implied between these parties, the notes to Keech *v.* Hall, 1 Smith's L. C. 295; Brown *v.* Storey, 1 M. & Gr. 117, (39 E. C. L. R. 372,); The Mayor of Poole *v.* Whitt, 15 M. & W. 571;* and Turner *v.* Cameron's Coalbrook Steam Coal Company, 5 Exch. 932. Where a mortgagee out of possession gave notice of the mortgage to a tenant whose occupation began since the mortgage, and afterwards made an entry on the land, it was held that he could not maintain trespass for mesne profits against the tenant in respect of the occupation prior to the entry. Litchfield *v.* Ready, 5 Exch. 939.(*a*)

[7] See s. 3.

[8] See *ante*, p. 62, note [5], where this section is given at length.

(*a*) For the American law on the subject of this note, see the note by the American editor of Smith's Leading Cases, to Moss *v.* Gallimore, 1 Smith's L. C. 5 Am. Ed. p. 697.

invalid unless reduced into writing and signed as the statute directs; with the exception of certain leases for terms not exceeding three years from the making, which are still good, though by words only;[9] but though leases of this description (being expressly excepted out of this statute) can be made by mere words, yet they cannot be assigned without writing, the enactment in the Statute of Frauds regarding assignments containing no exception similar to that regarding leases; *Botting* v. *Martin*, 1 Camp. 318 (*a*).[10]

Next as to the *consequences* of an assignment.

At common law, the rule which I have already stated, that *a contract cannot be assigned though an estate may*, produced extremely awkward consequences when a landlord assigned his reversion. In such cases the occupying tenant was bound to *pay rent to the assignee and might be sued in debt for it, for [*283] that liability was considered to arise out of his relation to the land and to be inseparable from it; but, inasmuch as covenants are distinct contracts and not any essential part of a lease, it was held, that, if the landlord assigned his reversion, the assignee could not sue on the covenants contained in the lease, nor, on the other hand, could he be sued upon them. And thus all the most carefully framed covenants were liable to be rendered useless by a mere assignment, for, though

[9] See *ante*, pp. 62–64.

[10] And it would seem that an assignment which is invalid under the Statute of Frauds, because not in writing, cannot operate as an underlease. Barrett *v.* Rolph, 14 M. & W. 348.* But the decisions on this point are not consistent. See Poultency *v.* Holmes, 1 Str. 405; and the judgments in Pollock *v.* Stacy, 9 Q. B. 1034, (58 E. C. L. R. 1034,) and Cottee *v.* Richardson, 7 Exch. 151.

(*a*) But see *ante*, note to page 225.

the original parties to the lease might, it is true, still sue each other upon their express covenants, yet, it is obvious that the main object of introducing those covenants into the lease was, *that the person in actual possession of the land should always be under certain stipulations with regard to the owner of the reversion immediately expectant on his estate; and, vice versâ, that the reversioner should always be subject to certain stipulations and obligations with regard to his tenant*—an object which the assignment altogether defeated. Thus, for instance, suppose at common law, the tenant had been under a covenant to *repair*, the landlord had assigned, and then the covenant had been broken. The assignee of the reversion, although the only person who had any interest in enforcing the observance of this covenant, had no right of action on it, the covenant being a *chose in action*, and, consequently, not having passed [*284] to *him by the assignment of the original lessor; the only person who could sue on it was the original lessor himself though he had ceased to have any interest in the premises to which the covenant related.[11]

This state of things was found so inconvenient that it occasioned the passing of the famous Statute 32 Hen. VIII. c. 34, which enacted "that all persons being grantees or assignees to or by the king, or to or by any other persons than the king, and their heirs, executors, successors, and assigns, shall have like advantages against the lessees, their executors, administrators, and assigns,

[11] These consequences followed from the common law rule mentioned in the text, and which is expressed in the preamble of the 32 Hen. 8, c. 34, in the following words: "*by the common law of this realm, no stranger to any covenant, action, or condition, shall take any advantage or benefit of the same by any means or ways in the law, but only such as be parties or privies thereunto.*"

by entry for non-payment of the rent, or for doing of waste or other forfeiture, and by action only, for not performing other conditions, covenants, or agreements, expressed in the indentures of leases and grants against the said lessees and grantees, their executors, administrators, and assignees, as the said lessors and grantors, their heirs, or successors, might have had."

Section 2 enacted, "that all lessees and grantees of lands, or other hereditaments, for terms of years, life or lives, their executors, administrators, or *assigns, shall have like action and remedy against [*285] all persons and bodies politic, their heirs, successors, and assigns, having any gift or grant of the king, or of any other persons, of the reversion of the lands and hereditaments so letten, or any parcel thereof, for any condition or covenant expressed in the indentures of their leases, as the same lessees might have had against the said lessors and grantors, their heirs and successor.[12](a)

[12] These are not the precise words of the 32 Hen. 8, c. 34, but the substance of the statute is given. This statute applies only to leases *by deed;* therefore where a lease is not under seal, the assignee of the reversion on it cannot sue the lessee upon the contracts made in the lease between the latter and the assignor. Standen *v.* Chrismas, 10 Q. B. 135, (59 E. C. L. R. 135,). It also follows, that where the lease is not under seal the lessor does not lose any of his rights of action upon it against the lessee by assigning his reversion to a third person. See Bickford *v.* Parson, 5 C. B. 920, (57 E. C. L. R. 920,). The better opinion appears to be that, at common law, covenants ran with the land, but not with the reversion. See the notes to Thursby *v.* Plant, 1 Wms. Saund. 240 a; and the judgments in the case last cited.

(a) This statute is in force in Pennsylvania and Illinois. See the Rep. of the Judges, 3 Binney, Plumleigh *v.* Cook, 13 Ill. 669.

It refers, however, only to the remedies for and against the grantees and assignees of the reversion. It does not apply to remedies

So that you see the first section gives the assignee of a reversion the same remedies against the lessee and his assigns as the original landlord would have had against the original tenant. And the second section gives the tenant and his assigns the same remedy against the reversioner and his assigns, as they would have had against the original landlord.

This statute although so general in its terms that it would *prima facie* seem to embrace every possible covenant between a landlord and tenant has never-

[*286] theless been construed to include only *covenants *relating to the subject matter of demise*, such as in technical language are said *to run with the land*.(*a*) And the reasonableness and, indeed, neces-

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between lessors and the assignees of lessees. Those cases are provided for by the common law. Lewis *v.* Campbell, 8 Taunt. 728, (4 E. C. L. R. 355,); Middlemore *v.* Goodale, Cro. Car. 503; Thursley *v.* Plant, 1 Wms. Saund. 240; Pollard *v.* Schaffer, 1 Dall. 211; Weidner *v.* Foster, 2 Penna. 26; White *v.* Whitney, 3 Met. 81; Shelton *v.* Codman, 3 Cush. 318; Fairbanks *v.* Williamson, 7 Greenl. 96; Heath *v.* Whidden, 17 Shep. 383; Martin *v.* Baker, 5 Blackford, 232; Allen *v.* Culver, 3 Denio, 284; Bowdre *v.* Hampton, 6 Rich. 208.

An assignment of the rent without the reversion, carries with it no right of action on the covenants contained in the lease. Allen *v.* Wooley, 1 Blackf. 149; Randolph *v.* Kinney, 3 Rand. 394.

(*a*) The learning on the subject of covenants running with the land, admits of many and nice distinctions, and is very thoroughly gone into in the notes to Spencer's case by the English and American editors of Smith's Leading Cases, 5 Am. Ed. Vol. I., p. 139, &c., to which the reader is referred. It was held in Mitchell *v.* Warner, 5 Conn. 497, that the covenant, to carry the right to a remedy upon it to the assignee, must relate to lands and tenements; consequently when the conveyance was of the privilege of drawing water from a pond, this not being a conveyance of land, a covenant respecting the privilege, was not allowed to be enforced by an assignee of the grantee.

sity of this construction will be obvious to you after a very few moments' consideration, for, any covenant whatever may be inserted in a lease. Now, suppose A. leases to B., and B. besides the usual covenants contained in a lease, covenants to pay A. a gross sum of money, say 100*l.* A. assigns his reversion before the 100*l.* is paid. Now, it is very reasonable that the assignee should sue upon the covenant to keep the premises in repair, or to pay rent, or any covenant of that description, which concerns the condition of the premises, the reversion of which has been assigned to him, but how absurd would it be to say that the assignee should not only sue on these covenants, the performance of which is for his benefit, but should likewise sue B. if he neglected to pay A. the 100*l.*, the payment or non-payment of which could not concern the assignee at all. Accordingly, the Courts have put the rational construction on the act, and it is settled that it transfers to the assignee only the benefit of such covenants as *touch and concern the thing demised.* You will find that laid down at the conclusion of Spencer's Case, 5 Coke, 16, which is the great authority on this branch of the law.[13]

*Now then, bearing in mind that the assignee of the landlord has a right to sue the tenant, and *vice versâ*, the assignee of the tenant the [*287]

[13] See the notes to this case, 1 Smith's L. C. 27; and Mayho *v.* Buckhurst, Cro. Jac. 438. In Pargeter *v.* Harris, 7 Q. B. 708, (53 E. C. L. R. 708,) the recitals contained in a lease showed that the land was mortgaged, and that the lessors had only an equity of redemption. The mortgagor was not a party to the lease, but the lessee covenanted to pay a yearly sum in part of the interest on the mortgage, at an office mentioned in the deed, and which was described as the place where the interest on the mortgage was payable half-yearly. It was held this was a covenant in gross.

landlord, upon covenants which *touch and concern the thing demised*,(*a*) and on no others, I must enumerate to you the principal covenants which have been decided to *touch and concern the thing demised*, and, consequently, to be capable of being put in suit by assignees. And, if you refer to the cases, or to some of them, their perusal will give you a clear notion of the state of the law upon this subject. In the first place it is a rule that *all implied covenants run with the land*,[14] for instance, the covenant to pay rent which, as I said in a former Lecture,[15] the law implies from the words "*yielding and paying*" in a lease, even if there be no express covenant. And so, likewise, you will find it laid down in Spencer's Case that, if a man makes a lease by the words "*demise and grant*," from which words, if there [*288] be no *express covenant for quiet enjoyment, the law implies one,[16] the right to sue on this

[14] It would, it is apprehended, be more correct to say that all *covenants implied by law*, that is, all covenants *in law*, run with the land. For, as is explained by the Court in Williams *v.* Burrell, 1 C. B. 402, (50 E. C. L. R. 402,) there are many *implied* covenants which are not covenants *in law*, and it would seem that it is only covenants of the latter description which necessarily run with the land. See as to this distinction, *post*, p. 293, note [19].

[15] *Ante*, p. 96.

[16] Since the 8 & 9 Vic. c. 106, s. 4, the word "grant" does not imply any covenant in law in respect of any tenements or hereditaments, except in cases in which by force of any Act of Parliament it may have this effect. See *ante*, p. 68, note.

(*a*) There are numerous American cases affirming the principle that the covenants which run with the land must touch and concern the thing demised. Nesbit *v.* Nesbit, C. & N. 324; Norman *v.* Wells, 17 Wend. 136; Lamitti *v.* Anderson, 6 Cow. 302; Taylor *v.* Owen, 2 Blackf. 301; Dunbar *v.* Jumper, 2 Yeates, 74; Kimpton *v.* Walker, 9 Verm. 191; Tallman *v.* Coffin, 4 Comst. 134.

implied covenant if he be evicted, passes to the tenant's assignee. But, besides these *implied* covenants, there are many express ones, which so far concern the demised premises that the assignee may take advantage of them. Such are express covenants for quiet enjoyment. Campbell *v.* Lewis, 3 B. & A. 392, (5 E. C. L. R. 230,)—further assurance, Middlemore *v.* Goodale, Cro. Car. 503—renewal, Roe *v.* Hayley, 12 East. 464—to repair, Dean and Chapter of Windsor's Case, 5 Co. 24. And see further examples in Mayor of Congleton *v.* Pattison, 10 East. 130; Tatem *v.* Chaplin, 2 H. Black. 133; Vernon *v.* Smith, 5 B. & A. 1, (7 E. C. L. R. 3,); Vyvyan *v.* Arthur, 1 B. &. C. 410, (8 E. C. L. R. 175,).[17](*a*)

[17] See also as to the covenant for renewal, Brook *v.* Bulkeley, 2 Ves. Sen. 498, and Simpson *v.* Clayton, 4 Bing. N. C. 758, (33 E.

(*a*) In America the covenants for quiet enjoyment, further assurance and warranty run with the land until breach. Markland *v.* Crump, 1 Dev. & Bat. 94; Keath *v.* Widden, 11 Shep. 383; Martin *v.* Baker, 5 Blackf. 232; Carter *v.* Denman, 3 Zabr. 232; Suydam *v.* Jones, 10 Wend. 180; Wymann *v.* Ballard, 12 Mass. 306; Sprague *v.* Baker, 17 Mass. 586; De Chaumont *v.* Forsythe, 2 Penna. 507; Witby *v.* Mumford, 5 Cow. 137; Williams *v.* Witherbee, 1 Aik. 233; King *v.* Kerr, 5 Ham. 156; Clark *v.* Redman, 1 Blackf. 381; Mitchell *v.* Warner, 5 Conn. 497; Williams v. Beeman 2 Dev. 483; Van Horne *v.* Crain, 1 Paige, 455; Brown *v.* Staples, 28 Maine, (15 Shep. 497,); Fowler *v.* Poling, 6 Barb. Sup. Ct. 165; Redwine v. Brown, 10 Geo. 311; Rawle on Covenants of Title, ch. 8.

The covenants of seizin, of right to convey, and against incumbrances, are in America, except in Indiana, and perhaps Ohio, held, contrary to the English doctrine, to be of necessity broken, if ever, as soon as made, and thus are turned to a mere right of action, which is not assignable. Hacker *v.* Storer, 8 Greenleaf, 228; Heath *v.* Widden, 24 Maine, 383; Williams *v.* Witherbee, 1 Aikens, 233; Gerfield *v.* Williams, 2 Verm. 327; Richardson *v.* Dorr, 5 Verm. 9;

[*289] *Here I must mention a point, which is one of so much nicety that you may find some diffi-

C. L. R. 522,); and as to the covenant for quiet enjoyment, Williams *v.* Burrell, 1 C. B. 402, (50 E. C. L. R. 402,) and *ante*, p. 207, note [25]. It appears to be clear that a covenant to repair runs with the

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Mitchell *v.* Warner, 5 Conn. 497; Bickford *v.* Page, 2 Mass. 455; Wheelock *v.* Thayer, 16 Pick. 68; Clark *v.* Swift, 3 Met. 390; Greenby *v.* Wilcocks, 2 Johns. 1; Hamilton *v.* Wilson, 4 Johns. 72; Townsend *v.* Morris, 6 Cowen, 123; Beddoes Ex's *v.* Wadsworth, 21 Wend. 120; M'Carty *v.* Leggett, 3 Hill, 134; Lot *v.* Thomas, 1 Pennington, 407; Chapman *v.* Holmes, 5 Halst. 20; Garrison *v.* Sandford, 7 Halst. 261; Wilson *v.* Forbes, 2 Dev. 30; Pierce *v.* Duval, 9 B. Munroe, 48; Logan *v.* Moulder, 1 Pike, 313; Stinson *v.* Summer, 9 Mass. 143; Redwine *v.* Brown, 10 Geo. 311; Martin *v.* Baker, 5 Blackf. 232; Foote *v.* Burnet, 10 Ohio, 317.

See also Rawle on Covenants of Title, ch. 8, where this subject is fully and satisfactorily canvassed.

Covenants to pay rent run with the land. Hurst *v.* Rodney, 1 Wash. C. C. 375.

So also covenants to repair, and to rebuild, and insure. Damarest *v.* Willard, 8 Cow. 206; Norman *v.* Wells, 17 Wend. 148; Pollard *v.* Schaffer, 1 Dall. 210; Thomas *v.* Von-Kapff, 6 Gill. & Johns. 372; Harris *v.* Goslin, 3 Harring. 338.

It was held in Norman *v.* Wells, 17 Wend. 136, that a covenant not to let or establish any other site on the same stream to be used for sawing mahogany, is a covenant running with the land, on which an assignee can maintain an action whenever a new mill for sawing mahogany is erected.

The purchaser at a sheriff's sale is such an assignee as may maintain an action on all preceding covenants that run with the land. Andrews *v.* Wolcott, 16 Barb. 21; Lewis *v.* Cook, 13 Ired. 193; McCrady *v.* Brisbane, 1 N. & M. 104; Tufts *v.* Adams, 8 Pick. 547; Streaper *v.* Fisher, 1 R. 155.

A purchaser at sheriff's sale, who has no right to the possession or profits of the land until the acknowledgment of the deed, is not personally liable for the rent accruing between the day of the sale, and the execution of his deed. Thomas *v.* Connell, 5 Barr, 13.

culty in *bearing it in mind; but still it is so important, that I must not leave it unmen- [*290]

land, and with the reversion. See Lougher *v.* Williams, 2 Lev. 92; Buckley *v.* Pirk, 1 Salk, 317; and Wakefield *v.* Brown, 9 Q. B. 209, (58 E. C. L. R. 209,). In the last of these cases, the covenant on which the action was brought had been entered into by the lessee with three persons, and it appeared on the lease that one of them had no legal estate in the premises, and that of the other two covenantees one had the legal estate at the time of the granting of the lease, having a term in it for sixty-one years wanting a day, and the other had a reversion of one day on this term. It was held, after the death of the covenantee who had no legal estate in the land, that the surviving covenantees might join in an action against the assignee of the lessee for not repairing the premises. It has, however, been thought that covenants will not run with the land unless they have been made with the person having the legal estate in it. 4 Jarman on Convey. 424 (3d Edit.); see also the judgment of Lord Kenyon in Webb *v.* Russell, 3 T. R. 401; Pargeter *v.* Harris, cited *ante*, p. 286, note [13]; and Magnay *v.* Edwards, 13 C. B. 479, (76 E. C. L. R. 479,). The facts of several of the cases mentioned in the text show so clearly the application of the rule of law with respect to covenants running with the land, that it may be useful to refer to them here. In Tatem *v.* Chaplin, it was held that a covenant in a lease that the lessee, his executors and administrators, should constantly, during the demise, reside on the premises, was binding on the assignee of the lessee, although he was not named. In the Mayor of Congleton *v.* Pattison, where a piece of ground had been demised on which the lessee was to erect a silk mill, and the lessee had covenanted for himself, his executors, administrators, and assigns, that he would not hire persons to work in the mill who were settled in other parishes without a certificate of their settlement; it was held that this was a collateral covenant which did not bind the assignee of the land. It would appear from the judgment of Lord Ellenborough in this case, that a covenant not to carry on a particular trade on the premises will run with the land. In Vernon *v.* Smith, also cited above, it was held that a covenant to insure against fire premises which were situated within the limits of the weekly bills of mortality, ran with the land; s. 83 of the old Metropolitan Buildings Act, the 14 Geo. 3, c. 78 (a section

tioned. I have already told you that the only covenants an assignee, whether he be the assignee of the landlord or of the tenant, can avail himself of, are those

which is still in force), enabling the owner of the estate to have the sum insured laid out in rebuilding the premises. And in Vyvyan *v.* Arthur, it was held that an implied covenant by a lessee to grind at the mill of the lessor all the corn grown on the lands demised, ran with the land so long as it and the mill belonged to the same person. In a later case than that last mentioned, a lease of an undivided third part of a mine contained a recital of an agreement made between the lessee, the lessor, and the owner of the other two-thirds, for pulling down an old smelting mill, and building another of a larger size upon land which adjoined the mine, and under which the mine seems to have extended. The lease contained a covenant by the lessee to keep the new mill engaged to be erected in repair, and to deliver it up in good condition at the end of the term, but did not contain any express covenant to build the new mill. It was held by the Court of King's Bench, and afterwards by the Court of Exchequer Chamber, that such a covenant was to be implied, and that the assignee of the reversion might sue upon it. See Sampson *v.* Easterby, 9 B. & C. 505, (17 E. C. L. R. 230,); S. C. in error, 6 Bing. 644, (19 E. C. L. R. 291,); and see also as to implying a covenant in cases of this description, Rashleigh *v.* the South Eastern Railway Co., 10 C. B. 612, (70 E. C. L. R. 612,). A covenant to leave part of the land as pasture, runs with the land, Cockson *v.* Cock, Cro. Jac. 125; so do covenants to cultivate the land in a particular manner, Woodfall's Landlord and Tenant, 81, (6th Edit.); and covenants to produce title deeds. Barclay *v.* Raine, 1 Sim. & St. 448. In Jourdain *v.* Wilson, 4 B. & A. 266, (6 E. C. L. R. 478,) a landlord covenanted to supply the demised premises, which consisted of two houses, with a sufficient quantity of good water, at a certain rate of payment for each house, and it was held that this covenant ran with the land and with the reversion. A general covenant not to assign, in which the *assigns* are not mentioned, does not run with the land. Philpot *v.* Hoare, 2 Atk. 219; the judgment in Bally *v.* Wells, 3 Wils. 33; and *ante*, p. 118, note. See further as to covenants running with the land, the notes to Duppa *v.* Mayo, 1 Wms. Saund. 288 b; Wootton *v.* Steffenoni, 12 M. & W. 129;* and the notes to Spencer's Case, 1 Smith's L. C. 27.

which *touch and concern the thing demised.* But even among covenants *which do touch and concern the thing demised* a distinction prevails; for there are some of them which bind the assignee, if the word "assigns" be used in the covenant, but otherwise do not. The criterion is stated in Spencer's Case in the first two resolutions, and it is this:—if the covenant concern something which is in being at the time of making the covenant, and is part and parcel of the demised premises, there it will *bind the assignee even [*291] though not named; but if it relate to something which is not in being at the time of making the covenant, there it will not bind the assignees unless they are named. For example, if at the time of the lease there is a house standing on the demised premises, and the tenant or landlord covenants to keep it in repair, this covenant would bind the assignees of the covenator, although not named—for the house was part and parcel of the demised premises at the time of making the lease. But, if the covenant had been to build a new house on the premises, although this covenant would bind the assignees if the covenantor had covenanted for himself *and his assigns*, yet if he omit the word assigns, the assignees will not be bound by it, because the house was not in being at the time at which the covenant was entered into. You will find a good example of this in Sampson *v.* Easterby, which was decided first in the Queen's Bench in 9 B. & C. 505, (17 E. C. L. R. 230,); and afterwards in the Exchequer Chamber on a writ of error, in 6 Bing. 644, (19 E. C. L. R. 291,*).[18](*a*)

[18] In this case, which is mentioned more at length in the last note, the point decided was that the covenant *ran with the reversion;* that

(*a*) Harris *v.* Coulbourn, 3 Harring. 338; Tallman *v.* Coffin, 4

[*292] *Such then is the effect of an assignment, either of the term, or of the reversion, upon the new party—on the assignee—which may be summed up by saying, that subject to the distinction I have just

is to say, that the assignee of the lessor was entitled to sue upon it. But the Court observed, that the covenant had been made with the lessor, his heirs or assigns, and the distinction mentioned in the text applies as much to covenants which run with the reversion, as to those which run with the land. This rule is illustrated by the recent case of Doughty *v.* Bowman, 11 Q. B. 444, (63 E. C. L. R. 444,). In this case a lessee covenanted for himself, his executors, administrators, and assigns, to pay rent, and to build on the land demised four houses within a specified time; and the lease contained a proviso for re-entry upon the non-performance of any of the covenants. The lessee afterwards underlet the premises to a third person for the residue of the term wanting one day. At the time of the making of the underlease, the houses had not been built, but the time for building them had not expired. The lessee covenanted with the under-lessee that he, the lessee, *his heirs, executors, or administrators* (not naming *his assigns*), would pay the rent reserved on the original lease, and perform, or effectually indemnify the under-lessee against all the covenants contained in it on the lessee's or assignee's part to be performed. The lessee afterwards assigned his reversion on the underlease. It was held by the Court of Queen's Bench, and afterwards by the Court of Exchequer Chamber, that the covenant in the underlease, by which the lessee undertook to perform the covenants in the original lease, or to indemnify the under-lessee, did not pass with the reversion, and that the assignees of the lessee were not bound by it. The grounds of this decision were, that the covenant in question was either one of indemnity only, and therefore merely collateral, or that if it amounted to a covenant on the part of the lessee to build the houses mentioned in the original lease, *it related to a thing not in esse, and therefore did not bind the assignee of the reversion, who was not named.* See also Greenaway *v.* Hart, 14 C. B. 340, (78 E. C. L. R. 340,).

Comst. 134; Thompson *v.* Rose, 8 Cowen, 266, 269; Norman *v.* Wells, 17 Wend. 137; Allen *v.* Culver, 3 Denio, 284.

stated he may sue, and is liable to be sued on all covenants which concern the demised premises, or as we usually say, *run with them*. Now let us see what is the condition of the party assigning: and the rule is as you will find it shortly stated in the beginning of Lord Kenyon's judgment in Auriol *v.* Mills, 4 T. R. 94, that if the lessee assign over the lease, and the lessor accept the assignee as his tenant either expressly or impliedly, as for instance by receiving rent from him —he cannot afterwards bring an action of *debt* for his *rent against his original lessee: though he may if he think proper, refuse to accept the assignee as his tenant, and so long he may sue in *debt* for rent against the original lessee; but whether he accept the assignee of the tenant or not, the original lessee will continue liable on his *express* covenants; for those are obligations which he has brought on himself by his own deed, and was bound to know the extent of before he entered into them. All this you will find laid down in the same judgment of Lord Kenyon; and in Thursby *v.* Plant, 1 Wms. Saund. 240.[19](*a*) [*293]

[19] See also Bachelour *v.* Gage, Cro. Car. 188; Norton *v.* Acklane, ib. 580; Barnard *v.* Godscall, Cro. Jac. 309; and Brett *v.* Cumberland, ib. 521. The reason of this rule is that although by the assignment the *privity of estate* between the lessor and the lessee is at an end, there is a *privity of contract* between them, created by the lease, and this is not affected by the assignment. The result of the cases on this subject is thus shortly stated in Coote's Landlord and Tenant, p. 337: "The lessor and lessee are reciprocally bound to each other for the covenants *in law* by privity of *estate*, for the covenants *in deed* by privity of *contract*. When the lessor grants his reversion, the privity of estate is thereby transferred to the grantee; and the privity of contract, in respect of such covenants as run with the land, is also

(*a*) Kunckle *v.* Wynick, 1 Dall. 305; Fisher *v.* Milliken, 8 Barr, 111; Dewey *v.* Dupuy, 2 W. & S. 556; Ghegan *v.* Young, 11 Harris, 18.

[*294] *The case, however, of the assignee is different. If *he* assign he frees himself from all *future* responsibility, for his liability springs altogether from his relation to the land; and, therefore, when he parts with that relation, he puts an end to the liability. And consequently, if A. lease to B. and B. assign to C., —B., the original lessee, continues liable on all the express covenants contained in the lease, and C., the assignee, is liable, *while he remains such, to so many of them as run with the land*, but as soon as he parts with his estate in the land, he puts an end to his liability

transferred by force of the statute 32 Hen. 8, c. 34. When the lessee assigns his estate, the privity of estate is transferred to the assignee; the lessee still remaining liable upon his privity of contract. When the lessor or lessee dies, the covenants running with the land devolve upon the person to whom the land passes: and such covenants as are merely collateral devolve upon the executor." It must be observed, that within the meaning of the rules thus laid down, *implied* covenants are not necessarily covenants *in law;* and the expression "covenants *in deed*" extends to all covenants, whether express or implied, which are not covenants *in law*. For, as is explained in the judgment of the Court in Williams *v.* Burrell, 1 C. B. 429–431, (50 E. C. L. R. 429–431,) many implied covenants differ only from express covenants, because the meaning of the parties is, in the former class of covenants obscurely, and in the latter clearly and explicitly expressed. And covenants in law are, properly speaking, covenants which the law itself implies from the use of words having a known legal operation in the creation of an estate; so that after they have had their primary operation in creating the estate, the law gives them a secondary force by implying an agreement on the part of the grantee to protect and preserve the estate which, by the words used, has been already created. Such, for instance, is the covenant for quiet enjoyment which is implied by the law from the use, in a deed, of the word "*demise*." It has been already mentioned, that where the lease is not by deed so that the 32 Hen. 8, c. 34, does not apply, an assignment by the lessor of his interest does not affect his rights of action against the lessee. Bickford *v.* Parson, 5 C. B. 920, (57 E. C. L. R. 920,).

to be sued on these covenants: and this he may do by assigning even to an insolvent person. Taylor *v.* Shum, 1 B. & P. 21; Lekeux *v.* Nash, Str. 1221; Odell *v.* Wake, 3 Camp. 394.[20] But, though his *liability for *future* breaches is thus at an end, he remains liable in respect of any which he may have already committed; Harley *v.* King, 5 Tyrwh. 692; [S. C. 2 Cr. M. & R. 18*].[21](*a*) [*295]

[20] See also Barnfather *v.* Jordan, 2 Dougl. 452, and Paul *v.* Nurse, 8 B. & C. 486, (15 E. C. L. R. 241,). From the first of these cases it appears that an assignment by an assignee even to a married woman is a good answer to an action against him for rent accruing after the assignment over; for a married woman may purchase without the consent of her husband, although if he disagree the estate is divested. An assignee is not, as is obvious, liable for breaches of covenant committed by the lessee before the assignment. Therefore, where a lessee covenanted for himself and his assigns to rebuild a house within a certain time, and after that time assigned the premises, it was held that the assignee was not liable upon this covenant. Grescot *v.* Green, 1 Salk. 199.

[21] See also as to the liability of the assignee to the lessee, Burnett *v.* Lynch, 5 B. & C. 589, (11 E. C. L. R. 597,); and Smith *v.* Peat, 9 Exch. 161. Where a lease is assigned there is, during the continuance of the interest of the assignee, a duty on his part towards the lessee to pay the rent and perform the covenants in the lease; but this duty is commensurate with the time during which the interest of the assignee in the premises lasts. When he has assigned over, his liability in this respect ceases, so far as relates to future breaches of

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(*a*) Armstrong *v.* Wheeler, 9 Cow. 88. And it has been held that any one in the occupation of leasehold premises, under the lessee, will be presumed to be an assignee of the lease in favor of the lessors. Durando *v.* Wyman, 2 Sandf. Sup. Ct. 597; Van Rensselaer *v.* Jones, 2 Barb. Sup. Ct. R. 643; Carter *v.* Hammitt, 12 Barb. 253. But the presumption may be rebutted by disclosing the facts. Quackenboss *v.* Clarke, 12 Wend. 555; Williams *v.* Woodward, 2 Wend. 487.

Hitherto I have spoken only of assignments of the whole interest in the term, or in the reversion; but it [*296] is obvious that there may be an assignment *of *part* as well as of the whole. The statute of Henry 8th, has been held to apply to these cases, and to transfer the right of suing, and the liability to be sued upon the covenants, to the assignee of the part: 1st Inst. 215 a; Kidwelly *v.* Brand, Plowd. 69; Twynam *v.* Pickard, 2 B. & A. 105; from which last case it appears, that not only may a grantee of part of the reversion in the whole of the lands maintain covenant against the lessee upon this statute, but that a grantee of the whole reversion in part of the lands may likewise do so.[22] For instance; A. [owner in fee]

the covenants in the lease; unless there is some contract between him and the lessee, which carries that liability on. And this duty appears to exist whether the assignment is expressed to be made *subject to the performance of the covenants in the lease, or not.* See the cases last cited, and Wolveridge *v.* Steward, 1 Cr. & M. 644.* In the last-mentioned case an assignee took leasehold premises from a lessee by an indenture of assignment indorsed on the lease, and by the assignment the assignee was "to have and to hold" the premises for the remainder of the term granted by the lease, "subject to the payment of the existing rent, and to the performance of the covenants and agreements reserved and contained" in the lease. It was held by the Court of Exchequer Chamber that the assignee was not liable in covenant to the lessee for the rent which the latter had been called on by the lessor to pay after the assignee had assigned over; for the Court was of opinion that the words "subject to the payment, &c.," occurring as they did, after the *habendum*, were not words of agreement on the part of the assignee, but were merely descriptive of the obligations to which the assignee was to be liable, so long as he continued assignee.

[22] See also Gates *v.* Cole, 2 Bro. & Bing. 660, (6 E. C. L. R. 318,); Wollaston *v.* Hakewill, 3 M. & Gr. 297, (42 E C. L. R. 161,); and Wright *v.* Burroughes, 3 C. B. 685, (54 E. C. L. R. 685,). In a recent case it has been held, in accordance with the rule acted on in

leases to B. Blackacre and Whiteacre under one lease. Suppose he grant the whole reversion to C. for ten years; C. may, during these ten years, maintain actions against B. for any covenants broken during that time. Again, suppose A. grant C. the reversion in fee, not however in the whole of the lands demised, but in Whiteacre only; C. may maintain actions of covenant for any covenants broken, the breach of which is injurious to Whiteacre; and so upon the other hand, if the lessee assign part of the land, his assignee may bring actions of covenant against the lessor, and the lessor's assignees; Palmer *v.* Edwards, 1 Dougl. 187 note.(*a*) But though this *is the rule with [*297] regard to covenants, it is otherwise with regard to conditions; for it is a rule of law, that *a condition cannot be apportioned:* and, therefore, if A. make a lease to B. with a condition of re-entry for breach of covenants, and assign the reversion in part of the land to C.; now, if the covenants are broken, neither can take advantage of the condition of re-entry, though both can sue upon the broken covenants. All this you will find laid down and discussed in the judgments in Twynam *v.* Pickard.[23]

Twynam *v.* Pickard, that it is not necessary in order to maintain an action on the privity of contract transferred by the 32 Hen. 8, c. 34, that the entire interest in the covenant should have passed to the parties who sue. See Badeley *v.* Vigurs, 23 L. J. Q. B. 377.

[23] See also Co. Litt. 215 a; Wright *v.* Burroughes, 3 C. B. 685, (54 E. C. L. R. 685,) from which case it appears that a grantee of the grantor's reversionary interest in the whole of the land may take advantage of a condition, but that a grantee of the whole reversionary interest in part of the land cannot do so.

(*a*) Van Rensselear *v.* Gallup, 5 Denio, 454; Ingersoll *v.* Sergeant, 1 Wh. 337.

So much with regard to assignments by the act of the parties; next with regard to assignments by operation of law. The most common instances of an assignment by operation of law are those which occur when the lessor or lessee dies and his interest passes to his representative; or where he becomes bankrupt or insolvent, and his interest passes under the operation of the Bankrupt or Insolvent laws.

With regard to the case of death, we will first suppose the death of the lessor. Now, the reversion is either of a descendible quality and goes to the heir; or it is a chattel, and passes to the executor or administrator. If it descend to the heir, he in every respect represents his ancestor, and is bound by, and has the advantage of, all the conditions and covenants; Lougher *v.* Williams, *2 Lev. 92.[24] And the rule is the same with regard to a personal representative [*298]

[24] The general statement in the text as to the *right* of the heir to take advantage of the covenants in the lease must be understood to relate to covenants which are of such a nature as to run with the reversion, and to breaches of covenant which occur after the death of the ancestor. For, the heir cannot sue on a merely collateral covenant, which does not run with the reversion, Fitz. N. B. 145 D. 146 D.; Com. Dig. *Covenant* (B. 2); and the general rule of the common law, that the personal representative is the right person to sue upon all contracts with the deceased, broken in his lifetime, has been qualified by the later cases to this extent only,—that when the covenants are real, that is to say, run with the land and descend to the heir, the heir, and not the executor, is the proper plaintiff if the substantial damage has taken place since the ancestor's death, although there may have been a formal breach in his lifetime. See Com. Dig. *Administration* (B. 13) *Covenant* (B. 1); Kingdon *v.* Nottle, 1 M. & S. 355; King *v.* Jones, 5 Taunt. 418, (1 E. C. L. R. 219,); Orme *v.* Broughton, 10 Bing. 533, (25 E. C. L. R. 254,); Raymond *v.* Fitch, 2 Cr. M. & R. 588;* and Ricketts *v.* Weaver, 12 M. & W. 718.* The right of the heir, upon whom the reversion has descended, to sue upon a

where the *reversion is transmitted to him, being of a chattel nature; for he as completely [*299] represents the deceased *quoad* the personalty, as the heir does *quoad* the realty.[25] Next, suppose the death

covenant which runs with the reversion, does not, however, depend upon his being named in the covenant; he may, in this case, sue on the covenant not only where he is not named in it, but even where it has been made with the ancestor *and his executors*. See Lougher *v.* Williams, cited in the text, in which case it was held that the heir of the lessor might sue the executors of the lessee upon a covenant to repair, which had been made with the lessor, *his executors and administrators*. It is not stated distinctly in the report, but it must have appeared in this case that the reversion on the lease had descended to the heir. See also Sacheverell *v.* Froggatt, 2 Wms. Saund. 367 a, in which case the owner in fee had let land for years, and the lessee had covenanted to pay the rent during the term to the lessor, *his executors, administrators and assigns*, and it was held that the reservation was good to continue the rent during the whole term, and that the devisee of the lessor might sue in covenant for so much of it as had become due after the lessor's death. With respect to the *liability* of the heir of the lessor upon the covenants in the lease, he appears to be liable, whether named in the covenants or not, upon all covenants that run with the reversion and are broken after the death of the ancestor. See Andrew's Case, 2 Leon. 104, Anon. Dyer, 257 a; and Coote's Landl. & Ten. 333. He is not, however, liable in respect of breaches committed by the ancestor in his lifetime, unless the covenant mentions the heirs; and even if this be so, he is only liable in respect of such breaches to the extent of the assets which he has by descent. See Co. Litt. 209 a, Anon. Dyer, 14 a, Shep. Touchst. 178; Gifford *v.* Young, 1 Lutw. 287; Dyke *v.* Sweeting, Willes, 585; and Buckley *v.* Nightingale, 1 Str. 665.

[25] The personal representative *more nearly* represents the deceased *quoad* the personalty than the heir does *quoad* the realty; for if a man binds himself, his executors are bound although they be not named; but it is otherwise with respect to the heir, as is explained in the last note. See Co. Litt. 209 a; Com. Dig. *Covenant* (C. 1); and Williams *v.* Burrell, 1 C. B. 402, (50 E. C. L. R. 402,). The executor of the lessor may sue the lessee for the breach of a covenant

of the lessee; in this case the term, being a chattel interest, vests in his personal representative. Now, it is quite clear, that HE may be sued *in this his representative capacity*, for rent accruing due, or breach of covenant; and if he be sued in his representative capacity, he may, as in any other action brought against him in that capacity, discharge himself from liability beyond the amount of the assets.[26](*a*) But the cases

not to fell, stub up, lop or top timber trees which are excepted out of the demise, where the breach has been committed in the lifetime of the testator. Raymond *v.* Fitch, 2 Cr. M. & R. 588.* And the executor of a tenant for life may sue his lessee for a breach of a covenant to repair committed in the lifetime of the testator, without averring any damage to the personal estate. Ricketts *v.* Weaver, 12 M. & W. 718.*

[26] See Tilney *v.* Norris, 1 Ld. Raym. 553; Williams on Executors, 1492; and the judgment in Wollaston *v.* Hakewill, 3 M. & Gr. 320, (42 E. C. L. R. 173,).

(*a*) Covenants of a testator bind the executor, though not named. Harrison *v.* Sampson, 2 Wash. (Virginia) 125, (page 200 of Phila. ed. of 1823,); Lee *v.* Cooke, 1 ib. 306, (page 396 of Phila. ed.,); McCrady *v.* Brisbane, 1 Nott & McCord, 104.

It has been held in New York, in the case of Van Rensselaer *v.* Platner, 2 Johns. Cases, 17, that the executors and administrators of a grantee in fee are liable in covenant for the rent, when the grantee has covenanted for himself, his executors and administrators, to pay a rent in fee; and in Pennsylvania the same rule prevailed until the recent case of Quain's Appeal, 10 Harris, 510. The Court in that case, by Judge Lowrie, argues as follows: "Does a ground rent covenant survive against executors and administrators? In its usual form it binds heirs, executors, administrators and assigns; but still this may be satisfied as to executors and administrators, if they pay the rent that accrued in the decedent's lifetime.

"It is a perpetual covenant, and it is totally impracticable to require it to be performed by executors and administrators, for their office is not perpetual. If we retain the perpetuity of the covenant, as against them, even with the restriction that they are to be liable only when

of difficulty which arise happen when the landlord sues the representative, *not in *his representative capacity, but as assignee*, which he is, of the [*300] term, and seeks in that manner to hold him personally liable. In these cases the executor is sometimes placed in a very hard situation: he takes possession of premises demised to the testator, and as soon as he has done so, finds himself assailed by actions of covenant in his personal capacity for damages, which the assets in his hands are quite inadequate to answer. Now, if the action brought against him be for *rent*, he must apply the whole profits of the demised premises in payment of it.[27] If they produce no profit, or less than

[27] The executor is not, it would seem, bound to retain the profits of the land, or the purchase-money of the lease, if it be sold by him, for the purpose of satisfying future breaches of covenant. See Collins *v.* Crouch, 13 Q. B. 542, (66 E. C. L. R. 542,). In this case the executrix of the assignor of a lease sued the executrix of the assignee upon a covenant by the assignee to perform the covenants in the lease, and to indemnify the assignor against any breach of these covenants. The defendant pleaded *plene administravit*, and it was proved at the trial that all the assets, including the amount received by the defendant for the sale of the lease to a third person, had been applied by her, before the breaches of covenant complained of, in payment of simple contract debts. It was held that these facts constituted a defence to the action, although it appeared that some of the breaches of covenant were in respect of the non-payment of rent. It must be observed, however, that in this case the action was not brought on the covenant to pay rent, but on the covenant of indemnity made with the assignor.

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the resort to the land is ineffectual, we still prevent all distribution of the estate in their hands; and as all the lands of the decedent are assets for the payment of debts, we constructively charge the rent of a single lot upon all his lands."

"It is a covenant payable, in the contemplation of the parties, out of the profits of the land; and it would be entirely unreasonable that

the rent due, and he have no other assets, he should offer to surrender the lease to his landlord. And if he do all this, and show that he has done so by a plea properly framed, it seems pretty clear that he may protect himself from paying the residue out of his own pocket. See Billinghurst *v.* *Speerman, 1 Salk. 297; Buckley *v.* Pirk, 1 Salk. 317; Remnant *v.* Bremridge, 8 Taunt. 191, (4 E. C. L. R. 104,); Rubery *v.* Stevens, 4 B. & Ad. 241, (24 E. C. L. R. 112,).[28] But if he be sued for the breach of any covenant other than that to pay rent, it seems very doubtful whether he can protect himself by any plea, if he have once taken possession of the premises. See Tremeere *v.* Morison, 1 Bing. N. C. 89, (27 E. C. L. R. 556,); Hornidge *v.* Wilson, 3 Per. & Dav. 641; [S. C. 11 A. & E. 645,]; (39 E. C. L. R. 186,). His best and only safe course is to make inquiry into the value of the term before he in any way deals with it as owner; and

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[28] See Wollaston *v.* Hakewill, 3 M. & Gr. 297, (42 E. C. L. R. 161,). It appears from this case that the executor may be sued *as assignee*, whether he enter or not, but that if he is no otherwise assignee than by being executor, he may discharge himself from personal liability by pleading this fact, and by alleging that the term is of no value, and that he has fully administered all the assets which have come to his hands. If the executor of a lessee for years enters, he is, in the absence of other assets, liable *de bonis propriis*, for the rent reserved, to the extent to which he might, by the exercise of reasonable diligence, have derived profit from the premises. Hopwood *v.* Whaley, 6 C. B. 744, (60 E. C. L. R. 744,).

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the law should hold the administrator for the rent, when it gives the land to the heir."

This is new doctrine in Philadelphia, where it has been long the practice in such case to sue the executors or administrators on the covenant, restricting the judgment to the lands out of which the rent issued.

if its sufficiency in point of value turn out to be doubtful, not to take to it at all. By this course it would seem—from the judgment of the Court of Common Pleas in Wollaston *v.* Hakewill, 3 M. & Gr. 297, (42 E. C. L. R. 161,)—that he may protect himself from liability beyond the extent of his assets, in respect of breaches of covenant. An executor or administrator may, however, like any other assignee, assign, and will not be personally liable, for any breach of covenant committed subsequently to his doing so. Taylor *v.* Shum, 1 B. & P. 21.(*a*)

*With regard to the case of bankruptcy or insolvency; the assignee as he becomes entitled to the bankrupt's whole estate, may if he please, take possession of a term for years, if that be part of the estate. But, as the assignee's estate is given him for the benefit of the creditors, and as it would be obviously no benefit to them if the assignee were to be saddled with a lease, the rent reserved on which might be more than its value, the assignee has, it is held, an option whether he will take a lease of the bankrupt's or not; and may refuse it if he think proper; Copeland *v.* Stephens, 1 B. & A. 593. And that the assignees may make their election with their eyes open, they are allowed to make all proper inquiries and experiments for that purpose. Turner *v.* Richardson, 7 East, 335; but no more, otherwise they will render themselves liable; Hastings *v.* Wilson, Holt, 290, (3 [*302]

(*a*) In a case in Massachusetts, it is said: "Where a lessee of lands, demised to him, his heirs and assigns, for a term of years, dies before the end of the term, his administrator becomes assignee of the term in law, and is liable on the covenants in the lease until he is lawfully discharged of the estate." Montague *v.* Smith, 13 Mass. 405.

[*303] E. C. L. R. 120,)[29] If *they accept the lease they stand in the position of an ordinary assignee; if they refuse it, the tenant formerly remained liable upon the covenants notwithstanding his bankruptcy; but now, by the 75th section of the Bankrupt

[29] See also as to what acts are sufficient to render the assignees liable, Hanson *v.* Stevenson, 1 B. & A. 303; Page *v.* Godden, 2 Stark. 309, (3 E. C. L. R. 422,); Welch *v.* Myers, 4 Camp. 368; and Ansell *v.* Robson, 2 Cr. & J. 610.* In Clark *v.* Hume, Ry. & Moo. 207, (21 E. C. L. R. 733,) the assignee of a bankrupt, who was chosen in the month of November, kept the bankrupt upon the premises, carrying on the business for the benefit of the creditors until the April following, and came frequently himself to inspect the business, and furnished the bankrupt with money for the purpose of carrying it on; and the accounts, which were kept by the bankrupt, were transmitted by him every week to the assignee. About a year after the bankruptcy the assignee disclaimed the lease in a letter to the landlord. It was held, under these circumstances, that he was liable, as assignee of the lease, notwithstanding the disclaimer. In Carter *v.* Warne, Moo. & Malk. 479, a question arose at Nisi Prius in a somewhat analogous case. In this case the assignees of a debtor's property under an assignment for the benefit of his creditors, were sued as the assignees of a lease belonging to him. It appeared that at the time of the execution of the assignment to the assignees they were ignorant of the existence of the lease, but that afterwards they had put it up for sale. Lord Tenterden directed the jury that the assignees were entitled to put up the lease for sale in order to ascertain whether it could be made beneficial, but that if they had dealt with the estate as their own, or done anything with it that was injurious to the owner, they had rendered themselves liable as assignees of the lease. See also How *v.* Kennett, 3 A. & E. 659, (30 E. C. L. R. 305,). Where the assignees actually occupy the premises, they may be sued for use and occupation. See Gibson *v.* Courthope, 1 Dow. & Ry. 205, (16 E. C. L. R. 33,); Clarke *v.* Webb, 1 Cr. M. & R. 29;* and How *v.* Kennett, cited above. They may, after accepting the lease, get rid of any future liability for rent by assigning over; even though it be to an insolvent person. Onslow *v.* Corrie, 2 Mad. 330.

Act, 6 Geo. 4, c. 16, he may, within fourteen days after the assignees have declined, get rid of his own liability by delivering the lease up to his immediate landlord; and if they will neither accept nor decline, he may petition the Lord Chancellor.[30](*a*)

[30] The 6 Geo. 4, c. 16, was repealed by the Bankrupt Law Consolidation Act, 1849, the 12 & 13 Vic. c. 106, which is the Bankrupt Act now in force. The 145th section of the present act corresponds with the 75th section of the earlier act. By this section it is enacted "that if the assignees of the estate and effects of any bankrupt having or being entitled to any land either under a conveyance to him in fee or under an agreement for any such conveyance, subject to any perpetual yearly rent reserved by such conveyance or agreement, or having or being entitled to any lease or agreement for a lease, shall elect to take such land or the benefit of such conveyance or agreement, or such lease or agreement for a lease, as the case may be, the bankrupt shall not be liable to pay any rent accruing after the issuing of the fiat or filing of the petition for adjudication of bankruptcy against him, or to be sued in respect of any subsequent non-observance or non-performance of the conditions, covenants, or agreements in any such conveyance or agreement, or lease or agreement for a lease; and if the assignees shall decline to take such land, or the benefit of such conveyance or agreement, or lease or agreement for lease, the bankrupt shall not be liable if, within fourteen days after he shall have had notice that the assignees have declined, he shall deliver up such conveyance or agreement, or lease or agreement for lease, to the person then entitled to the rent, or having so agreed to convey or lease, as the case may be; and if the assignees shall not (upon being thereto required) elect whether they will accept or decline such land or conveyance or agreement for conveyance, or such lease or agreement for a lease, any person entitled to such rent, or having so conveyed or agreed to convey, or leased or agreed to lease, or any person claiming under him, shall be entitled to apply to the Court, and the Court may order them to elect and deliver up such conveyance or

(*a*) Bosler *v.* Kuhn, 8 W. & S. 183; Lansing *v.* Pendergast, 9 Johns. 127; Steinmitz *v.* Ainslie, 4 Denio, 573; Prentiss *v.* Kingley, 10 Barr, 120.

[*304] *This section of the Bankrupt Act however, only applies to cases arising between the origi-
[*305] nal lessor *and the original lessee; and there

agreement for conveyance, or lease or agreement for lease, in case they shall decline the same, and the possession of the premises, or may make such other order therein as it shall think fit." In Briggs *v.* Sowry, 8 M. & W. 729,* the assignees of a bankrupt had, under the 6 Geo. 4, c. 16, s. 75, declined a lease to which the bankrupt was entitled, but the bankrupt had not delivered up the lease to the lessor. It was held, under these circumstances, that the property in the demised premises continued, in the mean time, vested in the bankrupt, and that the lessor retained, until such delivery up to him, his right of distress for the rent. And the Court expressed an opinion, although it was not necessary to decide the point, that the effect of this section of the 6 Geo. 4, c. 16, was only to exempt the bankrupt from personal liability, and not to affect the right of the landlord to distrain. See also as to the construction of s. 75 of the 6 Geo. 4, c. 16. Slack *v.* Sharpe, 8 A. & E. 366, (35 E. C. L. R. 408,); and the notes to Auriol *v.* Mills, 1 Smith's L. C. 456. It is provided by s. 129 of the 12 & 13 Vic. c. 106, that no distress for rent made and levied after an act of bankruptcy upon the goods or effects of any bankrupt (whether before or after the issuing of the fiat or the filing of the petition for adjudication) shall be available for more than one year's rent accrued prior to the date of the fiat or the filing of the petition; but that the person to whom the rent is due shall be allowed to come in as a creditor for the overplus of the rent due, and for which the distress shall not be available. See as to the construction of the corresponding section in the 6 Geo. 4, c. 16, Briggs *v.* Sowry, cited above. But the certificate does not operate as a release of the rent due before the bankruptcy, and cannot be set up in answer to a subsequent distress. See Newton *v.* Scott, 9 M. & W. 434;* S. C. 10 M. & W. 471;* and *ante*, p. 164, note. Where persons employed in husbandry upon land let to farm, become bankrupt, their assignees, and all purchasers from them, are bound to dispose of the hay, straw, grasses, and other produce of the land, and of the manure, &c., intended for and being on the land, in the manner and for the purposes to which the bankrupts would have been bound to apply them if the bankruptcy had not happened. See the 12 & 13 Vic. c. 106, s. 144; and the 56 Geo. 3, c. 50, s. 11, cited *ante*, p. 151, note.

are therefore many cases still, in which if the assignees refuse the lease, the tenant remains liable to the rent and covenants notwithstanding his bankruptcy. See Manning *v.* Flight, 3 B. & Ad. 211, (23 E. C. L. R. 100,); Taylor *v.* Young, 3 B. & A. 521, (5 E. C. L. R. 302,).

The 1 & 2 Vic. c. 110, s. 50, contains similar provisions with regard to leases belonging to insolvents,[31]

[31] This section of the 1 & 2 Vic. c. 110, enacts that "in all cases in which any such prisoner shall be entitled to any lease or agreement for a lease, and his assignee or assignees shall accept the same, and the benefit thereof, as part of such prisoner's estate and effects, the said prisoner shall not be or be deemed to be liable to pay any subsequent rent to which his discharge, adjudicated according to, this act, may not apply, nor be in any manner sued after such acceptance in respect or by reason of any subsequent non-observance or non-performance of the conditions, covenants, or agreements therein contained: provided that in all such cases as aforesaid it shall be lawful for the lessor, or person agreeing to make such lease, his heirs, executors, administrators, or assigns, if the said assignee or assignees shall decline, upon his or their being required so to do, to determine whether he or they will or will not accept such lease or agreement for a lease, to apply to the said Court, praying that he or they may either so accept the same, or deliver up such lease or agreement for a lease, and the possession of the premises demised or intended to be demised; and the said Court shall thereupon make such order as in all the circumstances of the case shall seem meet and just, and such order shall be binding on all parties." By two later acts, the 5 & 6 Vic. c. 116, and the 7 & 8 Vic. c. 96 (usually called the Protection Acts), relief has been given to insolvent persons who are either not traders within the meaning of the Bankrupt Acts, or who, if such traders, owe debts amounting to less than three hundred pounds; and they may obtain protection under these statutes, although they are not in custody. The latter of these acts contains a provision with respect to leases belonging to persons seeking protection under them, which is similar to that contained in s. 50 of the Insolvent Act. See s. 12. The jurisdiction created by the Protection Acts was originally vested in the Court of Bankruptcy, but by the 10 & 11 Vic. c. 102,

[*306] except only that the petition under *that act is to the Insolvent Debtors' Court, not to the Chancellor.(a)

s. 4, it has been transferred to, and is now exercised by the Insolvent Court in London, and the County Courts constituted under the 9 & 10 Vic. c. 95. It must be observed, that as the discharge of the tenant under the Insolvent Act does not extinguish the rent which became due before the insolvency, although it protects his person against any proceedings in respect of it, the landlord may distrain after the insolvency for rent which became due before the discharge. Phillips *v.* Shervill, 6 Q. B. 944, (51 E. C. L. R. 944,).

(a) It is sometimes made a question, on the sale of the term by the sheriff, on an execution against the lessee, whether arrears of rent are a lien, so as to be discharged by the sale, and the landlord turned over to the proceeds. It was early held in Pennsylvania, that in cases of ground rent reserved on a conveyance of the fee, when the deed contained *a clause of re-entry by which the land itself might be seized*, that in such cases the arrears constituted a lien, and were payable out of the fund produced by the sale, but without interest. Bantleon *v.* Smith, 2 Binn. 146; Pancoast's Appeal, 8 W. & S. 381; Dougherty's Estate, 9 W. & S. 189; Terhoven *v.* Kerns, 2 Barr, 96. In the case of Sands *v.* Smith, 3 W. & S. 9, which was a conveyance of the fee, reserving a rent payable for one hundred years, with clause of distress, but *without the right to re-enter, and hold the land for arrears*, it was held that the arrears were not such a lien as would be discharged by the sheriff's sale, and payable out of the purchase-money, but that the landlord might distrain for the arrears, notwithstanding the sale. And in the late case of Sibley *v.* Celt, or Spangler's Appeal (not yet in the Reports), but to be found in 12 Legal Intelligencer, p. 351, paper of 12th December, 1855, Judge Lowrie says, "The defendants were lessees of certain contiguous coal mines, at a rent per ton, payable monthly, enforceable by action by distress, and also by a stipulated right to re-enter and forfeit or annul the lease for arrears, without thereby discharging the lessees from their personal liability. This leasehold estate was taken in execution at the suit of the plaintiff, and sold, the lessees being considerably in arrears for rent, and

v

this raises the question, had the lessors such a lien upon the estate of the lessees, as is discharged by the sheriff's sale ?"

"We are of opinion that the present case falls precisely within the principle of Bantleon *v.* Smith, *that the right of entry constitutes a lien for the rent in arrears*—that the right to exercise it, for these arrears, was taken away by the sheriff's sale, and that the lessors are entitled to share in the distribution."

It should have been mentioned in the chapter on distress for rent —that *interest* on arrears cannot be recovered by distress. Bantleon *v.* Smith, 2 Binney, 153; Blake *v.* Delisseline, 4 McCord, 496; Lansing *v.* Rattoone, 6 Johns. 43; Dennison *v.* Lee, 6 Gill. & Johns. 383; Vechte *v.* Brownell, 8 Paige, 212.

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